State Public Trust Doctrines

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ALABAMA

The Public Trust Doctrine in Alabama

Lorena Wisehart

1.0 Origins

The public trust doctrine (PTD) is an ancient doctrine recognizing that the public shares the air and certain waters.[1] English law adopted this concept and asserted that the Crown held title to submerged lands beneath navigable waters, subject to rights of public to use those waters for navigation and fishing.[2] When America won independence from Britain, title to submerged lands vested in the thirteen original colonies, and subsequently each state admitted to the Union under the equal footing doctrine. [3] The scope Alabama's PTD has changed little since then.

2.0 Basis

Alabama has a relatively undeveloped public trust doctrine.[4] The state nevertheless has recognized some public trust-like concepts in its constitution. The Alabama Constitution provides that "all navigable waters shall remain forever public highways, free to the citizens of the state and the United States."[5] In 1841, the Alabama Supreme Court recognized this provision as "a clear dedication to the public use of the navigable waters within the state."[6] A different provision of the constitution allows for acquisition, maintenance, and protection of unique land and water areas "to protect the natural heritage of Alabama for the benefit of present and future

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[1] *See, e.g.,* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471, 475–478 (1970) (discussing the historical background of the public trust doctrine).
[2] *See id.* at 476.
[3] Pollard v. Hagan, 44 U.S. 212, 230 (1845)
[4] *See* Sierra Club v. Ala. Dep't of Envtl. Mgmt., 1992 WL 123372, 30–31 (Ala. Dep't Envtl. Mgmt. 1992) (rejecting claim that state water quality standards violated the PTD because the "doctrine in Alabama has retained its traditional narrow scope as a common law doctrine limited to the ownership of lands beneath navigable waterways").
[5] ALA. CONST. art. I, § 24.
[6] *See* Pollard's Heirs v. Files, 3 Ala. 47, 48 (1841), *rev'd on other grounds sub nom.* Pollard's Lessee v. Files, 43 U.S. 591 (1844).

generations," "with full recognition that this generation is a trustee of the environment for succeeding generations."[7] The Alabama Consitution may, therefore, support extending the PTD to lands acquired and managed under the state's Forever Wild Land Trust.[8]

Alabama state statutes also recognize public trust-like concepts concerning coastal resources. Alabama enacted the Alabama Coastal Area Management Program (ACAMP)[9] in 1976 to promote, improve, and safeguard coastal lands and waters of the state "through a comprehensive and cooperative program designed to preserve, enhance and develop such valuable resources for the present and future well-being and general welfare of the citizens of this state."[10] In enacting the ACAMP, the Alabama legislature also declared that "it is state policy [t]o preserve, protect, develop and, where possible, to restore or enhance the resources of the state's coastal area for this and succeeding generations."[11] The ACAMP therefore recognizes the state's PTD-like duty to preserve coastal areas for present and future citizens.

The Alabama Supreme Court has also addressed the extent of the PTD in the state. In 1839, the Alabama Supreme Court considered whether the city of Mobile owned land between the high and low water mark of the tidally influenced Mobile River, a river also used for commercial navigation. The court held that the state owned the lands beneath navigable waters, and that the citizens of Alabama shared a public easement over all such waters within the state.[12]

3.0 Institutional Application

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[7] ALA. CONST. art. XI, § 219.07 (establishing the Forever Wild Land Trust).
[8] See *id.*
[9] Ala. Admin. Code r.335-8-1-.01 et seq. (2012).
[10] Ala. Code § 9-7-11 (2012).
[11] *Id.* § 9-7-12.
[12] Mayor of Mobile v. Eslava, 9 Port. 577, 599, 601–04 (1839). *See* Wendy A. Pierce, *Private Property Owners Hold Their Ground Under Alabama's Public Trust Claim To Tidelands*, 20 CUMB. L. REV. 451, 463 (1989–1990).

Although Alabama has a limited PTD, state constitutional provisions and statutes impose some restrictions concerning the transfer and management of trust resources.

3.1 Restraint on alienation

In 1898, the Alabama Supreme Court recognized the state has limited ability to alienate certain publicly owned lands, stating "municipal corporations hold the title to streets, alleys, public squares, wharves, etc., in trust for the public."[13] The court recognized that Alabama towns are trustees of these properties and any conveyance of such properties is "absolutely void."[14] Consequently, the court ruled that the city council could not convey parkland held in trust for public to a railroad company.[15]

Despite this early recognition of the government's limited authority to convey lands held in trust for the public, in 1956 Alabama passed legislation allowing the governing bodies of the state "full power and authority to alienate public parks and playgrounds, other public recreational facilities and public housing projects on such terms as may be agreeable to them," subject only to the approval of a majority of the qualified electors.[16] Although this legislation did not address publicly owned wharves or other lands within the scope of the PTD,[17] it suggested that the legislature intended to loosen restrictions on the state's discretion to manage the state's resources.

Fourteen years later, the Alabama Supreme Court determined that a municipality did not have power to dispose of property dedicated to public use unless public use of the property had

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[13] Douglass v. City Council of Montgomery, 118 Ala. 599, 600 (Ala. 1898).
[14] *Id.* (explaining that such conveyances would be void because they were "beyond the authority" of the municipalities).
[15] *Id. (*the city council had adopted ordinances granting a public park to a railroad company and allowing the company to lay track across the park).
[16] Ala. Code § 35-4-410 (2012).
[17] *See Douglass*, 118 Ala. at 600 (recognizing restraint on alienation of publicly owned wharves); *see also infra* §§ 4, 6 (discussing the scope of the PTD in Alabama).

previously been abandoned.[18] The court thus reinstated some of the pre-1956 protections for lands held in trust for the public by preventing the alienation of such lands if they were still being used for trust purposes.[19] In that case the court nevertheless held that the property at issue, containing a playground and natural swampland, could be alienated for purposes of building a shopping mall because its original conveyance to the city was not subject to dedication provisions, and the city had not formally designated the land a public park.[20] Because the land had not been formally dedicated to public use, the fact that the public was currently using the property was insufficient to prevent the municipality from allowing private development on the property.[21] Thus, although there are restrictions on the alienation of public property burdened with a trust, mere use of a property by the public does not automatically restrict alienation.

3.2 Limit on legislature

The Alabama legislature has the sole power to dispose of the state's property rights in its oyster beds and oysters.[22] If the legislature decides to dispose of its right to these trust resources, it may transfer its rights only to the people of Alabama.[23]

3.3 Limit on administrative action

The PTD does not impose any additional limits or duties on administrative actions.

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[18] O'Rorke v. City of Homewood, 237 So. 2d 487, 492 (Ala. 1970).
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] State v. Harrub, 10 So. 752, 753 (Ala. 1892); Skrmetta v. Alabama Oyster Comm'n, 168 So. 168, 169 (Ala. 1936):

> The State of Alabama owns the absolute property in the oyster-beds and oysters in her navigable waters, holding it in trust for the use and benefit of her people, subject only to the paramount right of navigation; and in the exercise of her property rights, she may, by legislative enactment, grant or give away the right to take oysters, restricting the grant to her own citizens, and qualifying the exercise of it by them by limitations as to time and manner of taking, selling, or transporting, until the oysters have become an article of inter-state commerce, and as such subject to the laws of the United States.

[23] *Id.*

4.0 Purposes

The PTD in Alabama has not expanded beyond traditional public uses of tidal waters.

4.1 Traditional

Alabama courts have recognized that the PTD in Alabama protects the public's right to use navigable waters for commerce, navigation, and fishing.[24]

4.2 Beyond traditional

In addition to recognizing traditional uses, Alabama's PTD may extend to coastal resources, including oysters. State statutes recognize that "[t]he people of Alabama own absolutely the oyster-beds and oysters" and such resources may be fished only in accordance with the laws of the state.[25] Nevertheless, the right to access these resources is limited to public waters, as there is no public right to fish in privately-owned waters.[26]

The Alabama Supreme Court has relied on public trust authority to uphold the constitutionality of state laws regulating seafood harvest.[27] The court's recognition of the PTD as a "source of governmental regulatory authority to protect public trust resources" suggests the PTD could serve as the legal basis for protecting other coastal resources as well.[28] However, at least one administrative decision has rejected the application of the PTD in Alabama to "aesthetic enjoyment" of trust resources.[29]

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[24] Mobile Transp. Co. v. City of Mobile, 44 So. 976, 978-79 (Ala. 1907).
[25] *Harrub*, 10 So. at 753; Ala. Code § 9-12-20 (2012).
[26] Hood v. Murphy, 165 So. 219, 220 (Ala. 1936).
[27] Robin Kundis Craig, *Public trust and public necessity defenses to takings liability for sea level rise responses on the gulf coast*, 26 J. LAND USE 395, 405 (2011) *available at* http://www.law.fsu.edu/journals/landuse/vol26_2/craig.pdf (citing Skrmetta v. Ala. Oyster Comm'n, 168 So. 168, 169–70 (Ala. 1936)).
[28] *Id.*
[29] *See* Sierra Club v. Ala. Dep't of Envtl. Mgmt., 1992 WL 123372 at *30–31 (Ala. Dept. Env. Mgmt. 1992) (rejecting Sierra Club's claim that PTD should extend to "aesthetic enjoyment" of trust resources because such an interpretation of the PTD is "without precedent" in the state).

5.0 Geographic Scope of Applicability

Alabama courts have not extended the geographic scope of Alabama's PTD beyond navigable waters.[30] Alabama common law thus provides no authority for extending the PTD to non-navigable waters used for recreation, or wetlands, or groundwater. Alabama has extended the PTD to shellfish, regardless of whether they occur in navigable waters,[31] which suggests there may be trust duties that extend to non-navigable waters where shellfish may be present. The PTD may also extend to the state-owned uplands acquired through the state's "Forever Wild" land trust."[32]

5.1 Tidal

In Alabama, the mean high tide line separates the upland owner's property from public trust lands.[33] Additionally, "all tidal streams are, prima facie, public and navigable."[34]

5.2 Navigable-in-fact

In 1839, the Alabama Supreme Court held that the public shared an easement over all navigable waters within the state.[35] The case concerned whether the PTD extended to a tract of land originally located between the high and low water marks of the navigable-in-fact Mobile River.[36] The court determined the PTD extended to the land at issue in the case, but did not state whether the holding was based on the whether the water was subject to the ebb and flow of the

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[30] *See* Wendy A. Pierce, *Private property owners hold their ground under Alabama's public trust claim to tidelands*, 20 CUMB. L. REV. 451, 463-464 (1989–1990).
[31] *See infra* § 5.6.
[32] Ala. Const. art. XI, § 219.07 (establishing the state's "Forever Wild" land trust which provides for acquisition, maintenance, and protection of unique land and water areas "to protect the natural heritage of Alabama for the benefit of present and future generations . . . with full recognition that this generation is a trustee of the environment for succeeding generations").
[33] Tallahassee Fall Mfg. Co. v. State, 68 So. 805, 806 (Ala. 1915).
[34] Walker v. Allen, 72 Ala. 456, 458 (1882).
[35] Mayor of Mobile v. Eslava, 9 Port. 599, 601–04 (1839)
[36] *Id.* at 580.

tide, or whether it was because the river was "navigable in fact."[37] Nevertheless, the court determined that the public's right to navigable waters was superior to any private ownership rights to lands beneath navigable waters.[38] In 1845, in *Pollard's Lessee v. Hagan*, the United States Supreme Court confirmed Alabama's public trust claim to all navigable waters in the state.[39] The Court held that Alabama received the land beneath Mobile Bay to the high water mark when it entered the Union as a state in 1819.[40]

In 1882, the Alabama Supreme Court explained that "every stream which, in its natural state, and its ordinary volume of water, is capable of being used for the purposes of commerce, of transportation of the products of the fields, forests, or mines upon its banks, in a marketable condition, is for the purposes of navigation to be deemed public—upon its waters the public have a right of way, or easement, which is superior to the right of the riparian proprietor, though he may own the soil of the bed."[41] This early decision by the Alabama Supreme Court thus affirmed the extension of the PTD to navigable waters in the state and defined such waters to be those naturally suitable for use in commerce and navigation.[42]

More recently, in *Wehby v. Turpin*, [43] the Alabama Supreme Court determined whether a stream feeding a lake was a navigable water by applying both federal and state tests for navigability.[44] Under Alabama law, a stream is navigable if it "has an aptitude for beneficial public servitude, capable of being traversed for a considerable part of the year."[45] In *Wehby*, the

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[37] See *id.*; Pierce, *supra* note 30, at 460.
[38] *Id.* at 591.
[39] 44 U.S. 212 (1845).
[40] *Id.* at 229.
[41] *Id.* at 459.
[42] *Id.*
[43] Wehby v. Turpin, 710 So. 2d 1243 (Ala. 1998).
[44] *Id.*
[45] *Id.* at 1250; Rhodes v. Otis, 33 Ala. 578, 597–8 (1859).

court rejected evidence of the lake being traversed by fishing boats and canoes during some parts of the year in support of a finding of navigability.[46] Recognizing that navigability must exist for a "considerable" part of the year, the court ruled that "occasional use by "fishing boats" and "canoes" during some parts of the year is not sufficient to demonstrate that Yellowleaf Creek is capable of any beneficial public use."[47] The court then held the creek, and the artifical lake created by a dam in that creek, to be non-navigable, and thus not public waters under Alabama Code.[48] The court limited riparian landowners to using only those waters over their land, absent an easement allowing use of the rest of the lake.[49] The holding in *Wehby* was limited to surface water rights of owners of land beneath an artificial, non-navigable lake, and therefore may only have limited effect on the applicability of PTD to natural non-navigable waters.[50]

5.3 Recreational waters

No specific statutory provisions address recreational waters. However, Alabama's Water Resources Act states that "[a]ll waters of the state, above or below surface of ground, are the resources of state."[51] The broad language of this provision suggests that non-navigable recreational waters might also be a resource of the state. If so, the PTD could extend to waters used for recreational purposes in Alabama.[52]

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[46] *Wehby*, 710 So. 2d at 1250.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] Ala. Code § 9-10B-1 (2012).
[52] *See* 2012 AL S.J.R. 16 (Ala. 2012) (proposed joint resolution offering clarification of the state's ownership role over water as a state resource and recognizing the PTD is embedded in the Alabama Water Resources Act).

In *Wehby v. Turpin*, discussed above,[53] the water was not "navigable" because the recreational boaters did not use the creek for a "considerable" part of the year.[54] Thus, the court upheld the exclusion of recreational boaters lake waters over privately-owned lands because the lake at issue was "non-navigable."[55] The court's ruling in *Wehby* suggests a water may be navigable based on recreational use if that use extends for a substantial portion of the year.[56]

5.4 Wetlands

Alabama's Water Resources Act states that "[a]ll waters of the state, above or below surface of ground, are the resources of state."[57] Although wetlands are not specifically identified as a resource of the state, the broad language of this provision suggests that wetlands may also be a resource of the state. If so, the PTD could apply to wetland resources in Alabama.

5.5 Groundwater

The Water Resources Act designates "all waters of the state, above or below surface of ground" as resources of the state,[58] suggesting that the PTD may extend to groundwater resources. State ownership is often considered a signal of the PTD.[59]

5.6 Wildlife

The Alabama Supreme Court has declared that the people of Alabama own the state's oysters and oysterbeds, and that those resources are subject to state regulation.[60] The Alabama

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[53] *See supra* notes 39–45 and accompanying text.
[54] 710 So. 2d 1243, 1249 (Ala. 1998).
[55] *Id.*
[56] *See id.*
[57] Ala. Code § 9-10B-1 (2012).
[58] *Id.*
[59] *See, e.g.*, Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 695 (2005) (discussing authority for extending the PTD to state-owned wildlife).
[60] State v. Harrub, 10 So. 752, 753 (Ala. 1892); Skrmetta v. Alabama Oyster Comm'n, 168 So. 168, 169 (Ala. 1936).

legislature has also recognized that the state holds the oysters and oysterbeds "in trust" for the people until they are legally harvested.[61] Since Alabama owns all wildlife within the state "for the purpose of regulating the use and disposition" of the wildlife according to state law,"[62] there may be a basis for extending the PTD to wildlife beyond oysters.

6.0 Activities Burdened

Neither the Alabama legislature nor Alabama courts have broadly applied the PTD to reach conveyances of property, wetland fills, water rights, or wildlife harvest. However, Alabama's courts and legislature have applied the PTD in limited circumstances, which may support extending the doctrine to cover these activities more generally.

6.1 Conveyances of property interests

As discussed above,[63] Alabama municipalities have limited ability to convey lands held in trust for the public.[64] However, the state's ability to convey public trust lands is unclear given the apparent contradiction between the Alabama Supreme Court's limits on conveyances by municipalities and legislation allowing governing bodies of the state "full power and authority" to alienate public lands.[65]

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[61] Ala. Code § 9-12-21 (2012):

> "All seafoods existing or living in the waters of Alabama not held in private ownership legally acquired and all beds and bottoms of rivers, streams, bayous, lagoons, lakes, bays, sounds and inlets bordering on or connecting with the Gulf of Mexico or Mississippi Sound within the territorial jurisdiction of the state of Alabama, including all oysters and other shellfish and parts thereof grown thereon, either naturally or cultivated, shall be, continue and remain the property of the State of Alabama to be held in trust for the people thereof until title thereto shall be legally divested in the manner and form authorized in this article, and the same shall be under the exclusive control of the department of conservation and natural resources until the right of private ownership shall vest therein as provided in this article."

[62] Ala. Code § 9-11-230 (2012).

[63] *See supra* § 3.1.

[64] *See* O'Rorke v. City of Homewood, 237 So. 2d 487, 492 (Ala. 1970).

[65] *See supra* § 3.1; *O'Rorke*, 237 So. 2d at 492; Ala. Code § 35-4-410 (2012).

6.2 Wetland fills

Alabama regulates dredging and filling of the submerged lands and adjacent wetlands, at least within the coastal zone.[66] Dredging or filling of these areas may only be done when permitted or certified to be in compliance with the Alabama Coastal Area Management Program.[67] The statutory text authorizing the regulation of dredging and filling recognizes a "state interest in the effective administration, beneficial use, protection and development of the coastal area."[68] Although these regulations and statutes do not identify the PTD as burdening wetland fills, recognition of the state's authority and interest in regulating that type of activity may accommodate future PTD applications.

6.1 Water rights

Water rights in Alabama do not appear to be affected by the PTD.

6.2 Wildlife harvests

Alabama has "title and ownership to all wild birds and wild animals in the State of Alabama or within the territorial jurisdiction of the state."[69] The assertion of state ownership over wildlife resources suggests the PTD may burden wildlife harvests.[70]

The Alabama legislature has also declared all waters of the state as public waters for the purpose of allowing access to fishing "if such waters are natural bodies of water such as rivers, creeks, brooks, lakes, bayous, bays, channels, canals or lagoons or are dug, dredged or blasted . . . [or] any water impounded by the construction of any lock or dam or other impounding device

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[66] Ala. Admin. Code r.335-8-2-.02 (2012).
[67] *Id.*
[68] Ala. Code 9-7-11 (2012).
[69] Ala. Code § 9-11-230 (2012).
[70] *See id.;* Blumm & Ritchie, *supra* note 58, at 695.

placed across the channel of a navigable stream is declared a public water."[71] However, the right of access to navigable waters for fishing is nevertheless subject to consent of the landowner.[72] Alabama considers all non-navigable waters to be private waters, and consequently allows exclusion of the public from fishing in those waters.[73]

7.0 Public standing

The Alabama Supreme Court has recognized public standing to sue to prevent conveyance of properties held in trust for the public.[74] However, there does not seem to be any statutory authority explicitly providing the public with a right to sue to enforce the PTD.

7.1 Common-law based

In *Douglass v. City Council of Montgomery*, the Alabama Supreme Court determined a citizen had standing to sue a municipality for conveying parkland held in trust for the public.[75] In *Douglass*, the Alabama Supreme Court determined a citizen who owned property adjacent to a public park could seek injunctive relief preventing the city council from conveying the parkland to a railroad company for use in building a railroad.[76]

7.2 Statutory basis

Alabama has no statutes that specifically authorize citizens to sue to enforce the state's public trust responsibilities.

7.3 Constitutional basis

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[71] Ala. Code §§ 9-11-80; 10B-2 (2012).
[72] *Id.* § 9-11-80.
[73] *Id.*
[74] *See infra* § 7.1.
[75] 118 Ala. 599, 600, 613–14 (1898); *see also supra* § 3.1 (discussing *Douglass*).
[76] *Id.* (stating "we find no difficulty in holding, that the complainant in this case is in reason, and for the purposes of this case, an adjacent proprietor to the said park, and occupies such a position as entitles him to maintain this bill . . .[f]or the purposes for aid and recreation, he has shown he has a direct and special interest against its proposed destruction").

Alabama has no constitutional provisions that specifically provide citizens with a right to sue to enforce public trust duties.

8.0 Remedies

Given the limited case law relating to the PTD in Alabama, it is not clear whether damages or injunctive relief are generally available to enforce the PTD. However, as discussed below,[77] at least one Alabama Supreme Court decision has issued an injunction to prevent conveyance of lands held in trust for the public to private use. The statutory and constitutional requirements cited above[78] may provide the state with a defense to claims of private property takings.

8.1 Injunctive Relief

In *Douglass v. City Council of Montgomery*, discussed above,[79] the Alabama Supreme Court issued an injunction stopping the Montgomery City Council from conveying parkland held in trust for the public to a private railroad company.[80] The court stated that injunctive relief was

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[77] *See infra* § 8.1.

[78] *See supra* § 2–3.

[79] *See supra* §§ 6.1, 7.1.

[80] 118 Ala. 599, 600, 614 (1898).

> These parks, by these means, are the great resorts for health and recreation by all the inhabitants of the municipality, valuable and beneficent in their advantages to all alike. The one living remote, is borne in a few minutes, at the cost of a trifle, to and from these grounds, and derives as much rest, recreation and profit, from their existence, as the one in closer proximity may enjoy. When the hand of vandalism and destruction is laid upon them, by the municipality itself or by strangers, it is difficult to understand, upon what principle, any individual property owner, without respect to where he lives in the city or town, may not himself invoke injunctive relief against their destruction or misuse when perpetrated by the municipality, or join it for such relief, against such acts when done by others. If there ever existed any good reason why such relief should be invoked alone by an abutting proprietor, it may be that it must give way, in accommodation to the necessities and conditions of modern life, brought about by the wonderful discoveries of the present age.

Id. at 613.

appropriate where property held in trust for the public was being conveyed for private use.[81] Although the *Douglass* court addressed publicly owned parks, the court also discussed the limitations on municipalities' conveyance of other publicly owned properties like wharves, suggesting that injunctive relief might be available in cases involving other public trust resources in the state.[82]

8.2 Damages

Alabama courts have not yet recognized damages as a remedy for injury to public trust resources.

8.3 Defense to takings claims

Alabama courts have ruled that private property "cannot be taken, or its value lessened or impaired, even for public use, without compensation."[83] Alabama's strong PTD concerning oysters and other seafoods suggests the state could use the PTD as a defense to takings claims for activities relating to protecting these and other coastal resources.[84] Thus, if citizens bring takings claims in the future, the state may not be required to compensate for physical or regulatory takings so long as the state was acting to protect public trust resources, such as oysters and other seafoods.

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[81] *Id.* at 612–14 (1898) (recognizing that "[i]f dedicated property be put to use foreign to that contemplated by the intention and purpose of the dedication, then not only the dedicator, but any property owner will have his remedy in equity to enforce the proper use, and inhibit an improper one") (quoting 5 Am. & Eng. Enc. Law, 416).

[82] *See id.* at 600.

[83] Hood v. Murphy, 165 So. 219, 220 (Ala. 1936).

[84] *See* Robin Kundis Craig, *Public Trust and Public Necessity Defenses to Takings Liability for Sea Level Rise Responses on the Gulf Coast*, 26 J. LAND USE 395, 405 (2011) *available at* http://www.law.fsu.edu/journals/landuse/vol26_2/craig.pdf (suggesting that because "oyster and seafood cases in Alabama . . . recognize the public trust doctrine as a source of governmental regulatory authority to protect public trust resources . . . Alabama could, if properly motivated, use the [PTD] as a legal basis for protecting other coastal resources without running afoul of the prohibition on takings").

ALASKA

The Public Trust Doctrine in Alaska

Emily Stein

1.0 Origins

The origins of the PTD in Alaska lie in traditional common law principles that connect the state's trust obligations to its ownership of the submerged land underlying navigable waters. The Alaska Supreme Court adopted the PTD as articulated by the United States Supreme Court in *Illinois Central Railroad v. Illinois*, to the effect that "when a state receives title to tidelands and lands beneath navigable waterways within its borders at the time of admission to the Union, it receives such land "in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[1] And in codifying common law public trust principles in the Alaska Constitution, the framers relied upon the historical notion that the state as sovereign held title to fish and wildlife.[2]

While the common law PTD in Alaska has not evolved much beyond the minimum requirements set forth in *Illinois Central,* the state constitution appears to extend the doctrine beyond its traditional scope to reach most waterways in Alaska regardless of ownership or navigability.[3] Moreover, several statutory provisions appear to contemplate an even broader expansion of the PTD.[4] However, the courts have yet to examine the effects of these constitutional and statutory provisions on the scope of the PTD in Alaska.

2.0 Basis

The Alaska Constitution provides the most frequently relied upon basis for the PTD in Alaska,

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1 CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1117-18 (Alaska 1988) (quoting Illinois Central Railroad v. Illinois, 146 U.S 387, 452-53 [1892]).

2 Owsichek v. State, 763 P.2d 488, 493 n 11 (Alaska 1988) (extensively reviewing the constitutional history of the common use clause). The United States Supreme Court's subsequent rejection of state ownership of fish and wildlife as a legal fiction did not affect the state's trust obligations with respect to those resources. *See* Hughes v. Oklahoma, 441 U.S. 322, 335-36 (1979); *Owsichek*, 763 P.2d at 495 n. 12 ("After *Hughes*, the statements in the Alaska Constitutional Convention regarding sovereign ownership . . . are technically incorrect," but "the trust responsibility that accompanied state ownership remains").

3 Alaska Const., art. VIII, § 3.

4 AS § 38.05.126; AS § 38.05.502.

appearing to provide a firm foundation for the expansion of the doctrine well beyond its traditional scope and purpose.

Article VIII of the Alaska Constitution, devoted entirely to natural resources, provides the basis for the constitutional codification of the PTD. Section three supplies the authority for the imposition of trust duties upon the state in managing natural resources. Known as the "Common Use Clause," that section provides that "wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[5] Although it does not expressly refer to the public trust, the Alaska Supreme Court has construed this provision to "impos[e] upon the state a trust duty to manage the fish, wildlife, and water resources of the state for the benefit of all the people."[6] The courts have not yet determined whether the Common Use Clause imposes greater trust obligations upon the state than under the common law PTD.[7]

Article VIII, section 14 of the Alaska Constitution guarantees public access to "navigable" and "public" waters, as defined by the legislature.[8] The legislature has in turn broadly defined "navigable" waters as waters that are "navigable in fact for any useful public purpose"[9] and "public" waters to include non-navigable waters that are "reasonably suitable for public use and utility [and for] habitat for fish and wildlife in which there is a public interest."[10] Although these expansive definitions grant the state far-reaching regulatory authority, the courts have yet to determine whether the PTD is coextensive with this authority. The legislature, however, apparently thought so, declaring that "the state holds and controls all navigable or public water in trust for the use of the people of the state."[11]

An additional statutory basis for the PTD also exists in Alaska. A provision in the Alaska Land

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5 Alaska Const., art. VIII, § 3.
6 *Owsichek*, 763 P.2d at 495.
7 *See, e.g., CWC Fisheries*, 755 P.2d at 1120 (expressly declining to decide the issue).
8 Alaska Const., art. VIII, § 14 ("Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes").
9 AS § 38.05.965(13).
10 *Id.*(18).
11 AS § 38.05.126. The legislature also enacted a statutory provision that mirrors the language of the Common Use Clause: "[w]herever occurring in a natural state, the water is reserved to the people for common use." AS § 46.15.030.

Act provides that "all land in the state and all minerals not previously appropriated are the exclusive property of the people of the state and the state holds title to the land and minerals in trust for the people of the state."[12] Although no court has addressed the issue, these statutory codifications of the PTD could provide authority to expand the PTD beyond its traditional scope and purposes to encompass most waters in Alaska, regardless of navigability and the ownership of the underlying submerged land, as well as to state-owned land and resources.[13]

3.0 Institutional Application

The Alaska Department of Fish and Game (DF&G) is responsible for carrying out the state's public trust duties with respect to fish and wildlife, while the Alaska Department of Natural Resources (DNR) implements the state's trust obligations on state-owned land, water, and all other natural resources. To implement the provisions of Article VIII of the Alaska Constitution,[14] the legislature enacted the Alaska Land Act,[15] which gives the DNR the power to acquire, manage, and dispose of state land.[16]

The DF&G also has broad powers to carry out its statutory responsibilities.[17] Within the DF&G, the Board of Fisheries is responsible for conservation and development of the state's commercial, subsistence, sport and personal use fisheries and has the authority to promulgate regulations to achieve

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12 AS § 38.05.502. The statute was adopted by public initiative in 1983 and was popularly known as the "Sagebrush Initiative." *See* Gregory F. Cook, *The Public Trust Doctrine in Alaska,* 8 J. Envtl. L. & Litig. 1, 7 n 25 (1993). Apparently, the debate surrounding the initiative focused on the "tension between the land management roles of the federal government and the State of Alaska." *Id.*

13 Considering the state of Alaska owns approximately 90 million acres of land (and the federal government is to convey an additional 14 million acres), and the state contains about 40% of the nation's freshwater flow, an extension of the PTD to include all state-owned land would greatly expand the geographical scope of the PTD. *See* http://dnr.alaska.gov/commis/pic/about.htm

14 North Slope Borough v. LeResch, 581 P.2d 1112, 1114 (Alaska 1978). Article VIII, Section 2 of the Alaska Constitution provides: "The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people."

15 AS §§ 38.05.005 - .370.

16 *See, e.g.,* AS § 38.05.035 (listing powers and duties of the Director); AS § 38.05.04 (authorizing sale of state land); AS § 38.04.065 (requiring ADNR to formulate management plans governing the development and utilization of state lands).

17 *See* AS § 16.05.020(2) (the commissioner shall "manage, protect, maintain, improve, and extend the fish, game, and aquatic plant resources of the state in the interest of the economy and general well-being of the state"); AS § 16.05.092(1) (requiring ADF&G to "develop and continually maintain a comprehensive, coordinated state plan for the orderly present and long-range rehabilitation, enhancement, and development of all aspects of the state's fisheries for the perpetual use, benefit, and enjoyment of all citizens").

its purposes.[18] The Board of Game is responsible for conservation and development of the state's wildlife resources and also has the authority to promulgate regulations.[19]

3.1 Restraint on Alienation of Private Conveyances

As discussed below, the public has a continuing easement over state-owned tidelands and submerged lands that pass into private ownership for purposes of commerce, navigation, and fishery. Thus, these lands should remain burdened by the public easement regardless of any subsequent private conveyance.

3.2 Limit on the Legislature

A. Alienation of Trust Land

Although the PTD does not prohibit the alienation of trust land,[20] these lands will generally be subject to continuing public easements for purposes of navigation, commerce and fishery.[21] Under the common law, state conveyances of trust land will pass title free of public trust obligations only where the conveyance is either made in furtherance of a specific public trust purpose or can be made without substantial impairment of the public's interest.[22] In order to establish that the conveyance was made in furtherance of a trust purpose, the statute authorizing the conveyance must "clearly express[] or necessarily impl[y] the legislature's intent to convey the land for such purpose;" otherwise, courts will interpret statutes authorizing such conveyances as retaining public trust obligations in the land

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18 The enabling statute for the Board of Fisheries is AS § 16.05.251. Regulations enacted by the Board are found in the Alaska Administrative Code (AAC) Title 5, Chapters 1 – 77.

19 The enabling statute for the Board of Game is AS § 16.05.255. Regulations enacted by the Board are found in the Alaska Administrative Code (AAC) Title 5, Chapters 84 – 92.

20 In fact, both the state constitution and statutes authorize the sale of state land. *See* Alaska Const., art. VIII, § 10 ("No disposals or leases of state lands, or interests therein, shall be made without prior notice and other safeguards of the public interest as may be prescribed by law"); AS § 38.050.045 (generally authorizing the sale of state land with the exception of tide, submerged or shoreland, and timber or grazing land). Although AS § 38.050.045 does not expressly authorize the sale of tide and submerged land, it does not prevent the disposition of state land under other enumerated statutory provisions, including AS § 38.05.820, which grants a conveyance preference to the those who occupied and developed tide and submerged land prior to statehood.

21 *CWC Fisheries*, 755 P.2d at 1121 (holding that tidelands conveyed to private parties pursuant to Class I preference rights under AS § 38.05.820 were subject to public's right to utilize those tidelands for purposes of navigation, commerce and fishery).

22 *Id.* at 1119 (adopting *Illinois Central's* exceptions).

whenever the statute is susceptible of such an interpretation.[23] Significantly, however, the Alaska Supreme Court has left open the question "whether a fee simple tideland conveyance which satisfied the strictures of *Illinois Central* would nonetheless run afoul of article VIII, section 3."[24] Thus, it is unclear whether the Common Use Clause of the Alaska Constitution provides additional protection beyond the common law PTD.

B. Management of State Resources

Although the courts have construed the Common Use Clause to impose a public trust duty on the state in managing fish, wildlife and water resources, the "extent to which this public duty . . . limits a state's discretion in managing its resources is not clearly defined."[25] At times, the Alaska Supreme Court has invoked general principles of trust law to delineate the nature of the state's trust obligations.[26] However, the court nevertheless has rejected "wholesale application" of trust principles in the context of natural resources management, reasoning that the "applicability of private trust law depends greatly on both the type of trust created and the intent of those creating the trust."[27]

For example, although the state has a fiduciary duty in managing trust resources, this duty does not require the state to retain exclusive law-making authority over natural resource management decisions.[28] In *Brooks v. Wright*, the Alaska Supreme Court upheld an initiative proposal that would ban wolf snares, rejecting an argument that the initiative would impair the legislature's ability to fulfill its trust obligations.[29] The court opined, "the State of Alaska acts as 'trustee' over wolves and other

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23 *Id.* (concluding that AS § 38.05.820, the statute authorizing the conveyance, neither expressly nor impliedly indicated the legislature's intent to convey the tidelands free from public trust obligations).
24 *Id.* at 1120 n 10.
25 *Owsichek*, 763 P.2d at 495.
26 *See, e.g.*, Shepherd v. State, 897 P.2d 33, 40-41 (Alaska 1995) (concluding that the state may prefer residents to nonresidents in taking wildlife because, "[a]s the trustee of [fish and wildlife] resources for the people of the state, the state is required to maximize for state residents the benefits of state resources").
27 Brooks v. Wright, 971 P.2d 1025, 1032 (Alaska 1999).
28 *Id.* at 1031.
29 *Id.* at 1031-32. Before deciding whether "the state's trustee-like duty set forth in Article VIII implies that the public may not propose initiatives relating to wildlife management," *id.* at 1028, the court first concluded that the state's public trust duties did not make the initiative process "clearly inapplicable" within the meaning of Article XII, section 11 of the Alaska Constitution, which authorizes law-making through initiative. *Id.* at 1029. Significantly, however, the court did not decide whether the wolf snare law could be considered an appropriation of a state assets, *id.* at 1027-28, in which case the initiative

wildlife not so much to avoid *public* misuse of these resources as to avoid the *state's* improvident use or conveyance of them."[30]

At a minimum, the PTD, as codified in Article VIII of the Alaska Constitution, prohibits the legislature from granting exclusive rights or special privileges to certain groups over access to the state's trust resources.[31] However, the legislature may allocate trust resources and treat user groups[32] differently.[33]

3.3 Limits on Administrative Action

The legislature has delegated authority to the DF&G and the DNR to allocate trust resources, for example, by regulating the means and methods of harvesting fish and wildlife.[34] In reviewing such decisions, courts employ a deferential standard of review, upholding agency action unless it is unreasonable, arbitrary and capricious or made in violation of the applicable procedures.[35] In contrast, courts will closely scrutinize any administrative action that appears to grant special privileges or exclusive rights over natural resources to a particular user group and will require the least restrictive

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process would be barred under Article XI, section 7 of the Alaska Constitution ("The initiative shall not be used to . . . make or repeal appropriations . . ."). *See* Pebble Limited Partnership v. Parnell, 215 P.3d 1064, 1074 (Alaska 2009) (the waters of the state are public assets that cannot be appropriated by iniative); Pullen v. Ulmer, 923 P.2d 54, 61 (Alaska 1996) (salmon is a state asset that cannot be appropriated by initiative).

30 *Brooks*, 971 P.2d at 1031.

31 *See, e.g., Owsichek*, 763 P.2d at 496 (Common Use Clause prohibits exclusive guide areas); McDowell v. State, 785 P.2d 1 (Alaska 1989) (statute granting preference to rural residents to take fish and game for subsistence purposes violates Common Use Clause). However, leases and exclusive concessions on state lands are constitutionally permissible. *See Owsichek*, 763 P.2d at 497 (observing that such leases and concession contracts are of limited duration and are subject to competitive bidding procedures and valuable consideration); *CWC Fisheries*, 755 P.2d at 1120-21 (stating in dictum that shore fisheries leasing program would not violate public trust in part because leases were of finite duration and required annual rent).

32 The courts define "'user groups' in terms of the nature of the resource (i.e., fish or wildlife) and the nature of the use (i.e., commercial, sport or subsistance)," as opposed to the means or methods of access. Alaska Fish Spotters Assoc. v. State, 838 P.2d 798, 803 (Alaska 1992).

33 *See, e.g.*, State v. Kenaitze Indian Tribe, 894 P.2d 632, 640 (Alaska 1995) ("Article VIII limitations on the state's power to restrict access to natural resource user groups do not apply to the state's authority to allocate fishery resources among sport, commercial, and subsistence users"). Indeed, the state constitution expressly authorizes the state to allocate natural resources among competing uses: "Fish forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, *subject to preferences among beneficial uses.*" Alaska Const., art. VIII, 4 (emphasis added).

34 *See, e.g.*, Tongass Sport Fishing Assoc. v. State, 866 P.2d 1314, 1317-18 (Alaska 1994) (regulation allocating harvest limits of salmon among sport and commercial fisherman does not violate article VIII); *Alaska Fish Spotters Assoc.*, 838 P.2d at 801-02 (DF&G can ban aerial fish spotting).

35 *Kenaitze Indian Tribe*, 894 P.2d at 641.

alternative of accomplishing the state's purpose.[36]

4.0 Purposes

The PTD in Alaska includes recreational purposes. Moreover, the statutory codification of the PTD appears to extend the PTD even further to most public purposes, but the courts have not yet spoken on this issue.

4.0.1. Traditional (Navigation/Fishing)

As discussed above,[37] the common law PTD in Alaska encompasses the traditional PT purposes of commerce, navigation, and fishing. By statute, these uses include "the right to use land below the ordinary high water mark to the extent reasonably necessary to use the navigable water consistent with the public trust."[38]

4.0.2. Beyond Traditional (recreational/ecological)

The PTD in Alaska also includes recreational purposes.[39] Moreover, statutory support also exists for the extension of the PTD to include other public purposes.[40] The statutory definition of "navigable" includes waters that are navigable in fact "for any useful purpose."[41] Further, in codifying the PTD in navigable and public waters, the legislature stipulated that "[o]wnership of land bordering navigable or public water does . . . is subject to the rights of the people of the state to use and have access to the water for recreational purposes or *other public purposes for which the water is used or capable of being used consistent with the public trust.*"[42] The inclusion of the term "other public purposes" indicates that the legislature intended to extend the PTD to include not only to recreational uses, but also other nontraditional uses. However, the courts have yet to address the meaning of the

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36 *Owsichek*, 763 P.2d at 494.
37 *See supra* § 1.0.
38 AS § 38.05.128(d).
39 *See, e.g., CWC Fisheries*, 755 P.2d at 1121 n 14 (noting that the PTD guarantees fisherman access to public resources for recreation purposes); 1982 Op. Att'y Gen. No. 6 (July 14) (the PTD extends to hunting, bathing, and swimming).
40 The Alaska Attorney General also opined that the PTD extends to "preservat[ation] for ecological study," without citing to any authority for this proposition. 1982 Op. Att'y Gen. No. 6 (July 14). The courts have not yet addressed this question.
41 AS § 38.05.965(13).
42 AS § 38.05.126(c) (emphasis added).

term "other public purposes" under this statutory provision."[43]

5.0 Geographic Scope

Under Alaska's expansive definition of navigability and public waters, the geographic scope of the PTD could potentially reach most naturally occurring waters in the state, including wetlands and groundwater. And by statute, the PTD may reach all state-owned uplands and resources.[44]

5.1 Tidal

Perhaps because Alaska only recently attained statehood in 1959 and the legislature subsequently defined the term "navigable," Alaskan state courts never adopted the tidal test for navigability.[45]

5.2 Navigable in Fact

The statutory definition of "navigable" subsumes the federal navigable-in-fact test used to determine state title to submerged land, but is much broader. The legislature defined "navigable" as:

> any water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal, sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purpose.[46]

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43 The Alaska Supreme Court has noted the expansion of the PTD in other jurisdictions to include scenic, scientific, and ecological uses of trust resources and has recognized the importance of preservation, which may indicate a willingness to expand the PTD to cover such purposes in the future. *See* Hayes v. A.J. Assoc., Inc., 846 P.2d 131, 133 (noting the trend toward the expansion of PT purposes to include preservation of land in its natural state and concluding that "even the most expansive interpretation of the scope of public trust easements would not include private mining enterprises," which constitute "an exclusive, depleting use of a non-renewable resource for private profit"). *But see Brooks*, 971 P.2d at 1031 (suggesting that the "expansion of the public trust doctrine to include all or most public uses merely because it has been applied to a particular public use would be inappropriate").

44 *See* AS § 38.05.502 ("all land in the state and all minerals not previously appropriated are the exclusive property of the people of the state and the state holds title to the land and minerals in trust for the people of the state").

45 The legislature, however, has distinguihsed between tidal and nontidal waters in defining "shorelands," "submerged" lands, and" tidelands." Submerged lands and tidelands are limited to land covered by tidal waters. *See* AS § 38.05.965 (22) and (23). In contrast, "shorelands" pertain to land covered by nontidal waters, but only nontidal water that is navigable in fact under federal law. *See* AS § 38.05.965(20). The practical effect of this distinction is unclear, but it may be relevant in interpreting the statutory codification of the PTD under AS § 38.05.502, which appears to extend the PTD to all "state land," including shorelands, tidelands, and submerged land.

46 AS § 38.05.965(13).

Although the federal navigable-in-fact test is limited to waterways used for commerce and to "customary modes of trade and travel,"[47] Alaska's statutory definition of navigability is not so limited, including "any useful purpose" and, presumably, noncustomary modes of transportation.[48] Consequently, the statutory codification of the PTD in Alaska appears to extend beyond the waters over state-owned submerged land to reach waters over privately-held submerged land.[49] Whether Alaskan courts will recognize the PTD as extending to waters independent of state title in the submerged land remains to be seen.

5.3 Recreational Waters

Both the constitution and statute provide a basis to extend the PTD to recreational waters, regardless of navigability. Although the courts have yet to address the issue, the Common Use Clause of the Alaska Constitution, with its general reference to "waters," could be broadly construed to include both navigable and non-navigable waters and may provide grounds for extending the PTD to non-navigable recreational waters.[50]

Further, by defining "navigable," as "navigable in fact for any useful purpose, including . . . recreation[],"[51] the legislature extended the PTD to recreational waters that are navigable in fact. However, the statutory codification of the PTD under section 38.05.126 of Alaska Statutes is not limited solely to navigable waters, but also applies to "public waters," which the legislature broadly defined to include: "navigable water and all other water, whether inland or coastal, fresh or salt, that is reasonably suitable for public use and utility, habitat for fish and wildlife in which there is a public interest, or migration and spawning of fish in which there is a public interest."[52] Thus, the statutory codification of the PTD appears to extend to non-navigable recreational waters that otherwise fall under

47 The Daniel Ball, 77 U.S. 10 Wall. 557, 557 (1870).
48 AS § 38.05.965(13).
49 Alaska Public Easement Defense Fund v. Andrus, 435 F.Supp. 664, 677 (D.Alaska 1977) (observing that under the Alaska Constitution and state law the public has the right to use such waterways).
50 Alaska Const., art. VIII, § 3.
51 AS § 38.05.965(13).
52 AS § 38.05.965(18).

the definition of "public waters" by being "reasonably suitable for public use" or by providing "habitat for fish and wildlife in which there is a public interest." What qualifies as "public use" or "public interest" is unclear, however, as the courts have not yet addressed these questions. Given the apparent breadth of the text, any waterway used for some form of recreation would seem to meet the "public use" requirement and, when used for some form of wildlife-dependant recreation, would likely meet the requirement that it provide habitat for fish or wildlife that is "in the public interest."

Finally, section 38.05.502 of Alaska Statutes, which appears to extend the PTD to state land, may provide an additional basis for extending the PTD to all recreational tidal waters on such land, regardless of navigability. The legislature has defined "state land" or "land" as "all land, including shore, tide, and submerged land, or resources belonging to or acquired by the state."[53] Because the definitions of "submerged land" and "tideland" are not limited to navigable waters,[54] this statutory provision may provide an additional basis to extend the PTD to non-navigable recreational waters over such lands.

5.4 Wetlands

The general reference to "waters" in the Common Use Clause of the Alaska Constitution could also provide the basis for the extension of the PTD to wetlands.[55] Likewise, the statutory codifications of the PTD could also provide a basis for extending the PTD to wetlands.[56] For example, wetlands would arguably meet the definition of "public waters" under section 38.05.965(18) of Alaska Statutes, since they serve important ecological functions and provide essential habitat for fish and wildlife in

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53 AS § 38.05.965(21).

54 "Submerged land" is "land covered by tidal water between the line of mean low water and seaward to a distance of three geographical miles or further as may hereafter be properly claimed by the state." AS § 38.05.965(22). "Tideland" is "land that is periodically covered by tidal water between the elevation of mean high water and mean low water." AS § 38.05.965(23). In contrast to submerged and tidelands, "shoreland" is limited to nontidal waters that are navigable in fact under federal law. AS § 38.05.965(20) ("'shoreland' means land belonging to the state which is covered by nontidal water that is navigable under the laws of the United States up to ordinary high water mark as modified by accretion, erosion, or reliction").

52 Alaska Const., art. VIII, § 3.

53 *See* AS §§ 38.05.126 ("the state holds and controls all navigable or public water in trust for the use of the people of the state") and 38.05.502 ("all land in the state and all minerals not previously appropriated are the exclusive property of the people of the state and the state holds title to the land and minerals in trust for the people of the state").

which there may be "a public interest."[57] Thus, the statutory codification of the PTD under section 38.05.126 of Alaska Statutes may provide a basis for extending the PTD to wetlands. Moreover, section 38.05.502 of Alaska Statutes, which apparently extends the PTD to all state-owned land, would appear to include wetlands located on such land.

5.5 Groundwater

No case law exists extending the geographic scope of the PTD in Alaska to groundwater, but the constitution's broad reference to "waters" in the Common Use Clause could be construed to include groundwater.[58] In fact, Article VIII, section 13 of the Alaska Constitution contemplates the reservation of "subsurface waters to the people for their common use" and, although water may be appropriated, appropriated water rights remain subject to "the general reservation of fish and wildlife."[59]

Further, the statutory codification of the PTD under section 38.05.126 of Alaska Statutes appears to cover groundwater, which likely qualifies as "public water," in that it is "reasonably suitable for public use." And the statutory extension of the PTD to state land under section 38.05.502 of Alaska Statutes, defined to include "resources," could arguably include groundwater as a state-owned resource.

5.6 Wildlife

Although a dearth of case law exists on the scope of the PTD with respect to other resources, the PTD in Alaska unquestionably extends to fish and wildlife under both the common law and as codified in the state constitution. Indeed, Alaska's public trust jurisprudence frequently involves the

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57 In fact, courts have increasingly recognized the ecological importance of wetlands and tidelands. *See, e.g.,* Hayes v. A.J. Assoc., Inc. 846 P.2d 131, 133 (Alaska 1993) (noting "[t]here is growing recognition that one of the most important public use of tidelands . . . is the preservation of those lands in their natural state").

58 *See* MAPCO Alaska Petroleum, Inc. v. Central Nat. Ins. Co. of Omaha, 795 F.Supp. 941, 949 (D.Alaska 1991) (rejecting plaintiff's argument that it owned groundwater for purposes of an exclusion under an insurance policy based on the court's conclusion that although the constitution "does not specifically state that groundwater is owned by the people of Alaska, it clearly suggests that since use is enjoyed by all, ownership is not vested in any person").

59 Article VIII, Section 13, provides in its entirety:

> All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to State purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.

application of the PTD to fish and wildlife.[60]

5.7 Uplands (beaches, parks, highways)

Although no court has addressed the issue, section 38.05.502 of Alaska Statutes appears to extend the PTD to all state-owned land, which would include state-owned beaches, parks, and highways. With respect to uplands along navigable waters, by statute the public's usufructuary rights in such water "includes the right to enter adjacent land above the ordinary high water mark as necessary to portage around obstacles or obstructions to travel on the water," subject to certain conditions.[61] Further, the statutory codification of the PTD over navigable and public waters assures the public some form of access.[62] However, the nature and extent of the public's right of access to navigable and public waters over private land is unclear.

6.0 Activities Burdened

6.1 Conveyances of Property Interests

As discussed above,[63] the PTD does not prohibit the alienation of submerged and tidelands, but it does impose a continuing public easement upon the property for purposes of commerce, navigation, and fishing.[64]

6.2 Wetland Fills

Although the state has broad regulatory authority over wetlands, including the regulation of

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60 *See, e.g., Owsichek*, 763 P.2d at 495 n 12.

61 AS § 38.05.128(e) provides:

> Free passage or use of any navigable water includes the right to enter adjacent land above the ordinary high water mark as necessary to portage around obstacles or obstructions to travel on the water, provided
>
> (1) entry is made without injury or damage to the land;
>
> (2) entry is made in the least obtrusive manner possible;
>
> (3) there is no reasonable alternative available to avoid the use of the adjacent land above the ordinary high water mark; and
>
> (4) the navigable water is reentered immediately below the obstacle or obstruction at the nearest point where it is safe to do so.

62 AS § 38.05.126(c) provides, in relevant part: "[o]wnership of land bordering navigable or public water does not grant an exclusive right to the use of the water and a right of title to the land below the ordinary high water mark is subject to the rights of the people of the state to use and have access to the water . . . ."

63 *See supra* § 3.2(A).

64 *CWC Fisheries*, 755 P.2d at 1121.

wetland fills, no court has held that the PTD provides the basis for such authority. However, in *R&Y, Inc. v. Anchorage*, the Alaska Supreme Court rejected a regulatory takings claim based on a municipal setback to protect wetlands after determining that the city's interest in regulating the wetlands outweighed the minor diminution in property value caused by the land use restriction.[65] Although the court did not rely on the PTD, it did cite a law review article on the PTD as a takings defense in its discussion of the important ecological functions that wetlands serve.[66]

6.3 Water Rights

The state constitution established a prior appropriation system of water rights in Alaska.[67] Appropration of water is subject to preferences among "beneficial uses" and, significantly, a "general reservation of fish and wildlife.[68] By statute, the DNR has the authority to manage and allocate the water resource through a permit system.[69] In issuing a permit, the DNR must ensure that the proposed use is "beneficial"[70] and will be "in the public interest."[71] In making the public interest determination, the DNR must consider, among other things, the effect of the proposed on "fish and game resources,"[72] "public recreational opportunities,"[73] and "access to navigable or public water."[74] When appropriated,

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65 34 P.3d 289 (Alaska 2001).

66 *Id.* at 298 n. 34 (citing Paul Sarahan, *Wetlands Protection Post Lucas: Implications of the Public Trust Doctrine on Takings Analysis*, 13 Va. Envtl. L.J. 537, 538-39 [1994]).

67 Article VIII, § 13 provides:

> All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.

The prior appropriation system is also codified in AS § 46.15.030: "Wherever occurring in a natural state, the water is reserved to the people for common use and is subject to appropriation and beneficial use and to reservation of instream flows and levels of water, as provided in this chapter."

68 *Id.*

69 AS § 46.15.080. The Alaska Water Use Act is set forth in AS §§ 46.15.010 – 46.15.270.

70 Beneficial uses are enumerated statutorily and include "domestic, agricultural, irrigation, industrial, manufacturing, fish and shellfish processing, navigation and transportation, mining, power, public, sanitary, fish and wildlife, recreational uses, and maintenance of water quality." AS § 46.15.260(3).

71 AS § 46.15.080(a)(4).

72 *Id.* (b)(3).

73 *Id.*

74 *Id.* (b)(8)

water becomes a usufructuary or use right,[75] which is protected from "involuntary divestment."[76] However, courts have yet to address the interplay between the constitutionally established prior appropriation system of water rights, the general reservation for fish and wildlife, and the PTD.[77]

6.4 Wildlife Harvests

The state's public trust duties in managing wildlife resources require the state to regulate the taking of wildlife to conserve the resource.[78] To this end, state agencies may allocate the wildlife and fishery resources among competing user groups and may regulate the means and methods of harvesting fish and wildlife.[79]

7.0 Public Standing

Members of the public generally have standing to challenge violations of the PTD under the common law, statute, and the state constitution.

7.1 Common-law Basis

Members of the public may have standing to enforce the PTD based on their status as taxpayers and citizens.[80] To determine whether a plaintiff may avail herself of "citizen-taxpayer" standing, courts employ a case-by-case approach, examining several factors such as whether the case involves an issue

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75 *Owsicheck*, 763 P.2d at 493.

76 Alaska Const. art. VIII, § 16 ("No person shall be involuntarily divested of his right to the use of waters, . . . except for a superior beneficial use or public purpose and then only with just compensation and by operation of law.).

77 As no court has addressed this issue, it is unclear whether the General Reservation Clause of Article VIII, section 13 of the Alaska Constitution merely grants the legislature the authority to enact laws reserving water for fish and wildlife or as imposing an affirmative duty on the legislature to do so. However, in Tulkisarmute Native Community Council v. Heinze, 898 P.2d 935, 952 (Alaska 1995), the Alaska Supreme Court ruled that DNR abused its discretion in issuing a diversion permit because it failed to impose sufficient conditions to ensure an adequate stream flow for fish and wildlife. The permit application failed to state the points of diversion and return, as required by the applicable regulations, making DNR unable to determine the effects of dewatering on fish and wildlife and the condition it had imposed "too vague to ensure the protection of salmon habitat." *Id.* Because the court based its decision on the applicable regulations, it declined to determine whether DNR's actions violated the General Reservation Clause. *Id.* at n. 29.

78 *See, e.g.*, Gilbert v. State, 803 P2d 391, 399 (Alaska 1990) (because migrating schools of fish are "held in trust for the benefit of all the people of the state," the state has "the obligation and the authority to equitably and wisely regulate the harvest").

79 *See, e.g., Owsichek*, 763 P.2d at 492 (licensing requirements, bag limits, and seasonal restrictions are "time-honored methods of conserving the resources").

80 Baxley v. State, 958 P.2d 422, 428 (Alaska 1998). Members of the public may also have standing under the "interest-injury" approach, although no case has explicitly addressed "interest-injury" standing in a public trust case. Under "interest-injury" standing, a plaintiff must have an interest – whether economic, aesthetic or environmental – that has been adversely affected by state action. *See* Trustees for Alaska v. State, 736 P.2d 324, 327 (Alaska 1987).

of public significance. Courts will also examine whether the plaintiff is an appropriate party to the action, ensuring that the plaintiff 1) is not a "'sham plaintiff' with no true adversity of interest," 2) "is capable of competently advocating her position," and 3) "no other plaintiff [is] more directly affected who is likely to bring suit."[81] Because the state's alleged breach of its public trust duties has constitutional dimensions and implicates issues of public significance, plaintiffs generally have citizen-taxpayer standing to maintain an action to enforce the PTD.[82]

7.2 Statutory Basis

Members of the public have a statutory basis to bring an action to abate an unauthorized obstruction of navigable water as a public nuisance.[83] Otherwise, the statutory provisions codifying the PTD do not contain express enforcement provisions.

7.3 Constitutional Basis

The Common Use Clause of the Alaska Constitution gives members of the public standing to challenge state actions that allegedly violate the PTD.[84] However, courts will apparently require that such plaintiffs demonstrate that their use of the trust resource is sufficiently direct.[85]

8.0 Remedies

Remedies for violations of the PTD in Alaska usually involve injunctions to enjoin unauthorized obstructions of navigable waters. However, both the government and private parties may seek damages for injuries to natural resources caused by the unpermitted release of a hazardous substance.

8.1 Injunctive Relief

By statute, plaintiffs may seek injunctive relief for unauthorized obstructions to or interferences

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81 *Baxley*, 958 P.2d at 428.
82 *See id.* (plaintiff's allegation that statute authorizing amendment of certain provisions of state oil and gas leases violated PTD and the state constitution was an issue of public concern sufficient to afford plaintiff citizen-taxpayer standing).
83 AS § 38.05.128(b) ("An unauthorized obstruction or interference is a public nuisance and is subject to abatement.").
84 *See Owsichek*, 763 P.2d at 491 n 9 (noting that although the state did not argue that plaintiff lacked standing under common use clause, it "would reject such an argument").
85 *See id.* (noting that a professinal hunting guide has standing under the common use clause because "a professional hungin guide's 'use' of the wildlife resource is sufficiently direct that he falls within the protection of the common use clause").

with navigable waters.[86] With respect to other violations of the PTD, the common law doctrines of nuisance and trespass may provide additional potential avenues for relief.

8.2 Damages for Injuries to Natural Resources

By statute, state and local governments may recover against private parties for damages to natural resources caused by an unpermitted release of a hazardous substance.[87] Modeled after the federal Superfund statute, the state statute imposes joint and several strict liability on owners of hazardous substances for environmental damage caused by the release of such substances.[88] The statute also creates a private cause of action for a property owner affected by the release.[89]

In contrast to damages caused by private parties, no authority exists for bringing an action against the state for such damages. In *Brady v. State*, pro se plaintiffs, whose application for a negotiated timber sale for dead and dying trees had been denied by the state, brought an action against the state, alleging several claims relating to the state's denial of the timber sale and its management of the state forests that had been damaged by a beetle epidemic.[90] Insofar as is relevant, the plaintiffs relied in part on the PTD in arguing that the state's forest management decisions and response to the beetle epidemic rendered it liable for damages to the forests caused by the beetle infestation.[91] The court refused to reach the merits of this argument, concluding that discretionary-function immunity bars tort such claims against the state.[92]

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86 AS § 38.05.128.

87 AS § 46.03.822(a) ("the following persons are strictly liable, jointly and severally, for damages to persons or property, whether public or private, including damage to the natural resources of the state or a municipality, and for the costs of response, containment, removal, or remedial action incurred by the state or a municipality, resulting from an unpermitted release of a hazardous substance . . . "); Maddox v. Hardy, 187 P.3d 486 (Alaska 2008).

88 AS § 46.03.822(a).

89 *Maddox*, 187 P.2d at 486; Fed. Deposit Ins. Corp. v. Laidlaw Transit, Inc., 21 P.3d 344, 356 (Alaska 2001).

90 965 P.2d 1 (Alaska 1998).

85 *Id.*

92 *Id.* at 17 ("The Bradys offer no authority for their argument that, since the State holds public lands as a "trustee" under Alaska's Public Trust Doctrine, and since a private trustee can be subject to an accounting to the beneficiaries for allowing waste of the trust corpus, the State can thus by analogy be liable *in damages* under the Public Trust Doctrine for letting beetles destroy the arboreal corpus of the public trust.") (emphasis in original).

8.3 Defense to Takings Claims

In the context of real property, research reveals no case law in which the state sought to use the PTD as a defense against a takings claim. However, the state invoked trust principles embodied in the Common Use Clause of the Alaska Constitution to successfully defend against a claim involving an alleged regulatory taking of fishery entry permits, which are authorized by Article VIII, Section 15 of the Alaska Constitution.[93] The court concluded that if such "permits were given the status of property for purposes of a takings challenge based on changes in regulations, then the waters would not truly be "reserved to the people for common use," . . . [and] a permit holder would effectively own the right to fish to the exclusion of other people in a manner that was not contemplated by [Article VIII, Section 15]."[94]

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93 Vanek v. State Board of Fisheries, 193 P.3d 283, 290 (Alaska 2008). Article VIII, Section 15 of the Alaska Constitution bans exclusive rights in fisheries, but contains an exception added by amendment in 1972 to authorize a limited entry system:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent on them for a livelihood and to promote the efficient development of aquaculture in the State.

Because of the "tension . . . between the new language authorizing limited entry and the pre-existing language of the common use and no exclusive right of fishery clauses," the courts require that "whatever system of limited entry is imposed must be one which, consistent with a feasible limited entry system, entails the least possible impingement on the common use reservation and on the no exclusive right of fishery clause." *Ostrosky*, 667 P.2d at 1191.

94 *Vanek*, 193 P.3d at 290.

ARIZONA

The Arizona Public Trust Doctrine

Ian Michael Brown

1.0 Origins

The public trust doctrine (PTD) in Arizona was relatively unaddressed and unnoticed throughout the majority of Arizona's existence as a state. For the first sixty-one years of Arizona's history, since the state's inception in 1912, the PTD lay dormant. In 1973, the U.S. Supreme Court ruled, in *Bonelli Cattle Co. v. Arizona*, that the Colorado River was navigable at statehood in 1912, and therefore was part of Arizona's public trust lands.[1] The state, however, has never declared any watercourses aside from the Colorado River to be navigable.

In 1985, the state attorney general asserted the PTD over the Verde River, located in central Arizona, in an attempt to slow destruction caused by gravel operations near the river.[2] This unexpected assertion of state authority drew sharp opposition from private landowners, since it upset their long-standing assumptions that they owned the land

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[1] 414 U.S. 313, 320 (1973) (the United States Supreme Court in *Bonelli* recognized that the Colorado River was navigable at statehood, and that Arizona therefore held title to the beds underlying the river) (citing *Arizona v. California*, 283 U.S. 483 (1931)), *overruled on other grounds,* Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 371 (1977) (holding that the doctrines of avulsion and accretion were matters of state law, not federal common law, because the equal footing "had vested title to the riverbed in Arizona as of the time of its admission to the Union, (after which point) the force of that doctrine was spent; it did not operate after that date to determine what effect on titles the movement of the river might have.").

[2] *See* D. Tracey Zobenica, *The PTD in Arizona's Streambeds*, 38 Ariz. L. Rev. 1053, 1057 (1996) (stating that, by asserting public authority over the Verde River, the Arizona attorney general "opened the floodgates of controversy as private landowners along the river complained that the action resulted in clouded titles, canceled property sales, and the unavailability of title insurance. (footnote omitted)).

underlying the water.[3] Opposition to the state's assertion of ownership of the Verde River riverbed spawned a great deal of legislation and litigation, keeping Arizona's PTD in a state of perpetual uncertainty.

In response to the public controversy the attorney general created by asserting the PTD, in 1985 the state legislature passed House Bill 2017,[4] in an attempt to disclaim state ownership of all the state's riverbeds, with the exception of the Colorado, Gila, Salt, and Verde Rivers, effectively recognizing ownership in riparian landowners.[5] But in 1991, the Arizona Court of Appeals, in *Arizona Center for Law in the Public Interest v. Hassell,*[6] declared that House Bill 2017 was both a violation of the "gift clause" of the state's constitution[7] and the PTD, which, the court explained, does not exist at the pleasure of the legislature, but for the benefit of present and future generations.[8] The court ruled that there was "substantial evidence" to suggest that many of the waterbeds the state disclaimed could in fact be "navigable," and thus subject to the PTD, which the legislature had no authority to rescind.[9]

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[3] *See* Navigable Streambeds: Hearings on H.B. 2324 Before the Arizona House of Representatives Committee on Natural Resources, Agriculture, and Rural Development, 41st Leg., 2d Reg. Sess. (Jan. 19, 1994) (minutes).
[4] Ariz. Rev. Stat. Ann. §§ 37-1101 to 37-1108, 12-510, and 12-529 (West 1990).
[5] Zobenica, *supra* note 2, at 1057.
[6] 837 P.2d 158 (Ariz. App. 1992).
[7] Article IX, section 7 provides that "neither the State, nor any county, city, town, municipality, or other subdivision of the State shall ever…make any donation or grant, . . . to any individual, association, or corporation…" Because S.B. 2017 categorically disposed of all waterbeds without a particularized assessment of the potential "value" of individual parcels of the waterbeds, the legislation violated Arizona's gift clause – which prohibits the forfeiture of public resources without the reciprocal payment of adequate consideration. *Hassell*, 837 P.2d at 168-69.
[8] Zobenica, *supra* note 2, at 1061.
[9] *Hassell*, 837 P.2d at 168. The *Hassell* court noted that the legislature could disclaim its ownership of public trust lands; however, it could not disclaim proprietary affirmative

In response, the Arizona legislature created an administrative system to deal with the PTD, enacting House Bills 2594 in 1993[10] and House Bill 2589 in 1994.[11] House Bill 2594 established the Arizona Navigable Streambed Adjudication Commission (ANSAC),[12] with the authority to investigate and determine the "navigability" of Arizona's waters, in order to assess whether the public trust applied to them.[13] House Bill 2589, by narrowly defining what rivers could qualify as "navigable," effectively precluded the ANSAC from declaring any river but the Colorado River as navigable.[14]

In 2001, the Arizona Court of Appeals, in *Defenders of Wildlife v. Hull,*[15] overturned House Bill 2589, ruling that the Arizona legislature lacked the authority to redefine what qualified as navigable because federal laws defining navigability preempted the state.[16] As a result, the legislature finally adopted the federal test for

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duty to protect the public trust resources. *Id.* at 166 (citing *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387, 452 (1892)).

[10] Ariz. Rev. Stat. Ann. §§ 37-1121 to 1131.

[11] *Id. at* §§ 37-1101, 37-1121 to 37-1132, 37-1151, 37-1154, and 37-1156.

[12] ANSAC is a five-member commission, all of whom are appointed by the Arizona governor with the advice and consent of the Arizona Senate. *Id.* at 38-211. No more than three members can be from the same political party. *Id.* at § 37-1121(A).

[13] *See* Zobenica, *supra* note 2, at 1057. ANSAC determines the navigability of a watercourse after notice to the public and a public hearing, ANSAC must also publish a report on its finding of (non)navigability. *Id.* at § 37-1128. If ANSAC finds a watercourse to be navigable, it must also publish the public trust values associated with the watercourse. *Id.* An ANSAC finding of non-navigability relieves the state of public trust authority over the watercourse. *Id. at* § 37-1130. The state land commissioner or any aggrieved party can appeal an ANSAC decision to the superior court of the county in which the watercourse is located. *Id.* at § 37-1129.

[14] *See* Zobenica, *supra* note 2, at 1066.

[15] 18 P.3d 722 (Ariz. App. 2001). In *Hull*, the legislature tried to once again disclaim nearly all the state's waterbeds to private owners after ANSAC concluded that none of the state's rivers were navigable. *Id.*

[16] *Id.* at 730 (citing the federal definition of "navigability" provided in the *The Daniel Ball* Supreme Court case: navigable waters are those that are "...used, or are susceptible of being used, in their ordinary condition, as highways for commerce,..." 77 U.S. (10 Wall.) 557, 563 (1870)).

navigability in 2001.[17] Then, in 2006, ANSAC completed its determinations of navigability under the federal test for all the waters of the state.[18] Even under the more expansive federal test, ANSAC concluded that no waters, except for the Colorado River, were navigable and thus subject to the PTD.

2.0 The Basis of the Public Trust Doctrine in Arizona

In 1992, in *Arizona Center for Law in the Public Interest v. Hassell,*[19] the Arizona Court of Appeals concluded that the Arizona courts had recognized the PTD since the 1930s, and that the doctrine was a permanent underlying principle of Arizona's jurisprudence due to the equal footing doctrine, and the legislature did not have the authority to rescind the PTD or limit the judiciary's application of it.[20] Under equal footing,[21] the state owns the beds of navigable waters existing at the time of statehood in

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[17] Ariz. Rev. Stat. Ann. § 37-1101(5).

[18] Arizona Navigable Stream Adjudication Commission, *Final Reports, available at* http://www.azstreambeds.com/docs/hearings/hearing.htm (last updated March 12, 2009). ANSAC maintains a website in order to make available to the public all of the agency's findings and the administrative rules that govern the agency. *Id.*

[19] 837 P.2d 158 (Ariz. 1992).

[20] *Id.* at 168 (quoting *Maricopa County Municipal Water Conservation Dist. No.1 v. Southwest Cotton Co.*, 4 P.2d 369, 372 (Ariz. App. 1931), as follows: "Navigable waters were, under the common law, considered as under the exclusive control of the government, in trust for the general public..."). The *Hassell* court also explained that "on February 14, 1912, at the instant it achieved the constitutional status of a state, Arizona acquired title to the lands below high-water mark in all navigable watercourses within its boundaries." *Id.* at 162. *See also* San Carlos Apache Tribe v. Superior Court, 972 P.2d 179, 199 (Ariz. 1999) (holding that the legislature cannot limit the judiciary's right to apply the PTD in water rights disputes or any context).

[21] Under the equal footing doctrine, each new state to the Union has equal sovereignty and jurisdictional power as the original thirteen states. *See* Escanaba Co. v. Chicago, 107 U.S. 678, 689 (1883).

1912, just like all the other states created after the original thirteen states.[22] These lands, held in trust for the public, form a basis of the PTD in the state.

In addition, Arizona holds land granted to it by the federal government in trust for the "benefit of the common schools."[23] This trust land was created by the Arizona Statehood Act,[24] which requires the state to manage the land in order to fund the state schools.[25] Arizona also claims sovereign ownership of all wildlife within its borders by statute.[26]

3.0 Institutional Application

Arizona courts have not applied the PTD in many contexts, but they have employed the doctrine to reject the legislature's authority to disclaim public trust resources[27] and alter the federal definition of navigability.[28] Arizona courts have not employed the doctrine to limit private party conveyances of public trust resources, however.

3.1 Restraint on alienation (private conveyances)

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[22] Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845). The U.S. Supreme Court's decision in *Pollard,* established the rule that new states are automatically vested with sovereign title to the beds of the navigable waters within their borders because all new states are semi-sovereign "equals" under the equal footing doctrine. *Id.* at 216.

[23] *See* 43 U.S.C.A §§ 372 to 498

[24] *Id.*

[25] *See* State Land Department, *State Trust at a Glance, available at* http://www.land.state.az.us/news/ataglance.htm (last updated December 10, 2009).

[26] Arizona statutes declare: "Wildlife, both resident and migratory, native and introduced, found in this state, except fish and bull frogs impounded in private ponds or tanks or wildlife birds reared or held in captivity under permit or license from the [Game and Fish] commission, are property of the state." Ariz. Rev. Stat. Ann. § 17-102 (West 1998).

[27] *See* Arizona Center for Law in the Public Interest v. Hassell, 837 P.2d 158, 167 (Ariz. App. 1992); *see infra* note 31.

[28] *See* Defenders of Wildlife v. Hull, 18 P.3d 722, 731-37 (Ariz. App. 2001); *see infra* note 36.

Arizona courts have not used the PTD to limit private conveyances of property. The statutory scheme governing ANSAC established by the state legislature, allows for a "record" landowner (someone who held record title to a waterbed prior to an ANSAC determination) to petition ANSAC to release a waterbed from public trust status by showing that "either because of its nature or because of changes, [the watercourse] is no longer of material use for protecting public trust values."[29] Private parties may also petition for permits to use public trust lands so long as the use will be consistent with, and in the best interests of, the public trust.[30] However, because ANSAC has yet to declare any watercourses with riparian land owners to be navigable, and because the state has not conveyed any public trust resources into private hands, the courts have yet to determine what burdens there might be on private conveyances of public trust resources.

3.2 Limit on legislature

Arizona holds sovereign title to all public trust resources as a trustee, not as a proprietary owner.[31] The Arizona Court of Appeals explained in *Arizona Center for Law in the Public Interest v. Hassell* that the judiciary had an essential role in overseeing the administration of the public trust to ensure that the legislature fulfilled its role as a trustee.[32] Thus, the PTD is not merely a source of authority for the state; instead, the public trust imposes an affirmative duty on the state to protect the public interest in trust

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[29] Ariz. Rev. Stat. Ann. § 37-1151.
[30] *Id.* at § 1153.
[31] *Hassell*, 837 P.2d at 167 (ruling that Arizona is not entirely barred from alienating public trust property, but that it must do so only when it is in the public interest).
[32] *Id.* at 170. (ruling that the Arizona courts must "give public trust dispensations 'a close look'"(footnote omitted)).

resources,[33] making the legislature judicially accountable for its disposition of those resources. The *Hassell* court also explained that the courts had a duty to oversee the state's administration of the public trust as part of its responsibility to act as a check on the legislative branch of the state government, preventing imprudent dispositions of irreplaceable public resources.[34] So far, the Arizona courts have restricted both the legislature's ability to alienate the public trust resources[35] and an attempt to alter the federal definition of navigability.[36]

Arizona courts have repeatedly reaffirmed that the PTD imposes several duties and limitations on the state legislature. As *Hassell* explained, the legislature cannot categorically dispose of public trust lands.[37] In order for the legislature to make a constitutional disposition of public trust land, it must make a particularized assessment of the land's value, including its value to the public.[38] Otherwise, the legislature violates

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[33] *Id.* at 166 (quoting *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 453-54 (1892), as follows: "The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public."); *see also* San Carlos Apache Tribe v. Superior Court, 972 P.2d 179, 199 (Ariz. 1999) (striking down a legislative provision that prohibited the courts from considering the PTD in water rights disputes, explaining that it was within the courts' exclusive authority to decide the applicability of the PTD in any context).

[34] *Hassell,* 837 P.2d at 168.

[35] *Id.*

[36] *See Hull*, 18 P.3d at 731-37. The Arizona legislature codified the federal definition of a "navigable watercourse" as "a watercourse that was in existence on February 14, 1912, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water." Ariz. Rev. Stat. Ann. § 37-1101(5).

[37] 837 P.2d at 731.

[38] *Id.* at 169 (ruling that reviewing courts must first be satisfied that a sale of public trust property serves the public interest and, second, that the sale pays adequate consideration to the public).

both the PTD as well as the Arizona Constitution's gift clause,[39] which forbids the forfeiture of public resources.

In 2001, in *Defenders of Wildlife v. Hull,* the Arizona Court of Appeals explained that federal laws defining navigability bind the state.[40] Thus, the state legislature could not reduce this federal minimum in determining what waters are navigable, and therefore subject to the public trust.[41] The *Hull* court also ruled that the legislature could not preclude the use of evidence such as periodic flooding, use of ferries, or fishing in deciding whether a watercourse was navigable in 1912, because the federal test for navigability allows such evidence.[42] In addition, the court determined that the legislature could not create presumptions in favor of non-navigability to determine the applicability of the public trust, because such a presumption would also be inconsistent with the federal test for navigability.[43]

3.3 Limit on administrative action (hard look doctrine)

The legislature delegated its authority to ANSAC to make particularized assessments of the public trust's applicability to the state's watercourses. The governor appoints five people to serve as the agency's commissioners, no more than three of whom can belong to the same political party, and none of the commissioners can have expressed

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[39] Ariz. Const. art. IX, § 7.
[40] 18 P.3d at 729 (ruling that Arizona accepts *Illinois Central* as binding federal law that preempts state attempts to alter the PTD) (citing 146 U.S. at 453).
[41] Hull, 18 P.3d at 730.
[42] *Id.* at 736 (explaining that the federal test for navigability does not inherently preclude the consideration of any type of evidence in determining whether a watercourse is navigable).
[43] *Id.* at 731 (explaining that a majority of cases that follow the federal test for navigability do so by applying a preponderance of the evidence standard as the burden of proof. The Arizona legislature's attempt to raise the burden of proof to clear and convincing evidence was therefore preempted).

any bias concerning the PTD in the past.[44] The legislature does not review ANSAC decisions; however, the agency's decisions are subject to judicial review at the request of either the state land commissioner or any other aggrieved person.[45]

4.0 Purposes

Arizona courts have not applied the PTD beyond the doctrine's traditional purpose of protecting fishing and navigation. The state's courts have yet to articulate whether the PTD exists beyond this traditional context.

4.1 Traditional (navigation/fishing)

The purpose of the PTD in Arizona is to protect the traditional functions of the public trust, such as navigation and fishing. The Arizona legislature declared, in the laws governing ANSAC, that the values protected by the public trust are "commerce, navigation and fishing."[46] Neither the courts nor the legislature have stated whether this is an exclusive definition of the public trust's purposes.

4.2 Beyond traditional (recreational/ecological)

In 1992, Litigants brought the PTD to the Arizona courts in a challenge to the legislature's attempt to disclaim the state's ownership of the beds of the various watercourses. Neither the legislature nor the courts have addressed what uses the PTD might protect beyond the traditional categories of navigation and fishing. However, in 2001, in *Defenders of Wildlife v. Hull*, the Arizona Court of Appeals explained that the functions served by the PTD include not only protecting the resource subject to the trust,

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[44] Ariz. Rev. Stat. Ann. § 37-1121.
[45] *Id.* § 37-1102.
[46] Ariz. Rev. Stat. Ann. § 37-1101(9).

but also preventing the forfeiture of public resources, which may be sold by the state only for adequate compensation as required by the Arizona Constitution's gift clause.[47]

5.0 Geographic Scope of Applicability

Arizona courts have not extended the geographic scope of the PTD beyond navigable waterways. However, the state holds substantial acreage of uplands provided by federal land grants in "trust" for the "common schools."[48] Some of the duties of state officials when dealing with school trust lands are similar to those for traditional public trust resources, such as considering the public interest before disposal.[49]

5.1 Tidal

Arizona, as a landlocked state, has no tidal waters.

5.2 Navigable in fact

By statute, the public trust extends to waters "susceptible to being used, in [their] ordinary and natural condition, as highway(s) for commerce."[50] The geographical scope of the PTD in Arizona watercourses is below the high-water marks of navigable watercourses.[51] In *Defenders of Wildlife v. Hull*, the Arizona Court of Appeals ruled that the legislature could not limit the scope of the PTD to below the low-water mark of a

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[47] 18 P.3d at 729 (stating that "without a particularized assessment of the validity of equal footing claims, [a disposition of trust resources] is both a violation of the gift clause and invalid under the public trust doctrine").
[48] 43 U.S.C. § 857.
[49] *See* Arizona Center for Law in the Pubic Interest v. Hassell, 837 P.2d 158, 167 (Ariz. App. 1992) (ruling that Arizona is not entirely barred from alienating public trust property, but that it must do so only when it is in the public interest).
[50] Ariz. Rev. Stat. Ann. § 37-1101(5).
[51] *Id.* at § 37-1101.

watercourse's banks because the federal PTD uses the high-water mark to define the scope of the trust, and federal law preempts state law.[52]

5.3 Recreational waters

Neither the Arizona courts nor the state legislature have recognized a public trust in recreational waters.

5.4 Wetlands

Neither the Arizona courts nor the state legislature have recognized a public trust in wetlands.

5.5 Groundwater

Neither the Arizona courts nor the state legislature have recognized a public trust in groundwater.

5.6 Wildlife

Arizona claims ownership of all wildlife within its borders by statute.[53] Moreover, in *Begay v. Sawtelle*, the Supreme Court of Arizona ruled that the state holds ownership of all wildlife within its borders for the benefit of its citizens,[54] suggesting that the state's ownership is sovereign, not proprietary, and that wildlife must be managed for the benefit the public. Although, no state laws elaborate on the nature of the public interest in wildlife, the state attorney general declared that reasonable access to wildlife on state

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[52] 18 P.3d 722, 731 (Ariz. App. 2001) (explaining that the federal test for navigability has always been used to determine whether the public trust applies between high-water marks).

[53] Arizona statutes declare: "Wildlife, both resident and migratory, native and introduced, found in this state, except fish and bull frogs impounded in private ponds or tanks or wildlife birds reared or held in captivity under permit or license from the [Game and Fish] commission, are property of the state." Ariz. Rev. Stat. Ann. § 17-102 (West 1998).

[54] 88 P.2d 999, 1000 (Ariz. 1939) (ruling that Arizona legislation, which denied hunting and fishing licenses to Native Americans, violated the Fourteenth Amendment).

grazing land must be available to all licensed hunters.[55] No state statutes or court decisions have specifically referred to the PTD in reference to wildlife management.

5.7 Uplands (beaches, parks, highways)

Due to its Statehood Act, Arizona holds nearly 10 million acres of the state's surface area in "trust" for the "benefit of the common schools."[56] The Statehood Act requires that school trust lands be conserved, sold, or leased by the state in order to fund the state's education system.[57] Although school trust lands are distinct from traditional public trust resources,[58] the state does manage school trust land in a similar fashion as it would with traditional public trust lands. Arizona's enabling statute requires the state to dispose of trust land only for "full value."[59] Acting as the trustee of the state's schools in the land, the state must open land sales to all viable bidders to obtain the highest price for

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[55] "Reasonable access to land held under grazing leases form the Arizona land department, existing and historically available gates to roadways should be accessible by hunters." Op. Att'y Gen. 76-4 (Ariz. 1976).

[56] *See* 43 U.S.C.A §§ 372 to 498

[57] *Id; See also* State Land Department, *State Trust at a Glance, available at* http://www.land.state.az.us/news/ataglance.htm (last updated December 10, 2009). The Arizona State Land Department describes the trust land held for the common schools as follows: "State Trust lands are often misunderstood in terms of both their character and their management. They are not public lands, but are instead the subject of a public Trust created to support the education of our children. The Trust accomplishes this mission in a number of ways, including, through its sale and lease of Trust lands for grazing, agriculture, municipal, school site, residential, commercial and open space purposes… Earning money for Arizona's public schools is the primary mission of the Trust's management. Over the first 90 years of the Trust nearly $1 billion has been amassed in the schools permanent fund alone." *Id.*

[58] School trust lands are distinct from traditional public resources in a number of ways: 1) the federal government granted school lands to the state in the Statehood Act, whereas common law public trust lands are reserved by implication under the equal footing doctrine; 2) the common law PTD has a history tracing back to Roman times, whereas state school lands are a consequence of federal public land policy; and 3) school lands are not reserved for public uses such as access. *Id.*

[59] *See* 43 U.S.C.A §§ 372 to 498.

the public.[60]

In 1996, the state legislature passed the Arizona Preserve Initiative, which allows the state land commissioner to sell or lease trust land for conservation purposes.[61] In deciding whether to reclassify trust land for conservation under the statute, the commissioner must consider the public's interest in the land for conservation or development.[62] The requirement to sell school trust land at full value and the Arizona Preserve Initiative both mimic the traditional PTD, as they both impose an affirmative duty upon state officials to safeguard the public interest in trust resources.

6.0 Activities Burdened

Neither the state courts nor the legislature have articulated what activities are burdened by the PTD in Arizona. If ANSAC determines that a watercourse was navigable in 1912, state law requires the agency to "identify and make a public report of any public trust values associated with the navigable watercourse."[63] However, because ANSAC has yet to conclude that any state watercourse is navigable-in-fact, the agency has never identified any "trust values" associated with any watercourses.[64]

6.1 Conveyances of property interests

Neither the Arizona courts nor the state legislature have applied the PTD to

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[60] *See* Forest Guardian v. Wells, 34 P.3d 364, 366 (Ariz. 2001) (ruling that the state could not prevent environmental groups from bidding for state lands because the state's duty is to seek maximum return for trust lands, regardless of who is bidding).
[61] Ariz. Rev. Stat. Ann. § 37-1131.
[62] *Id.*
[63] Ariz. Rev. Stat. Ann. § 37-1128.
[64] The U.S. Supreme Court concluded that the Colorado River was navigable in *Bonelli Cattle Co. v. Arizona* 414 U.S. 313, 320 (1973). The Court did not articulate what activities were burdened by Arizona's public trust ownership of the Colorado River's bed, however, and the Arizona legislature gave ANSAC no authority over the Colorado River.

private conveyances of property interests.

6.2 Wetland fills

Neither the Arizona courts nor the state legislature have recognized that the PTD restrains wetland fills.

6.3 Water rights

The Arizona Supreme Court has eluded to the possibility that groundwater and minor tributaries that feed navigable waters may be burdened by the public trust.[65] In 1995, the Arizona legislature enacted an amendment to the state's water laws that precluded courts from considering the public trust in water rights cases.[66] But, in *San Carlos Apache Tribe v. Superior Court*, the Arizona Supreme Court struck down that provision.[67] The court explained that while the PTD does not directly implicate water rights, if a particular water use were to affect a watercourse subject to the PTD, the court would consider the public trust in resolving a water rights dispute.[68] Perhaps the Arizona Supreme Court was suggesting that state courts should remain open to the PTD in a broad range of matters such as water rights, potentially protecting navigable waters from being depleted by diversions or dams or overuse of groundwater.[69]

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[65] *See* San Carlos Apache Tribe v. Superior Court, 972 P.2d 179, 199 (Ariz. 1999) (stating that "we (the courts) do not yet know if the (public trust) doctrine applies to all, some, or none of the [state's non-navigable waters].").
[66] Ariz. Rev. Stat. § 45-263(B).
[67] 972 P.2d at 199.
[68] *Id.*
[69] Arizona's neighboring state, California, extended public trust burdens to tributaries that feed navigable waters in *National Audubon Society v. Superior Court*, 658 P.2d 709 (Calif. 1983). As an arid state similar to California, one legal scholar believes that the *San Carlos* decision, like the Mono Lake decision, could open the door to apply public trust burdens on the various water diversions constructed off of the Colorado River, currently Arizona's one and only public trust resource. *See* Robert Glennon, *General Stream Adjudication and the Environment*, 133 Ariz. L. Rev. 26, 26-28 (2006).

6.4 Wildlife harvests

Arizona holds sovereign ownership of all wildlife within its borders.[70] Accordingly, the state requires a valid hunting or fishing license for taking wildlife on public and private land.[71] The state Game and Fish Department issues licenses for wildlife harvests after calculating sustainable yields based on the best available scientific data on population sizes, seasonal breeding patterns, predation, and disease.[72] The state's ownership of wildlife has not been judicially challenged.

7.0 Public Standing

No Arizona court has considered citizen standing under the PTD. But in ANSAC's enabling statue, the state legislature did grant standing to the state land commissioner and all other people "aggrieved" by an ANSAC finding.[73]

7.1 Common law-based

The Arizona courts have yet to address public standing under common law to sue under the PTD.

7.2 Statutory basis

The Arizona legislature granted standing to challenge ANSAC's decisions to any citizen "aggrieved by the commission's determination."[74] The legislature entrusted the duty of protecting the public trust with the state land commissioner, who is to act as an advocate to promote the public trust.[75]

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[70] Ariz. Rev. Stat. Ann. § 37-1101(9).
[71] *Id.* § 17-331.
[72] *Id.* §§ 17-301 to 335.
[73] Ariz. Rev. Stat. § 37-1129.
[74] *Id.*
[75] *Id.* § 37-1102.

7.3 Constitutional basis

The Arizona Constitution does not address public standing to sue under the PTD.

8.0 Remedies

Arizona courts have struck down several acts of legislation for violating the PTD.[76] The courts have not articulated what other remedies might be available should the state violate the PTD.

8.1 Injunctive relief

Arizona courts have granted injunctive relief against implementation of statutes that violate the state's public trust duties.[77] The state courts have yet to enjoin non-legislative action.

The state legislature has provided judicial review of ANSAC decisions that may violate the public trust or which erroneously interpret navigability.[78] Even though ANSAC has determined that none of Arizona's watercourses (except the Colorado River) are subject to the public trust, the struggle over Arizona's public trust duties is far from resolved. ANSAC has concluded its hearings and made determinations for all of the state's 30,039 watercourses,[79] but ANSAC must publish reports with supporting evidence justifying the agency's determinations of navigability or non-navigability.[80] After publication, there remains a 180-day time period for the state land commissioner to

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[76] *See* Defenders of Wildlife v. Hull, 18 P.3d 722, 731-37 (Ariz. App. 2001); *see supra* note 36.
[77] *See* Arizona Center for Law in the Public Interest v. Hassell, 837 P.2d 158; *See also* Hull, 18 P.3d 722.
[78] Ariz. Rev. Stat. § 37-1129.
[79] *See* Arizona Navigable Stream Adjudication Commission, *Final Reports, available at* http://www.azstreambeds.com/docs/hearings/hearing.htm (last updated March 12, 2009).
[80] Ariz. Rev. Stat. § 37-1128.

appeal, and a 270-day appeal period for all other interested parties to an appropriate state superior court.[81]

ANSAC has yet to publish reports for some of the state's major watercourses,[82] so the period to challenge the agency's rulings on those rivers remains open. The Arizona Center for Law in the Public Interest has challenged the agency's determination of non-navigability for the Salt, Santa Cruz, San Pedro, and Verde Rivers, but the courts have yet to rule.[83]

8.2 Damages for injuries to resources

No Arizona courts have ruled that damages are available to plaintiffs should the state violate its public trust duties.

8.3 Takings claims

If considered to be a "background principle" of state property law under the framework established by the U.S. Supreme Court in *Lucas v. South Carolina Coastal Commission*, the PTD would preclude private parties from maintaining takings claims against governments, when the state asserts its authority over public trust resources.[84] The

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[81] *Id. at* § 37-1128.

[82] *See* Arizona Navigable Stream Adjudication Commission, *Final Reports, available at* http://www.azstreambeds.com/docs/hearings/hearing.htm (last updated March 12, 2009).

[83] Arizona Navigable Stream Adjudication Commission, *Program Summary, available at* http://www.azleg.gov/jlbc/psnav.pdf (last updated September 10, 2008). The Arizona State Land Department challenged ANSAC in 2006, contesting the agency's finding of non-navigability for the Salt River. The Superior Court of Maricopa County found for ANSAC; however, the Arizona Center for Law in the Public Interest appealed that decision. The Center also separately challenged ANSAC's non-navigability findings regarding the Santa Cruz, San Pedro, and Verde Rivers. These challenges were stayed pending a ruling by the Arizona Court of Appeals in the Lower Salt River case. *See id.*

[84] 505 U.S. 1003, 1019 (1992) (holding that background principles such as nuisance law can be used as a categorical takings defense when the government is acting in its authority to prohibit a land use that a private landowner was never entitled to conduct in the first place); *see also* Palazzolo v. Rhode Island, 533 U.S. 608, 610 (2001);

essential reasoning behind this categorical defense to takings claims is that no taking of a property right can occur if the property right never existed in the first place; the public trust is essentially a background principle to all property interests.[85] Nonetheless, Arizona has provided measures to protect private property owners from potential losses should ANSAC determine that their property is subject to the public trust. These provisions require the state to 1) refund all property taxes ever paid on the property, 2) compensate the former "owner" for all improvements to the property, and 3) refund the purchase price paid for the property if the property was purchased from this state.[86] these three provisions, are the only statutory directives providing for compensation should Arizona get to protect public trust resources on what was once thought to be private property. Arizona courts have yet to determine if the state's voluntary compensation scheme violates the Arizona Constitution's gift clause.[87]

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[85] Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1042 (R.I. 1995).
[86] Ariz. Rev. Stat. Ann. § 37-1132.
[87] Ariz. Const. art. IX, § 7; *see also* D. Tracey Zobenica, *The PTD in Arizona's Streambeds*, 38 Ariz. L. Rev. 1053, 1077-78 (1996).

ARKANSAS

The Public Trust Doctrine in Arkansas

R. D. Guthrie

1.0 Origins

The public trust doctrine (PTD) in Arkansas derives from English common law.[1] After the Louisiana Purchase in 1803, Congress passed the Act of March 3, 1811, which reflected the common law origins of the PTD by reserving navigable waters of the former territories as public highways.[2] The Arkansas legislature later codified this principle by statute.[3] At statehood in 1836, Arkansas gained the same rights to the beds of navigable waters as the original thirteen colonies under the equal footing doctrine.[4]

During the mid to late 1800s, Arkansas Supreme Court explored the extent of state ownership of trust resources by defining navigability, establishing the geographic scope of the PTD, and adopting a wildlife trust. In 1867, the court briefly applied the English tidal

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[1] *See, e.g.*, Ark. Game & Fish Comm'n v. Storthz, 29 S.W.2d 294, 295–96 (Ark. 1930) (discussing incorporation of Roman and English law principles that *ferae naturae* are common property, and the sovereign's trust duty to preserve and protect animal resources for the benefit of the public (quoting State v. Mallory, 83 S.W. 955, 956 (Ark. 1904))); State *ex rel.* Thompson v. Parker, 200 S.W. 1014, 1017 (Ark. 1917) (hunting and fishing rights are not incident to navigation, but inherent in the public due to the state's trust relationship which originated in the Magna Carta (citing Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, (1845))); Lewis v. State, 161 S.W. 154, 155 (Ark. 1913) (declaring the Magna Carta's incorporation of the duty of the sovereign to protect *ferae naturae* for the benefit of the public a "common heritage of the English-speaking people" inherited by American states from English law); St. Louis, Iron Mountain & S. Ry. Co. v. Ramsey, 13 S.W. 931 (Ark. 1890) (discussing the *parens patria* duty of the king over the beds of navigable waters for the benefit of the public, and subsequent application of this doctrine to American states); Warren v. Chambers, 25 Ark. 120,1867 WL 647, at *2 (1867) (stating Arkansas traces the doctrines of alluvion, reliction, and determination of tidal navigability from England).

[2] *Warren*, 25 Ark. 120, 1867 WL at *3 (citing 11 Cong. Ch. 47 § 12, March 3, 1811, 2 Stat. 666, stating that "[a]ll the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways.").

[3] ARK. CODE ANN. § 22-6-201 (2007) ("It is further the intent of this subchapter to establish the policy that all submerged lands following the navigable waterways of this state shall remain in the state domain. 'Submerged lands' shall be those lands found at and below the line of ordinary highwater and shall include, but not be limited to, the beds, channels, chutes, and adjoining areas of rivers, lakes, and streams"). However, Arkansas courts apparently abandoned the Act of March 3, 1811 as a basis for decision, because no Arkansas courts have referenced the Act since 1882, in Little Rock, Miss. River & Tex. R.R. Co. v. Brooks, 39 Ark. 403, 1882 WL 1646 (1882).

[4] *See* Harrison v. Fite, 148 F. 781, 783 (8th Cir. 1906) (suit by riparian landowning club to enjoin market hunters and fishermen from operating in Big Lake. On equal footing, the court said, "[t]he shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the states respectively; and the new states upon their admission to the Union have the same rights in respect thereof as the original states.").

navigability test,[5] but by 1882, it adopted a navigability-in-fact test, premised on the practical and commercial usefulness of a stream as a public highway.[6] In 1890, the court expanded the navigability-in-fact test to include waters susceptible to navigation and defined the ordinary high water mark by the character of the soil and vegetation of the bank,[7] a definition later codified by the legislature.[8] In 1892, the court extended the state's trusteeship to fish.[9] By 1904, the court incorporated all wildlife into state trusteeship,[10] subjecting the common right of hunting and fishing to the state's duty to preserve and protect fish and wildlife for the benefit of the people.[11]

These early cases laid the groundwork, but the Arkansas PTD expanded in scope and purpose over the last century to encompass artificially navigable waters and recreational usefulness. In 1917, the Arkansas Supreme Court expanded the geographic scope of navigable waters to include those artificially created.[12] Historically, recreational uses were bound by the high water mark of navigable waters.[13] But Arkansas courts upheld public rights to recreate on both artificially navigable waters and nonnavigable waters (i.e., those not commercially useful)

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[5] *See Warren*, 25 Ark. 120, 1867 WL at *2 ("[N]o river is navigable, in a common law sense, above the point where the tide ebbs and flows, though it may be so, in fact . . . ").
[6] *Brooks*, 39 Ark. 403, 1882 WL at *4 ("By the American doctrine, tide water, as a criterion of navigable character, has been discarded."); *see* St. Louis, Iron Mountain & S. Ry. Co. v. Ramsey, 13 S.W. 931, 932 (Ark. 1890) (calling the tidal test "arbitrary" and "wholly inapplicable" to waters in America compared with England).
[7] *Ramsey*, 13 S.W. at 932–33 ("But the more reasonable test, as we conceive of the navigability of a river, is its use as a navigable stream, or its capability of being used as such," and declaring the high water mark "is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself"); *see also* Hayes v. State, 496 S.W.2d 372 (Ark. 1973); Anderson v. Reames, 161 S.W.2d 957, 957 (Ark. 1942); Lutesville Sand & Gravel Co. v. McLaughlin, 26 S.W.2d 892, 892 (Ark. 1930); State *ex rel.* Thompson v. Parker 200 S.W. 1014, 1016 (Ark. 1917)..
[8] ARK. CODE ANN. § 15-22-202 (7) (2007) ("'Ordinary high watermark' means the line delimiting the bed of a stream from its bank, that line at which the presence of water is continued for such length of time as to mark upon the soil and vegetation a distinct character").
[9] *See* Organ v. State, 19 S.W. 840, 840 (Ark. 1892) (declaring "[t]he ownership of fish is in the state for the benefit of its people in common," and upholding the legislature's right to regulate fishing).
[10] *See* Lewis v. State, 161 S.W. 154, 155 (Ark. 1913) (declaring the sovereign holds title to *ferae naturae* for the benefit of the public, whose rights are inalienable and exist since time immemorial).
[11] *See* State v. Mallory, 83 S.W. 955, 956–59 (Ark. 1904); Organ v. State, 19 S.W. 840, 840 (Ark. 1892); *see also* Ark. Game & Fish Comm'n v. Storthz, 29 S.W.2d 294, 295–96 (Ark. 1930).
[12] State *ex rel.* Thompson v. Parker, 200 S.W. 1014, 1016 (Ark. 1917).
[13] *See Anderson*, 161 S.W.2d at 960 (discussing the public's right to bathe, hunt, fish and land boats below the ordinary high water mark); *see also* Barboro v. Boyle, 178 S.W. 378, 380 (Ark. 1915) (indicating that Horseshoe Lake may later be used for pleasure boating, bathing, hunting, and fishing).

not expressly based on the PTD, but on several other legal theories.[14] Not until 1980 did the PTD's navigability-in-fact test expand to encompass recreational as well as commercial usefulness.[15] Many Arkansas statutes emphasize the importance of recreational use of waters[16] and, in 2003, one Arkansas court indicated that navigability may extend to purposes beyond recreation and commerce.[17] Thus, although the Arkansas PTD clearly originates in English common law, it has expanded to reflect American geography and modern values.

2.0 The Basis of the Public Trust Doctrine in Arkansas

Although Arkansas courts rarely reference the "public trust" *per se*,[18] the state clearly bases its PTD in common law.[19] Under various legal theories—adverse possession or prescriptive easement,[20] nuisance[21] and trespass[22]—Arkansas courts have recognized the public's

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[14] *See* State v. Hatchie Coon Hunting & Fishing Club, 279 S.W.3d 56, 64 (Ark. 2008) (holding the state acquired title to a submerged island by adverse possession in trust for public use after the island was used for duck hunting and fishing for over 20 years); Buffalo River Conservation & Recreation Council v. Nat'l Park Serv., 558 F.2d 1342, 1344 (8th Cir. 1977) (declaring a public prescriptive right to canoe on a nonnavigable stream).

[15] *See McIlroy*, 595 S.W.2d at 665 (enjoining riparian owners from interfering with public's right to float and canoe Mulberry River, which was nonnavigable under the commercial usefulness test).

[16] *See, e.g.*, ARK. CODE ANN. § 15-22-217 (d) (2007) ("Water needs shall include domestic and municipal water supply needs, agricultural and industrial water needs, and navigational, recreational, fish and wildlife, and other ecological needs."); ARK. CODE ANN. § 15-20-302 (2007) (Arkansas Environmental Quality Act of 1973 states that it is the policy of the state to "Preserve, to the fullest extent possible, areas of historical, geological, archaeological, paleontological, ecological, biological, and recreational importance. . ."); ARK. CODE ANN. § 15-22-501 (2)(A) (2007) ("Provide for the people of the state adequate supplies of quality water for municipal, industrial, agricultural, recreational, and domestic purposes, water for navigation, and access to the state's lakes and streams, and parks and other recreational sites along their shores. . "); ARK. CODE ANN. §22-5-815 (b) (2007) (private ownership of minerals under artificially created navigable waters " . . . shall not be permitted to interfere with or impair, the rights of public navigation, transportation, fishing, and recreation in and upon such navigable waters").

[17] *See* Ark. River Rights Comm. v. Echubby Lake Hunting Club, 126 S.W.3d 738, 745 (Ark. App. 2003) ("We disagree that the concept of navigability for the purpose of determining the public's right to use water is that static. Although navigability to fix ownership of a river bed or riparian rights is determined as of the date of the state's entry into the union, navigability for other purposes may arise later"). But no Arkansas courts have indicated what "other purposes" may be acceptable.

[18] State v. Hatchie Coon Hunting & Fishing Club, 279 S.W.3d 56, 64 (Ark. 2008) (declaring the state acquired title to a submerged island through adverse possession "for the public trust and for the public's use"); *McIlroy*, 595 S.W.2d at 664 (in establishing recreational navigability, the court looked among other states to Ohio's application of "a 'public trust' to the Little Miami River").

[19] *See supra* note 1 and accompanying text.

[20] *See, e.g.,* State v. Hatchie Coon Hunting & Fishing Club, 279 S.W.3d 56, 64 (Ark. 2008) (declaring the state acquired title to a submerged island through adverse possession "for the public trust and for the public's use"), Buffalo River Conservation & Recreation Council v. Nat'l Park Serv., 558 F.2d 1342, 1345 (8th Cir. 1977) (granting prescriptive easement to Buffalo River after public use exceeded statute of limitations).

right to use and access state resources and the state's correlate duty to protect those resources, often using language reflecting PTD principles.

The Arkansas Supreme Court arguably first recognized the PTD in 1882, when it ruled that neither riparian owners nor the state could impair a navigable body's usefulness for public navigation.[23] In 1890, the court explicitly announced the PTD's application to navigable waters, declaring that ". . . the beds of all navigable rivers in the state belong to the state in trust for the use of the public. . . ."[24] In 1892, the court again used trust language to incorporate wildlife into the PTD, concluding that "[t]he ownership of fish is in the state for the benefit of its people in common. . ."[25] These early PTD decisions laid the groundwork for later expansions of the public trust in navigable waters and wildlife in Arkansas.

In contrast to Arkansas common law, the PTD is largely absent from Arkansas statutes and completely omitted from the Arkansas Constitution. However, a few statutes arguably embody PTD principles.[26] For example, the Arkansas Code declares state ownership of the beds of navigable waters for use as public highways.[27] The Arkansas legislature also codified the definition of the ordinary high water mark established by the Arkansas Supreme Court in 1890.[28] The Arkansas Environmental Quality Act of 1973 incorporated PTD language, stating the policy

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[21] Little Rock, Miss. River & Tex. R.R. Co. v. Brooks, 39 Ark. 403, 1882 WL 1646 at *5 (Ark. 1882) (declaring railroad's obstruction a public nuisance, for which a barge company had suffered special injury).
[22] *E.g.,* Barboro v. Boyle, 178 S.W. 378, 380–81 (Ark. 1915) (denying riparian owners right to exclude public on basis of trespass where waters or banks unenclosed).
[23] *Brooks*, 39 Ark. 403, 1882 WL at *3 (unacceptable that piers and supports for railroad bridge made Bayou Bartholomew impassible to barges).
[24] St. Louis, I. M. & S. Ry. Co. v. Ramsey, 13 S.W. 931, 933 (Ark. 1890) ("If we apply the principle of the common law, that the soil under the navigable waters belongs to the sovereign for the benefit and use of the public, and are not governed by the common-law test of the navigability of streams, but by their navigability in fact, we are constrained to maintain that the true doctrine is that the beds of navigable rivers belong to the government, notwithstanding that the tide does not ebb and flow in them").
[25] Organ v. State, 19 S.W. 840, 840 (Ark. 1892).
[26] *See supra* note 16 and accompanying text.
[27] ARK. CODE ANN. § 22-6-201 (2007) (reiterating the Act of Congress of March 3, 1811, *supra* note 2, which reserved as public highways all navigable waters of the Louisiana Purchase territories).
[28] ARK. CODE ANN. § 15-22-202 (2007).

of the state to "[p]reserve, manage, and enhance the lands, waters, and air of the state with full recognition that this generation is a trustee of the environment for succeeding generations. . ."[29] Together, these laws seem to provide a statutory basis for future PTD decisions.

3.0 Institutional Application

Because no constitutional provisions and few statutes expressly entrench the PTD in Arkansas law, it has had little institutional application. The state apparently can alienate some trust property,[30] but it cannot alienate the wildlife trust.[31] Arkansas courts refuse to uphold wildlife harvest regulations when the state treats its citizens unequally, or where they are not necessary for wildlife preservation.[32] Although the courts do not seem to have adopted a "hard look" approach to administrative action, they have invalidated government contracts which interfere with a private landowner's right to fish on privately owned waters.[33]

3.1 Restraint on alienation (private conveyances)

The Arkansas PTD places few restrictions on state conveyances of trust resources to private entities. In fact, the legislature expressly condones alienation of islands formed in navigable waters when no state agency determines the island is or will be appropriate for its use.[34] However, the state's right to alienate trust resources is not unlimited: the state cannot

[29] ARK. CODE ANN. § 15-20-302 (2007).
[30] *See infra* § 3.1.
[31] *See infra* § 3.2.
[32] *See infra* § 3.2.
[33] *See infra* § 3.3.
[34] ARK. CODE ANN. § 22-6-201(a) (2007) (islands "should be sold by the state only when it is determined that they have no present or future use to the state") *Id.* § 22-6-201(d) (if the state "finds that an island is not appropriate for operation, management, or use by any appropriate state agency and if no state agency is desirous of accepting the responsibility and duty of managing and operating the island" the state "may sell the island.").

authorize private entities to interfere with public navigation,[35] nor can it alienate the trust in wildlife.[36]

3.2 Limit on legislature

One of the earliest cases concerning navigable waters in Arkansas involved limits the PTD may place on the legislature. In 1882, in *Little Rock Mississippi River and Texas R.R. Co. v Brooks*, merchants sued a railroad because piers and supports for a railroad bridge made Bayou Bartholomew impassible to barges.[37] The Arkansas Supreme Court concluded that even with an express grant from the legislature, the state lacked authority to allow the railroad to construct bridges that impede public navigation.[38]

Arkansas courts have concluded that the state constitution imposes limits on the legislature's power to regulate the wildlife trust. In 1913, the Arkansas Supreme Court invalidated an act prohibiting nonresidents of three counties from unlicensed hunting but allowing residents to hunt unlicensed.[39] The court declared that the state has an affirmative duty to protect and preserve wildlife for the benefit of the public, and landowners' rights must yield to this duty.[40] However, the court concluded that unless the preservation of wildlife requires territory-specific regulations, the privileges and immunities clause of the Arkansas Constitution required the state to regulate equally.[41]

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[35] *See, e.g.*, Little Rock, Miss. River & Tex. R.R. Co. v. Brooks, 39 Ark. 403, 1882 WL 1646 at *3 (1882) (concluding the state could not authorize a railroad to build a bridge in a manner that interfered with navigation).
[36] *See, e.g.*, State *ex rel.* Thompson v. Parker, 200 S.W. 1014, 1017 (Ark. 1917) ("The state can neither alienate these rights [of the public to hunt and fish in navigable waters] nor abdicate the trust to hold and preserve them for the untrammeled use of the whole people of the state.").
[37] *Brooks*, 39 Ark. 403, 1882 WL at *3.
[38] *Id.*
[39] Lewis v. State, 161 S.W. 154, 154–55 (Ark. 1913).
[40] *Id.* at 155; *see also Thompson*, 200 S.W. at 1017 (declaring the state could neither alienate the public right to hunt and fish, nor abdicate its trust duty to preserve and protect the same).
[41] *Lewis*, 161 S.W. at 155 (citing ARK. CONST. art. II § 18).

Statutes also restrict the state from overreaching in its application of the PTD. Although the state owns islands that form in navigable waters,[42] all land that accretes onto the original boundaries of a riparian landowner's property is retained by the landowner.[43] Additionally, while the state may acquire title to the beds of artificially created navigable waters, the former landowner retains title to oil, gas and other minerals in the submerged lands.[44]

3.3 Limit on administrative action (hard look)

Few Arkansas cases involve administrative action and the PTD, but there are some restrictions on the administrative authority to regulate wildlife. In 1913, in *Lewis v. State*, the Arkansas Supreme Court invalidated hunting regulations that allowed unlicensed hunting to county residents but not to nonresidents, concluding the regulations were discriminatory in violation of the Arkansas privileges and immunities clause.[45] Also, in 1930, in *Arkansas Game & Fish Commission v. Storthz*, the Commission granted contracts to certain fishermen for the exclusive right to fish in privately owned nonnavigable waters.[46] The Arkansas Supreme Court concluded that the state could not prohibit a landowner from fishing in private waters except to fulfill its preservation duty, and therefore affirmed an injunction and money damages to the landowner for the value of the fish.[47]

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[42] ARK. CODE ANN. § 22-6-201 (a) (2007) (Note the state may sell islands if not useful to a state agency or department. (*Id.*)).
[43] ARK. CODE ANN. § 22-5-403 (2007).
[44] ARK. CODE ANN. § 22-5-815.
[45] *Lewis*, 161 S.W. at 155 ("The only justification for a law regulating and restricting the common right of individuals to take wild game and fish is the necessity for protecting the same from extinction...."). Despite this reference to "extinction," *Lewis* also used language less limiting to the state's authority, describing purposes of "regulation and preservation." *Id. See also* Ark. Game & Fish Comm'n v. Storthz, 29 S.W.2d 294, 296 (Ark. 1930) (state has authority to "regulate and preserve [fish] for the public use"), State v. Mallory, 83 S.W. 955, 957 (Ark. 1904) (discussing state's authority to regulate wildlife "for the purposes of protection, control, and regulation."), Organ v. State, 19 S.W. 840, 840 (Ark. 1892) (state may condition fishing in navigable waters "[w]hen preserved for the common benefit of the people of the state.").
[46] *Storthz*, 29 S.W.2d at 295–96 (the court determined that the statute in issue expressly excluded nonnavigable waters wholly within private lands. Thus, the lack of deference the court gave to the Commission was not due to a "hard look" approach, but demanded by the statutory language.)
[47] *Id.* at 296–97.

4.0 Purposes

Historically, Arkansas courts limited the PTD to traditional purposes of navigation, commerce, and fishing.[48] Hunting was also included due to recognition of a wildlife trust.[49] But recently, the courts have expanded the PTD to include recreational uses such as canoeing.[50] Statutes also reflect the importance of recreational, ecological, and other nontraditional uses of Arkansas' trust resources.[51]

4.1 Traditional (navigation/fishing)

Arkansas courts historically limited public rights of access to navigable waters that were practically or commercially useful as a public highway.[52] Until 1980, this "commercial usefulness" test dominated the navigability inquiry, thus restricting the public's right of access to purposes of navigation or commerce.[53] But a venture did not have to be financially successful to establish a public right to navigate.[54] In addition to commerce and navigation, the public's right to fish in navigable waters was incident to the state's ownership of the beds.[55]

Even for nonnavigable waters, Arkansas courts have upheld public access rights for fishing under legal theories other than the PTD. Some of these decisions were based on Arkansas trespass law, which recognizes a public right to hunt and fish on unenclosed private lands

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[48] *See infra* § 4.1.
[49] *See infra* § 5.6.
[50] *See infra* § 4.2.
[51] *See infra* § 4.2.
[52] *E.g.*, Warren v. Chambers, 25 Ark. 120, 1867 WL 647, at *2 (1867) (the question of navigability is important in cases concerning the public's right to use a waterway as a highway and for commerce).
[53] Little Rock, Miss. River & Tex. R.R. Co. v. Brooks, 39 Ark. 403, 1882 WL 1646 at *2 (1882) ("The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise."); *see also* Parker v. Moore, 262 S.W.2d 891, 892 (Ark. 1953); McGahhey v. McCollum, 179 S.W.2d 661, 662 (Ark. 1944); Lutesville Sand & Gravel Co. v. McLaughlin, 26 S.W.2d 892, 893 (Ark. 1930); *Barboro*, 178 S.W. at 379–80; Harrison v. Fite, 148 F. 781, 784 (8th Cir. 1906).
[54] *See Barboro*, 178 S.W. at 379; Hayes v. State, 496 S.W.2d 372, 374 (Ark. 1973).
[55] *See* Organ v. State, 19 S.W. 840, 840 (Ark. 1892).

without penalty.[56] Other courts have declared public rights to fish based on adverse possession or prescription: Where the state artificially creates navigability sufficient to form a new high water mark for at least the statutory period, the state gains title to the submerged lands by prescription and all public use rights for navigable waters apply.[57] However, non-PTD bases for public use rights, like trespass and prescription, may not be necessary in the future, because the Arkansas PTD now encompasses recreational waters.[58]

4.2 Beyond traditional (recreational/ecological)

The Arkansas PTD has expanded beyond traditional purposes to include first hunting, then recreation, and possibly ecological purposes. Hunting in Arkansas was historically a public right, coupled with fishing in navigable waters, by virtue of a wildlife trust.[59] In the early 20th century, Arkansas courts announced that fish and wildlife were owned by the state for the benefit of the public.[60] In 1917, the Arkansas Supreme Court clarified that hunting and fishing on navigable waters is not merely incident to the right of navigation, but is an inherent public right by virtue of the state's ownership of the beds of navigable waters.[61]

In addition to hunting, Arkansas courts recognize other recreational PTD uses. In 1915, in *Barboro v. Boyle,* the Arkansas Supreme Court indicated that the PTD might expand to encompass nontraditional uses like pleasure boating, bathing, domestic, municipal, and agricultural use.[62] Until 1980, the courts established recreational rights for activities such as fishing and canoeing based on prescription or trespass law, rather than state ownership under the

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[56] *See* Medlock v. Galbreath, 187 S.W.2d 545, 545 (Ark. 1945); Barboro, 178 S.W. at 381.
[57] *See, e.g.*, State v. Hatchie Coon Hunting & Fishing Club, 279 S.W.3d 56, 64 (Ark. 2008); State *ex rel.* Thompson v. Parker, 200 S.W. 1014, 1016–17 (Ark. 1917).
[58] *See infra* § 4.2.
[59] *See infra* § 5.6.
[60] *See* Lewis v. State, 161 S.W. 154, 155 (Ark. 1913); State v. Mallory, 83 S.W. 955, 956–57 (Ark. 1904); *Organ*, 19 S.W. at 840.
[61] *Hatchie Coon*, 279 S.W.3d at 62 (citing *Thompson*, 200 S.W. at 1017; Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845); and the Magna Carta).
[62] Barboro v. Boyle, 178 S.W. 378, 380 (Ark. 1915).

PTD.[63] But in 1980, in *State v. McIlroy*, the Arkansas Supreme Court finally expanded the PTD by declaring that navigability is defined by recreational as well as commercial usefulness.[64]

Beyond hunting and recreation, the Arkansas PTD may expand to other nontraditional purposes. Several statutes discuss the importance of recreational and ecological uses of water resources, indicating there may be a statutory basis for future expansions of the Arkansas PTD.[65]

5.0 Geographic Scope of Applicability

The scope of the Arkansas PTD is generally bound by the ordinary highwater mark of navigable waters, including all waters susceptible to navigability.[66] Recreational waters also comprise the Arkansas PTD.[67] However, trusteeship extends to uplands only when the state's conservation duty towards wildlife is implicated.[68]

5.1 Tidal

After statehood in 1836, Arkansas courts briefly recognized the traditional tidal test for navigability.[69] But by 1882, the Arkansas Supreme Court discarded tidal ebb and flow as a basis of navigability, adopting instead a "commercial usefulness" test for navigability in fact.[70] In 1890, the commercial usefulness test was thoroughly entrenched in the Arkansas PTD, and the

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[63] *See, e.g.*, Buffalo River Conservation & Recreation Council v. Nat'l Park Serv., 558 F.2d 1342, 1344 (8th Cir. 1977) (establishing a prescriptive easement for canoeists); Medlock v. Galbreath, 187 S.W.2d 545, 546–47 (Ark. 1945) (upholding the public's right to fish on nonnavigable water, because where the surface was unenclosed, there was no trespass).

[64] State v. McIlroy, 595 S.W.2d 659, 664–65 (Ark. 1980) (calling language in *Barboro* "prophetic," viewing Arkansas' definition of navigability a "remnant of the steamboat era," and expanding the PTD to recreational waters rather than find a prescriptive easement).

[65] *See supra* note 18 and accompanying text.

[66] *See infra* § 5.2.

[67] *See infra* § 5.3.

[68] *See infra* § 5.4, 5.6, 5.7.

[69] Warren v. Chambers, 25 Ark. 120, 1867 WL 647, at *2 (1867) (declaring that navigability was limited by "the point where the tide ebbs and flows" regardless of navigability in fact; stating this rule was adopted by most states at the time).

[70] Little Rock, Miss. River & Tex. R.R. Co. v. Brooks, 39 Ark. 403, 1882 WL 1646 at *4 (1882) ("[U]sefulness for purposes of transportation, for rafts, boats, or barges, gives navigable character, reference being had to its natural state, rather than to its average depth the year round"); *see also* Lutesville Sand & Gravel Co. v. McLaughlin, 26 S.W.2d 892, 893 (Ark. 1930).

Arkansas Supreme Court categorized the tidal test as "arbitrary" and "wholly inapplicable" to America, where large freshwater rivers flow thousands of miles inland from the sea.[71]

5.2 Navigable in fact

Arkansas owns the beds of navigable waters to the ordinary high water mark.[72] In 1890, the Arkansas Supreme Court defined the ordinary high water mark as the line where the continued presence of the water gives the vegetation and soil a distinct character,[73] and the Arkansas legislature later codified this definition.[74] In 1882, the Arkansas Supreme Court ruled that navigability is a question of fact determined by a stream's "usefulness" in its natural state for transportation and commercial purposes, if it may be so used with "tolerable regularity."[75] Thus, waters need not be navigable year-round to be navigable-in-fact.

In 1890, the Arkansas Supreme Court expanded the navigability-in-fact test to include waters "susceptible" to navigation.[76] Thus, navigability did not remain static at the time of statehood, but may change over time.[77] "Mere depth" without commercial utility was insufficient to establish navigability, however.[78] Also, once navigable is not always navigable: the public

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[71] St. Louis, Iron Mountain & S. Ry. Co. v. Ramsey, 13 S.W. 931 (Ark. 1890) ("[T]he ebb and flow of the tide is merely an arbitrary test, since many waters where the tide flows are not in fact navigable, and many, especially on this continent, where it does not flow, are navigable," and declaring the tidal test "wholly inapplicable in this country, where there are large fresh-water rivers, thousands of miles long, flowing almost across the entire continent, bearing upon their bosom the commerce of the outside world in part, as well as of the continent").

[72] *See, e.g.*, Little Rock v. Jeuryens, 202 S.W. 45, 46 (Ark. 1918); Barboro v. Boyle, 178 S.W. 378, 381 (Ark. 1915); Harrison v. Fite, 148 F. 781, 783 (8th Cir. 1906); Nix v. Pfeifer, 83 S.W. 951, 951 (1904); Wallace v. Driver, 33 S.W. 641, 643 (1896); *Ramsey*, 13 S.W. at 933.

[73] *Ramsey*, 13 S.W. at 933 (following Howard v. Ingersoll, 54 U.S. (13 How.) 381, (1851)).

[74] ARK. CODE ANN. § 15-22-202 (2007).

[75] Little Rock, Miss. River & Tex. R.R. Co. v. Brooks, 39 Ark. 403, 1882 WL 1646 at *4 (1882); *see* McGahhey v. McCollum, 179 S.W.2d 661, 664 (Ark. 1944); *Lutesville Sand*, 26 S.W.2d at 893.

[76] *Ramsey*, 13 S.W. at 933; *see also* Parker v. Moore, 262 S.W.2d 891, 892 (Ark. 1953) ("The question is whether the lake is susceptible of public servitude as a means of transportation either now or within the foreseeable future when considered in the light of modern methods and the reasonable needs of local commerce"); *McGahhey*, 179 S.W.2d at 663 (distinguishing swampy waters from *Barboro*, because not susceptible to navigation); Barboro v. Boyle, 178 S.W. 378, 380 (Ark. 1915) (concluding that, even though never used for navigation for pecuniary purposes, Horseshoe Lake was navigable because it was susceptible to such use).

[77] *See* Ark. River Rights Comm. v. Echubby Lake Hunting Club, 126 S.W.3d 738, 744 (Ark. App. 2003).

[78] Harrison v. Fite, 148 F. 781, 784 (8th Cir. 1906) (involving Big Lake, a body of water formed on Little River after the New Madrid earthquakes of 1811–12). "Meandering"—laying out survey lines to establish stream boundaries—

may lose its access rights if a waterway changes naturally or through government action, such as dams.[79]

Although Arkansas courts originally determined navigability by the natural condition of a waterway,[80] the PTD soon included artificially navigable waters. For example, in 1917, in *State ex rel. Thompson v. Parker*, the Arkansas Supreme Court declared that the state acquires prescriptive title to the beds of artificially navigable waters inundated for the statutory period or long enough to create a new high water mark.[81] However, *Thompson* has limits. As with any prescriptive claim, a riparian landowner's express consent to the state's flooding can destroy the adverseness requirement.[82] Also, a riparian landowner may return the waters to their natural level through siphoning, ditch building, or similar means, thus interrupting the prescriptive period.[83] Moreover, the state does not gain prescriptive title where flooding of a navigable body causes flooding of connected bodies wholly within a riparian landowner's property.[84] Finally, statutes deny the state prescriptive title to oil, gas, and other minerals under artificially-created navigable waters.[85]

5.3 Recreational waters

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by government surveyors is prima facie evidence of navigability, but is not conclusive. *Id.* Courts may also take judicial notice of the navigability of waterways. *Id. See also Lutesville Sand*, 26 S.W.2d at 894 (Ark. 1930).

[79] *Harrison*, 148 F. at 784–85 (lawful government improvements or discontinuance thereof may remove navigable capacity); *see* Parker v. Moore, 262 S.W.2d 891, 892 (Ark. 1953) (separation from the Red River over time resulted in Cutoff Lake's loss of navigable character).

[80] Little Rock, Miss. River & Tex. R.R. Co. v. Brooks, 39 Ark. 403, 1882 WL 1646 at *4 (1882) (navigability determined "without artificial improvements").

[81] State *ex rel.* Thompson v. Parker, 200 S.W. 1014, 1016 (Ark. 1917).

[82] State v. Hatchie Coon Hunting & Fishing Club, 279 S.W.3d 56, 62 (Ark. 2008) (implied consent to raise White River two feet by construction of artificial grates was insufficient to defeat the state's claim of adverse possession of a submerged island).

[83] Barboro v. Boyle, 178 S.W. 378, 380 (Ark. 1915). (owner may siphon water to return lands on Horseshoe Lake pre-flood level); *see* Beck v. State *ex rel.* Atty. Gen., 14 S.W.2d 1101, 1104 (Ark. 1929) (holding that riparian owners on Horseshoe Lake may build a ditch to return water to natural level, clarifying *Thompson* holding that state's possession is adverse where owner is powerless to remove artificial condition,).

[84] Five Lakes Outing Club v. Horseshoe Lake Protective Ass'n, 288 S.W.2d 942, 944 (Ark. 1956).

[85] ARK. CODE ANN. § 22-5-815 (2007) (denying state ownership without purchase or eminent domain, but making private ownership of minerals under artificially navigable waters subservient to public rights of navigation, transportation, fishing, and recreation).

In Arkansas, riparian owners on nonnavigable waters own the streambed to the thread of the stream; on nonnavigable lakes, landowners own to the extent of their property line and have the right to control the surface of such waters.[86] Early courts maintained that recreational uses, such as canoeing, on otherwise nonnavigable waters were insufficient to establish navigability.[87] However, in 1915, in *Barboro v. Boyle*, the Arkansas Supreme Court suggested that public use of Horseshoe Lake might expand to agricultural, domestic and municipal uses, as well as "boating for pleasure, for bathing, fishing, and hunting."[88] Thus, the court signaled the possible extension of the PTD to recreational waters.

In 1980, the navigable-in-fact standard expanded to include waters recreationally useful in *State v. McIlroy*.[89] Riparian owners in *McIlroy* sought to exclude canoeists from floating the Mulberry River, nonnavigable under the "commercial usefulness" test.[90] The Arkansas Supreme Court declared that Arkansas' definition of navigability was a "remnant of the steamboat era," and called the language in *Barboro* "prophetic."[91] The court then announced that navigability is a question of whether a stream is public or private property, and reasoned that because of heavy public recreational use, the Mulberry River was public, and thus navigable.[92] Although *McIlroy*

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[86] *See, e.g.*, Goforth v. Wilson, 184 S.W.2d 814, 815 (Ark. 1945); Medlock v. Galbreath, 187 S.W.2d 545, 546 (Ark. 1945); Lutesville Sand & Gravel Co. v. McLaughlin, 26 S.W.2d 892, 893 (Ark. 1930); Kilgo v. Cook, 295 S.W. 355, 356 (Ark. 1927); *Barboro*, 178 S.W. at 380; Glasscock v. Nat'l Box Co., 148 S.W. 248, 251 (Ark. 1912); Little v. Williams, 113 S.W. 340, 342 (Ark. 1908); Rhodes v. Cissell, 101 S.W. 758, 760 (Ark. 1907); Little Rock, Miss. River & Tex. R.R. Co. v. Brooks, 39 Ark. 403, 1882 WL 1646 at *4 (1882); Warren v. Chambers, 25 Ark. 120, 1867 WL 647 at *2 (1867).

[87] Harrison v. Fite, 148 F. 781, 784 (8th Cir. 1906).

[88] *Barboro*, 178 S.W. at 380 (emphasizing the state's policy of encouraging any beneficial use of water). *But see* McGahhey v. McCollum, 179 S.W.2d 661, 663–64 (Ark. 1944) (saying that Cook's Lake "has never been navigated, except by fish, mosquitos, wildfowl and row boats, or perhaps with small outboard motors," and thus was not navigable under the practical/commercial usefulness test)

[89] State v. McIlroy, 595 S.W.2d 659, 659 (Ark. 1980).

[90] *Id.* at 660.

[91] *Id.* at 664.

[92] *Id.* at 663, 665. The dissent thought this test was upside down, saying, "Never before in Arkansas, has determining the navigability of a stream been essentially a matter of deciding if the water is public or private property. Quite the reverse: the rights of riparian owners have depended upon the test of navigability." The dissent would have found a public right on a theory of prescriptive easement, but argued that declaring the stream navigable amounted to a judicial taking without due process. *Id.* at 671.

did not expressly incorporate the beds,[93] the Arkansas Supreme Court in 2008 made clear that the public owns the beds of recreationally navigable waters.[94]

However, before *McIlroy,* a few courts found public access rights in nonnavigable (i.e., not commercially useful) waters. For example, in 1944, the Arkansas Supreme Court recognized a public right to fish in nonnavigable waters,[95] maintaining that even for privately owned waters, where fish were free to migrate, the public was free to fish without penalty for trespass as long as the waters remained unenclosed.[96] In 1977, the Eighth Circuit affirmed the public's right to use the Buffalo River, a nonnavigable waterway, for floating.[97] The court considered the public right of access a prescriptive easement, analogizing the public's use of the river to terrestrial right-of-way cases.[98] Thus, even without expressly acknowledging a "public trust," Arkansas courts have been willing to find public access rights for recreation and other PTD purposes.

5.4 Wetlands

The Arkansas PTD may encompass wetlands if they are commercially or recreationally useful.[99] Early courts were not receptive to considering wetlands as navigable, viewing them instead as desolate swamps.[100] But where wildlife and wetlands intersect, the PTD may apply to enforce the state's duty to preserve and protect wildlife for the benefit of the public.[101] Since

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[93] The court did state that since Mulberry River was navigable, it had "all the incidental rights of that determination." *Id.* at 665

[94] State v. Hatchie Coon Hunting & Fishing Club, Inc., 279 S.W.3d 56, 62 (declaring that "the State *holds title to the bed* of the St. Francis River because the circuit court found that the St. Francis River is navigable for recreational purposes," citing *McIlroy*) (emphasis added).

[95] Medlock v. Galbreath, 187 S.W.2d 545, 545 (Ark. 1945).

[96] *Id.* at 547 (declaring that persons hunting on unenclosed lands were never considered trespassers).

[97] Buffalo River Conservation & Recreation Council v. Nat'l Park Serv., 558 F.2d 1342, 1342 (8th Cir. 1977).

[98] *Id.* at 1345 (listing prescription requirements: open, adverse, notorious, and for the statutory period).

[99] *See* Parker v. Moore, 262 S.W.2d 891, 892–93 (Ark. 1953); McGahhey v. McCollum, 179 S.W.2d 661, 664 (Ark. 1944); Harrison v. Fite, 148 F. 781, 785 (8th Cir. 1906).

[100] *See, e.g.*, McGahhey, 179 S.W.2d at 663 (describing body of water as a "swamp" navigated only by mosquitos and fish); Harrison, 148 F. at 786 (referring to Big Lake as an "unnavigable swamp" with an "aspect of desolation, of dead trees, logs, stumps, snags, and other obstructions").

[101] *See, e.g.*, Ark. Game & Fish Comm'n v. Storthz, 29 S.W.2d 294, 295 (Ark. 1930); Lewis v. State, 161 S.W. 154, 155 (Ark. 1913); State v. Mallory, 83 S.W. 955 (Ark. 1904).

Arkansas courts do not consider navigability to be static,[102] if the public can establish that wetlands are recreationally useful (e.g., for birdwatching), wetlands may be incorporated into the PTD. Because the Arkansas legislature has included recreational, fish and wildlife, and other ecological considerations in various statutes concerning water,[103] it has perhaps laid the groundwork for incorporation of wetlands into the PTD. But even if the PTD does not apply, the public may obtain access through a prescriptive easement in wetlands.[104]

5.5 Groundwater

No cases indicate Arkansas courts are willing to extend the PTD beyond navigable waters or wildlife, but a few statutes may leave the issue of groundwater unsettled. The Arkansas Environmental Quality Act of 1973 declares the policy of the state is to:

> (1) Preserve, manage, and enhance the lands, waters, and air of the state with full recognition that this generation is a trustee of the environment for succeeding generations;
> (2) Preserve, to the fullest extent possible, areas of historical, geological, archaeological, paleontological, ecological, biological, and recreational importance. . . .[105]

Arguably, because "waters" is unqualified, the Arkansas legislature may consider groundwater to be a trust resource, especially if it is important ecologically or otherwise. Other statutes require consideration of navigational, recreational, and fish and wildlife concerns in water distribution, indicating that where other public trust resources intersect with groundwater, the PTD may apply.[106] Although these statutes are hardly conclusive on groundwater's place in the Arkansas PTD, they leave the issue open to some question.

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[102] *See* Ark. River Rights Comm. v. Echubby Lake Hunting Club, 126 S.W.3d 738, 744 (Ark. App. 2003) (declaring navigability for public use is not static, may change with time); *McIlroy*, 595 S.W.2d at 665 (establishing recreational usefulness test for navigability).
[103] *See infra* notes 103–104 and accompanying text.
[104] *E.g.*, Buffalo River Conservation & Recreation Council v. Nat'l Park Serv., 558 F.2d 1342, 1344 (8th Cir. 1977).
[105] ARK. CODE ANN. § 15-20-302 (2007).
[106] *See* ARK. CODE ANN. § 15-22-501 (2007) (discussing the disposal of "the state's water resources and related land" for water development projects, and listing a broad array of projects such as "municipal, industrial,

5.6 Wildlife

The geographic scope of the Arkansas PTD extends beyond the banks of navigable waters to reach fish and wildlife. In 1892, the Arkansas Supreme Court concluded that the state owned fish for the benefit of the public.[107] By 1904, the court declared that the state also owned wildlife to the subordination of private landowners' rights to harvest.[108] However, the state's proprietary interest was limited to its preservation duty.[109] Thus, the PTD extends upland only to the extent necessary to regulate private harvests for wildlife preservation.

5.7 Uplands (beaches, parks, highways)

Arkansas courts have not extended the PTD beyond the high water mark of navigable waters, with the exception of the wildlife trust.[110] In fact, although the PTD applies to recreational waters, the Arkansas Supreme Court has upheld the right of riparian landowners to prohibit the public from crossing their uplands to reach recreational waters.[111] However, the Arkansas Environmental Quality Act of 1973 recognizes the state's trust duties to future generations in the preservation and management of the "lands, waters, and air of the state," indicating that there may be a statutory basis for extending the PTD upland.[112]

6.0 Activities Burdened

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agricultural, recreational, and domestic purposes, water for navigation, and access to the state's lakes and streams, and parks and other recreational sites along their shores . . . "); *see also* ARK. CODE ANN. § 15-22-217 (2007) ("Water needs shall include domestic and municipal water supply needs, agricultural and industrial water needs, and navigational, recreational, fish and wildlife, and other ecological needs").

[107] Organ v. State, 19 S.W. 840, 840 (Ark.1892) (upholding state prohibition of interstate export of fish).

[108] *Id.*; State v. Mallory, 83 S.W. 955, 956–59 (Ark. 1904); *see also* State *ex rel.* Thompson v. Parker, 200 S.W. 1014, 1017 (Ark. 1917) (declaring the state cannot alienate the common right of hunting and fishing nor abdicate its trust duties).

[109] *See, e.g.*, Ark. Game & Fish Comm'n v. Storthz, 29 S.W.2d 294, 295–96 (Ark. 1930) (holding state may regulate for preservation of wildlife, but may not prohibit owner of wholly-private lake from fishing in it while allowing commercial fishermen to fish); Lewis v. State, 161 S.W. 154, 155 (Ark. 1913) ("The only justification for a law regulating and restricting the common right of individuals to take wild game and fish is the necessity for protecting the same from extinction . . .").

[110] *See supra* § 5.6.

[111] *See* State v. McIlroy, 595 S.W.2d 659, 665 (Ark. 1980).

[112] ARK. CODE ANN § 15-20-302 (2007).

Few activities are burdened by the PTD in Arkansas. Landowners may convey property interests and fill wetlands with relatively little interference from the state. Wildlife harvests are limited only by the state's conservation duty under the wildlife trust.

6.1 Conveyances of property interests

The Arkansas PTD places some limits on conveyances of property. First, if the public has acquired a prescriptive easement on a body of water, conveyances of submerged lands will be subject to a public servitude to the ordinary high water mark.[113] Second, where the state has acquired title to the beds of artificially navigable waters, the former landowner retains all rights to the oil, gas, and other minerals, but private ownership of the minerals is subservient to, and cannot impair the public's right of use and access of overlying waters.[114] Third, the state cannot grant property rights to private entities if such a grant would interfere with public navigation.[115] Finally, the state cannot alienate the wildlife trust.[116]

6.2 Wetland fills

There are no PTD cases concerning wetlands in the state, so the Arkansas PTD likely does not include wetlands.[117] But given the nature of the wildlife trust in Arkansas, the state as

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[113] *See* Buffalo River Conservation & Recreation Council v. Nat'l Park Serv., 558 F.2d 1342, 1344 (8th Cir. 1977) (public obtained a prescriptive right to canoe the Buffalo River, a non-navigable stream, but limiting the scope to "the course of the stream and its bed"); *see also McIlroy*, 595 S.W.2d at 665 (even where riparian owners were divested of their rights to the beds due to the PTD, they retained the right to exclude the public from uplands).

[114] ARK. CODE ANN. § 22-5-815 (b) ("The private ownership of the oil, gas, and other minerals in and under lands covered by artificially created navigable waters as established by this section shall be subservient to, and the exercise of rights of extraction and removal thereof shall not be permitted to interfere with or impair, the rights of public navigation, transportation, fishing, and recreation in and upon such navigable waters").

[115] *E.g.*, Little Rock, Miss. River & Tex. R.R. Co. v. Brooks, 39 Ark. 403, 1882 WL 1646 at *3 (1882) (concluding the state could not authorize a railroad to build a bridge where it would interfere with public navigation).

[116] *See, e.g.*, State *ex rel.* Thompson v. Parker, 200 S.W. 1014, 1017 (Ark. 1917) ("The state can neither alienate these rights nor abdicate the trust to hold and preserve them for the untrammeled use of the whole people of the state") (discussing the public right of hunting and fishing on navigable waters).

[117] *See* McGahhey v. McCollum, 179 S.W.2d 661, 663 (Ark. 1944) (stating that the swampy water of Cook's Lake "has never been navigated, except by fish, mosquitos, wildfowl and row boats, or perhaps with small outboard motors," and thus was not navigable under the "practical usefulness" test); Harrison v. Fite, 148 F. 781, 786 (8th Cir. 1906) (referring to Big Lake as an "unnavigable swamp" with an "aspect of desolation, of dead trees, logs, stumps, snags, and other obstructions," focusing on its "practical usefulness" for navigation).

trustee could probably regulate wetland fills to "preserve and protect" wildlife for the benefit of the public.[118] Also, because several statutes recognize the importance of protecting ecologically important waters, the state probably can regulate to prohibit wetland fills as ecologically sensitive lands.[119] In additional, because navigability encompasses recreational waters,[120] and because navigability is not a static concept,[121] wetlands could be considered to be navigable waters for PTD purposes for the recreational use of birdwatching, for example.

6.3 Water rights

No Arkansas cases address the PTD's implications for the *use* of water. However, the PTD may restrict the efforts of riparian landowners to *control* water if they interfere with the rights of the public or the state. Riparian rights include the right to "wharf out" and to access the water.[122] But these activities may not interfere with public rights to bathe, hunt, fish, or land boats below the high water mark of navigable waters, and the public also may not unreasonably interfere with the riparian landowner's right of access to the water.[123] Similarly, riparian owners on navigable waters cannot unreasonably interfere with the right of the state to use the beds and banks below the high water mark.[124] Even on nonnavigable waters, riparian landowners cannot interfere with public access where the surface is unenclosed.[125]

6.4 Wildlife harvests

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[118] *See supra* § 5.6.
[119] *See supra* note 101and accompanying text.
[120] *McIlroy*, 595 S.W.2d at 665.
[121] Ark. River Rights Comm. v. Echubby Lake Hunting Club, 83 126 S.W.3d 738, 745 (Ark. App. 2003); *see* Barboro v. Boyle, 178 S.W. 378, 380 (Ark. 1915).
[122] In Arkansas, riparian rights generally include (1) the right of access to the water; (2) the right to build a pier out to the line of navigability; (3) the right to future accretions; and (4) the right to reasonable use of the water as it flows past the land. Anderson v. Reames, 161 S.W.2d 957, 960 (Ark. 1942).
[123] *Id.* at 960–61.
[124] *Id.* at 961.
[125] *See, e.g.*, Medlock v. Galbreath, 187 S.W.2d 545 (Ark. 1945) (holding commercial fishermen had right to fish on Portia Bay, a privately owned lake, because fish were free to migrate and thus not owned by riparian landowners and surface was unenclosed, so there was no trespass).

Because wildlife is trust property,[126] the right of private landowners to harvest game on their own lands is not absolute.[127] Instead, as the Arkansas Supreme Court stated in *Lewis v. State*, landowners' rights "must always yield to the state's ownership and title, held for the purposes of regulation and preservation for public use."[128] However, fish may be privately owned if a nonnavigable body lies exclusively within private property, and the fish are not free to migrate.[129] The state's authority is also limited by the Arkansas constitution: state regulations must apply equally to all citizens, unless conservation needs are limited to particular territory.[130]

7.0 Public standing

The public's right to sue to enforce the PTD seems to be entirely based in common law. The PTD is not entrenched in the Arkansas constitution and, although various statutes could be construed to implement the PTD,[131] there is no statutory basis for public standing.

7.1 Common law-based

In Arkansas, although landowners seeking to *exclude* the public bring the majority of suits,[132] the public clearly has standing to enforce access rights to trust resources.[133] In early cases, courts considered interference with public access rights on navigable waters to be a public nuisance, for which a plaintiff must have suffered special injury to maintain an action.[134] But by 1917 the state was bringing suit on behalf of the public to enforce access rights regardless of any

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[126] *See, e.g.*, Lewis v. State, 161 S.W. 154, 155 (Ark. 1913); State v. Mallory, 83 S.W. 955, 959 (Ark. 1904).
[127] *See, e.g.*, *Mallory*, 83 S.W. at 959.
[128] *Id.*
[129] *Medlock*, 187 S.W.2d at 545 (holding that where fish are free to migrate, as where a stream feeds into a lake, the public is free to hunt and fish unless the riparian owner encloses the nonnavigable surface of the lake, but distinguishing lakes without outlets).
[130] *E.g.*, *Lewis*, 161 S.W. at 155 (striking down law that applied unequally to residents and nonresidents of certain counties on basis of Arkansas privileges and immunities clause (ARK. CONST. art. II, § 18)).
[131] *See, e.g.*, ARK. CODE ANN. § 15-20-302 (1) (2007) (declaring this generation is a "trustee of the environment" for future generations).
[132] *See, e.g.*, Buffalo River Conservation & Recreation Council v. Nat'l Park Serv., 558 F.2d 1342, 1344 (8th Cir. 1977) (riparian owners sue to enjoin public access to Buffalo River for floating).
[133] *See infra* notes 131, 136 and accompanying text.
[134] Little Rock, Miss. River & Tex. R.R. Co. v. Brooks, 39 Ark. 403, 1882 WL 1646 at *5 (1882) (suit by merchants to enjoin railroad from obstructing passage of Bayou Bartholomew with expanded bridge supports).

public nuisance, often on grounds of adverse possession or prescriptive easement.[135] Not until 1942 did public plaintiffs bring a successful PTD suit against landowners for access rights where the state was not a party.[136] Thus, the public can sue on a variety of legal theories.[137]

7.2 Statutory basis

There is no statutory basis for public standing to enforce the PTD in Arkansas.[138] In fact, although the Arkansas Natural and Scenic Rivers System Act expresses the policy of the state to "[p]rotect and preserve the designated streams in their natural and scenic state for future generations,"[139] it expressly denies any public right or privilege of access to private lands.[140]

7.3 Constitutional basis

The PTD does not appear to be implicit in any constitutional provisions in Arkansas.

8.0 Remedies

In 1882, in *Little Rock, Mississippi River & Texas R.R. Co. v. Brooks*. the Arkansas Supreme Court declared that riparian owners must not impair a waterway's usefulness for public navigation.[141] Although the court affirmed an award of money damages to a barge company after construction of a railroad bridge made a bayou impassible, the award was based on nuisance law,

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[135] *See, e.g.*, Hayes v. State, 496 S.W.2d 372, 373 (Ark. 1973) (state intervened in suit to prevent riparian landowner from erecting fences on submerged island); Beck v. State *ex rel.* Atty. Gen., 14 S.W.2d 1101, 1102 (Ark. 1929) (state sued to enjoin water diversions that impaired navigability, fishing, and hunting); State *ex rel.* Thompson v. Parker, 200 S.W. 1014, 1014 (Ark. 1917) (state sued on behalf of citizen to enjoin fencing of navigable waters).

[136] Anderson v. Reames, 161 S.W.2d 957, 958 (Ark. 1942) (suit by "public plaintiffs" against riparian landowner to enjoin the enclosure of shorelands and interference with occupancy of a campsite operated below high water mark under a lease from the riparian land owner); *see Hayes*, 496 S.W.2d at 372 (former lessee sued to enjoin lessor from fencing land below the high water mark; state later intervened).

[137] In addition to standing, Arkansas courts place procedural requirements on public plaintiffs. Persons claiming a public servitude in navigable waters have the burden of proving navigability. *See* Harrison v. Fite, 148 F. 781, 785 (8th Cir. 1906); Brooks, 39 Ark. 403, 1882 WL at *4. But parol proof is admissible; a waterway need not be navigable by law. *See* Lutesville Sand & Gravel Co. v. McLaughlin, 26 S.W.2d 892, 894 (Ark. 1930); *Brooks*, 39 Ark. 403, 1882 WL at *4.

[138] The legislature codified the state's ownership of the beds of navigable waters but did not mention public rights of access or use PTD language. ARK. CODE ANN. § 22-6-201 (d), (2007).

[139] ARK. CODE ANN. § 15-23-313 (e)(2)(F) (2007).

[140] ARK. CODE ANN. § 15-23-314 (2007).

[141] *Brooks*, 39 Ark. 403, 1882 WL at *3.

not on the PTD.[142] However, the general principles established in *Brooks* suggest that both the state and the public may obtain equitable relief[143] and possibly damages[144] for interference with the public's right of access.

8.1 Injunctive relief

The PTD gives both the public[145] and the state[146] the right to injunctive relief if a riparian owner interferes with the public's right of access to navigable waters. Even on nonnavigable waters, injunctive relief may prevent riparian owners from interfering with the public's right to fish, as long as certain conditions are met.[147]

8.2 Damages for injuries to resources

No Arkansas cases have awarded money damages for interference with public access or injuries to resources on the basis of the PTD, although at least one court awarded money damages based on nuisance law.[148] Statutes require any person or entity removing sand or gravel from state waters to pay royalties to the state and keep a detailed account of all sand or gravel removed, based on the state ownership doctrine.[149] Whether the state expects compensation for the use of other trust resources is unclear.

8.3 Defense to takings claims

Arkansas cases seldom reference takings. Whether a takings claim is successful may depend on which theory—the PTD or prescription—a court applies to uphold public rights.

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[142] *Id.* at *5.
[143] *See infra* § 8.1.
[144] *See infra* § 8.2.
[145] *See* Anderson v. Reames, 161 S.W.2d 957, 958 (Ark. 1942) (public plaintiffs obtained an injunction preventing a riparian landowner from enclosing navigable lake shore).
[146] *See* State v. McIlroy, 595 S.W.2d 659 (Ark. 1980) (state intervened in suit to enjoin a riparian landowners from interfering with the public's right to access Mulberry River for recreation).
[147] Medlock v. Galbreath, 187 S.W.2d 545, 546 (Ark. 1945) (riparian owners enjoined from interfering with public right to fish, where fish were free to migrate and surface not enclosed, because Arkansas trespass law allows hunting and fishing on the unenclosed lands of another).
[148] *See supra* notes 138–139 and accompanying text (discussing *Brooks*).
[149] ARK. CODE ANN. § 22-5-814 (b)–(c) (2007).

Where the state has created artificially navigable waters by inundating riparian lands, there is no requirement to compensate the riparian landowner because the courts view the state action as prescription.[150] For example, in 2008, in *State v. Hatchie Coon Hunting & Fishing Club*, the owners of an island artificially submerged by a dam attempted to defeat the state's prescription claim by alleging the club consented to the inundation of the island.[151] The Arkansas Supreme Court required express consent, concluding that "to embrace a theory of consent by implication. . . as a defense to an obvious taking would severely curtail the State's rights with respect to navigable streams and rivers. . ."[152] Thus, although the court seemed to acknowledge the flooding was a "taking," it did not view the state's action as a taking requiring compensation because its decision rested on prescription.

Although prescription sidesteps the takings issue, some judges view the PTD not as a defense to, but as *cause for* takings claims. For example, in *McIlroy*, the Arkansas Supreme Court incorporated the recreational waters of Mulberry River into the PTD instead of using a theory of prescription.[153] Although the majority did not address takings, the dissent argued the majority affected a judicial taking by declaring recreational waters navigable and depriving the riparian landowners of their title to the beds of the river, yet the dissent did not see a takings issue in upholding public access based on prescription.[154] The majority's silence on the issue may indicate that the PTD is a defense to takings. However, *McIlroy* was a case of first impression, and the 2008 *Hatchie Coon* decision is the only case since *McIlroy* to even mention

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[150] *See* State v. Hatchie Coon Hunting & Fishing Club, 279 S.W.3d 56, 64 (Ark. 2008) (state flooding of island held to be adverse possession); State *ex rel.* Thompson v. Parker, 200 S.W. 1014, 1017 (Ark. 1917) (referring to the state's right to inundated lands by prescriptive title).
[151] *Hatchie Coon*, 279 S.W.3d at 63–64.
[152] *Id.*
[153] *See* State v. McIlroy, 595 S.W.2d 659, 663–65 (Ark. 1980)
[154] *Id.* The dissent declared the majority's holding "judicial fiat," and compared it to communism. However, the dissent would have upheld the public's right of access under a theory of prescriptive easement. *Id.* at 668–71.

takings. Thus, whether the PTD may be used as a defense to takings is still unclear. The courts' continued reliance on prescription post-*McIlroy* may avoid the issue altogether.[155]

[155] *See Hatchie Coon*, 279 S.W.3d at 64 (declaring state inundation of an island prescription, even though used by public for hunting and fishing); Ark. River Rights Comm. v. Echubby Lake Hunting Club, 126 S.W.3d 738 (Ark. App. 2003) (overturning summary judgment because questions remained as to navigability of inundated lands used for public recreation, but emphasizing question of whether public had "acquired a prescriptive right").

CALIFORNIA

The Public Trust Doctrine in California

Emily Stein

1.0 Origins

California courts have traced the origins of the PTD to Roman law, quoting Justinian: "[b]y the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea."[1] However, a more recent antecedent to the PTD in California is English common law, although the California Supreme Court has recognized that the doctrine may have separate origins in Mexican and Spanish law.[2] Although the California PTD arose at statehood in 1850, when the state received title to the submerged lands underlying its navigable waters, the state has since extended the reach of the PTD well beyond its traditional geographical scope.

Over the years, California courts have applied the doctrine in various contexts, examining and elaborating upon the doctrine's history, scope, and purposes. Not only is the PTD in California responsive to "changing public needs," but it recognizes the evolving scientific understanding of our natural world.[3] Thus, California has expanded the doctrine has beyond its traditional purposes to include recreational interests and the preservation of natural environments. Conflicts between those interests and the population's consumption of natural resources inevitably arose as, for example, when the City of Los Angeles's water diversions from Mono Lake's tributaries threatened the ecological integrity of the lake. In *National Audubon Society v. Superior Court of Alpine County (Mono Lake)*,[4] the California Supreme Court sought to accommodate both the PTD and the state's system of

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1 Nat'l Audubon Soc'y v. Superior Court of Alpine Co., 33 Cal.3d 419, 433-434 (Cal. 1983) (citing Institutes of Justinian 2.1.1).

2 *Nat'l Audubon Soc'y*, 33 Cal.3d at 434, n.15.

3 Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (observing that "one of the most important public uses of the tidelands – a use encompassed within the tidelands trust – is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.").

4 *Nat'l Audubon Soc'y*, 33 Cal.3d 419.

appropriative water rights. After discussing the evolution of the PTD in California, the court enunciated a central tenet of the doctrine: the PTD imposes affirmative duties upon the state, including the authority to exercise continuous supervision and control over trust resources. Significantly, the court concluded that this authority provides the basis for the state to regulate activities in nonnavigable waters that adversely affect the state's trust interests in navigable waters. The broad scope and dynamic nature of the PTD in California make it a particularly useful tool for protecting public resources against environmental degradation and privatization.

2.0 Basis

Because the common law PTD in California is well-developed, flexible, and extends beyond the traditional reach of the PTD, it has been the primary vehicle for enforcing the public trust in the state. However, several provisions of the state constitution and statutes codify the state's PTD,[5] and the courts have increasingly looked to state statutes to define the nature of the state's trust duties. Nevertheless, despite the courts' increased reliance on statutes to define the contours of the PTD, the common law PTD provides an important, independent basis for the imposition of affirmative trust duties upon the state, as well as a vehicle for members of the public to enforce the trust. As the California Supreme Court observed, "[a]side from the possibility that statutory protections can be repealed, the noncodified public trust doctrine remains important both to confirm the state's sovereign supervision and to require consideration of public trust uses in cases filed directly in the courts without prior proceedings before the board."[6]

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5 *See* Cal. Const., art. X, § 2 (requiring the beneficial use of water, which includes the protection of public trust interests); *id.* § 3 (prohibiting sale of certain tidelands); *id.* § 4 (guaranteeing public access to navigable water); Cal. Water Code § 102 ("water within the State is the property of the people of the State"); Fish & Game Code § 711.7 ("The fish and wildlife resources are held in trust for the people of the state by and through the department"); Cal. Civ. Code § 670 ("The State is the owner of all land below tide water, and below ordinary high-water mark, bordering upon tide water within the State; of all land below the water of a navigable lake or stream; of all property lawfully appropriated by it to its own use; of all property dedicated to the State; and of all property of which there is no other owner.").

6 *Nat'l Audubon Soc'y*, 33 Cal.3d at 447, n.27.

3.0 Institutional Application

The legislature has delegated its PTD obligations and regulatory authority over trust lands and resources to various state agencies.[7] The State Lands Commission has exclusive jurisdiction over ungranted trust lands and any residual authority remaining in the state.[8] The Department of Fish and Game (DFG) is responsible for the management and protection of fish and wildlife resources.[9] And the State Water Resources Control Board is charged with planning and allocating water resources, including the authority to grant appropriative water rights,[10] establish water quality standards,[11] and ensure reasonable use of water.[12]

3.1 Restraint on Alienation of Private Conveyances

The PTD in California does not bar the alienation of private conveyances. However, the conveyed property remains subject to any public trust easement already burdening it.

3.2 Limit on the Legislature

The California PTD limits the state's ability to convey trust lands free of the public trust unless the conveyance is made to further trust purposes and protects the public access to navigable

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7 *See, e.g.*, Zack's, Inc. v. City of Sausalito, 81 Cal.Rptr.3d 797, 806 (Cal. Ct. App. 2008) (although the state may delegate its trust duties to local governments, "there always remains with the state the right to revoke those powers and exercise them in a more direct manner") (quoting Illinois Centrol R. Co. v. State of Illinois, 146 U.S. 387, 453-454 [1892]). Even in the absence of legislation expressly delegating such authority, local governments, "[as . . . subdivision[s] of the state, share[] responsibility for protecting [the state's] natural resources and may not approve of destructive activities without giving due regard to the preservation of those resources." Center for Biological Diversity, Inc. v. FPL Group, Inc., 83 Cal. Rptr.3d 588, 605, n.19 (Cal. Ct. App 2008).

8 *See* Cal. Pub. Res. Code §§ 6301 to 6369.3 These provisions give "exclusive jurisdiction over all ungranted tidelands and submerged lands owned by the State" to the State Lands Commission.

9 *See* Cal. Fish & Game Code § 1802 ("The [DFG] has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. The department, as trustee for fish and wildlife resources, shall consult with lead and responsible agencies and shall provide, as available, the requisite biological expertise to review and comment upon environmental documents and impacts arising from project activities").

10 *See* Cal. Water Code § 1201, et seq.

11 *See* Cal. Water Code § 13241 (requiring the Board to establish water quality objectives "to ensure the reasonable protection of beneficial uses"); 33 U.S.C. § 1313(c)(2) (requiring the state pollution control agency to establish water quality standards).

12 *See* Water Code § 275 (authorizing the Board to prevent waste or unreasonable use of water); Cal. Const., art. X, § 2 (requiring that all water use be reasonable and not wasteful).

waters. The PTD also requires the state to take public trust interests into account in making decisions that affect trust resources and to protect public trust uses whenever feasible.

A. Alienation of Trust Land

The PTD in California places certain limitations on the state's ability to alienate trust lands. Generally, the state lacks the power to alienate trust lands free of the public trust unless the conveyance is made to further a specific public trust purpose;[13] otherwise, state conveyances of trust land generally remain subject to a public easement for trust purposes.[14] The courts strictly construe statutes authorizing such conveyances, requiring the statute to clearly express or necessarily imply the legislature's intent to convey the land to advance a trust purpose, and will interpret the statute as retaining public trust interests whenever such a construction is possible.[15] The legislature may modify or revoke a grant of trust lands to ensure that the lands are administered in a manner consistent with the public trust,[16] and the state cannot be estopped from claiming that certain property is subject to the public trust.[17]

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13 However, under certain limited circumstances, the "state in its proper administration of the trust may find it necessary or advisable to cut off certain tidelands from water access and render them useless for trust purpose. In such a case the state through the Legislature may find and determine that such lands are no longer useful for trust purposes and free them from the trust" and "they may be irrevocably conveyed into absolute private ownership." City of Long Beach v. Mansell, 3 Cal.3d 462, 482 (Cal. 1970).

14 *See, e.g.*, City of Berkeley v. Superior Court, 606 P.2d 362, 365 (Cal. 1980); People v. California Fish Co., 138 P. 79 (1913) (holding that tideland grants made under a dozen different statutes during the 19th century are subject to the public trust). State statutes and the consitution also prohibit or restrict the alienation of trust land. *See* Cal. Const., art. I, § 25, ("no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon . . ."); Cal. Const., art. X, § 3 ("All tidelands within two miles of any incorporated city, city and county, or town in this State, and fronting on the water of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale . . ."); Cal. Gov't Code § 56740 ("No tidelands or submerged lands. . . which are owned by the State or by its grantees in trust shall be incorporated into, or annexed to, a city, except lands which may be approved by the State Lands Commission."). In fact, article X, section 3 of the state constitution was adopted in 1879 in response to "[t]he widespread abuses in the disposition of tidelands" that occurred during the 19th century and resulted in the private ownership of nearly one-quarter of the San Francisco Bay. City of Berkeley, 606 P.2d at 366.

15 *See City of Berkeley*, 606 P.2d at 369.

16 *See* Mallon v. City of Long Beach, 282 P.2d 481 (Cal. 1955).

17 *See* California v. Superior Court (Fogerty), 625 P.2d 256, 258-259 (Cal. 1981).

B. Management of State Resources

The PTD also limits the state's ability to restrict public access to navigable waters.[18] Although the state and local governments may exercise their police power to reasonably regulate the public's use of navigable waters,[19] the courts will closely scrutinize any restrictions or limitations placed on public access to navigable waters.[20]

The PTD in California also imposes upon the state affirmative duties to protect public trust resources. The state – and the agencies and local governments to which it has delegated its trust responsibilities – must take public trust interests into account in making decisions that affect trust resources and "protect public trust uses whenever feasible."[21] However, the state is not "burdened with an outmoded classification favoring one mode of utilization over another," and may prefer one trust use over other competing trust interests.[22] Moreover, the state must exercise continuous supervision and control over trust resources.[23]

3.3 Limits on Administrative Action

Administrative agencies responsible for enforcing the public trust in California must take the trust interests into account in administering their duties, and maintain a continuing duty to reconsider

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18 *See Marks*, 491 P.2d at 374; *see also* Cal. Const., art. X, § 4 (guaranteeing public access to navigable waters); People *ex rel.* Younger v. County of El Dorado, 157 Cal. Rptr. 815 (Cal. Ct. App. 1979) (ban on river rafting violates constitutional right to access navigable rivers); Cal. Gov't Code § 39933 ("All navigable waters situated within or adjacent to city shall remain open to the free and unobstructed navigation of the public. Such waters and the water front of such waters shall remain open to free and unobstructed access by the people from the public streets and highways within the city. Public streets, highways, and other public rights of way shall remain open to the free and unobstructed use of the public from such waters and waterfront to the public streets and highways.").

19 *See, e.g.*, People *ex rel.* Younger, 157 Cal. Rptr. at 815 (valid exercise of government's police powers include "time-of-day restrictions, speed zones, special-use areas, and sanitation and pollution control" measures).

20 *See, e.g.*, Lane v. City of Redondo Beach, 122 Cal.Rptr. 189 (Cal. Ct. App 1975) (PTD prohibits municipality from vacating a city street where it would destroy public access to tidelands or navigable waters).

21 *Nat'l Audubon Soc'y*, 33 Cal.3d at 446.

22 *See, e.g.*, Carstens v. California Coastal Com., 182 Cal.App.3d 277, 289, 227 Cal.Rptr. 135 (Cal. Ct. App.1986) (state may consider commerce as well as recreational and environmental needs in carrying out the PTD); Personal Watercraft Coalition v. Bd. of Supervisors, 100 Cal.App.4th 129, 149, 122 Cal.Rptr.2d 425 (Cal. Ct. App 2002) (upholding county's ban on jet skis as conflicting with other public trust uses of navigable waterway).

23 *Nat'l Audubon Soc'y*, 33 Cal.3d 445.

the effect of authorized actions on public trust resources.[24] Depending on whether the agency action is legislative or adjudicative in nature, the courts will apply different standards of review. For example, when the Water Quality Control Board sets water quality standards, it acts in its legislative capacity, and the courts afford the Board's determination great deference in light of the Board's technical expertise.[25] Judicial review of such "quasi-legislative actions is thus limited to whether the Board's action was arbitrary, capricious, lacking in evidentiary support, or otherwise procedurally deficient."[26] In contrast, when an agency performs an adjudicative function – for example, actions taken by the Board on water appropriation applications and permits – courts will review the record to determine whether the Board's determination is supported by substantial evidence.[27]

4.0 Purposes

The PTD in California is a dynamic doctrine that is responsive not only to current societal values and demands, but also to an evolving scientific understanding of environmental processes and interrelationships. Thus, California has broadly defined public trust purposes to include recreational and aesthetic interests, and has increasingly recognized the importance of preservation as a trust use.

4.1 Traditional (navigation/fishing)

The California Supreme Court has broadly construed the traditional trust purposes of commerce, navigation, and fisheries to include "the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes."[28]

4.2 Beyond Traditional (recreational/ecological)

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24 *Id.*
25 United States v. State Water Resources Control Bd., 182 Cal.App.3d 82, 112, 227 Cal. Rptr. 161 (Cal. Ct. App. 1986).
26 *See, e.g., id.* at 112-113 ("a reviewing court will not substitute its independent policy judgment for that of the agency").
27 *Id.* at 115.
28 *Marks*, 491 P.2d at 380.

Recognizing that the purposes of the PTD should reflect the changing needs and values of society, the California Supreme Court has extended the PTD beyond its traditional purposes to include recreational and ecological interests.[29] These interests include scenic views, clean air and water, and adequate habitat to support wildlife.[30]

5.0 Geographic Scope

The geographic scope of the PTD in California includes recreational waters, wildlife, wetlands, and some uplands. Moreover, the state's trust interest in navigable waters and wildlife may provide independent authority to regulate certain activities otherwise beyond the traditional geographic scope of the doctrine that adversely affects trust interests.

5.1 Tidal

The PTD in California applies to tidal waters regardless of navigability.[31] However, California's definition of navigability for public trust purposes is not limited to tidal waters.[32]

5.2 Navigable in Fact

California adopted the navigable-in-fact test to determine whether a waterway is subject to the PTD, and the state considers waterways that are navigable for recreational purposes to be navigable in fact.[33] The determination of navigability for public trust purposes is a question of fact made on a case-

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29 *See Nat'l Audubon Soc'y*, 33 Cal.3d at 434 ("The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways"); *Marks*, 491 P.2d at 380 ("The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs" and includes preservation).

30 *See Nat'l Audubon Soc'y*, 33 Cal.3d at 435 (observing that "recreational and ecological" values include "the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds").

31 *See* Golden Feather Community Assoc. v. Thermalito Irrigation Dist., 209 Cal.App.3d 1276, 1283 n.3, 257 Cal.Rptr. 836 (Cal. Ct. App. 1989) (stating that "[w]aters which are subject to tidal influence are subject to the public trust regardless whether they are navigable") (citing Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 [1988]).

32 American River Water Co. v. Amsden, 6 Cal. 443, 446 (1856) (rejecting both tidal and float log test for navigability).

33 *See, e.g., Nat'l Audubon Soc'y*, 33 Cal.3d at 435, n.17 (A waterway is navigable in fact even if it is "usable only for pleasure boating").

by-case basis,[34] and is not limited to waters that were navigable as of the date of statehood.[35] Moreover, waterways that are navigable only during part of the year are subject to the PTD,[36] and the PTD may even extend to flood waters over private property under certain circumstances.[37] The PTD also extends to artificially created or enlarged waterways that are navigable.[38]

5.3 Recreational Waters

The PTD extends to navigable recreational waters, as well as tidal recreational waters regardless of navigability. The PTD may also limit certain activities in nonnavigable recreational waters where those activities adversely affect trust interests in navigable waters.[39] However, the California Supreme Court in *Mono Lake* expressly declined to "consider the question whether the public trust extends for some purposes – such as protection of fishing, environmental values, and recreation interests – to nonnavigable streams,"[40] and appellate courts have subsequently refused to extend the PTD to nonnavigable waters in the absence of an impact on navigable waters.[41]

5.4 Wetlands

The PTD extends to tidal wetlands[42] and wetlands adjacent to navigable waters,[43] and may even provide the basis for the state to regulate activities in wetlands if they adversely affect navigable

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34 Hitchings v. Del Rio Woods Recreation & Park Dist., 127 Cal. Rptr. 830, 833 (Cal. Ct. App. 1976).

35 Bohn v. Albertson, 107 Cal.App.2d 738, 742-743, 238 P.2d 128 (Cal. Ct. App. 1951). In contrast, the determination of navigability for state title purposes is measured on the date of statehood. *Id.*

36 *See Hitchings*, 127 Cal.Rptr. at 837 (concluding that a waterway is navigable even if "it may be navigated only seasonally").

37 *Bohn*, 238 P.2d 128 (holding that landowner could not charge the public for using a navigable body of water created when a levee broke flooding the landowner's property; however the landowner has the right to reclaim the land because retains title under the common law doctrinw of avulsion).

38 *See* State of California v. Superior Court (Fogerty), 29 Cal.3d 240, 245-246, 172 Cal.Rptr. 713 (Cal. 1981) (the PTD extends to land submerged by artificially enhanced lake).

39 *See Nat'l Audubon Soc'y*, 33 Cal.3d at 437 (the PTD "protects navigable waters from harm caused by diversion of non-navigable tributaries").

40 *Id.* at n.19.

41 *See, e.g., Golden Feather*, 257 Cal. Rptr. at 839 (the PTD "does not extend to nonnavigable streams to the extent they do not affect navigable waters").

42 *Marks*, 491 P.2d at 380.

43 *Fogerty*, 29 Cal.3d at 245-246.

waters.[44] Indeed, the courts' recognition of the important ecological functions that wetlands serve may indicate a willingness to extend the PTD to protect such wetlands.[45] Moreover, California exerts regulatory jurisdiction over wetlands, including isolated wetlands that are not subject to the federal Clean Water Act's (CWA) permitting requirements.[46] However, the courts have not addressed whether the PTD provides the basis for the state's regulatory jurisdiction over these wetlands.

5.5 Groundwater

Groundwater regulation is primarily a local matter, and its use is not subject to the Water Board's permitting authority,[47] although groundwater use is subject to the constitutional prohibition against unreasonable use.[48] However, the Court of Appeal has declined to extend the PTD to groundwater.[49] But under *Mono Lake*, the PTD could potentially apply to restrict groundwater use insofar as it adversely affects navigable waters.

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44 *See Nat'l Audubon Soc'y*, 658 P.2d at 721 (the PTD "protects navigable waters from harm caused by diversion of non-navigable tributaries").

45 *See, e.g., Marks*, 491 P.2d at 380 (observing that "[t]here is a growing public recognition that one of the most important public uses of the tidelands – a use encompassed within the tidelands trust – is the preservation of those lands in their natural state").

46 *See* Cal. Water Code § 13260(a)(1) (requiring "any person discharging waste, or proposing to discharge waste, within any region that could affect water of the state, to file a report of discharge"); *id.* § 13050(3) (defining "waters of the state" as "any surface or groundwater, including saline waters, within the boundaries of the state"); (construing Water Code §§ 13260 and 13050 as providing a basis for the state to regulate the discharge of pollutants into isolated wetlands not subject to the CWA's permitting requirements). California also has additional statutory schemes to regulate and protect wetlands, *see, e.g.*, Cal. Pub. Res. Code §§ 5810-5816 (Keene-Nejedly California Wetlands Preservation Act); Cal. Fish & Game Code §§ 1410-1422 (California Inland Wetland Conservation Program), but neither the state nor the courts have exlipitly declared that the PTD provides the basis for this regulatory authority.

47 Cal. Water Code § 1200 ("Whenever the terms stream, lake or other body of water, or water occurs in relation to applications to appropriate water or permits or licenses issued pursuant to such applications, such term refers only to surface water, and to subterranean streams flowing through known and definite channels.").

48 Cal. Const, art. X, § 2; *see* Peabody v. City of Vallejo, 40 P.2d 486, 498-99 (Cal. 1935) (holding that "the rule of reasonable use as enjoined by the Constitution applies to all water rights enjoyed or asserted in this state, whether the same be grounded on the riparian right or the right, analogous to the riparian right, of the overlying land owner, or the percolating water right, or the appropriative right").

49 Cal. Water Network v. Castaic Lake Water Agency, 2006 WL 726882, at *11 (Cal. Ct. App. 2006) (rejecting a claim that a groundwater banking project violated the PTD because "[t]he doctrine has no direct application to groundwater sources"); Santa Teresa Citizen Action Group v. City of San Jose, 7 Cal. Rptr.3d 868, 884 (Cal. Ct. App. 2003) (rejecting public trust claim as unripe, but noting that "the doctrine has no direct application to groundwater sources").

5.6 Wildlife

By statute and under the common law, the PTD extends to fish and wildlife.[50] In addition to the direct regulation of fish and wildlife, the common law PTD provides a basis for the state to regulate certain activities that adversely affect fish and wildlife wherever they may be found.[51] For example, in *People v. Truckee Lumber Co.*, the California Supreme Court upheld the state's authority to enjoin a private riparian landowner from polluting a nonnavigable waterway in order to protect the fish passing through that waterway to navigable waters.[52] The court concluded that the state's authority to "protect[] its sovereign rights in the fish within it waters, . . . extends to all waters within the state, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the state."[53]

Not only does the California PTD grant the state authority to regulate fish and wildlife, but the Court of Appeal held that it also "places a *duty* upon the government to protect those resources."[54] In *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, an environmental group, among others, brought an action against wind farm operators, alleging that defendants violated the PTD by operating turbine generators which killed and injured thousands of birds.[55] The court reaffirmed that the PTD extends to wildlife, including birds, and further concluded that members of the public may bring an action to compel state agencies to enforce the trust over wildlife.[56]

However, the court affirmed the dismissal of plaintiffs' public trust claim on the ground that

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50 *See, e.g.*, Center for Biological Diversity, Inc. v. FPL Group, Inc., 166 Cal. App.4th 1349, 1361 (Cal. Ct. App. 2008).

51 *See* People v. Truckee Lumber Co., 116 Cal. 397, 400, 48 P. 374 (1897) ("To the extent that waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters, and subject to all laws of the state regulating the right of fishery"); Cal. Trout, Inc. v. State Water Res. Control Bd., 255 Cal. Rptr. 212 (Cal. Ct. App. 1989) (concluding "that a public trust interest pertains to non-navigable streams which sustain a fishery").

52 *Truckee Lumber Co.*, 116 Cal. at 400.

53 *Id.*

54 *Center for Biological Diversity*, 166 Cal.App.4th at 1365 (emphasis in original).

55 *Id.*

56 *Id.* at 1366 ("The suggestion that members of the public have no right to object if the agencies entrusted with preservation of wildlife fail to discharge their responsibilities is contrary to the holding in *National Audubon Society* and to the entire tenor of the cases recognizing the public trust doctrine.").

they failed to bring it against the government agency that authorized the wind farms. The court reasoned, "the [PTD] places on the state the responsibility to enforce the trust,"[57] and this responsibility involves "[a] delicate balancing of the conflicting demands for energy and for the protection of other environmental values."[58] Therefore, the court concluded,

> "[i]f the appropriate state agencies fail to do so, members of the public may seek to compel the agency to perform its duties, but neither members of the public nor the court may assume the task of administering the trust."[59]

Although the courts have long recognized that the common law PTD extends to fish and wildlife, the California Supreme Court recently differentiated between the common law PTD, "which involves the government's 'affirmative duty to take the public trust into account in the planning and allocation of water resources'," and a "second . . . public trust duty derived from statute, specifically Fish and Game Code section 711.7, pertaining to fish and wildlife."[60] While recognizing that "[t]here is doubtless an overlap between the two public trust doctrines," the court emphasized that "the duty of government agencies to protect wildlife is primarily statutory."[61] Therefore, the courts will generally "look to the statutes protecting wildlife to determine if DFG or another government agency has breached its [public trust] duties."[62] The implications of the court's reliance on statutes to define the state's trust duties over wildlife are unclear. However, the decision does not appear to require explicit statutory authorization before the courts may impose affirmative trust duties upon the state, since the court acknowledged the existence of the state's general common law trust duties over wildlife.[63]

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57 *Id.* at 1368.
58 *Id.* at 1369 (discussing *Mono Lake*).
59 *Id.* at 1368.
60 Envtl. Prot. & Information Ctr. v. Cal. Dept. of Forestry & Fire Prot., 187 P.3d 888, 926 (Cal. 2008) (quoting *Nat'l Audubon Soc'y*, 658 P.2d at 709).
61 *Id.*
62 *Id.*
63 *Id.* ("There is doubtless an overlap between the [common law and the statutory] public trust doctrines – the protection of water resources is intertwined with the protection of wildlife.").

5.7 Uplands (beaches, parks, highways)

Although the PTD, the state constitution,[64] and state statutes[65] guarantee public access to navigable waters, the public does not have the right to access those waters over private property.[66] Nor does a public highway easement along a navigable river necessarily include, as incidental to the use of the highway, a right of access to the river.[67] However, according to the Court of Appeal, where "the easement not only intersects with the navigable river but crosses the riverbed and continues on over lands located on the other side, it grants access to the river as an incident to the use of the highway."[68] Further, a municipality cannot exercise its power to vacate a city street if it would prevent public access to tidelands or navigable waters.[69]

The courts have also used public trust language to characterize the nature of the government's duties over land dedicated by a private entity for public use. For example, the Court of Appeal has state that "[a] public trust is created when property is held by a public entity for the benefit of the general public," and "[a]ny attempt to divert the use of the property from its dedicated purposes or uses incidental thereto would constitute an ultra vires act."[70]

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64 Cal. Const., art. X, § 4 ("No individual, partnership, or corporation, claiming or possessing the frontage or tide lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water").

65 *See, e.g.,* Cal. Gov't Code § 39933 ("All navigable waters situated within or adjacent to a city shall remain open to the free and unobstructed navigation of the public. Such waters and the water front of such waters shall remain open to free and unobstructed access by the people from the public streets and highways within the city."); *see also* Cal. Gov't Code §§ 66478.1 to 66478.14 (provisions providing for public access to public resources).

66 Bolsa Land Co. v. Burdick, 151 Cal. 254, 262 (Cal. 1907). However, in light of state policy favoring public access to to navigable waters, the courts have been willing to find an implied dedication of shoreline areas to provide public access. *See, e.g.,* Gion v. City of Santa Cruz, 2 Cal.3d 29, 43, 84 Cal.Rptr. 162 (Cal. 1970) (concluding that beach and shoreline area had been impliedly dedicated to the public by adverse use).

67 People v. Sweetser, 72 Cal.App.3d 278, 283, 140 Cal.Rptr. 82 (Ct. Cal. App. 1977).

68 *Id.* at 284.

69 Lane v. City of Redondo Beach, 49 Cal.App.3d 251, 257 (Ct. Cal. App. 1975).

70 Save the Welwood Murray Memorial Library Com. v. City Council, 215 Cal.App.3d 1003, 1017, 263 Cal.Rptr. 896 (Cal. Ct. App. 1989); County of Solano v. Handlery, 66 Cal.Rptr.3d 201, 209-210 (Cal. Ct. App. 2007) (rejecting argument that PTD only applies to tidelands and relying in part on the PTD to reject argument that use restrictions in deed dedicating property for use as a public park are unenforceable); Big Sur Properties v. Mott, 62 Cal.App.3d 99, 105, 132 Cal.Rptr. 835 (Cal. Ct. App. 1976) (the PTD "restrict[s gifted] property exclusively to the public park purposes for which it was donated," notwithstanding Public Resources Code § 5003.5, which authorizes private access rights-of-way across public parks).

6.0 Activities Burdened

The common law PTD limits the ability of private landowners to fill tidelands and navigable waters, prevents water users from acquiring vested water rights, and regulates the taking of wildlife. Moreover, the PTD may restrict activities occurring wholly on private property that are not otherwise subject to the PTD if that activity may harm navigable waters or wildlife.

6.1 Conveyances of Property Interests

The PTD does not limit or prohibit private property owners from conveying their property. Nor does the PTD preclude the state from alienating trust lands, but it does not impose a continuing public easement upon the property for trust purposes. For example, although the state granted riparian property owners title to the land between the high- and low-water marks along navigable lakes and rivers, that land remains subject to the public trust.[71]

6.2 Wetland Fills

The PTD generally prohibits the filling tidal or navigable wetlands, and those wetlands that have been filled usually remain subject to the public trust.[72] The PTD may also provide a basis to regulate or prohibit fills of nontidal or nonnavigable wetlands where the fill could adversely affect trust

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71 State of California v. Superior Court (Lyon), 29 Cal.3d 210, 226-233, 172 Cal.Rptr. 696 (Cal. 1981); *Fogerty*, 231 Cal. Rptr. at 815-17 (riparian landowners may use the shorezone of Lake Tahoe for any purpose that is not incompatible with the public trust).

72 *See Marks*, 491 P.2d at 391 ("There is absolutely no merit in [plaintiff's] contention that as the owner of the *jus privatum* under this patent he may fill and develop his property, whether for navigational purposes or not" and "[r]eclamation with or without prior authorization from the state does not ipso facto terminate the public trust"). An exception exists with respect to certain filled tidelands in and around the City of Berkeley in the San Fransisco Bay area that passed into private ownership under an 1870 statute. Overturning two of its prior decisions, the California Supreme Court determined that the property conveyed pursuant to that statute was not made in furtherance of a trust purpose and, therefore, is subject to the public trust. *City of Berkeley*, 26 Cal.3d at 528-533. However, the court declined to give its determination full retroactive effect because to do so "would reduce the value of investments that may have been made in reliance on [overruled decisions], without necessarily promoted the purposes of the trust." *Id.* at 534. Instead, the court held that the "[p]roperties that have been filled, whether or not they have been substantially improved, are free of the trust to the extent the areas of such parcels are not subject to tidal action." *Id.*

interests in navigable waters.[73]

In addition, the Water Board maintains that it has regulatory jurisdiction to prevent the filling of isolated wetlands under the Porter-Cologne Water Quality Control Act, which grants the Board authority to issue cleanup and abatement orders against anyone who creates or threatens to create "a condition of pollution" by discharging waste into waters of the state.[74] Because the statute defines "pollution" as "an alteration of the quality of the waters of the state by waste . . . which unreasonably affects . . . [t]he waters for beneficial uses,"[75] and "wildlife is a beneficial use," the Water Board takes the position that "filling or threatening to fill wetlands would provide grounds to issue an appropriate [cleanup and abatement] order under [the Porter-Cologne Water Quality Control Act]."[76] Although the Water Board relies on the state's interest in wildlife as the basis for it regulatory jurisdiction, the courts have not addressed whether this authority does in fact stem from the PTD.

6.3 Water Rights

California recognizes both riparian and appropriative rights to surface waters.[77] Although not subject to the permitting system, riparian rights are subject to the constitutional prohibition against unreasonable use.[78] Moreover, the Court of Appeal has suggested that riparian water rights are also subject to the PTD.[79]

In contrast, appropriative water rights are extensively regulated through a permitting system

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73 *See Nat'l Audubon Soc'y*, 33 Cal.3d at 441 (PTD "is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, *marshlands* and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust") (emphasis added).

74 Cal. Water Code § 13304(a).

75 Cal. Water Code § 13050(l)(1)(a).

76 Wilson Memorandum, *Effect of* SWANCC v. United States *on the 401 Certification Program* (January 25, 2001), at 4, available at http://www.swrcb.ca.gov/water_issues/programs/cwa401/wrapp.shtml.

77 *See* People v. Shirokow, 605 P.2d 859, 864 (Cal. 1980) ("California operates under the so-called dual system of water rights which recognizes both the appropriation and the riparian doctrines."). Surface waters includes both surface streams and subterranean streams.

78 Cal. Const., art. X, § 2.

79 *See In re* Water of Hallett Creek Stream Sys., 749 P.2d 324, 337 n.16 (Cal. 1988) (suggesting that the PTD applies to riparian rights).

under the California Water Code.[80] By statute[81] and under the common law PTD, the Water Board is required to take public trust interests into account in allocating appropriative water rights.[82] Although the Water Board may grant appropriative water rights despite foreseeable harm to trust interests,[83] the Water Board must nevertheless "consider the effect of the taking on the public trust and [] preserve, so far as consistent with the public interest, the uses protected by the trust."[84] Moreover, the PTD imposes on the state, and by delegation the Water Board, a duty of continuous supervision to ensure that trust resources are not harmed.[85] Accordingly, the Water Board may modify or revoke existing water rights if it subsequently determines that they are "incorrect in light of current knowledge or inconsistent with current needs."[86]

6.4 Wildlife Harvests

The extension of the PTD to fish and wildlife requires that the state reasonably regulate the taking of fish and wildlife to conserve the resource.[87] And although the state constitution guarantees

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80 Cal. Water Code §§ 1250-76.

81 *See* Cal. Water Code § 1257 ("the board shall consider the relative benefit to be derived from (1) all beneficial uses of the water concerned including, but not limited to, . . . preservation and enhancement of fish and wildlife, and recreational, . . . purposes"); *id.* § 1243 ("[t]he use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water"); *id.* § 1243.5 (in determining the amount of water available for appropriation, the Water Board must "take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses"); *Nat'l Audubon Soc'y*, 658 P.2d at 728 n.27 (construing the foregoing provisions of the Water Code as "codify[ing] in part the duty of the Water Board to consider public trust uses of stream water").

82 *Nat'l Audubon Soc'y*, 33 Cal.3d at 446.

83 *Id.* at 446 ("As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses.").

84 *Id.*

85 *Id.*

86 *Id.; see also* United States v. State Water Resources Control Bd., 227 Cal. Rptr. 161, 200-202 (1986) (the PTD provides the state with authority to set and enforce new water quality standards to protect fish and wildlife despite impairment of existing water appropriation rights).

87 *See, e.g.*, Ex parte Maier, 103 Cal. 476, 483, 37 P. 402 (Cal. 1894) ("The wild game within a state belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good."); People v. Brady, 234 Cal.App.3d 954, 959, 286 Cal.Rptr. 19, (Cal. Ct. App. 1991) ("like other wild game, the abalone caught in the state's coastal waters belong to the people of the State of California in their collective, sovereign capacity" and "the state acts as trustee to protect and regulate them for the common good."); Betchart v. Department of Fish and Game 158 Cal.App.3d 1104, 1107, 205 Cal.Rptr. 135 (Cal. Ct. App. 1984) (Because wildlife is a publicly-owned resource, "[w]ildlife may not be taken or possessed except as provided by the Fish and Game Code"); Young v. Department of Fish & Game, 124 Cal.App.3d

the right to fish,[88] it subjects that right to reasonable regulation providing for "the season when and the conditions under which the different species of fish may be taken."[89]

7.0 Public Standing

The common law PTD provides members of the public an independent basis for standing to bring actions to enforce the public trust with few limitations. The state constitution and statutes also provide an additional standing basis for members of the public to assert their rights with respect to navigable waters.

7.1 Common law Basis

- California courts have long recognized that members of the public have standing to bring an action to enforce the public trust.[90] However, the Court of Appeal recently held that the state, as trustee of public resources, is a necessary party to an action alleging harm to wildlife.[91]

7.2 Statutory Basis

By statute, California defines an unlawful obstruction of a navigable waterway or "public park, square, street, or highway" as a nuisance[92] and grants members of the public standing to bring an action to abate the nuisance and for damages.[93]

7.3 Constitutional Basis

257, 279, 177 Cal.Rptr. 247, (Cal. Ct. App.1981) ("The Legislature's power to regulate the wildlife in this state is extensive and that power to regulate includes the power to prohibit.").

88 Cal. Const., art. I, § 25 ("The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, . . . , and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State . . .").

89 Cal. Const, art I, § 25.

90 *See Nat'l Audubon Soc'y*, 33 Cal.3d at 431, n.11.

91 *See, e.g.*, Center for Biological Diversity, Inc. v. FPL Group, Inc., 83 Cal.Rptr.3d 588, 604 (Cal. Ct. App. 2008) (observing that in administering the trust, the state must engage in "[a] delicate balancing of the conflicting demands for energy and for the protection of other environmental values").

92 Cal. Civ. Code § 3479.

93 Cal. Civ. Pro. Code § 731.

The constitutional codification of the PTD, which guarantees public access to navigable waters,[94] affords members of the public standing to enforce that provision.[95]

8.0 Remedies

Remedies for violations of the PTD in California most often involve injunctions to enjoin harm to trust resources. However, natural resource damages are also authorized under several statutory schemes. And the PTD provides a successful defense to takings claims against the state.

8.1 Injunctive Relief

Under the common law PTD, members of the public may seek injunctive relief to enforce the public trust.[96] A statutory basis also exists for members of the public, as well as state and local governments, to bring an action to abate an unlawful obstruction of a navigable waterway or a public park, square, street, or highway as a nuisance.[97]

8.2 Damages for Injuries to Natural Resources

Although apparently there is no state court authority for natural resource damage claims under the common law PTD, several statutory provisions authorize the state to bring such claims. For example, the Miller Anti-Pollution Act of 1971 authorizes claims for damages to natural resources caused by oil spills.[98] California's hazardous waste program, which was adopted in lieu of the federal

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94 Cal. Const., art. 10, § 4 ("No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water").

95 *See* Carstens v. California Coastal Comm'n, 227 Cal.Rptr. 135, 142 (Cal. Ct. App. 1986) (implicitly concluding that plaintiff had standing by rejecting, on the merits, his claim based on "the public trust doctrine set forth in Article X, section 4 of the California Constitution").

96 *See, e.g., Nat'l Audubon Soc'y,* 33 Cal.3d at 431, n.11.

97 Cal. Code Civil Proc. § 731.

98 Harb. & Nav. Code § 293 (establishing liability for damages to natural resources caused by the discharge of oil and other hazardous substances into navigable waters); Harb. & Nav. Code § 151 (establishing liability natural resource damages caused by oil spills in any waters of the state, "including but not limited to navigable waters").

Resource Conservation and Recovery Act,[99] also authorizes the recovery of damages for injuries to natural resources resulting from the discharge of hazardous substances.[100] And the Fish and Game Code provides for the recovery of natural resource damages flowing from the unlawful or negligent taking of wildlife[101] or the discharge of "any substance or material deleterious to fish, plant, [wildlife] or their habitat into . . . the waters of [the] state."[102]

8.3 Defense to Takings Claims

The PTD provides a defense to takings claims, whether the property interest involved is a water right[103] or an interest in land.[104] As the California Supreme Court held in *Mono Lake*, the PTD it "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust."[105] However, if the state determines that improvements on privately-owned riparian property subject to the PTD are inconsistent with trust uses and requires their removal, the state must compensate the property owners for those improvements.[106]

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99 Health & Safety Code § 25101(d).

100 *Id.* § 25189.1(a)(2) (establishes civil liability "for all the costs or expenses which may be incurred by the state" to "[r]estore, rehabilitate, replace, or acquire the equivalent of, any natural resource injured, degraded, destroyed, or lost as a result of the disposal of the hazardous waste").

101 Fish & Game Code § 2014(a) (declaring that "[i]t is the policy of this state to conserve its natural resources and to prevent the willful or negligent destruction of birds, mammals, fish, reptiles, or amphibia").

102 *Id.* § 12016(a); *see also id.* § 12011(2) (persons convicted of violating section 5650 of the Fish & Game Code section 5650, which prohibits water pollution, are also liabile for "all actual damages to fish, plant, bird, or animal life and habitat").

103 *See, e.g., Nat'l Audubon Soc'y*, 33 Cal.3d at 445.

104 *See, e.g., Fogerty*, 29 Cal.3d at 249 (the state may not be estopped from asserting public trust interest in shorezone).

105 *Nat'l Audubon Soc'y*, 33 Cal.3d at 445.

106 *Id.*

COLORADO

THE PUBLIC TRUST DOCTRINE IN COLORADO

Mac Smith

1. Origins of the PTD in Colorado

The public trust doctrine (PTD) in Colorado dates to August 1, 1876, when the state was admitted into the Union.[1] The idea that the public shares the air and certain waters is an ancient doctrine that emerged in sixth century Roman law, perhaps earlier.[2] English civil law adopted this concept and asserted that the Crown held title to submerged lands beneath navigable waterways, subject to certain rights of the public such as navigation and fishing.[3] When America won independence from Britain, title to these submerged lands vested in the thirteen original colonies, and later to each state subsequently admitted to the Union, pursuant to the equal footing doctrine.[4] Thus, in 1876, Colorado gained sovereign title to lands beneath the navigable waterways within the state, subject to certain federal restrictions and duties owed to the public.[5]

Colorado has since taken a very limited view of the PTD, declining to expand the PTD's scope in the state constitution, statutes, or case law. The state lacks a constitutionalized PTD provision, despite state ballot initiatives that were introduced in the mid-1990s, and most recently in the 2010-2011 legislative session, seeking to amend

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[1] *See* Pollard v. Hagan, 44 U.S. 212 (1845) (holding the shores of navigable waters, and the soils under them, were reserved to the states, and the new states have the same sovereignty and jurisdiction over these lands as the original thirteen states).

[2] For concise historical background on PTD, s*ee, e.g.,* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 Mich. L. Rev. 471, 475-78 (1970); Michael Blumm & Thea Schwartz, *Mona Lake and the Evolving Public Trust in Western Water* 37 Ariz. L. Rev. 701, 713-16 (1995); Charles Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine,* 19 Env. L. 425 (1989).

[3] *See* Frank P. Grad, TREATISE ON ENVIRONMENTAL LAW § 10.05 (1995).

[4] *See supra* note 1.

[5] *Pollard,* 44 U.S. at 231.

the state constitution to include a PTD.[6] Still, some constitutional provisions suggest state trust duties for managing water and other resources, including a provision that recognizes public ownership of the waters of natural streams.[7] Moreover, Colorado does have a constitutional provision that imposes trust duties on the State Board of Land Commissioners, the state land board that oversees Colorado school trust lands.[8] That provision requires the land board to prudently manage trust property for the benefit of future generations and consider aesthetic, natural, and wildlife values.[9]

Similarly, Colorado courts have refused to recognize or apply the PTD in their decisions. They have never explicitly applied the PTD to navigable waters within the state, nor have they determined any state water to be "navigable."[10] Instead, in *Stockman v. Leddy*, the Colorado Supreme Court suggested that all waters in the state are

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[6] *See, e.g.,* Robin Kundis Craig, *A Comparative Guide to the Western States Public Trust Doctrines: Public Values, Private Rights, and the Evolution Towards an Ecological Public Trust,* 37 Ecology L.Q. 53, 116 (2010), *citing In re Matter of Title, Ballot Title, Submission Clause, and Summary Adopted April 6, 1994, by Title Board Pertaining to a Proposed Initiative on Water Rights,* 877 P.2d 321, 326-29 (Colo. 1994) (en banc) (upholding the initiative because the title, submission clause, and summary fairly and accurately represented true intent and meaning of initiative); *In the Matter of the Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995 by the Board Pertaining to a Proposed Initiative "Public Rights in Water II,"* 898 P.2d 1076, 1078-80 (Colo. 1995) (en banc) (striking down the initiative because it contained more than one subject); *In the Matter of the Title, Ballot Title, Submission Clause, and Summary Adopted March 20, 1996, by the Title Board Pertaining to Proposed Initiative "1996-6,"* 917 P.2d 1277, 1279-82 (Colo. 1996) (en banc) (upholding the initiative because it satisfied constitutional single-subject requirement). Regardless, each of the initiatives failed to obtain the required signatures and approvals needed to qualify for the ballot. *See also* John R. Hill, Jr., *The "Right" to Float Through Private Property in Colorado: Dispelling the Myth,* 4 U. Denv. Water L. Rev. 331, 341 (2001) (discussing the 1990's initiatives that failed to qualify for the ballot due to political opposition). Nevertheless, a new initiative was recently filed and may make it to the ballot by 2012.

[7] COLO. CONST. art. 16, §§ 6,7; *see also infra* notes 15-16 and accompanying text.

[8] COLO. CONST. art. IX, § 10; *see also infra* notes 18-23 and accompanying text.

[9] *Id.*

[10] *See, e.g.,* Stockman v. Leddy, 129 P. 220, 222 (Colo. 1912), declaring: "The federal government, by its lawmaking and executive bodies, knew that the natural streams of this state are, in fact, nonnavigable within its territorial limits, and practically all of them have their sources within its own boundaries, and that no stream of any importance whose source is without those boundaries, flows into or through this state. The entire volume of these streams is therefore made up of rains and snows that fall upon the surface of lands included within the exterior lines of this state and of springs which issue from the earth within the same area." *See infra* § 5.2 and note 47 for further discussion.

nonnavigable under the federal navigation test.[11] Because, in its most traditional sense, the PTD applies only to navigable waters,[12] it is unclear whether the traditional PTD even exists in Colorado. And it does not appear that Colorado courts will expressly adopt the PTD, since the Colorado Supreme Court stated that establishing a PTD is a legislative function, not a judicial one.[13] Further, Colorado courts have refused to expand the PTD to recreational purposes,[14] despite the vast amount of rafters and fisherman that use Colorado waters.

2. The Basis of the PTD in Colorado

Although Colorado has yet to officially recognize or apply the PTD, the state has recognized some public trust-like concepts in its constitution. For example, Article 16 recognizes: "The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."[15] But Article 16 also requires that the state never deny a right to divert unappropriated waters of any natural stream to beneficial uses.[16] Article 27 created the Colorado Great Outdoors Program, which places lottery money in a state trust fund used to preserve and manage state wildlife, parks, rivers, and open space.[17] Article 9 identifies

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[11] *Id.*
[12] *See, e.g.*, Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 452-53 (1892) (applying the public trust to public navigable waterways used for commerce); Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842) ("when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government").
[13] *Id.*, *citing* Smith v. People, 120 Colo. 39 (Colo. 1949) ("If a change in long established judicial precedent is desirable, it is a legislative and not a judicial function to make any needed change.")
[14] *See, e.g.*, People v. Emmert, 198 Colo. 137, 141 (Colo. 1979) (declaring private landowner's ownership of the *streambed* of a nonnavigable stream, and thereby upholding a charge of criminal trespass against a recreationist who had floated down a nonnavigable stream, occasionally touching the streambed).
[15] COLO. CONST. art. XVI, § 5.
[16] *Id.* at XVI, § 6.
[17] *Id.* at Art. XXVII.

state school lands as public trust lands that require sound stewardship.[18] This provision requires the land board, which is elected to oversee the management of Colorado trust property and mineral rights,[19] to prudently manage the trust property for the benefit of future generations and consider aesthetic, natural, and wildlife values when managing the property.[20]

Colorado legislation builds on the Colorado Constitution by requiring the land board to consider aesthetic, natural, and wildlife values when managing state trust land.[21] Although the board's primary mission is manage the land in trust for state public schools and other state trusts,[22] the legislature recognized that the economic productivity of the trust land depends on sound stewardship, including "protecting and enhancing the beauty, natural values, open space, and wildlife habitat...for this and future generations."[23]

3. Institutional Application

Although Colorado has yet to recognize a PTD, state constitutional provisions and legislation impose restrictions on the legislature and state agencies concerning the management of state trust land and wildlife.

3.1 Restraint on the alienation of private conveyances

As previously discussed,[24] section 10 of Article 9 of the Colorado Constitution and its implementing statute both impose a duty on state agencies to properly manage

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[18] *Id.* at Art. IX, § 10.
[19] COLO. REV. STAT. § 36-1-101, *et seq.* (West 2010).
[20] COLO. CONST. art. IX, § 10.
[21] COLO. REV. STAT. § 36-1-101.5 (West 2010).
[22] Although the public school trust constitutes an overwhelming majority of the total trust land acreage in the state, Colorado has also established trusts to benefit state forests, state parks, state penitentiaries, Colorado State University, Fort Lewis College, University of Colorado, and public buildings. *See* 2008 COLO. STATE LAND BRD. ANN. REPORT 16 (breaking down the amount of land held in each state trust).
[23] COLO. REV. STAT. § 36-1-101.5 (West 2010).
[24] *See supra* notes 18-23 and accompanying text.

state trust properties for the benefit of the present and future generations.[25] This duty requires the land board to consider its fiduciary duties when selling, exchanging, or leasing land or mineral resources to private parties.[26] Although these same trust duties do not expressly survive conveyances to private parties, the land board must consider the lessee's care and conservation efforts when determining whether to renew a lease of trust land.[27]

3.2 Limit on the legislature

The PTD does not impose any additional duties on the Colorado legislature.

3.3 Limit on administrative action

State law imposes trust duties on administrative action when managing wildlife resources and state trust property. For example, Colorado legislation imposes a duty on the state wildlife commission to create licensing requirements and promulgate rules[28] necessary to manage, protect, and preserve wildlife for the use and benefit of the public.[29] As discussed above,[30] state law requires state agencies to consider aesthetic, natural, and wildlife values when managing state trust land.[31]

4. Purposes

[25] COLO. CONST. art. IX, § 10; COLO. REV. STAT. § 36-1-101.5 (West 2010).
[26] COLO. CONST. art. IX, § 10(1) ("The disposition and use of [trust] lands should therefore benefit public schools... and is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space and wildlife habitat thereof, for this and future generations... It shall be the duty of the state board of land commissioners to provide for the prudent... sale, exchange, or other disposition of all the lands.")
[27] Colo. Stat. Ann. § 36-1-118(1)(b) (West 2010) (The "board shall consider, among other things, the care and use given the land and the development work done by the lessee in conserving and promoting the productivity thereof and in promoting benefit for the trusts").
[28] *Id.* at § 33-1-103, *et seq.*
[29] *Id.* at § 33-1-101(1).
[30] *See supra* notes 18-23 and accompanying text.
[31] COLO. CONST. art. 9, § 10; COLO. REV. STAT. § 36-1-101.5 (West 2010).

Colorado courts have not expressly recognized a state PTD. Because the Colorado Supreme Court has suggested that all waters in the state are nonnavigable,[32] it is unclear whether a basic, traditional PTD even exists in Colorado. Further, the Colorado Supreme Court has expressly refused to recognize a PTD concerning water or recreation.[33]

4.1 Traditional Purposes – Commerce, Navigation, and Fishing

The traditional PTD protects the public's right to use navigable waterways for basic trust uses such as commerce, navigation, and fishing.[34] However, in the early 20th century, the Colorado Supreme Court suggested that all Colorado waters are nonnavigable,[35] and later declared that private landowners own the title to the bed and banks of nonnavigable rivers.[36] Therefore, it is hardly clear that a traditional PTD exists in Colorado.

4.2 Beyond Traditional Purposes – Recreational, Ecological, and Water Rights

Colorado is yet to extend the PTD to non-traditional purposes. Although Colorado's constitution suggests that the PTD could apply to public water rights[37] and protect ecological functions,[38] Colorado courts have yet to apply the state constitution in this manner.[39] For example, although section 5 of Article 16 of the Colorado

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[32] *See infra* § 4.1.
[33] People v. Emmert, 198 Colo. 137, 139 (Colo. 1979); *See infra* § 4.2.
[34] Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 436 (1892).
[35] Stockman v. Leddy, 129 P. 220, 222 (Colo. 1912). *See supra* note 10 and *infra* note 47 and accompanying text for further discussion regarding the *Stockman* decision.
[36] *Emmert*, 198 Colo. at 140-42.
[37] COLO. CONST. art. 16, § 5 ("The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.")
[38] COLO. CONST. art. 9, § 10 (requiring land board to consider natural, aesthetic, and wildlife purposes when managing school trust land).
[39] *See, e.g.*, Hartman v. Tresise, 84 P. 685, 686-87 (Colo. 1905) (holding that public ownership of the water itself, as stated in the Colorado Constitution, does not create a public fishery in nonnavigable streams;

Constitution recognizes public ownership of the water in every state natural stream, no state court has recognized the PTD with respect to water.[40] Likewise, while section 10 of Article 9 requires the land board to consider natural, aesthetic, and wildlife purposes when managing school trust land, these ecological purposes are secondary to the land board's "primary duty" to produce "reasonable and consistent" economic income for state public schools and other state trusts.[41] Further, Colorado has explicitly refused to expand the scope of the PTD to recreational rights.[42]

5. Geographic Scope of Applicability

Colorado courts have intentionally limited the geographic scope of the PTD. The geographical scope of Colorado's PTD does not appear to extend to nonnavigable waters, recreational waters, wetlands, or groundwater.[43] However, the state has asserted ownership of wildlife and imposed trust duties for management of school trust lands.[44]

5.1 Tidal Waters

Colorado, a land-locked state, has no tidal waters.

5.2 Navigable in Fact

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instead, the private landowner owns the right of fishery, and only appropriative rights can trump this common-law rule).

[40] *See, e.g.*, Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Bd., 901 P.2d 1251, 1263 (Colo. 1995) (Mallarky, J., dissenting) (Explaining that the Colorado Supreme Court has never recognized the PTD with respect to water).

[41] COLO. CONST. art. 9, § 10 ("It shall be the [primary] duty of the state board of land commissioners to provide for the prudent management, location, protection, sale, exchange, or other disposition of all the lands...in order to produce reasonable and consistent income over time.")

[42] People v. Emmert, 198 Colo. 137, 140-42 (Colo. 1979) (rejecting the public trust as a basis for assuring public recreational use of water overlying privately owned stream beds of nonnavigable waterways), discussed *infra* § 5.3; *Hartman,* 84 P. at 686-87, discussed *supra* note 39.

[43] *See infra* §§ 5.2-5.5.

[44] *See infra* §§ 5.6-5.7.

Although it appears that Colorado retains a "commercial use" definition of "navigable waters,"[45] Colorado courts have not yet articulated a state standard for navigability.[46] The Colorado Supreme Court suggested that all state waters are nonnavigable in *Stockman v. Leddy* without applying a navigation test.[47] It is thus not entirely clear whether the traditional PTD, which protects the public's rights in navigable waters, exists in Colorado.

Colorado courts have declared that the PTD does not extend to nonnavigable waters in Colorado.[48] However, Colorado has never found any section of the Colorado River to be navigable, although the U.S. Supreme Court has declared the river navigable in both Utah[49] and Arizona.[5051]

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[45] *See, e.g., Emmert,* 198 Colo. at 139 ("The parties stipulated that the river is nonnavigable and had not historically been used for commercial or trade purposes of any kind.")

[46] *See, e.g., Id.* at 139-41.

[47] 129 P. 220, 222 (Colo. 1912). *But see, e.g.,* Richard Gast, *People v. Emmert: A Step Backward for Recreational Water Use in Colorado,* 52 U. Colo. L. Rev. 247, 268 (1981) ("A finding of navigability of any Colorado stream under the...commercial use doctrine would have invited federal regulation under the Commerce Clause power...and by flatly declaring the water nonnavigable, the court sought to avoid this potential conflict....Any preclusive effect of the *Stockman* and *German Ditch* pronouncements must also be limited by the historical period in which they were delivered. At the time these cases were decided, the legal approach to the issue of navigability was confined to the traditional commercial, navigable-in-fact standard. The notion of recreational use and a doctrine of navigability based on such use were so far removed from contemporary legal thinking that they were not considered by the *Stockman* and *German Ditch* courts. Therefore, statements by these courts cannot be construed to be an absolute bar to the introduction of a doctrine of navigability grounded in recreational use.") *See supra* note 10 for explanation of *Stockman* decision. *In Re German Ditch and Reservoir Co.*, 56 Colo. 252 (1913) primarily dealt with whether an intermittent creek was a natural stream subject to appropriation, and the Colorado Supreme Court stated in dictum that Colorado streams are non-navigable, with no indication as to what test was applied to reach such a conclusion.

[48] *Emmert,* 198 Colo. at 140-42 (rejecting the public trust as a basis for assuring public recreational use of water overlying privately owned stream beds of nonnavigable waterways); *Aspen Wilderness,* 901 P.2d at 1263 (explaining that the Colorado Supreme Court has never recognized the PTD with respect to water).

[49] Utah v. United States, 403 U.S. 9, 10 (1971) (concluding that the Green, Grand, and Colorado Rivers were navigable in Utah because they were "navigable in fact when they are used...in their ordinary 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.")

[50] Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 319 (1973) (noting that the state of Arizona holds title to the bed of the Colorado River, a navigable river).

[51] Arguably, the state's failure to declare any section of the Colorado River navigable conflicts with federal law, as the U.S. Supreme Court has proclaimed it inconceivable to declare private ownership of running water in great navigable streams. United States v. Twin City Power Co., 350 U.S. 222, 224-5 (1956)

5.3 Recreational Waters

In two cases, the Colorado Supreme Court ruled that the public has no right to recreate on nonnavigable waters that cross private lands. In 1979, in *People v. Emmert,* the court upheld a charge of criminal trespass against a recreationist who floated down a nonnavigable river, occasionally touching the riverbed.[52] The *Emmert* decision declared that the riparian landowner holds title to the bed and banks of nonnavigable rivers, and therefore the landowner has a right to exclude recreational users who use the riverbed for recreational purposes.[53] In an older 1905 decision, *Hartman v. Tresise,* the court held that the public has no implicit right to fish in nonnavigable streams because the riparian landowner owns the rights to fish.[54]

Still, some Colorado law suggests that a recreationist has an easement to float across state waters, no matter who owns the riverbed. For example, Colorado law declares that a recreationist commits criminal trespass on nonnavigable streams only by touching the private streambed or bank.[55] In 1983, the Colorado Attorney General concluded that Colorado law allows a person to float on a nonnavigable waterway through private property without committing criminal trespass.[56] The attorney general maintained that this interpretation did not conflict with *People v. Emmert.*[57] Another

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(holding that Congress has the authority to regulate commerce on the Savannah River, and that this power prevails over any conflicting rights a utility may assert in the land).

[52] *Emmert,* 198 Colo. at 147 (rejecting the PTD as a basis for assuring public recreational use of water overlying privately owned stream beds of nonnavigable waterways).

[53] *Id.* at 140 (citing Colo. Rev. Stat. § 41-1-107, which declares that ownership of the air above lands and waters of the state are vested in the owners of the surface beneath, subject to the rights of aircraft.)

[54] Hartman v. Tresise, 84 P. 685, 686-87 (Colo. 1905).

[55] COLO. REV. STAT. § 18-14-503, 503-504.5 (West 2010)

[56] *Purpose and effect of C.R.S. 1973, 18-4-504.5,* COLO. OP. ATT'Y GEN. NO. ONR8303042/KW 1, 6-7 (1983) (concluding that the statute allows a recreationist to float through private property without touching the streambed).

[57] *Id.* at 6. The opinion noted that the 1983 statute includes, within the definition of "premises" upon which an intruder may commit trespass, the banks and beds of nonnavigable rivers, but omits the water of nonnavigable streams, thereby suggesting that one may lawfully float on the water of nonnavigable

Colorado statute makes it a misdemeanor to obstruct a waterway "to which the public or a substantial group of the public has access."[58]

5.4 Wetlands

Neither the Colorado courts nor state legislature have specifically recognized a public trust in wetlands.

5.5 Groundwater

Neither the Colorado courts nor state legislature have recognized a public trust in groundwater. The legislature has expressly declared that the waters of "natural streams" referenced in Article 16 of the Colorado Constitution do not include "nontributary groundwater."[59] Further, the Colorado Supreme Court has never recognized the PTD with respect to water.[60]

5.6 Wildlife

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streams, as long as one avoids touching the bank or bed. *Emmert* was decided before this statute was enacted, so the *Emmert* court applied the common law *ad coelum* doctrine – whoever owns the soil owns up to heavens – and suggested that the riparian landowner also owns the water under this doctrine. However, the attorney general concluded that the new statute defining "premises" altered the *ad coelum* doctrine to exclude the waters of state streams. The opinion concluded that statute would reverse a finding of trespass under *Emmert* if a person floated down a nonnavigable stream without touching the private streambed.

[58] COLO. REV. CODE § 18-9-107 (West 2010). But *see* John R. Hill, Jr., *The "Right" to Float Through Private Property in Colorado: Dispelling the Myth*, 4 U. Denv. Water L. Rev. 331, 339 (2001) (explaining that the statute did not create any rights on its face, but simply declared it illegal to obstruct waterways to which the public has access -- that is, waterways flowing through public land). Still, the statute does seem to give the public an unobstructed right to access state waterways at designated public access points.

[59] COLO. REV. CODE § 37-82-101(1) (West 2010) ("The water of every natural stream, as referred to in sections 5 and 6 of article XVI of the state constitution...does not include nontributary ground water as that term is defined in section 37-90-103.") COLO. REV. CODE § 37-90-103 in turn defines "nontributary ground water" as "any water not visible on the surface of the ground under natural conditions" and "located outside the boundaries of any designated ground water basins in existence on January 1, 1985, the withdrawal of which will not, within one hundred years of continuous withdrawal, deplete the flow of a natural stream...at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal."

[60] Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Bd., 901 P.2d 1251, 1263 (Colo. 1995) (Mallarky, J., dissenting) (explaining that Colorado has never applied to the PTD to water).

Colorado has claimed ownership of all wildlife within its borders, not including domesticated animals like dogs and cats.[61] The legislature recognized the duty to protect state wildlife and created a wildlife commission for this purpose.[62]

Colorado case law also recognizes the state's ownership of wild game for the benefit of the public. For example, *Hornbeke v. White,* a 1904 Colorado Court of Appeals decision, declared that "the state, in its sovereign capacity, has power to limit and qualify the ownership which a person may acquire in game with such conditions and restrictions as it may deem necessary for the public interest."[63] In 1933, in *Maitland v. People*, the Colorado Supreme Court upheld a statute creating a game refuge, which included plaintiff's private property, and which prohibited the killing of animals within the refuge.[64] The *Maitland* court recognized the right to kill game as a privilege granted by a sovereign, not an individual right,[65] adding that the state has a duty to preserve its game against the "greed of hunters," and that creating a game refuge is within state police powers to protect its property for the benefit of the citizens.[66] Although these decisions did not explicitly apply the PTD to wildlife, they impose a duty on the state to protect wildlife for the benefit of the public.

5.7 Uplands (beaches, parks, and highways)

[61] COLORADO CODE ANN. § 23-13-3 (West 2010).
[62] The Colorado legislature has recognized that the state wildlife must be "protected, preserved, enhanced, and managed for the use, benefit, and enjoyment of the people of this state and its visitors." COLO. REV. STAT. § 33-1-101(1) (West 2010). The legislature created a wildlife commission responsible for wildlife management, licensing requirements, and the promulgation of rules necessary to manage wildlife. *Id.* at § 33-1-103, *et seq.*
[63] 20 Colo. App. 13, 22 (Colo. 1904) (upholding a game warden's seizure of deer hides that hunter took illegally under Colorado game laws).
[64] 93 Colo. 59 (Colo. 1933)
[65] *Id.* at 62.
[66] *Id.*

Although Colorado has not extended the PTD to state uplands, it protects state school trust land for the benefit of the public.[67] As previously discussed,[68] the state constitution identifies school trust lands as "public trust lands" and requires the land board to prudently manage the property for the benefit of future generations, accounting for the land's "beauty, natural values, open space, and wildlife habitat."[69] Colorado legislation imposes a similar duty on the land board as well.[70] Also, Article 26 of the Colorado Constitution dedicates lottery money "to the preservation, protection, enhancement and management of the state's wildlife, park, river, trail and space heritage" and establishes a trust fund for these purposes.[71]

6. Activities Burdened

The PTD does little to restrict property conveyances or wetland fills in Colorado. However, pursuant to its trust duties, the state has restricted rights to take wildlife.[72]

6.1 Conveyances of property interests

As discussed above,[73] the land board has a duty to protect school trust lands for the public.[74] The land board could violate this duty by conveying property without considering the constitutional and statutory mandate to soundly manage the land for the benefit of the schools and Colorado citizens.[75]

6.2 Wetland fills

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[67] COLO. CONST. art. 9, § 10.
[68] *See supra* notes 18-20.
[69] *Id.*
[70] COLO. REV. ST. § 36-1-101.5 (West 2010) (requiring land board to consider aesthetic, natural, and wildlife values when managing state trust land); *See also supra* notes 21-23 and accompanying text.
[71] COLO. CONST. art. 26, §§ 1,2,7.
[72] COLO. CODE ANN. § 23-13-3 (West 2010); *See also supra* § 5.6.
[73] *See supra* §§ 2.0; 3.1.
[74] *See supra* notes 21-27 and accompanying text.
[75] *See supra* notes 24-27 and accompanying text.

Neither the legislature nor courts have recognized the PTD explicitly applies to wetlands.[76]

6.3 Water rights

Although section 5 of Article 16 of the Colorado Constitution declares the public ownership of natural waterways in Coloardo,[77] the state has historically applied Article 16 only to water appropriation and diversion matters, and not to access rights or other public trust purposes.[78] For example, in *West End Irrigation Co. v. Garvey*, the Colorado Supreme Court declared, "water in possession is personal property [and] the right to divert water from a stream is an interest in real estate."[79] Further, section 6 of Article 16 requires the state to never deny a right to divert unappropriated waters of any natural stream to beneficial uses.[80]

6.4 Wildlife

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[76] *See, e.g., Aspen Wilderness*, 901 P.2d at 1263 (explaining that the Colorado Supreme Court has never recognized a public trust with respect to water). Further, the Clean Water Act gives the Army Corps. of Engineers and the United States Environmental Protection Agency primary responsibility regulate wetland fills in Colorado, although Colorado has retained authority to regulate wetland water quality. *See* CWA § 404 [33 U.S.C. § 1344 (West 2010)] and COLO. REV. STAT. § 25-8-101, *et seq.* (West 2010).

[77] COLO. CONST. art. 16, § 5 ("The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided").

[78] *See supra* notes 37-40 and accompanying text.

[79] West End Irrigation Co. v. Garvey, 184 P.2d 476, 479 (Colo. 1947) (settling a priority of use dispute between multiple parties). *But see* Bijou Irrigation Dist. v. Empire Club, 804 P.2d 175, 184 (Colo. 1991) ("Although we have stated that water once diverted becomes the personal property of the appropriator, this somewhat overstates the scope of right."). Colorado case law recognizes that Article 16 restricts water use to beneficial uses, and does not guarantee a right to appropriate for speculation or mere profit. *See* Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co, 197 Colo. 413, 415 (1979) *overturned on other grounds,* FWS Land and Cattle Co. v. State, Div. of Wildlife, 795 P.2d 837 (Colo. 1990) (municipalities' evidence of future needs and uses of water, without firm contractual commitments to use any of the water, was insufficient to show the intent to take the water and put it to a beneficial use).

[80] COLO. CONST. art. 16, § 6. Colorado law in turn defines "natural stream" as "a place on the surface of the earth where water naturally flows regularly or intermittently with a perceptible current between observable banks, although the location of such banks may vary under different conditions." COLO. REV. STAT. § 37-87-102 (West 2010).

Colorado claims ownership of all wildlife within its borders, not including domesticated animals like dogs and cats.[81] Under its police powers, the state may limit takings of wildlife and take other preventive measures to protect wildlife for the benefit of the public.[82]

7. Public Standing

Although there is no specific authority allowing the public to sue under the PTD, Colorado has fairly liberal common law standing requirements. Still, the lack of a judicially recognized PTD law may make it difficult for a plaintiff to show an injury to a legally protected interest.

7.1 Common law

Although litigants generally benefit from a relatively broad definition of standing in Colorado,[83] the lack of a PTD and applicable laws may be a significant hurdle to overcome for a party trying to establish standing under the PTD. To establish standing in Colorado, a plaintiff must show (1) an "injury in fact" (2) to a legally protected interest.[84] Showing an "injury in fact" requires more than "the remote possibility of a future injury,"[85] but it may apply to intangible harms,[86] including environmental concerns. The second prong of Colorado's standing test requires a plaintiff to show a "legally protected

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[81] Colorado Code Ann. § 23-13-3 (West 2010); *see supra* § 5.6.
[82] *See, e.g., Maitland,* 93 Colo. at 59-62 (Colo. 1933); *see supra* § 5.6.
[83] *See, e.g.,* Ainscough v. Owens, 90 P.3d 851, 856 (Colo. 2004) (Colorado Supreme Court recognizing that the standing test has traditionally been relatively easy to satisfy in Colorado, and allowing a labor organizations and state employees to bring a suit against the governor challenging an executive order that eliminated employee payroll deductions for union dues).
[84] Wimberly v. Ettenberg, 194 Colo. 163, 168 (1977) (establishing basic standing test commonly used by Colorado courts).
[85] *Ainscough,* 90 P.3d at 856, *quoting* Brotman v. E. Lake Creek Ranch, L.L.P., 31 P.3d 886, 890-91 (Colo. 2001).
[86] Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n, 620 P.2d 1051, 1058 (Colo. 1980) (holding Colorado case law provides broad taxpayer standing in the trial and appellate courts).

interest,"[87] which may include intangible interests.[88]

Although a citizen is yet to successfully sue under the PTD in Colorado, the Colorado standing test suggests that members of the public have a broad ability to challenge a government's violation of the state constitution and statutes.[89] Still, a citizen would need to show an injury to a legally protected interest under Colorado law, [90] such as a challenge to the state's improper trust land management.

7.2 Statutory basis

Although there are no Colorado statutes that specifically authorize citizens to enforce the state's public trust duties, a citizen may seek judicial or administrative review of agency action under the Colorado Administrative Procedure Act ("APA").[91] The Colorado APA authorizes "any person adversely affected or aggrieved by an agency action [to file] an action for judicial review in the district court."[92]

7.3 Constitutional basis

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[87] *Wimberly,* 194 Colo. at 168.

[88] *Ainscough,* 90 P.3d at 856, *quoting* Nicholl v. E. 470 Pub. Highway Auth., 896 P.2d 859, 866 (Colo.1995) (noting that "even where no direct economic harm is implicated, a citizen has standing to pursue his or her interest in ensuring that governmental units conform to the state constitution").

[89] *See, e.g.,* Colo. State Civil Serv. Employees Ass'n v. Love, 167 Colo. 436, 444 (1968) (allowing petitioners, as taxpayers, to maintain original proceeding challenging statutory provisions involving reorganization of state government). Citizens bringing suit against the government for a potential constitutional violation need only show a generalized injury in fact; that is, that the injury flowed "from governmental violations of constitutional provisions that specifically protect the legal interests involved. Conrad v. City and County of Denver, 656 P.2d 662, 668 (Colo. 1983) (allowing citizens to bring a suit for declaratory and injunctive relief against alleged unconstitutional display of a nativity scene on the steps of the city and county building).

[90] *Wimberly*, 194 Colo. at 168.

[91] COLO. REV. STAT. § 24-4-101, *et seq.* (West 2010).

[92] *Id.* at § 24-4-106. *See., e.g., Friends of the Black Forest Regional Park, Inc. v. Board of County Com'rs of County of El Paso,* 80 P.3d 871 (App. 2003) (nonprofit organized to preserve a park and protect the interests of the park's neighbors had standing to seek judicial review of the county's decision to approve a road easement across a portion of the park; corporation and owners alleged that the road would adversely affect the aesthetics of the park and erode the property values of the owners, which was sufficient to establish an injury in fact); *National Wildlife Federation v. Cotter Corp.,* 665 P.2d 598 (Colo. 1983) (environmental groups' allegations that its members were directly exposed to radioactive and toxic materials established that the groups were aggrieved, and thus they had standing to seek judicial review of health department's decision to issue an amended radioactive materials license to a uranium mill operator).

There are no Colorado constitutional provisions that specifically give citizens standing to enforce the state's trust duties. However, a party may be able to challenge the misuse of state waters under the state constitution provision that declares public ownership of the natural waters.[93] Similarly, the public may be able to challenge the state's mismanagement of trust land under the state constitution.[9495]

8. Remedies

Because Colorado has yet to adopt or apply the PTD, the availability of either monetary damages or injunctive relief to enforce the PTD is not clear. However, the state's sovereign ownership of wildlife may be viewed as a defense to the government's taking of private property.[96]

8.1 Injunctive relief

Colorado courts have yet to recognize injunctive relief as a remedy for injury to public trust resources.

8.2 Damages for injuries to resources

Colorado courts have yet to recognize a damages remedy for injury to public trust resources.

8.3 Defense to takings claims

In *Maitland v. People*, the Colorado Supreme Court suggested that the PTD may be a defense to takings in Colorado.[97] *Maitland* upheld the creation of a state game

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[93] COLO. CONST. art. 16, § 5 ("The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided").
[94] COLO. CONST. art. IX, § 10 (requiring the land board to consider natural, aesthetic, and wildlife purposes when managing school trust land).
[95] *See* supra note 89 and accompanying text (Colorado citizens may sue to remedy violations of the state constitution).
[96] *See infra* § 8.3.
[97] Maitland v. People, 93 Colo. 59 (Colo. 1933); *See supra* § 5.6 for more discussion of the case.

refuge, which included plaintiff's private property, because the state owns wildlife within its borders in a sovereign capacity and has a duty to protect the wildlife for the public.[98] The court even refused to find an infringement when protected deer damaged the landowner's crops, reasoning that "whenever legislative protection is accorded game, some harm usually is done to some person as an incident to such protection," but ruling that "such incidental injuries are not sufficient to render the protecting statute unconstitutional."[99]

[98] *Maitland,* 93 Colo. at 62-3.
[99] *Id.* at 63.

CONNECTICUT

The Public Trust Doctrine in Connecticut

Kya B. Marienfeld

1.0 Origins

The public trust doctrine ("PTD") in Connecticut has origins as a safeguard for the public use of tidelands and the fishable seashore. Connecticut received title to lands beneath navigable waters as one of the thirteen original states and a "successor to the British Crown."[1] Although Connecticut became the fifth state in 1788, its courts did not discuss public rights to navigable waters until 1811.[2] In early cases, the Connecticut Supreme Court recognized the public's right to use tidal and seaside areas to take fish and shellfish, regardless of the private or public ownership of the adjacent land.[3] In tidal areas, Connecticut quickly established that the ordinary high water mark is the boundary between public and private rights.[4]

As the state developed, it soon recognized that the public had rights in waters outside the tidal zone. As a result, the Connecticut Supreme Court adopted a new test that expanded the public trust doctrine to all waters that were navigable-in-fact, even if they were outside tidal influence.[5] For navigable-in-fact waters, Connecticut recognizes a "substantial paramount public right [to their] free and unobstructed use" for navigation.[6] If waters are below the high water line

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[1] *Utah v. United States*, 403 U.S. 9, 10 (1971) (explaining that states receive ownership of the beds of navigable waters through the "equal footing doctrine" upon admittance to the union or as one of the original thirteen states, who received their ownership of submerged lands directly from the Crown).

[2] *Lay v. King*, 1811 WL 162, at *4 (Conn. 1811) (rejecting a trespass claim on private property at the mouth of the Connecticut River because "the locus in quo was a portion of the river used from time immemorial as a common fishing place... the acts complained of were done in the exercise of such common right.").

[3] *Id.*

[4] *Chapman v. Kimball*, 9 Conn. 38, 41 (1831) (Conn. July 1831) (concluding that the "right to take sea-weed growing and accumulating on the bed of a navigable river, below low water mark, is in the public, and not exclusively in the riparian proprietor," the court rejected a trespass action).

[5] *Enfield Toll Bridge Co. v. Hartford N.H.R. Co.*, 1845 WL 431, at *5 (Conn. June 1845) (concluding that the Connecticut River is navigable, even above tidewater).

[6] *Town of Orange v. Resnick*, 109 A. 864, 865-66 (Conn. 1920) (in action by the Town of Orange against a landowner to enjoin the construction of a bathing pavilion and for the removal of any buildings or structures that stood on land between high and low water marks, the court concluded that "a bathing pavilion which does not

in a tidal area, the exclusive occupation of this area by the riparian owner can extinguish the public rights to fishing and recreation, but not navigation rights.[7]

2.0 Basis

Connecticut courts quickly recognized the public trust doctrine as a part of common law.[8] In contrast, the Connecticut Constitution lacks any language that would establish the public trust. In *Peck v. Lockwood*, the Supreme Court of Errors settled a dispute between a landowner and a member of the public accused of trespassing by harvesting shellfish from private tidal lands below the high water mark.[9] Adopting the common law of England, the court ruled that the public's fishing rights extended to high water because "[their] ancestors always supposed that they had a right to fish and take clams on such lands as these," and that this "appear[ed] to be uniformly the law of that country from which they came."[10] *Peck* established that the right to take shellfish between high and low water mark was a public right, not an exclusive right of the landowner.

Connecticut's recognition of the public trust doctrine does not lie only in common law, however. Statutes now codify the state's trust responsibilities and extend the regulatory power of the state to other, non-traditional trust resources. Beginning in the 1940's, these statutes recognized a broad array of public trust interests. Some prohibit obstructions to aquatic

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obstruct navigation may lawfully be erected between high and low water mark by the owner of the adjoining upland. In some places the privilege of developing the shore as a bathing beach may constitute a large part of the value of the adjoining upland, and when this is done without obstruction to navigation it is a legitimate use of the owner's advantages.").

[7] *See id.* ("The public rights of fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge, and of passing and repassing are necessarily extinguished, *pro tanto*, by any exclusive occupation of the soil below high-water mark on the part of a riparian owner. The only substantial paramount public right is the right to the free and unobstructed use of navigable waters for navigation.")

[8] *See, e.g. Lay v. King*, 1811 WL 162.

[9] *Peck v. Lockwood*, 5 Day 22 (1811).

[10] *Id.*

navigation and public use.[11] Others regulate dredging in tidal, coastal, and navigable waters.[12] Notably, the legislature in 1971 expanded the doctrine to allow citizen suits for the protection of the "public trust in the air, water and other natural resources of the state" under the Connecticut Environmental Protection Act ("CEPA").[13] Although Connecticut's statutorily created and common law public trust doctrines differ,[14] both reflect the state's longstanding and continually evolving trust responsibilities.

3.0 Institutional Application

Neither the state courts nor the state legislature have used the PTD to impose restraints on private conveyances of trust land, but courts have employed the doctrine to determine that riparian rights are alienable from the adjoining upland property.[15] Additionally, the PTD requires both the Connecticut legislature and the Connecticut Department of Energy and Environmental Protection ("DEEP") to consider public trust interests in land conveyances and permit proceedings, although Connecticut courts have yet to bar any legislative or administrative action specifically on public trust grounds.

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[11] Conn. Gen. Stat. Ann. § 15-140d ("No person shall place or cause to be placed any marker, raft, dockslip, ski jump or similar structure upon the state's waters so as to create an obstruction or menace to navigation or a hindrance to the public use of such waters.").

[12] Conn. Gen. Stat. Ann. §§ 22a-359 to 22a-363f ("The Commissioner of Energy and Environmental Protection shall regulate dredging and the erection of structures and the placement of fill, and work incidental thereto, in the tidal, coastal or navigable waters of the state waterward of the coastal jurisdiction line. Any decisions made by the commissioner pursuant to this section shall be made with due regard for indigenous aquatic life, fish and wildlife, the prevention or alleviation of shore erosion and coastal flooding, the use and development of adjoining uplands, the improvement of coastal and inland navigation for all vessels, including small craft for recreational purposes, the use and development of adjacent lands and properties and the interests of the state, including pollution control, water quality, recreational use of public water and management of coastal resources, with proper regard for the rights and interests of all persons concerned.").

[13] Conn. Gen. Stat. Ann. §§ 22a-16 to 22a-17.

[14] *See, e.g., Fort Trumbull Conservancy, L.L.C. v. City of New London*, 925 A.2d 292. (Conn. 2007) (discussing the PTD created by the CEPA statute as distinct from the PTD at common law in a case challenging approval of a local land use development plan, the court explained that the statute provided the public with jurisdictional standing and the common law did not).

[15] *Town of Orange v. Resnick*, 109 A. at 866 (stating that such a separable and assignable interest in the soil exists and is an "exclusive right to the soil between high and low water mark for the purpose of erecting wharves and stores thereon").

3.1 Restraint on Alienation

Private owners of land adjacent to navigable waterways or tidal areas have full rights of alienation in Connecticut, but private conveyances do not extinguish PTD rights. Therefore, a riparian landowner may not exclude the public from adjacent waters, but only a landowner may use his or her exclusive upland to access the water.[16] The right to the shore—the area of land below the high water mark—is subject to the paramount right of the public, although a landowner's right to use the land down to the ordinary high water mark, including "wharfing out" from his or her property into the waterway, is not affected by the PTD.[17] Nor does the PTD erect barriers to the transfer of upland property interests and accompanying shoreline structures, even below the high water mark, so long as there is no interference with public navigability rights. [18] Moreover, riparian rights in Connecticut are separable, so that the state may convey the interest in the area below the high water mark—the shoreline—either before or after the landowner has occupied any part of it.[19]

3.2 Limit on the Legislature

As is true in most states that recognize the public trust either through common law or by statute, the state of Connecticut holds *jus publicum* rights, with the right to govern its shores and

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[16] *Leydon v. Town of Greenwich*, 777 A.2d 552, 564 n.17 (Conn. 2001) ("Under the public trust doctrine, members of the public have the right to access the portion of any beach extending from the mean high tide line to the water, although it does not give a member of the public the right to gain access to that portion of the beach by crossing the beach landward of the mean high tide line").

[17] *Chapman v. Kimball*, 9 Conn. at 41 ("Adjoining proprietors have the right to the shore subject to the paramount right of the public. The usage of the owners of land to high-water mark, to wharf out against their own land, has never been disputed. The interests of navigation have been subserved, and the consequences have been altogether salutary").

[18] *Id* ("On the death of the owner to high-water mark, his estate in the shore and the erections upon it has descended to his heirs. This is our common law founded on immemorial usage"); *Burrows v. Gallup*, 32 Conn. 493, 500 (87 Am. Dec. 186) ("It has been adjudged in many cases that the owner of the soil may do such acts upon his own land within the limits of a highway, as do not interfere with the public easement. And there is abundant authority that the owner of land along the seashore may do in like manner with his soil covered by the sea, if navigation is not thereby incommoded.").

[19] *See supra* note 15 and accompanying text.

navigable waters for the protection of public uses.[20] As the proprietor of Connecticut's public trust resources, the state and municipal legislatures must maintain the tidal and navigable waters for navigation and other public uses. The duty of protecting the right of navigation rests upon the legislature, which may determine how best to implement these protections.[21]

Therefore, the state has the power to alienate trust land for any use that benefits the public, or at least for any use that does not substantially impair the public interest.[22] Connecticut courts have limited the state's ability to alienate public rights by determining that the legislature cannot part with state lands unless it has made its intent to extinguish the public's rights expressly clear.[23]

In 2011, the Connecticut legislature's passage of Senate Bill 1196, known locally as the "Haddam Land Swap," raised public trust issues.[24] The bill sought to provide 17 acres of state-owned public shoreland along the Connecticut River in the town of Haddam to a private

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[20] *Lane v. Harbor Commission*, 40 A. 1058 (Conn. 1898) (concluding that "subject to the limitations of the federal constitution, the state has the jus publicum, or right of governing its shores and navigable waters for the protection of public rights, and also the jus privatum, or title to the soil itself below high-water mark, in trust for the public use and benefit; that the littoral proprietor owns in fee only to high-water mark, but that he has, in the shore in front of his upland, certain exclusive advantages called in our Reports 'rights, privileges, and franchises,' among which is the right of access to actually navigable water by wharfing out; that the right or privilege of wharfing out, certainly so far, at least, as it has not been actually exercised, is held subordinate and subservient to the public right of navigation.").

[21] *State v. Sargent & Co.*, 45 Conn. 358 (1877) (concluding that the owners of land on a harbor own only to high-water mark and have a right to construct wharves upon the soil below that line, if they follow state regulations and do not obstruct navigation, and that "the duty of protecting the paramount right of navigation rests upon the legislature, and they are to determine for themselves by what methods and instrumentalities they will discharge it").

[22] *State v. Knowles-Lombard Co.*, 188 A. 275, 276 (Conn. 1936) (explaining that "in the exercise of its sovereignty, the State has the power to grant such land for any public use when that can be done without substantial impairment of the public interest and subject to the paramount right of Congress to control navigable waters so far as may be necessary for the regulation of commerce.").

[23] *Inhabitants of Town of East Haven v. Hemingway*, 7 Conn. 186, 199 (1828) (denying a landowner's claim that "it was the object of the grant to convey the public right of the colony in the shores of navigable rivers to the purchasers of lands from the natives, requesting the confirmation of their title. A right so important as this is to the public cannot be considered as parted with, except by words so unequivocal as to leave no reasonable doubt concerning the meaning").

[24] Jon Lender, *General Assembly Approves Controversial Haddam Land Swap*, Capitol Watch, Jun. 8, 2011, http://blogs.courant.com/capitol_watch/2011/06/senate-approves-haddam-land-sw.html.

developer in exchange for approximately 80 acres of upland forest adjacent to a state park.[25] The state originally purchased the Haddam land for conservation, with funds from the state's Department of Energy and Environmental Protection's Recreation and Natural Heritage Trust.[26] In the deed of purchase, the state promised that the Haddam land would "be retained in its natural scenic or open condition as park or public open space,"[27] suggesting PTD limitations. Despite public and environmental opposition, the Connecticut legislature approved the land swap.[28] The public never had a chance to test the PTD limitations on the legislature's land swap actions, however, because the developers abandoned the deal due to financial concerns shortly after receiving legislative and gubernatorial approval.[29]

4.2 Limit on administrative action (hard look)

The Connecticut Department of Energy and Environmental Protection ("DEEP") regulates activities such as dredging, filling, and construction below the high tide line and in tidal wetlands. Like the legislature, DEEP considers public trust interests in the course of permit proceedings and is also responsible for elaborating on what constitutes "natural resources" protected in trust.[30]

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[25] *Id.*
[26] *See Statement on the Haddam Land Swap by Martin Mador, Legislative and Political Chair of the Sierra Club*, Environmental Headlines, Jul. 10, 2011, http://environmentalheadlines.com/ct/2011/07/10/statement-on-the-haddam-land-swap-by-martin-mador-legislative-and-political-chair-of-the-sierra-club%E2%80%99s-connecticut-chapter/.
[27] *Id.*
[28] *Id.*
[29] *Developers Pull Out of Haddam Land Swap Deal,* WTNH.com News 8, Apr. 4, 2012, http://www.wtnh.com/dpp/news/middlesex_cty/developers-pull-out-of-haddam-land-swap-deal#.UJeUHYUVw14.
[30] *Paige v. Town Plan & Zoning Comm'n of Town of Fairfield*, 668 A.2d 340, 344 (Conn. 1995) ("In promulgating regulations regarding its responsibilities, the department of environmental protection…has elaborated on what constitutes natural resources").

Because state courts retain jurisdiction of an agency action pending completion to determine whether regulators considered the relevant doctrine or statutes,[31] a court could overturn an action that fails to consider public trust rights and resources and remand it to the relevant agency.[32] However, like many state and federal courts, the Connecticut Supreme Court has established a presumption of correctness and a "substantial evidence" standard of review, indicative of deference toward the decisions of state agencies, including DEEP.[33]

4.0 Purposes

As a coastal state, and one of the first states to recognize the PTD, Connecticut's application of the public trust focuses largely on tideland and navigability rights. Although Connecticut's PTD protects more resources than it did in 1811, the state's common law doctrine remains narrow in scope. The Connecticut legislature has, however, expanded the state's PTD statutorily, so that it now includes air quality and natural resources protection along with the doctrine's traditional applications.

4.1 Traditional (navigation/fishing)

Connecticut courts were among the earliest to apply the PTD to navigation and fishing rights. In 1811, the Connecticut Supreme Court recognized the traditional English common law

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[31] *City of Waterbury v. Town of Washington*, 800 A.2d 1102, 1122 (Conn. 2002) (remanding the case to the trial court and holding that "the court shall retain jurisdiction of the action pending completion of administrative action for the purpose of determining whether adequate consideration by the agency has been given" in an action by one city against adjacent town seeking declaration that its diversion of water from river for water supply, through city's operation of a dam, did not violate CEPA).

[32] *See, e.g., id.*

[33] *See, e.g., State v. Figueroa*, 665 A.2d 63 (Conn. 1995) ("there is a presumption that public officials entrusted with specific public functions related to their jobs properly carry out their duties"); *Beechwood Garden Tenants' Assn. v. Dept. of Housing*, 572 A.2d 989 (Conn. 1990) ("it must be presumed that public officials have performed their statutory duties, in the absence of substantial evidence to the contrary").

purposes of the PTD to protect the public's interest in unhindered navigability and fishing rights.[34]

4.2 Beyond traditional (recreational/ecological)

Both state courts and the legislature have expanded the scope of Connecticut's PTD. By 1920, the Connecticut Supreme Court had concluded that fishing, boating, hunting, swimming, gathering vegetation, and navigation were all legitimate purposes of the state's PTD.[35] The passage of the Connecticut Environmental Policy Act ("CEPA") in 1971 by the legislature created Connecticut's broadest statutory recognition of the PTD. Employing clear trust language, CEPA empowers Connecticut courts to "grant temporary and permanent equitable relief, or impose such conditions on the defendant as are required to protect the *public trust* in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction.[36]

5.0 Geographic Scope of Applicability

Connecticut has a well-defined scope of when the PTD does and does not apply.[37] Most often, the doctrine arises in tidal areas and other navigable bodies of water. Overall, each judicial determination of "trust or no trust" rests on navigability—either in fact or in law.[38]

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[34] *Peck v. Lockwood*, 5 Day 22 (The public has the right to fish and shellfish over submerged private lands); *Adams v. Pease*, 2 Conn. 481 (1818) (The public has the right to pass in navigable rivers).

[35] *Town of Orange v. Resnick*, 109 A. at 865 (recognized the public's "rights of fishing, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge… [a]nd of passing and repassing…"); *see also State v. Brennan*, 3 Conn. Cir. 413 (1965) ("It is settled in Connecticut that the public has the right to boat, hunt, and fish on the navigable waters of the state"); *Chapman v. Kimball*, 9 Conn. 38 (The public may gather seaweed between ordinary high water and low water).

[36] Conn. Gen. Stat. Ann. § 22a-18 (2006) (part of a collection of statutes, §§ 22a-16 to 22a-17, that make up the Connecticut Environmental Policy Act) (emphasis added).

[37] *Adams v. Pease,* 2 Conn. at 483 ("By the common law, in the sea, in navigable rivers, and navigable arms of the sea, the right of fishing is common to all. In rivers not navigable, the adjoining proprietors have the exclusive right. Rivers are considered to be navigable as far as the sea flows and reflows; and thus far the common right of fishing extends. Above the ebbing and flowing of the tide, the fishery belongs exclusively to the adjoining proprietors; and the public have a right or easement in such rivers, as common highways, for passing and repassing with vessels, boats, or any watercraft").

5.1 Tidal

With navigability as the standard, Connecticut established that "all tidewater is *prima facie* navigable" early in its history.[39] From the state's earliest court decisions to the present, the applicability of the PTD to Connecticut's tidelands, from the water itself to the mean high water line, is well established. The state has also expanded the PTD's tidal scope by including tidal flats adjacent to an arm of the sea as publicly owned.[40]

5.2 Navigable-in-Fact

Connecticut adopted the navigable-in-fact test in 1818, adding actual navigability in coastal rivers to the *prima facie* navigability that it already accepted concerning tidelands.[41] In 1845, the Connecticut Supreme Court applied navigability to a non-tidal body of water for the first time, using the navigable-in-fact test to find a public trust in waters above the influence of the tides.[42] In 1850, the court clarified the navigable-in-fact test to include only waters in which the public regularly passes, in vessels or boats, for the purpose of commerce or other navigation that is valuable for more than hunting or fishing.[43]

5.3 Recreational waters

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[38] *Chapman v. Kimball*, 1831 WL 142, at *3 (Conn. 1831) ("A distinction is always maintained between rivers navigable and those not navigable").
[39] *Town of Orange v. Resnick*, 109 A. at 866.
[40] *Simons v. French*, 25 Conn. 346, 352-53 (1856) (affirming that "an owner of upland adjoining flats on an arm of a sea over which the tide ebbs and flows is entitled... to the exclusive right of wharfing out over such flats to the channel of the arm of the sea," so long as this right remains "subject to the rights of the public" for navigation and passage on the flats).
[41] *Adams v. Pease*, 2 Conn. at 483 ("Above the ebbing and flowing of the tide, the fishery belongs exclusively to the adjoining proprietors; and the public have a right or easement in such rivers, as common highways, for passing and repassing with vessels, boats, or any watercraft").
[42] *Enfield Toll Bridge Co. v. Hartford N.H.R. Co.*, 1845 WL 431, at *5 (concluding that the Connecticut River is a public river, because it is navigable-in-fact beyond the ebb and flow of the tides).
[43] *Town of Wethersfield v. Humphrey*, 1850 WL 664, at *7 (Conn. Aug. 1850) (Navigation "only is such, and those only are navigable waters, where the public pass and repass upon them, with vessels or boats, in the prosecution of useful occupations. There must be some commerce or navigation which is essentially valuable. A hunter or fisherman, by drawing his boat through the waters of a brook or shallow creek, does not create navigation, or constitute their waters channels of commerce").

Although state common law has not independently recognized waters used for recreation as part of the public trust, the Connecticut Environmental Protection Act ("CEPA") includes public recreation in its list of public trust resources that may be wrongfully "impaired" under the statute.[44] Additionally, public recreation is a factor listed under the state's other natural resource statutes, which give substantive content to suits brought under CEPA's procedures.[45]

5.4 Wetlands

Connecticut courts have also interpreted CEPA to extend the scope of the PTD to include wetlands as a recognized "natural resource," although the statute itself does not explicitly mention wetlands.[46] Because CEPA is a procedural statute that only grants standing to the general public, courts must use other state environmental protection statutes to give specific meaning to CEPA's definitions and substantive requirements when applying the law in a particular case.[47] The Connecticut Supreme Court has applied CEPA's public trust protection of wetlands using the Inland Wetlands and Watercourses Act ("IWWA").[48] Therefore, when a Connecticut agency makes a decision that may have jeopardized the public trust interest in wetlands, it could be subject to a CEPA claim alleging the pollution, impairment, or destruction of the state's inland wetlands and watercourses and using the IWWA as the substantive

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[44] Conn. Gen. Stat. Ann. § 22a-1a-3(a)(14) (determination of environmental significance can include, among others, "substantial impact on natural, cultural, recreational or scenic resources.").

[45] *City of Waterbury v. Town of Washington,* 800 A.2d at 1140 (recognizing that the state minimum flow statute which charged the state with "recognizing and providing for the needs and requirements of ... public recreation," to "promote and protect the usage of such water for public recreation" governed the court's interpretation of "unreasonable impairment" under CEPA).

[46] *Finley v. Inland Wetlands Comm'n of Town of Orange*, 959 A.2d 569, 584-85 (Conn. 2008) ("An intervenor pursuant to § 22a-19 has standing to bring an appeal from an agency's decision "only to protect the natural resources of the state from pollution or destruction").

[47] *See City of Waterbury v. Town of Washington,* 800 A.2d at 1138 ("In order to read our environmental protection statutes so as to form a consistent and coherent whole, we infer a legislative purpose that those other enactments are to be read together with CEPA, and that, when they apply to the conduct questioned in an independent action under CEPA, they give substantive content to the meaning of the word 'unreasonable' in the context of such an independent action.").

[48] *Finley v. Inland Wetlands Comm'n of Town of Orange*, 959 A.2d at 569.

standard.[49] This is especially true if the proposed action is "reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state."[50]

5.5 Groundwater

CEPA, Connecticut's statutory public trust, also mentions the need for regulators, when weighing approval of a water diversion, to consider "the effect of the proposed diversion on the existing water conditions, with due regard to watershed characterization, groundwater availability potential, evapotranspiration conditions and water quality."[51] Although Connecticut courts have not yet discussed groundwater under CEPA specifically, the Connecticut Supreme Court mentioned briefly that if a state action was challenged under CEPA for impairing the public interest in groundwater, the state's water diversion acts would provide the substantive analysis for any reasonableness inquiry relating to groundwater.[52]

5.6 Wildlife

One of the nation's landmark public trust cases began in Connecticut and eventually found its way to the U.S. Supreme Court in *Geer v. Connecticut*, which held that the state owned fish and game in its sovereign capacity, and that the state must exercise this ownership as a trust, for the benefit of the people.[53] Over eighty years later, the Court overruled the part of *Geer* that

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[49] *Id.* at 579.
[50] *Id.*
[51] *City of Waterbury v. Town of Washington*, 800 A.2d at 1157 (noting the importance of assessing the effect of a proposed diversion of water on other needs for public water supply, including groundwater development).
[52] *Id.* at 593.
[53] *Geer v. Connecticut*, 161 U.S. 519, 529 (1896) (citing *Martin v. Waddell*, 41 U.S. 366, for the proposition that the "ownership is that of the people in their united sovereignty").

held state ownership of wildlife trumped federal prerogatives,[54] but states—including Connecticut—still claim ownership of wildlife.[55]

In 2010, an animal welfare group attempted to use the state's public trust doctrine to protect non-game wildlife, alleging that a power company's destruction and capture of monk parakeets nesting on power lines was an unreasonable impairment of the public trust in a natural resource of the state.[56] The Connecticut Supreme Court dismissed the group's claims, reasoning that the protections of the state's wild bird act specifically do not apply to birds that are a health or safety hazard because of their concentrated numbers, without ruling on the merits of the PTD claim.[57]

5.7 Uplands

According to the Connecticut Coastal Management Act, the shoreland below the mean high water mark is defined as "public beach" and is part of the state's PTD.[58] In Connecticut, if an area is regularly wet from the tides, it is subject to the public trust. Under the PTD, members of the public have the right to access the area of the beach that extends from the mean high tide line to the water—the tidelands. This does not, however, give a member of the public the right to access tidelands by crossing over an area of the beach that is above the high water mark.[59]

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[54] *Hughes v. Oklahoma,* 441 U.S. 322 (1979) (holding that an Oklahoma statute which forbade transportation of any commercially significant number of minnows out of state for sale was discriminatory against interstate commerce).
[55] *Id.* at 338 (Justice Brennan, writing for the majority opinion that "the overruling of Geer does not leave the States powerless to protect and conserve wild animal life within their borders"); *see also* Michael C. Blumm and Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 Envtl. L. Rev. 673, 707 (noting that "[d]espite Hughes' overruling of the *Geer* ownership doctrine on the issue of the ability of states to insulate themselves from Commerce Clause limits, state courts continue to rely on the rationale that the state 'owns' wildlife in trust for its citizens as justification to regulate animals *ferae naturae*.").
[56] *Friends of Animals, Inc. v. United Illuminating Co.*, 6 A.3d 1180 (Conn. 2010).
[57] *Id.*
[58] Conn. Gen. Stat. Ann. § 22a-93(6) ("Public beaches" are "held in public fee ownership by the state, or that portion of the shoreline below the mean high tide elevation that is held in public trust by the state.").
[59] *Leydon v. Town of Greenwich*, 777 A.2d 552 at 564 (concluding that "under the public trust doctrine, members of the public have the right to access the portion of any beach extending from the mean high tide line to the water, although it does not also give a member of the public the right to gain access to that portion of the beach by crossing the beach landward of the mean high tide line").

6.0 Activities Burdened

6.1 Conveyances of property interests

As mentioned above,[60] an adjacent private landowner in Connecticut may alienate riparian rights without alienating the upland property above the mean high water mark. Absent an express grant from the legislature that clearly says otherwise, however, after conveyance the alienated portion remains subject to established public trust rights.[61] Connecticut courts strictly construe grants in derogation of public rights against the grantee,[62] and the threshold for terminating the *jus publicum* in a state trust land is quite high.[63]

6.2 Wetland fills

Connecticut regulates the placement of fill in its navigable waters, which include coastal wetlands.[64] All licenses, certificates, and permits that authorize fills for construction of docks or other structures specify that title to the area being filled is not being transferred, nor is any property right being conveyed in a permit to fill waterward of the high tide line.[65] Connecticut courts have yet to discuss the PTD in relation to inland wetland fills, but a provision in CEPA, the state's statutory PTD, establishes the legislature's intent to protect inland wetlands from destruction by filling and other practices that obstruct water flow.[66]

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[60] *See supra*, § 3.1.
[61] *East Haven v. Hemingway*, 7 Conn. 186, 199 (1828) (explaining that land purchased from the Indians in 1685 gave town of New Haven proprietary interest in all facets of the purchased land except the soil between high and low water mark of the Dragon River, which remained in trust with the state).
[62] *Lovejoy v. City of Norwalk*, 152 A. 210, 215 (Conn. 1930) ("Grants in derogation of the common or public right are to be strictly construed against the grantee. Nothing passes except what is granted specifically or by necessary implication. As the state acts for the public good, we should expect to find the grant consistent with the general welfare of the state at large, and of the particular community to be affected").
[63] *See supra* § 3.1.
[64] Conn. Gen. Stat. Ann. § 22a-32.
[65] *Id.*
[66] Conn. Gen. Stat. Ann. § 22a-36 ("Many inland wetlands and watercourses have been destroyed or are in danger of destruction because of unregulated use by reason of the deposition, filling or removal of material, the diversion or obstruction of water flow, the erection of structures and other uses, all of which have despoiled, polluted and eliminated wetlands and watercourses.").

6.3 Water rights

In Connecticut, the state owns the beds of navigable waters, but riparian owners have the right to make any reasonable use of water relating to their riparian lands so long they don't interfere with the same reasonable use by adjacent riparian owners.[67] The Connecticut state legislature has placed restrictions on the development of public water supplies, so that any person with a riparian right to divert water from a navigable water (a public trust resource) must first obtain a permit from the state Water Resources Commission.[68]

6.4 Wildlife harvests

As previously mentioned,[69] the state of Connecticut claims ownership of wildlife as part of the public trust. An animal welfare organization in Connecticut has used CEPA's statutory right of action to bring PTD-based claims against the state for killing fawn deer in violation of state hunting regulations.[70] The case was a straightforward application of CEPA's power to protect a public trust resource, and the Connecticut Superior Court held that the state's conduct in allowing 53 fawn deer to be killed by hunters and in authorizing the State Department of Environmental Protection to kill one fawn deer was "reasonably likely to unreasonably impair or destroy the public trust in wildlife, a natural resource of the state."[71] The statute that prohibited the killing of fawn deer set the substantive threshold for a CEPA claim of "unreasonable impairment" to wildlife. Because the animal rights group could show that CEPA gave the group standing and was intended to protect wildlife from "unreasonable impairment," and that under

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[67] Robert L. Leonard, *An Economic Evaluation of Connecticut Water Law: Water Rights, Public Water Supply, and Pollution Control*, Connecticut Institute of Water Resources-Special Reports 7 (1970).
[68] *Id.*
[69] *See supra* § 5.6.
[70] *Animal Rights Front v. Rocque*, 1998 WL 203403 (Conn. Super. Ct. Apr. 16, 1998) (Animal rights group brought this action seeking a temporary injunction to restrain Department of Environmental protection from "causing. permitting, participating in or sanctioning actions which ... are likely to result in the killing of fawn deer.").
[71] *Id.* at *1 ("in that the killing of fawn deer is a violation of Conn. Gen. Stat. § 26-86f").

the relevant statute, this "unreasonable impairment" meant killing *any* fawn deer, the group prevailed under CEPA.[72]

7.0 Public Standing

In Connecticut, the right of the public to sue on behalf of the public trust has largely taken shape under CEPA.[73] However, as discussed previously, [74] a state conveyance of trust lands to a private use that negatively affects the public interest is likely actionable under common law alone.

7.1 Common law-based

Because Connecticut courts have long since settled that the public has the right to boat, hunt, fish, and recreate on navigable waters in the state,[75] the public should be able to sue as beneficiaries of the trust if the trustee (the state) misuses or attempt to privatize lands or waters subject to the PTD. For example, the public may have had an opportunity to challenge the "Haddam Land Swap" because the state conserved the area on behalf of the public, the title to the land invoked trust language,[76] and this land was then legislatively "swapped" for a non-riparian land parcel in favor of developing the riparian area. [77]

7.2 Statutory basis

Under the Connecticut Environmental Protection Act ("CEPA"), any member of the public may sue to protect the public trust in air, water, and other natural resources from

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[72] *Id.*
[73] Conn. Gen. Stat. Ann. §§ 22a-16 to 22a-17 (2006).
[74] *See supra* § 3.2 (Haddam Land Swap implications).
[75] *State v. Brennan*, 3 Conn Cir. 413 ("It is settled in Connecticut that the public has the right to boat, hunt, and fish on the navigable waters of the state").
[76] *See supra* note 26 (The land "should be retained in its natural scenic or open condition as park or public open space").
[77] *Id.*

pollution, impairment, or destruction.[78] However, the Connecticut Supreme Court has stated that the "[i]nvocation of [CEPA] is not an open sesame for standing to raise environmental claims with regard to any and all environmental legislation..."[79] Consequently, a member of the public has standing to bring an action under CEPA where "an administrative body does not have jurisdiction to consider the environmental issues raised by the parties. Where the alleged conduct involves a permitting claim, however, there is no standing pursuant to [the statute] to bring the claim directly in the Superior Court and the claim must be resolved under the provisions of the appropriate licensing statutes."[80] When one of these exceptions does not apply, however, all that is required to invoke the jurisdiction of the Connecticut state courts under CEPA is a colorable claim that alleges conduct reasonably likely to impair a state public trust resource.[81]

Additionally, the Connecticut Supreme Court has inferred that the state's other environmental statutes are to be read together with CEPA, and that this combination gives substantive content to the meaning of "unreasonable impairment" through an action.[82] In essence, CEPA is procedural, providing standing for the public to make substantive claims under other environmental statutes.

7.3 Constitutional basis

The Connecticut Constitution does not recognize the public trust doctrine, and therefore provides no right of public standing to enforce the PTD.

8.0 Remedies

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[78] Conn. Gen. Stat. Ann. §§ 22a-16 to 22a-17 (2006).
[79] *City of Waterbury v. Town of Washington*, 800 A.2d at 1128.
[80] *Connecticut Coalition Against Millstone v. Rocque,* 836 A.2d 414 (Conn. 2003) (claims brought were under Conn. Gen. Stat. Ann. § 22a-16).
[81] *Fort Trumbull Conservancy, LLC v. City of New London*, A.2d at 302 (all that is required for standing is "is a colorable claim, by any person [or entity] against any person [or entity], of conduct resulting in harm to one or more of the natural resources of this state...").
[82] *City of Waterbury v. Town of Washington*, 800 A.2d at 1138 (holding, in action against the city for diversion of water from river, that the court is governed in its substantive analysis of "unreasonable impairment" under CEPA by the state's minimum flow statute, which gave meaning to "unreasonable" in the present case).

Remedies for violations of the PTD in Connecticut have included both declaratory and injunctive relief.[83]

8.1 Injunctive relief

The most common remedy for violations of the PTD in Connecticut is declaratory relief, and, if the court finds necessary, injunctive relief against the conduct violating the PTD.[84] Connecticut courts often grant injunctive relief to secure the enjoyment of a statutory or common law right or to prevent immediate damage to a trust resource.[85]

8.2 Damages for injuries to resources

Courts in Connecticut have yet to award damages to the public for injuries to trust resources.

8.3 Defense to takings claims

Connecticut courts have not yet recognized the PTD as a defense to takings claims.

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[83] *Leydon v. Town of Greenwich*, 777 A.2d at 578 (granting declaratory relief that the town association's ordinance excluding non-locals was unenforceable and could have also granted an injunction, had the plaintiff attempted to establish that the unconstitutionality of the ordinance requires the association to grant him access over its property).
[84] *See, e.g.*, Conn. Gen. Stat. Ann. § 22a-16 to 22a-17 (allowing any person to seek declaratory or injunctive relief against another person to protect public trust in air, water and other natural resources).
[85] *See, e.g., Animal Rights Front v. Rocque*, 1998 WL 203403 (granting an injunction against further killing of fawn deer when animal rights group prevailed on a CEPA claim that state agency harmed a public trust resource).

HAWAII

The Public Trust Doctrine in Hawai'i

Nathan Morales

1.0 Origins

The source of the public trust doctrine (PTD) in Hawai'i is as vast and expansive as its application. In 1899, Hawai'i first established the PTD in the territory as a matter of common law, based on United States Supreme Court precedent.[1] Since its initial adoption of the PTD, Hawai'i has continuously expanded the scope of the doctrine through statutes[2] and the constitution.[3] Hawai'i not only enlarged the scope of the PTD, but its purposes as well.[4] Only recently, when the Hawai'ian Department of Health and the governor denied a petition for rulemaking to regulate greenhouse gases based on the air as a trust resource, has Hawai'i given any indication that a limit to its extension of the PTD exists.[5] However, the PTD remains a vibrant doctrine, widely used in protecting natural resources and other rights within Hawai'i.

2.0 The Basis of the Public Trust Doctrine in Hawai'i

Initially, Hawai'i relied primarily on the common law to guide its evolution of the PTD, but the state eventually began to conclude that the doctrine exists in a multitude of state statutes, as well as the constitution. The Hawai'i Supreme Court recognized public

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[1] King v. Oahu Railway & Land Co., 11 Haw. 717, 725 (1899) (citing Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892) as reasoning for establishing the PTD in Hawai'i).

[2] Stop H-3 Ass'n v. State Dept. of Transp., 706 P.2d 446, 451 (Haw. 1985) (holding that HAW. REV. STAT. § 183-41(c)(3) includes trust language); *See* State by Kobayashi v. Zimring, 566 P.2d 725, 737 (Haw. 1977) (holding that the state's Organic and Admission Acts recognized trust responsibilities).

[3] In re Waiola O Molokai, Inc., 83 P.3d 664, 684 (Haw. 2004) (hereinafter referred to as *Molokai*) (holding that the PTD is a state constitutional doctrine); In re Water Use Permit Applications, 9 P.3d 409, 443 (Haw. 2000) (hereinafter referred to as *Waiahole I*) (holding that the PTD is a constitutional mandate).

[4] *Molokai*, 83 P.3d at 694 (a reservation of water constitutes a public trust purpose); *Waiahole I*, 9 P.3d at 449 (Native Hawai'ian and traditional and customary rights are a public trust purpose); *Kobayashi*, 566 P.2d at 737 (including public education, home ownership, and open spaces as public trust purposes); Kuramoto v. Hamada, 30 Haw. 841, 845 (1929) (including recreation as a trust purpose).

[5] *See* Our Children's Trust, *Hawaii: Legal Updates* (Jun. 8, 2011), http://ourchildrenstrust.org/state/hawaii (State of Hawai'i Department of Health and the Governor of Hawai'i denying a petition for rulemaking to regulate greenhouse gases based on the air as a trust resource).

rights beginning in 1899 when it cited the United States Supreme Court cases *Illinois Central R.R. v. Illinois*[6] and *Martin v. Waddell*[7] in *King v. Oahu Railway & Land Co.*[8] After establishing the history of the PTD in the United States, the Hawai'i Supreme Court held that "the people of Hawaii hold the absolute rights to all its navigable waters and the soils under them for their own common use."[9] The court later reaffirmed the origin of the PTD as a common law doctrine in subsequent cases.[10] In addition, the court expanded on the nature of the common law public trust as separate and superior to private property rights, which remain subject to the public right or "*jus publicum.*"[11]

Not only does the common law of Hawai'i provide for PTD authority, the Hawai'ian Constitution establishes it as well. In 2000, the Supreme Court of Hawai'i declared that, "the people of this state have elevated the public trust doctrine to the level of a constitutional mandate,"[12] interpreting Article XI, section 1 of the Hawai'i Constitution, which reads: "For the benefit of present and future generations, the State...shall conserve and protect...all natural resources...of the State. All public natural resources are held in trust by the State for the benefit of the people."[13] In the *Waiahole I* case, the Hawai'i Supreme Court used this constitutional language as the basis of the PTD, quoting this section of the constitution when discussing the history and

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[6] Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892).
[7] Martin v. Waddell, 41 U.S. 367 (1842).
[8] *King*, 11 Haw. at 723-25.
[9] *Id.* at 724.
[10] *Waiahole I*, 9 P.3d at 442 (noting that Hawai'i's public trust doctrine has its genesis in the common law); Bishop v. Mahiko, 35 Haw. 608, 643 (1940) (holding that the shores of the sea and navigable rivers belonged *prima facie* to the king before statehood, but transferred to the state at annexation under common law principles).
[11] Territory v. Kerr, 16 Haw. 363, 368-69 (1905) (holding that an owner of seashore property may enjoy his littoral rights so long as he does not interfere with public rights, and all land grants that include the shore are subject to the *jus publicum*).
[12] *Waiahole I*, 9 P.3d at 443.
[13] HAW. CONST. art. XI § 1.

development of the PTD in Hawai'i.[14] The court reaffirmed existence of the PTD as a state constitutional doctrine in a subsequent case.[15] In *In re Waiola O Molokai, Inc.* ("*Molokai*"), the Hawai'i Supreme Court overruled a decision by the Commission on Water Resource Management granting application for water use permits, based on the constitutional PTD.[16]

In addition to Article XI, Section 1, separate provisions of the state constitution assert public rights as well. Under the constitution, all lands ceded by the federal government at statehood are held by the state "as a public trust for native Hawaiians and the general public."[17] The Constitution also protects traditional native Hawai'ian rights, which the Hawai'ian Supreme Court subsequently held constitute a trust purpose.[18]

After recognizing the common law and constitutional PTD in 1977 the Hawai'i Supreme Court began to recognize a statutory dimension to the doctrine. Also in 1977, *State by Kobayashi v. Zimring*, the court announced that the state's Admission Act vested beneficial ownership of the people of Hawai'i in the state's public lands.[19] As an extension of the public's ownership in land resources, in 1975, in *Stop H-3 Ass'n v. State Dept. of Transp.*, the Supreme Court of Hawai'i interpreted a land use statute to require the state Department of Land and Natural Resources to permit land uses that promoted

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[14] *Waiahole I*, 9 P.3d at 445.
[15] *Molokai*, 83 P.3d at 693 (citing HAW. CONST. art. XI § 1).
[16] *Id.*
[17] HAW. CONST. art. XII § 4.
[18] *See* In re Contested Case Hrg. On Water Use Permit Application Filed by Kukui (Molokai), Inc., 174 P.3d 320, 347 (Haw. 2007) (hereinafter referred to as *Kukui*) (acknowledging the legitimacy of marine life harvesting as a public trust resource); *Waiahole I*, 9 P.3d at 449 (including the exercise of native Hawai'ian and traditional and customary rights as a public trust purpose); Public Access Shoreline Hawaii by Rothstein v. Hawaii County Planning Commission by Fujimoto, 903 P.2d 1246, 1272 (Haw. 1995) (hereinafter referred to as *PASH*) (requiring the state to take native Hawai'ian rights into account when issuing permits); McBryde Sugar Co., Ltd. v. Robinson, 504 P.2d 1330, 1339 (Haw. 1973) (recognizing native water rights for traditional taro farming as being established pre-statehood).
[19] *Kobayashi*, 566 P.2d at 737.

"present and future needs" and "public use and enjoyment."[20] Additionally, the Admission Act establishes that all ceded lands "are held by the State as a public trust for native Hawai'ians and the general public."[21] Arguably, the Admission Act is the source of the PTD in Hawai'i, since it codified the application of the common law of England in Hawai'i.[22]

In addition to the Admission Act, the legislature enacted multiple statutes including public trust language. For example, in the most recent amendment to the Public Access to Coastal and Inland Recreational Areas Act, the legislature "reaffirm[ed] a longstanding public policy of extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible..."[23] The substantive portion of this amendment obligates the state to require private landowners "to ensure that beach transit corridors abutting their lands shall be kept passable and free..."[24] Aside from coastal areas, Hawai'i also included public trust language in its Water Code, stating, "the waters of the State are held for the benefit of the citizens of the State."[25] Wildlife statutes also provide for public protections when the Department of Land and Natural Resources manages "wildlife resources of the State," by allowing the transfer of wildlife to private parties only if "the public interest will not be materially interfered by so doing."[26] All of these cases, statutes, and the constitution illustrate that the basis of the PTD in Hawai'i comes from multiple sources of state law.

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[20] *See Stop H-3*, 706 P.2d at 451 (interpreting HAW. REV. STAT. § 183-41(c)(3) to require state Department of Land and Natural Resources to permit utilizations of public lands only after taking into account "present and future needs" and "public use and enjoyment").
[21] Trustees of Office of Hawaiian Affairs v. Yamasaki, 737 P.2d 446, 451 (Haw. 1987).
[22] HAW. REV. STAT. § 1-1 (1892); *Proceedings of the 2001 Symposium on Managing Hawai'i's Public Trust Doctrine*, 24 U. HAW. L. REV. 21, 40 (2001).
[23] H.B. 1808, 25th Legis. (2010) (enacted).
[24] HAW. REV. STAT. § 115-10 (2010).
[25] *Id.* § 174C-2 (1987).
[26] *Id.* § 183D-2 (1985).

3.0 Institutional Application

Hawai'i's PTD restrains alienation, legislative and administrative actions. Some of these restrictions arise as a result of their historical existence in the common law of Hawai'i, while others exist as a result of the Hawai'i Supreme Court interpreting statutes and the constitution. Hawai'i has insured that the PTD contains both duties and obligations against the state.

3.1 Restraint on Alienation

The major restraint on alienation of Hawai'ian trust lands came about because of the common law basis of the PTD. When Hawai'i became part of the United States, it acquired all pre-statehood property rights, as well as any burdens that ran with the land.[27] One of the pre-statehood property rights included title to the lands below the high water mark, which initially belonged to the King of Hawai'i by the common law and is now held in trust by the state for the public.[28] According to the 1899 Hawai'i Supreme Court in *King*, these submerged lands, and their corresponding waters, are inalienable unless they "subserve the public interest" and "do not substantially impair the public interest."[29]

In addition, in 1848 King Kamehameha III of Hawai'i commissioned the "Great Mahele," consisting of multiple public land conveyances to private parties.[30] The water rights attached to these lands could not be transferred to the grantee because ownership of the watercourses remained in the people of Hawai'i for their common good.[31] Existing lands are not the only resources with conveyance restrictions attached, however. In 1977,

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[27] *Bishop*, 35 Haw. at 643.
[28] *Kerr*, 16 Haw. at 368-69.
[29] *King*, 11 Haw. at 725 (referencing the exceptions established in Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892)).
[30] Omerod v. Heirs of Kaheananui, 172 P.3d 983, 991-93 (Haw. 2007) (providing a history of the Great Mahele).
[31] *McBryde*, 504 P.2d at 1338-39.

the Supreme Court of Hawai'i held that new lands created by lava flows belong "to the benefit of all the people of Hawaii, in whose behalf the government acts as trustee....[u]nder public trust principles, the State as trustee has a duty to protect and maintain the trust property and regulate its use....[s]ale of the property would be permissible only where the sale promotes a valid public purpose."[32] These actions all reflect intent by the state to limit conveyances of public trust resources.

3.2 Limit on Legislature

As a result of the constitutional basis for the PTD in Hawai'i, limits exist concerning how the state legislature may allocate trust resources. The Hawai'i Supreme Court held that the state holds these resources in a sovereign capacity, and the government cannot surrender its sovereign authority.[33] This authority precludes any statutory grant of vested rights to use water to the detriment of public trust purposes.[34] The state also cannot delegate its public trust duties to a private body which, unlike a public body, is not subject to public accountability.[35] In addition, the state may not enact legislation that diminishes or limits the benefits of the PTD.[36] The Hawai'i Supreme Court has, therefore, actively enforced the PTD, making the legislative and executive branches judicially accountable for dispositions of the public trust.[37]

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[32] *Kobayashi*, 566 P.2d at 735.
[33] *Waiahole I* 9 P.3d at 443.
[34] *Id.* at 453.
[35] Ka Pa'akai O Ka'Aina v. Land Use Comm'n, State of Hawaii, 7 P.3d 1068, 1089 (Haw. 2000).
[36] *See generally* Office of Hawaiian Affairs v. State, 31 P.3d 901, 903 (Haw. 2001) (citing various sections of the Hawai'i Constitution to establish that legislative acts must comport with public trust purposes).
[37] *Molokai*, 83 P.3d at 684-85.

3.3 Limit on Administrative Action

Hawai'ian courts have also limited the state in terms of what it may do administratively, by requiring agencies to take a more holistic approach in their decisions. When reviewing administrative decisions, courts take a "close look" at the action to determine if it complies with the PTD.[38] Administrative agencies must use clarity in their reasoning, especially where the agency acts as a public trustee.[39] If enough information is not available at the time of the decision, the Hawai'i Supreme Court has imposed the "precautionary principle," which requires agencies to err on the side of adopting reasonable measures designed to further the public interest.[40] In addition, administrative rules require an agency as a trustee to "act on behalf of the public."[41] These limitations collectively restrict agencies in order to further the public trust doctrine in their decisionmaking.

4.0 Purposes

Hawai'i courts, statutes, and the constitution have recognized both the traditional trust purposes of navigation and fishing, as well as other uses lying outside the traditional scope of the PTD.

4.1 Traditional (Navigation/Fishing)

The Supreme Court of Hawai'i has held that when land grants include shorelands, private ownership below the high water mark is subject to the *jus publicum*, including the

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[38] *Waiahole I*, 9 P.3d at 456 (citing Owsichek v. State, 763 P.2d 488, 494 (Alaska 1988); Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1092 (Idaho 1983); Weden v. San Juan County, 958 P.2d 273, 283 (Wash. 1998)); *Molokai*, 83 P.3d at 685 (citing *Waiahole I*, 9 P.3d at 456)).

[39] In re Water Use Permit Application, 93 P.3d 643, 653 (Haw. 2004) (hereinafter referred to as *Waiahole II*) (citing Save Ourselves, Inc. v. Louisiana Environmental Control Comm'n, 452 So.2d 1152, 1159 (La. 1984)).

[40] *Waiahole I*, 9 P.3d at 467.

[41] *See* HAW. ADMIN. R. § 11-451-17 (1995).

right of public use for purposes of navigation and fishing.[42] When the right of navigation conflicts with that of fishery, the latter is subordinate and the former paramount.[43] The right of navigation includes as a necessary incident the right of anchorage.[44]

4.2 Beyond Traditional

Hawai'i recognizes purposes beyond the traditional PTD that include recreation, ecology, traditional native Hawai'ian rights, and other purposes which promote the public welfare. In Hawai'i, the right of navigation includes the right to travel on waters not only for business purposes, but also in pursuit of pleasure.[45] Although not explicitly within the PTD framework, specific statutes promote recreation, enjoyment, and public ownership of the beaches.[46]

The Hawai'i Supreme Court declared that the state has a duty to maintain the ecological purposes of purity and flow of waters for future generations, and to assure that the waters are put to reasonable and beneficial uses.[47] The court has recognized resource protection as an important underlying purpose of the PTD.[48] Moreover, a reservation of water, in itself, constitutes a public trust purpose.[49]

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[42] *Kerr*, 16 Haw. at 369.
[43] *Kuramoto*, 30 Haw. at 843.
[44] *Id.*
[45] *Id.* at 845.
[46] Maunalua Bay Ohana 28 v. State, 222 P.3d 441, 447 & 454 (Haw. App. 2009) (public policy favors extending public use and ownership of Hawai'i's shoreline; protection of public enjoyment of the beaches is a statutory purpose) (citing H. Stand. Comm. Rep. No. 346, in 1985 House Journal, at 1142; S. Stand. Comm. Rep. No. 790, in 1985 Senate Journal at 1223; S. Stand. Comm. Rep. No. 899, in 1985 Senate Journal, at 1291); *Morgan*, 86 P.3d 982 at 991 (objectives of CZMA include providing public recreational opportunities in coastal zone management areas).
[47] Robinson v. Ariyoshi, 658 P.2d 287, 310-11 (Haw. 1982).
[48] *Waiahole I*, 9 P.3d at 448-49.
[49] *Molokai*, 83 P.3d at 694 ("Our analysis in *Waiahole*, however, begs the question whether a reservation of water constitutes a public trust purpose...We answer the foregoing in the affirmative and hold that, pursuant to article XI, section 1 and 7 of the Hawai'i Constitution, HHCA § 220(d), and HRS § 174C-101(a), a reservation of water constitutes a public trust purpose.").

In addition to recreation and ecology, Hawai'i has recognized a myriad of other public trust purposes. For example, the scope of Hawai'i's PTD includes water rights for traditional taro farming.[50] In fact, the Hawai'i Supreme Court has consistently upheld the exercise of native Hawai'ian traditional and customary rights as a public trust purpose.[51] In addition to the PTD purposes mentioned above, the state recognizes support of public schools and other public institutions, betterment of the conditions of native Hawai'ians, development of farm and home ownership, making of public improvements, and regulating public lands as purposes of the PTD.[52]

5.0 Geographic Scope of Applicability

As in other areas of the PTD in Hawai'i, its geographic scope is vast and expansive, extending to virtually all natural resources. Also, like the basis and purpose, Hawai'i's geographic scope of applicability for the PTD lies in the common law, statutes, and constitution. These three sources allow the state flexibility in affording maximum protection under the doctrine.

5.1 Tidal

The original scope of the public trust doctrine in the United States was limited to lands covered by tidewaters, a result of pre-statehood rights held by the monarchy.[53] At common law, shores of the sea and tidal rivers belonged to the king; these same lands transferred to the state upon joining the Union.[54]

In 1905, the Hawai'i Supreme Court further defined state ownership in tidal lands by determining that private ownership of tidelands is subject to a usufructuary right of the

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[50] *McBryde*, 504 P.2d at 1339.
[51] *Waiahole I*, 9 P.3d at 448-49; *PASH*, 903 P.2d at 1272.
[52] *Kobayashi*, 566 P.2d at 737.
[53] Illinois Central R.R. v. Illinois, 146 U.S. 387, 435 (1892).
[54] *Bishop*, 35 Haw. at 643.

public, with the boundary of public rights at the high water mark.[55] The precise location of the high water mark, however, is dynamic and may be altered by erosion.[56] Private beachfront titles extend only to the upper reaches of the wash of waves during high tide of the winter season.[57]

5.2 Navigable-in-Fact

In addition to tidal waters, Hawai'i has extended the scope of the PTD to include waters that are navigable-in-fact. The Supreme Court of Hawai'i held, in 1929, that all navigable waters are public highways.[58]

5.3 Recreational Waters

When Hawai'i concluded that all navigable waters are within the geographic scope of the PTD, it included waters navigated by rowboats and other small recreational craft.[59]

5.4 Wetlands

Although Hawai'i has not explicitly included wetlands under the PTD, it has established that the PTD is applicable to "all water resources" of the state.[60] In *Waiahole I*, the Hawai'i Supreme Court specifically rejected a definition of "waters" based on "artificial surface-ground distinctions."[61] As a result of such a broad definition of "waters," and the Hawai'i Supreme Court's willingness to expand the state's water resources trust, it is likely likely that wetlands are within the scope of the state's PTD.

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[55] *Kerr*, 16 Haw. at 369.
[56] Hawaii County v. Sotomura, 517 P.2d 57, 60 (Haw. 1973).
[57] Application of Sanborn, 562 P.2d 771, 773 (Haw. 1977).
[58] *Kuramoto*, 30 Haw. at 845.
[59] *Id.*
[60] *Waiahole I*, 9 P.3d at 447.
[61] *Id.* at 485.

5.5 Groundwater

One of the more significant expansions of the PTD in Hawai'i is the inclusion of groundwater within the geographic scope. In 2000, the Hawai'i Supreme Court held that the public trust doctrine applies to all water resources without exception or distinction.[62] The water resources trust includes, surface water, groundwater, and all other waters.[63]

5.6 Wildlife

Although the Hawai'i has not explicitly determined that the PTD extends to wildlife, it can be inferred from the constitution, statute, and court opinion. The Hawai'i Constitution states that the state "shall conserve and protect Hawaii's natural beauty."[64] When the legislature established the Department of Land and Natural Resources, the enabling statute included language requiring the agency to "manage and administer...aquatic life...[and] wildlife."[65] In *Waiahole II*, the court acknowledged the gathering of marine life as a customary native Hawai'ian right.[66] The constitution, the wildlife statute, and the *Waiahole II* opinion indicate that the state may, in the future, expressly include wildlife within the geographic scope of the PTD.

5.7 Uplands (Beaches, Parks, Highways)

The extension of the PTD in Hawai'i to uplands begins at the shoreline and extends inland to all state public lands.[67] Beach lands accreted after May 20, 2003 are included in the statutory definition of public lands.[68] Under the Public Access to Coastal

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[62] *Waiahole I*, 9 P.3d at 445 & 447.
[63] *Id.*
[64] HAW. CONST. art. XI § 1.
[65] HAW. REV. STAT. § 171-3 (1962).
[66] *Waiahole II*, 93 P.3d at 347.
[67] HAW. REV. STAT. § 171-2 (1962) (defines "public lands" as "all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date...").
[68] *Id.* ("...including lands accreted after May 20, 2003...").

and Inland Recreational Areas Act, the state must prevent private landowners from blocking beach access as a result of the state's policy of "extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible...."[69] In addition to beach lands, the Department of Land and Natural Resources has regulatory authority only to permit land uses not detrimental to the conservation and preservation of necessary forest growth and open spaces for public use.[70] Finally, the state must impose appropriate regulations to govern the exercise of native Hawai'ian rights in conjunction with permits issued for the development of land.[71] These rights may extend beyond the land in which a native Hawai'ian resides, where such rights have been customarily and traditionally exercised in this manner.[72] In *Pele Defense Fund v. Paty*, the Hawai'i Supreme Court upheld the rights of native Hawai'ians to enter undeveloped lands owned by others to practice customary and traditional rights, so long as the practice did not result in actual harm to the property.[73]

6.0 Activities Burdened

As a result of the wide geographic scope of the PTD in Hawai'i, the doctrine also affects a number of different activities within these areas. Specifically, the PTD burdens land and water rights, and probably constricts wetland fills and wildlife harvests.

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[69] HAW. REV. STAT. § 115-10 (2010); H.B. 1808, 25th Legis. (2010) (enacted) ("The purpose of this Act is to reaffirm a longstanding public policy of extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible by ensuring the public's lateral access along the shoreline, by requiring the removal of the landowners' induced or cultivated vegetation that interferes or encroaches seaward of the shoreline."); Hawaii County v. Sotomura, 517 P.2d 57, 61 (Haw. 1973) ("Public policy, as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible.")

[70] *Stop H-3*, 706 P.2d 446 at 451.

[71] *PASH*, 903 P.2d at 1271.

[72] Pele Defense Fund v. Paty, 837 P.2d 1247, 1272 (Haw. 1992).

[73] *Id.* at 1271.

6.1 Property Interests

The main property interest affected by the PTD in Hawai'i is a landowner's right to exclude. In the *Public Access Shoreline Hawaii by Rothstein v. Hawai'i County Planning Comm'n by Fujimoto* ("*PASH*"), the Supreme Court of Hawai'i recognized that, as a result of its inclusion of native Hawai'ian customary rights in the PTD, the western concept of exclusivity in property is not universally applicable in Hawai'i.[74] As a result, the *PASH* court held that private property owners could not exclude an individual from exercising customary native Hawai'ian rights.[75]

6.2 Wetland Fills

Although the state of Hawai'i has not specifically addressed whether the PTD burdens wetland fills, evidence suggests they would be. For example, in *Morgan v. Planning Dept., County of Kauai*, the Hawai'ian Supreme Court determined that land development in coastal areas could not lawfully occur without the issuance of a permit from the state.[76] State agencies charged with issuing permits must take any applicable PTD factors into account prior to the issuance of a permit.[77] Wetland fills require a state permit because development includes "[g]rading, removing, dredging, mining, or extraction of any materials."[78] As a result of the permit requirement, the PTD would likely burden these activities.

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[74] *PASH*, 903 P.2d at 1268 (the court felt that "[a]lthough this premise clearly conflicts with common 'understandings of property' and could theoretically lead to disruption...the non-confrontational aspects of traditional Hawaiian culture should minimize potential disturbances.").
[75] *Id.* at 1271.
[76] *Morgan*, 86 P.3d at 989-91.
[77] *See Id.*; *Waiahole II*, 93 P.3d at 653.
[78] HAW. REV. STAT. § 205A-22 (1975).

6.3 Water Rights

To ensure protection of its water sources, Hawai'i has interpreted the PTD to impose burdens on water rights. The PTD in Hawai'i includes a public right to ownership of water, specifically reserved for the people of Hawai'i for their common good.[79] This public ownership right places explicit encumbrances on private rights holders. First, private water rights are inferior to any legitimate customary native Hawai'ian right—for example, taro farming.[80] In *Waiahole I*, the Supreme Court of Hawai'i held that state authority over water resources precludes any grant or assertion of vested rights to use water to the detriment of any public trust purpose.[81] Grants of water rights to entities for private commercial uses require an even higher level of scrutiny by the approving agency.[82]

Following concerns over protection of the state's water resources, the legislature ultimately decided to incorporate the public trust doctrine and all of its restrictions wholesale in the state's Water Code.[83] The Water Code's declaration of policy states specifically that "[i]t is recognized that the waters of the State are held for the benefit of the citizens of the State. It is declared that the people of the State are beneficiaries and have a right to have the waters protected for their use."[84] Water rights, therefore, are burdened not only by common law PTD restrictions, but by state statute as well.

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[79] *McBryde*, 504 P.2d at 1338.
[80] *Id.* at 1339-40.
[81] *Waiahole I*, 9 P.3d at 453.
[82] *Molokai*, 83 P.3d at 692.
[83] *Waiahole II*, 93 P.3d at 329.
[84] HAW. REV. STAT. § 174C-2 (1987).

6.4 Wildlife Harvests

Although regulated by the state, wildlife harvests are not clearly burdened by the PTD because neither courts nor the legislature have ever specifically ruled on this issue. *In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc.* ("*Kukui*") suggests that certain harvests might be protected under the public trust doctrine, however.[85] In *Kukui*, the Hawai'i Supreme Court addressed native subsistence gathering of marine resources—including crab, fish, and octopus.[86] The court acknowledged that customary native Hawai'ian rights protected by the PTD include the "subsistence activities" of harvesting marine resources on Moloka'i, and that a severe reduction in marine life due to decreased water levels could diminish the ability to practice these "traditional customary native Hawaiian gathering rights."[87] In *Waiahole I*, the Hawai'i Supreme Court declared that the water resources trust PTD is superior to any other granted or claimed vested water right.[88] Following the reasoning cited in support of this proposition, the court would likely extend this reasoning and apply it to marine wildlife harvest permits as well.[89]

7.0 Public Standing

Although relying on state agencies to provide the main enforcement mechanism for the PTD, Hawai'i also recognizes the need to provide additional remedies in order to ensure adequate protection. The state allows citizens to enforce the PTD. By recognizing

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[85] *Kukui*, 174 P.3d at 347.
[86] *Id.*
[87] *Id.*
[88] *Waiahole I*, 9 P.3d at 453 (citing National Audubon Socy. v. Super. Ct., 658 P.2d 709, 727 (Cal. 1983); *Robinson*, 658 P.2d at 310; *Kootenai*, 671 P.2d at 1094 ("[T]he public trust doctrine takes precedent even over vested water rights."); Karam v. State Dept. of Envtl. Protec., 705 A.2d 1221, 1228 (N.J. Super. App. Div. 1998) ("[T]he sovereign never waives its right to regulate the use of public trust property.")).
[89] *Id.* (specifically the reasoning from *Karam*).

public standing for the PTD through common law, statute, and the constitution, Hawai'i ensures that all voices are heard.

7.1 Common-Law Based

Originally, Hawai'i treated violations of the public trust as equivalent to a public nuisance, and limited public standing to those who could prove "special injury."[90] Eventually, however, the Hawai'i Supreme Court broadened this requirement, determining that a member of the public has standing to enforce the rights of the public even though the alleged injury is not different in kind from the public's, so long as an individual can show injury in fact to a recognized interest.[91] Specific interests recognized by the court that warrant the lowering of standing barriers include environmental concerns (including aesthetic, recreational, or conservational interests) and native Hawai'ian rights.[92] Both of these interests are public trust purposes, and therefore the public has standing to sue under the PTD, especially because the legislature cannot statutorily preclude standing based on the public trust.[93] In addition, Hawai'ian courts allow private citizens to sue the state on PTD grounds, so long as the plaintiff establishes the prospective nature of the remedy.[94]

7.2 Statutory Basis

Although no statute authorizes the public to enforce the PTD, the Hawai'i Administrative Procedure Act allows citizen suits to challenge agency actions that

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[90] *Kerr*, 16 Haw. at 371.
[91] *See* Bush v. Watson, 918 P.2d 1130, 1135 (Haw. 1996) (holding that standing barriers should be lowered in cases of public interest); Akau v. Olohana Corp., 652 P.2d 1130, 1134-35 (Haw. 1982).
[92] Motti v. Miyahira, 23 P.3d 716, 728 (Haw. 2001).
[93] *See Akau*, 652 P.2d at 1135 (acknowledging that "the legislature may limit standing to sue despite an injury-in-fact where plaintiff asserts rights that arise from a statute," determining that "plaintiffs are not claiming any rights under a violation of that statute, [since] their alleged rights are based on custom, necessity, public trust, and other non-statutory rights," and therefore the legislature could not statutorily limit standing.).
[94] *Pele*, 837 P.2d at 1268-69.

"adversely affect" the rights of individuals.[95] This statute states, "any person aggrieved by a final decision and order...or by a preliminary ruling...is entitled to judicial review."[96] The Hawai'ian courts review agency decisions to determine, among other things, whether they are "[i]n violation of constitutional or statutory provisions; or...[i]n excess of the statutory authority or jurisdiction of the agency."[97] Since the PTD has its basis in both constitutional and statutory law, aggrieved parties may challenge PTD violations by an agency under the state's APA.

7.3 Constitutional Basis

In addition to common-law and statutory bases for public standing to enforce the PTD, Hawai'i also provides for a cause of action in its constitution. Regarding environmental rights, the constitution specifically states that "[a]ny person may enforce this right against any party, public or private, through appropriate legal proceedings..."[98] The Hawai'i Supreme Court has also ruled that constitutional due process requires a contested hearing in water permit decisions, subject to judicial review.[99] And the court has held that public trust provisions in the state constitution impose duties on state officials. Thus, citizens have standing to bring suit, enjoining public officials from violating constitutional provisions.[100]

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[95] HAW. ADMIN. R. § 16-201-2 (1981).
[96] HAW. REV. STAT. § 91-14 (1961).
[97] *Id.*
[98] HAW. CONST. art. XI, § 9.
[99] In re Iao Ground Water Management Area High Level Source Water Use Permit Applications, 2012 WL 3535294, 10 and 15 (2012) (holding that because of the individual instream and offstream rights, duties, and privileges at stake, constitutional due process requires a contested hearing for all water permit decisions).
[100] *Pele*, 837 P.2d at 1264 ("We find that the actions of state officials, acting in their official capacities, should not be invulnerable to constitutional scrutiny. Article XII, § 4 imposes a fiduciary duty on Hawaii's officials to hold ceded lands in accordance with the § 5(f) trust provisions, and the citizens of the state must have a means to mandate compliance...Thus we hold that PDF, whose members are beneficiaries of the trust, may bring suit for the limited purpose of enjoining state officials' breach of trust by disposal of trust assets in violation of the Hawaii constitutional and statutory provisions...").

8.0 Remedies

Many PTD enforcement issues come up in the context of state action. In order to ensure the efficacy of the PTD, Hawai'i has recognized remedies which may not be available otherwise. The available remedies include injunctive relief, damages for injuries to resources, and defense to takings claims.

8.1 Injunctive Relief

To prevent damage to trust resources by private parties, Hawai'i has provided for injunctive relief by promulgating administrative regulations. Hawai'i's regulations governing land and natural resources acknowledge the "right of any injured person to seek...equitable relief against...any person who violates any provision..."[101] In addition, a party may seek injunctive relief against the state if the state fails to prove that injunction will substantially affect the treasury.[102] In citizen suits against the state, if the relief requested by a party is prospective in nature, courts may award injunction against the state if a citizen can establish that the result "is likely to remedy" future injury.[103]

8.2 Damages for Injuries to Resources

Like injunctive relief, state administrative rules provide for damages for injuries to resources. The state specifies factors for agencies to consider when determining an administrative sanction, including "value of the resource that is damaged...costs for the state to remedy any damage...level of damage to the public for whom the state holds a public trust of the resource."[104] In addition, administrative rules describe duties and responsibilities of the state as the natural resource trustee. When the state is notified (by

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[101] HAW. ADMIN. R. § 13-167-10 (1988).
[102] Office of Hawaiian Affairs v. State, 133 P.3d 767, 786 (Haw. 2006).
[103] *Id.*
[104] HAW. ADMIN. R. § 13-1-70 (2009).

private citizen or otherwise) of a PTD violation the appropriate agency "shall act on behalf of the public to...recover damages [and]...shall request that the attorney general seek compensation..."[105] Although citizens themselves cannot claim damages to resources as a remedy, the state "shall" pursue compensation in a separate action once the damage is discovered.[106]

8.3 Defense to Takings Claims

In order to defeat a takings claim, the state must be able to identify "background principles" of state law that prohibit the intended use.[107] Since the Hawai'ian PTD existed at statehood by the adoption of the common law in the Admission Act, the bundle of rights belonging to private property owners in Hawai'i never included rights retained by the *jus publicum*.[108] As a result of the common law and constitutional basis of the PTD, the doctrine exists as a background principle of Hawai'i state law. In fact, the Hawai'i Court of Appeals has explicitly stated that the state need not compensate for denying landowners rights to accretions of trust properties.[109]

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[105] HAW. ADMIN. R. § 11-451-17 (1995).
[106] *Id.*
[107] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031 (1992).
[108] *Waiahole I*, 9 P.3d at 494.
[109] *Maunalua*, 222 P.3d at 449 (holding that because the state cannot relinquish title to land below the high water mark, the state need not pay compensation for a statute declaring that owners of oceanfront tracts could no longer claim title to accreted lands unless the accretion restored previously eroded land).

IDAHO

The Public Trust Doctrine in Idaho

Ellie Dawson

1.0 Origins

The Public Trust Doctrine ("PTD") in Idaho seems to have two distinct iterations: first, a slowly-expanding mechanism that the Idaho courts recognize as important for the protection of state resources;[1] second, a legislative codification of the bare minimum of the traditional purposes of the doctrine, limited to the beds of navigable waters under the federal test of navigability.[2] The first iteration was a product of cases dating almost as far back as Idaho's statehood in 1890[3] through as recently as 1995.[4] These decisions recognized increasing purposes to which the PTD could be put[5] and expanded the geographic bounds of its applicability.[6] The second and more recent iteration, however, reflects a legislative attempt to return the PTD to its historic roots,[7] and may serve to severely curtail future actions seeking to invoke the PTD to protect those resources Idaho courts had once considered part of the public trust.

2.0 The Basis of the Public Trust Doctrine in Idaho

The Idaho PTD relies primarily on case law for its articulation and evolution, but may also be found in legislative acts and, if interpreted broadly, the state constitution. The Idaho constitution does not have any provisions explicitly recognizing the PTD, but in announcing that

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[1] *See, e.g.*, Walbridge v. Robinson, 125 P. 812, 814 (Idaho 1912) (indicating that the state may hold in its sovereign capacity all resources not suited to private appropriation, including light and air); Selkirk-Priest Basin Ass'n v. State *ex rel.* Andrus, 899.P.2d 949, 954–55 (Idaho 1995) (recognizing that, even if not public trust lands themselves, if the alienation of state land could adversely affect trust resources, private citizens have standing to challenge the sale under the PTD).

[2] IDAHO CODE ANN. §§ 58-1201–58-1203 (2010).

[3] *See infra* note 16 and accompanying text.

[4] *See infra* note 10 and accompanying text.

[5] *See infra* § 4.

[6] *See infra* § 5.

[7] *See* IDAHO CODE ANN. §§ 58-1201–58-1203.

all water appropriations are "declared to be a public use" and subject to regulation by the state,[8] the constitution implicitly recognizes the public nature of the resource, if not the state's trust responsibilities over it. However, judicial interpretation of the provisions indicate that, while the PTD may have been a basis for challenging the state's allocations of water rights after allocations were made (until explicitly rejected by statute[9]), the PTD is not an independent factor to consider in making the allocations.[10]

Another constitutional provision creates a state board of land commissioners that controls state lands,[11] and also provides that any lands granted from Congress are to be held "in trust,"[12] but simultaneously allows the board to dispose of such lands, subject to limited restrictions.[13] The Idaho Supreme Court has applied this constitutional provision to the beds of navigable waters, recognizing the state land board's jurisdiction over those lands as well.[14] As described below, however,[15] recent legislation may operate to negate the application of the PTD to these provisions. The Idaho constitution thus seems a tenuous basis on which to assert PTD claims for the protection of trust resources.

The Idaho Supreme Court recognized public rights in navigable waters as early as 1904, fourteen years into Idaho's statehood.[16] More recently, the Supreme Court clarified the state's modern PTD jurisprudence in *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club,*

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[8] IDAHO CONST. art. XV, §§ 1, 3.
[9] *See infra* notes 31–39 and accompanying text.
[10] Idaho Conservation League v. State, 911 P.2d 748, 750 (Idaho 1995) (deciding that although water rights "are held subject to the public trust," the PTD "is not an element of a water right used to determine the priority of that right").
[11] IDAHO CONST. art. IX, § 7.
[12] *Id.* § 8.
[13] *Id.*
[14] Ritter v. Standal, 566 P.2d 769, 772 (Idaho 1977) (upholding riparian rights against the owner of a fish farm whose construction was blocking access to an estuary).
[15] *See infra* note 31 and accompanying text.
[16] Small v. Harrington, 79 P. 461, 464–65 (Idaho 1904) (recognizing the right of a private citizen to maintain an action for nuisance for the obstruction of a navigable stream).

Inc.,[17] a case concerning a proposed yacht club on Lake Coeur D'Alene. In that case, the court surveyed the PTD as it has evolved in Massachusetts, Wisconsin, and California, to articulate its own interpretation of the doctrine for Idaho.[18] In a sweeping statement, the court stated that "the public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources."[19] Over time, the Idaho courts have recognized that the PTD may apply to recreational waters, wildlife, and water appropriations.[20]

The Idaho Supreme Court has also stated that the Idaho PTD is based on equitable common law principles.[21] For example, because of its roots in equity, determinations of the applicability of the PTD to lands that were once submerged but are no longer requires a case-by-case examination of the particular facts of the land in question, for example, whether the loss of navigability was the result of natural or manmade events.[22]

Additionally, Idaho courts recognize custom, a doctrine somewhat analogous to the PTD, as a way to obtain public rights of access, because of the state's adherence to English common law where not already abrogated by constitution or statute.[23] To obtain rights in land through custom users must show uninterrupted use dating from time immemorial, a requirement the Idaho Supreme Court interprets strictly.[24] For example, where citizens sought to use custom to establish public rights in privately owned land by showing that public use had been proven as early as 1912, the court reasoned such length of time insufficient to qualify as from "time

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[17] 671 P.2d 1085 (Idaho 1983).
[18] *Id. See also infra* § 3.2.
[19] *Kootenai*, 671 P.2d at 1095.
[20] *See infra* §§ 4.2, 5.3, 5.6.
[21] Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist., 733 P.2d 733, 738 (Idaho 1987) (ruling that summary judgment was improper because material issues of fact existed with respect to the public trust status of the land in question).
[22] *Id.*
[23] State *ex rel.* Haman v. Fox, 594 P.2d 1093, 1101 (Idaho 1979) (citing Idaho Code Ann. § 73-116) (denying citizens' claim of a right to use private land by striking down arguments of prescription, dedication, custom, and the public trust doctrine).
[24] *Id.*

immemorial."[25] Additionally, the argument that the use was uninterrupted failed because the landowners had previously removed people from their land.[26] Should citizens be successful in showing that custom renders lands public, the lands could potentially become subject to the PTD.

The Idaho Code contains several provisions that tacitly recognize the state's responsibilities with respect to its resources, either by providing public access to the resources[27] or regulating and constraining the allocation and disposition of the resources.[28] Even before statehood, the Idaho Territorial Legislature passed laws regulating the takings of wild game, an early expression of potential trust responsibilities.[29] Although Idaho courts were increasingly likely to decide that these resources comprised part of the corpus of the public trust,[30] recent legislation calls into question whether these laws relate to the Idaho PTD.

Recently, the Idaho legislature attempted to codify a limited PTD, seeking to clarify and, essentially, overrule prior judicial decisions expanding the scope of the PTD. In the statutory title governing public lands, the legislature enacted a chapter entitled "The Public Trust Doctrine,"[31] under which the legislature affirmed the state's title to the beds of navigable waters pursuant to the PTD.[32] However, the purpose of the legislation was not to expand the PTD but to react to what the legislature considered to be "confusion in the administration and management of the waters and endowment lands."[33] In so doing, it explicitly confined application of the PTD to "the power of the state to alienate or encumber the title to the beds of navigable waters," not to any

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[25] *Id.*
[26] *Id.*
[27] *See, e.g.*, IDAHO CODE ANN. tit. 42, ch. 11 (2010) (governing rights of way over land to access water); *id.* tit. 58, ch. 13 (regulating encroachments on navigable lakes).
[28] *See, e.g., id.* tit. 36 (regulating the taking of wild fish and game and creating wildlife preserves; *id.* tit. 38, ch. 1 (stating Idaho's forest policy); *id.* tit. 42, ch. 1 (stating general provisions regarding the appropriations of water).
[29] Lisa Lombardi, Comment, *The Public Trust Doctrine in Idaho*, 33 IDAHO L. REV. 231, 239 (1996) (citing "An Act relating to Wild Game," Laws of the Territory of Idaho, 1st Sess. (1864)).
[30] *See, e.g., infra* §§ 5.6, 5.7, 6.4.
[31] IDAHO CODE ANN. §§ 58-1201–1203.
[32] *Id.* § 58-1201.
[33] *Id.*

other trust lands or water rights.[34] Several scholars have criticized this legislation as either a reaction to a nonexistent threat,[35] a law that impermissibly abdicates the state's trust duties,[36] or even an unconstitutional attempt to relinquish responsibility of lands protected by a federal public trust.[37] To date, however, no Idaho court has opined on its validity, and few cases since then even mention the "public trust doctrine" in so many words. The Idaho Department of Lands, meanwhile, has defined public trust doctrine to mean "[t]he duty of the State to its people to ensure that the use of public trust resources is consistent with identified public trust values."[38] While acknowledging the legislature's codification of the PTD in statute,[39] this language leaves sufficient room to apply more broadly should statute or case law change.

Finding cases decided subsequent to this enactment that recognize an embodiment of trust principles in resources in addition to those enumerated in the statute requires looking beyond the phrase "public trust doctrine" to more subtle references to the state's responsibility to protect its resources for the public. Thus, it may be that two distinct PTDs exist in Idaho: a pre-1997 PTD in which the courts were incrementally expanding the doctrine to explicitly encompass more resources, and a post-1997 PTD in which courts must rely on other statutes and common law doctrines to recognize and apply trust principles.

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[34] *Id.* § 58-1203.
[35] Scott W. Reed, *Keeping Idaho Brown*, THE ADVOCATE (IDAHO), June 1997, 26, at 27 (arguing that the legislation was unnecessary because the PTD was already rarely invoked and posed no real threat to the extractive lobbies).
[36] Michael C. Blumm, Harrison C. Dunning, & Scott W. Reed, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 ECOLOGY L.Q. 461, 487, 499–500 (1997) (arguing that the statute relinquished state responsibilities toward trust resources established both in the state constitution and through judicial decisions). Interesting to note, though, is that a former Idaho Supreme Court Justice, Robert Bakes, penned the first version of the law. James M. Kearney, Recent Statute, *Closing the Floodgates? Idaho's Statutory Limitation on the Public Trust Doctrine*, 34 IDAHO L. REV. 91, 94 (1997) (concluding that the legislature was acting beyond its powers). This same justice had earlier upheld the idea of expanding the PTD to include new uses for water and to include increasing recreational usage. Blumm et al., *supra*, at 468.
[37] Blumm et al., *supra* note 36, at 491–92; Kearney, *supra* note 36, at 114.
[38] IDAHO ADMIN. CODE r. 20.03.04.010 (2009).
[39] *Id.*

3.0 Institutional Application

Although the Idaho Supreme Court has explained how it will analyze any conveyances of or actions concerning public trust resources, in practice Idaho courts have sanctioned most state decisions concerning the PTD.[40] However, given the legislature's recent attempt to limit the resources to which the PTD applies,[41] state actions with respect to resources other than the beds of navigable waters may not face such scrutiny in the future.

3.1 Restraint on Alienation of Private Conveyances

The only limitation the Idaho PTD imposes on private conveyances is that conveyances of trust land to a private entity from the state remain subject to the trust once conveyed.[42] Thus, although the legislature may grant land to a private party to construct an aid of navigation, if the legislature subsequently determines the trust requires rescission of the grant, the legislature may act to do so.[43]

3.2 Limit on the Legislature

As described above,[44] the Idaho Supreme Court in its 1993 *Kootenai* decision began to articulate a modern PTD. There, the court described how it would analyze conveyances of trust lands, espousing a two-part test emanating from *Illinois Central Railroad Co. v. Illinois*:[45] 1) whether the grant would be in aid of trust purposes like navigation and commerce, and 2) whether the conveyance would substantially impair the public's rights in the lands.[46] The court also took a page from Wisconsin PTD jurisprudence concerning the relevant factors to weigh in applying the two-part test, including 1) the effect of the proposal on traditional trust purposes, 2)

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[40] *See infra* § 3.2.
[41] *See supra* notes 31–34 and accompanying text.
[42] Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1094 (Idaho 1983).
[43] *Id.*
[44] *See supra* § 2.0.
[45] 146 U.S. 387 (1892).
[46] *Kootenai*, 671 P.2d at 1089.

the extent to which an individual project affects the resource both on its own and in conjunction with any existing effects, and 3) the degree to which private interests may be favored over public interests, among others.[47] The court also agreed with California's PTD jurisprudence that, once subject to the PTD, lands retain that character even when conveyed, such that a subsequent legislature could decide to invalidate a prior grant.[48] The court decided that requiring express legislative grants of trust land would be too onerous a burden for the legislature; however, it also decided that the public must be informed of any proposed alienation and have an opportunity to comment.[49] Nevertheless, the court proceeded to uphold a grant to a private yacht club, agreeing with the Department of Lands' decision that the grant would not have an adverse effect on the navigable lake.[50]

3.3 Limit on Administrative Action

Under the Idaho Administrative Procedure Act,[51] a court can reverse an agency decision if it violates the state constitution or statutes, is in excess of statutory authority, if it was not taken pursuant to the proper legal procedure, if it was not supported by substantial and competent evidence on record, or if it was arbitrary and capricious.[52] The PTD provides grounds for agencies to grant or deny permits, and citizens may challenge such decisions under this law.[53] With respect to water, the Department of Water Resources, which handles the permitting of water rights appropriations, has the duty to protect the public interest when making permitting

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[47] *Id.* at 1092–93.
[48] *Id.* at 1094.
[49] *Id.* at 1091.
[50] *Id.* at 1096.
[51] IDAHO CODE ANN. §§ 67-5201–67-5292 (2010).
[52] Dupont v. State Bd. of Land Comm'rs, 7 P.3d 1095, 1098 (Idaho 2000) (affirming the revocation of a dock permit based on evidence that it would violate the PTD as well as other applicable laws).
[53] *Id.* at 1100–01.

decisions.[54] Although the "public interest" includes more considerations than the traditional PTD, it is in some respects analogous.

The Idaho Board of Land Commissioners, another agency responsible for trust resources, has wide discretion to deny or grant permits for the use or alienation of trust resources, and the Idaho Supreme Court will uphold Land Commission decisions unless they are not based on substantial evidence,[55] even if it ultimately disagrees with the decision.[56] Indeed, instead of espousing a "hard look" doctrine whereby a court will carefully scrutinize the evidence administrative agencies use in making their decisions, in Idaho agency decisions receive a "strong presumption of validity."[57] However, the Idaho Supreme Court may remand for further factual findings when an agency imposes restrictions on a permit without the requisite evidentiary support.[58] Additionally, it will more closely scrutinize non-legislative actions affecting trust lands than legislative actions.[59]

Idaho administrative agencies also impose their own requirements regarding the permitting of structures in the beds of navigable waters. For example, the Department of Lands declares that it will consider "public trust values" when determining the proper size of a community dock, and whether to allow any filling, demolition activities, or any other encroachments.[60] Also, notwithstanding legislative action to remove water rights from the

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[54] Shokal v. Dunn, 707 P.2d 441, 448 (Idaho 1985) (remanding for a hearing to comply with procedural requirements but upholding the Director's substantive decisions regarding the granting of a water use permit).
[55] *Dupont*, 7 P.3d at 1100.
[56] *Id.* at 1101.
[57] Cowan v. Bd. of Comm'rs of Fremont County, 148 P.3d 1247, 1254 (Idaho 2006) (recognizing the adjoining landowners' standing to sue for the improper issuance of a development permit but upholding the commission's issuance of that permit as based on sufficient evidence).
[58] Hardy v. Higginson, 849 P.2d 946, 953 (Idaho 1993) (affirming the lower court's decision that the director of the Department of Water Resources could take into account the public interest when making a decision regarding a water permit amendment, but remanding for further factual findings as to the necessity of the restrictions).
[59] Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1091 (Idaho 1983).
[60] IDAHO ADMIN. CODE r. 20.03.04.015, .020, .030 (2009).

coverage of the PTD, the Idaho Department of Water Resources still refers to certain waters as being "held in trust by the state."[61]

4.0 Purposes

Idaho courts have recognized both the traditional purposes the PTD encompasses[62] as well as expanding uses of trust resources such as recreation and aesthetic beauty.[63] Although, as previously described,[64] recent legislation limited the application of the PTD to solely the beds of navigable waters, the Idaho Supreme Court has subsequently affirmed the purposes for which the state must preserve them for the public.[65]

4.1 Traditional Purposes

In keeping with the traditional purposes of the PTD, in 1906 Idaho sanctioned the use of navigable streams for commerce, whether via boats or simply the floating of logs downstream.[66] Quoting a law review article describing the roots of the PTD, the Idaho Supreme Court recognized the traditional PTD as including navigation, fishing, and commerce.[67]

4.2 Beyond Traditional Purposes

The Idaho Supreme Court has declared more purposes ascribable to the PTD, including fish and wildlife habitat, recreation, aesthetic beauty, and water quality.[68] Even though the legislature attempted to geographically limit the PTD to the beds of navigable waters,[69] it also provided that "[n]othing in this chapter shall be construed as a limitation on the power of the

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[61] *See, e.g.*, IDAHO ADMIN. CODE r. 37.03.02.010, .08.030 (2009).
[62] *See infra* § 4.1.
[63] *See infra* § 4.2.
[64] *See supra* notes 31–39 and accompanying text.
[65] *See infra* § 4.2.
[66] Powell v. Springston Lumber Co., 88 P. 97, 99 (Idaho 1906) (reversing an order dissolving a temporary injunction against a party who was obstructing a navigable river to the detriment of others).
[67] Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1087–88 (Idaho 1983) (quoting Roderick E. Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 SANTA CLARA L. REV. 63, 65–66 (1982) (footnotes omitted).
[68] *In re* Sanders Beach, 147 P.3d 75, 85 (Idaho 2006) (citations omitted) (upholding lower court's determination that beachfront property owners could not exclude the public from the land below the OHWM).
[69] IDAHO CODE ANN. § 58-1203(1) (2010).

state to authorize public or private use . . . for such purposes as navigation, commerce, recreation, agriculture, mining, forestry, or other uses."[70] Recent case law makes clear that the Idaho Supreme Court still considers the PTD to include expanded rights of use of the beds of navigable waters.[71] The public may also portage watercraft around dams and other obstructions on navigable waters.[72] Additionally, although the Idaho legislature has declared that the PTD no longer applies to water rights, should a court invalidate that legislation, it would likely uphold past precedent recognizing that the preservation of water it in its location for its scenic beauty and recreational benefits constitutes a beneficial use under the state constitution, and is thus protectable under the PTD.[73]

5.0 Geographic Scope of Applicability

As with other areas of the Idaho PTD, a distinction exists between what the Idaho courts recognize as part of the PTD, and what the Idaho legislature articulated in its 1997 legislation. Prior to the 1997 legislation the courts were expanding the geographic scope of the PTD, extending it to recreational waters,[74] wildlife,[75] and certain uplands.[76] However, the Idaho legislature reverted the geographical scope to the beds of waters that were navigable for commerce at statehood.[77]

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[70] *Id.* § 58-1203(3).
[71] *In re Sanders Beach*, 147 P.3d at 85.
[72] S. Idaho Fish and Game Ass'n v. Picabo Livestock, 528 P.2d 1295, 1297 (Idaho 1974) (adopting the lower court's test for navigability and its application to a disputed creek).
[73] State Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924, 929 (Idaho 1974) (affirming Department of Parks' ability to appropriate waters in trust for the public).
[74] *See infra* § 5.3.
[75] *See infra* § 5.6.
[76] *See infra* § 5.7.
[77] IDAHO CODE ANN. §§ 58-1202–58-1203 (2010).

5.1 Tidal

Because there are no "tidal" lands in Idaho, the Idaho Supreme Court rejected the tidal test in 1916 in favor of the navigability-in-fact test.[78] However, Idaho still relies on the ordinary high water mark ("OHWM") to determine the bounds of state title.[79] The state must be specific as to what the OHWM is; for example, it may not simply set an inaccurate seawall as a dividing line because it is convenient.[80]

5.2 Navigable in Fact

The Idaho Supreme Court adopted the navigable-in-fact test for purposes of the geographic scope of the PTD in 1916.[81] With respect to what constitutes "navigable in fact," the Idaho legislature codified the log-flotation test for navigability asserted in *Southern Idaho Fish & Game v. Picabo Livestock*,[82] at least for state title and public fishing rights.[83] However, subsequent case law expanded the log-flotation test to include as navigable bodies of water suitable for use by small recreational watercraft, because the salient question, according to the Idaho Supreme Court, is whether the water is suited to public use, which includes fishing, hunting and recreation.[84]

On navigable lakes and streams, private landowners may take only to the OHWM, not the middle thread of the stream or lake.[85] Similarly, patents from the United States to lands bordering navigable lakes and rivers did not grant title to the bed of the bordering water nor to

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[78] N. Pac. Ry. Co. v. Hirzel, 161 P. 854, 859 (Idaho 1916) (rejecting the tidal test as impractical for the geography of the United States); *see also* Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 130 (2010) (surveying the PTD in the western states).
[79] IDAHO CODE ANN. § 58-1202.
[80] *In re* Sanders Beach, 147 P.3d 75, 83 (Idaho 2006) (upholding lower court's determination that beachfront property owners could not exclude the public from the land below the OHWM).
[81] *N. Pac. Ry. Co.*, 161 P. at 859.
[82] S. Idaho Fish and Game Ass'n v. Picabo Livestock, 528 P.2d 1295, 1297 (Idaho 1974).
[83] IDAHO CODE ANN. § 36-1601.
[84] Idaho Forest Indus. v. Hayden Lake Watershed Improv. Dist., 733 P.2d 733, 739 (Idaho 1987) (internal citations omitted).
[85] *See* Craig, *supra* note 78, at 131; *see also In re Sanders Beach*, 147 P.3d at 85.

any island within it.[86] In the case of intermittently navigable streams, the public has a right to use them when navigable, but when nonnavigable and flowing over private land, the public may not trespass upon private property and use the water.[87]

The Idaho PTD does not extend to nonnavigable waters because the state does not retain title to them.[88] Riparian rights of landowners adjacent to nonnavigable lakes are contingent upon their owning the lakebed as well—if they do not own the lakebed, no rights attach.[89] Ordinarily, though, grants of riparian land will include land to the middle of a nonnavigable lake.[90]

Again, however, the 1997 statute may have changed the course of the Idaho PTD by limiting what constitutes a "navigable" water to those waters that were navigable for commerce at the time of statehood in 1890,[91] meaning that waters once subject to the public trust may no longer be. However, the public still seems to retain a right-of-way on all recreationally navigable waters,[92] even if not navigable for title at statehood, notwithstanding the legislature's relinquishment of public title to such waters.

5.3 Recreational Waters

The Idaho Supreme Court recognizes the use of small recreational boats as an indication of navigability for purposes of the PTD.[93] Although the recent legislation declares that it does not

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[86] Callahan v. Price, 146 P. 732, 734–35 (Idaho 1915) (upholding judgment of nonsuit for insufficiency of evidence as to who holds title to an island in the Snake River).
[87] La Veine v. Stack-Gibbs Lumber Co., 104 P. 666, 667 (Idaho 1909) (reversing and remanding to enjoin lumber company from maintaining a dam on La Veine's property against his wishes and using it to float logs).
[88] Mesenbrink v. Hosterman, 210 P.3d 516, 522 (Idaho 2009) (vacating and remanding lower court decision to apply law of nonnavigable lakes instead of navigable lakes).
[89] *Id.*
[90] *Id.*
[91] IDAHO CODE ANN. § 58-1202(3) (2010).
[92] IDAHO CODE ANN. § 36-1601; *see also* Stephen D. Osborne, Jennifer Randle, & Michael Gambrell, *Laws Governing Recreational Access to Waters of the Columbia Basin: A Survey and Analysis*, 33 ENVTL. L. 399, 424–426 (2003) (describing Idaho's distinction between navigability for state title and navigability for public access).
[93] Idaho Forest Indus. v. Hayden Lake Watershed Improv. Dist., 733 P.2d 733, 739 (Idaho 1987) (internal citations omitted).

operate to limit the public's rights of access for recreation,[94] the state's ability to protect recreational resources by employing the PTD may be limited because the statute allows the PTD to apply only to waters navigable under the federal test of navigability at the time of Idaho's statehood.[95]

5.4 Wetlands

The Idaho courts have not explicitly connected wetlands to the state PTD. In one of the most recent cases concerning a wetland the Idaho Supreme Court upheld a county ordinance requiring compliance with state and federal wetlands laws,[96] but did not suggest the PTD as a justification. Although Idaho statutes contain provisions that mention wetlands, they refer to soil conservation districts[97] and the siting of waste,[98] swine,[99] and electrical transmission facilities,[100] not to the PTD. The Idaho Department of Lands defines "lake" to include wetlands as long as they are below the OHWM,[101] so any act on navigable lakes occurring below the OHWM that may affect wetlands could have PTD implications. The Department of Parks and Recreation simply requires that permit applicants comply with all federal and state laws regarding wetlands.[102] While these examples demonstrate Idaho agencies' recognition of the importance of wetlands, they do not specifically implicate the PTD.

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[94] IDAHO CODE ANN. § 58-1203(4).
[95] *Id.* § 58-1202(3).
[96] Cowan v. Bd. of Comm'rs of Fremont County, 148 P.3d 1247, 1260 (Idaho 2006) (upholding the grant of a subdivision permit against a challenge that law on which it was based was unconstitutionally vague).
[97] IDAHO CODE ANN. § 22-2716.
[98] *Id.* § 39-7407.
[99] *Id.* § 39-7907.
[100] *Id.* § 61.1705.
[101] IDAHO ADMIN. CODE r. 20.02.01.010 (2009).
[102] *Id.* r. 26.01.10.200.

5.5 Groundwater

By statute, Idaho claims ownership of all water in the state, ground or surface.[103] Although state statutes declare that the "traditional policy of the state of Idaho, requiring the water resources of the state to be devoted to beneficial use . . . is affirmed with respect to the ground water resources of the state,"[104] the 1997 legislation limiting the application of the PTD to the beds of navigable rivers makes clear that the PTD does not apply to groundwater.[105] The Idaho statutes also provide, though, that the Water Resources Board can consider groundwater resources in creating "a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest."[106] Thus, even though the words "public trust doctrine" may not appear in a comprehensive water plan, by allocating water in "the public interest" trust principles may implicitly be included.

The Idaho Department of Water Resources has quite specific provisions regarding what it considers to be "trust waters," enumerating specific rivers and sources of hydropower waters, but excluding groundwater that may be feeding those trust waters.[107] The Department of Water Resources also makes a distinction between "public water" and "trust water," indicating that not all water that it considers "public" is subject to the PTD.[108]

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[103] IDAHO CODE ANN. § 42-101.
[104] IDAHO CODE ANN. § 42-226 (2010).
[105] *Id.* § 58-1203(1) ("The public trust doctrine . . . is solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters.").
[106] *Id.* § 42-1734A.
[107] IDAHO ADMIN. CODE r. 37.03.08.030 (2009).
[108] *Id.* r. 37.03.08.035.

5.6 Wildlife

Idaho statutes declare wildlife to be the "property of the state of Idaho."[109] The legislature also prohibits the taking of wildlife "owned or held in trust by the state."[110] In addition, the state has adopted the Wildlife Violator Compact,[111] which declares that "[w]ildlife resources are managed in trust by the respective states for the benefit of all residents and visitors."[112] The state even regulates the creation of private fish ponds, prohibiting them from being constructed in natural watercourses where wild fish may reside, and requiring that they be constructed entirely on private land.[113] Further, the Idaho Court of Appeals has declared that "[t]he wild game within our state belongs to the people as a whole in their collective, sovereign capacity and is treated as a common trust."[114] With respect to forest products on state lands, Idaho statutes require the preservation of trees which help conserve water or whose logging would not provide land "suitable for cultivation."[115] Thus, although asserting only ownership, an argument exists that the statutes support trust responsibilities, as well.

5.7 Uplands

The Idaho Supreme Court has declared that the PTD does not apply to uplands without a connection to navigable waters.[116] If land was once submerged by navigable waters, however, the land may still be subject to the public trust.[117] But where water has simply receded and no public purpose would be served by maintaining the land in trust, it will not remain burdened and

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[109] IDAHO CODE ANN. § 36-103.
[110] *Id.* § 36-704.
[111] *Id.* § 36-2302.
[112] *Id.*
[113] *Id.* § 36-706; *see also* Sherwood v. Stephens, 90 P. 345, 346 (Idaho 1907) (recognizing statutory regulation of private fish ponds and placing the burden on the owner to prove compliance with the statutory scheme).
[114] State v. Thurman, 996 P.2d 309, 316 (Idaho App. 1999) (upholding checkpoints to search for illegally-acquired game).
[115] IDAHO CODE ANN. § 58-401.
[116] Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist., 733 P.2d 733, 737 (Idaho 1987) (remanding to determine whether the PTD applies to the land in question); *see also* Craig, *supra* note 78, at 133.
[117] *Idaho Forest Indus.*, 733 P.2d at 738.

is available for acquisition via adverse possession.[118] Additionally, case law supports the notion that the PTD may extend to highways.[119] Land may also be held in trust and dedicated to certain uses, like a school lands trust, but in those cases private citizens do not have standing to enforce the PTD on those trust lands, because they are not the "direct beneficiaries" of the trust, the schools instead are.[120]

6.0 Activities Burdened

For the most part, the Idaho PTD does not operate as a justification for restraining the alienation or exploitation of trust resources. Especially given the recent statutory limitations imposed upon the doctrine,[121] the state and concerned citizens must use other rationales to protect resources once protected by the PTD.

6.1 Conveyances of Property Interests

To a large extent the Idaho PTD does not serve to bar conveyances of trust property.[122] However, if the state decides to convey trust land, the property typically remains subject to the PTD.[123] Additionally, the state may grant easements or other use rights to the beds of navigable streams, but must do so expressly and not in contravention of the public's right of navigation.[124]

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[118] Rutledge v. State, 482 P.2d 515, 517 (Idaho 1971) (affirming decision quieting title in favor of adjacent landowners where the Boise River was diverted and subsequently the river changed course and the southern channel became dry).

[119] State *ex rel.* Rich v. Idaho Power Co., 346 P.2d 596, 601 (Idaho 1959) ("Streets and highways belong to the public and are held by the governmental bodies . . . in trust for use by the public."); *see also* Keyser v. City of Boise, 165 P. 1121, 1122 (Idaho 1917) (denying a city the right to permit the construction of a permanent obstruction in a street due to its trust responsibilities to maintain the street for the public, but allowing that a permit for private use of a public street may be issued with the caveat that it could be revoked by the city at any time).

[120] Selkirk-Priest Basin Ass'n v. State *ex rel.* Andrus, 899 P.2d 949, 952 (Idaho 1995) (rejecting association's argument that they had standing to attempt to enjoin a timber sale on school trust land but reversing the grant of summary judgment as to whether the groups may have standing under the PTD to enforce protection of a potentially affected creek).

[121] *See supra* notes 31–34 and accompanying text.

[122] *See supra* § 3.1.

[123] Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist., 733 P.2d 733, 739 (Idaho 1987).

[124] N. Pac. Ry. Co. v. Hirzel, 161 P. 854, 860 (Idaho 1916) (deciding that title to the beds of the Snake and Clearwater Rivers rested with neither the railway nor the city of Lewiston but with the state).

Although a municipality may make use of the trust lands, it cannot acquire title to it through prescription or adverse possession.[125]

6.2 Wetland Fills

As described above,[126] Idaho law concerning wetlands is sparse. The state thus has not employed the PTD to prevent or sanction wetland fills.

6.3 Water Rights

By statute, the PTD no longer applies to water rights in Idaho.[127] However, prior to the recent statute's enactment, a line of cases existed that indicated an expanding role for the PTD with respect to the allocation and regulation of water rights.[128] Nevertheless, the Idaho Supreme Court decided that while water in Idaho is subject to the public trust and water rights are "impressed with the public trust," the PTD is not an independent ground for determining priority between competing water rights claims.[129] However, the statute did not change the effect of the laws rendering all waters of the state public, even though not within the reach of the PTD.[130] Thus, the exact effect of disallowing the PTD to apply to water appropriation claims is not quite clear.

With respect to adjacent landowners' rights, the doctrine of prior appropriation, where it conflicts with riparian rights, overrules the tenets of riparian rights.[131] Hence, although the waters

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[125] *Id.*
[126] *See supra* § 5.5.
[127] IDAHO CODE ANN. § 58-1201 (2010).
[128] Craig, *supra* note 78, at 77.
[129] Idaho Conservation League v. State, 911 P.2d 748, 750 (Idaho 1995) (upholding district court's determination that the PTD did not allow conservation groups to challenge the allocation of water rights and concluding that the legislature's repeal of certain state statutes eliminated the groups' basis for intervention to assert the public interest).
[130] IDAHO CODE ANN. § 58-1203(4).
[131] Maher v. Gentry, 186 P.2d 870, 874 (Idaho 1947) (citations omitted) (denying former tenant-in-common the right to appropriate water from a stream now located solely in the hands of her former co-tenant).

from a spring located wholly within private property remains private, once flowing off the land the water becomes public property and subject to the jurisdiction and regulation of the state.[132]

Although the legislature regulates the pumping of groundwater to ensure that no one rights holder appropriates more than a reasonable amount, prior appropriators' rights are still superior to those of later appropriators.[133] Where appropriate, a court may use its equitable powers to craft a compromise, for example, allowing a later appropriator to pump, but requiring him to pay for the prior appropriator's well enlargement.[134] Another early requirement for the appropriation of water for beneficial use was that the use be in Idaho instead of taking the water to another state to use.[135]

While the prior appropriation doctrine traditionally favors actual diversion or use of the water to establish rights, in Idaho the legislature altered that presumption, at least with respect to state agencies. For example, the legislature authorized the Department of Parks to appropriate water in trust for the people, and the Idaho Supreme Court determined that such appropriation did not require actual use for its validity.[136] Even acting under the auspices of a water right that effectively makes public water private property, the rights holder has the responsibility to put the water to beneficial use, because the water, although no longer public, is still "impressed with the

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[132] *Id.* at 875.
[133] Parker v. Wallentine, 650 P.2d 648, 651 (Idaho 1982) (deciding that wells drilled prior to a state statue's enactment were exempt from its provisions, and so requiring that, if a permit holder sought to appropriate groundwater, that he do so in a way that does not infringe on prior appropriator's rights.).
[134] *Id.* at 656.
[135] Walbridge v. Robinson, 125 P. 812, 816 (Idaho 1912) (deciding that, in absence of legislation to the contrary, the constitutional provision declaring appropriation of water to be a public use, in combination with the state's title to the water for the benefit of the people of the state, prevented interstate use of water from a wholly intrastate stream). The Idaho Supreme Court in this case also indicated, although in dicta, that the state holds, in its sovereign capacity, not only water but also "wild animals, fish . . . gas, light, and air," an indication that, at least prior to the recent enactment of a statute limiting the expansion of the PTD, Idaho courts may have been amenable to a broader interpretation of the doctrine. *Id.* at 814.
[136] State Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924, 929 (Idaho 1974) (upholding lower court's determination that the Department of Parks was justified in its application for an appropriation).

public trust."[137] The recent statutory change[138] may have the effect of altering this presumption, however.

In most respects, prior appropriation is the rule of water rights in Idaho. However, certain tenets of the riparian rights scheme remain, such as the right of access to the water and the right to ease of navigation.[139] Access rights can also be acquired by prescription, for example, through the mooring of a houseboat along riparian land.[140] Even when acting under the auspices of a state franchise, if an upstream riparian landowner changes the banks of a river and impounds water, then subsequently releases the water flooding the land of the downstream owner, the upstream owner will be held liable.[141]

6.4 Wildlife Harvests

Idaho courts have upheld the state's right to regulate wildlife harvests as "a valid exercise of the state's police power in the pursuit of . . . preserving the state's natural resources."[142] For example, to prevent the illegal taking of game, the Idaho Court of Appeals upheld the creation of a checkpoint to question drivers and search their cars, if needed.[143] Because the purpose behind the wildlife statutes is to "preserve, protect, and perpetuate . . . wildlife,"[144] it extends even to a

[137] Washington County Irrigation Dist. v. Talboy, 43 P.2d 943, 945 (Idaho 1935) (reversing and remanding for a new trial regarding the rights between the parties as to profits from appropriations of diverted water).
[138] *See supra* notes 31–34 and accompanying text.
[139] West v. Smith, 511 P.2d 1326, 1334 (Idaho 1973) (upholding lower court's ruling that owners of a houseboat acquired a prescriptive easement in gross over riparian owners' right of access to the water).
[140] *Id.*
[141] Mashburn v. St. Joe Improvement Co., 113 P. 92, 94 (Idaho 1910) (upholding jury's award of damages to a downstream owner for flooding of his land by the upstream owner's actions).
[142] State v. Coffee, 556 P.2d 1185, 1194 (Idaho 1976) (affirming the conviction of a Kootenai tribe member who shot a deer out of season on private land, upholding the right of the state to regulate the taking of game by Indians on lands not included in the aboriginal right).
[143] State v. Thurman, 996 P.2d 309, 316 (Idaho App. 1999).
[144] IDAHO CODE ANN. § 36-103(a).

prohibition on killing deer out-of-season on one's own property.[145] The state thus appears to assert its trust powers broadly to protect wildlife resources.

7.0 Public Standing

Citizens in Idaho face an uphill battle with respect to enforcing the PTD. Because of recent legislation limiting the resources to which the PTD applies, and the scarcity of cases where Idaho courts delineated the state's standing requirements before the statute's enactment, the current status of the public's standing to enforce the PTD is not entirely clear.

7.1 Common-Law Based

Prior to the legislature's limiting the PTD, the Idaho Supreme Court recognized that the public may have standing to enforce the PTD when the beds of navigable waters could be harmed by state action, such as a timber sale.[146] To the extent that public standing was allowed concerning the beds of navigable rivers, the court's decision appears to remain valid; however, asserting standing to uphold the PTD concerning other resources may not be similarly successful.

7.2 Statute-Based

Private citizens may maintain an action to abate a public nuisance where they can allege a special injury separate from the public.[147] However, if a company is constructing an aid of navigation in public water in accordance with statute, for example, a presumption may exist that the structure is not a nuisance.[148] Although the Idaho Administrative Procedure Act allows

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[145] State v. Thompson, 33 P.3d 213, 215 (Idaho App. 2001) (affirming the convictions of a property owner who told her son to kill a deer interfering with plants on her property, the son who killed it, and a neighbor who received some of its remains).
[146] Selkirk-Priest Basin Ass'n, Inc. v. State *ex rel.* Andrus, 899 P.2d 949, 954–55 (Idaho 1995) (reversing grant of summary judgment to the state because an issue of fact existed as to whether the timber sale would violate the PTD by having an adverse affect on a navigable creek).
[147] IDAHO CODE ANN. § 18-5901 (2010); *see also* Small v. Harrington, 79 P. 461, 468 (Idaho 1904) (citations omitted) (reversing and remanding for a new trial to decide on all the material issues of the case, but opining that the particular structure at issue did not constitute a nuisance).
[148] *Small*, 79 P. at 468.

citizens to challenge agency action,[149] no statute provides citizens standing to sue solely using the PTD. For example, where statutes provide for school trust lands, citizens cannot sue to enforce the trust in those lands, because the beneficiaries are not the public as a whole, but the schools.[150] Should a county's prosecuting attorney believe the public's rights in navigable waters may be in jeopardy, though, a state statute does allow the county attorney to bring suit on behalf of the public.[151]

7.3 Constitution-Based

The Idaho constitution provides no standing to the public to sue to uphold the PTD. Although Idaho citizens have a constitutional right to appropriations of water,[152] and the constitution stipulates that the state land board holds certain lands in trust,[153] the Idaho legislature has made clear that such appropriations do not implicate the PTD.[154]

8.0 Remedies

Depending on the resource, the state and private citizens may recover damages and injunctive relief for injuries to trust resources, as well as the restoration of the resource itself. The state has used the PTD only tangentially as a defense to takings claims, however, and primarily in areas not typical for such claims.

8.1 Injunctive Relief

Although not explicitly invoking the PTD as the rationale behind the laws, Idaho statutes are generally predisposed toward allowing injunctions for damages to state resources. With

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[149] IDAHO CODE ANN. § 67-5270.
[150] *Selkirk-Priest Basin Ass'n*, 899 P.2d at 952 (rejecting environmentalist group's challenge to timber sale as a violation of the state's trust duties with respect to school trust lands).
[151] State *ex rel.* Haman v. Fox, 594 P.2d 1093, 1096 (Idaho 1979) (interpreting Idaho Code Ann. § 31-2604 to include actions to vindicate public rights in waterfront property).
[152] IDAHO CONST. art. XV, §§ 1, 3.
[153] IDAHO CONST. art. IX, § 7.
[154] IDAHO CODE ANN. § 58-1203(2)(b) (2010).

respect to obstructions in navigable waters, Idaho citizens may obtain injunctive relief,[155] but they must also exhaust all administrative remedies before doing so.[156] If a citizen is lawfully harvesting trust resources such as wildlife or fish, and someone attempts to interfere with such a lawful taking, an injunction is similarly allowed.[157] Injunctions are also available for violations of the Forest Practices Act.[158]

8.2 Damages for Injuries to Resources

By statute, Idaho law allows the recovery of damages for encroachments on the beds of navigable waters and, in addition, allows the state to require the violator to restore the bed to its prior condition.[159] Additionally, the state may recover damages for violations of the Forest Practices Act.[160] Depending on the circumstances, public actions to enforce the PTD may also allow for the awarding of attorney's fees if the plaintiffs prevail and the action is for the purpose of benefitting the public, not the private citizen's own interest.[161] The Idaho Supreme Court has adopted a 3-part test to determine whether injunctions are merited: 1) the public policy importance of the litigation; 2) the burden on the plaintiff and the need for private enforcement; and 3) how many people could benefit from the decision.[162]

8.3 Defenses to Takings Claims

Idaho case law concerning the PTD and takings claims is limited, and often even when trust resources are at issue the takings claim will be decided on other grounds. Landowners in

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[155] Ritter v. Standal, 566 P.2d 769, 773 (Idaho 1977) (confirming the presence of a nuisance created by a fish farm in an estuary); *see also* IDAHO CODE ANN. § 42-3809 (declaring violations of statutes regarding stream alteration to be public nuisances subject to abatement).
[156] Lovitt v. Robideaux, 78 P.3d 389, 396 (Idaho 2003) (affirming the district court's decision not to determine the littoral rights of the respective parties, where one party sought an injunction against the other to remove pilings, because the parties had not exhausted their administrative remedies).
[157] IDAHO CODE Ann. § 36-1510(5).
[158] *Id.* § 38-1307.
[159] *Id.* § 58-1309.
[160] *Id.* § 38-1307.
[161] State v. Hagerman Water Right Owners, 947 P.2d 391, 399 (Idaho 1997) (rejecting lower court's award of attorney's fees to a party to the Snake River Basin Adjudication).
[162] *Id.* at 396–97 (citing *Hellar v. Cenarrusa*, 682 P.2d 524 (Idaho 1984)).

one recent case alleged a taking when the city of Coeur D'Alene attempted to require the removal of fences on their waterfront property, but the Idaho Supreme Court remanded to determine whether a regulatory taking occurred,[163] and no subsequent decision exists. Although the case concerned the beds of navigable waters, the city did not raise the PTD as a defense to the takings claim.

Another case in which the court mentioned the resource as being in trust but the disposition of the case did not rest on the PTD was where a utility company alleged a taking when the state required it to relocate due to highway construction.[164] Although the Idaho Supreme Court wrote of the highway as being held in trust by the state,[165] ultimately the court decided that no taking occurred because the utility's use of the land was subordinate to the rights of the public in the land.[166] With respect to takings claims for wildlife held in trust, the Idaho Court of Appeals has decided that no takings claim will lie in a case where a property owner claims that a wild animal, as property of the state, damaged the owner's property, because the "conduct of a depredating animal is not a state act," notwithstanding the state's relationship to wildlife.[167]

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[163] City of Coeur D'Alene v. Simpson, 136 P.3d 310, 325 (Idaho 2006) (remanding to the lower court to determine whether a shoreline regulation effected a taking).
[164] State *ex rel.* Rich v. Idaho Power Co., 346 P.2d 596, 598 (Idaho 1959).
[165] *Id.* at 606.
[166] *Id.* at 612.
[167] State v. Thompson, 33 P.3d 213, 217 (Idaho App. 2001) (rejecting a takings claim for wild deer that damaged owner's property).

ILLINOIS

The Public Trust Doctrine in Illinois

Robert Menees

1.0 Origins of the Public Trust Doctrine in Illinois

Illinois obtained jurisdiction over all navigable waters in the territory through the Northwest Ordinance of 1781.[1] Under the Statehood Act of 1818, the United States admitted Illinois into the Union on "equal footing" with all other states, and the state thereby obtained title to all land underlying all navigable waterways in trust for the people.[2] Land submerged beneath non-navigable waterways remained owned by the federal government.[3]

The state of Illinois was the subject of the first federal pronouncement by the U.S. Supreme Court of the public trust doctrine (PTD) in *Illinois Central Railroad Co. v. Illinois*.[4] Illinois courts view this seminal case as creating the PTD in the state as a matter of state law. Following the *Illinois Central* lead, state courts generally focused on limits on legislative conveyances of submerged lands and the inability of the state to abdicate control of trust properties to private entities.[5] In the intervening years, the common law expanded the reach of the public trust doctrine to include new trust purposes, increased its scope of geographical applicability, and recognized public standing.[6]

Illinois has enacted various statutes that contain trust language for the benefit of the public with respect to trust resources, mostly in relation to submerged lands.[7] The extent to

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[1] *See* Dupont v. Miller, 141 N.E. 423, 425 (Ill. 1923).
[2] *See* Wilton v. Van Hessen, 94 N.E. 134, 136 (Ill. 1911).
[3] *Id.*
[4] Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892).
[5] *See infra* note 18.
[6] *See infra* §§ 4.0 and 5.0.
[7] These include the Submerged Lands Act, 5 Ill. Comp. Stat. §§ 605/0.01 to 605/2; the Chicago Submerged Lands Act of 1903, 70 Ill. Comp. Stat. §§ 1550/0.01 to 1550/1; the Chicago

which most of these statutory provisions impose trust duties on the state, however, remains open to judicial interpretation. When Illinois amended its Constitution in 1970, the legislature added two key provisions declaring that the state and individuals had a duty to provide a healthful environment for current and future generations.[8] The Illinois Supreme Court interpreted these provisions to entrench the PTD but has not interpreted them to grant public standing in the absence of some other cognizable cause of action.[9]

2.0 The Basis of the Public Trust Doctrine in Illinois

Illinois PTD derives from the common law, state statutes, and the Illinois state constitution. Most of the cases interpreting the PTD involve submerged lands beneath Lake Michigan, although recent case law suggests that the doctrine is expanding in the state.

2.1 Common Law Basis

In *Illinois Central*, the U.S. Supreme Court held that the state owned all submerged lands beneath navigable waters within its jurisdiction, but its title was different from the title to public lands owned by the federal government, which allowed for pre-emption and sale.[10] Instead, the state held these lands "in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the

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Submerged Lands Act of 1931, *Id.* § 1555/1; the Lincoln Park Submerged Lands Act, *Id.* §§ 1575/0.01 to 1575/2.; and the Rivers, Lakes, and Streams Act, 615 Ill. Comp. Stat. 5/4 *et. seq.*

[8] Ill. Const., art. XI, §§ 1-2 (1970). Section 1 declares that: "[t]he public policy of the State and duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations." Section 2 states that, "[e]ach person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private..."

[9] People ex rel. Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976) (recognizing the PTD was embodied in the state constitution). City of Elgin v. County of Cook, 660 N.E.2d 875 (Ill. 1995) (concluding that provision does not create a cognizable cause of action but eliminates the special injury requirement); NBD Bank v. Krueger Ringier, Inc., 686 N.E.2d 704 (Ill. App. Ct. 1997) (holding that provision does not require special injury but also does not create a separate cause of action in tort against seller of contaminated property).

[10] *Illinois Central*, 146 U.S. at 452.

obstruction or interference of private parties."[11] Illinois courts view the state's PTD as a creature of state law under the *Illinois Central* decision.[12] The *Illinois Central* Court ruled that the state, as trustee, could not abdicate control of trust lands to private entities because such governmental action would be inconsistent with the purpose of the trust.[13] The trust requires the state to preserve trust resources for the benefit of the public through management and control of trust property, which cannot be relinquished by a transfer to private entities.[14]

Illinois Central established two key exceptions to the doctrine's otherwise strict limitations on legislative conveyances of public trust resources to private entities.[15] First, the state may dispose of public trust lands if the conveyance aids the public purposes of navigation or commerce, for example, by the construction of wharves and piers.[16] Second, the state may convey lands where the grant does not "substantially impair the public's interest in the lands and waters remaining."[17] Following the *Illinois Central* lead, Illinois case law generally focuses on legislative conveyances of submerged lands and the state's inability to relinquish control of trust properties to private entities.[18]

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[11] *Id.*
[12] Timothy Christian Schools v. Village of Western Springs, 675 N.E.2d 168, 173-74 (Ill. App. Ct. 1996) (stating that the Supreme Court created the state's public trust doctrine in *Illinois Central*).
[13] *Illinois Central*, 146 U.S. at 452-53 (invalidating state legislative conveyance of 1000 acres of Chicago shorefront to a railroad company because the conveyance abdicated control of trust property).
[14] *Id.* at 453.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *See, e.g.*, People ex rel. Moloney v. Kirk, 162 Ill. 138 (Ill. 1896) (a conveyance of submerged lands by legislature to private developers along Lake Michigan did not violate the trust because grant of trust lands was for public benefit to construct Lake Shore Drive in furtherance of the trust); and Friends of the Parks v. Chicago Park Dist., 786 N.E.2d 161, 169 (Ill. 2003) (upholding a lease of trust properties, Soldier Field in Burnham Park, to the NFL's Chicago Bears because the park district retained control of trust properties under the lease); *Cf.* People ex rel. Scott v.

2.2 Statutory Basis

Illinois has enacted various statutes that contain trust language for the benefit of the public, and Illinois courts have often interpreted these provisions to impose trust duties on the state legislature and agencies. Some statutes contain explicit trust language, while other provisions may impose trust duties implicitly but have yet to be interpreted as doing so by the courts. For example, the state Submerged Lands Act declares that the state holds title in trust to all submerged lands under navigable waters for the benefit of the people.[19] The Act authorizes the state to assert and reclaim title to all submerged lands, whether presently or previously submerged, that have been illegally filled, reclaimed, or occupied.[20] The Act also authorizes the state to reclaim these submerged lands granted if they are not used for the purposes for which they were originally intended.[21] In *People ex rel. Scott v. Chicago Park District*, the Illinois Supreme Court held that the PTD explicitly applies to the Submerged Lands Act, thereby imposing trust duties on the state with respect to these trust resources.[22]

Chicago Park Dist., 360 N.E.2d 773 (Ill. 1976) (rejecting a legislative conveyance of trust lands to steel company violated public trust doctrine because grant was primarily for private purpose at the expense of the public right to use and enjoy trust lands); Lake Michigan Federation v. U.S. Army Corps of Engineers, 742 F.Supp. 441 (N.D. Ill. 1990) (rejecting a legislative conveyance because the grant of trust lands for a lakefill to Loyola University was for a private purpose, despite simultaneous public benefit).

[19] 5 Ill. Comp. Stat. § 605/1 ("The State of Illinois for the benefit of the People of the State and in pursuance of protecting the trust wherein the State holds certain lands for the People, hereby elects and determines to assert and reclaim the title to lands of the State of Illinois now submerged and lands that were formerly submerged, but that have been illegally filled in, reclaimed and occupied, and also any such lands that may have been allotted to any person or corporation, public or private, and which have been illegally filled in, reclaimed and occupied, or which are not used and occupied for the purposes for which they were allotted.").

[20] *Id.* Whether this provision requires the state to assert and reclaim title to all submerged lands is unclear. The statute states that "[t]he State of Illinois..., hereby elects and determines to assert and reclaim title" to submerged lands. No Illinois case has specifically addressed this issue.

[21] *Id.*

[22] People ex rel. Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976) (holding that Lake Michigan is a valuable resource belonging to the people of the state in perpetuity under the Act,

The Chicago Submerged Land Act, enacted in 1903, applies to two areas of submerged lands: 1) all submerged and artificially made land from the southern boundary line of Jackson Park to the southern line of Seventy-Ninth Street, extending 1000 feet into Lake Michigan from the eastern shore line; and 2) all submerged and artificially made land from the northern line of Ninety-fifth street to the boundary line of Indiana and Illinois.[23] The Act conveyed both areas to the Board of South Park Commissioners to be held, managed, and controlled for park uses.[24] Although not encompassing as large an area, the Lincoln Park Submerged Lands Act contains stronger trust language than the Chicago Submerged Lands Act, as the legislature granted submerged lands to the Lincoln Park Commissioners "to be held for the use and benefit of the public" as part of Lincoln Park "for no other purpose whatever."[25] The Act authorizes the park commissioners to exercise police power over the waters of Lake Michigan fronting the driveway of the park.[26] It is likely that a court would interpret these provisions to reflect the PTD, as the *Scott* decision held in the case of the state Submerged Lands Act.[27]

The Rivers, Lakes, and Streams Act establishes that the state holds title to the beds of all lakes meandered by federal survey, regardless of size, shape or location, including Lake

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and any attempt to grant the lake's submerged lands must withstand "the most critical examination").

[23] 70 Ill. Comp. Stat. §§ 1550/0.01 to 1550/1.

[24] *Id.* A similar act passed in 1931 extended the geographical scope of the grant in the 1903 Act to include all submerged and artificially made lands extending east from the shorefront into Lake Michigan to the eastern Illinois border where the previous grant only extended 1000 feet into the lake. *Id.* § 1555/1.

[25] *Id.* § 1575/1. The Illinois Supreme Court held that the park commissioners could make any covenant for the purpose of obtaining riparian rights on lake, so long as the covenant did not violate the public interest or the Lincoln Park Act. Bowes v. City of Chicago, 120 N.E.2d 15, 26 (Ill. 1954).

[26] *Id.* § 1575/2.

[27] People ex rel. Scott v. Chicago Park Dist., 360 N.E.2d 773, 779-80 (Ill. 1976) (holding that the Submerged Lands Act imposed trust duties on the Chicago Park Commissioners, preventing the conveyance of trust lands to private entities where the public purpose was incidental and remote).

Michigan, in trust for the people.[28] If a lake was not meandered by federal government surveys of swamp or overflowed lands, it is presumed to be non-navigable for purposes of public rights, and courts have been reluctant to find to the contrary.[29]

2.3 Constitutional Basis

In 1970, the Illinois legislature amended the state's constitution, declaring that "[t]he public policy of the State and duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations."[30] A simultaneous amendment provided that "[e]ach person has the right to a healthful environment. Each person may enforce this right against any party, government or private..."[31] In 1976, the Illinois Supreme Court interpreted these constitutional provisions to explicitly incorporate the state's PTD.[32] However, Illinois courts have denied that these provisions create separate causes of action; instead, interpreting them only to eliminate the special injury requirement in existing causes of action.[33]

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[28] 615 Ill. Comp. Stat. 5/24 (incorporating a report of meandered lakes in Illinois by the Department of Public Works and Building (1962); Niles v. Cedar Point Club, 175 U.S. 300, 306 (1899) (defining "meandered" as following the sinuosities of a waterway).

[29] Leonard v. Pearce, 181 N.E. 399, 400-01 (Ill. 1932) (citing State of Illinois v. New, 117 N.E. 597, 599 (Ill. 1917)). A non-meandered lake, however, may be considered navigable by showing that it is able to "furnish a highway over which commerce was or might have been carried on in the customary modes." New, 117 N.E. at 599. If a court determines this test has been satisfied, title to the lakebed "passed to and vested in the state of Illinois in trust for all the people of the state." *Id.* (citing Wilton v. Van Hessen, 94 N.E. 134 (Ill. 1911). However, where the federal government issued a patent to a private landowner, absent fraud or mistake, the state cannot successfully assert that a non-meandered lake was navigable in its state of nature, and thereby reclaim title to the submerged lands. Dupue Rod & Gun Club v. Marliere, 163 N.E. 683, 685 (Ill. 1928).

[30] Ill. Const., art. XI, § 1.

[31] Ill. Const., art. XI, § 2.

[32] People ex rel. Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976).

[33] City of Elgin v. County of Cook, 660 N.E.2d 875 (Ill. 1995) (recognizing that provision does not create a cognizable cause of action but eliminates special injury requirement); NBD Bank v. Krueger Ringier, Inc., 686 N.E.2d 704 (Ill. App. Ct. 1997) (concluding that provision does not require special injury but also does not create a separate cause of action in tort against seller of contaminated property).

3.0 Institutional Application

Illinois courts have not restrained private parties from conveying private property through the PTD. However, since *Illinois Central*, Illinois courts have frequently limited the ability of the legislature to alienate public trust lands.[34] Recent case law has focused on whether the government can convert trust resources from one public purpose to another.[35] State courts have given minimal attention to the limitations on administrative agencies imposed by the public trust doctrine.[36]

3.1 Restraint on Alienation (Private Conveyances)

Illinois courts have not used the PTD to restrain private parties from conveying private properties.

3.2 Limits on the Legislature

According to Professor Robin Craig, Illinois courts have at times had an "unusually strong focus on the State's ability to alienate public trust lands."[37] In *Illinois Central*, the U. S. Supreme Court famously invalidated a grant by the Illinois legislature to the Illinois Central Railroad Company that gave the railroad title to 1000 acres of submerged land along nearly the entire shorefront of the city of Chicago.[38] The Court affirmed a decision of the northern district of Illinois, which declared the conveyance void, and held that the state legislature violated the public trust by abdicating control over such a vast quantity of land that it held in trust for the benefit of the people of Illinois.[39] Following the *Illinois Central* lead, Illinois courts focused on

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[34] *See infra* § 3.2.
[35] *See infra* § 4.2.
[36] *See infra* § 3.3.
[37] *See* Robin Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENV. L. REV. 1, 10 (2007).
[38] *Illinois Central*, 146 U.S. at 460.
[39] *Id.* at 452-53.

the state's inability to alienate submerged lands to private interests unless the conveyance falls within one of the *Illinois Central* exceptions.[40]

Six years after *Illinois Central*, the same railroad company sued the city of Chicago to prevent the city from interfering with its plans to construct an engine house by filling 4.48 acres of submerged lands on Lake Michigan that it believed was authorized by its state charter.[41] In *Illinois Central II*, the Illinois Supreme Court affirmed a denial of an injunction against the city and declared the conveyance void because the benefits that would accrue from the project inured solely in the railroad at the expense of public use of trust resources.[42] The court stated that it was unreasonable to assume that the legislature had granted the railroad unlimited authority to fill submerged lands under its charter, and that if the state had contemplated divesting its power to control and manage trust resources to the railroad, it "transcended its authority" and "undertook to part with governmental power, which it could not do."[43]

Illinois Central and *Illinois Central II* imposed restraints on the state legislature's ability to alienate trust resources to private entities, and subsequent state and federal court cases have applied these restraints vigorously. If a legislative grant of submerged lands has only a private purpose, the state violates the Illinois PTD, and the conveyance is void.[44] For a legislative conveyance of trust lands to be valid, the public purpose for which the state conveys the trust lands must directly benefit public use of the trust resource, rather than indirectly benefit the state

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[40] *See supra* notes 15-17.
[41] Illinois Central R.R. Co. v. City of Chicago (Illinois Central II), 50 N.E. 1104, 1106-07 (Ill. 1898).
[42] *Id.* at 1109.
[43] *Id.*
[44] People ex rel. Scott v. Chicago Park Dist., 360 N.E.2d 773, 779-80 (Ill. 1976) (citing *Illinois Central*, 146 U.S. at 460 and *Illinois Central II*, 50 N.E. at 1109).

economically.[45] Thus, a private conveyance of 194.6 acres of submerged land in Lake Michigan by the Illinois legislature to U.S. Steel to construct a steel plant violated the public trust because it would have impaired the public uses of the waterway, while the proposed expansion of the steel plant served only private purposes.[46] Although the legislature explicitly determined that the grant would not impair the public interest because a public park was located north of the proposed mill, the Illinois Supreme Court nonetheless invalidated the grant because prior cases had never upheld a grant where "the primary purpose was to benefit a private interest."[47] Moreover, the court stated that "the public purpose to be served cannot be only incidental and remote," and declared that the public benefit claimed by the steel plant of additional employment and economic improvement was "too indirect, intangible and elusive to satisfy the requirement of public purpose."[48] By rejecting these indirect public purposes, the court affirmed the public's rights to use and enjoy trust resources.

In 1990, the federal district court for the Northern District of Illinois held that a grant by the state legislature of 18.5 acres of submerged lands on the shore of Lake Michigan to Loyola University violated the public trust.[49] The Illinois legislature approved the grant and declared that it was not in violation of the trust because the proposed project would give public access to the lakefront where none currently existed.[50] The federal district court, however, found a violation of the trust because, despite the enhancement of public rights of access to the lake

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[45] *Id.* at 781.
[46] *Id.* at 780-781.
[47] *Id.* at 780.
[48] *Id.* at 781.
[49] Lake Michigan Federation v. U.S. Army Corps of Engineers, 742 F.Supp. 441 (N.D. Ill. 1990).
[50] *Id.* at 445-47. The university argued that the shoreline at the proposed site was eroded and unsuitable for the public uses of access and navigation and that by allowing it to fill the submerged lands the project would enhance the public rights. *Id.*

through the project, the purpose of the grant was for the private benefit of the university.[51] The court also determined that the grant abdicated state control of trust property and relinquished state authority to safeguard the public interest in the future.[52]

In 1896, in *People ex rel. Moloney v. Kirk*, the Illinois Supreme Court upheld a legislative grant of submerged lands abutting Lake Michigan to private parties to create Lake Shore Drive in Chicago.[53] According to the court, the *Kirk* case fell within the second exception articulated in *Illinois Central*, where the legislature may dispose of trust lands to private entities if the conveyance does not "substantially impair" the public rights of commerce and navigation.[54] The court reasoned that the conveyance did not substantially impair public rights to the navigable waters of Lake Michigan because the submerged lands conveyed by the state were not well-suited for navigation, fishing, and commerce, and the public had rarely used them for those purposes.[55]

In 2003, the Illinois Supreme Court affirmed the dismissal of a challenge to the approval of a new stadium for the Chicago Bears in Burnham Park by the state legislature pursuant to the Sports Facilities Authority Act.[56] The court ruled that the legislature did not violate the PTD, distinguishing the case from *Illinois Central* and *Scott* because it involved a lease, not a

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[51] Loyola University unsuccessfully argued that it should be allowed to create a lakefill because Northwestern University had done so thirty years prior in the early 1960s. *Id.* at 448-49. The court rejected Loyola's claim that it should be able to violate the trust because a similar entity had done so in the past. *Id.* at 449. However, the court held that its jurisdiction over challenges to the Northwestern University lakefill had terminated because no lawsuit had been filed at the time of the extension, and the Constitution limits federal court jurisdiction to adjudication of actual, ongoing controversies. *Id.* (citing Deakins v. Monaghan, 484 U.S. 193 (1988).

[52] *Id.* at 445. The court determined that the restrictions on the grant were illusory because subsequent legislation could be passed to remove the restrictions and the state could choose not to exercise its right of re-entry which would leave the public trust lands in private control. *Id.*

[53] People ex rel. Moloney v. Kirk, 45 N.E 830 (Ill. 1896).

[54] *Id.* at 835.

[55] *Id.* at 835-36.

[56] Friends of the Parks v. Chicago Park Dist., 786 N.E.2d 161 (Ill. 2003).

conveyance of land, so the state did not abdicate control of the trust resource to the owners of the football team, and thus did not violate the trust.[57]

Since *Illinois Central*, Illinois courts have viewed legislative grants of public trust lands to private entities with skepticism. They have adhered to the principle that, although courts should give consideration to a declaration of legislative purpose, "the self-serving recitation of a public purpose within a legislative enactment is not conclusive of the existence of such purpose."[58] Consequently, Illinois courts review legislative acts granting private parties trust resources with "great circumspection" and "considerable skepticism," and the conveyance must "withstand a most critical examination."[59] A primary purpose of the PTD in Illinois is to police the legislature's disposal of public trust lands.[60]

3.3 Limit on Administrative Action

Illinois courts apply the same level of judicial scrutiny to administrative actions as to legislative grants of public trust lands. Where the state holds a trust resource for the use of the general public, the court looks "with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties."[61] If the legislature has recognized or dedicated a public land as trust property, agencies created by the legislature must manage such property "in

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[57] *Id.* at 169-70.

[58] People ex rel. Scott v. Chicago Park Dist., 360 N.E. 2d at 781 (citing People ex rel. City of Salem v. McMackin, 291 N.E. 2d 807, 812 (Ill. 1972); Lake Michigan Federation v. U.S. Army Corps of Engineers, 742 F.Supp. 441, 446 (noting that legislative expressions of public interest do not encumber Illinois courts).

[59] *People ex rel. Scott*, at 780.

[60] *Lake Michigan Federation*, 741 F.Supp. at 446 (stating that "[i]f courts were to rubber stamp legislative decisions... the [public trust] doctrine would have no teeth. The legislature would have unfettered discretion to breach the public trust as long as it was able to articulate some gain to the public.").

[61] Timothy Christian Schools v. Village of Western Springs, 675 N.E.2d 168, 174 (Ill. App. Ct. 1996) (citing *People ex rel. Scott*, 360 N.E. 2d, at 78) (emphasis in original).

trust for the uses and purposes specified and for the benefits of the public."[62] Thus, Illinois courts view an administrative agency's discretion concerning actions that affect trust resources with little deference and give a hard look to such administrative decisions.

4.0 Purposes

Illinois courts have extended the purposes that the PTD protects from traditional rights of navigation and fishing to embrace a modern adaptive approach.

4.1 Traditional (navigation/fishing)

Illinois courts initially acknowledged only the public purposes of navigation and fishing under the PTD, even holding that fishing was subordinate to navigation.[63] Evolution of the public trust doctrine in other state courts nationwide and the ratification of the 1970 state constitution has led the courts to adopt a more expansive view of the public trust doctrine and its public purposes.[64]

4.2 Beyond traditional (recreational/ecological)

In 1976, the Illinois Supreme Court ruled the public uses protected under the PTD may reflect changed circumstances.[65] The court recognized that due to increasing interest in conserving natural resources and in protecting the environment, as evidenced by the 1970 state constitution and the enactment of the Illinois Environmental Protection Act,[66] the purposes of the PTD extended beyond navigation, commerce, and fishing to accommodate for changing uses of

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[62] Paepcke v. Public Building Comm. of Chicago, 263 N.E.2d 11, 15 (Ill. 1970).
[63] Schulte v. Warren, 75 N.E. 783, 787 (Ill. 1905) (holding that fishing is subordinate to navigation); Dupont v. Miller, 141 N.E. 423, 425 (Ill. 1923) (acknowledging the rights of navigation and fishing under the PTD).
[64] *See infra* § 4.2.
[65] People ex rel. Scott v. Chicago Park District, 360 N.E.2d at 780. In *Scott*, the Court adopted the approach recognized by New Jersey. *Id.* (quoting Borough of Neptune City v. Borough of Avon-by-the Sea, 294 A.2d 47, 54-55 (N.J. 1972)).
[66] 415 Ill. Comp. Stat. §§ 5/1 *et. seq.*

trust resources.[67] The court did not articulate exactly what these purposes might include, instead focusing on limitations of trust purposes that are remote and indirect, such as providing jobs.[68] Perhaps due to this lack of articulation of specific purposes, Illinois courts have focused on permissible diversionary purposes under the PTD and have upheld diversions of trust resources for a variety of purposes.

The courts have adopted a broad view of permissible trust purposes, mostly in cases where the state has sought to divert public trust lands from one trust purpose to another.[69] For example, in *Paepcke v. Public Building Comm. of Chicago*, the Illinois Supreme Court rejected an argument that the legislature and its agencies--the Public Building Commission of Chicago, the Board of Education, and the Chicago Park District--violated the public trust by converting two trust properties dedicated as parks into a combination of school and recreational facilities.[70] The court upheld the conversion as a matter of statutory interpretation because the language in the authorizing statute was "sufficiently broad, comprehensive, and definite to allow the diversion in use."[71] The court referred to a balancing test adopted in Wisconsin for proposed diversions in the purposes of public trust lands which required, in part, that the lands remain under governmental control, devoted to public purposes, and open to the public.[72] The Illinois

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[67] *Scott*, 360 N.E.2d at 780.
[68] *Id.*
[69] This trend in court recognition of permissible diversions from one trust purpose to another stems from the supreme court's holding in *People ex rel. Moloney v. Kirk*, allowing the construction of Lake Shore Drive, which converted trust resources from water-based to land-based navigation and commerce, where such a diversion was clearly in the public interest. People ex rel. Moloney v. Kirk, 45 N.E 830 (Ill. 1896). *See infra* note 53.
[70] Paepcke v. Public Building Comm. of Chicago, 263 N.E.2d 11, 18-19 (Ill. 1970).
[71] *Id.* at 19.
[72] Under the Wisconsin test, a diversion is appropriate where: "(1)...public bodies would control use of the area in question, (2)...the area would be devoted to public purposes and open to the public, (3) the diminution of the area of original use would be small compared with the entire area, (4)...none of the public uses of the original area would be destroyed or greatly impaired

Supreme Court stated that the test "might serve as a useful guide for future administrative action."[73] Illinois courts, however, have not responded uniformly to this pronouncement, and no strong precedent has resulted.

The state court of appeals in *Wade v. Kramer*, for example, held that the legislature may permissibly transfer trust resources from one public use to another "where the public interest requires such alteration."[74] The court upheld a bridge construction over the Illinois River to connect the cities of Peoria and Springfield on trust resources originally dedicated as a conservation area and archaeological site.[75] The *Wade* court cited *Paepcke* for the proposition that trust resources are transferable from one use to another and that to hold otherwise would "freez[e]...any future configuration of policy judgments" which would "seriously hamper" the legislature from adapting to the felt necessities of society.[76]

5.0 Geographic Scope of Applicability

The scope of the PTD in Illinois extends to navigable-in-fact waters, including Lake Michigan and most of its beaches in the city of Chicago, as well as parks dedicated to public use. The doctrine may also apply to conservation areas and wildlife; however, the extent to which it protects these resources remains unclear.

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and (5)..the disappointment of those wanting to use the area of new use for former purposes was negligible when compared to the greater convenience to be afforded those members of the public using the new facility." Id. (citing State v. Public Service Comm., 81 N.W.2d 71, 73-74 (Wis. 1957)).

[73] *Id.*

[74] Wade v. Kramer, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984).

[75] *Id.*

[76] *Id.* (citing Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. Law. Rev. 471, 482 (1970).

5.1 Tidal

Although Illinois possesses no traditional tidal lands abutting the sea, Illinois courts extended the PTD to include submerged lands in Lake Michigan.[77] The English common law ebb-and-flow test determines boundary and ownership.[78] For determining public rights, however, the ebb-and-flow test does not apply, as Illinois courts long ago adopted the navigability-in-fact test.[79]

5.2 Navigable-in-fact

Whether a water is navigable-in-fact determines the extent of the public rights.[80] According to Illinois' navigability-in-fact test, if the public can use a particular waterway as a highway for commerce in its natural state or with reasonable improvements, including trade and travel by customary modes, Illinois courts consider it navigable.[81] Illinois does not apply the "log flotation" test used by other nearby states, such as Michigan, Wisconsin, Minnesota, and Arkansas.[82] Likewise, the ability to pass rowboats or small skiffs over the water is insufficient to establish navigability.[83] Instead, a waterway must have the capacity for fairly continuous support of commercial vessels.[84] However, the fact that a waterway requires artificial means or

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[77] Schulte v. Warren, 75 N.E. 783, 785 (Ill. 1905).
[78] *Id.*
[79] *Id.*; Wilton v. Van Hessen, 94 N.E. 134 (Ill. 1911) (accord); State of Illinois v. New, 117 N.E. 597, 599 (accord); Dupont v. Miller, 141 N.E. 423, 425 (Ill. 1923) (accord). Early Illinois cases applied the English common law definition of navigability, which only covered arms of the sea and streams subject to the ebb and flow of the tide. City of Chicago v. McGinn, 51 Ill. 266, 272 (Ill. 1869); Middleton v. Pritchard, 4 Ill. 510, 520 (1842). No waterways in Illinois met this test, and the courts quickly shifted to a "navigability-in-fact" test. Healy v. Joliet & C.R.R., 116 U.S. 191 (1886).
[80] Schulte v. Warren, 75 N.E. 783, 785 (Ill. 1905).
[81] Dupont v. Miller, 141 N.E. 423, 425 (Ill. 1923); Courts have also described the test as whether the water is "sufficiently deep" to be useful for commerce. *Id.*; *Schulte*, 75 N.E. at 785.
[82] *Schulte*, 75 N.E. at 785; *Dupont*, 141 N.E. at 425 (accord).
[83] *Schulte,* 75 N.E. at 785.
[84] Hubbard v. Bell, 54 Ill. 110, 121 (Ill. 1870).

reasonable improvements to make it useful for commerce does not disqualify it from being navigable.[85]

In Illinois, the public enjoys the right of navigation on all navigable-in-fact waters, regardless of who owns the submerged lands.[86] The right to fish and hunt, however, is not incident to the right of navigation, and therefore bed ownership of the waterway determines the extent of the public hunting and fishing right in navigable-in-fact waters.[87] This rule gives private landowners the right to exclude the public from hunting and fishing on these navigable-in-fact waterways, however, the public cannot be excluded from navigating these waters.[88]

5.3 Recreational waters

The public has the right to recreate on waters over state-owned streambeds, including "boating, fishing, and the like."[89] A privately owned streambed on a navigable-in-fact water is subject to a public easement of navigation, but the easement does not include the right to hunt and fish.[90] However, where the state owns the underlying beds, the public enjoys a right to recreate, including hunting and fishing.[91] There is no Illinois case law recognizing activities incident to navigation, such as portaging, picnicking, or overnight camping under the Illinois PTD.

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[85] Senko v. LaCrosse Dredging Corp., 147 N.E. 2d 708, 710-11 (Ill. App. Ct. 1957). Earlier case law, however, suggested that where man-made improvements are necessary to make a waterway usable for commercial purposes, the waterway is not considered navigable. People v. Economy Light & Power Co., 241 Ill. 290, 326 (Ill. 1909). While *Senko* did not expressly overrule *Economy Light*, Illinois courts have steered away from *Economy Light's* restrictive interpretation of navigability, focusing instead on the "reasonable improvements" language in the federal navigability-in-fact test.

[86] Schulte v. Warren, 75 N.E. 783, 785 (Ill. 1905).

[87] Beckman v. Kreamer, 43 Ill. 447 (1867).

[88] Schulte v. Warren, 75 N.E. 783, 787 (Ill. 1905)

[89] *Id.*

[90] *Id.*

[91] *Id.* at 786.

5.4 Wetlands

Illinois case law has not specifically recognized wetlands as a public trust resource. Unless the wetland is part of a conservation area or other designated parkland, the PTD apparently cannot be used to protect this resource from private development.[92]

5.5 Groundwater

Illinois has not extended its PTD to include groundwater as a trust resource. However, the Water Use Act of 1983 established a rule of reasonable use of groundwater.[93]

5.6 Wildlife

Illinois has not applied the PTD to wildlife. However, in 1881, the Illinois Supreme Court recognized that the people of the state collectively own wildlife.[94] The court reasoned that the legislature, as sovereign, holds title to wildlife in trust for the benefit of the public.[95] In 1984, in *Wade v. Kramer*, the court of appeals recognized that the PTD in Illinois applied to a conservation area, supporting the notion that Illinois may extend the doctrine to wildlife.[96] In fact, the court in *Wade* cited the court below, which held that it is "undoubtedly true that the State has a type of guardianship or trust over wildlife in the state."[97] Whether Illinois courts will recognize that the PTD protects wildlife as a trust resource remains unclear.

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[92] *See infra* Section 5.7.
[93] 525 Ill. Comp. Stat. 45/6. If a private landowner proposes to withdraw groundwater reasonably expected to be more than 100,000 per day, the landowner must notify the Department of Natural Resources before construction of the well. *Id.* § 45/5
[94] Magner v. People, 97 Ill. 320, 1881 WL 10415, at 8 (Ill. 1881).
[95] *Id.* The court declared that "the ownership of the sovereign authority is in trust for all the people of the State, and hence, by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use, in the future, to the people of the State." *Id.*
[96] Wade v. Kramer, 459 N.E.2d 1025 (1984).
[97] *Id.* at 1026.

5.7 Uplands

Along Lake Michigan, the law is unclear whether the high-water mark or the water's edge separates public and private ownership of the shorefront.[98] Landowners with shorefront property have a right of access to the lake, determined by the lateral boundary width of their premises bordering the lake.[99] Natural accretion of the lake belongs to the shorefront owner.[100] Illinois courts prohibit shorefront landowners from augmenting property boundaries "by building out into the lake for that purpose."[101]

The Illinois PTD explicitly applies to parks wholly segregated from submerged lands.[102] Nearly the entire Lake Michigan shore in the city of Chicago is parkland that, with minor exceptions, is subject to the trust.[103] However, outside of the city of Chicago, the application of the trust doctrine to uplands on Lake Michigan is unclear, and many municipalities continue to exclude the general public in favor of local residents.[104] Illinois courts have not yet heard a case on the right of the public to access beaches above the high water mark or water's edge.

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[98] Revell v. People, 52 N.E. 1052, 1055 (1898) (citing *Illinois Central*, 146 U.S. 375, 152 (1892), Shively v. Bowlby, 152 U.S. 9 (1894), People v. Kirk, 45 N.E. 830, 133 (Ill. 1986)) (holding that high water mark separates public and private ownership on Lake Michigan). *Cf.* Brundage v. Knox, 117 N.E. 123, 124 (Ill. 1917); Hammond v. Shepard, 57 N.E. 867, 868 (Ill. 1900) (holding that the water's edge separates public and private ownership on Lake Michigan).

[99] *Revell*, 52 N.E. 105, 1057 (Ill. 1898).

[100] *Id.*

[101] Brundage v. Knox, 117 N.E. 123, 127 (Ill. 1917). The state may, however, issue fill permits to municipalities for the construction of wharves, piers, levees, and water purification plants, and the permitted municipality thereafter owns such fills in fee simple. 65 Ill. Comp. Stat. 5/11-117-11.

[102] Paepcke v. Public Bldg. Comm. of Chicago, 263 N.E.2d 11 (1970) (ruling that two Chicago city parks were trust resources that could be used by the city for a school-park hybrid as a valid trust purpose in furtherance of the trust); Friends of the Parks v. Chicago Park Dist., 786 N.E.2d 161, 169 (Ill. 2003) (stating that the home site of the Chicago Bears, Burnham Park, is a public trust property).

[103] Sean D. Hamill, *No line in the sand on beach rights; Confusion reigns in state on public access to shore*, Chicago Tribune, Aug. 9, 2005.

[104] *Id.*

According to the Illinois Court of Appeals, the PTD also applies to conservation areas.[105] However, there are no reported cases in which the public trust doctrine has successfully been used to protect a conservation area. In *Wade v. Kramer*, the court rejected a claim that the construction of a bridge over the Illinois River violated the trust because the public would lose a conservation area and archaeological site held in trust for public use because the legislature could divert these lands to the public purpose of transportation.[106] The geographic scope of the doctrine does not apply to empty lots or alleyways.[107]

6.0 Activities Burdened

Illinois primarily uses the public trust doctrine to restrict alienation of trust lands to private entities, and has not expanded the doctrine to burden other activities associated with the use of trust lands.

6.1 Conveyances of property interests

Illinois courts have not used the PTD to prevent private conveyances of land. As discussed in earlier sections,[108] Illinois courts have used the doctrine only to limit the government's ability to transfer trust properties to private entities.[109] However, the Submerged

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[105] Wade v. Kramer, 459 N.E.2d 1025 (Ill. App. Ct. 1984) (acknowledging that the trust applied to a conservation area despite ruling that the legislature and Department of Transportation could convert area into public bridge).
[106] *Id.*
[107] Timothy Christian Schools v. Village of Western Springs, 675 N.E.2d 168, 174 (Ill. App. Ct. 1996) (declining to extend the public trust doctrine to an empty lot that had been used as a drainage area to restrict a municipality from conveying lot to a developer); Paschen v. Village of Winnetka, 392 N.E.2d 306 (Ill. App. Ct. 1979) (declining to extend the PTD to an alleyway where a bank's proposed construction would not alter public right to use alleyway).
[108] *See infra* §§ 3.1 and 3.2.
[109] *Id.*

Lands Act appears to give the state the authority to reclaim trust lands illegally filled in the past, which might have implications for private landowners in the future.[110]

6.2 Wetland fills

No cases in Illinois suggest that the PTD prevents a private landowner from filling a privately owned wetland.

6.3 Water rights

Illinois courts have not used the PTD to limit consumptive water rights.

6.4 Wildlife harvests

In 1881, the Illinois Supreme Court in *Magner v. People* declared that the legislature holds title to wildlife in trust for the people of the state, and therefore has the authority to regulate and control the hunting of wildlife.[111] In *Wade v. Kramer*, the court of appeals recognized that the state has long been considered trustee of wildlife.[112] However, no reported cases suggest that the Illinois PTD expressly burdens wildlife harvests.

7.0 Public standing

Illinois courts initially refused to recognize public standing under the PTD, and only allowed claims brought by the attorney general.[113] However, Illinois courts granted public

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[110] *See supra* note 20.

[111] Magner v. People, 97 Ill. 320, 1881 WL 10415, at 8 (Ill. 1881). The court stated that the legislature "may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as, in the opinion of its members, will best subserve the public welfare."

[112] Wade v. Kramer, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984).

[113] Droste v. Kerner, 217 N.E.2d 73 (Ill. 1966) (denying standing to a taxpayer who sought to enjoin the state from selling public trust lands to a private entity).

standing in reaction to Joseph Sax's seminal law review article, and cases from other jurisdictions, which granted the public the right to sue under the PTD.[114]

7.1 Common law-based

Initially, Illinois courts were unwilling to recognize a private right of action, either by individual taxpayers or property owners, to challenge an alleged misuse of trust property unless the individual suffered "special injury," different in kind than the general public, or if a statute conferred a right to bring suit.[115] But after publication of Joseph Sax's seminal law review article in 1970,[116] the Illinois Supreme Court reconsidered the issue and overruled prior precedent in *Paepcke v. Public Building Commission of Chicago*, which declared that if the public trust doctrine were "to have any meaning or vitality at all, members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it."[117] The court concluded that denying standing, and thus forcing individuals who benefit from trust resources to wait for governmental intervention to assert trust rights, would effectively preclude the public's right to benefit from trust resources in most cases.[118] More recently, the Illinois Supreme Court[119] and the United States District Court for Northern District of Illinois[120]

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[114] *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. Law. Rev. 471-566 (1970); Gould v. Greylock Reservation Comm., 215 N.E. 2d 114 (1966) and Robbins v. Dept. of Pub. Works, 244 N.E. 2d 577 (1969)).
[115] Droste v. Kerner, 217 N.E.2d at 79.
[116] *See* Sax *supra* note 114.
[117] Paepcke v. Public Building Comm. of Chicago, 263 N.E.2d 11, 18 (Ill. 1970).
[118] Id. (quoting Gould v. Greylock Reservation Comm., 215 N.E. 2d 114 (1966) and *Robbins v. Dept. of Pub. Works*, 244 N.E. 2d 577 (1969)).
[119] Friends of the Parks v. Chicago Park Dist., 786 N.E.2d 161 (Ill. 2003) (granting a private organization standing to sue Chicago Park District under public trust doctrine).
[120] Lake Michigan Federation v. U.S. Army Corps of Engineers, 742 F.Supp. 441 (N.D. Ill. 1990) (granting a private organization standing to sue private university and government under public trust doctrine).

have granted standing to private organizations seeking to enforce the PTD to protect trust resources.

Since *Paepcke* first recognized individual standing, Illinois courts have further defined and expanded the right of individuals to enforce the public trust. According to the court of appeals, in order to establish PTD standing, a plaintiff must show that: (1) a governmental body holds trust property for a given public use; (2) governmental action with respect to the trust property is inconsistent with its original intended public use; and (3) the action is arbitrary and capricious.[121] However, Illinois courts recognizing public standing under this test have yet to hold a challenged governmental action in violation of the trust.[122]

7.2 Statutory basis

No statute in Illinois explicitly grants standing to the public to protect trust resources under the PTD. No other statute recognizing public standing could assist public trust doctrine claimants in challenging government actions in Illinois.

7.3 Constitutional basis

Article XI, sections 1 and 2 of the 1970 Constitution, which declare that "the public policy of the state and duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations," and announce that "each person may enforce this right against any party, government or private party," do not provide an independent right to standing absent a separate cognizable cause of action.[123] However, because the Illinois Supreme Court, in *People ex rel. Scott v. Chicago Park Dist.*, linked the PTD to these constitutional provisions, it is

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[121] Paschen v. Village of Winnetka, 73 Ill.App.3d 1023, 1028 (1979); Timothy Christian Schools v. Village of Western Springs, 675 N.E.2d 168, 173-74 (Ill. App. Ct. 1996) (accord).
[122] Paschen, 73 Ill.App.3d, at 1028.
[123] *See supra* note 33.

possible that both public and private parties can use these provisions to obtain standing to sue under the PTD.[124]

8.0 Remedies

Illinois courts have granted declaratory relief and injunctive relief for conveyances of trust property; however, the courts have not yet awarded damages for injuries to trust resources. Since *Illinois Central*, Illinois courts have not used the public trust doctrine as a defense to takings claims.

8.1 Injunctive relief

Illinois courts that have found violations of the public trust have historically granted declaratory relief to invalidate the grant of trust resources to private entities.[125] More recently, the federal District Court for Northern District of Illinois held that Loyola University's plans to construct a lakefill on Lake Michigan violated the public trust and permanently enjoined the university from developing these trust resources.[126]

8.2 Damages for injuries to resources

Illinois courts have yet to grant damages for injuries to trust resources under the public trust doctrine.

8.3 Defense to takings claims

The Supreme Court in *Illinois Central* used the public trust doctrine as a defense to a takings claim when it voided a legislative conveyance of the shorefront of Lake Michigan in the

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[124] People ex rel. Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976).
[125] *See infra* § 3.2.
[126] Lake Michigan Federation v. U.S. Army Corps of Engineers, 742 F.Supp. 441, 447 (N.D. Ill. 1990).

city of Chicago to a railroad company.[127] Interestingly, since *Illinois Central*, no Illinois court has used the PTD as a defense to a takings claim.

[127] Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, 460 (1892). "We hold, therefore, that any attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof, and that any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective." *Id.*

IOWA

The Public Trust Doctrine in Iowa

Kya B. Marienfeld

1.0 Origins

Since achieving statehood in 1846, Iowa has had a small but persistent application of the public trust doctrine ("PTD"). Title to the lands beneath navigable waters and to the waters themselves passed from the United States to Iowa in trust for the citizens of the new state under the "equal footing doctrine" at the time of statehood.[1]

English common law and the use of the tidal water test for navigability defined U.S. public trust doctrine in its early stages. As applied in Iowa, this meant that the Mississippi River—one of the largest and most traveled rivers in North America— was "non-navigable" because it was not a tidal water. In 1856, the Iowa Supreme Court responded by adopting a navigable-in-fact test for public navigation, in lieu of the antiquated tidal test inherited from English common law.[2]

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[1] *State v. Sorensen*, 436 N.W.2d 358, 361 (Iowa 1989).

[2] *McManus v. Carmichael*, 3 Iowa 1 (1856) (recognizing that the term navigable, "embraces within itself, not merely the idea that the waters could be navigated, but also the idea of publicity, so that saying waters are public, is equivalent, in legal sense, to saying that they are navigable." Additionally, the court advocate, in 1856, wrote briefs that included some memorable arguments:

> "Are we to be told that the Mississippi river is not a navigable stream, and its bed private property? The father of the floods, private property! The great river, to see which the conqueror of Florida periled the lives of his followers, to find for himself a grave in its waters, instead of gold in its sands, belongs to every petty owner who pays a dime for the land on its banks! The river, which carries to the sea the products of millions of people, the boundary of states without number; which carries to a single port commerce numbered by hundreds of millions of dollars, and numbers the ships which float on its waters by thousands, cannot be private property. We know that men, with the wealth of Crœsus, and the genius of Archimedes, have spanned its waters with a bridge. So has science bridged and tunneled the Thames, at London, and the thundering car has swept across the straits of Menai, and Niagara at the falls; but they are navigable streams, and the father of waters has yielded to the genius of progress, not to diminish, but increase, the trade and intercourse on this great highway of the republics which have grown, and will continue to grow, on its borders").

In 1883, Iowa expanded its navigability-in-fact test beyond the Mississippi River corridor, applying it to the Des Moines River.[3] Since the state's first recognition of public navigation, Iowa has embraced the idea that "public" waters are equivalent to "navigable" waters, and vice versa.[4] Therefore, any waters in Iowa that are navigable-in-fact are also "public," or navigable-in-law.[5] As with other states that recognize the PTD, the doctrine applies to property that the state owns in trust for its citizens.[6]

2.0 The Basis of the Public Trust Doctrine in Iowa

Iowa courts recognized that the PTD, as inherited from English common law, needed modification to fit a state with many rivers but no tidelands.[7] Since statehood, Iowa has also codified the PTD in statutes.[8] Although there were no provisions in the Iowa Constitution relating to the PTD for a long time, recent amendments arguably embrace the PTD.[9]

2.1 Common Law Basis

As mentioned previously, Iowa courts first recognized the PTD at common law in 1856, in *McManus v. Carmichael*,[10] in which the Iowa Supreme Court discussed the English origins of the PTD and explained how the doctrine might apply to a case of trespass on the banks of the Mississippi River.[11] Using trust language, the court recognized that, in England, the "soil under navigable streams belonged to the king, as *parens patriae*, for the same reason that the waters

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[3] *Wood v. Chicago, R.I. & P.R. Co.*, 15 N.W. 284 (Iowa 1883).
[4] *McManus v. Carmichael*, 3 Iowa at 1.
[5] *Id.* at 5-6 ("By the civil law, all rivers in which the flow of waters was perennial, belonged to the public, and the public right extended to the use of the banks, as well as to fishing. Navigable rivers, in the language of the civil law, are not merely rivers in which the tide ebbs and flows, but rivers capable of being navigated in the common sense of the term. In the words of the digests, *statio itur re navigatio*.").
[6] *Schaller v. State*, 537 N.W.2d 738, 743 (Iowa 1995) (recognizing that because a tract of subject to inverse condemnation to prevent public access was not state-owned, the public trust doctrine did not apply).
[7] *See infra* § 2.1.
[8] *See infra* § 2.2.
[9] *See infra* § 2.2.
[10] *See supra* note 2.
[11] *Id.*

did... as a trust for the public use and benefit."[12] However, after recognizing and affirming the purpose of English public trust doctrine, the court in *McManus* expanded the traditional English test for public trust applicability, which centered on the ebb and flow of the tide.[13] Acknowledging that "the ebb and flow of the tide does not, in reality, make the waters navigable, nor has it, in the essence of the thing, anything to do with it,"[14] the court adopted Iowa's "navigable-in-fact" test, stating that it was a "common sense" rule.[15] Iowa courts soon applied the new, common sense navigability test beyond the Mississippi River, expanding it to other large rivers that, although not "tidal waterways," were nonetheless navigable-in-fact.[16]

2.2 Statutory Basis

Several statutory provisions in the Iowa Code interpret and codify the PTD. Most importantly, Iowa statutes affirm that the land under a flowing water is subject to the public's use of that body of water and codify the PTD's emphasis on navigation by defining "public waters" as any "water occurring in any river, stream, or creek... with visible evidence of the flow of water... and subject to use for navigation purposes in accordance with law."[17] In addition, the

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[12] *Id.* at 29 (emphasis added).
[13] *Id.* at 30.
[14] *Id.* at 27.
[15] *Id.* at 30.
[16] *See e.g. Wood v. Chicago, R.I. & P.R. Co.,* 15 N.W. 284 (applying the PTD navigability-in-fact test to the Des Moines River); *also Musser v. Hershey*, 42 Iowa 356, 53 (1876) (extending the *McManus* navigability rule as a general principle of state law).
[17] Iowa Code Ann. § 462A.69 (explaining that "water occurring in any river, stream, or creek having definite banks and bed with visible evidence of the flow of water is flowing surface water and is declared to be public waters of the state of Iowa and subject to use by the public for navigation purposes in accordance with law. Land underlying flowing surface water is held subject to a trust for the public use of the water flowing over it. Such use is subject to the same rights, duties, limitations, and regulations as presently apply to meandered streams, or other streams deemed navigable for commercial purposes and to any reasonable use by the owner of the land lying under and next to the flowing surface water"); Other statutes involving the public trust include those that define "navigable waters," Iowa Code Ann. § 462A.2 ("'Navigable waters' means all lakes, rivers, and streams, which can support a vessel capable of carrying one or more persons during a total of six months in one out of every ten years"), define the state's responsibility for removing debris within navigable waterways, Iowa Code Ann. § 461A.53 ("the commission may enter into agreements for the removal of ice, sand, gravel, stone, wood, or other natural material from lands or waters under the jurisdiction of the commission if, after investigation, it is determined that such removal will not be detrimental to the state's interest"), and confer jurisdiction over all state lands and waters to a legislative commission, Iowa Code Ann. § 461A.18 ("jurisdiction over all meandered streams and lakes of this state and of

Iowa Attorney General announced that the public may float on any stream that is considered "navigable" under Iowa statute, and may engage in "activities incident to navigation, including fishing, swimming, and wading."[18]

2.3 Constitutional Basis

The Iowa Constitution did not include language that implicated the public trust doctrine until recently. But, in 2010, the state amended its constitution to include a natural resources and outdoor recreation trust for the purpose of protecting and enhancing water quality and state natural areas, including parks, trails, fish and wildlife habitat, and agricultural soils.[19] Although this amendment created a fiscal trust for the future benefit of the state's natural resources—instead of establishing that these resources are part of the state's public trust—the amendment demonstrates Iowa's commitment to set aside long-term funding to preserve public resources affecting recreation, navigability, fishing, and other public trust interests.[20]

3.0 Institutional Application

The Iowa PTD has yet to impose any restraints on private conveyances of riparian land. The doctrine does, however, place limitations on legislative actions that seek to give any or all public trust benefits over to private ownership.[21] Iowa has no similar limits on administrative action.

3.1 Restraint on alienation (private conveyances)

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state lands bordering thereon, not now used by some other state body for state purposes, is conferred upon the commission").

[18] 1996 WL 169627 (Iowa A.G. Feb. 6, 1996).

[19] Iowa Const. art. VII, § 10 (the amendment also provides that "moneys in the fund shall be exclusively appropriated by law for these purposes").

[20] *Id.* (the amendment states that "a natural resources and outdoor recreation trust fund is created within the treasury for the purposes of protecting and enhancing water quality and natural areas in this State including parks, trails, and fish and wildlife habitat, and conserving agricultural soils in this State.").

[21] *Bushby v. Washington County Conservation Bd.*, 654 N.W.2d 494, 497 (Iowa 2002) (affirming that "the purpose of the public-trust doctrine is to prohibit states from 'conveying important natural resources' to private parties.").

Iowa courts have yet to discuss whether the PTD limits private conveyances of land. However, on any navigable water, a riparian owner's right of access is a property right, but will always be subject to the state's right to "maintain and promote navigation by whatever reasonable means, ... [which] is paramount to the right of ingress and egress of a riparian owner."[22] Therefore, the riparian owner in any private conveyance of land takes the incidents of his or her title subject to navigability of the waters, whose bed up to the ordinary high water mark is held in trust by the state.[23]

3.2 Limit on legislature

The Iowa PTD severely limits the alienation of trust lands by the state legislature. The state has little power to dispose of the public's inviolable rights to certain natural resources.[24] For example, the Iowa Supreme Court has ruled that land from the riverbed center to the ordinary high water mark in the Missouri River is public trust property and cannot be sold by the state.[25] However, the Iowa Code does authorize the state to sell parklands to cities or other counties, provided that if the conveyed lands cease to be used as a public park by the local government, the lands revert to the state, because the state only conveyed to the locality a fee simple determinable.[26]

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[22] *Peck v. Alfred Olsen Const. Co.*, 245 N.W. 131, 134 (Iowa 1932).
[23] *Id.* at 136.
[24] *Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 813 (Iowa 2000) (declining to extend the PTD to a public alleyway and recognizing the PTD's severe restrictions on alienability of trust property); *see also State v. Sorensen*, 436 N.W.2d at 362 (noting the "stringent limitations on the state's power to alienate such property").
[25] *State v. Dakota County, Nebraska*, 93 N.W.2d 595, 599-60 (Iowa 1958) (deciding in quiet title action that the "State of Iowa in its sovereign capacity, holds title to the soil below the high water mark of a navigable river in trust for navigation and commerce," and therefore a private claimant to land which might be below the high water mark could not obtain title to it by a conveyance from parties (in Dakota County, NE) that themselves did not hold good title. "The state cannot be divested of title to its land in this manner.").
[26] Iowa Code Ann. § 461A.32 (providing that "when such lands cease to be used as public park by said city or county such lands revert to the state, and such park shall, within one year after such land has reverted to the state, be restored, as nearly as possible, to the condition it was in when acquired by such city, county or legal agency thereof at the expense of such city, county or legal agency." In addition, the state may check up on its conveyed parklands by "requir[ing] that the city, county or legal agency thereof file a notice of intention every three years").

3.3 Limit on administrative action (hard look)

Iowa has not used the public trust to limit the actions of its administrative agencies.

4.0 Purposes

Iowa's PTD rests on the premise that there are important public rights to use the state's natural resources that warrant the state's protection. In Iowa, navigability is equivalent to public usage rights, and Iowa's courts and legislature have expanded the PTD to encompass recreation and other rights of use.

4.1 Traditional (navigation/fishing)

Navigability is a major touchstone of Iowa's PTD. The Iowa Supreme Court adopted a navigable-in-fact test to help sort out state titles in 1856.[27] Statutorily, Iowa's PTD is quite specific—the Iowa Code defines navigable waters as "all lakes, rivers, and streams which can support a vessel capable of carrying one or more persons during a total of six months in one out of every ten years."[28] Iowa courts also recognize public fishing rights as another traditional public trust use.[29]

4.2 Beyond traditional (recreational/ecological)

Iowa's use-based test of navigability accommodates recreational purposes as a part of the state's public trust; the Iowa Supreme Court has defined the PTD to "embrace the public's use of lakes or rivers for recreational purposes."[30] Nevertheless, the PTD protects recreation only to the extent that the recreational waterway is accessible by state or other public land.[31] Thus, "access for recreation" on Iowa's navigable waters does not mean unlimited public rights to cross over

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[27] *McManus v. Carmichael*, 3 Iowa at 56.
[28] Iowa Code Ann. § 462A.2.
[29] *See e.g. State v. Sorensen*, 436 N.W.2d at 363 (establishing that "fishing … [is] among the expressly recognized uses protected by the public trust doctrine… fishing and navigation, whether of a commercial or recreational nature, require means of public access to the river.").
[30] *Larman v. State*, 552 N.W.2d 158, 161 (Iowa 1996).
[31] *State v. Sorensen*, 436 N.W.2d at 363 (the doctrine applies to natural resources within the state and to "state-owned land" adjoining these resources).

private land to get there; the public may not trespass on private property to exercise public recreational rights.[32]

5.0 Geographic Scope of Applicability

5.1 Tidal

Iowa rejected the common law tidal test in 1856.[33] Because the state possesses no tidal lands, the Iowa Supreme Court recognized that a public trust navigability test based on the ebb and flow of the tides was impractical for an inland state.[34]

5.2 Navigable-in-fact

Iowa adopted the navigability-in-fact test for public rights in 1856.[35] The navigability-in-fact test still underscores the principles behind the state's use-based public trust rights. Iowa courts determine navigability chiefly by examining public use, for public recreation, rather than just public or commercial transportation on the water.[36] In 1989, the Iowa Supreme Court concluded that the breadth of the state's navigability test meant that "saying waters are public is equivalent, in a legal sense, to saying that they are navigable."[37] Thus, if a waterway can be used for recreational purposes, it is navigable-in-fact and subject to public rights, even if the riverbed is in private ownership. However, the public's right of access to navigable waterways exists "only to the extent the land providing such access is owned by the state."[38] There is no public right in Iowa to cross private uplands to reach publicly navigable waters.

5.3 Recreational waters

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[32] *Id.*
[33] *See generally McManus v. Carmichael*, 3 Iowa 1 (1856).
[34] *Id.* at 30.
[35] *Id.* at 56.
[36] *State v. Sorensen*, 436 N.W.2d at 363.
[37] *Id.* (noting that "the term navigable, embraces within itself, not merely the idea that the waters could be navigated, but also the idea of publicity").
[38] *Larman v. State*, 552 N.W.2d at 161 (concluding that for the state to invoke the PTD, it must at least show an ownership interest in the land).

The PTD in Iowa has evolved to include the public's use of lakes and rivers for recreational purposes.[39] Recreational uses include the right of fishing, boating, skating, and other water sports.[40]

5.4 Wetlands

Although wetlands in Iowa may be privately owned,[41] like other non-navigable bodies of water, a federal or private grant to a riparian owner does not extinguish the *jus publicum*.[42] Therefore, the state of Iowa exercises *jus publicum* control over the waters and bed of wetlands and other non-navigable inland bodies of water in trust for its citizens.[43]

5.5 Groundwater

Iowa courts have yet to discuss whether the state's PTD applies to groundwater. However, the state's water allocation and planning regulations provide for the protection of groundwater, as a resource necessary to ensure the long-term availability of drinking water and to advance public health and welfare.[44] Although this provision in the Iowa Code does not mention the public trust, it does establish that the control and regulation of groundwater, for the

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[39] *Robert's River Rides, Inc. v. Steamboat Dev. Corp.*, 520 N.W.2d 294, 299 (Iowa 1994) (concluding that although the 'public trust' doctrine was originally intended to protect commercial navigation, it has been expanded to safeguard the public's use of navigable waters for purely recreational and non-pecuniary purposes.").

[40] *McCauley v. Salmon*, 14 N.W.2d 715, 716 (Iowa 1944) (concluding that the Des Moines River is "a navigable stream," and therefore "[t]he right of the public to navigate the water is paramount. This includes the right of fishing, boating, skating and other sports.").

[41] *State v. Jones*, 122 N.W. 241 (Iowa 1909) *aff'd sub nom. Marshall Dental Mfg. Co. v. State of Iowa*, 226 U.S. 460 (1913) (concluding that unless the federal government issued a patent to the state for swampland, title remains with the federal government).

[42] *Id.* at 244 (rejecting the private defendant's claim that "the grant to the riparian owner conveys the bed of a nonnavigable lake and makes its waters mere private water.").

[43] *Id.* (affirming that "so long as such meandered lakes exist, over their waters and bed, when covered with water, the state exercises control, and holds the same in trust for all the people, who alike have benefit thereof in fishing, boating, and the like").

[44] Iowa Code Ann. § 455B.262 ("Water occurring in a basin or watercourse, or other body of water of the state, is public water and public wealth of the people of the state and subject to use in accordance with this chapter, and the control and development and use of water for all beneficial purposes is vested in the state, which shall take measures to ensure the conservation and protection of the water resources of the state. These measures *shall include the protection of specific surface and groundwater sources as necessary to ensure long-term availability* in terms of quantity and quality to preserve the public health and welfare") (emphasis added).

public benefit, rests with the state.[45] This directive creating a state responsibility to maintain groundwater for the use and benefit of the public may imply a trust-like responsibility concerning groundwater.[46]

5.6 Wildlife

In *State v. Sorenson,* the Iowa Supreme Court noted that the PTD has evolved to incorporate a variety of non-navigational interests, among them wildlife.[47] State ownership of wildlife has been codified by the Iowa legislature,[48] and the Iowa Supreme Court clarified that this state ownership of wildlife is "more accurately characterized as an ownership or title in trust, to conserve natural resources for the benefit of all Iowans."[49]

In *Metier v. Cooper Transport Company, Inc.*, the Iowa Supreme Court considered whether the state's control or supervision over the intrastate deer population provided a basis for imposing liability for personal injury and property damage.[50] A motorist involved in a traffic collision argued that the state was liable for an automobile accident because the state owned all wildlife, and attempting to avoid a deer on the roadway caused her damages.[51] The state, she maintained, exercises greater ownership rights over its deer than cattle or hog farmers exercise over their livestock; therefore, the state should be liable for damages caused by wildlife, because

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[45] *Id.*
[46] *Id.*
[47] *State v. Sorensen,* 436 N.W.2d at 362 (accepting that the PTD "is said to have evolved to the point that it now has emerged from the watery depths to embrace the dry sand area of a beach, rural parklands, a historic battlefield, wildlife, archaeological remains, and even a downtown area").
[48] Iowa Code Ann. § 481A.2 ("The title and ownership of all fish, mussels, clams, and frogs in any of the public waters of the state, and in all ponds, sloughs, bayous, or other land and waters adjacent to any public waters stocked with fish by overflow of public waters, and of all wild game, animals, and birds, including their nests and eggs, and all other wildlife, found in the state, whether game or nongame, native or migratory, except deer in parks and in public and private preserves, the ownership of which was acquired prior to April 19, 1911, are hereby declared to be in the state, except as otherwise provided in this chapter.").
[49] *Metier v. Cooper Transp. Co., Inc.*, 378 N.W.2d 907, 914 (Iowa 1985).
[50] *Id.* at 909.
[51] *Id.*

livestock owners would be liable for livestock damage in a similar situation.[52] But the court rejected the idea that state ownership of wildlife meant state responsibility for wildlife damage, explaining that making the state liable for the actions of its wild animals would cause "intractable problems" and impose "intolerable risks [on] the ultimate ability of the State to administer its trust."[53] Consequently, although the state owns wildlife in trust for its citizens, it is not liable for damage caused by every deer, muskrat, or goose in the state.

5.7 Uplands (beaches, parks, highways)

The Iowa Supreme Court has recognized that the PTD "is said to have evolved to the point that it now has emerged from the watery depths [of navigable waterways] to embrace the dry sand area of a beach, rural parklands, a historic battlefield, wildlife, archaeological remains, and even a downtown area."[54] Although recognizing that the PTD may apply to some uplands, the court concluded that it would not "necessarily subscribe to broad applications of the doctrine," and cautioned "against an overextension of the doctrine" outside navigable waterways.[55]

In *Fencl v. City of Harpers Ferry*, the Iowa Supreme Court declined to extend the PTD to streets and alleys, distinguishing between land "held in trust for the public's use," like public streets and walkways, and natural resources that are "'public trust property' subject to the severe restrictions on alienability inherent in the public trust doctrine."[56] Roads and alleyways are not

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[52] *Id.* at 914.
[53] *Id.* (also noting that, under Metier's theory of liability for wildlife damage, the "heritage of wildlife beauty and splendor the State seeks to preserve for future generations might well be lost").
[54] *State v. Sorensen,* 436 N.W.2d at 362.
[55] *Id.* at 363.
[56] *Fencl v. City of Harpers Ferry*, 620 N.W.2d at 814-16.

part of the public trust because they exist wherever the government chooses to place them, unlike a resource that is unique and naturally occurring, like a river or a stream.[57]

Although Iowa courts have yet to extend the PTD to parks, historic sites, or other upland property interests, cases like *Fencl* suggest that the Iowa Supreme Court might focus on whether the resource in question was of a "unique nature" warranting imposing a restraint on alienability to protect public rights.[58]

6.0 Activities Burdened

As mentioned previously, the state is burdened by the PTD when it tries to convey public property interests.[59] Additionally, a purchaser of private riparian land takes his or her title subject to public navigation rights,[60] and a private conveyance of riparian land does not extinguish the state's *jus publicum* interests.[61]

6.1 Conveyances of property interests

In Iowa, the PTD burdens the conveyance of private property interests. A private conveyance of riparian property that contains navigable or nonnavigable waters does not privatize these waters.[62] In addition, existing PTD restrictions on development and use of riparian property are not extinguished by private conveyances.[63]

6.2 Wetland fills

The PTD does not burden wetland fills in Iowa.

6.3 Water rights

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[57] *Id.* at 814 (explaining that "[u]nlike the unique nature of the Missouri River, an alley exists merely where the governmental entity chooses to place it").
[58] *Id.* (concluding that generic public property is "distinguishable from public trust property with respect to the uniqueness of the land as well as the limitations on its alienability").
[59] *See supra* § 3.2.
[60] *Peck v. Alfred Olsen Const. Co.* 216 Iowa at 136.
[61] *State v. Jones*, 122 N.W. at 244 (rejecting a private defendant's claim that "the grant to the riparian owner conveys the bed of a nonnavigable lake and makes its waters mere private water.").
[62] *Id.*
[63] *Peck v. Alfred Olsen Const. Co.* 216 Iowa at 136.

Iowa has yet to expressly recognize the PTD's application to water rights, but statutory provisions require the state to take measures to protect its water resources in the interest of the public, resembling what the state's responsibilities for protecting water rights would be under the PTD.[64]

6.4 Wildlife harvests

Although the state owns all wildlife,[65] and is not responsible for wildlife-induced damages,[66] Iowa courts have yet to hear a case specifically invoking the PTD to restrict wildlife harvests.

7.0 Public Standing

Iowa citizens may sue to enforce the PTD if they can establish that they use the resource in question and would be injured by the challenged activity.[67]

7.1 Common law-based

In 2002, the Iowa Supreme Court concluded that a plaintiff in a PTD case establishes standing if "they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."[68] The public may sue to enforce the PTD if they meet this threshold, which the Iowa adopted from the U.S. Supreme Court's decision in *Friends of the Earth, Inc. v. Laidlaw*.[69]

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[64] Iowa Code Ann. § 455B.262 ("The general welfare of the people of the state requires that the water resources of the state be put to beneficial use which includes ensuring that the waste or unreasonable use, or unreasonable methods of use of water be prevented, and that the conservation and protection of water resources be required with the view to their reasonable and beneficial use in the interest of the people, and that the public and private funds for the promotion and expansion of the beneficial use of water resources be invested to the end that the best interests and welfare of the people are served.").

[65] *See supra* § 5.6.

[66] *See Metier v. Cooper Transp. Co., Inc.*, 378 N.W.2d 907.

[67] *Bushby v. Washington County Conservation Bd.*, 654 N.W.2d 494, 496-97 (Iowa 2002) (adopting the *Laidlaw* test for environmental suits, the Iowa Supreme Court concluded that plaintiffs in a PTD case had alleged sufficient facts to prove standing).

[68] *Id.*

[69] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183 (2000) (citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

7.2 Statutory basis

Iowa has no statutory basis for standing under the PTD.

7.3 Constitutional basis

Although the Iowa Constitution now includes a provision that seems to invoke trust language,[70] it establishes only a financial trust for protecting natural resources within the state treasury, not a new, enforceable public trust right. Currently, there are no cases that interpret the Iowa Constitution to grant standing or a specific cause of action under the PTD.

8.0 Remedies

Remedies for violations of the PTD in Iowa could conceivably include declaratory or injunctive relief. However, Iowa courts have yet to grant either remedy to parties seeking relief under the PTD in Iowa.

8.1 Injunctive relief

Although Iowa courts have yet to grant injunctive relief based on PTD claims, parties have sought this remedy in the past. In 2002, opponents of a proposed tree-clearing project in a county park sued the county conservation board and board of supervisors, seeking to enjoin the removal of trees, claiming that the county violated the PTD.[71] Although the district court granted a temporary injunction against the proposed tree harvest, it was on other grounds, and both the district court and the Iowa Supreme Court rejected the plaintiffs' claim that the PTD applied, reasoning that the PTD "does not serve as an impediment to legally sanctioned management of

[70] Iowa Const. art. VII, § 10 ("a natural resources and outdoor recreation trust fund is created within the treasury for the purposes of protecting and enhancing water quality and natural areas in this State including parks, trails, and fish and wildlife habitat, and conserving agricultural soils in this State.").
[71] *Bushby v. Washington County Conservation Bd.*, 654 N.W.2d at 494.

forested areas by the public bodies entrusted with their care."[72] However, neither court dismissed the possibility of using the PTD to provide injunctive relief in other cases.[73]

8.2 Damages for injuries to resources

Although no court has awarded damages or injunctive relief for injuries to trust resources, the state of Iowa may bring a civil enforcement action against an individual or business that violates the PTD by obstructing the passage of pedestrians below the ordinary high water mark of state-owned or state-managed waters.[74] For violating the right to public access and travel on navigable waterways, the state may impose a civil penalty, not to exceed $5,000, for each day of the violation.[75]

8.3 Defense to takings claims

In 1871, in *Tomlin v. Dubuque, B & M. R. Co.*, a riparian landowner on the Mississippi River sought damages after the state granted a railroad company the right to place its tracks along the shore between the high and low water mark in front of the landowner's premises, effectively cutting off his access to the Mississippi River.[76] The Iowa Supreme Court rejected the landowner's claim for compensation for land allegedly taken below the ordinary high water mark, because the landowner did not own the fee interest in land below the high water mark. [77] Instead, the court considered whether the landowner could recover damages because the state deprived him of access to a navigable river by allowing the railroad company to separate his

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[72] *Id.* at 498.
[73] *See generally Bushby v. Washington County Conservation Bd,* 654 N.W.2d at 494.
[74] Iowa Code Ann. § 461A.4(1)(a) (providing that "a person shall not construct or maintain a structure beyond the line of private ownership along or upon the shores of state-owned or state-managed waters in a manner to obstruct the passage of pedestrians along the shore between the ordinary high-water mark and the water's edge…").
[75] Iowa Code Ann. § 461A.5B (2).
[76] *Tomlin v. Dubuque, B. & M.R. Co.*, 32 Iowa 106 (1871).
[77] *Id.* at 109.

property from the river by placing tracks.[78] The court concluded that a riparian owner had no common law rights in the shore between high and low water mark on the river because the state owned the land between high and low water mark in trust.[79] Therefore, the upland landowner was not entitled to damages for a "taking" of his property's river access since the state had ultimate control between the high and low water mark and could dispose of this land in any way that furthered navigation, even if it disadvantaged the upland landowner.[80]

However, shortly after the *Tomlin* case, in 1874, the legislature enacted a statute curtailing the state's ability to cut off a landowner from riparian access without just compensation.[81] In 1878, the Iowa Supreme Court recognized that this statute overruled the result in the *Tomlin* case, and the court ruled that the state could no longer deny compensation to landowners deprived of access to a navigable waterway by state action.[82]

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[78] *Id.*
[79] *Id.* at 106.
[80] *Id.*
[81] *Renwick v. Davenport & N.W.R. Co.*, 49 Iowa 664, 669 (1878) (applying Iowa Public Law of the Fifteenth General Assembly, 28 (1874): "It shall not be lawful for any person or corporation to construct or operate any railroad or other obstruction between such lots or lands and either of said rivers, or upon the shore or margin thereof, unless the injury and damage to such owners occasioned thereby shall be first ascertained and compensated in the manner provided by chapter 4, title 10 of the Code.").
[82] *Id.* (reasoning that because a different statute which gave railroad corporations "use and enjoyment" of "any lands of the State" without payment of damages was in force when the *Tomlin* case was decided, the repeal of this older statute makes the "rule of the *Tomlin* case... no longer applicable").

KANSAS

The Public Trust Doctrine in Kansas

Melissa Parsons

1.0 Origins

Upon entering the Union in 1861, Kansas acquired title to all beds of navigable waterways, held in trust for the people.[1] Kansas courts based early determinations of navigability on varying factors, including a surveyor's meandering of the stream or river,[2] or whether the waterway was in fact navigable.[3] In 1927, the Kansas Supreme Court finally adopted a standard test for navigability,[4] modeled after the federal navigable-in-fact test[5] rather than the ancient tidal ebb-and-flow test.[6] Under both the early tests and the modern standard test adopted by the state, the Kansas Supreme Court has explicitly recognized state ownership of the beds of navigable waterways.[7] The court has long equated a waterway's public character with its navigability,[8]

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[1] State v. Akers, 92 Kan. 169, 140 P. 637, 649 (1914) (recognizing that Kansas's property rights are the same as those of other states under the "equal footing" doctrine), *aff'd sub nom.* Wear v. State of Kansas ex rel. Brewster, 245 U.S. 154 (1917).

[2] Wood v. Fowler, 26 Kan. 682, 686 (1882) (considering meandering in a survey as evidence of the fact of navigability); *see also* Kregar v. Fogarty, 78 Kan. 541, 96 P. 845, 847 (1908) (identifying a surveyor's meandering as a factor in a navigability determination).

[3] *Wood*, 26 Kan. at 689; *Kregar*, 96 P. at 846–47 (recognizing navigability in fact as the capacity of the waterway as "a public highway of transportation").

[4] Webb v. Bd. of Comm'rs of Neosho Cnty., 124 Kan. 38, 40, 257 P. 966, 967 (1927) (establishing a state test for navigability based on the federal test).

[5] United States v. Holt Bank, 270 U.S. 49, 55–56 (1926) (establishing a navigability test to determine if title to the bed of a waterway vests in the state based on whether (1) at the time of statehood, (2) the waterway in its natural condition (3) was used or susceptible to use for commerce (4) conducted in the customary modes of trade or travel on the water).

[6] *Akers*, 140 P. at 645–47 (holding tidal ebb and flow irrelevant to a navigability determination, as there are no state waters affected by the ebb-and-flow of the tide).

[7] *See id.* at 649; Dana v. Hurst, 86 Kan. 947, 122 P. 1041, 1047 (1911) (declaring the Arkansas River navigable and explaining that Kansas owns its bed); *Wood*, 26 Kan. at 688–90 (declaring the Kansas River navigable and explaining that Kansas holds title to its bed).

[8] *Akers*, 140 P. at 647 (quoting *McManus v. Carmichael*, 3 Iowa 1, 41 (1856)); *see* Piazzek v. Drainage Dist. No. 1 of Jefferson County, 119 Kan. 119, 237 P. 1059, 1060 (1925) (recognizing state title in the beds of waterways characterized interchangeably as public or navigable).

recognizing the rights of the public accordingly.[9] Further, the Kansas Supreme Court has declared only three waterways navigable—the Kansas River, the Arkansas River, and the Missouri River—and only three nonnavigable—the Neosho River, the Delaware River, and the Smoky Hill River.[10]

Beginning in 1927, the Kansas legislature enacted a series of statutes focused on waters and watercourses, addressing issues of title, conveyances, easements, and navigability.[11] Nearly twenty years later, the state legislature expanded the water code and dedicated all water in the state to public use, subject to state regulation under the Kansas Water Appropriation Act (KWAA) of 1945.[12] However, the Kansas Supreme Court in *State ex rel. Meek v. Hays* interpreted this statute to apply only to consumptive uses of water and not to nonconsumptive uses, including recreation.[13] Despite the limited applicability of the KWAA, it could represent a relatively expansive assertion of what is otherwise a limited public trust doctrine (PTD) in Kansas. Finally, in arguably its most explicit statutory recognition of the PTD, in 1955 Kansas enacted legislation declaring a state policy of protection and prudent management of the state's natural resources, including wildlife, for the benefit of the public.[14] This policy is implemented through state ownership and control of wildlife and preserves, and through statutes that provide

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[9] State ex rel. Meek v. Hays, 246 Kan. 99, 111 (1990) (holding the public has no right to recreational use of nonnavigable water overlying private land absent consent of the landowner).
[10] *Meek*, 246 Kan. at 103 (discussing rivers declared navigable and nonnavigable by the court).
[11] The same year the Kansas Supreme Court established the state test for navigability in *Webb*, the Kansas legislature enacted the water code, which contains no express public trust language. Kan. Stat. Ann. § 82a-201 *et seq.*
[12] Kan. Stat. Ann. § 82a-702 ("All water within the state of Kansas is hereby dedicated to the use of the people of the state").
[13] 246 Kan. at 110 (citing *Williams v. City of Wichita*, 190 Kan. 317, 331–36 (1962) discussing the legislative history of the KWAA and the dedication of the state's water to public use.).
[14] Kan. Stat. Ann. § 32-702; *see also* Kan. Stat. Ann. § 74-6611 ("Natural and scientific preserves are hereby declared to be held in trust . . . for the benefit of the people of the state").

for public use and enjoyment of these resources.[15]

2.0 Basis

Although there are no constitutional provisions relating to the PTD in Kansas, the state has recognized some form of the PTD for well over a hundred years. In 1882, the Kansas Supreme Court first acknowledged the PTD in a case considering the right of the public to take ice from the Kansas River.[16] The court's latest articulation of the doctrine was in its 1990 decision *State ex rel. Meek v. Hays*,[17] which implicitly recognized a public right to recreational use of navigable water overlying state-owned beds.[18] Kansas courts have not otherwise expanded the scope of the PTD beyond its traditional purposes of commerce, navigation, and fishing. In fact, in *Meek*, the Kansas Supreme Court indicated its refusal to create PTD rights where the legislature did not intend them.[19]

Of the Kansas statutes explicitly and implicitly recognizing the PTD,[20] consideration or examination by Kansas courts has been limited largely to the Kansas Sand and Gravel Act (KSGA)[21] and the KWAA[22]. The KWAA's dedication of all of the state's water to the public

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[15] Kan. Stat. Ann. § 32-703 ("The ownership of and title to all wildlife…[is] hereby declared to be in the state"); Kan. Stat. Ann. § 74-6611 ("Natural and scientific preserves are hereby declared to be held in trust . . . for the benefit of the people of the state"); *see also* Kan. Stat. Ann. §§ 32-203 to 204 (declaring state control of preserves); Kan. Stat. Ann. § 32-1061(a)(1) ("[w]ildlife resources are managed in trust…for the benefit of all residents").

[16] *Wood*, 26 Kan. at 688–90 (declaring the Kansas River navigable and recognizing that the river belongs to the public, as managed by the state legislature).

[17] *Meek*, 246 Kan. at 111 (refusing to extend the PTD in Kansas to the exercise of any public use of nonnavigable water overlying private lands absent consent from the private landowner).

[18] *Id.* This assertion represents the converse implication of the court's holding in *Meek*, and aligns with the court's longstanding recognition of public rights in navigable waters.

[19] *Id.* (refusing to alter the policy of the state legislature through "judicial legislation" of a recreational right of the public in nonnavigable waterways).

[20] *See supra* notes 12–14 and accompanying text.

[21] Kan. Stat. Ann. § 70a-101 *et seq.*; *see infra* note 28 and accompanying text.

[22] Kan. Stat. Ann. § 82a-701 *et seq.*

appears to be a declaration of broad public rights in water.[23] However, the scope of the KWAA is limited to consumptive uses,[24] which do not include recreation or even traditional public trust rights such as navigation and fishing.[25] Thus, the KWAA implicates the PTD only to the extent that the state employs protective measures to preserve waters for public appropriative use.[26]

3.0 Institutional Application

Although the PTD in Kansas is not well developed, state statutory provisions have effectively limited private conveyances of land held in trust by the state.[27] The Kansas Supreme Court has also expressly imposed limitations on the legislature where disposal of property burdened by the public trust is concerned.[28]

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[23] *See supra* note 12 and accompanying text.
[24] *Meek*, 246 Kan. at 110; *see* James B. Wadley, *Recreational Use of Nonnavigable Waterways*, J.K.B.A. 27 (Nov./Dec. 1987) (distinguishing consumptive and nonconsumptive uses).
[25] Nearly 80 years after the first implication of the PTD in Kansas statutes, the Kansas legislature attempted to expand and better define the PTD in Kansas. *See Meek*, 246 Kan. at 110-11 (quoting House Bill 2835, introduced in 1986 to amend the KWAA by broadening the definition of public waters, and by extending the scope of public use to include nonconsumptive uses of the newly-defined public waters). That same year, the state legislature attempted to broaden the scope of the PTD in Kansas to include recreational use of water through the introduction of House Bill 3038 – the Kansas River Recreational Act. But the House Energy and Natural Resources Committee killed both bills. The last legislative attempt to redefine the scope of the PTD in Kansas was 25 years ago, when the Senate resurrected HB 3038 as Senate Bill 94, which ultimately suffered the same fate as the earlier bills.
[26] Kan. Stat. Ann. § 82a-702 ("All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state"). The KWAA further provides for minimum streamflow standards, permitting processes, and conservation of water. *See* Kan. Stat. Ann. § 82a-703; Kan. Stat. Ann. § 82a-733.
[27] *See, e.g.*, Kan. Stat. Ann. § 74-6611 (natural and scientific preserves held in trust "shall not be taken for any other use except another public use and except after a finding by the state biological survey of the existence of an imperative and unavoidable public necessity for such other public use, with the approval of the legislature, and any owner of a dedicated interest therein, and upon such terms and conditions as the state biological survey may determine, except as may otherwise be provided in the articles of dedication").
[28] *Akers*, 140 P. at 650 (declaring the state's right, as sovereign owner of the beds of navigable waterways, to dispose of overlying surplus water and other materials, including sand and gravel, therein where such action is not violative of the state's obligations to its citizens under the PTD).

3.1 Restraint on Alienation

The Kansas Supreme Court recognizes the model of judicial skepticism established by the U.S. Supreme Court in the landmark decision, *Illinois Central Railroad Company v. Illinois*.[29] Thus, the court has questioned actions impinging on the public trust. For example, in its influential 1914 *State v. Akers* decision, the Kansas Supreme Court upheld the validity of a state statute prohibiting the taking of materials from state-owned rivers and islands, title to which is held in trust for the people, without the state's consent.[30] Further, the court held that, as against the state, the title to the beds of public waterways could not be acquired through prescription.[31] Similarly, the Kansas legislature has imposed a duty on the attorney general to recover any lands wrongfully reclaimed from state waterways[32] and, in some instances, has limited private conveyances of trust resources except for public uses.[33]

3.2 Limit on Legislature

The PTD provides some additional authority[34] and imposes some duties[35] on the Kansas legislature.

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[29] *Meek*, 246 Kan. at 109 (citing *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892), which held that the State of Illinois did not possess the authority to grant fee title to submerged lands held in the public trust as navigable waters and citing Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich.L.Rev. 473, 490 (1970), recognizing *Illinois Central*'s standard of judicial skepticism where public rights are constrained or public resources reallocated in favor of private interests).

[30] 140 P. 637 (declaring the validity of the KSGA, Kan. Stat. Ann. § 70a-101 *et seq.* and recognizing that "[t]he title of the state to the bed of a meandered stream is not an absolute fee, which the state can dispose of as it wishes; but such title is vested in it in trust for the benefit and common right of all the people"); *see also* Kan. Stat. Ann. § 70a-106 ("For the purposes of this act the bed and channel of any river in this state . . . shall be considered to be the property of the state of Kansas").

[31] *Akers*, 140 P. at 650.

[32] Kan. Stat. Ann. § 24-102.

[33] *See supra* note 27 and accompanying text.

[34] *See, e.g.*, *Akers*, 140 P. at 650 (validating the state legislature's power to impose royalties on takings from state-owned beds for the benefit of the state, as trustee for the people).

[35] *Id.* (recognizing the state's right to dispose of trust resources, where that disposition does not interfere with the rights of its citizens under the PTD); *see supra* note 28 and accompanying text.

3.3 Limit on Administrative Action

Kansas law might be interpreted to impose trust responsibilities on administrative agencies when implementing state statutes invoking the PTD. For example, the Kansas Wildlife, Parks and Tourism secretary, commission, and department must manage natural resources for "the public's health and its cultural, recreational, and economic life,"[36] including wildlife, fish, and parks, held in trust by the state.[37] Likewise, the KSGA expressly imposes a duty on the state attorney general to take legal action where necessary to protect the state's property, including sand and other materials found in streambeds, held in trust for the public under the statute.[38]

4.0 Purposes

4.1 Traditional

Illinois Central announced each state's obligation to protect public rights in waters, including navigation, fishing, and commerce, imposing limitations on both alienation and discharge of the state's trust responsibilities.[39] Kansas adheres to these minimum standards established in *Illinois Central*, as long recognized by the Kansas Supreme Court.[40] Despite legislative attempts to expand the PTD,[41] Kansas courts have hesitated to extend the doctrine's traditional scope.[42]

4.2 Beyond Traditional

Kansas has recognized only a very limited right of the public to make nontraditional public

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[36] Kan. Stat. Ann. § 32-702; *see infra* §§ 5.6.
[37] Kan. Stat. Ann. Ch. 32; *see supra* notes 14 and 15 and accompanying text.
[38] Kan. Stat. Ann. §§ 70a-101, 70a-115; *Akers*, 140 P. at 650.
[39] 146 U.S. 387 (1892); Robin Kundis Craig, *A Comparative Guide to the Western States Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L.Q. 53, 71 (2010).
[40] Craig, *supra* note 39, at 71; *Akers*, 140 P. at 640 (recognizing the beds of navigable streams are held "in trust for the benefit and common right of all the people, for the purposes for which such property has been used from time immemorial, viz., the common right of passage, of fishing, of the use of the waters for domestic, agricultural, and commercial purposes").
[41] *See supra* note 25.
[42] Craig, *supra* note 39, at 71; *Meek*, 246 Kan. at 111 (refusing to create PTD rights where the legislature did not expressly intend them).

trust uses – such as recreational uses – of waterways. These public trust uses are confined largely to those waters overlying state-owned beds or dependent upon consent of private owners.[43] Kansas has also implemented a water conservation scheme under the KWAA, which, while not a direct expression of the PTD, establishes a system to protect current and future consumptive uses of water in the state.[44] Additionally, the Kansas legislature has explicitly recognized a trust responsibility in some state lands, establishing "[n]atural and scientific preserves" as "held in trust . . . for the benefit of the people of the state."[45] Likewise, "[w]ildlife resources are managed in trust...for the benefit of all residents."[46] These express statutory recognitions of the PTD advance the state's policy of protecting natural and recreational resources for the benefit of the public.[47]

5.0 Geographic Scope of Applicability

5.1 Tidal

As an inland state, Kansas has no tidal waters to which the ebb-and-flow or tidal test of navigability would apply. The state has long employed the federal navigability-in-fact test.[48]

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[43] Wadley, *supra* note 24, at 30 (noting general public access for recreational purposes is only possible where Kansas holds title to the beds by virtue of the waterway's navigable status); *see also Piazzek*, 237 P. 1059 (holding that title to beds of nonnavigable waters is in riparian owners); 1974 Op. Atty Gen (Ks.) 74-137 (May 2, 1974); *Meek*, 246 Kan. at 111 (holding that absent consent from private owners, the public has no right to recreate in nonnavigable waters).
[44] *See infra* § 6.3.
[45] Kan. Stat. Ann. § 74-6611.
[46] Kan. Stat. Ann. § 32-1061(a)(1).
[47] Kan. Stat. Ann. § 32-702 ("It shall be the policy of the state of Kansas to protect, provide and improve outdoor recreation and natural resources in this state and to plan and provide for the wise management and use of the state's natural resources thus contributing to and benefiting the public's health and its cultural, recreational and economic life").
[48] Webb v. Bd. of Comm'rs of Neosho Cnty., 257 P. 966, 967 (1927); *see supra* notes 4 and 5 and accompanying text.

5.2 Navigable-in-Fact

The Kansas Supreme Court, in *Webb v. Board of Commissioners of Neosho County*,[49] adopted three of the four enumerated criteria of the federal navigability-in-fact test established by the U.S. Supreme Court in *United States v. Holt Bank* to define navigability under state law.[50] Kansas courts determine navigability of waterways based on whether (1) the waterway in its natural condition (2) was used or susceptible to use for commerce (3) conducted in the customary modes of trade or travel on the water.[51] The *Webb* court adopted this test after grappling with the results that might obtain under the factors previously considered by the court in determining navigability.[52]

Under this test, known as the *Webb* navigability test, Kansas courts have clearly delineated rights of riparian owners versus rights of the state concerning navigable and nonnavigable waters. Riparian ownership extends "only to the banks"[53] of navigable streams, the beds of which are publicly owned, creating shared rights of use and access to the overlying water with the general public.[54] Conversely, landowners adjacent to nonnavigable streams own the bed of the stream and may exercise exclusive control, prohibiting public access and use of the water running over the streambed.[55] The Kansas Supreme Court has applied the navigability test only six times, finding only three rivers in the state to be navigable.[56] As a result, public rights to

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[49] *Id.*
[50] 270 U.S. 49, 55–56 (1926); *see supra* note 5.
[51] *Webb*, 257 P. at 967 (quoting *Oklahoma v. Texas*, 258 U.S. 574, 586, which enunciates essentially the same test as *Holt*, except for the "time of statehood" prong).
[52] *Id.* at 969–70 (discussing the previous potential for conflicting findings of "navigability" where river conditions change and the actual navigability of a stream varies at different points).
[53] *Meek*, 246 Kan. at 101; *Kregar*, 96 P. at 847 (citing *Wood v. Fowler*, recognizing riparian ownership to the bank, and state ownership of the beds of navigable waters).
[54] *Wood*, 26 Kan. at 684 (declaring the navigable waterway a public highway, free from exclusive use and control of any individual).
[55] *Meek*, 246 Kan. at 101; *Kregar*, 96 P. at 848; *Piazzek*, 237 P. at 1060.
[56] *Meek*, 246 Kan. at 103.

many waterways in the state remain undefined.

5.3 Recreational Waters

The Kansas Supreme Court has expressly refused to extend public trust rights to include recreational uses of nonnavigable waters where the legislature has not expressed such intent.[57] Thus, recreational use is limited to navigable waterways or to instances in which the user has secured the private owner's permission.[58]

5.4 Wetlands

Kansas has no specific constitutional provisions, statutes, or case law recognizing a public trust in wetlands.

5.5 Groundwater

Kansas does not recognize a public trust in groundwater. The KWAA controls groundwater and allocates rights to both ground and surface water in Kansas via prior appropriation.[59] Prior to the KWAA's enactment in 1945, the state applied the absolute ownership doctrine to groundwater, under which riparian owners had an exclusive right to drill but had no ownership in the groundwater until it was captured. Once captured, riparian owners could retain water rights regardless of whether they made beneficial use of the water.[60] This system is distinguished from the current appropriation system under the KWAA, which requires beneficial use to maintain the right.[61] The KWAA also authorizes the Division of Water Resources (DWR) Chief Engineer to designate intensive groundwater use control areas and to promulgate applicable rules and

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[57] *Id.* at 111; *see supra* note 17 and accompanying text.
[58] *Id.*
[59] Kan. Stat. Ann. § 82a-703.
[60] Hawley v. Kansas Dept. of Agric., 281 Kan. 603, 614 (2006) (reviewing the history of water use in Kansas).
[61] Kan. Stat. Ann. § 82a-703 ("Nothing contained in this act shall impair the vested right of any person except for nonuse").

regulations governing those areas, subject to the interests of the public.[62] No trust language appears in the statute.

5.6 Wildlife

Kansas has declared state ownership of all resident and migratory wildlife[63] and has expressly extended the PTD to wildlife within the state under a multi-state compact.[64] In 1955, the Kansas legislature adopted a policy of protecting the state's natural resources, including wildlife, for the benefit of the public.[65] Under its sovereign ownership and attendant trust responsibilities, Kansas exercises statutory and other regulatory authority[66] to control taking, dealing, possessing, or transferring any wildlife within the state[67] and across state lines.[68] The U.S. District Court for the District of Kansas, in its 2006 decision *Taulman v. Hayden*, examined several of these statutes and upheld the validity of Kansas's declaration of state ownership of wildlife and the state's attendant right to regulate the resource.[69]

5.7 Uplands

The Kansas legislature's policy of protecting the state's natural resources for the benefit of the public includes protection of specified[70] state parks[71] and preserves[72] for the benefit of the public and includes maintenance of state highways for exclusive public highway uses.[73] The Kansas Supreme Court has also recognized a common-law public right of access in the state's

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[62] Kan. Stat. Ann. § 82a-706a; *see supra* note 34 and accompanying text.
[63] Kan. Stat. Ann. § 32-703.
[64] The Wildlife Violator Compact provides that "[w]ildlife resources are managed in trust by the respective states for the benefit of all residents and visitors." Kan. Stat. Ann. § 32-1061(a)(1).
[65] Kan. Stat. Ann. § 32-702.
[66] Kan. Admin. Regs. § 115-1-1 *et seq.*
[67] Kan. Stat. Ann. § 32-1002.
[68] Kan. Stat. Ann. § 32-1061.
[69] 2006 WL 2631914 (D. Kan. Sept. 13, 2006).
[70] Kan. Stat. Ann. § 32-837.
[71] Kan. Stat. Ann. § 32-702.
[72] Kan. Stat. Ann. § 74-6611; *supra* note 27.
[73] Kan. Stat. Ann. § 68-413b.

streets and highways.[74]

6.0 Activities Burdened

6.1 Conveyances of Property Interests

Despite endorsing *Illinois Central*'s recognition of the PTD,[75] Kansas courts appear reluctant to embrace any extension of the PTD that would "unsettle existing property rights."[76] Kansas courts have done little to expressly limit private conveyances under the PTD. However, both federal and Kansas courts have recognized that littoral owners' state titles carry with them accretions and relictions,[77] affecting individual ownership where courses of state-owned navigable waterways change. In Kansas, riparian ownership extends only to the banks of navigable waterways while the state owns the beds, held in trust for the people.[78] Where the waterway is nonnavigable and its bed is subject to private ownership, the owner is free to exclude the public from making non-consumptive uses of the water overlying the bed.[79]

6.2 Wetland Fills

The Kansas Department of Agriculture's DWR regulates state wetlands, including oversight of the permitting process for fills and stream obstructions, for the purpose of protecting

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[74] Sebree v. Bd. of County Comm'rs of County of Shawnee, 251 Kan. 776, 781 (1992) (quoting *Smith v. State Highway Commission,* 185 Kan. 445, 451 (1959) recognizing the public common-law right of access in state highways).
[75] *See supra* note 29 and accompanying text.
[76] Danielle Spiegel, *Can the Public Trust Doctrine Save Western Groundwater?,* 18 N.Y.U. Envtl. L.J. 412, 437 (2010) (discussing the state's refusal to protect PTD rights in nonnavigable waters and state court reluctance to expand the PTD).
[77] *See, e.g.*, Thurlow v. Waite-Phillips Co., 22 F.2d 781, 785 (8th Cir. 1927) (resolving title disputes based on longstanding Kansas accretion laws); Murray v. State, 226 Kan. 26, 37, 596 P.2d 805, 814 (1979) (recognizing long established Kansas laws regarding effect on title of riparian owners caused by reliction, accretion, and avulsion).
[78] *Wood*, 26 Kan. at 690 (establishing that the riparian owner whose land joins the land of the state has no title to the state's land "or to anything formed or grown upon it, any more than it does to anything formed or grown or found upon the land of any individual neighbor").
[79] *Meek*, 246 Kan. at 111.

designated uses of waters of the state, but not necessarily for the protection of any PTD rights.[80]

6.3 Water Rights

Kansas recognizes both riparian and appropriative water rights, but the PTD has very limited application to those rights. Under the KWAA, the DWR must consider the "public interest" when issuing appropriation permits. [81] Although independent of the PTD, such public interest requirements are nonetheless related in that they require conservation of resources for the public's benefit. In keeping with the state's limited view of the PTD, this definition of public interest is relatively narrow.

6.4 Wildlife Harvests

Wildlife is a public trust resource in Kansas,[82] and harvests are subject to the numerous statutes and enforcement provisions[83] of the state's Wildlife, Parks, and Recreation Code.[84] Both state and federal courts have recognized a public right to hunt in Kansas, subject to statutory limitations, restrictions, and regulations.[85]

7.0 Public Standing

There are no constitutional or statutory bases for public standing to enforce PTD rights in

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[80] Kan. Stat. Ann. § 24-126.

[81] Kan. Stat. Ann. §§ 82a-711(b), 712; *see also* Craig, *supra* note 39, at 134 (citing several sections of the KWAA and noting its establishment of a water bank and recognized appropriation rights subject to state permitting, minimum streamflows, and conservation standards). Under the KWAA, the priority of appropriation rights varies depending on whether the water is used for domestic or other purposes. *See* Kan. Stat. Ann. §§ 82a-705(a), 707(c) (priority dates from the time of the permit application or the time the user makes beneficial use of the water, whichever comes first); Kan. Stat. Ann. § 82a-707(c) (for commercial and agricultural uses, priority dates from the time of filing the permit application); Kan. Stat. Ann. § 82a-701(g) (once permitted, the water right, like other real property rights, may be sold or otherwise transferred).

[82] Kan. Stat. Ann. § 32-1061(a)(1) ("[w]ildlife resources are managed in trust...for the benefit of all residents").

[83] Kan. Stat. Ann. § 32-1001 *et seq.*

[84] Kan. Stat. Ann. Ch. 32.

[85] *See, e.g.*, Ottawa Hunting Ass'n v. State, 178 Kan. 460, 465, 289 P.2d 754, 758 (1955) (holding hunting a public right granted by state statute); *Taulman*, 2006 WL 2631914 at 5 (examining hunting rights under Kansas statutes and common law); *see supra* § 5.6.

Kansas. However, the Kansas Judicial Review Act (KJRA) confers standing to obtain judicial review of agency actions for a person (a) to whom the agency action is specifically directed; (b) who was a party to the agency proceedings that led to the agency action; (c) who was subject to a rule and/or regulation constituting the challenged agency action; or (d) who is eligible for standing under another provision of law.[86]

7.1 Common Law-based

In addition to determining whether a litigant has standing under the KJRA, a Kansas court will assess standing under the traditional common law requirements.[87] Although Kansas courts have yet to expressly recognize public standing to enforce PTD rights, the Kansas Supreme Court recently examined standing under the KWAA,[88] the state's closest statutory recognition of the PTD concerning water rights.[89] This decision does not establish public standing to enforce a PTD-like right, but it does build on an earlier Kansas Supreme Court decision that upheld public and associational standing to challenge an agency action where the plaintiffs are considered

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[86] Kan. Stat. Ann. § 77-611.

[87] These traditional requirements include (1) suffering a cognizable injury, and (2) demonstrating that the challenged conduct caused said injury. *See, e.g.*, Families Against Corporate Takeover v. Mitchell (FACT), 268 Kan. 803, 807, 810–11 (2000); *see also* Moorhouse v. City of Wichita, 259 Kan. 570, 574 (1996). Kansas courts have also articulated requirements to establish associational standing, providing that an association may sue on behalf of its members when: (1) the individual members have standing to sue; (2) the interests the association seeks to protect are central to the purpose of the organization; and (3) neither the claim asserted nor the relief requested require individual member participation. *See* NEA-Coffeyville v. Unified Sch. Dist. No. 445, Coffeyville, Montgomery County, 268 Kan. 384, 387 (2000) (adopting the U.S. Supreme Court associational standing test articulated in *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977)).

[88] *See supra* notes 12 - 13, 22 - 26 and accompanying text; Cochran v. State, Dept. of Agr., Div. of Water Res., 291 Kan. 898, 904–10 (2011) (holding that senior appropriators have standing to challenge the DWR Chief Engineer's permitting decision, despite the fact that they were not permit applicants).

[89] Kan. Stat. Ann. § 82a-711(a).

"part[ies] to the agency proceeding,"[90] a designation the court loosely interpreted to include even those members of the public who submitted written comments during a public notice and comment period.[91] These decisions indicate that, as the PTD evolves in the state, Kansas courts may be amenable to entertaining public standing to enforce PTD rights.

7.2 Statutory Basis

There is no express statutory basis under which to enforce PTD rights in Kansas. The Kansas Supreme Court employs plenary review of an agency's statutory interpretation, as the court no longer gives deference to agency interpretations.[92]

7.3 Constitutional Basis

There is no constitutional basis from which to enforce PTD rights in Kansas.

8.0 Remedies

8.1 Injunctive Relief

Kansas courts have not granted injunctive relief as a remedy for injuries to public trust resources. However, the Kansas Supreme Court has granted an individual claimant injunctive relief arising from personal injuries related to trust resources. For example, in a KSGA case that sought to enjoin unauthorized removal of sand—a statutorily and judicially recognized trust resource[93]—from a navigable river, a company sought injunctive relief rather than the state

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[90] Bd. of Cnty. Comm'rs of Sumner Cnty. v. Bremby, 286 Kan. 745, 761 (2008) (establishing standing of adjacent landowners to challenge agency issuance of landfill permit).
[91] *Id.*; *Cochran*, 291 Kan. at 905.
[92] Kansas Dept. of Revenue v. Powell, 290 Kan. 564, 567 (2010) (discussing the court's unlimited review without deference to agencies concerning statutory interpretation).
[93] Kan. Stat. Ann. § 70a-106 ("For the purposes of this act the bed and channel of any river in this state or bordering on this state to the middle of the main channel thereof and all islands and sand bars lying therein shall be considered to be the property of the state of Kansas"); *State v. Akers*, 140 P. 637, 649-50 (1914) (holding that title streambeds, including "any natural product found therein," and the right to dispose of that title rests in the state, subject to the PTD).

attorney general, because there was no effect on the public's rights in that case.[94] The KSGA does not authorize a citizen suit or public standing to seek injunctive relief for injury to trust resources, (here, marine products including sand and gravel) that attach to state-owned streambeds held in trust, but does authorize the attorney general to file suit to protect the state's property rights.[95]

8.2 Damages for Injuries to Resources

Kansas courts have not awarded monetary damages for injuries to public trust resources.

8.3 Defense to Takings Claims

Having adopted a regulated system of water use beyond the riparian system,[96] Kansas has effectively insulated itself from takings claims arising from state regulatory restrictions on riparian property.[97] In a recent Kansas Court of Appeals takings case, *Wheatland Elec. Co-op., Inc. v. Polansky*, appropriation rights-holders challenged regulatory reduction of their water rights as a taking.[98] The court held that the consumptive use regulations were a reasonable use of the state's police power based on the principle that all state water is dedicated to the public use subject to the state's regulation and control.[99] This is the most recent example of a flexible "public use" interpretation aiding in the defeat of a takings claim. Although not involving a PTD claim, public use is an element of public trust. This kind of flexible interpretation may signal a willingness of Kansas courts to consider future PTD defenses to takings claims.

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[94] Dreyer v. Siler, 180 Kan. 765 (1957) (holding that injured plaintiff who had permission to remove river sand properly brought suit to enjoin unauthorized taking of sand).
[95] Kan. Stat. Ann. § 70a-104.
[96] Kan. Stat. Ann. § 82a-701 *et seq.*
[97] Jack Tuholske, *Trusting the Public Trust: Application of the Public Trust Doctrine to Groundwater Resources*, 9 Vt. J. Envtl. L. 189, 234 (2008) (citing Baumann v. Smrha, 145 F. Supp. 617, 624–25 (D. Kan. 1956)); Baumann v. Smrha, 145 F. Supp. 617, 624–25 (D. Kan. 1956) (citing Katz v. Walkinshaw, 141 Cal. 116, 118 (1903), noting that with few exceptions, Kansas courts will not recognize a vested right in water that has not been put to beneficial use).
[98] 265 P.3d 1194 (Kan.App. 2011).
[99] *Id.*

LOUISIANA

The Public Trust Doctrine in Louisiana

Stephanie Short

1.0 Origins

The public trust doctrine (PTD) in Louisiana originated before statehood, when the Civil Code of 1808 first classified the sea and seashore as "common things" and navigable waters as "public things."[1] Subsequent versions of the Civil Code retained these concepts;[2] however, the sea and the seashore are now also classified as "public things."[3] Louisiana also acquired all territorial lands subject to the ebb and flow of the tide by virtue of the equal footing doctrine upon statehood in 1812.[4]

Since the origins of the PTD in Louisiana, the state constitution, statutes, the Civil Code, and common law have modified the doctrine. Theoretically, Louisiana has been unable to alienate trust lands at least since statehood, because in the 1800s various statutes and Civil Code articles proscribed the sale of public trust land in fee.[5] Act 62 of 1912 brought the alienability of trust lands into question by creating a prescriptive period for the government to contest land grant patents.[6] Sixty-two years later, the Louisiana Supreme Court clarified that this article did not apply to alienated trust lands because the state never had the power to alienate them.[7]

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[1] La Civ. Code Art. 450 (1808) (referring to public property as "public things"); La. Civ. Code Art. 453 (1808)(referring to common property as "common things"); James G. Wilkins & Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 La. L. Rev. 861, 868 (1992).

[2] *Id.;* LA. CIV. CODE. ANN. Art. 450 (West 2009).

[3] *See* Wilcoms & Wascom, *supra* note 1, at 868.

[4] 2 A.N. YIANNOPOULOS, Property, §65, *in* LOUISIANA CIVIL LAW TREATISE 120 (4th Ed. 2009).

[5] See *id*, §66) ("The first direct legislative prohibition of alienation of state-owned water bottoms is found in Act No. 106 of 1886, which declared that the state owned all waters adjoining the Gulf of Mexico, and announced that public ownership of these waters should be continued and maintained."). However, the Act did not specifically prohibit alienation.

[6] Gulf Oil Corp. v. State Mineral Board, 317 So.2d 576, 580-581 (La. 1974) (on rehearing) (ruling that the state of Louisiana was entitled to oil for submerged lands beneath navigable water because Act 62 of 1912 did not apply, since the state never had the ability to alienate the trust lands.).

[7] *Id.* at 592, 593.

Louisiana added an article to the 1921 constitution expressly prohibiting the Louisiana legislature from alienating trust lands.[8] This article remains in the constitution today.[9]

The 1921 constitution established another constitutional article confirming the existence of the PTD in Louisiana. Article IV, Section 1 established a state duty to protect the natural resources of the state.[10] This article remains in the current constitution in Article IX, Section 1.[11] The Louisiana Supreme Court has interpreted Article IX, Section 1 to require state agencies to protect the state's natural resources so long as that protection promotes the public welfare—this rule, established in *Save Ourselves v. Environmental Control Commission*, is known as the "rule of reasonableness."[12]

2.0 The Basis of the Public Trust Doctrine in Louisiana

In 1812, Louisiana gained sovereignty over the state's navigable waters through the equal footing doctrine,[13] a principle grounded on the notion that the English colonies received the same sovereignty rights as England—these same rights then passed to each original American state as they entered the Union.[14] Among these rights was the ownership of all waters subject to the ebb and flow of the tide and all non-tidal, navigable waters.[15] The equal footing doctrine is codified in the Louisiana statutory code,[16] which claims state ownership of all the

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[8] LA. CONST. of 1921, art. IV, §2.
[9] LA. CONST., art. IX, §3.
[10] LA. CONST. of 1921, art. IV, §1.
[11] LA. CONST., art. IX, §1.
[12] Save Ourselves v. Louisiana Environmental Control Commission, 542 So.2d 1152, 1156-7 (La. 1984) (ruling that the Louisiana Environmental Control Commission did not provide a sufficient record to demonstrate the required balancing concerning the issuance of a permit for the construction of a hazardous waste plant).
[13] *See* YIANNOPOULOS, *supra* note 4, §65.
[14] *See* Robin Kundis Craig, *A Comparative Guide to the Eastern Trust Doctrine: Classifications of States, Property Rights, and State Summaries,* 16 PENN ST. ENVTL. L. REV. 1, 6-7 (2007); *see also* Martin v. Wadell, 41 U.S. 367, 384-6 (holding that the "regalia" of the British crown, meaning the sovereign ownership of the beds of navigable rivers and the sea and seashore, passes to each subsequent sovereign as the power is transferred).
[15] *Id.*
[16] LA. REV. STAT. ANN. §9:1101 ("The waters of and in all bayous, rivers, streams, lagoons, lakes and bays, and the beds thereof, not under the direct ownership of any person on August 12, 1910, are declared to be the property of the

waters of the state not privately owned on August 12, 1910.[17] That provision also rescinded any conveyance of navigable waters to any levee district, although, it acknowledged the legitimacy of good faith sales of navigable waters before August 12, 1910.[18]

The public trust doctrine in Louisiana, however, predates statehood. Louisiana's Civil Code is derived from French and Spanish law—both of which traditionally considered rivers, the sea, and the seashore to be "common things," or property that cannot be privately owned.[19] The 1808 Civil Code classified "navigable rivers, seaports, roads, harbours, highways, and the beds of rivers as long as the same is covered by water," as public property, or property owned by the state; the sea and seashore, on the other hand, were common property, which, as in French and Spanish law, is property insusceptible to ownership. [20]

Today's Civil Code embodies the PTD in a series of articles defining public property and its uses. Article 450 defines "public things," owned by the state, including "running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore."[21] Article 452 stipulates that "public things ... are subject to public use in accordance with

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state. There shall never be any charge assessed against any person for the use of the waters of the state for municipal, industrial, agricultural or domestic purposes. While acknowledging the absolute supremacy of the United States of America over the navigation on the navigable waters within the borders of the state, it is hereby declared that the ownership of the water itself and the beds thereof in the said navigable waters is vested in the state and that the state has the right to enter into possession of these waters when not interfering with the control of navigation exercised thereon by the United States of America. This Section shall not affect the acquisition of property by alluvion or accretion. All transfers and conveyances or purported transfers and conveyances made by the state of Louisiana to any levee district of the state of any navigable waters and the beds and bottoms thereof are hereby rescinded, revoked and canceled. This Section is not intended to interfere with the acquisition in good faith of any waters or the beds thereof transferred by the state or its agencies prior to August 12, 1910.").

[17] *Id.*

[18] *Id.*

[19] *See* Wilkins & Wascom, *supra* note 1, at 863-864.

[20] La. Civil Code art. 6, p. 94 (1808). See also YIANNOPOULOS, *supra* note 4, §65 (arguing that the equal footing doctrine only gave Louisiana a sovereignty right without any obligation to exercise it, and that proprietary ownership was conveyed to the state by only the Civil Code provisions discussed *infra*).

[21] La. Civ. Code Ann. Art. 450 (2008) (effective Jan. 1, 1979). The 1978 Civil Code reclassified the sea and seashore as "public things," as opposed to common things. *See* Wilkins & Wascom, *supra* note 1, at 686.

applicable laws and regulations." [22] The statute also specifies that "[e]veryone has the right to fish in the rivers, ports, roadsteads, and harbors, and the right to land on the seashore, to fish, to shelter himself, to moor ships, to dry nets and the like, provided that he does not cause injury to the property of adjoining owners."[23] The modern Civil Code also acknowledges that private property may be subject to public use,[24] and that the banks of navigable rivers or streams are private property that may be subject to public use.[25]

Louisiana also has a constitutional basis for the public trust doctrine.[26] The first constitutional public trust language appeared in the constitution of 1921, which proclaimed that "[t]he natural resources of the state shall be protected, conserved and replenished."[27] The 1979 constitution expanded on this language, stating that:

> "[t]he natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy."[28]

This provision imposes a public trust duty on all state agencies to protect all natural resources of the state.[29]

The 1921 constitution also addressed the alienation of public trust land by the legislature[30] by denying the legislature any power "to alienate, or authorize the alienation of, the

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[22] La. Civ. Code Ann. Art. 452 (2008) (effective Jan. 1, 1979).
[23] *Id.*
[24] La. Civ. Code Ann. Art. 455 (2008) (effective Jan. 1, 1979).
[25] La. Civ. Code Ann. Art. 456 (2008) (effective Jan. 1, 1979).
[26] Lake Bistineau Preservation Society, Inc. v. Wildlife and Fisheries Commission of the State of Louisiana, 895 So.2d 821, 824 (La. App. 2 Cir. 2005) ("La. Const. art. 9, § 1, otherwise known as the 'Public Trust Doctrine.'").
[27] LA CONST. of 1921, art. VI, §1.
[28] LA. CONST., art. IX, §1.
[29] Wilkins & Wascom, *supra* note 1, at 896. *See also* Save Ourselves, Inc. v. The Louisiana Environmental Control Commission, 452 So.2d 1152, 1154 (La. 1984) (finding a public trust obligation in the Louisiana Constitution Art. IX, §1 for the protection, conservation, and replenishment of the state's natural resources). This obligation was enacted in the Louisiana Environmental Affairs Act, now the Environmental Quality Act, La. Rev. Stat. Ann. § 25:1101 et seq., which was amended in 1983 and renamed the Environmental Quality Act, *see Save Ourselves,* 452 So.2d at 1155 n. 4.

fee of the bed of any navigable stream, lake or other body of water, except for purposes of reclamation." [31] This restraint on the alienation of trust lands remains in Louisiana's current constitution.[32]

3.0 Institutional Application

The institutional applications of the public trust doctrine in Louisiana include restraints on the legislature's ability to alienate trust lands[33] and a requirement that agencies take a "hard look" at agency actions that may adversely affect the environment.[34] Neither limit is absolute, however, as the legislature may lease trust lands and resources,[35] and detrimental effects of agency actions on the environment may be outweighed by the social or economic benefits of a proposal.[36]

3.1 Restraint on alienation

During the first 109 years of Louisiana's statehood, the various Civil Code articles and statutes codified the inalienability of water bottoms.[37] However, the inalienability of water bottoms became suspect in 1912 when Act No. 62[38] created a six-year prescriptive period for the state to contest the conveyance of state-owned lands to private parties.[39] But in 1974, the

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[30] Although Louisiana courts interpreted Articles 449, 450, and 453 of the 1870 constitution to proscribe alienation of trust lands, the 1921 constitution was the first explicit prohibition of alienation in the constitution. The Louisiana legislature also codified inalienability in Act No. 106 of 1886, which required maintenance of public ownership of state owned waters adjoining the Gulf of Mexico. But the 1921 constitutional provision and its successor in the 1979 constitution appears to be the primary source of the notion that public trust lands are inalienable. *See* YIANNOPOULOS, *supra* note 4, §66.

[31] LA. CONST. of 1921, art. IV, §2.

[32] LA CONST. art. IX §3.

[33] *Id.*

[34] LA CONST. art. IX §1.

[35] LA CONST. art. IX §3; LA. REV. STAT. ANN. 56:4 (West 2009).

[36] . Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 452 So.2d 1152, 1156 (La. 1984).

[37] *See* Stephen H. Kupperman, *Property—Susceptibility of Beds of Navigable Waters to Private Ownership,* 50 TUL L. REV. 193, 194 (1975).

[38] LA. REV. STAT. ANN. 9:5661 (West 2009).

[39] *Id.; see also* Gulf Oil Corp. v. State Mineral Bd., 291 So.2d 807, 809 (La. App. 1974).

Louisiana Court of Appeals held that this prescriptive period did not apply to trust lands that the state had no authority to alienate in the first place.[40]

In 1921, Louisiana voters ratified a constitutional provision, now codified in Article IX, Section1 that restricted the alienation of the bed of any navigable stream, lake, or other body of water.[41] However, this provision contains three qualifications, allowing alienation for: 1) reclamation by riparian landowners of land lost to erosion,[42] 2) reclamation for public use, and 3) leasing of water bottoms for mineral or other purposes such as the cultivation of oysters.[43]

Article IX, Section 3 does not prevent the state from reclaiming land.[44] In *Save Our Wetlands v. Orleans Levee Board,*[45] the Louisiana Court of Appeals held that a state agency could fill a lake bottom to expand an airport because it was reclaiming land that it already owned.[46] The court held that an airport was a public use within the "necessary for reclamation" exception of the article.[47]

3.2 Limit on legislature

The Louisiana constitution denies the legislature the power to alienate "the fee of any navigable stream, lake, or other body of water."[48] Although Louisiana courts interpreted Articles 449, 450, and 453 of the 1870 constitution to proscribe the alienation of trust lands, the 1921

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[40] *Gulf Oil Corp.*, 291 So.2d at 809.
[41] LA CONST. art. IX §3.
[42] This provision appeared in 1921 version of the constitutional article. Only land lost to erosion since 1921 can be reclaimed by the riparian landowner. Op.Atty.Gen., No. 75-1602, Jan. 8, 1976.
[43] LA CONST. art. IX §3; LA. REV. STAT. ANN. 56:4 (West 2009) (the Louisiana Department of Natural Resources may lease or otherwise administer the beds of navigable rivers, streams, bayous, lagoons, lakes, bays, sounds, or inlets in Louisiana territory or connecting to the Gulf of Mexico); LA. REV. STAT. ANN. 41:1225 (West 2009) (the Louisiana Department of Wildlife and Fisheries may lease the beds of navigable water ways for the cultivation, productions, or harvest of oysters).
[44] Save Our Wetlands, Inc. (SOWL) v. Orleans Levee Board, 368 So.2d 1210, 1213 (La.App 1979).
[45] *Id.*
[46] *Id.*
[47] *Id.* at 1213.
[48] LA CONST. art. IX §3; *see* Section 3.1 *supra*, for a complete discussion on the limits on alienation.

constitution was the first explicit prohibition of alienation in the constitution.[49] The Louisiana legislature also codified inalienability in an 1886 statute that required maintenance of public ownership of state owned waters adjoining the Gulf of Mexico.[50] But the 1921 constitutional provision and its successor in the 1979 constitution appear to be the primary source for the notion that public trust lands are inalienable.

3.3 Limit on administrative action

The public trust doctrine established in Article IX, Section 1 of the Louisiana constitution obliges all state agencies to protect the environment.[51] This requirement is tempered by a "rule of reasonableness," [52] meaning that state agencies must balance environmental impacts with the economic or social impacts of an action.[53] If the economic or social impacts outweigh negative effects on the environment, the "rule of reasonableness" requires agencies to pursue the public interest by proceeding with actions despite the effect on the environment.[54]

The "rule of reasonableness" was first articulated in 1974, in *Save Ourselves v. Louisiana Environmental Control Commission,*[55] and reiterated in 2005, in *Lake Bistineau Preservation Society v. Wildlife and Fisheries Commission.* In *Lake Bistineau*, the Louisiana Court of Appeals upheld the Department of Wildlife and Fisheries (DWF) decision to "drawdown" Lake Bistineau for several months of the year, ruling that the agency complied with its duty to balance

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[49] *See* YIANNOPOULOS, *supra* note 4, §66.
[50] *Id.* (discussing Act No. 106 of 1886).
[51] LA. CONST., art. IX, §1 ("states that the legislature shall implement the policy of protecting the state's natural resources in a manner consistent with the public welfare); *see, e.g.,* Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 452 So.2d 1152, 1156 (La. 1984) (". . .the Natural Resources article of the 1974 Louisiana Constitution imposes a duty of environmental protection on all state agencies and officials, establishes a standard of environmental protection, and mandates the legislature to enact laws to implement this policy."); Lake Bistineau Preservation Society v. Wildlife and Fisheries Commission, 895 So.2d 821, 827 (La.App. 2005) ("Under the Public Trust Doctrine, DWF has an obligation to protect the Louisiana environment.").
[52] *Save Ourselves,* 452 So.2d at 1156, 1157.
[53] *Id.*
[54] *Id.*
[55] *Id.*

environmental and other factors affecting the public interest, even though the agency appeared to base its decision largely on economic factors.[56] *Lake Bistineau* suggests that the constitutional duty of environmental protection may not place a particularly heavy burden on state agencies.

4.0 Purposes

The public trust purposes in Louisiana include the traditional trust purposes: navigation, commerce, and fishing.[57] By statute, however public trust purposes include the general protection of all the natural resources of the state.[58]

4.1 Traditional (navigation/fishing)

Louisiana's PTD recognizes the traditional public uses of navigation, commerce, and fishing.[59] In theory, all of these rights apply universally to all public trust waters, but there is considerable debate as to whether there is a public right to fish on private lands subject to the public trust.[60] The public does have a right to use private property between the low and high water mark of navigable waterways for purposes incidental to navigation, such as mooring ships, unloading cargo, and drying fishing nets.[61]

4.2 Beyond traditional (recreational/ecological)

Louisiana recognizes environmental protection as a use protected by the public trust doctrine.[62] The Louisiana constitution proclaimed the public trust in environmental protection in

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[56] *895 So.2d 821, 827 (La.App. 2005).*
[57] See Wilkins &Wascom, *supra* note 1, at 865.
[58] LA. CONST., art. IX, §1.
[59] See Wilkins & Wascom, *supra* note 1, at 865. La. Civ. Code Ann. Art. 452 (2008) (effective Jan. 1, 1979) ("Everyone has the right to fish in the rivers, ports, roadsteads, and harbors, and the right to land on the seashore, to fish, to shelter himself, to moor ships, to dry nets and the like, provided that he does not cause injury to the property of adjoining owners.").
[60] Parm v. Shumate, 513 F.3d 135 (5th Cir. 2007) (holding that there is no right to fish on privately owned banks of navigable rivers); *but see* Chaney v. State Mineral Bd., 444 So.2d 105 (La. 1983) (holding that the public has the right to swim, wade, baptize, tube, skip stones, or dig for clams in the waters covering a privately owned riverbed).
[61] *Parm,* 513 F.3d at 145 (the servitude for public use on the banks of navigable rivers is limited to those activities that are incidental to navigation and commerce); Buckskin Hunting Club v. Bayard, 868 So.2d 266 (La. App. 2004) (same).
[62] *See* Wilkins & Wascom, *supra* note 1, at 865.

Article IX, Section 1;[63] the Louisiana legislature implemented the trust provision of the constitution through the Environmental Quality Act.[64]

The Louisiana constitution established the state's policy to "protect, conserve, and replenish" all the natural resources of the state in a manner consistent with the "health, safety, and welfare of the people."[65] The constitution includes a non-exclusive list of natural resources to be protected including "air and water, and the healthful, scenic, historic, and esthetic quality of the environment."[66] The Louisiana Supreme Court has interpreted this provision to include protection of wildlife and fisheries within the state's police powers.[67] However, the regulatory authority granted by the constitution provision is limited by a "rule of reasonableness," requiring state agencies to weigh the environmental impacts of their actions against the social and economic benefits.[68]

Article IX, Section 1 of the constitution directs the Louisiana legislature to enact laws to implement the state's natural resources policy.[69] The legislature complied with this constitutional mandate in 1979 by enacting the Louisiana Environmental Affairs Act, now called the Environmental Quality Act.[70] The Act created the Environmental Control Commission (ECC) within the Department of Natural Resources (DNR) to review environmental permits and to ensure the protection of natural resources required by the public trust provision of the

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[63] LA. CONST., art. IX, §1.
[64] LA. REV. STAT. ANN.§30:1051 et. seq. (2009); *see generally Save Ourselves,* 452 So.2d 1152 (good discussion of the constitutional article, statutes, and regulations related to the public trust and their interplay).
[65] LA. CONST., art. IX, §1.
[66] *Id.*
[67] State v. Weaver, 805 So.2d 166, 171 (La. 2002) (ruling that a lifetime revocation of a fisherman's mullet fishing license for violating a commercial mullet taking statute was not a violation of due process, because Louisiana had a legitimate state interest in protecting its fisheries).
[68] Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 452 So.2d 1152, 1156 (La. 1984).
[69] *Id.*
[70] *Save Ourselves,* 452 So.2d at 1155 n.4.

constitution.[71] The ECC could review, permits issued by the DNR, and any individual suffering an injury from a final decision by the DNR may appeal to the ECC.[72] This role has since been taken over by the Secretary of the Department of Environmental Quality.[73]

Article IX, Section 1 and the ensuing legislation, however, do not require absolute protection of the environment as a public trust right, only that the state minimize the adverse effects on the environment to the extent that it is consistent with the public welfare.[74] This "rule of reasonableness" results from the Louisiana Supreme Court's interpretation of Article IX, Section 1, which states that "the natural resources of the state...shall be protected...insofar as possible and consistent with the health, safety, and welfare of the people."[75]

5.0 Geographic Scope of Applicability

The public trust doctrine in Louisiana applies to navigable waters and the sea and seashore.[76] Although the PTD does not specifically apply to wildlife and uplands, provisions of Louisiana constitutional and statutory law express public trust-like concern over these resources and areas.[77]

5.1 Tidal

Louisiana holds all the lands subject to the ebb and flow of the tide up to the mean high water mark in public trust by virtue of the equal footing doctrine.[78] Initially, the Civil Code

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[71] *Id.* at 1155 n.4, 1156.

[72] LA. REV. STAT. ANN. art 30:1062 (West 2009); *see also Save Ourselves,* 452 So.2d at 1155.

[73] LA. REV. STAT. ANN. art 30:2013 (West 2009).

[74] *Id.* at 1156, 1157 (interpreting the language in constitutional article IX, §1 to qualify the protections of the environment "insofar as possible and consistent with the health, safety, and welfare of the people," LA. CONST., art. IX, §1.).

[75] *Save Ourselves,* 452 So.2d at 1157, *interpreting* LA. CONST., art. IX, §1.

[76] LA. CIV. CODE. Art. 450.

[77] LA. REV. STAT. ANN. §56:3 (West 2009); LA. CIV. CODE ANN. art. 455.

[78] Philips Petroleum Co. v. Mississippi, 484 U.S. 469, 472 (1988) (holding that Mississippi acquired non-navigable tidelands through the equal-footing doctrine at the time of statehood); *see also* YIANNOPOULAS, *supra* note 4, §66 at n. 23. Despite the holding in *Philips Petroleum* there was some academic debate about the ownership status of non-navigable tidelands in Louisiana, Wilkins, *supra* note 1, at 869-896.

considered the sea and the seashore to be common property that was not susceptible to ownership.[79] However, the Louisiana Code now classifies the sea and seashore as public property owned by the state.[80] There appears to be little practical different between public and common property because neither can be used by the public; however, common property is not owned by anyone while public property is owned by the state.[81]

5.2 Navigable in fact

The 1808 Civil Code declared "navigable rivers, seaports, roads, harbours, highways, and the beds of rivers as long as the same is covered by water" to be public property, subject to public use.[82] The Civil Code's omission of a classification for other bodies of water led to considerable confusion and litigation.[83] Today, the Civil Code defines all navigable waters and water bottoms as public property owned by the state in trust for the public, remedying the previous confusion.[84] The Civil Code gives the public the right to use state-owned waterbeds to fish, land on the shore, moor boats, take shelter, and dry nets, so long as the adjoining owners are not injured.[85] Because of this Civil Code article, the Attorney General opined that landowners cannot prohibit public use of navigable waters flowing through private land.[86]

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[79] *See* Wilkins & Wascom, *supra* note 1, at 686.
[80] LA. CIV. CODE. Art. 450 ("Public things that belong to the state are such as. . . the territorial sea, and the seashore.").
[81] LA. CIV. CODE. Art. 450; LA. CIV. CODE. Art. 449.
[82] LA. CIV. CODE. Art. 6 (1808); *see* YIANNOPOULAS, *supra* note 4, §62.
[83] *See* YIANNOPOULAS, *supra* note 4, §62 (*see, e.g.,* Delcrois Corportion v. Jones-O'Brian Inc., 597 So.2d 65 (La.App. 1992) (ruling that a 1902 conveyance of the bed of a navigable lake to be valid).
[84] LA. CIV. CODE. Art. 450 ("Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.").
[85] LA. CIV. CODE. Art. 452.
[86] Op.Atty.Gen. No. 90-557, Dec. 12, 1990.

5.3 Recreational waters

Hunting and fishing are not part of the public servitude on "banks" of navigable water and therefore are not 'incidents of navigation.'[87] Landowners may also prohibit the public from hunting and fishing on seasonally-flooded, private property.[88]

5.4 Wetlands

"Flooded swamplands" are not protected by the PTD.[89] However, the Louisiana legislature asserts the right to regulate wetland use pursuant to the public trust article in the Louisiana constitution.[90] The legislature invoked the Article to mandate the closure of oil and gas pits in the wetlands in southern Louisiana, arguing that the legislation would implement the Article's mandate to "protect, conserve, and replenish the natural resources of the state."[91]

5.5 Groundwater

The Louisiana legislature asserts the power to regulate the use of ground water through Louisiana constitutional Article IX, Section 1, the constitutional expression of the public trust doctrine.[92] The legislature exercised this power by mandating that potable groundwater could not

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[87] Parm v. Shumate, 513 F.3d 135, 143 (5th Cir. 2008) (holding that "neither navigation not commerce encompass recreational fishing" and accordingly there is no right to fish on private land bordering a navigable river).

[88] Edmiston v. Wood, 566 So.2d 673, 676 (La.App. 1990) (holding that hunting, fishing, and navigation are not permitted on 'overflow lands'); State v. Barras, 602 So.2d 301,305 (La.App. 1992) (holding that hunting and fishing in overflowed lands adjacent to a navigable river is not permitted).

[89] Buckskin Hunting Club v. Bayard, 868 So.2d 266, 273 (La. App. 3 Cir. 2004) ("privately leased land is not subject to use by the public merely because during some periods of the year it is flooded swamp lands").

[90] LA. CONST., art. IX, §1; LA. REV. STAT. ANN. §30:25 (West 2009) ("In order to implement the provisions of Section 1 of Article IX of the Louisiana Constitution to protect, conserve, and replenish the natural resources of the state, the Legislature of Louisiana hereby declares that the use of production pits in oil and gas related activities is harmful to the wetland and marsh areas of the coastal zone of this state and therefore such pits shall be closed in accordance with this Section").

[91] LA. CONST., art. IX, §1; LA. REV. STAT. ANN. §30:25.

[92] LA. CONST., art. IX, §1; LA. REV. STAT. ANN. §30:2392 (West 2009) (statement of policy of the Louisiana Reclaimed Water Law which justifies the legislature's power to regulate the use of water through constitutional Article IX, Section 1); LA. REV. STAT. ANN. §30:2394 (West 2009) (prohibition on the use of potable groundwater for nonpotable uses).

be used for non-potable uses such as irrigating non-developed areas like cemeteries and gulf courses.[93]

5.6 Wildlife

The Louisiana "oyster statutes" claim state ownership of all oysters and other shellfish, either natural or cultivated, both when they are on the water bottoms and after they have been harvested.[94] The state may lease oyster beds to the public, and may impose any condition on an oyster lease so long as the condition promotes the oyster industry or for protects, conserves, or preserves the coast.[95] The state also owns all "wild birds, and wild quadrupeds, fish, other aquatic life."[96] The Department of Natural Resources permits taking of state owned wildlife.[97] These provisions reflect public trust principles because state ownership gives the state the power and duty to manage wildlife for the good of the public.

5.7 Uplands (beaches, parks, highways)

Article 455 of the Louisiana Civil Code provides that "[p]rivate things may be subject to public use in accordance with law or by dedication."[98] Louisiana courts interpret this provision to mean that state agencies can regulate private land so as to create a public servitude.[99] This Civil Code provision gives the state the power to use private property for public resembling the PTD, except that the land burdened by the servitude is private instead of state-owned.

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[93] LA. REV. STAT. ANN. §30:2394; LA. REV. STAT. ANN. §30:2392.
[94] LA. REV. STAT. ANN. §56:3 (West 2009).
[95] LA. REV. STAT. ANN. §56:435 (C) (West 2009); *see also,* Avenal v. State, 886 So.2d 1085, 1095 (La. 2004) (discussion the State's rights and duties under Louisiana Revised Statutes Title 56 as it pertains to oyster leases).
[96] LA. REV. STAT. ANN. §56:3 (A) (West 2009).
[97] LA. REV. STAT. ANN. §56:3 (B) (West 2009).
[98] LA. CIV. CODE ANN. art. 455.
[99] *Cf.* Evans v. Dugan, 17 So.2d 562 (La. 1944) (holding that La. Civil Code art. 455 gives state agencies the right to create a public servitude on private land, thus allowing a member of the public to maintain buildings on private property between the low and high water mark on Lake Bistineau because of a Lake Bistineau State Game and Fish Commission determination that it was an appropriate use of the property).

6.0 Activities Burdened

The PTD in Louisiana restricts the alienation of trust property by virtue of the constitution.[100] Although the public trust does not specifically burden the taking of wildlife, Louisiana statutes express trust-like concern in the state's ownership of wildlife.[101]

6.1 Conveyances of property interests

The state of Louisiana has never expressly alienated the navigable waters, seas, or sea shores of the state, and presumably has been unable to since achieving statehood, if not before.[102] Article IX, Section 3 the constitution forbids the legislature from alienating the beds of navigable bodies of water.[103] However, the state may lease the property for mineral or other interests.[104] The state can also reclaim the beds of navigable water bodies if in the public interest.[105] For example, the state may use the bed of a navigable lake once held in trust for the public for use as an airport because airports benefit the public.[106]

6.2 Wetland fills

Although, the Louisiana legislature has interpreted the state constitution to empower it with the ability to regulate wetlands through its public trust language, it has not specifically used that power to regulate wetland fills.[107] However, although state ownership of wetlands is never

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[100] LA. CONST., art. IX.

[101] LA. REV. STAT. ANN. §56 (West 2009).

[102] *See* Wilkins & Wascom, *supra* note 1, at 869; Gulf Oil Corp. v. State Mineral Board, 317 So.2d 576, 589 (La. 1974) (discussing the likelihood the public trust doctrine has prevented Louisiana from alienating trust lands since 1812).

[103] LA. CONST., art. IX, §3; this provision was originally enacted in 1921 in LA. CONST. of 1921, art. IV, §2.

[104] *Id.;* LA. REV. STAT. ANN. 41:1225 (West 2009) (Louisiana Department of Wildlife and Fisheries may lease the beds of navigable water ways for the cultivation, productions, or harvest of oysters).

[105] LA. CONST., art. IX, §3.

[106] LA. CONST., art. IX, §3; Save Our Wetlands, Inc (SOWL) v. Orleans Levee Board, 368 So.2d 1210, 1213 (La.App 4th Cir. 3/7/79) (holding that the state can reclaim land it already owns for a public purpose, such as building a public airport).

[107] LA. CONST., art. IX, §1; LA. REV. STAT. ANN. §30:2392 (West 2009) (statement of policy of the Louisiana Reclaimed Water Law which justifies the legislature's power to regulate the use of water through constitutional

asserted, the policy statement for the Louisiana Water Control Law has public trust language.[108] The Louisiana Water Control Law requires a permit to "discharge any substance" into "waters of the state."[109] "Waters of the state" are defined in the act to include wetlands,[110] and the "discharge of any substance" includes "dredge and fill operations, of any substance in concentrations which tend to degrade the chemical, physical, biological, or radiological integrity" of the water body.[111] The Louisiana Court of Appeals notes that this regulatory system is based in part of the public trust doctrine in *Matter of Dravo Co., Basic Materials.*[112]

6.3 Water rights

Louisiana owns "[t]he waters of and in all the bayous, rivers, streams, lagoons, lakes, and bays, and the beds thereof, not under direct ownership of any person on August 12, 1910."[113]

Article IX, Section 1); LA. REV. STAT. ANN. §30:2394 (West 2009) (prohibition on the use of potable groundwater for nonpotable uses).

[108] LA. REV. STAT. ANN. §30:2070 (West 2009) ("The legislature finds and declares that the waters of the state of Louisiana are among the state's most important natural resources and their continued protection and safeguard is of vital concern to the citizens of this state. To insure the proper protection and maintenance of the state's waters, it is necessary to adopt a system to control and regulate the discharge of waste materials, pollutants, and other substances into the waters of the state").

[109] LA. REV. STAT. ANN. §30:2070 (West 2009) ("No person shall conduct any activity which results in the discharge of any substance into the waters of the state without the appropriate permit, variance, or license required under the regulations of the department adopted pursuant to this Chapter").

[110] LA. REV. STAT. ANN. §30:2073 (West 2009) ("means all surface waters within the state of Louisiana and, on the coastline of Louisiana and the Gulf of Mexico, all surface waters extending therefrom three miles into the Gulf of Mexico. For purposes of the Louisiana Pollutant Discharge Elimination System, this includes all surface waters which are subject to the ebb and flow of the tide, lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, impoundments of waters within the state of Louisiana otherwise defined as "waters of the United States" in 40 CFR 122.2").

[111] LA. REV. STAT. ANN. §30:2073(4); *see also*, Matter of Dravo Co., Basic Materials, 604 So. 2d 630, 633-4 (La. App. 1992) (ruling that a permit is required to dredge shells from the bottom of Lake Pontchartrain because the dredge material would chemically and biologically affect the water bottom and the Louisiana environmental regulatory system is based on the federal system and the public trust doctrine).

[112] Matter of Dravo Co., Basic Materials, 604 So. 2d at 634 ("Louisiana's regulatory framework is also based on state constitutional provisions and mandates and the public trust doctrine") (*citing* Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 452 So.2d 1152 (La.1984)).

[113] LA. REV. STAT. ANN. §9:1101 (West 2009).

Although, the owner of an estate bordering running water has a usufructory right to that water,[114] that right is subject to certain conditions imposed for the public utility or welfare.[115]

The state legislature asserts the power to regulate water-use through the public trust article of the Louisiana constitution, Article IX, Section 1.[116] For example, the legislature justified the enactment of the Louisiana Reclaimed Water Law with their "constitutional mandate to protect the natural resources of the state" as encoded in Article IX, Section 1.[117]

6.4 Wildlife harvests

The state owns all the "wild birds, and wild quadrupeds, fish, other aquatic life. . . and all oysters in the shells after they are caught or taken. . . ."[118] Louisiana statutes prohibit the taking of any state owned wildlife unless a taking is permitted by the Department of Natural Resources. State ownership of gives the state the power to regulate wildlife for purposes similar to those protected by the public trust, like commerce or conservation.

7.0 Public standing

There are no provisions in Louisiana law that specifically provide standing for citizens to sue the state to perform its public trust duties, but several statutes may provide a basis for standing through the Environmental Quality Act and the Louisiana Trust Code.[119] The public

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[114] LA. CIV. CODE. ANN. Art. 657 (West 2009).

[115] *See, e.g.,* Pryun v. Nelson Bros., 157 So. 585 (La. 1934) (ruling that a government contractor could remove soil from a landowner's batture because it was in pursuance of rebuilding levees for the well being of the public).

[116] LA. CONST., art. IX, §1; LA. REV. STAT. ANN. §30:2392 (West 2009) ("In furtherance of the legislature's constitutional mandate to protect the natural resources of the state as provided in Article IX, Section 1 of the Constitution of Louisiana, there is hereby established the Louisiana Reclaimed Water Law").

[117] LA. REV. STAT. ANN. §30:2392 (establishing the state policy that it is a waste of resources to use potable water for nonpotable uses and declares the intention to create the infrastructure to support a reclaimed water system).

[118] LA. REV. STAT. ANN. §56:3 (B) (West 2009).

[119] LA. REV. STAT. ANN. art 30:1062 (West 2009); LA. REV. STAT. ANN. §9:2221 (West 2009).

has brought several suits to enforce the trust provisions of the constitution, but the courts have yet to identify the basis of standing. [120]

7.1 Common law-based

Louisiana courts have yet to recognize a common law basis for standing for the public to enforce the PTD.

7.2 Statutory basis

There are no Louisiana statutes that give citizens standing to sue to enforce the state's trust duties. However, the Environmental Quality Act initially created a cause of action for any citizen adversely affected by decisions of the Environmental Control Commission (ECC).[121] Although the Act did not expressly provide standing to enforce the PTD, the legislature created the ECC to implement the constitutional provisions that codify the PTD.[122] The ECC implemented the Act by reviewing Department of Natural Resource permit decisions to ensure that they sufficiently considered environmental impacts.[123] Thus, providing standing for citizens aggrieved by ECC decisions may have indirectly provided standing to enforce the environmental considerations that are required by the PTD. However, in 1987 the ECC was subsumed by the Louisiana Department of Environmental Quality and all the powers of the ECC are now held by the Secretary of the Department of Environmental Quality.[124]

Article 2221 the Louisiana Trust Code states that the beneficiary of a trust can compel the trustee to perform his duties or enjoin him from committing a breach of his duty.[125] This

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[120] Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 452 So.2d 1152 (La. 1984); Bistineau Preservation Society v. Wildlife and Fisheries Commission, 895 So.2d 821 (La.App. 2005).
[121] LA. REV. STAT. ANN. art 30:1062 (West 2009); *see also Save Ourselves,* 452 So.2d at 1155.
[122] LA. REV. STAT. ANN. art 30:1062 (West 2009); *see also Save Ourselves,* 452 So.2d at 1155.
[123] *Save Ourselves,* 452 So.2d at 1155.
[124] LA. REV. STAT. ANN. art 30:1062 (West 2009).
[125] LA. REV. STAT. ANN. §9:2221 (West 2009).

provision may provide a mechanism for a beneficiary of the public trust to sue the state to compel it to perform its duties[126] or enjoin it from violating its trust duties.

7.3 Constitutional basis

Although there is no express constitutional grant of standing to the public, Louisiana courts have recognized citizen standing to enforce constitutional Article IX, Section 1.[127]

8.0 Remedies

The Louisiana Trust Code may provide the option of injunctive relief if the state breaches its duty to protect the public trust.[128] The PTD also can be used as a defense against takings claims.[129]

8.1 Injunctive relief

Section 2221 the Louisiana Trust Code states that the beneficiary of a trust can compel the trustee to perform his duties or enjoin him from committing a breach of his duty.[130] This provision may provide a mechanism for a beneficiary of the public trust to sue the state to compel it to perform its duties[131] or enjoin it from violating its trust duties.

8.2 Damages for injuries to resources

There is no recognized damages remedy for injury to resources in Louisiana.

8.3 Defense to takings claims

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[126] *See* Robert E. Tacza, *The Public Trust Doctrine as a Basis for Environmental Litigation in Louisiana,* 27 Loy. L. Rev. 469, 479 (1981) (noting the possibility that section 2221 could provide a remedy for public trust beneficiary who wanted to compel the state to perform its trust duties, also notes that the last provision of the statute that allows removal of a trustee is inimical to the concept of the public trust doctrine).

[127] Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 452 So.2d 1152 (La. 1984) (challenging the Louisiana Environmental Control Commission's decision to open a hazardous waste facility under Louisiana Constitution Article IX §1); Lake Bistineau Preservation Society v. Wildlife and Fisheries Commission, 895 So.2d 821 (La.App. 2005) (challenging the Department of Wildlife and Fisheries' decision to seasonally lower the water level in Lake Bistineau under Louisiana Constitution Article IX §1).

[128] LA. REV. STAT. ANN. §9:2221 (West 2009).

[129] Avenal v. State, 886 So.2d 1085 (La. 2004).

[130] LA. REV. STAT. ANN. §9:2221 (West 2009).

[131] *See* Tacza, *supra* note 115, at 479 (noting the possibility that section 2221 could provide a remedy for public trust beneficiary who wanted to compel the state to perform its trust duties, also notes that the last provision of the statute that allows removal of a trustee is inimical to the concept of the public trust doctrine).

The public trust doctrine may be a defense to a takings claim in Louisiana. For example, in *Avenal v. State,*[132] the Louisiana Supreme Court rejected a takings claim by oyster lease holders for the loss of profitability of their oyster leases when the Caernarvin Freshwater Diversion changed the salinity of their leases.[133] Although the case was not decided on public trust grounds,[134] the court's language indicated that the public trust doctrine is a background principle of state property law that prevents injured parties from obtaining compensation for Fifth Amendment takings.[135]

[132] 886 So.2d 1085 (La. 2004).
[133] *Id.* at 1109, 1110.
[134] *Id.* (The court held that the plaintiffs' claim was proscribed by a statute that instituted a two-year prescriptive period for damages claims.).
[135] *Id.* at 1108 n. 28 (The court concluded that the state had a right to divert freshwater from the Mississippi into salt marshes to prevent coastal erosion because preventing coastal erosion is an "actual necessity" that will "forstall [a] grave threat to the lives and property of others." Because the Caernarvan Diversion, in fact, prevented coastal erosion, it was dispositive in the question of whether there was a taking (*quoting* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992))).

MARYLAND

The Public Trust Doctrine in Maryland

Nathan Morales

1.0 Origins

The source of the public trust doctrine (PTD) in Maryland is as narrow as its application. In 1821, Maryland first established the PTD as a matter of common law, based on the English public right of fishing and navigation.[1] Since its initial adoption of the PTD into state law, Maryland courts have continuously declined to expand the purposes and scope of this common law doctrine in any significant fashion.[2] As a result of the PTD's basis in common law, however, the state legislature can and has expanded the doctrine.[3] Despite relatively recent interest in the PTD, however, the legislature has failed to make much use of a potentially vast and vibrant doctrine.

2.0 The Basis of the Public Trust Doctrine in Maryland

Initially, the state of Maryland relied primarily on the common law to guide its evolution of the PTD but eventually began to use statutory authority in a limited capacity to include nontraditional resources. In 1821, reversing a Baltimore county court decision granting exclusive possession of lands beneath navigable waters to a riparian landowner, the Maryland Court of Appeals[4] established the PTD as a state common law doctrine.[5]

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[1] Browne v. Kennedy, 5 H. & J. 195, 204-06 (1821) (at common law, the public right to navigable waters was retained by the King of England. The common right was subsequently transferred by grant to Lord Baltimore, and then to the state of Maryland upon joining the Union).

[2] Dept. of Natural Resources v. Mayor and City Council of Ocean City, 332 A.2d 630, 634 (Md. 1975) (at common law, the public's right is limited to navigation and fishing); Van Ruymbeke v. Patapsco Indus. Park, 276 A.2d 61, 62 (Md. 1971) (common law PTD is limited to waters where the tide ebbs and flows).

[3] MD. NAT. RES. CODE ANN. § 1-202 (2010) (PTD includes "fish and wildlife"); MD. ENVIR. CODE ANN. § 16-101 (1973) (defining wetlands as "land under the navigable waters of the State below the mean high tide); White v. Pines Community Improvement Ass'n, Inc., 939 A.2d 165, 167 (Md. 2008) (riparian rights are subject to such rules and regulations as the legislature may think proper to protect public rights); See McRoble v. Mayor and Com'rs of Westernport, 272 A.2d 655, 657 (Md. 1971) (legislature has power to alter the PTD by statute); Phipps v. State, 22 Md. 380, 389 (1864) (legislature has the power to grant privileges and benefits to increase common rights).

[4] The Maryland Court of Appeals is the highest court in the state.

[5] *Browne*, 5 H. & J. 195 at 196-98 and 211.

The court explained that the King of England originally held in trust the public right in navigable waters.[6] Subsequently, King Charles I transferred to Lord Baltimore the rights to all navigable waters and land beneath them within the territory now known as Maryland.[7] However, the king had power only to grant what he initially held; therefore, Lord Baltimore's rights in the navigable waters remained subject to the public right of navigation and fishery, the "*jus publicum.*"[8] When Maryland joined the Union, and adopted the English common law through its state constitution, all of the rights and limitations held by Lord Baltimore became vested in the state.[9] As a result of this transfer and the application of common law, the state of Maryland retained all property rights in its navigable waters and the lands beneath, subject to the public right of navigation and fishing.

Aside from its common law source, the PTD arises from one wildlife statute. In affirming a judgment of the lower court, the Maryland Court of Appeals ruled that the state legislature had authority to change and modify common law rights by statute,[10] and the Maryland legislature used this authority in passing a statute in 2010, expressly declaring the PTD to include wildlife.[11]

Unlike common law and the wildlife statute, the Maryland constitution has no provision recognizing the PTD, a fact the Maryland Court of Appeals has recognized.[12] But arguably the Maryland Constitution does provide an independent source for the PTD,

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[6] *Ocean City*, 332 A.2d 630 at 633; *Id* at 204-06.
[7] *Id.*
[8] *Id.*
[9] MD. CONST. DECL. OF RTS. art. 5; *Ocean City*, 332 A.2d 630 at 633.
[10] *Van Ruymbeke*, 276 A.2d 61 at 66.
[11] MD. NAT. RES. CODE ANN. § 1-201 (2010).
[12] Bausch & Lomb, Inc. v. Utica Mut. Ins. Co., 625 A.2d 1021, 1034 (Md. 1993) ("Neither the Maryland Constitution nor any statute proclaims the State to be the owner of waters within its borders.").

since it states all legislative and executive entities are "Trustees of the Public."[13] The Court of Appeals, however, concluded that this constitutional language does not create obligations under the PTD.[14] As a result, the court effectively interpreted away a constitutional basis for the PTD in Maryland, at least for the time being.

3.0 Institutional Application

Maryland state courts have not imposed duties on the government institutions responsible for implementing the PTD. What few limits the courts have imposed have been limited to the traditional PTD purposes of navigation and fishing. Although some general affirmative duties exist under the PTD in Maryland, the state government does not have many specific responsibilities to ensure public trust rights.

3.1 Restraint on Alienation (private conveyances)

The major restraint on alienation on Maryland trust lands deals specifically with lands covered by navigable waters. In 1893, the Maryland Court of Appeals reversed a judgment for a landowner who claimed he owned lands submerged under navigable waters.[15] The court determined that the state may not issue any patent for land under navigable waters.[16] Later, however, the same court decided that the legislature, through a clear statute, could dispose of sovereign trust property.[17]

3.2 Limit on Legislature

Like conveyance restrictions, direct limits on the state legislature exist, although they allow for a large amount of legislative discretion. The U.S. Supreme Court defined

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[13] MD. CONST. DECL. OF RTS. art. 6.
[14] Kerpelman v. Board of Public Works of Md., 276 A.2d 56, 61 (Md. 1971) (holding that Maryland PTD is a common law doctrine, and Article 6 of the constitution does not change or expand this.).
[15] Sollers v. Sollers, 26 A. 188, 188 (Md. 1893).
[16] *Id.*
[17] *McRoble*, 272 A.2d at 657.

the PTD in Maryland as a state right.[18] As a result, the state "may" forbid all acts, which would diminish or destroy the value of public trust resources.[19] Subsequently, in *Phipps v. State*, the Maryland Court of Appeals upheld a statute making it a crime to take oysters from private beds.[20] Phipps maintained that the state did not have a right to privatize these beds, but the court disagreed, declaring the state legislature has power to confer private benefits, but did specify that the grant must further public trust purposes.[21]

Because the PTD in Maryland has a common law basis, the legislature has power to change or modify it.[22] In 1971 the Court of Appeals in Maryland stated the legislature "may" restrict rights as it sees fit and "may" regulate the public trust in the best way suited to the interests of the trustees.[23] The state can also choose to delegate regulation of navigable waters to municipalities within Maryland's boundaries.[24] These cases reflect a willingness on the part of Maryland courts to extend a considerable amount of discretion to the state legislature in administering the PTD.

3.3 Limit on Administrative Action

Administrative agencies have few requirements when making decisions which affect public trust lands. The first major restriction requires agencies to make grants of

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[18] *The Volant*, 59 U.S. 71, 72, 74 (1855) (state had power to enact a statute to protect oyster beds that prevented a "vessel of the United States" from "prosecuting its voyage." The court held the state statute lawful because "soil below low-water mark...belongs to the State," based on the state "as successor of the lord proprietary.") (citing Den ex dem. Russell v. Assoc. of Jersey Co., 56 U.S. 426 (1853); Pollard's Lessee v. Hagan, 44 U.S. 212 (1845); Martin v. Waddell, 41 U.S. 367 (1842)).
[19] *Id.* at 72.
[20] Phipps v. State, 22 Md. 380, 389 (1864).
[21] *Id.*
[22] See generally Board of Public Works v. Larmar Corp., 277 A.2d 427, 439 (Md. 1971) (legislature has the right to change or modify common law riparian rights); *Van Ruymbeke*, 276 A.2d 61 at 66 (common law rights are subject to change and modification by statute).
[23] Bruce v. Director, Dept. of Chesapeake Bay Affairs, 276 A.2d 200, 208 (Md. 1971).
[24] Anne Arundel County v. City of Annapolis, 721 A.2d 217, 225 (Md. 1998).

public trust lands only when expressly authorized by the legislature.[25] Second, if an agency does decide to grant lands covered by navigable waters to private persons, it can only lease the property subject to a condition that no use will interfere with navigability of the water.[26] No other limits appear to exist for administrative agencies affecting public trust resources.

4.0 Purposes

Maryland courts have refused to extend the PTD beyond the traditional trust purposes of navigation and fishing. The state legislature has created an ecological trust purpose, but only concerning wildlife.[27] As a result, the purposes of the PTD in Maryland remain relatively unchanged since statehood.

4.1 Traditional (Navigation/Fishing)

Since the early 1800's, cases in Maryland, including one reviewed by the U.S. Supreme Court, limited the PTD to the traditional purposes of navigation and fishing.[28] In 1903, the Maryland Court of Appeals stated that the state is "undoubtedly" the owner of navigable waters within its boundaries, with public rights of navigation and fishery.[29] Typically, the right of fishery gives way to the rights of navigation, unless a vessel goes

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[25] Dundalk, S.P. & N.P. Ry. Co. v. Smith, 54 A. 628, 628 (Md. 1903) (incorporated railroads cannot be granted the authority to cross navigable waters of the state without express consent of the legislature).
[26] Adams v. Carey, 190 A. 815, 820 (Md. 1937) (clarifying the rights Maryland has to convey land under navigable waters, in order to determine liability for a ferry captain who ran aground and destroyed private oyster beds).
[27] MD. NAT. RES. CODE ANN. § 1-201 (2010). *See infra* text accompanying note 35.
[28] *The Volant*, 59 U.S. at 72 (soil under navigable waters is held by the state in trust for certain public rights, including the common right of taking fish); *Anne Arundel*, 721 A.2d at 225 (citing Mayor of Baltimore v. Baltimore & Phila. Steamboat Co., 65 A. 353, 356 (Md. 1906) (navigable waters are held by the state to support the rights of navigation and fishery); *Becker v. Litty*, 566 A.2d 1101, 1104-05 (Md. 1989) (public has a right at common law to navigate over every part of a navigable river); *Dundalk*, 54 A. 628 (state ownership in navigable waters is subject to the public rights of navigation and fishery); Wilson's Lessee v. Inloes, 11 G. & J. 351, 351 (1840) (state rights to grant soil under navigable waters remains subject to the public right of fishing and navigation); *Browne*, 5 H. & J. at 195 (King Charles I transferred the right to navigable waters to Lord Baltimore, subject to the common right of fishing and navigation).
[29] *Dundalk*, 54 A. at 628.

out of its way to injure fishing nets, or if it could have reasonably avoided them.[30] Traditional PTD purposes of navigation and fishing are not absolute, however. When federal laws conflict with PTD purposes, federal law preempts the public right to navigation and, according to the Maryland Court of Appeals, the PTD "must fall."[31]

4.2 Beyond Traditional (Recreational/Ecological)

The Maryland courts leave it to the state legislature to expand beyond the traditional purposes of the PTD. The legislature, however, has not provided enough substantive regulation to provide effective recreational or ecological protections under the PTD.

The public's common law right under the PTD is limited to navigation and fishing.[32] The Court of Appeals concluded that the right to anchor, swim, pull small watercraft onto the shore, and sit on the sandy beach below mean high tide, are all ancillary to the traditional purposes.[33] By characterizing swimming and small watercraft as ancillary to navigation and fishing, the court avoided explicitly expanding PTD purposes to incorporate recreation. Arguably, however, both swimming and small watercraft constitute recreational activities included within Maryland's PTD.[34]

Unlike Maryland courts, the state legislature expanded the purposes of the PTD by statute to include environmental protection. The legislature declared that "[a]ll state agencies must conduct their affairs with an awareness that they are stewards of the air, land, water, living and historic resources, and that they have an obligation to protect the

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[30] *Adams*, 190 A. at 821.
[31] *Becker*, 566 A.2d at 1105-08.
[32] *Ocean City*, 332 A.2d at 634.
[33] Clickner v. Magothy River Assoc. Inc., 35 A.3d 464, 473 (Md. 2012).
[34] In addition to *Clickner*, a statute states that it is the policy of Maryland to foster "water safety" for recreational uses of the Potomac River, but falls short of establishing these uses as PTD purposes. MD. NAT. RES. CODE ANN. § 1-601 (1986).

environment for the use and enjoyment of this and all future generations."[35] But in 1993 the Maryland Court of Appeals concluded that this language does not establish a state proprietary interest in groundwater in a case concerning liability of a hazardous waste spill.[36] Maryland courts have not interpreted the "stewards" language in any other case.

The only statute which announcing environmental PTD purpose establishes a Natural Resources Police Force, after finding that an insufficient enforcement presence results in diminished protection for fish and wildlife guaranteed by the PTD.[37] This statute declares that "[a] diminishing enforcement presence on land and on the waterways correlates to an...erosion of the protections afforded to citizens by the public trust doctrine, which sets forth the responsibility of the government to administer, protect, manage, and conserve fish and wildlife."[38] The substantive content of the statute, however, merely establishes a new Natural Resources Police Force "with statewide authority to enforce conservation, boating, and criminal laws."[39] As a result, the environmental protections afforded to wildlife under the PTD may be limited to state statutes.

5.0 Geographic Scope of Applicability

As in other areas of the PTD in Maryland, its geographic scope is narrow and limited, extending only to navigable thoroughfares and wildlife. Like its basis and purpose, the geographic scope of applicability for the Maryland PTD lies in both the common law and statutes.

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[35] MD. NAT. RES. CODE ANN. § 1-302 (1973).
[36] *Bausch*, 625 A.2d 1021 at 1035.
[37] MD. NAT. RES. CODE ANN. § 1-201 (2010).
[38] MD. NAT. RES. CODE ANN. § 1-201 (2010).
[39] *Id.* § 1-201.1 (2010).

5.1 Tidal

The scope of the common law public trust doctrine remains primarily limited to lands lying adjacent to navigable waters where an ebb and flow of tide exists.[40] In fact, Maryland courts have consistently declared that ebb and flow is the test for determining navigability.[41] Private property owners retain rights free of the PTD on land above the mean high water mark.[42] These limits have remained unchanged since the genesis of the PTD in Maryland.

5.2 Navigable in Fact

Although Maryland courts acknowledge that other states use the navigable-in-fact test to determine navigability under the PTD, they have repeatedly rejected it and instead employ the ebb and flow test.[43] Appellate courts in Maryland have not heard any cases concerning public rights in non-tidal, navigable-in-fact waters.[44] However, the extensive history of the ebb and flow test, in conjunction with consistent case law rejecting the navigable-in-fact test, makes extension of the PTD beyond the scope of tidal waters questionable.

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[40] *Larmar*, 277 A.2d 427 at 432.

[41] Stansbury v. MDR Development, L.L.C., 871 A.2d 612, 620 (Md. 2005) (a channel subject to the ebb and flow of tide is navigable); *Van Ruymbeke*, 276 A.2d at 64 (Maryland navigable water is defined as where the tide ebbs and flows) (citing Wagner v. City of Baltimore, 124 A.2d 815 (Md. 1956) (court considering a river subject to the ebb and flow of tide to be navigable); Toy v. Atlantic Etc. Co., 4 A.2d 757 (Md. 1939) (considering a channel containing water that regularly rose and fell with the tide to be navigable); Linthicum v. Shipley, 116 A. 871 (Md. 1922) (court looked to ebb and flow of tide to determine navigability); Sollers v. Sollers, 26 A. 188 (Md. 1893) (considering a cove within the ebb and flow of the tide to be public river or arm of the sea); Hess v. Muir, 6 A. 673 (Md. 1886) (navigable waters of the state are those in which the tide ebbs and flows)).

[42] *Van Ruymbeke*, 276 A.2d 61 at 64.

[43] *Id.*; Owen v. Hubbard, 271 A.2d 672, 676 (Md. 1970); Wagner v. City of Baltimore, 124 A.2d 815, 820 (Md. 1956).

[44] Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1, 64 (2007).

5.3 Recreational Waters

Like navigable-in-fact waters, Maryland courts and the legislature do not recognize recreational waters to be encumbered by the PTD.

5.4 Wetlands

Although not specifically stating that the PTD covers wetlands, the Wetlands Act of 1970 defines wetlands as "land under the navigable waters of the State."[45] In *Hirsch v. Maryland Dept. of Natural Resources, Water Resources Admin.*, the Maryland Court of Appeals acknowledged this definition, and stated that these lands can also exist above mean high tide.[46] Other than *Hirsch*, Maryland courts have yet to determine whether wetlands are included in the PTD. However, courts could construe wetlands "under the navigable waters" and below mean high tide as trust lands. In Maryland, "navigable water and the land under it is held by the State, for the benefit of the public".[47] As a result of defining wetlands as "lands under the navigable waters of the State," combined with the determination that the PTD includes all lands under navigable water below mean high tide, those wetlands under navigable waters seem likely within the geographic scope of the doctrine.

5.5 Groundwater

The Maryland PTD does not appear to apply to groundwater through either statutes or case law. Although statutes show a commitment on the part of the state to regulate groundwater by defining "waters of the state" as "both surface and underground

[45] MD. ENVIR. CODE ANN. § 16-101 (1973).
[46] Hirsch v. Maryland Dept. of Natural Resource, Water Resources Admin., 416 A.2d 10, 13 (Md. 1980).
[47] *Ocean City*, 332 A.2d at 633.

waters,"[48] the Maryland Court of Appeals determined that nothing in the statutes themselves or their legislative history ascribes ownership of the groundwater to the state.[49]

5.6 Wildlife

As mentioned above,[50] the Maryland PTD includes wildlife under a 2010 statute.[51] This statute declares that the public trust doctrine includes both fish and wildlife, and requires the state to manage these resources for the benefit of future generations.[52] Prior to the enactment of this statute, the Court of Appeals used similar terms to describe fish and game as common property of the citizens of a state, which acts as a trustee for the benefit of its citizens.[53] The PTD in Maryland clearly protects wildlife resources.

5.7 Uplands (Beaches, Parks, Highways)

Maryland does not consider lands adjacent to water to be part of the geographic scope of the PTD, although the doctrine does include some uplands. The Maryland PTD protects the public in the use of the foreshore only up to the mean high water mark.[54] No evidence exists to suggest that land above the high water mark is impressed with a public trust.[55] Public rights and ownership of submerged lands end at the high water mark.[56]

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[48] MD. ENVIR. CODE ANN. § 9-101 (1982); MD. NAT. RES. CODE ANN. § 8-101 (1973).
[49] *Bausch*, 625 A.2d 1021 at 1035-36.
[50] *See supra* Part 4.2, text accompanying note 35.
[51] MD. NAT. RES. CODE ANN. § 1-201 (2010).
[52] *Id.* ("[T]o ensure the perpetuation of these coveted natural resources for the benefit of future generations....A diminishing enforcement presence on land and on the waterways correlates to an increasing number of violations of State conservation laws and an erosion of the protections afforded to citizens by the public trust doctrine, which sets forth the responsibility of the government to administer, protect, manage, and conserve fish and wildlife...").
[53] *Bruce*, 276 A.2d 200 at 207-08.
[54] *Ocean City*, 332 A.2d at 634.
[55] *Id.* at 638.
[56] *Id.* at 634; *Wagner*, 124 A.2d at 820. In addition, the public cannot acquire any new rights either by prescription or a showing of customary use. O'Brecht v. State, 125 A. 539, 541 (Md. 1954). Riparian

Unlike property adjacent to navigable waters, however, Maryland has recognized various types of other upland property as within the geographic scope of the PTD. In 1971, the Court of Appeals reversed a decision by the lower court approving the sale of land designated for public use.[57] As a justification for its decision, the court stated that municipalities hold all property in which the public is interested—streets, alleys, sidewalks, public squares, parks, and wharves—in trust for use by the public.[58] A prior case proclaimed that the importance of the public right to use streets and public highways imposes a duty upon the government to keep these areas free from all nuisances and obstructions which destroy or impair them.[59] Additionally, the court subsequently determined that railroads are analogous to public highways in terms of their public character, and therefore retain the same public rights.[60] Consequently, a court could certainly conclude that the PTD applies to a number of uplands, like parklands, as a result of their inherent public nature.

6.0 Activities Burdened

As a result of the somewhat narrow scope of the PTD in Maryland, the doctrine does not affect many activities. In addition, for those activities that the PTD does affect, the degree of burden extends only to the traditional purposes of the PTD.

6.1 Conveyances of Property Interests

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owners, however, not only obtain their traditional rights, but are also entitled to new land formed by accretion or alluvion, regardless of whether naturally or artificially formed. *Larmar*, 277 A.2d at 432; *Van Ruymbeke*, 276 A.2d at 65. Ultimately, if Maryland desires to acquire land adjacent to waters, or provide for access routes, it must purchase this property. MD. NAT. RES. CODE ANN. § 8-204 (1988) (provides for access to waters, but requires the state to purchase this access).

[57] *McRoble*, 272 A.2d at 657.

[58] *Id.*

[59] Sinclair v. Weber, 104 A.2d 561, 565-66 (Md. 1954).

[60] Chevy Chase Land Co. v. U.S., 125 A. 539, 541 (Md. 1924).

Conveyances of land encumbered with the PTD remain burdened with the PTD. The state has the right to grant public trust lands to private parties, but only in the form of a lease, and the *jus publicum* still applies.[61] This limitation, however, applies only to grants occurring after 1862.[62] Lawful grants of public trust lands in fee simple conveyed prior to this date are valid, subject to the public rights of fishing and navigation.[63] In addition to the prohibition on fee simple conveyances to a private party, property held in public trust may not be privately acquired by adverse possession.[64]

6.2 Wetland Fills

The Wetlands Act of 1970 could impose the PTD on wetlands[65] and requires a permit for wetland fills. This statute, however, does not require anything meaningful from agencies or landowners in conjunction with the issuance of a fill permit.[66] Therefore, the PTD in Maryland probably does not apply to wetland fills.

6.3 Water Rights

Restrictions on water rights are quite limited, perhaps nonexistent. Since the Maryland PTD only exists on tidal lands, only the water rights of tidal riparian owners are burdened.[67] The only meaningful burden on water rights of tidal property owners is the assertion that their rights remain subject to the public rights of fishing and navigation.[68] As a result, all riparian water rights burdened by the PTD exist as the legislature expands or limits tidal riparian rights as it thinks proper for the protection of

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[61] *Adams*, 190 A. at 820; *Wilson's Lessee*, 11 G. & J. at 351.
[62] *Stansbury*, 871 A.2d at 620-21; *Sollers*, 26 A. at 188.
[63] *Id.*
[64] Messersmith v. Mayor and Common Council of Riverdale, 164 A.2d 523, 525 (Md. 1960).
[65] *See supra* Part 5.4.
[66] MD. ENVIR. CODE ANN. § 16-202 (1973). The Maryland Court of Appeals, however, announced when authorizing fill permits, the state must consider public interest factors, although failed to establish what those factors include. *Hirsch*, 416 A.2d at 14.
[67] *Supra*, Part 5.1, p. 8.
[68] *Stansbury*, 871 A.2d at 620.

the *jus publicum.*[69] For example, the legislature created a statutory right for riparian owners to make improvements upon their shorewaters.[70] These improvements become vested in the private owner upon completion, but still remain subject to the public rights of fishing and navigation.[71]

6.4 Wildlife Harvests

The statute recognizing wildlife under the protection of the PTD does not establish any burdens for wildlife harvests.[72] This statute asserts that it is the responsibility of the state to increase enforcement presence in order to protect wildlife.[73] As a result of a lack of specific duties required by the statute, no statutory substantive burdens arise from the PTD for wildlife harvests. Regardless of this statute, however, the state must manage its wildlife in every capacity for the benefit of its citizens.[74] Consequently, the state cannot allow for the harvesting of wildlife to the detriment of its citizens, although the state has yet to determine the meaning of detriment.

7.0 Public Standing

The public in Maryland has few options available to enforce the PTD. Neither common law, statutes, nor the constitution, provide for a PTD cause of action.

7.1 Common-Law Based

Common law public standing is limited to an action for public nuisance. The Court of Appeals of Maryland determined that an action will lie to enforce rights of the public by one of its members, only when that individual has suffered special damage,

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[69] *White*, 939 A.2d at 167; *Larmar*, 277 A.2d at 439.
[70] Wicks v. Howard, 388 A.2d 1250, 1252 (Md. 1978).
[71] Harbor Island Marina, Inc. v. Board of County Com'rs of Calvert County, Md., 407 A.2d 738, 739-40 (Md. 1979).
[72] MD. NAT. RES. CODE ANN. § 1-201 (2010).
[73] *Id.*
[74] *Bruce*, 276 A.2d 200 at 207-08.

differing in character and kind from that inflicted upon the general public.[75] The courts have not decided whether PTD violations affect "rights of the public" enforceable under public nuisance law.

7.2 Statutory Basis

Various environmental statutes, as well as Maryland's Administrative Procedure Act (APA) provide for a cause of action in limited circumstances. The environmental statutes that do provide standing allow for "any other person" to bring an action, regardless of special injury.[76] The Court of Appeals of Maryland, however, narrowed the cause of action, stating that under environmental statutes, persons only have standing if they meet federal Article III requirements for environmental standing.[77] Under the Maryland APA, however, any party "aggrieved by the final decision" of an agency is entitled to judicial review.[78] No statutory basis exists to enforce the PTD as a member of the public seems to exist.

7.3 Constitutional Basis

No constitutional basis for public standing exists in Maryland. The constitution states that all state agents are accountable as trustees of the public.[79] The Court of Appeals, however, has expressly stated that this language does not give citizens standing to challenge a statute or the activities of public officials.[80]

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[75] *Becker*, 566 A.2d at 1108.
[76] MD. NAT. RES. CODE ANN. § 1-503 (1978); *Hirsch*, 416 A.2d 1101 at 1108 (Wetlands Act provides for a citizen to pursue judicial review of an agency decision).
[77] Patuxent Riverkeeper v. Maryland Dept. of Environment, 29 A.3d 584, 586 (Md. 2011).
[78] MD. STATE GOV'T. CODE ANN. § 10-222 (1984).
[79] MD. CONST. DECL. OF RTS. art. 6.
[80] *Kerpelman*, 276 A.2d at 61 ("Mrs. Kerpelman...seeks to establish her standing to sue upon the novel theory that she, as a member of the public of Maryland, is a beneficiary of a 'public trust' flowing from Art. 6 of the Declaration of Rights of the Maryland Constitution stating that persons invested with the legislative or executive powers of government 'are Trustees of the Public,' and, as such, accountable for their conduct....Art. 6 of the Declaration of Rights, however, does not purport to change, modify, or

8.0 Remedies

Remedies for violations of the PTD in Maryland are limited to equitable relief, except for a small number of wildlife statutes that provide for damages. Because the legislature acknowledged fish and wildlife as part of the PTD,[81] one of the available remedies for PTD actions includes damages for injuries to wildlife resources.

8.1 Injunctive Relief

Because the public has standing only through statute or public nuisance, the remedies available are limited to those two sources. At common law, injunction is a proper remedy for a public nuisance.[82] The Environmental Standing Act provides that any claim brought by a member of the public to enforce an environmental statute may request only equitable relief.[83]

8.2 Damages for Injuries to Resources

Damages for injuries to resources are provided for by wildlife statute, and can only be pursued by the government.[84]

8.3 Defense to Takings Claims

Maryland courts have yet to recognize a defense to takings claims based on the PTD.

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enlarge the nature of this holding by the State or to give a citizen of Maryland any different status to challenge a statute or the activities of public officials acting under a statute than exists in regard to any other matters of State concern. No decision of this Court is cited to sustain the construction of Art. 6 urged upon us by Mrs. Kerpelman and we know of no such decision.").

[81] MD. NAT. RES. CODE ANN. § 1-201 (2010).

[82] Windsor Resort, Inc. v. Mayor and City Council of Ocean City, 526 A.2d 102, 106 (Md. 1987).

[83] MD. NAT. RES. CODE ANN. § 1-503 (1978).

[84] MD. NAT. RES. CODE ANN. § 10-1107 (1988) (provides for restitution to the state for the resource value of destroyed or damaged wildlife); MD. NAT. RES. CODE ANN. § 4-1201 (1973) (provides for restitution to the state for the resource value of destroyed or damaged oysters, fish, and crabs).

MASSACHUSETTS

The Public Trust Doctrine in Massachusetts

Brian Sheets

1.0 Origins

The public trust doctrine (PTD) in Massachusetts has roots in the original colonial ordinances of 1641–47.[1] The "liberties common" to the inhabitants and foreigners included free fishing and fowling in any of the "Great Ponds, Bays, Coves, and rivers so far as the Sea ebbs and flows . . . ."[2] As early as 1810, Massachusetts courts interpreted this colonial ordinance to change the common law of England, by allowing ownership of land to the low water mark, not to exceed 100 rods below the high water mark.[3] Later courts upheld the ordinance of 1641–47,

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[1] *The Book of the General Lauues and Libertyes concerning the Inhabitants of the Massachusetts* (1648), *reprinted in* THE LAWS AND LIBERTIES OF MASSACHUSETTS at 35 (Cambridge, 1929). The Ordinance is also sometimes called the Ordinance of 1641. *See* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 67 (1851) ("This is commonly denominated the ordinance of 1641; but this date is probably a mistake. It is found in the Ancient Charters, 148, in connection with another on free fishing and fowling, and marked 1641, 47. That on free fishing, &c., is taken in terms from the 'Body of Liberties,' adopted and passed in 1641, leaving the date 1647 to apply to the other subject respecting ownership in coves, &c., about salt water."). Prior to the adoption of that ordinance, the ownership of individuals having grants on navigable waters ended at the high-water mark. Home for Aged Women v. Commonwealth, 89 N.E. 124, 125 (Mass. 1909).

[2] "Everie Inhabitant who is an hous-holder shall have free fishing and fowling, in ant great Ponds, Bayes, Coves and Rivers so far as the sea ebs and flows, within the general precincts of the town where they dwell, unless the Free-men of the same town, or the General Court have otherwise appropriated them. Provided that no town shall appropriate to any particular person or persons, any great Pond conteining more then ten acres of land: and that no man shall come upon anothers proprietie without their leave otherwise then as hereafter expressed; the way which clearly to determin, it is declared that in all creeks, coves and other places, about and upon salt water where the Sea ebbs and flows, the Proprietor of the land adjoining shall have proprietie to the low water mark where the Sea doth not ebb above a hundred rods, and not more wheresoever it ebbs farther. Provided that such Proprietor shall not by this libertie have power to stop or hinder the passage of boats or other travel vessels in, or through any fea creeks, or coves to other mens houses of lands. And for great Ponds lying in common through within the bounds of some town, it shall be free for any man to fish and fowl there, and may passe and repasse on foot through any mans prorpietie for that end, fo the trespasse not upon any mans corn or meadow." *The Book of the General Lauues and Libertyes concerning the Inhabitants of the Massachusetts*, *supra* note 1 at §2 (sic in original). *See* Adams v. Frothingham, 3 Mass. (3 Tyng) 352, 360–61, 363 (1807) (applying the ordinance to determine a conveyance of property and allowing accretions to the benefit of the upland owner); Rust v. Boston Mill Corp., 23 Mass. (6 Pick.) 158, 167–68 (1828) (applying the ordinance to determine the property lines of tidal flats in a cove); Gray v. Deluce, 59 Mass. (1 Cush) 9, 12 (1849) ("every proprietor is entitled to the flats in front of his upland of the same width at low water mark as they are at high-water mark"); Valentine v. Piper, 39 Mass. (22 Pick.) 85, 94 (1839) (the ordinance allows alienation of the uplands from the flats, independent of each other).

[3] Storer v. Freeman, 6 Mass. (6 Tyng) 435, 438 (1810) (To induce private parties to build wharves "the common law of England was altered by an ordinance, providing that the proprietor of land adjoining on the sea or salt water, shall hold to low water mark, where the tide does not ebb more than one hundred rods, but not more where the tide ebbs to a greater distance."); Commonwealth v. Inhabitants of Charlestown, 18 Mass. (1 Pick.) 180, 188 (1822) ("The government then, to encourage these objects, and to prevent disputes and litigations, transferred its property in the

explaining the ordinance's origins as an inheritance of common law from England in the patents to the Plymouth Colony from James the First, and confirmed by King Charles the first.[4]

Notably, the Massachusetts Supreme Judicial Court in *Commonwealth v. Alger*, interpreting the Ordinance of 1641–47 in 1847, announced the PTD as currently understood.[5] In an indictment against an upland property owner for building a wharf in Boston Harbor past a line set by the legislature, the Supreme Judicial Court examined the common law of England, the Colonial Ordinance of 1641–47, and Lord Hale's Treatise "*de Jure Maris.*"[6] After recognizing sovereign authority transferred from the crown to the people of Massachusetts following the American Revolution,[7] the legislature, as recipient of the sovereign power, had the power to enforce the public right of open fisheries and navigation "because . . . the legislature might declare it, and regulate it by suitable enactments and penalties, by precise and positive rules, as

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shore of all creeks, coves, and other places upon the salt water, where the sea ebbs and flows, giving to the proprietor of the land adjoining the property of the soil to low-water mark, where the sea does not ebb above one hundred rods."); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 68 (1851) ("The great purpose of the 16th article of the 'Body of Liberties' was to declare a great principle of public right, to abolish the forest laws, the game laws, and the laws designed to secure several and exclusive fisheries, and to make them all free. It expressly extended this right to places in which the tide ebbs and flows, then public domain, open to all."), *accord* Inhabitants of W. Roxbury v. Stoddard, 89 Mass. (7 Allen) 158, 165 (1863); *but see* Walker v. Boston & M.R.R., 57 Mass. (1 Cush) 1, 24 (1849) (rejecting an argument that "the colony ordinance was intended to promote the erection of wharves, and to facilitate navigation . . ." but instead was "to declare the right of private owners in the soil of the flats, between high water and low water, leaving the owners, with their rights thus ascertained, to use or appropriate their property, or sell and dispose of it, in any way which they might deem most beneficial."). *See also* Austin v. Carter, 1 Mass. (1 Will.) 231 (1804) ("Proprietor of land bounded on the sea has the exclusive right to low-water mark.").

[4] Commonwealth v. Inhabitants of Charlestown, 18 Mass. (1 Pick.) 180, 187 (1822) ("This right in the waters and shores of the sea passed from the crown, by letters patent from James the First, to the council established at Plymouth, . . . and their grant was confirmed by the charter of King Charles the First, which constituted the company a body corporate and politic, giving them absolute property in the land . . . and full dominion over all the ports, rivers, creeks, and havens, &c., in as full and ample a manner as they were before held by the crown of England.").

[5] Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851) ("The great purpose of the 16th article of the 'Body of Liberties' was to declare a great principle of public right, to abolish the forest laws, the game laws, and the laws designed to secure several and exclusive fisheries, and to make them all free. It expressly extended this right to places in which the tide ebbs and flows, then public domain, open to all."); *see also* Opinion of the Justices, 313 N.E.2d 561, 566 (Mass. 1974) (noting that *Alger* is "probably the leading case on the subject.").

[6] *Id.* at 65–67, 90.

[7] *Id.* at 93 ("It was also held, that as a part of the royalties, or *jura prerogativa*, which revested in the crown, and afterwards, by the establishment of the independence of the United States, vested in the states respectively, was the right to control and regulate the use of the sea and salt water, for all the purposes of navigation and fishing, to be held and used as a common benefit for the public.") (citing Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 368 (1842); Pollard v. Hagan, 44 U.S. (3 How.) 212, 214 (1845)).

to times and other particulars, better adapted to secure the right to the public, and guard all persons concerned against its infringement . . . ."[8] The Supreme Judicial Court concluded that these public rights of navigation and commerce on navigable rivers or ports—the *jus publicum*—were superior to the private *jus privatum* rights of property ownership on tidal lands, and that the legislature, by its power to enforce the public rights, could enact laws and regulations prohibiting nuisances to commerce and navigation.[9] Therefore, a wharf extending beyond the harbor line was in violation of a valid regulation.[10] Following the *Alger* decision, Massachusetts courts have upheld and embraced the PTD, applying the PTD not only to traditional coastal assets, but also amphibiously to public lands[11] and to federal lands acquired from the Commonwealth.[12]

2.0 The Basis of the Public Trust Doctrine in Massachusetts

The Massachusetts PTD is based on common law and constitutional provisions, thereby influencing the decisions of administrative agencies when implementing statutory provisions. Article VI of the Massachusetts Constitution provides that all of the colonial statutes and common laws in the Commonwealth prior to statehood are preserved in the law of Massachusetts.[13] This constitutional provision preserves the Ordinance of 1641–47 in Massachusetts law.[14] Lands taken by the Commonwealth for a public purpose must be used for public purposes, and the public use can be changed only after a two-thirds vote in both houses of

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[8] *Id.* at 101.
[9] *Id.* at 91.
[10] *Id.* at 104.
[11] *See* Gould v. Greylock Reservation Comm'n, 215 N.E.2d 114, 124–25 (Mass. 1966).
[12] *See* United States v. 1.58 Acres of Land Situated in City of Boston, Suffolk County, Com. of Mass., 523 F. Supp. 120, 124–25 (D. Mass. 1981).
[13] MASS. CONST. pt. 2, ch. 6, art. VI (2012) ("All the laws which have heretofore been adopted, used and approved in the Province, Colony or State of Massachusetts Bay, and usually practiced on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution.").
[14] *See* Mayhew v. Norton, 34 Mass. (17 Pick.) 357, 360 (1835) ("The principles of the ordinance of 1641 have been extended and applied to the old colony of Plymouth, and form a part of the common law.").

the legislature.[15] Chapter 91 of the Massachusetts General Laws gives the Department of Public Works the "charge of the lands, rights in lands, flats, shores and rights in tide waters belonging to the commonwealth . . . by ensuring that the tidelands are utilized only for water-dependent uses or otherwise serve a proper public purpose."[16] The PTD in Massachusetts consequently requires public purposes and uses for lands held by the Commonwealth when the lands are tidal, submerged, or acquired for public purposes.

3.0 Institutional Applications

3.1 Restraint on Alienation (private conveyances)

Private conveyances of tidal lands and submerged lands carry different *jus publicum* encumbrances. Private conveyances of tidal lands are subject to an "*easement* of the public for the purposes of navigation and fishing and fowling, and of passing freely over and through the water without any use of the land underneath, wherever the tide ebbs and flows."[17] On the other hand, a landholder of submerged lands "has title to its property in fee simple, but subject to the *condition subsequent* that it be used for the public purpose for which it was granted."[18] The terms "easement" and "condition subsequent" are used to "serve, in essence, as placeholders for historic public rights present in the jus publicum."[19] Landowner registration of tidal flats is

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[15] MASS. CONST. art 49. ("The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose . . . Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.").
[16] MASS. GEN. LAWS ch. 91, § 2 (2012).
[17] Arno v. Com., 931 N.E.2d 1, 17 (Mass. 2010) (emphasis in the original).
[18] *Id.* (emphasis in the original).
[19] *Id.* at 17–18.

available to quiet title and aid in marketability; however, registration will not extinguish the public trust easement.[20]

3.2 Limit on the Legislature

Submerged lands are subject to public trust restrictions and, in the event that those lands are transferred by the state, the legislature must ensure that there is a continued public trust use by the recipient.[21] In its 2010 *Arno* decision, the Supreme Judicial Court recognized that "constraints on the Legislature's authority reflect its role not as an owner but as a fiduciary for the public, as well as the fact that the land below the low water mark continued in its common-law state even after the passage of the Colonial Ordinance of 1641–1647."[22] Therefore, Massachusetts courts will scrutinize legislative decisions, applying fiduciary principles to decisions affecting public trust resources.

The legislature may grant fee simples in submerged lands, but only on the condition subsequent that those lands and the overlying waters continue to be used for a public trust purpose, primarily navigation.[23] If the submerged lands are not used for the authorized legislative purposes, the Commonwealth has the right to enter and repossess the property.[24]

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[20] *Id.* at 19. For registration of title complaints and processes and see MASS. GEN. LAWS ch. 185, §§ 26–56 (2012) (complaints for registration of title are available to persons, corporations, and guardians to demonstrate ownership of legal estates, easements, or rights in fee simple).

[21] *Arno*, 931 N.E.2d at 114. ("[E]xpress legislative authorization" is required to extinguish the public's rights in submerged lands, and even the "authority of the Legislature to abandon, release, or extinguish the public interest in submerged land is not without limits . . .the legislation must be explicit concerning the land involved; it must acknowledge the interest being surrendered; and it must recognize the public use to which the land is to be put as a result of the transfer. [And]'the transfer by the Legislature 'must be for a valid public purpose [so when there are] benefits to private parties, those private benefits must not be primary but merely incidental to the achievement of the public purpose.'").

[22] *Id.*

[23] Boston Waterfront Dev. Corp. v. Com., 393 N.E.2d 356, 367 (Mass. 1979).
("We therefore hold that the BWDC has title to its property in fee simple, but subject to the condition subsequent that it be used for the public purpose for which it was granted.").

[24] Opinion of the Justices to Senate, 424 N.E.2d 1092, 1099 (Mass. 1981) (" . . . structures had been placed with legislative authorization, was granted subject to the condition that it be used for the public purpose or purposes of the authorizing legislation and, if it is not so used, the Commonwealth has a right to enter and repossess the property.").

Although there is great judicial deference to the legislature's determination that a grant is for an actual public trust purpose, Massachusetts courts may review that determination.[25] When the Commonwealth takes or acquires lands for public purposes, the Massachusetts Constitution requires a two-thirds vote in both houses of the legislature to allow uses contrary to public purposes.[26] For the legislature to change public uses of land, the legislation must be explicit about the land involved, acknowledge the interest being surrendered, and recognize the new interest applied to the land as a result of the change in use.[27]

The Supreme Judicial Court in *Robbins v. Dep't of Public Works* invalidated a proposed transfer of parklands to the Department of Public Works for road construction because there was no express legislation that identified existing public uses in the parkland, and legislation was not explicit in changing the public use.[28] The *Robbins* court recognized that "[t]he rule that public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion is now firmly established in our law."[29] The *Robbins* decision has been cited favorably in subsequent important PTD cases in Massachusetts.[30]

The legislature may not impair a littoral property owner's access to the low water mark absent a substantial connection to a navigation-improving project and the extinguishment of the

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[25] *Id.* at 1101. ("The question whether a particular legislative act, or an administrative decision pursuant to statutory authorization, serves a public purpose is for the Legislature to determine, and, although that legislative determination is entitled to great deference, it is not wholly beyond judicial scrutiny.").
[26] *See* Newburyport Redevelopment Auth. v. Com., 401 N.E.2d 118, 137–38 (Mass. App. Ct. 1980) (discussing Article 49 of the Amendments to the Massachusetts Constitution, as amended by Article 97 of the Amendments). *But see* Muir v. City of Leominster, 317 N.E.2d 212, 215 (Mass. App. Ct. 1974) (absent a dedication for a public purpose, a municipality can use, in any way, lands conveyed: previous use as a playground does not make future uses only subject to public uses).
[27] Opinion of the Justices to Senate, 424 N.E.2d 1092, 1100 (Mass. 1981).
[28] Robbins v. Dep't of Pub. Works, 244 N.E.2d 577, 580 (Mass. 1969).
[29] *Id.* at 579.
[30] *See* Boston Waterfront Dev. Corp. v. Com., 393 N.E.2d 356, 366 (Mass. 1979); Opinion of the Justices to Senate, 424 N.E.2d 1092, 1100 (Mass. 1981).

access to the low water mark. In *Michaelson v. Silver Beach Improvement Association, Inc.*,[31] the Commonwealth dredged the floor of a harbor, cast the sand against a seawall in front of littoral property owners, and erected jetties to protect the newly created beach.[32] Landowners sued to enjoin the public from using the beach between their property and the harbor.[33] The Supreme Judicial Court reversed a trial court's refusal to grant an injucntion, holding that the newly-created beach was the property of the upland landowners under the Colonial Ordinance of 1641–47 because there was no substantial connection between creating the beach and improving navigation or fishing purposes.[34] A substantial connection to improving navigation or fishing would, however, allow the Commonwealth to extinguish the private rights in the flats.[35] As the *Michaelson* court said, "[t]he proper test is that the related project is immune from private rights only when it is so related to a project under the acknowledged public powers in the navigable waters (such as over navigation and the fisheries) that enjoyment of the latter project would be substantially impaired without the creation of the former."[36] Comparing *Robbins* to *Michaelson* suggests that Massachusetts courts are protective of public rights in parklands, but also protect littoral rights when in private ownership.

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[31] 173 N.E.2d 273 (Mass. 1961).
[32] *Id.* at 274.
[33] *Id.*
[34] *Id.* at 277.
[35] *Id.*
[36] *Id.* The Court speculated: "Suppose, for example, the Commonwealth caused a dredger to move along the entire Massachusetts coast, piling up sand and rocks just below the line of private ownership. Navigation might well be improved; but, if the contention of the defendant association were followed, a public beach would be created in front of the property of all the littoral proprietors. And, because the creating of the bar had some conceivable relation to navigation, the littoral owners would have no claim for damages. Such a result is in conflict with the whole spirit of the colonial ordinance, which granted the flats between the high and low water mark to the littoral owners, and with one of its primary purposes, which was to encourage private wharfing below the high water level." *Id.*

3.3 Limit on Administrative Action

The legislature may delegate PTD decision-making authority to Commonwealth administrative agencies,[37] including the ability to eliminate "vestigial" public rights held by the Commonwealth in lawfully-filled submerged lands.[38] However, a state agency does not have the authority to release the rights of any other governmental unit or another person, or grant waivers from coastal wetland regulations or other environmental protection measures.[39] So long as the agency has adequate statutory directive delineating its delegated authority and makes no determinations detrimental to navigation or other waterborne activities, the agency's determination complies with the Constitution.[40] These determinations, however, are subject to judicial review.[41]

Massachusetts statutes delegate PTD authority to state administrative agencies.[42] The Public Works Department regulates construction in submerged lands,[43] and the planning board determines if construction projects fulfill a public trust purpose.[44] Among other interests, the public trust must be considered by the Secretary of the Public Works Department in making

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[37] Fafard v. Conservation Comm'n of Barnstable, 733 N.E.2d 66, 71 (Mass. 2000) ("This history of the origins of the Commonwealth's public trust obligations and authority, as well as jurisprudence and legislation spanning two centuries, persuades us that only the Commonwealth, or an entity to which the Legislature properly has delegated authority, may administer public trust rights."). *See also Arno v. Com.*, 931 N.E.2d 1, 15 (Mass. 2010) ("The powers of the executive branch with regard to the stewardship of public trust rights are derived from delegations by the Legislature.").

[38] Opinion of the Justices to Senate, 424 N.E.2d 1092, 1104–05, 1108 (Mass. 1981).

[39] *Id.*

[40] *Id.* at 1105.

[41] *Id.*

[42] *See* MASS. GEN. LAWS ch. 91 (2012).

[43] *Id.* at §14 ("The department may license and prescribe the terms for the construction or extension of a wharf, pier, dam, sea wall, road, bridge or other structure, or for the filling of land or flats, or the driving of piles in or over tide water below high water mark, but not, except as to a structure authorized by law, beyond any established harbor line, nor, unless with the approval of the governor and council, beyond the line of riparian ownership.").

[44] MASS. GEN. LAWS ch. 91, § 18 (2012) ("Said recommendation shall state whether said planning board believes the development would serve a proper public purpose and would not be detrimental of the public's rights in these tidal lands. The department shall take into consideration the recommendation of the local planning board in making its decision whether to grant a license."). *See also* Fafard v. Conservation Comm'n of Barnstable, 733 N.E.2d 66, 75–76 (Mass. 2000).

decisions.[45] But absent express language from the legislature, the Department does not have the ability to extinguish public rights in tidelands.[46]

In *Moot v. Dep't of Envt'l Protection*, the legislature did not provide express language to abdicate pubic rights in "landlocked tidelands," and therefore when the agency authorized a developer to convert previous tidelands into office, retail, and residential buildings inconsistent with licensing requirements required by law, the Supreme Judicial Court invalidated the authorization as beyond the authority of the department because the legislature did not authorize relinquishment of public rights in those lands.[47] In *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*,[48] the Supreme Judicial Court upheld the legislature's delegation of decision-making authority from the Department of Environmental Protection to the Energy Facilities Siting Board because the authorizing statute was a proper and concurrent overlay of licensing requirements,[49] including considerations of the PTD.[50] Similarly, the legislature

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[45] MASS. GEN. LAWS ch. 91, § 18B (2012) ("In making said public benefit determination, the secretary shall consider the purpose and effect of the development; the impact on abutters and the surrounding community; enhancement to the property; benefits to the public trust rights in tidelands or other associated rights, including, but not limited to, benefits provided through previously obtained municipal permits; community activities on the development site; environmental protection and preservation; public health and safety; and the general welfare; provided further, that the secretary shall also consider the differences between tidelands, landlocked tidelands and great ponds lands when assessing the public benefit and shall consider the practical impact of the public benefit on the development.").

[46] Moot v. Dep't of Envtl. Prot., 861 N.E.2d 410, 417 (Mass. 2007) ("Although the department has broad discretion in the regulations that it promulgates under G.L. c. 91, § 18, the department does not have the authority to relinquish or extinguish the public's rights in any of the Commonwealth's tidelands, except on terms expressly authorized by the Legislature.") (citations omitted).

[47] *Id.* at 420. ("The rights of the public in Commonwealth tidelands-filled, landlocked, or otherwise-cannot be relinquished by departmental regulation. . . .").

[48] 932 N.E.2d 787 (Mass. 2010).

[49] MASS. GEN. LAWS ch. 164, § 69K (2012) ("Any electric, gas or oil company which proposes to construct or operate facilities in the commonwealth may petition the board for a certificate of environmental impact and public interest with respect to such facility.").

[50] *Alliance to Protect Nantucket Sound, Inc.*, 932 N.E.2d at 799–800 ("The Legislature has designated DEP as the agency charged with responsibility for protecting public trust rights in tidelands through the c. 91 licensing program, and where a tidelands license is necessary for a proposed facility, the Legislature has, in § 69K, expressly vested authority in the siting board to act in DEP's stead with respect to the initial permitting decision. Accordingly, an evaluation of § 69K's relationship to the public trust doctrine must take into account the fact that in a case such as this, § 69K operates as an overlay of c. 91.").

delegated decision-making authority to the Secretary of Energy and Environmental Affairs to oversee ocean-based development consistent with the PTD.[51]

3.4 Limit on Municipal Action

As early as 1827, Massachusetts courts have recognized that municipalities may not impair public rights in navigable rivers by restricting public access to the river "highway."[52] Massachusetts courts have repeatedly stated that only the legislature can sever the public rights in places administered by the PTD; absent such authorization, town ordinances restricting public rights are invalid.[53] However, when there is an express delegation of public trust authority to municipalities, a court will not hesitate to recognize a legitimate grant of authority. For example, in *Mad Maxine's Watersports, Inc. v. Harbormaster of Provincetown*,[54] the Massachusetts Court of Appeals recognized that Massachusetts law[55] authorized a town to regulate personal watercraft on municipal waterways and rejected a claim that the town's regulations restricted the Commonwealth's authority over public trust rights of free access to navigable waters. The court stated that "[t]his argument fails at the threshold" as "[t]he exclusive sovereign power recognized in the public trust doctrine is subject to Legislative delegation to municipalities."[56] Because of

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[51] MASS. GEN. LAWS ch. 21A, § 4C(a) (2012) ("The ocean waters and ocean-based development of the commonwealth, within the ocean management planning area described in this section, shall be under the oversight, coordination and planning authority of the secretary of energy and environmental affairs, hereinafter referred to as the secretary, in accordance with the public trust doctrine.").

[52] Kean v. Stetson, 22 Mass. (5 Pick.) 492, 503 (1827) ("It is true individuals may acquire the right by grant or prescription, or under the ordinance of 1641, to occupy flats with wharves and stores, but this is always on condition that the navigation of the stream be not materially impaired; if it be, such erections are a nuisance. Landing places have in some towns existed by immemorial usage on the banks, and perhaps on the shores of creeks or rivers, but towns have no right to create them either as such, or under the pretence of laying out a way. The attempt in this case to convert a wharf into a town way, effectually shows the wisdom of withholding such powers from towns.").

[53] *See* Inhabitants of W. Roxbury v. Stoddard, 89 Mass. (7 Allen) 158, 171 (1863) ("No possession adverse to the public right could be acquired or held by the town of Roxbury by means of any of the acts and votes set forth in the report."); Fafard v. Conservation Comm'n of Barnstable, 733 N.E.2d 66, 71 (Mass. 2000) (Public Trust administration "authority derives from the passage of trusteeship and ownership of lands from one sovereign authority to the sovereign authority of the Commonwealth. Absent a grant of authority from the Commonwealth, a municipality may not claim powers to act on behalf of public trust rights.").

[54] 858 N.E.2d 760 (Mass. App. Ct. 2006), *review denied*, 861 N.E.2d 29 (Mass. 2007).

[55] MASS. GEN. LAWS ch. 90B, § 15(b) (2012).

[56] *Id.* at 767.

the express delegation by the legislature to the municipality in statute, the Massachusetts Court of Appeals summarily rejected the state versus local PTD preemption claim.

3.5 Limit of Judicial Action

At least one case has recognized that only the legislature can authorize interruption of a navigable river by placing a bridge over the river and, absent that authorization, the courts have no authority to authorize obstructing the river. In the 1822 decision in *Commonwealth v. Inhabitants of Charlestown*,[57] the Supreme Judicial Court noted that "for if the stream is a navigable river, it is for common use, and none but the legislature can authorize the interruption of it. If the Court were to undertake to decide these questions of expediency, it would not be declaring law, but would be legislating upon each particular case."[58] So, if the court determines that the river is factually navigable, it cannot allow any obstruction without an accompanying legislative authorization.

4.0 Purposes

4.1 Traditional Purposes: Navigation/Fishing

The Colonial Ordinance of 1641–47 provides the basis for public access to free navigation over tidal waters.[59] Private title to the low-water mark, not exceeding 100 rods from the high-water mark, is subject to rights of navigation, and fishing, and fowling, and the Commonwealth reserves control over tidal lands for the protection and promotion of navigation

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[57] 18 Mass. (1 Pick.) 180 (1822).

[58] *Id.* at 192. "None but the sovereign power can authorize an interruption of such passages, because this power alone has the right to judge, whether the public convenience may be better served by suffering bridges to be thrown over the water, than by suffering the natural passages to remain free; and this power may exact such conditions as to the manner of building, as will sufficiently preserve the natural passage, at the same time that the public may be accommodated with an artificial one." *Id.* at 189.

[59] *The Book of the General Lauues and Libertyes concerning the Inhabitants of the Massachusetts*, *supra* note 1, at § 2 ("Provided that such Proprietor shall not by this libertie have power to stop or hinder the passage of boats or other travel vessels in, or through any fea creeks, or coves to other mens houses of lands."). *See also* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 89 (1851) (The ordinance "contained a reservation, to the effect that riparian proprietors should not, by this extension of their territorial limits, have power to stop or hinder the passage of boats and vessels, in or through any sea, creeks, or coves, to other men's houses or lands.").

in interest of the public.[60] So long as a property owner does not impede a neighbor's access to the ocean, the Commonwealth allows building structures to the low water mark.[61] Current statutes require agency approval of building into waters subject to the public trust.[62] Other laws impose fees on obstructions or water displacements in order to protect the navigability of Commonwealth waters.[63]

Historically, public access to fishing included not only access to fishing in tidal areas,[64] but also the right to have rivers unimpeded for migratory fish returning from the sea.[65] Where the tide does not influence river levels, "it is the established rule of law in this commonwealth, that the riparian owner has a fee in the soil from his own side to the middle of the river, or *ad filum medium aquæ*."[66] However, private rights in non-navigable waters are subject to the public rights

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[60] Home for Aged Women v. Commonwealth, 89 N.E. 124, 125 (Mass. 1909).

[61] Henry v. City of Newburyport, 22 N.E. 75, 76 (Mass. 1889) ("This secured to such proprietor not merely an easement, but a property in the land in fee, with full power to reclaim the flats by building wharves or inclosing them so as to exclude navigation, provided he did not wholly cut off his neighbors' access to their houses or lands . . so long as no one other proprietor was deprived of access to the sea thereby they might lawfully be erected."); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 97–98 (1851) ("The right of passage with boats, rafts, and other vessels adapted to the use of such waters . . . .)"

[62] MASS. GEN. LAWS ch. 91, § 18C(a) (2012) ("Notwithstanding any general or special law to the contrary, the department may issue a general license authorizing noncommercial small-scale docks, piers and similar structures that are accessory to a residential use, but not marinas or large-scale docks, piers or similar structures, in tidelands, great ponds, rivers and streams, otherwise subject to individual licensing under sections 12, 12A, 13, 14, 18 and 19; (k) The department shall adopt regulations to implement this section. The regulations shall protect and preserve any rights held by the commonwealth in trust for the public to use tidelands, great ponds and other waterways for lawful purposes and public rights of access on private tidelands, great ponds and other waterways for any lawful use.")

[63] Trio Algarvio, Inc. v. Comm'r of Dept. of Envtl. Prot., 795 N.E.2d 1148, 1155 (Mass. 2003) ("the historical purpose of displacement fees [is] to compensate for tidewater displacement caused by private development and maintain the navigability of the harbor for the public good, as and when the development occurs.").

[64] *See The Book of the General Lauues and Libertyes concerning the Inhabitants of the Massachusetts*, *supra* note 1 at §2; Weston v. Sampson, 62 Mass. (1 Cush) 347, 354–55 (1851) ("The rule, established by usage and judicial decision, has been, that although the ordinance transfers the fee to the riparian owner, yet until it is so used, built upon, or occupied, by the owner, as to exclude boats and vessels, the right of the public to use it is not taken away; but that whilst open to the natural ebb and flow of the tide, the public may use it, may sail over it, anchor upon it, fish upon it, and by so doing commit no trespass, and do not disseize the owner.").

[65] Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 98 (1851) ("The right of the public to have these rivers kept open and free for the migratory fish, such as salmon, shad and alewives, to pass from the sea, through such rivers, to the ponds and head waters, to cast their spawn.").

[66] *Id.* at 97; (*ad filum medium aquæ* means "to the middle line of the water").

in the fishery when regulated by statute.[67] Public rights in the fishery are therefore not limited to tidal geography, but move upstream to non-tidal, non-navigable rivers when migratory fish pass through privately-owned water courses.

4.2 Beyond Traditional Purposes: Recreation/Ecological

As early as 1877, Massachusetts courts considered recreation a public right on navigable waters. In the 1871 decision of *Attorney General v. Woods*, the Supreme Judicial Court of Massachusetts stated that "[n]avigable streams are highways; and a traveller [sic] for pleasure is as fully entitled to protection in using a public way, whether by land or by water, as a traveller for business."[68] Great Ponds[69] are similarly recognized to have extra-navigable purposes. The 1863 Massachusetts Supreme Court decision in *Inhabitants of West Roxbury v. Stoddard* identified several public rights on Great Ponds, including fishing, fowling, boating, bathing, skating or riding upon the ice of a frozen pond, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice.[70] So long as the public does not interfere with the reasonable use of the pond, or the legislature has not directed otherwise, these public rights remain lawful.[71]

5.0 Geographical Scope of Applicability

5.1 Tidal

In determining whether public rights attach to a tidal body of water, the rise and fall of the water mark the area as tidal; water salinity is irrelevant.[72] Massachusetts courts define "the

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[67] *Id.* at 99 ("The right of having the migrating fish pass in their seasons through these rivers, over the soil of riparian proprietors, has been declared and enforced by statute, as a public right; and the private rights of riparian proprietors are held subject to such regulation.")
[68] Attorney Gen. v. Woods, 108 Mass. 436, 439–40 (1871).
[69] Discussed *infra* § 5.2.
[70] 89 Mass. (7 Allen) 158, 171 (1863).
[71] *Id.*
[72] Attorney Gen. v. Woods, 108 Mass. 436, 439 (1871); Barker v. Bates, 30 Mass. (1 Pick) 255, 260 (1832) ("And we consider this as applying to the shores of the open sea, as well as to bays, coves and rivers, the language of the

shore" as the land between the high-water mark and the low-water mark.[73] The Ordinance of 1641–47 allowed riparian landowners to build and fill up to the low water mark; however, the 1851 *Alger* court noted that "whilst they are covered with the sea, all other persons have the right to use them for the ordinary purposes of navigation."[74] Although there are public rights to use the waters above the low water mark when land is submerged, no rights attach to use the submerged land below the water's surface—the court recognized that the public rights were limited to floating and swimming over the submerged lands.[75] But should the landowner enclose, obstruct, or fill tidal flats to the low-water-mark, the landowner may exclude the public.[76] Submerged lands below the low watermark are publicly owned, and held in fee by the state, with the sovereign retaining a complete right to control their use.[77]

5.2 Great Ponds

The Ordinance of 1641–47 also includes similar public trust rights in "Great Ponds:" upland waters that are ten acres or more in surface area.[78] These inland waters have received

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colony ordinance being, 'in all creeks, coves and other places, about and upon salt water, where the sea ebbs and flows.'").

[73] Storer v. Freeman, 6 Mass. (6 Tyng) 435, 439 (1810) (citing Hale's treatise *De Jure Maris et Brachiorum ejusdem*).

[74] Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 74–75 (1851) ("so long as the owner of the flats permits the sea to flow over them, the individual right of property in the soil beneath does not restrain or abridge the public right to the appropriate use of them"); Butler v. Attorney Gen., 80 N.E. 688, 689 (Mass. 1907) "(In the seashore the entire property, under the colonial ordinance, is in the individual, subject to the public rights . . of navigation, with such incidental rights as pertain thereto. We think that there is a right to swim or float in or upon public waters as well as to sail upon them.").

[75] *Butler,* 80 N.E. at 689 ("We are of opinion that a decree should be entered that the premises are held by the petitioners in fee subject, however, as to that portion between high and low water mark, to the easement of the public for the purposes of navigation and free fishing and fowling, and of passing freely over and through the water without any use of the land underneath, wherever the tide ebbs and flows.").

[76] Austin v. Carter, 1 Mass. (1 Will.) 231, 232 (1804) ("the owner . . . may, whenever he pleases, inclose [sic], build, and obstruct to low-water-mark, and exclude all mankind.").

[77] McCarthy v. Town of Oak Bluffs, 643 N.E.2d 1015, 1020 (Mass. 1994) ("The waters and the land under them beyond the line of private ownership are held by the State, both as owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public.").

[78] "[A]ny great Pond conteining more then ten acres of land . . ." *The Book of the General Lauues and Libertyes concerning the Inhabitants of the Massachusetts, supra* note 1, at § 2 (sic in original). *But see* MASS. GEN. LAWS ch. 131, § 1 (2012) ("Great pond" is a natural pond the area of which is twenty acres or more.). The difference being that the 20 acres is applicable to fisheries and game regulations under the department of fishery and wildlife,

special attention from the Massachusetts branches of government.[79] Even if the Great Pond is within a municipality, public rights remain; the municipality cannot grant private ownership to a Great Pond.[80] The 1863 Supreme Judicial Court decision in *Inhabitants of West Roxbury v. Stoddard* announced that public rights to Great Ponds include "[f]ishing, fowling, boating, bathing, skating or riding upon the ice, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice, [which] are lawful and free upon these ponds . . . ."[81] Recreational purposes similarly affix to Great Ponds, just as to tidal waters.[82] Only express grants from the legislature can place lands in Great Ponds in private ownership,[83] but even these grants retain the public use requirement, just as with tidal lands, meaning that the legislature grants private lands on condition subsequent that the submerged lands be used for a public purpose.[84]

The 1888 Massachusetts Supreme Court decision in *Watuppa Reservoir Co. v. City of Fall River* announced that the public trust applied to Great Ponds, distinguishing common law

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whereas the ten acres is applicable to navigation, fishing and fowling under the colonial ordinance. *See* MASS. GEN. LAWS ch. 91, § 35 (2012) ("The provisions of this chapter relative to great ponds shall apply only to ponds containing in their natural state more than ten acres of land, and shall be subject to any rights in such ponds which have been granted by the commonwealth."). *But see* Watuppa Reservoir Co. v. City of Fall River, 18 N.E. 465, 471 (Mass. 1888) ("It has continued in force through the provincial and state governments, except that by the present laws great ponds are defined to be ponds, the area of which is more than 20 acres . . . .").

[79] Sacco v. Dep't of Pub. Works, 227 N.E.2d 478, 479 (Mass. 1967) ("The great ponds of this Commonwealth are among its most cherished natural resources. Since early times they have received special protection."); Drury v. Inhabitants of Natick, 92 Mass. (10 Allen) 169, 179 (1865) ("It is perhaps worthy of notice in this connection that in another aspect the law of Massachusetts from the earliest times has regarded the rights of the public in great ponds as similar to their rights in the sea.").

[80] Cummings v. Barrett, 64 Mass. (10 Cush.) 186, 188 (1852) ("By the Colony Ordinance of 1641, Ancient Charters, 148, 149, all great ponds, which are defined to be ponds of over ten acres, are declared public; and though lying within any town, shall not be appropriated to any particular person or persons."); Inhabitants of W. Roxbury v. Stoddard, 89 Mass. (7 Allen) 158, 166 (1863).

[81] *Inhabitants of W. Roxbury v. Stoddard*, 89 Mass. (7 Allen) at 171.

[82] *See* Sacco v. Dep't of Pub. Works, 227 N.E.2d 478, 480–81 (Mass. 1967).

[83] Butler v. Attorney Gen., 80 N.E. 688, 689 (Mass. 1907).

[84] Watuppa Reservoir Co. v. City of Fall River, 18 N.E. 465, 472 (Mass. 1888) ("Under the ordinance, the state owns the great ponds as public property, held in trust for public uses. It has not only the jus privatum, the ownership of the soil, but also the jus publicum, and the right to control and regulate the public uses to which the ponds shall be applied.").

property principles of riparian ownership with public trust rights in Great Ponds.[85] The court stated that the Ordinance of 1641–47 impressed the Great Ponds with an implied reservation of public rights, with any private property rights subservient to the superior rights of the Commonwealth reserved for public uses.[86]

In *Sacco v. Dep't of Public Works*, the Supreme Judicial Court directed the Superior Court to enter a decree enjoining the Public Works Department from filling in a portion of Spy Pond for use as a highway, as the nature of the public use needed to be compatible with that of a pond.[87] Filling the pond conflicted with the statutory provision that reserved the pond for the public's recreation purposes.[88] Massachusetts courts are therefore likely to invalidate a transformation of land with a public purpose without the express authorization from the Commonwealth.

5.3 Navigable-in-Fact

In the 1827 Massachusetts Supreme Court case of *Commonwealth v. Chapin*, the court adopted the common law test in Lord Hale's treatise *De Jure Maris,* of whether a river is navigable or non-navigable.[89] Navigable rivers are influenced by the tides, and above that point of influence, according to Hale, the river is non-navigable.[90] Navigable waters are the property of

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[85] *Id.* ("In view of the rights and powers of the state in and over the great ponds, it seems clear that the rights of proprietors owning land, either on the pond or on any stream flowing from it, cannot be decided by the rules of the common law applicable to ordinary streams. They must be determined with reference to the ordinance, and the rule of property established by it, and we are of opinion that they must be regarded as subordinate, and subject to the paramount rights of the public declared by the ordinance.").

[86] *Id.* ("Each grant carries with it an implied reservation of these paramount rights unless the terms of the grant exclude such reservation; so that the grant from the state, of land upon a stream flowing from a great pond, did not convey an unqualified fee, with the right to enjoy the usual and natural flow of the stream, but a qualified right, subject to the superior right of the state to use the pond and its waters for other public uses if the exigencies of the public, for whom it holds the pond in trust, demand it.").

[87] 227 N.E.2d 478, 480–81 (Mass. 1967).

[88] *Id.* at 81.

[89] Commonwealth v. Chapin, 22 Mass. (5 Pick.) 199, 205–06 (1827) ("[t]he doctrine of Lord *Hale,* as laid down in his treatise *De Jure Maris,* has been approved of and adopted as the law . . . of this commonwealth; and he divides rivers into two classes, navigable and not navigable.").

[90] *Id.* ("They are considered navigable where the tide ebbs and flows, and not navigable above that point.").

the sovereign or the public, whereas the non-navigable waters may be owned privately.[91] Navigable waters, including the sea and its branches, are highways for public access and passage.[92] As early as 1822, the Supreme Judicial Court noted in *Commonwealth v. Inhabitants of Charlestown* that the sovereign alone owns the navigable waters for the public's benefit, and only with specific legislation can a private person or corporation appropriate or obstruct navigable waters for private use.[93]

5.4 Recreational Waters

Although there are passing mentions of recreational waters being navigable waters,[94] recent courts have distinguished the PTD from explicitly embracing recreational waters.[95] For example, in *Farfard v. Conservation Commission of Barnstable*, the Supreme Judicial Court had the opportunity to directly tie the PTD to recreational activities in navigable waters, yet the court decided that the Conservation Commission could deny a pier building permit on the ground of preserving recreation—the court's opinion explicitly discussed the PTD and could have linked public rights to recreation, but the opinion did not.[96]

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[91] *Id.* at 206. *See also* Home for Aged Women v. Commonwealth, 89 N.E. 124, 128 (Mass. 1909) (". . . ownership on the border of tide water differs from the ownership of a riparian proprietor upon an unnavigable river or small stream. The title of the owner, in the latter case, goes to the thread of the stream, or if his estate extends beyond the stream, he owns all the land under the water . . . [t]he state has no ownership of any part of these small streams, nor any control over them, except such as it has in all parts of its domain for governmental purposes.").

[92] Commonwealth v. Inhabitants of Charlestown, 18 Mass. (1 Pick.) 180, 193 (1822).

[93] *Id.* at 190. ("It is an unquestionable principle of the common law, that all navigable waters belong to the sovereign, or, in other words, to the public; and that no individual or corporation can appropriate them to their own use, or confine or obstruct them so as to impair the passage over them, without authority from the legislative power.").

[94] *See* Crocker v. Champlin, 89 N.E. 129, 130 (Mass. 1909) ("It appears from the evidence that it will materially benefit navigation for industrial and commercial purposes, as well as navigation for pleasure, which is equally within the control of the state, and is recognized and encouraged under our laws.").

[95] *See* Fafard v. Conservation Comm'n of Barnstable, 733 N.E.2d 66, 76 (Mass. 2000) ("the commission cited recreational values as one of the bases for its decision in addition to public trust rights.").

[96] *Id.* at 71 (using the Commonwealth's PTD to discuss delegation of authority from the legislature, rather than expanding PTD rights to recreational activities); *see also In Recreation We Trust: The Public Trust Doctrine After Fafard*, BOSTON B.J., Sept./Oct. 2001, at 8, 25 ("By holding that the public trust rights doctrine means what it has historically said and is to be enforced according to its terms, the Court is seemingly discouraging embellishments, perhaps interpreting the successor of the Colonial right narrowly to reflect the navigation-for-necessity that was the

5.5 Wetlands

Wetlands are not included in the Massachusetts PTD merely by being a wetland; there needs to be some connection to a traditionally held public trust resource.[97] The traditional trust resources include having tidal influence or qualifying for Great Pond status of over ten acres in size.[98]

5.6 Groundwater

Groundwater is not linked to the PTD in Massachusetts.

5.7 Wildlife

The 1922 Supreme Judicial Court decision of *Dapson v. Daly*, concerning a dispute over who shot a deer, briefly discussed public wildlife ownership. The Supreme Judicial Court briefly mentioned that "[i]n this commonwealth the title to wild animals and game is in the commonwealth in trust for the public, to be devoted to the common welfare."[99] A subsequent

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rule in the 17th century and differentiating it from the recreational activity that takes place on such a tidal inlet as was involved in the instant case.").

[97] *See* Com. v. Muise, 796 N.E.2d 1289, 1291 (Mass Ct. App. 2003) ("While in the present case there is no explicit grant of authority, the Gloucester regulation does not purport to protect the public trust, but rather is the ordinary and traditional police-power-public-safety regulation that needs no specific delegation."); Comstock v. Abodeely, 03222, 2004 WL 3218002 (Mass. Super. Oct. 27, 2004) *aff'd sub nom.* Comstock v. Barnstable Conservation Comm'n, 843 N.E.2d 721 (Mass. Ct. App. 2006) ("The State Wetlands Act seeks to protect the following interests: the public and private water supply, ground water supply, storm damage prevention, flood control, prevention of water pollution, shellfish and fisheries, and wildlife habitat . . .but [a municipal ordinance]lists additional interests . . . includ[ing] erosion and sedimentation control, aesthetics, agricultural and aquacultural values, historical values, public trust rights in trustlands, and recreation. The Bylaw defines all these interests as 'wetlands values.'").

[98] *The Book of the General Lauues and Libertyes concerning the Inhabitants of the Massachusetts*, *supra* note 1, at § 2 (sic in original); Commonwealth v. Chapin, 22 Mass. (1 Pick.) 199, 205–06 (1827).

[99] *Id.* at 196.

case[100] involving possession of road killed deer, adopted the *Geer v. Connecticut*[101] view of state ownership of wildlife held in trust for the benefit of the public.[102]

5.8 Uplands (beaches, parks, highways)

Massachusetts law extends public trust protections to uplands consistent with charitable trust and dedication law. Although the legislature limits property use conditions to a 30-year term after transfer, a public purpose dedication remains in perpetuity without the need to be assigned to a discreet single public use.[103]

5.8.1 Public Parks

Public parks are subject to public rights when they are dedicated to municipalities or the Commonwealth for public uses. For example, in *Newburyport Redevelopment Auth. v. Commonwealth*, the Massachusetts Appeals Court reversed the Land Court, ruling that a 1751 grant of lands dedicated for use as a park "forever" encumbered the land with a public purpose.[104] The court decided that this dedication in perpetuity created a trust, formed by contract, and the legislature could not impair the trust in statute.[105] Similarly, in *Dunphy v. Commonwealth*, the Supreme Judicial Court tied the public trust responsibilities to charitable

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[100] Commonwealth v. Worth, 23 N.E.2d 891, 894 (Mass. 1939) ("The title or ownership of the deer being in the Commonwealth in trust for the public and no individual having any property rights to be affected, the result of the legislation is to grant to the individual upon carefully guarded conditions, a privilege, to hunt and possess the game.")

[101] Geer v. State of Conn., 161 U.S. 519, 533, (1896) *overruled on other grounds by* Hughes v. Oklahoma, 441 U.S. 322 (1979) ("The ownership being in the people of the state, the repository of the sovereign authority, and no individual having any property rights to be affected . . .").

[102] *Worth*, 23 N.E.2d at 894 ("The title or ownership of the deer being in the Commonwealth in trust for the public and no individual having any property rights to be affected, the result of the legislation is to grant to the individual upon carefully guarded conditions, a privilege, to hunt and possess the game.").

[103] MASS. GEN. LAWS ch. 184, § 23 (2012) ("Conditions or restrictions, unlimited as to time, by which the title or use of real property is affected, shall be limited to the term of thirty years after the date of the deed or other instrument or the date of the probate of the will creating them, except in cases of gifts or devises for public, charitable or religious purposes."); Newburyport Redevelopment Auth. v. Com., 401 N.E.2d 118, 143, 145 n.23 (Mass. App. Ct. 1980) ("Contrary to the committee's contentions, the obvious intent of St.1960, c. 94, was to authorize the city to discontinue Riverside Park and use the land for any municipal purpose it might choose, with the result that the land would no longer be appropriated to a particular public use. The Legislature had the authority to do that" but "[o]f course, the Legislature could not impair the trust to which the land is subject.").

[104] *Newburyport Redevelopment Auth.*, 401 N.E.2d at 136, (Mass. App. Ct. 1980).

[105] *Id.*

trust law, stating "the town took and held title to the Reed Park land as trustee under a public charitable trust requiring it to use the land for a public park in perpetuity."[106] The *Dunphy* court applied the *Newburyport Redevelopment Auth.* contract principles, which prohibited legislation from impairing the trust created by accepting the public park for a public use in perpetuity.[107]

In *Gould v. Greylock Reservation Comm'n*, the Supreme Judicial Court invalidated the lease of a portion of Mt. Greylock State Reservation to a private company for a ski resort on public trust precepts, because not only was the proposal not clearly authorized by legislation, but converting the public use of the mountain park for private economic gain was against the spirit of the legislation and the grant creating the reservation.[108] A private ski resort on public lands was not a public purpose envisioned in the enabling statutes, and the delegation of control of public lands to a private party is improper without legislative authorization.[109] The court narrowly interpreted the scope of authority the legislature conveyed to the commission, noting that if the court misconstrued the authorizing statute, the legislature could amend the statute.[110]

5.8.2 Municipal Beaches

Municipal beaches are subject to the PTD if they are dedicated for public purposes, similar to the analysis applied to public parks.[111] Because of the Colonial Ordinance of 1641–47, which grants fee title to the low water mark, in Massachusetts beaches are public only if the

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[106] 331 N.E.2d 883, 887 (Mass. 1975).
[107] *Id.* ("[I]t is not within the power of the Legislature to impair those obligations by legislation, and [the proposed legislation] does not validate the diversion of the property from public purposes to other uses and purposes.").
[108] Gould v. Greylock Reservation Comm'n, 215 N.E.2d 114, 126 (Mass. 1966) ("[i]n addition to the absence of any clear or express statutory authorization of as broad a delegation of responsibility by the Authority as is given by the management agreement, we find no express grant to the Authority of power to permit use of public lands and of the Authority's borrowed funds for what seems, in part at least, a commercial venture for private profit.").
[109] *Id.* at 126.
[110] *Id.* at 125 ("It is our duty, of course, in considering the powers granted to an unusual public authority of this character to look at the substance of what it is authorized to do, or proposes to do, to determine whether it is designed or used to accomplish proper public objectives or is, instead, being employed as an artifice to obscure some other type of activity.").
[111] *See supra* discussion at § 5.8.1.

municipality owns the shore or uplands adjacent to the shore; the public does not enjoy a right to use beaches under the common law.[112]

5.8.3 Private Beaches

The Supreme Judicial Court, in *Butler v. Attorney General*, stated that "there is a right to swim or float in or upon public waters as well as to sail upon them," but "[i]t is plain we think that under the law of Massachusetts there is no reservation or recognition of bathing on the beach as a separate right of property in individuals or the public under the colonial ordinance."[113] Similarly, in *Michaelson v. Silver Beach Imp. Ass'n, Inc.*, the same court enjoined the Commonwealth from allowing members of the public enter an artificial beach created between the low water mark and the sea because the colonial ordinance recognized private property to the low water mark.[114] Because the Commonwealth created the beach solely for recreation, and the creation of the artificial beach did not have a substantial connection to navigation, the land was the property of the upland landowners who could exclude the public above the low water mark.[115]

6.0 Activities Burdened

6.1 Conveyance of Property interests

According to the Massachusetts Supreme Court in *Boston Waterfront Development Corp. v. Commonwealth*, when the legislature grants lands to a private party in submerged lands, these lands are subject to a condition subsequent of the grant.[116] Although conditions subsequent in

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[112] *See* Opinion of the Justices, 313 N.E.2d 561, 567 (Mass. 1974) ("public rights in the seashore do not include a right to use otherwise private beaches for public bathing")
[113] Butler v. Attorney Gen., 80 N.E. 688, 689 (Mass. 1907).
[114] 173 N.E.2d 273, 278 (Mass. 1961).
[115] *Id.*
[116] 393 N.E.2d 356, 367 (Mass. 1979) ("We therefore hold that the BWDC has title to its property in fee simple, but subject to the condition subsequent that it be used for the public purpose for which it was granted.").

lands are disfavored (since they can work as forfeitures),[117] the court nonetheless approved conditions subsequent in submerged land use because of the Commonwealth's strong interest in those lands.[118] The public trust burden continues, even if the grantee is the federal government, because "the federal government is as restricted as the Commonwealth in its ability to abdicate to private individuals its sovereign jus publicum in the land."[119] So, in Massachusetts, the sovereign—both the Commonwealth and the federal government—retains the obligation to the public to preserve public purposes in submerged PTD lands.

6.2 Wetlands

The legislature defines coastal wetlands as any bank, marsh, swamp, meadow, flat or other low land subject to tidal action or coastal storm flowage and such contiguous land determined by the commissioner of environmental protection.[120] Because of the influence by the tides, coastal wetlands are subject to the PTD. However, Massachusetts separates coastal wetlands from freshwater wetlands;[121] and, absent the freshwater wetlands qualifying as a Great Pond, the PTD does not likely apply to freshwater wetlands.

6.3 Water Rights

At common law, riparian water rights gave the landowner rights of free passage with boats on rivers and the rights of fishing where migratory fish move through the river.[122]

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[117] *Id.*
[118] *Id.* (the Commonwealth's interest in submerged lands "transcend[] the ordinary rules of property law").
[119] United States v. 1.58 Acres of Land Situated in City of Boston, Suffolk County, Com. of Mass., 523 F. Supp. 120, 124–25 (D. Mass. 1981).
[120] MASS. GEN. LAWS ch. 130, § 105 (2012).
[121] MASS. GEN. LAWS ch. 131, § 40 (2012) (freshwater wetlands "are wet meadows, marshes, swamps, bogs, areas where groundwater, flowing or standing surface water or ice provide a significant part of the supporting substrate for a plant community for at least five months of the year; emergent and submergent plant communities in inland waters; that portion of any bank which touches any inland waters.").
[122] Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 98 (1851) ("[t]he right of passage with boats, rafts, and other vessels adapted to the use of such waters" and "[t]he right of the public to have these rivers kept open and free for the migratory fish, such as salmon, shad and alewives, to pass from the sea, through such rivers, to the ponds and head waters, to cast their spawn.").

However, the Massachusetts PTD does not apply to water appropriation volumes or vested water rights.[123]

6.4 Wildlife Harvests

Early case law allowed a landowner to exclude others from fishing on a non-navigable river flowing through a landowner's property, or to the middle of the watercourse when the non-navigable river borders the landowner's property.[124] However, a landowner could not impede migratory fish from making runs up either a navigable or non-navigable waterway.[125] Although public rights in fishing allow collecting shellfish in privately owned tidal flats,[126] the public is limited to taking the shellfish only; taking soil for manure containing the shellfish is not within public right.[127]

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[123] *Cf.* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983) ("The public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources.")

[124] Commonwealth v. Chapin, 22 Mass. (5 Pick.) 199, 206 (1827) ("each proprietor of the land adjoining has a several or exclusive right of fishery in the river, immediately before his land, down to the middle of the river, and may prevent all others from participating in it, and will have a right of action against any who shall usurp the exercise of it without his consent").

[125] *Id.* at 207 ("Upon the same principle, that the exclusive property in the banks and bed of a river is subject to the public easement on the waters, the right of several fishery is limited to the taking of fish, but does not carry with it the right to hinder the passing of them above, that other owners may be prevented from enjoying a similar privilege."); Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 99 (1851); Inhabitants of Stoughton v. Baker, 4 Mass. (3 Tyng) 522, 528 (1808) ("Therefore every owner of a water-mill or dam holds it on the condition, or perhaps under the limitation, that a sufficient and reasonable passage-way shall be allowed for the fish.").

[126] *See* Weston v. Sampson, 62 Mass. (8 Cush.) 347, 354–55 (1851) ("the ordinance transfers the fee to the riparian owner, yet until it is so used, built upon, or occupied, by the owner, as to exclude boats and vessels, the right of the public to use it is not taken away; but that whilst open to the natural ebb and flow of the tide, the public may use it, may sail over it, anchor upon it, fish upon it, and by so doing commit no trespass, and do not disseize the owner.").

[127] Porter v. Shehan, 73 Mass. (7 Gray) 435, 437 (1856) ("No such public right exists, to take the soil of flats belonging to the proprietor of upland bounding on the sea, to be used as manure, although some living shell fish may be mixed in it.").

7.0 Public Standing

7.1 Common Law-Based

At common law, only the Attorney General had the ability to enforce public trust rights.[128] This follows with the practice of allowing only the Attorney general to enforce charitable trusts.[129] However, at least one Supreme Judicial Court decision permitted residents of a town to challenge the filling of a Great Pond by the Public Works Department for use as a road.[130] The court noted that standing may have been an issue, but because the Department of Public Works did not press the issue, the court allowed the case to proceed.[131] In *Gould v. Greylock Reservation Comm'n*, the Massachusetts Supreme Court allowed a group of five citizens to challenge the construction of a ski resort on a public park reservation.[132] Although the *Gould* court did not specifically assert that the citizens were enforcing a purely public right, by reviewing a legislative grant under a separation of powers framework,[133] the court assumed the citizens had standing to sue.

7.2 Statutory Basis

The statute of limitations for real property does not apply to lands or interests in lands held for public purposes.[134]

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[128] Blackwell v. Old Colony R. Co., 122 Mass. 1, 3 (1877) ("The direct injury alleged is to the navigation of the stream, to which the plaintiff is entitled only in common with the whole public; and the remedy for that injury is by indictment, and not by private action."); Kuliopulos v. Sec'y of Executive Office of Transp. & Const., 799 N.E.2d 158 (Mass. Ct. App. 2003) ("It is for the Attorney General to decide whether he should investigate whether there is a claim that could be made under the doctrine of public trust.").

[129] Brookins v. Zoning Comm'n of Boston, 850 N.E.2d 620 (Mass. App. Ct.2006) ("If one assumes that the alleged trust is a public trust, only the Attorney General has standing to allege misuse of charitable assets.").

[130] Sacco v. Dep't of Pub. Works, 227 N.E.2d 478 (Mass. 1967).

[131] *Id.* at 479 n.1 ("Although the question of the plaintiffs' standing to bring this suit was raised by the pleadings, the department does not press this issue.").

[132] 215 N.E.2d 114, 116 (Mass. 1966).

[133] *See id.* at 425–26 ("We recognize that in recent years much wholly proper use has been made of authorities to carry out important public projects. Nevertheless, these entities present serious risk of abuse, because they are frequently relieved of statutory restrictions and regulation appropriately applicable to other public bodies"). *See also supra* note 110.

[134] MASS. GEN. LAWS ch. 260, § 31 (2012).

7.3 Constitutional Basis

Although not specifically addressed in the case law, the Massachusetts Constitution recognizes public rights to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment.[135] Yet, the Supreme Judicial Court in *Enos v. Secretary of Envtl. Affairs* specifically ruled that this constitutional provision does not confer standing on a group of landowners seeking declaratory judgment against the Secretary of Environmental Affairs for approving a sewage treatment plant in a final environmental impact report.[136] The court noted that absent a duty owed by the government, a party would not have standing to challenge governmental action.[137]

Concerning legislative transfers of public rights in submerged lands, the Supreme Judicial Court has stated that a gross or egregious disregard of public rights would not survive constitutional challenge under the Massachusetts Constitution.[138] Although the court did not specify which provision of the Massachusetts Constitution applied, ignoring public rights would violate the trust responsibilities of the sovereign.[139] However, to obtain standing a plaintiff needs

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[135] *See* MASS. CONST. Amend. art. 49 ("The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.").

[136] 731 N.E.2d 525, 532 n.7 (Mass. 2000) ("We also reject the plaintiffs' claim that their constitutional right to clean air and clean water, as provided in art. 49 of the Amendments to the Massachusetts Constitution, entitles them to standing to challenge the Secretary's decision.").

[137] *Id.* at 528 ("we pay special attention to the requirement that standing usually is not present unless the governmental official or agency can be found to owe a duty directly to the plaintiffs.").

[138] Opinion of the Justices to Senate, 424 N.E.2d 1092, 1099 (Mass. 1981) ("The general view in this country is that constitutional considerations do not bar legislative grants of absolute rights in submerged lands, although a gross or egregious disregard of the public interest would not survive constitutional challenge.").

[139] *Id.* at 1100 n.3 ("There may, of course, be 'a gross perversion of the trust over the property under which it is held, and abdication of sovereign governmental power.'") (citing Appleby v. City of New York, 271 U.S. 364, 393 (1926)).

to "have shown or even alleged prejudice to their own substantial rights."[140] Absent the prejudice to substantial individual rights, enforcement of a public right is left to the Attorney General.[141]

8.0 Remedies

8.1 Injunctive Relief

Injunctive relief is the typical means of enforcing the PTD, including mandamus.[142] Damages for violating the PTD are not available, as the harm is to the public at large, rather than to discreet parties.[143] Specific injury to a private party is required for damages.[144]

8.2 Defense Against Takings Claims

The Massachusetts Constitution's takings provision states that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."[145] Littoral landowners with properties impressed with the public trust maintain only a qualified interest in the land, which prevents a takings claim based on investment-backed expectations.[146] However, there are some situations that may constitute a taking if the Commonwealth infringes on a landowner's riparian access

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[140] Bd. of Health of Sturbridge v. Bd. of Health of Southbridge, 962 N.E.2d 734, 743 (Mass. 2012).
[141] *See supra* note 128.
[142] Toro v. Mayor of Revere, 401 N.E.2d 853, 854 (Mass. App. Ct. 1980); Gould v. Greylock Reservation Comm'n., 215 N.E.2d 114 (Mass. 1966).
[143] Blackwell v. Old Colony R. Co., 122 Mass. 1, 3 (1877) ("The direct injury alleged is to the navigation of the stream, to which the plaintiff is entitled only in common with the whole public; and the remedy for that injury is by indictment, and not by private action."); Inhabitants of W. Roxbury v. Stoddard, 89 Mass. (7 Allen) 158, 171–72 (1863) ("The remedy for any unreasonable or excessive use of the liberty of cutting ice, being the violation of a public right, is by indictment . . .").
[144] Michaelson v. Silver Beach Imp. Ass'n, Inc., 173 N.E.2d 273, 278 (Mass. 1961) ("Some damages are distinguished from the general damage which comes from an interference with the right to pass up and down the river as the general public do. Interference of this latter kind would not entitle an owner to any individual damages, because he suffers from it only as one of the general public, his suffering being the same in kind as that of the public, although greater in degree by reason of the proximity of his property").
[145] MASS. CONST. pt. 1, art. X.
[146] Wilson v. Com., 583 N.E.2d 894, 901 (Mass. Ct. App.) *aff'd*, 597 N.E.2d 43 (Mass. 1992) ("Plaintiffs with coastal areas . . . impressed with a public trust have had only qualified rights to their shoreland and have no reasonable investment-backed expectations under which to mount a taking challenge.").

rights.[147] If the action by the Commonwealth is identifiable, and the burden is specific to the landowner's property, the Commonwealth may be liable for a taking.[148] However, if the burden is broadly shared by the general public, the landowner will not be able to maintain a taking claim.[149] For example, in *Home for Aged Women v. Commonwealth*, the Supreme Judicial Court denied a taking allegation concerning reduced riparian access by landowners adjacent to the Charles River when the legislature authorized the construction of a seawall and dam for the improvement of navigation.[150] The court concluded that the landowners' reduced access to the river was a consequential injury suffered by the public at large, and that the Commonwealth's rights to fill tidelands for the improvement of navigation superseded private riparian access.[151]

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[147] Michaelson v. Silver Beach Imp. Ass'n, Inc., 173 N.E.2d 273, 277–78 (Mass. 1961) ("interference with the right of access may in certain circumstances constitute a taking for which the Commonwealth may be liable in damages.").

[148] *Id.* at 278 ("It is a damage special and peculiar to the property, as distinguished from the general damage which comes from an interference with the right to pass up and down the river as the general public do.").

[149] Home for Aged Women v. Commonwealth, 89 N.E. 124, 126 (Mass. 1909) ("Some damages are distinguished from the general damage which comes from an interference with the right to pass up and down the river as the general public do. Interference of this latter kind would not entitle an owner to any individual damages, because he suffers from it only as one of the general public, his suffering being the same in kind as that of the public, although greater in degree by reason of the proximity of his property.").

[150] *Id.* at 129.

[151] *Id.* at 127–28 ("If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction, away from the shore line, of works in a public, navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution, a taking of private property for public use, but only a consequential injury of a right which must be enjoyed . . .") (quoting Scranton v. Wheeler, 179 U.S. 141, 164, (1900)).

MICHIGAN

The Public Trust Doctrine in Michigan

Ellie Dawson

1.0 Origins

Michigan courts recognize that the Public Trust Doctrine ("PTD") is a fundamental tenet of Michigan state law by virtue of its succession to English title via the American colonies and the Northwest Territory.[1] The Michigan PTD has origins in the Northwest Ordinance of 1787;[2] however, contemporary Michigan courts are more likely to refer to the state constitution as embodying trust principles when invoking the PTD.[3] According to the Michigan Supreme Court, the PTD applies to the Great Lakes by analogy to the law of the sea, in that the waters are so large and commercially important that necessity dictates their inclusion.[4] Although the public's ability to use other waters within the state's boundaries may not be on par with similar rights in the Great Lakes,[5] the state nevertheless applies certain trust principles to all navigable waters, regardless of ownership.[6]

State statutes enacted pursuant to the constitutional mandate codify the state's trust duties and powers, and provide citizens a statutory remedy to enforce the PTD.[7] Although state statutes indicate a broad grant of authority to citizens to sue to enforce the PTD, recent state court decisions have limited citizen standing.[8] Nevertheless, citizens and the government have been

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[1] *See, e.g.*, Glass v. Goeckel, 703 N.W.2d 58, 64 (Mich. 2005) (determining that the public trust doctrine encompasses the right of the public to walk along the shores of the Great Lakes).
[2] CONFEDERATE CONGRESS, ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT (July 13, 1787); Lorman v. Benson, 8 Mich. 18, 1860 WL 4665, at *5 (recognizing the Northwest Ordinance as codifying the public's right to navigate over all navigable, nontidal streams, but rejecting the notion that this easement extends to building wharves where the beds of the streams are privately owned). *See also infra* note 11 and accompanying text.
[3] *See infra* note 11 and accompanying text.
[4] *Glass*, 703 N.W.2d at 64.
[5] *See infra* § 4.1.
[6] *See infra* § 5.2.
[7] *See infra* § 2.0.
[8] *See infra* § 7.0.

successful in using the PTD as a means to protect trust resources.[9] Additionally, in 2009 the Michigan legislature proposed a new bill that would clarify and extend the state's PTD powers, officially recognizing its application to all waters of the state, including groundwater, and restore robust citizen standing.[10] The PTD in Michigan is thus an evolving doctrine, by no means static in the face of changing times and state priorities.

2.0 The Basis of the Public Trust Doctrine in Michigan

Multiple courts have cited the Northwest Ordinance as the first indication that the waters in and surrounding Michigan have been subject to the PTD since before statehood.[11] The state constitution, as amended in 1963, reflects the state's dedication to preserving and protecting trust lands.[12] Although the constitution does not use the words "public trust," courts have used its language to support the existence of the PTD in the state.[13] The constitution specifies that the legislature "shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."[14]

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[9] *See infra* §§ 3, 6, 8.

[10] H.B. 5319, 95th Leg., Reg. Sess. (Mich. 2009), *available at* http://www.legislature.mi.gov/documents/2009-2010/billintroduced/House/pdf/2009-HIB-5319.pdf ("The waters of the state, including groundwater, are held in trust by the state. . . . The attorney general, on behalf of the state, or any other person may maintain an action . . . to enforce the public trust in the state's natural resources, either alone or in conjunction with other provisions of [NREPA]."). As of May 12, 2010, the bill is still in committee.

[11] Nedtweg v. Wallace, 208 N.W. 51, 53 (Mich. 1926) (recognizing the Northwest Ordinance of 1787 to preserve navigable waters as "common highways"); Moore v. Sanborne, 2 Mich. 519, 1853 WL 1958 at *5 (Mich. 1853) (referring to the Northwest Ordinance as having "establish[ed] a public right over our rivers"); Glass v. Goeckel, 703 N.W.2d 58, 74 (Mich. 2005). *But see* La Plaisance Bay Harbor Co v. City of Monroe, Walker's Ch. 155, 165, 167 (Mich. 1843) (opining that the Northwest Ordinance served only to clarify existing rights and ensure no taxes would be levied for passing along navigable waters, and that upon entry into the Union and adoption of its own constitution, the ordinance ceased to be applicable to Michigan).

[12] MICH. CONST. art. IV, § 52 ("The conservation and development of the natural resources of the state are . . . of paramount public concern.").

[13] People v. Babcock, 196 N.W.2d 489, 497 (Mich. App. 1972) (recognizing that the state constitution embodies trust principles in Article 4, Section 52, which relates to conservation and pollution prevention).

[14] MICH. CONST. art. IV, § 52. The Michigan Supreme Court interprets the duties the constitution creates to be "mandatory." *In re* Highway US-24, in Bloomfield Twp., Oakland County, 220 N.W.2d 416, 425 (Mich. 1974) (upholding the constitutionality of the Highway Condemnation Act against a challenge that it did not comply with MEPA).

Over time, the Michigan legislature codified this mandate in the Natural Resources and Environmental Protection Act ("NREPA"),[15] containing within it the Great Lakes Submerged Lands Act[16] and the Michigan Environmental Protection Act ("MEPA"),[17] as well as other natural resources-related statutes. It remains the legislature's primary implementation of the legislature's constitutional duties. The Michigan Supreme Court has stated that MEPA not only creates a procedural mechanism for the protection of natural resources but also imposes substantive requirements with respect to the "environmental rights, duties and functions of subject entities."[18] Delegating administrative powers to what is now the Department of Natural Resources and Environment ("DNRE"),[19] the legislature made the agency responsible for "the development and coordination of all environmental functions and programs of the State of Michigan."[20]

The MDNR has used this authority to promulgate regulations to protect and ensure access to trust resources,[21] and has expansively defined "public trust" to mean 1) the public right to navigate and fish in all navigable waters, 2) the state's duty to preserve and protect this right, 3) the public concern in the protection of "the air, water, and other natural resources," and 4) the state's duty to protect the same.[22] The Michigan PTD finds support at the constitutional, legislative, and administrative levels, all of which impose on the state powers over and duties to protect trust resources.

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[15] MICH. COMP. LAWS ANN. ch. 324 (West 2010).
[16] *Id.* §§ 324.32502–.32156.
[17] *Id.* §§ 324.1701–.1706.
[18] *In re Highway US-24*, 220 N.W.2d at 428.
[19] MICH. COMP. LAWS ANN. § 299.13. The legislature actually codified an executive order Governor John Engler issued in 1991 to abolish the existing DNR and creating a new one. *Id.* Then, in October of 2009, Governor Jennifer Granholm issued an executive order folding the then-existing Department of Environmental Quality into a new Department of Natural Resources and Environment. Exec. Order No. 2009–45, 19 Mich. Reg. 68 (November 1, 2009).
[20] MICH. COMP. LAWS ANN. § 299.11.
[21] *See, e.g.* MICH. ADMIN. CODE r. 281.815–.846, 322.1001–1018 (2010) (prescribing rules and requiring permits for building structures and pursuing other water-related projects in inland waters and the Great Lakes, respectively).
[22] *Id.* r. 281.811.

3.0 Institutional Application

Because the PTD in Michigan is largely now codified in statute, these statutes define the parameters of conveyances of trust-encumbered land, as well as the legislature's and administrative agency's respective powers and duties under the PTD. While the statutory language appears to be facially robust, in application it does not serve to restrain much governmental action.

3.1 Restraint on Alienation of Private Conveyances

Although not expressed in terms of the PTD, the common law in Michigan restrains landowners from severing the fee to riparian upland from the adjacent submerged land, when such submerged land is in private ownership.[23] At most, a riparian landowner would be able to reserve an easement of access to the water, but never the title to the submerged lands apart from the riparian land.[24] Riparian owners may grant easements that contain traditionally riparian rights beyond access to the water, but they cannot sever the rights from the land and convey them to others.[25]

3.2 Limit on the Legislature

Michigan's constitution entrusts the legislature with protecting the state's natural resources, which, as mentioned above,[26] include trust lands. However, the latitude the legislature retains regarding alienation of trust lands is expansive, compared with other Great Lakes states.[27] The *jus publicum* is inalienable in Michigan, so any state alienation of submerged land would

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[23] Civic Ass'n of Hammond Lake Estates v. Hammond Lake Estates No. 3 Lots 126-135, 721 N.W.2d 801, 803 (Mich. 2006) (ruling that a reciprocal negative easement prohibiting the use of motorboats burdened riparian owners' titles).
[24] *Id.* at 804.
[25] Anglers of Ausable v. Dep't of Envtl. Quality, 770 N.W.2d 359, 374 (Mich. App. 2009) (recognizing the ability of the department to convey an easement to a natural gas production company that would allow it to run a pipe across state land and discharge treated water into a watershed).
[26] *See supra* notes 13–14 and accompanying text.
[27] *See, e.g.*, chapters on Minnesota, Wisconsin, and New York.

still be subject to the trust, but the *jus privatum* is alienable and has been alienated in the past.[28] Or, as one Michigan Supreme Court put it, the state doesn't have to remain the "proprietor" *and* the "sovereign."[29] Thus, where reliction caused the beds of previously navigable waters to become dry land, the Michigan Supreme Court upheld the legislature's ability to grant leases to that land, even for the purpose of building homes, so long as the legislation also made clear that the state remained trustee.[30] The legislature cannot alienate trust land, though, unless the alienation will serve to improve the public trust or may be made without harm to the public interest.[31] Moreover, no branch of state government may secure the property rights of littoral owners for itself.[32] Michigan courts will also narrowly construe statutes that could otherwise be interpreted as allowing adverse possession to apply to trust lands.[33] The power of the legislature is not absolute, but it does have the ability to convey lands burdened by the PTD in furtherance of the public interest, providing the lands are still subject to the trust.

3.3 Limit on Administrative Action

The Michigan legislature has entrusted what is now the DNRE with the "disposition and preservation" of the public trust.[34] This entrustment includes "all land under the public domain," whether subject to the trust or not.[35] Michigan courts do not seem to have employed a "hard look" doctrine to scrutinize agency action under this expansive authority. Although this

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[28] Glass v. Goeckel, 703 N.W.2d 58, 66, 67 (Mich. 2005).
[29] Nedtweg v. Wallace, 208 N.W. 51, 53 (Mich. 1926) (deciding that the legislature's act to lease relicted land to private individuals did not violate the PTD).
[30] *Id.* at 54.
[31] Obrecht v. Nat'l Gypsum Mining Co., 105 N.W.2d 143, 149 (Mich. 1960) (remanding for a determination of nuisance damages to be paid to neighboring landowners where the Department of Conservation erroneously granted a mining company a permit to construct a dock in an area previously used only for residential purposes).
[32] *Glass*, 703 N.W.2d at 74.
[33] State v. Lake St. Clair Fishing & Shooting Club, 87 N.W. 117, 125 (Mich. 1901) (ruling that disputed swampland belonged to the state in trust, not the private landowner, so the statute of limitations allowing title to pass by adverse possession did not apply).
[34] *Glass*, 703 N.W.2d at 68, n. 14.
[35] MICH. COMP. LAWS ANN. § 324.503(1) (West 2010); *see also* Yee v. Shiawassee County Bd. of Comm'rs, 651 N.W.2d 756, 769 (Mich. App. 2002) (upholding regulatory jurisdiction over a private lake under NREPA as consistent with the statute's intent).

entrustment grants the department great powers of the care and disposition of state lands, it does not operate entirely independently from other smaller units of government, such as towns. For example, even when following a statutory mandate requiring the DNRE to provide public access to navigable waters, it must be aware of and comply with town zoning ordinances, because the NREPA does not specifically immunize the department form local land use regulations.[36] Additionally, the legislature has vested smaller units of government with limited and discrete authority over trust lands; for example, county boards have the authority to bring suit to establish and maintain lake levels.[37]

4.0 Purposes

The PTD in Michigan includes the traditional common law purposes of navigation, fishing and hunting. Although the Michigan Supreme Court recently recognized that the right to walk along the shore is inextricably linked to these traditional purposes, at least with respect to the Great Lakes, Michigan courts in general have been reluctant to expand the uses the PTD encompasses.

4.1 Traditional Purposes

The Michigan PTD distinguishes between "inland" waters, or those waters within state boundaries, and the Great Lakes with respect to the traditional purposes of the PTD. On the Great Lakes, the PTD extends to navigation, hunting, and fishing.[38] In contrast with the public rights in the land underneath the Great Lakes, on land underneath inland waters only the rights of

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[36] Township of Burt v. Dep't of Natural Res., 576 N.W.2d 170, 173 (Mich. App. 1997) (rejecting the DNR's appeal to be immune from town zoning ordinances when attempting to construct a public-access boat launch, because the NREPA did not clearly provide for immunity).
[37] MICH. COMP. LAWS ANN. § 324.30702 (West 2010); *see also infra* § 6.1.
[38] *Glass*, 703 N.W.2d at 62; Collins v. Gerhardt, 211 N.W. 115, 117 (Mich. 1926) (recognizing the right of fowling on public navigable waters).

navigation and fishing remain.[39] Riparian owners have the exclusive right to of hunt and trap,[40] as well as take ice.[41] This distinction emanates from the Michigan courts' applying the English law of the sea to the Great Lakes but not necessarily to all navigable-in-fact waters,[42] as well as the fact that riparian landowners in Michigan may also own the beds of the adjacent water.[43]

4.2 Beyond Traditional Purposes

A recent Michigan Supreme Court decision recognized that the right to walk on the land below the high water mark is "inherent in the exercise of traditionally protected rights of fishing, hunting, and navigation,"[44] because the "right of passage" is necessary to enjoy those other rights.[45] However, the right to walk along the lakeshore does not include the right of "lateral" access, or the right to cross private property to get there.[46] As the Michigan Court of Appeals stated, where the public has a right of access to water, that right includes swimming and temporarily anchoring a boat but does not include "[l]ounging, sunbathing, picknicking, [or] the erection of boat hoists at the road ends."[47] However, that case had to do with an express dedication of access to otherwise privately-owned lakeshore,[48] not the Great Lakes or other navigable-in-fact water with public access, so it may not be applicable in other circumstances.

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[39] Bott v. Comm'n of Natural Res., 327 N.W.2d 838, 843 (Mich. 1982) (declining to adopt the recreational use test for navigability over the log-flotation test); *see also* Rushton v. Taggart, 11 N.W.2d 193, 197 (Mich. 1943) (deciding that riparians' ownership of a streambed was subject to the public's right to fish in the waters).
[40] Sterling v. Jackson, 37 N.W. 845, 853 (Mich. 1888) (denying the public the right to fowl on swamp land held in private ownership, even though the swamp was by that time connected to Lake Erie).
[41] *Bott*, 327 N.W.2d at 843; Lorman v. Benson, 8 Mich. 18, 1860 WL 4665, at *9 (Mich. 1860) (denying the public the right to take ice from a navigable stream whose bed was in private ownership).
[42] *Glass*, 703 N.W.2d at 64, 64 n.6.
[43] *See infra* § 5.2.
[44] *Glass*, 703 N.W.2d at 62.
[45] *Id.* at 74.
[46] *Id.*; Collins v. Gerhardt, 211 N.W. 115, 118 (Mich. 1926) (clarifying that navigability-in-fact in itself does not provide the public with a right to cross private land to reach the water).
[47] Higgins Lake Prop. Owners Assn. v. Gerrish Twp., 662 N.W.2d 387, 404 (Mich. App. 2003) (enumerating the rights contained within a public dedication of an access road to a lake).
[48] *Id.* at 400.

Additionally, although private citizens may not erect boat hoists pursuant to a public dedication, the government may,[49] thus providing public access to docks.

5.0 Geographic Scope of Applicability

The state of Michigan succeeded to federal title of submerged lands upon statehood, but only to those lands not already granted to private landowners.[50] Consequently, if private owners held a federal patent, the state could not assert title, and the PTD would not apply. However, the PTD does apply to many resources within the state, including not only many navigable waters but also wildlife, state lands, and, arguably, all natural resources within the state.

5.1 Tidal

Although Michigan is not a state with tidal waters in the traditional sense, at least one state Supreme Court decision discussed the geographical scope of the PTD in those terms.[51] Because the shore of the Great Lakes does shift, though, the current boundary of the PTD is the ordinary high water mark ("OHWM"), and everything between the OHWM and the water is subject to the doctrine.[52] Even if a landowner's title extends past the OHWM, that land is still subject to the public trust.[53] The state also takes title to any abandoned property discovered on the bottom of the Great Lakes, by virtue of the state's holding the beds in trust for the people.[54]

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[49] Thies v. Howland, 380 N.W.2d 463, 470 (Mich. 1985) (citations omitted) (interpreting an easement to back-lot owners not to include the right to erect a dock).
[50] People v. Broedell, 112 N.W.2d 517, 519 (Mich. 1961) (remanding for further factual development as to whether the disputed land was within the description of a federal patent dating from 1811).
[51] State v. Lake St. Clair Fishing & Shooting Club, 87 N.W. 117, 120 (Mich. 1901) (recognizing public rights up to the high water mark wherever the water is tidal).
[52] Glass v. Goeckel, 703 N.W.2d 58, 69 (Mich. 2005).
[53] *Id.* at 70.
[54] People v. Massey, 358 N.W.2d 615, 618 (Mich. App. 1984) (upholding jury's decision that defendant illegally salvaged state-owned property).

5.2 Navigable in Fact

The Michigan Supreme Court adopted the log-flotation test for navigability in 1853,[55] and still uses the "saw log" test for navigability today.[56] The question of navigability is thus a case-by-case determination depending on the particular qualities of the waterbody.[57] However, navigability does not necessarily mean the public has access or other traditional public trust rights.[58] In contrast, in Michigan riparian owners hold title to the beds adjacent to their land, to the middle of the stream in the case of rivers.[59] Although the purposes ascribed to the PTD in inland waters may be fewer than in the Great Lakes, riparian ownership is still subject to the trust.[60] However, the public may have no right to use a body of water, even if navigable-in-fact, if the uplands surrounding the entire waterbody are privately-owned. Even if a boater can get to the water through navigable means,[61] if it is a "dead-end lake" with no commercially available outlet, the riparian owner has exclusivity of use.[62]

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[55] Moore v. Sanborne, 2 Mich. 519, 1853 WL 1958 at *4 (Mich. 1853) (ruling that the stream in question was navigable by virtue of its use for floating logs).
[56] Bott v. Comm'n of Natural Res., 327 N.W.2d 838, 841 (Mich. 1982).
[57] *Moore*, 2 Mich. 519, 1853 WL 1958 at *6.
[58] *See supra* § 4.1
[59] Collins v. Gerhardt, 211 N.W. 115, 117, 118 (Mich. 1926) (denying riparian owner the right to prevent the public from fishing in the stream where it runs through his land, because while "a riparian proprietor owns the land to the thread or center of navigable rivers . . . he does not own the water, and he does not own the fish"). In an early case, *La Plaisance Bay Harbor Co. v. City of Monroe*, the Michigan Court of Chancery stated that "the case with all meandered streams" is that "the bed of the stream is public property, and belongs to the state." Walker's Ch. 155, 168 (Mich. 1843). However, a later court recognized that "so far as the decision relates to the rights of shore owners on rivers and inland lakes, it is not now the law in Michigan." People v. Silberwood, 67 N.W. 1087, 1088 (Mich. 1896) (citations omitted) (upholding a law prohibiting the cutting of vegetation on marshy submerged land on Lake Erie).
[60] *Collins*, 211 N.W. at 118.
[61] Pigorsh v. Fahner, 194 N.W.2d 343, 345 (Mich. 1972) (declaring the Inland Lakes and Streams Act, MICH. COMP. LAWS ANN. § 281.731 (West 2010), unconstitutional as applied to privately owned inland lakes, because such application would constitute a taking of property without just compensation).
[62] Winans v. Willets, 163 N.W. 993, 995 (Mich. 1917) (declaring no public access existed when a riparian owner held title to the entire lakeshore).

5.3 Recreational Waters

The Michigan Supreme Court has explicitly rejected use for recreation as a test to determine whether the PTD applies to a particular bedland.[63] Although recreational uses are permitted on trust lands,[64] recreational use does not make a water navigable.

5.4 Wetlands

The Michigan legislature enacted the Wetland Protection Act ("WPA")[65] in 1970 because "[w]etland conservation [wa]s a matter of state concern."[66] The WPA applies to wetlands that are "contiguous to" surface waters or not contiguous and more than five acres in size, unless the DNRE determines a smaller wetland's protection is essential to preserve state natural resources.[67] The WPA requires permits for dredging, filling, and construction on wetlands,[68] but other uses such as farming, irrigation ditching, and grazing do not require a permit.[69]

In interpreting these permit requirements, the Michigan Court of Appeals determined that the exemptions from permitting only extend to existing uses of wetlands at the time of the statute's enactment, and do not permit similar new activities on the wetlands.[70] Although part of NREPA, the WPA does not specifically invoke the PTD, but the court of appeals has opined that it is "reasonably related" to "the protection of the public trust in inland lakes and streams."[71] As discussed below, Michigan courts have employed these statutes to deny landowners the right to

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[63] Bott v. Comm'n of Natural Res., 327 N.W.2d 838, 850 (Mich. 1982) (opining that adopting the recreational use test would upset settled expectations of property owners).
[64] *See supra* § 4.2.
[65] MICH. COMP. LAWS ANN. §§ 324.30301–30329 (West 2010).
[66] *Id.* § 324.30302.
[67] *Id.* § 324.30301.
[68] *Id.* § 324.30304.
[69] *Id.* § 324.30305.
[70] Huggett v. Dep't of Natural Res., 590 N.W.2d 747, 751 (Mich. App. 1998) (reading the WPA to exempt only preexisting wetland use for farming as consistent with the legislature's intent to maintain compliance with the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §§ 1251–1387 (2006)).
[71] Blue Water Isles Co. v. Dep't of Natural Res., 431 N.W.2d 53, 58 (Mich. App. 1988) (upholding the trial court's denial of an inverse condemnation claim where plaintiffs were denied a permit to drain and fill a marsh).

drain and fill wetlands[72] and to reject subsequent takings claims.[73] Thus, even without an explicit connection between the PTD and regulation of wetlands, trust principles are implicit in the courts' decisions regarding their use.

5.5 Groundwater

A 2004 Michigan Attorney General opinion affirms the state's right to regulate all waters of the state, including withdrawals of both surface and groundwater, indicating a connection between the PTD's "affirmative obligation to protect the public interest in navigable waters," without explicitly stating that the PTD could be a basis for the regulation of groundwater.[74] In 2008 the state also adopted the Great Lakes-St. Lawrence River Basin Water Resources Compact,[75] which recognizes that the entire Great Lakes Basin, including connected tributaries and groundwater, are part of the trust.[76]

Additionally, Michigan administrative rules require that, in locating a groundwater monitoring site for wastewater discharges, applicants must demonstrate that no alternatives exist considering "the state's paramount concern for the protection of its . . . public trust in the resources from pollution."[77] However, Michigan courts recognize that the PTD applies only to navigable waters.[78] Thus, although other authorities suggest that groundwater should be a component of the state's PTD, Michigan courts have not yet connected these developments to

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[72] *See infra* § 6.2.
[73] *See infra* § 8.3.
[74] 2004 Mich. Op. Att'y Gen. No. 7162, 2004 WL 2157847 at *2 (Mich. 2004).
[75] MICH. COMP. LAWS ANN. § 324.34201 (West 2010).
[76] *Bott*, 327 N.W.2d at 846; *see also* Bridget Donegan, *The Great Lakes Compact and the Public Trust Doctrine: Beyond Michigan and Wisconsin Common Law*, 24 J. Envtl. L. & Litig. 455, 468 (2009) (noting a disconnect between the robust trust duties embodied in the Compact and the courts' reluctance to recognize an expanded PTD and arguing that the Compact actually created a "Compact trust" distinct from Michigan's preexisting PTD).
[77] MICH. ADMIN. CODE r. 323.2224 (2010).
[78] *Bott*, 327 N.W.2d at 846; Michigan Citizens for Water Conservation v. Nestlé Waters N. Amer., 709 N.W.2d 174, 222 (Mich. App. 2005) ("[W]ater as a general resource is not subject to the public trust."), *rev'd on other grounds by* Michigan Citizens for Water Conservation v. Nestlé Waters N. Amer., 737 N.W.2d 447 (Mich. 2007).

the PTD. Should the abovementioned pending bill to extend a codified PTD pass, though, groundwater may officially become a component of the PTD.[79]

5.6 Wildlife

Although state statutes call wildlife "property of the people of the state,"[80] the Michigan Court of Appeals has clarified that the state's interest in the wildlife and natural resources of the state is not one of sovereign ownership but rather a trust both empowering and requiring the state to regulate and conserve trust resources.[81] The courts expressly recognize trust duties with respect to the taking of fish,[82] even the taking of fish ensured by treaty rights, and will enjoin harvesting if necessary to conserve the resource, so long as the regulation does not discriminate against the treaty holders.[83]

5.7 Uplands (beaches/parks/highways)

The state of Michigan is the trustee of "state land and resources" and, as such, is empowered to "prevent the destruction or spoliation of state lands."[84] For example, the DNRE requires that, when applying for a mining permit, companies demonstrate that the activity will not damage the public trust in the state's resources.[85] And when the state acquires land, it cannot be sold without approval of the state's administrative board;[86] although not specifically

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[79] *See supra* note 10 and accompanying text.
[80] MICH. COMP. LAWS ANN. § 324.40105 (West 2010).
[81] Att'y Gen. v. Hermes, 339 N.W.2d 545, 550 (Mich. App. 1983) (affirming lower court's decision that the defendants were liable for damages for taking of fish under the auspices of a tribal treaty after their tribal status was revoked).
[82] *See, e.g.*, MICH. COMP. LAWS ANN. § 324.41102 ("The department . . . may regulate the taking or killing of all fish . . . and may suspend or abridge the open season . . . if in the opinion of the department it is necessary to assist in the increased or better protection of the fish.").
[83] Michigan United Cons. Clubs v. Anthony, 280 N.W.2d 883, 891 (Mich. App. 1979) (upholding an injunction against the defendants for illegal commercial fishing). Even where treaty rights exist, they only extend to naturally occurring fish, not those the state plants. *Id.* at 890.
[84] Michigan Oil Co. v. Natural Res. Comm'n, 249 N.W.2d 135, 142, 143 (Mich. 1977) (upholding a court of appeals decision that the Natural Resources Commission had the authority to deny a permit to Michigan Oil, notwithstanding its lease of state lands for the purpose of mining).
[85] MICH. ADMIN. CODE r. 425.201 (2010).
[86] MICH. COMP. LAWS ANN. § 322.1.

mentioning the PTD, this level of review prior to sale opens the door for future judicial recognition of a trust in such lands. Another statute also provides that any attempted conveyance of land the state holds "in trust" is void.[87] Additionally, if the legislature designates a portion of state land as a "state land reserve," that land remains permanently in reserve and protected from disposal unless the legislature acts to remove the designation.[88] The state's definition of what constitutes a "resource" extends to sand, but this inclusion does not necessarily equate to a prohibition on the exploitation of such resources.[89] For example, statutes instruct the DNRE to encourage forestry and mineral extraction, and authorize a grant and loan program to do so,[90] although forestry on state lands may be managed in a sustainable manner.[91]

Private citizens can also dedicate land to the public trust; in that case, the governmental entity to whom it was dedicated may not alienate that land in contravention of the public trust.[92] No presumption exists that land owned by a municipality is in trust, though. To the contrary, until dedicated, cities may alienate property freely.[93] However, using land for a public purpose can imply dedication to a public use, thus preventing its alienation.[94]

6.0 Activities Burdened

Perhaps the most pervasive way in which the PTD burdens trust lands in Michigan is that it simply never goes away: no matter what the activity, the trust remains, and must be considered in every potential action. Although this consideration does not always result in a complete restriction of activity, it has served to temper competing interests in favor of the trust.

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[87] *Id.* § 322.264.
[88] MICH. CONST art. 10, § 5.
[89] Preserve the Dunes, Inc., v. Dep't of Envtl. Quality, 690 N.W.2d 487, 490 (Mich. App. 2004) (upholding the trial court's decision that the DEQ's grant of a sand dune mining permit did not violate MEPA).
[90] MICH. COMP. LAWS ANN. § 324.702 (West 2010).
[91] *Id.* § 324.52502.
[92] Curry v. City of Highland Park, 219 N.W. 745, 747 (Mich. 1928) (determining land in question was devoted to public use, even though not explicitly dedicated).
[93] *Id.*
[94] *Id.* at 749.

6.1 Conveyances of Property Interests

Any land subject to the public trust will not lose that quality when conveyed to another owner, because Michigan distinguishes between the *jus publicum*, which cannot be alienated, and the *jus privatum*, which can.[95] Additionally, where the state leases trust lands, such a lease does not automatically imply the right to undertake any activity the lessee wishes; the lessee will still have to comply with all other laws and obtain permits when necessary, if the activity involves use of trust resources.[96] When a smaller unit of government, such as a municipality, owns land, that entity may not alienate property "which is devoted to the discharge of those duties which devolve upon it as an arm of the state,"[97] that is, the entity is the trustee of the land for the benefit of the public.

6.2 Wetland Fills

Prior to the enactment of MEPA, Michigan courts sanctioned using the PTD to prevent the filling of submerged lands.[98] According to one Michigan appellate court, the state can allow the disposition of trust lands only when there is "no substantial public value" in the lands.[99] Although decided based on NREPA's Wetland Protection Act and not the PTD by itself, another Michigan case upheld the right of the DNRE to deny a permit to fill wetlands without constituting a taking, in part because of the state's policy to protect wetlands "for the benefit of

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[95] Glass v. Goeckel, 703 N.W.2d 58, 66 (Mich. 2005).
[96] Michigan Oil Co. v. Natural Res. Comm'n, 249 N.W.2d 135, 144 (Mich. 1977) (deciding that no taking had occurred when the Natural Resources Commission denied the company a mining permit).
[97] *Curry*, 219 N.W. at 749 (preventing a city from alienating land used as a garbage disposal because it was used for public purposes). *But see* Huron-Clinton Metro. Auth. v. Att'y Gen., 379 N.W.2d 474, 476, 477 (Mich. App. 1985) (ruling that the authority granted to a quasi-municipal corporation included leasing, although not specifically enumerated in its charter, because it was empowered to buy and sell land, and that a proposed lease for a water slide did not violate the public trust).
[98] Township of Grosse Ile v. Dunbar & Sullivan Dredging Co., 167 N.W.2d 311, 316 (Mich. App. 1969) (upholding trial court's determination that allowing filling operations around an island to continue would violate the public trust doctrine).
[99] People v. Babcock, 196 N.W.2d 489, 497 (Mich. App. 1972) (affirming trial court's finding that filling submerged lands would be detrimental to the public trust).

its citizens."[100] This statute allows the DNRE to compromise, however, in the event that a court does find a taking, by either paying the judgment or granting an alternative permit for activity on wetlands that allows development but is still protective of the wetland.[101] Thus, although protection of wetlands is a part of Michigan's overall statutory scheme codifying the PTD, no categorical ban on wetland fills exists.

6.3 Water Rights

Under Michigan statutes, riparian owners "control[] any temporarily or periodically exposed bottomland to the water's edge . . . subject to the public trust to the ordinary high-water mark."[102] Generally, riparians have the right to the use of the water, to erect wharves to the point of navigability, to have access to the water, and have title to accretions.[103] Although riparian owners (bordering "inland," or non-Great Lakes waters) can put structures in the water so long as they do not impede navigability, littoral owners (bordering the Great Lakes) have to get a permit from the state.[104] Riparian owners along inland waters can also remove sand and gravel without permission from the state, because they own the adjacent beds.[105] Littoral owners' rights supersede public rights in trust lands only to the extent that they do not "contravene" the trust.[106] However, riparian rights attach only to waters that are capable of being used when the water is in

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[100] K & K Constr., Inc. v. Dep't of Envtl. Quality, 705 N.W.2d 365, 378 (Mich. App. 2005) (reversing the trial court after almost two decades of litigation and remanding to the trial court to analyze the facts under the balancing test set out in *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978), because of the trial court's improper and inadequate application of the test).

[101] *K & K Constr.*, 705 N.W.2d at 379; *see also* MICH. COMP. LAWS ANN. § 324.30323 (West 2010).

[102] MICH. COMP. LAWS ANN. § 324.30111.

[103] Hilt v. Weber, 233 N.W. 159, 168 (Mich. 1930) (overruling a pair of cases that had altered the property lines of Michigan citizens by ending them at the meander line instead of the water's edge, returning to previous state law); *see also* MICH. ADMIN. CODE r. 322.1001 (2010) (defining "riparian rights" to include access, dockage and wharfage, use of the water, and title to accretions).

[104] Obrecht v. Nat'l Gypsum Mining Co., 105 N.W.2d 143, 149–150 (Mich. 1960) (requiring regulatory consent for the building of a wharf in the Great Lakes).

[105] McMorran Milling Co. v. C.H. Little Co., 167 N.W. 990, 996 (Mich. 1918) (ruling that when the federal government prevented a company with a contract to remove gravel from doing so, a property right was taken, relieving the company of the duty to pay for the right from that point on).

[106] Glass v. Goeckel, 703 N.W.2d 58, 75 (Mich. 2005).

its natural state, so the alteration of a waterway for facilitating log flotation, for example, is not within the scope of riparian rights if it would cause a detriment to a downstream riparian owner.[107]

6.4 Wildlife Harvests

Commensurate with its trust powers and duties over wildlife, the state of Michigan regulates wildlife harvests.[108] This regulation extends to such activities as cutting trees on public lands, but not all effects on state trust resources "justify judicial intervention."[109] Although not "wildlife" in so many words, peat is a resource the state regulates and allows to be harvested on state-owned lands,[110] further evidence of the state's trust responsibilities over its land. State regulation of wildlife harvests extends beyond those lands that have public access under the PTD, however. For example, the state can regulate fishing in waters where no public rights of access exist,[111] indicating that the state considers its trust duties to go beyond ensuring access and extending to the protection of wildlife as an overall public good.

7.0 Public Standing

Michigan citizens may pursue actions to enforce the PTD through statute, while riparian landowners have an additional common law remedy. However, in either case plaintiffs must adhere to the traditional standing requirements of injury, causation, and redressability.

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[107] Koopman v. Blodgett, 38 N.W. 649, 651 (Mich. 1888) (restraining log drivers from holding back water to the detriment of downstream mill owner).

[108] *See supra* § 5.6; *see also* MICH. COMP. LAWS ANN. § 324.41102 (West 2010).

[109] City of Portage v. Kalamazoo County Road Comm'n, 355 N.W.2d 913, 915 (Mich. App. 1984) (overturning the trial court's decision that the removal of 74 trees along a city road would violate MEPA because the environmental damage did not rise to a level requiring judicial intervention).

[110] MICH. COMP. LAWS ANN. § 324.64103.

[111] Winans v. Willetts, 163 N.W. 993, 995 (Mich. 1917) (denying the public access to a nonnavigable lake whose shore rests in private ownership); Giddings v. Rogalewski, 158 N.W. 951, 953 (Mich. 1916) (stating that "although the state may have jurisdiction over private waters to enforce the fish laws and control the manner and time of their taking," such state rights do not create a public right to fish).

7.1 Common-Law Based

For the most part, Michigan citizens have been unsuccessful in employing the PTD along with common law nuisance to try and protect trust resources beyond asserting riparian rights. Although prior to MEPA's enactment, the government had used the PTD to enjoin the filling of submerged lands,[112] common law actions undertaken by private citizens primarily concerned the rights and responsibilities of riparian owners,[113] and did not extend to the general public's interest in trust lands.

7.2 Statute-Based

In part, the legislature codified statutory standing to enforce the PTD as a response to the inability of citizens to successfully employ the PTD and common law nuisance.[114] Indeed, the Michigan Court of Appeals opined that MEPA supersedes common law nuisance where it may conflict with the statutory scheme.[115] In MEPA Michigan citizens appear to have a robust statutory mechanism to enforce the state's duties under the PTD. However, recently Michigan courts have begun to limit citizens' abilities to enforce the PTD by reading common law standing requirements into the statute. Although MEPA facially appears to grant broad standing rights to the public, providing "any person" the ability to maintain an action,[116] the Michigan Supreme

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[112] Township of Grosse Ile v. Dunbar & Sullivan Dredging Co., 167 N.W.2d 311, 316 (Mich. App. 1969) (preventing company from filling submerged land adjacent to an island). This is the only Michigan case before 1970 to use the phrase "public trust doctrine," although many other cases use the phrase "public trust."

[113] *See, e.g.*, Obrecht v. Nat'l Gypsum Mining Co., 105 N.W.2d 143, 152 (Mich. 1960) (requiring mining company to pay damages to neighboring landowners for nuisance because construction proceeded in violation of the PTD).

[114] Susan J. Mahoney, *Muddying the Waters: The Effects of the* Cleveland Cliffs *Decision and the Future of the MEPA Citizen Suit*, 83 U. DET. MERCY L. REV. 229, 234–35 (2006) (describing efforts to use the PTD and nuisance to enforce environmental regulations prior to MEPA and the courts' belief that such issues were best left to the agencies entrusted with decisionmaking).

[115] Wayne County Dep't of Health v. Olsonite Corp., 263 N.W.2d 778, 791 (Mich. App. 1977) (remanding to the trial court to adopt a new pollution control standard regarding a corporation's air emissions).

[116] MICH. COMP. LAWS ANN. § 324.1701 (West 2010).

Court has interpreted "any person" to mean "any person *with standing*."[117] Consequently, the court determined that MEPA does not lower standing requirements for "environmental" cases.[118] Thus, a citizen cannot sue in the name of the "public interest" without having standing as an individual.[119]

Even when suing under MEPA, plaintiffs must adhere to the traditional standing requirements of injury, causation, and redressability.[120] For example, unless a citizen has a concrete recreational, aesthetic, or economic interest in a particular area by demonstrating actual use, the citizen does not have standing to sue under MEPA.[121] In the case of "imminent" injury, to have standing plaintiffs need to both allege facts showing that they use the area in dispute, are reasonably concerned about its continued integrity, and provide sufficient facts to demonstrate that the defendant's conduct will cause the injury.[122] Although the Michigan Supreme Court has yet to address the issue specifically in terms of the PTD, analogizing to MEPA permit cases where the court decided that a statutory cause of action did not reduce standing requirements indicates that plaintiffs seeking to enforce the PTD on its own would face similar hurdles.

7.3 Constitutional Basis

The Michigan Supreme Court has determined that the state constitutional provision relating to the conservation of natural resources does not reduce standing requirements for

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[117] Natl. Wildlife Federation v. Cleveland Cliffs Iron Co., 684 N.W.2d 800, 825 (Mich. 2004) (ruling that plaintiffs showed standing by providing affidavits attesting to their use of the area in question, their concerns that irreparable harm will ensue from mining activities, and pointing to a scientific expert confirming their fears).

[118] Michigan Citizens for Water Conservation v. Nestlé Waters N. Amer., 737 N.W.2d 447, 459 (Mich. 2007) (rejecting the appellate court's use of an ecosystem nexus-like theory to uphold standing for plaintiff seeking to enjoin Nestlé from constructing a bottling plant, but only with respect to a discrete area for which plaintiff could not demonstrate a concrete interest).

[119] *Id.* at 460.

[120] *Natl. Wildlife Federation*, 684 N.W.2d at 814.

[121] *Michigan Citizens for Water Conservation* , 737 N.W.2d at 449, 455.

[122] *Natl. Wildlife Federation*, 684 N.W.2d at 814–15. The Michigan Supreme Court cited the U.S. Supreme Court's decisions in both *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (laying out the requirements of an actual or imminent injury in fact, causation by the defendant, and redressability by a favorable decision), and its subsequent refinement in *Friends of the Earth v. Laidlaw Envtl. Serv.*, 528 U.S. 167 (2000) (upholding standing where plaintiffs alleged injury was that defendant's activity curtailed their use of the area in question), as support for its holding.

plaintiffs to bring suit to protect the environment.[123] However, because the provision instructs the legislature to "provide for the protection of the air, water, and other natural resources of the state,"[124] the legislature has standing to bring suit to protect its ability to carry out the constitutional mandate.[125]

8.0 Remedies

To remedy a violation of the PTD in Michigan, MEPA allows declaratory and injunctive relief, but courts have construed the statutory language to include reparation of harm. Because the majority of actions enforcing the PTD occur under the auspices of MEPA, MEPA's remedial language is most often invoked, but it is not the exclusive mode of obtaining relief in Michigan.

8.1 Injunctive Relief

MEPA allows "private individuals and other legal entities . . . to maintain actions . . . for declaratory and other equitable relief against anyone" to further the cause of environmental protection.[126] Indeed, shortly after its enactment, the Michigan Supreme Court interpreted MEPA to "impose[] a duty . . . to prevent or minimize degradation."[127] Even prior to MEPA's enactment, though, Michigan courts enjoined activities that could damage trust resources because the PTD mandated their protection for public use.[128] Injunctive relief is thus a favored remedy for enforcing the PTD.

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[123] *Michigan Citizens for Water Conservation*, 737 N.W.2d at 449, 459 (Mich. 2007).
[124] MICH. CONST. art. IV, § 52.
[125] House Speaker v. Governor, 491 N.W.2d 832, 836 (Mich. App. 1992) (deciding that legislators had standing to sue the governor under both the separation of powers clause of the state constitution and the provisions requiring them to protect natural resources), *rev'd on other grounds*, 506 N.W.2d 190 (Mich. 1993).
[126] Ray v. Mason County Drain Comm'r, 224 N.W.2d 883, 888 (Mich. 1975) (remanding to the trial court to conduct a fuller factual inquiry in keeping with the intent of MEPA).
[127] *Id.*
[128] *See, e.g.*, Township of Grosse Ile v. Dunbar & Sullivan Dredging Co., 167 N.W.2d 311, 316 (Mich. App. 1969) (enjoining the filling of submerged lands because they were subject to the PTD and the proposed activity would interfere with the public's use of them); People v. Babcock, 196 N.W.2d 489, 497 (Mich. App. 1972) (same).

8.2 Damages for Injuries to Resources

Damages for injuries to trust resources in Michigan are not always directly related to the PTD itself, but still provide a remedy to citizens and the state. MEPA allows recovery only in the form of declaratory or injunctive relief; however, Michigan courts have interpreted these remedies to encompass the ability to order the restoration of damaged resources.[129] Although not monetary damages, restoration obviously entails expenditure on the part of the entity that damaged the resource. Other provisions of NREPA also allow the state to recover penalties for violations of permit requirements,[130] violations of the Wetland Protection Act,[131] illegal takings of wildlife,[132] and illegal fishing.[133] Additionally, where the trust resources have been irreparably damaged, neighboring landowners may be able to recover damages in nuisance.[134] Precedent also exists for state recovery for illegally taken wildlife under a combination of the PTD and other common law theories where statutory means are unavailable due to treaty rights.[135] The PTD gives the state the standing to sue, but the recovery of damages, at least with respect to wildlife, occurs via the doctrine of conversion.[136]

8.3 Defenses to Takings Claims

The state has successfully used the PTD as a defense to takings claims, but not uniformly so. For example, when the Michigan Supreme Court articulated that the PTD encompasses the right to walk below the OWHM along the shores of the Great Lakes, it rejected the notion of a

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[129] Stevens v. Creek, 328 N.W.2d 672, 674 (Mich. App. 1982) (upholding the ability of a landowner to sue her neighbor for the destruction of trees on her property and remanding to allow her to argue the applicability of MEPA).
[130] MICH. COMP. LAWS ANN. § 324.30112 (West 2010).
[131] *Id.* § 324.30316.
[132] *Id.* § 324.40118.
[133] *E.g.*, *id.* §§ 324.45102, .47327.
[134] Obrecht v. Nat'l Gypsum Mining Co., 105 N.W.2d 143, 149 (Mich. 1960) (remanding for a determination of damages to neighbors' property due to mining company's nuisance).
[135] Att'y Gen. v. Hermes, 339 N.W.2d 550, 550, 551 (Mich. App. 1983) (affirming that defendants wrongly appropriated fish after discovering they were not of Indian ancestry and remanding for determination of damages for the taking of fish).
[136] *Id.* at 550.

viable takings claim because "[t]he state cannot take what it already owns . . . [N]o taking occurs when the state protects and retains that which it could not alienate: public rights held pursuant to the public trust doctrine."[137] Moreover, although not always couched in terms of the PTD, a takings claim will not lie when the state takes action to set the level of a private inland lake where the action is for the protection of the public welfare and for the conservation of natural resources.[138] Another setting in which Michigan courts have rejected takings claims, again based on statute instead of the PTD explicitly is wetland regulation. As discussed above,[139] Michigan courts have upheld the Wetlands Protection Act and its prevention of wetland fills against takings challenges.[140]

On the other hand, although the Michigan Supreme Court allows that improvements necessary for navigation that incidentally damage littoral property do not constitute compensable takings because littoral title is subordinate to the public trust right to improve navigation.[141] However, if the DNRE damages other land such as "fast lands" (above the high water mark), or lands that are unrelated to the necessary improvement, the state must compensate the landowners.[142] Thus, Michigan courts seem likely to employ the PTD to deny takings claims in the event of state action intended to protect trust resources, but will uphold takings claims for unnecessary physical alterations to landowners' property, notwithstanding an overriding trust purpose.

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[137] Glass v. Goeckel, 703 N.W.2d 58, 78 (Mich. 2005).
[138] Yee v. Shiawassee County Bd. of Comm'rs, 651 N.W.2d 756, 769 (Mich. App. 2002) (rejecting the argument that proceedings by a governmental entity to set the level of a private lake would constitute a taking).
[139] *See supra* § 6.2.
[140] *See supra* § 6.2; K & K Constr., Inc. v. Dep't of Envtl. Quality, 705 N.W.2d 365, 386 (Mich. App. 2005).
[141] Peterman v. Dept. of Natural Res., 521 N.W.2d 499, 502, 508 (Mich. 1994) (deciding that a taking of littoral owners' land occurred because the DNR's activities destroyed fast lands and because the normally permissible improvements to navigation were conducted so carelessly as to result in unnecessary destruction of the owners' beach).
[142] *Id.* at 511, 512.

MINNESOTA

The Public Trust Doctrine in Minnesota

Elizabeth B. Dawson

1.0 Origins

The public trust doctrine (PTD) in Minnesota requires a close look at statutes and case law. Underlying principles of the PTD run through much of the state's policies concerning the beds of navigable waters and similar resources. Although perhaps not as robustly applied as its neighbor across the Mississippi River, Wisconsin, Minnesota's PTD also originates in the Northwest Ordinance of 1787,[1] which stated that "[t]he navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free."[2] This language, no paraphrased in the state's constitution,[3] established Minnesota's trust obligations over navigable waters in the state.[4]

The state's recognition of the PTD does not end with constitutional provisions, however. The legislature has proactively asserted its trust duties through codification of riparian water law,[5] through the Minnesota Environmental Rights Act (MERA),[6] and through the Minnesota

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[1] CONFEDERATE CONGRESS, ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT (July 13, 1787).
[2] *Id.* art. IV; *see also* Lamprey v. Danz, 90 N.W. 578, 580 (Minn. 1902) (quoting the Northwest Ordinance of 1787), *overruled on other grounds by* Johnson v. Seifert, 100 N.W.2d 689, 696 (Minn. 1960).
[3] MINN. CONST. art II § 2. ("The state of Minnesota has concurrent jurisdiction on the Mississippi and on all other rivers and waters forming a common boundary with any other state or states. Navigable waters leading into the same, shall be common highways and forever free to citizens of the United States without any tax, duty, impost or toll therefor [sic].").
[4] Minnesota was admitted to the Union in 1858; thus, , the equal footing doctrine was central to the state's ability to assert the PTD, since it was not one of the states that received its land from the British Crown. But, at the most fundamental level, the PTD exists in Minnesota's constitution. *See* St. Anthony Falls Water-Power Co. v. Bd. of Water Comm'rs of St. Paul, 168 U.S. 349, 365 (1897) (recognizing Minnesota's title to the beds of navigable waters under the reasoning of *Shively v. Bowlby*, 152 U.S. 1 (1894), when deciding that Minnesota did not grant the right to the entire natural flow of a river with the right to harness the power from it); *see also* U.S. v. Holt State Bank, 270 U.S. 49, 55 (1926) (applying principles of the equal footing doctrine to Native American reservation lands, deciding that absent express language of disposition, courts will not interpret a grant to convey title to beds of navigable waters).
[5] *See* MINN. STAT. ANN. chs. 103A–114B (West 2009).
[6] MINN. STAT. ANN. § 116B.01–.13.

Environmental Policy Act (MEPA).[7] Because Minnesota statutes nearly occupy the field of what once was common law PTD,[8] Minnesota courts today look primarily to these statutes to effectuate the state's trust responsibilities.

2.0 The Basis of the Public Trust Doctrine in Minnesota

The origins of Minnesota's PTD lie in the Northwest Ordinance, as incorporated into the state constitution.[9] Minnesota's constitution contains express public trust language not only with respect to the beds of navigable waters,[10] but also in other, less traditional resources. For example, the legislature, with the approval of the governor, the attorney general, and the state auditor, may exchange public lands, including those held in trust, for any other public or private lands.[11] However, the lands received are then subject to the same trust burdening the lands exchanged, and the state retains the mineral and water power rights to the exchanged lands.[12] No cases in Minnesota interpret this constitutional provision with respect to the traditional PTD, though, so the extent to which the state may invoke it is unclear. The Minnesota constitution also establishes a "permanent environmental and natural resources trust fund . . . for the public purpose of protection, conservation, preservation, and enhancement of the state's . . . natural resources," with funds deriving from the state lottery.[13] Again, though, the absence of case law

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[7] MINN. STAT. ANN. § 116D.01–.11. The most overt trust language in this statute states that "it is the continuing responsibility of the state government to use all practicable means . . . to the end that the state may . . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." *Id.* § 116D.02.
[8] *See* Alexandra Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 721–723 (2006).
[9] MINN. CONST. art II § 2. ("The state of Minnesota has concurrent jurisdiction on the Mississippi and on all other rivers and waters forming a common boundary with any other state or states. Navigable waters leading into the same, shall be common highways and forever free to citizens of the United States without any tax, duty, impost or toll therefor [sic].").
[10] *Id.*
[11] MINN. CONST. art. XI § 10 (amended 1984) ("[A]ny of the public lands of the state, including lands held in trust for any purpose, may be exchanged.").
[12] *Id.* ("Lands so acquired shall be subject to the trust, if any, to which the lands exchanged therefor [sic] were subject. The state shall reserve all mineral and water power rights in lands transferred by the state.").
[13] MINN. CONST. art. XI § 14 (amended 1998).

explicitly connecting this provision to the PTD makes uncertain its usefulness for public trust purposes.

Although the PTD in Minnesota has roots in the Northwest Ordinance and the state's constitution, today much of the state's ability to assert control over the beds of navigable waters and other natural resources exists in statute. The legislature has codified the state's trust responsibilities in controlling activities on "public waters,"[14] extending the state's regulatory reach to wetlands.[15] The definition of "public waters" specifically provides that neither navigability nor commercial use at the time of statehood, nor the ownership of the underlying bed, determine exclusively what "public water" is.[16] On the contrary, "public waters" could be anything from a watercourse with a drainage area over two square miles to a waterbody that a court designates as public or navigable.[17] The Minnesota Supreme Court concluded that this definition only serves to extend the state's regulatory reach, not necessarily its duties under the PTD.[18] The legislature also asserted fee simple ownership over the beds of all rivers navigable for commercial purposes,[19] designating the Department of Natural Resources (MDNR) as administrator of these lands.[20]

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[14] MINN. STAT. ANN. § 103A.201 (West 2009) ("To conserve and use water resources of the state in the best interests of the people . . . public waters are subject to the control of the state." The Minnesota Supreme Court has ruled that this statute was a codification of the state's public trust power. *See* State v. Kuluvar, 123 N.W.2d 699, 706 (Minn. 1963) (stating that "the statute directs that the state fulfill its trusteeship over [public] waters by protecting against interference by anyone, including those who assert the common-law rights of a riparian owner").

[15] MINN. STAT. ANN. § 103A.201. Note though, that the legislature clarified that the designation of an area as a public water or wetland neither grants the public any more rights of access to the waters or wetlands nor diminishes existing rights of ownership or usage of the underlying beds. *Id.* §§ 103A.201(2)(a), 103G.205.

[16] *Id.* § 103G.005(15)(b).

[17] *Id.* § 103G.005(15)(a).

[18] Pratt v. Minn. Dep't of Nat. Resources, 309 N.W.2d 767, 771 (Minn. 1981) (determining that the legislature's classification of waters as "public" makes them "subject to the protection and control of the state under its regulatory scheme"). In the next sentence, however, the Minnesota Supreme Court said that "[t]he state is said to hold title only in a sovereign capacity, as trustee for the public good," *id.*, indicating the possibility of an extension of the PTD.

[19] *Id.* § 103G.711. Interestingly, although this statute asserts "fee simple" ownership over riverbeds, and has done so in Minnesota Statutes since at least 1911, *see* 1911 Minn. Laws 291 § 1, courts continue to refer to the state's ownership as being in trust. *See, e.g.*, State v. Slotness, 185 N.W.2d 530, 532 (Minn. 1971) ("[T]he state owns the bed of navigable waters below the low-water mark in trust for the people."). *But see* State v. Longyear Holding Co.,

In 1971 the Minnesota Environmental Rights Act (MERA) gave every citizen both the right to use the natural resources of the state and the responsibility to protect them.[21] In 1973 the Minnesota Environmental Policy Act (MEPA) imposed a state duty "to fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."[22] The cases that interpret and apply these statutes have yet to specifically connect either to the state's duties under the PTD. But the Minnesota legislature, invoking the constitutional provisions as a backdrop, codified the traditional PTD with respect to the beds of navigable waters[23] and, depending on one's reading of the statutes, may have extended the state's trust responsibilities to other lands as well.

Although Minnesota's constitutional and statutory codification of the PTD effectively occupies the field of PTD law in the state, common law recognition of the PTD in Minnesota exists as well. Just seven years after statehood, the Minnesota Supreme Court recognized that "[at] common law rivers navigable in fact are public highways," and declared that a "public easement" exists in the beds of navigable waters for purposes of navigation and commerce, notwithstanding a riparian landowner's title.[24] Subsequent cases affirmed both the public's right to navigation and the state's duty to protect that right.[25] After enactment of the water law,

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29 N.W.2d 657, 669 (Minn. 1947) (stating both that "[a]t the time Minnesota was admitted to statehood it held absolute title, both sovereign and proprietary, to all the beds of navigable waters" and that "the character of the state's title in such lands is frequently defined as sovereign rather than proprietary").

[20] MINN. STAT. ANN. § 84.027 ("The commissioner [of the Department of Natural Resources] shall have charge and control of all the public lands, parks, timber, waters, minerals, and wild animals of the state.").

[21] *Id.* § 116B.01.

[22] *Id.* § 116D.02(2)(1).

[23] *See supra* note 14 and accompanying text.

[24] Schurmeier v. St. Paul & Pac. R.R. Co., 1865 WL 43, at *10 (Minn. 1865), 10 Minn. 82, *aff'd*, 74 U.S. 272 (1868); *see also* Miller v. Mendenhall, 44 N.W. 1141, 1141 (Minn. 1890) (describing the status of PTD in Minnesota at that time as the state holding title to low-water mark in trust for its citizens, the riparian rights being subordinate only to this right, and the public right being limited to activities pursuant to navigation and commerce).

[25] *See In re* Union Depot St. Ry. & Transfer Co., 17 N.W. 626, 629 (Minn. 1883) (affirming that a riparian owner may not interfere with the superior public right of navigation by filling the streambed beyond the point of navigability to extend the riparian owner's land); Lamprey v. Metcalf, 53 N.W. 1139, 1144 (Minn. 1893) (deciding that, although the public right burdens navigable lakes, if the lake dries up to the point that it is no longer navigable,

MERA, and MEPA, the use of "trust" language in case law declined dramatically, most likely because the public and the government then had a statutory framework that redefined the limits of protectable interests in public waterways. This decline in trust language in court decisions does not diminish the importance of the underlying principles of the PTD in decisions interpreting and applying water law, MERA, and MEPA, especially with respect to navigable waters.[26]

3.0 Institutional Application

The Minnesota PTD has not imposed any restraints on private conveyances of riparian land. The PTD in Minnesota does impose upon both the legislature and the MDNR the responsibility to ensure that any actions taken concerning trust lands benefit the public, but Minnesota courts give considerable deference to the legislature and the MDNR in their determinations regarding the public interest.

3.1 Restraint on alienation of private conveyances

Private owners of riparian land appear to have full rights of alienation in Minnesota, subject to the public trust easement encumbering the beds of any navigable waters.[27] Indeed, even though the state may designate water as "public," the legislature has made clear that such a designation abrogates no private rights.[28] However, should a private landowner engage in an exchange of lands with the state, the state requires the private owner to relinquish the mineral

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the dry land becomes the riparian owner's because of the riparian right to relictions, and the public right ceases to exist).

[26] Although case law after enactment of MERA and MEPA may not explicitly speak of the PTD, it does address the public right in state waters as the Minnesota legislature has defined it, and is therefore a useful example of the evolution of the PTD in contemporary Minnesota.

[27] Nelson v. DeLong, 7 N.W.2d 342, 347 (Minn. 1942) (declaring that "[a]ny grant by the riparian owner transfers only rights which are . . . subordinate to the paramount rights of the state" when upholding a village's water ordinances).

[28] MINN. STAT. ANN. § 103G.205 (West 2009).

and water power rights in the lands that he or she receives.[29] Additionally, the "sticks in the bundle" of riparian rights in Minnesota are separable so, for example, a riparian owner may alienate the shoreline itself from the rest of the property.[30]

3.2 Limit on the legislature

The PTD in Minnesota resembles that in many other states concerning its restraint on the legislature's ability to alienate and alter public trust lands. Courts require any change to be for the benefit of all citizens and serve the primary purpose of the PTD, which is to maintain the beds of navigable waters for navigation and other public uses.[31] However, the Minnesota Supreme Court has upheld a lease, but not a fee conveyance, of a navigable lakebed to a mining company, allowing the company to temporarily drain the lake, mine the ore, and then refill the lake.[32] Nevertheless, a later decision ruled that condemning land that once was lakebed to construct a highway was not sufficiently related to public trust purposes to withstand judicial scrutiny.[33]

When the Minnesota legislature has decided to alienate state lands, it has made expressly clear what it does and does not intend to alienate.[34] Even when granting land to the federal

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[29] MINN. CONST. art. XI § 10 (amended 1984); *see also supra* note 11 and accompanying text.

[30] *Nelson*, 7 N.W.2d at 346, 347 ("[R]ights in the shore line and submerged lands along the lake shore may be separated and dissociated from littoral or riparian lands and transferred to and enjoyed by persons having no interest in the original riparian estate.").

[31] State v. Longyear Holding Co., 29 N.W.2d 657, 669–670 (Minn. 1947) (stating that the legislature cannot "divide or parcel [trust land] for sale as it might other lands," because of the duty to preserve the land for "navigation, commerce, and fishing").

[32] *Id.* at 670. In this case the Court ruled that under the PTD the state had the duty to put the lakebed to the "greatest productive and beneficial use for the benefit of all the people," *id.* at 662, and upheld the legislature's discretion as to what was most productive. Riparian landowners maintained that once the mining company had drained the lake, the title to the dry land would vest in them due to reliction, but the court deemed such a temporary removal of water not sufficient to change ownwership of the lakebed the title. *Id.* at 667.

[33] State v. Slotness, 185 N.W.2d 530, 533, 534 (Minn. 1971) (declining to extend *Longyear*'s holding to "the taking of riparian land for highway purposes," because constructing a highway "is not remotely connected with navigation or any other water-connected public use").

[34] *See, e.g.*, MINN. STAT. ANN. § 84B.061 (West 2009) ("Ownership of and jurisdiction over [Rainy, Kabetogama, Namakan, Sand Point, and Crane lakes] has not been ceded by the state, either expressly or implicitly, to the United States.").

government for purposes of creating a national park, the state retained title to the beds of navigable waters located within the park,[35] subject to the federal government's right under the Property Clause to regulate activities on those waters that may interfere with the enjoyment of the land.[36]

Another limit on the legislature's power is that it may not alienate land a private owner dedicates to the public, because the alienation would constitute a violation of the government's trust duty to the private grantor.[37] But the legislature may delegate its public trust responsibilities to other units of government, and indeed it has: not only to the MDNR,[38] but also to smaller localities such as villages.[39] The legislature thus may empower the MDNR and local governments to make decisions regarding the most beneficial ways to steward trust lands.

3.3 Limit on administrative action

The MDNR, the agency primarily responsible for stewarding and administering the public trust in Minnesota, receives a great deal of deference from the Minnesota courts when the courts review agency decisions potentially affecting trust lands. The Minnesota Supreme Court has established a presumption of correctness for agency decisions, further empowering the MDNR.[40] Indeed, the court has stated that its role is to determine whether the agency took a

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[35] *Id.*

[36] U.S. v. Brown, 431 F.Supp. 56, 62–63 (D. Minn. 1976) (deciding that the United States had the power, under the Property Clause of the U.S. Constitution, to prohibit duck hunting on waters of Voyageurs National Park, the beds of which Minnesota owned).

[37] Headley v. Northfield, 35 N.W.2d 606, 609 (Minn. 1949) (ruling that land dedicated to the city for use as a "public square" for "public use" does not belong to the city in a proprietary, alienable manner, and that the city must use it for the purposes for which the landowner dedicated it).

[38] MINN. STAT. ANN. § 84.027 ("The commissioner [of the Department of Natural Resources] shall have charge and control of all the public lands, parks, timber, waters, minerals, and wild animals of the state."); *see also* text accompanying note 20.

[39] Nelson v. DeLong, 7 N.W.2d 342, 348 (Minn. 1942) (upholding both the legislature's delegation of PTD powers to a village and the village's subsequent ordinances).

[40] *In re* Cent. Baptist Theological Seminary, 370 N.W.2d 642, 648 (Minn. Ct. App. 1985) (affirming MDNR's denial of a permit to build a radio tower in a wetland); *see also* Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 824 (Minn. 1977) ("decisions of administrative agencies enjoy a presumption of correctness").

"hard look" at the facts before making its decision.[41] For example, a hearing officer's lack of confidence in the character of people seeking a permit should not outweigh the facts in the administrative record in siting a mine disposal facility.[42] Because most judicial review of administrative action is predicated upon existing statutes like MERA or MEPA instead of the PTD, courts do not frequently describe the agency as administering "public trust" duties; however, insofar as state statues codify the PTD, and require the MDNR to adhere to these statutory mandates, Minnesota courts will scrutinize agency action to ensure compliance with the law.

4.0 Purposes

The Minnesota PTD includes among its protected purposes navigation and the activities traditionally associated with it. The PTD in Minnesota also includes, at least for certain bodies of water, the protection of additional purposes, like the preservation of scenic beauty.

4.1 Traditional (navigation/fishing)

The Minnesota PTD recognizes the traditional purposes of the public interest in navigable waters; that is, navigation and fishing rights.[43] However, in line with the state's reliance on timber as a vital component of the local economy, it has also included log floating as one of the basic protected purposes of the PTD.[44]

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[41] *Reserve Mining*, 256 N.W.2d at 825 (stating as the court's duty "to intervene" when "the agency has not taken a 'hard look' at the salient problems" (citation omitted)).

[42] *Id.* at 830 (ruling that a hearing officer's recommendation that a different site for a taconite mine disposal would be preferable was in error because the proposed site was shown through substantial evidence to be safe, and because the officer erroneously relied on character evidence in making his determination). Although the agency's factual determinations receive deference, the Minnesota Supreme Court will not defer to the judgment of lower courts in making its own determination regarding agency decisionmaking. *Id.* At 824

[43] Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn. 1893) (recognizing that traditional public trust uses in English common law were navigation and fishing).

[44] Crookston Waterworks Power & Light Co. v. Sprague, 98 N.W. 347, 349 (Minn. 1904) (validating a state statute providing that all rivers that can float logs are public waterways but also recognizing log floating as coexisting with the right to reasonable dam construction, so long as log passage remains unimpeded). *But see* Bingenheimer v. Diamond Iron Mining Co., 54 N.W.2d 912, 915 (Minn. 1952) (deciding that although a waterbody could technically

4.2 Beyond traditional (recreational/ecological)

The Minnesota legislature has expanded the scope of the protectable purposes under the PTD to the preservation of scenic value, at least for certain bodies of water like "scenic" rivers.[45] The Minnesota Supreme Court has taken a similarly expansive view of the purposes of the PTD, at one point stating that "sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated" were uses that may make a water "public."[46] In that case, the court stated a preference for the term "public" as opposed to "navigable" as a more correct reflection of the purpose of the Minnesota PTD, but merely suggested that the "old nomenclature" be discarded.[47] Unfortunately, the use of "public" as opposed to "navigable" waters can be misleading today, because the state asserts regulatory, but not necessarily public trust control over "public" waters.[48] Regardless of this potential confusion regarding the geographic application of the PTD, though, should a waterbody in Minnesota be subject to the PTD, the public's rights of use extend beyond navigation and fishing to include recreational and ecological uses.

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float logs for three days out of the year, if the logs could not float anywhere useful for the purposes of commerce, the waterbody did not constitute a "navigable" waterway).

[45] MINN. STAT. ANN. § 103A.208 (West 2009) ("[C]ertain of Minnesota's rivers and their adjacent lands possess outstanding scenic, recreational, natural, historical, scientific and similar values. It is . . . an authorized public purpose to preserve and protect these rivers."). Although this provision has not been interpreted to expand the geographic scope of the state's PTD to uplands, the inclusion of "adjacent lands" may provide a future court the opportunity to do so.

[46] *Lamprey*, 53 N.W. at 1143.

[47] *Id.* at 1143–1144.

[48] Pratt v. Minn. Dep't of Nat. Resources, 309 N.W.2d 767, 771 (Minn. 1981); *see also supra* note 18 and accompanying text.

5.0 Geographic Scope of Applicability

Minnesota takes an expansive view of what constitutes a "public" water,[49] but this definition does not necessarily mean that the state's PTD extends that far. Indeed, in Minnesota, "[a] lake clearly can be public water without having any public access to it."[50] Once designated a "public" water, however, the PTD does not necessarily apply, even though Minnesota asserts regulatory control.[51] The principal distinction between Minnesota's regulatory and public trust control seems to be one of access, meaning that the public may have no rights to access a public water located wholly on private land for recreational or other public trust purposes, but the state can regulate a private landowner's actions concerning the public water, lack of public access notwithstanding.[52]

Another area of uncertainty in the Minnesota PTD is whether the state holds title to the beds of navigable waters to the high-water mark or to the low-water mark. An 1865 Minnesota Supreme Court case was unclear as to whether, in the case of the navigable rivers, riparian owners may hold qualified title to the middle of the stream subject to the public trust, but was certain that they hold unqualified, absolute title to the low-water mark.[53] But some forty years later the Supreme Court recognized that the common law was not clear about whether the low-water mark or the high-water mark was the limit of unqualified riparian rights.[54] More recently, however, the Minnesota Supreme Court ruled that a riparian owner holds title to the low-water

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[49] MINN. STAT. ANN. § 103G.005(15)(a) (West 2009); *see also supra* note 17 and accompanying text.
[50] *In re* Excavation of Erickson Lake, 392 N.W.2d 636, 639 (Minn. Ct. App. 1986) (upholding the MDNR's authority to require a landowner to refill an illegally dug channel).
[51] MINN. STAT. ANN. § 103G.205 (West 2009) (assigning title of "public waters" to any waterway in Minnesota neither abrogates private property interests in submerged lands nor grants the public greater access rights).
[52] *Erickson Lake*, 392 N.W.2d at 639.
[53] Schurmeier v. St. Paul & Pac. R.R. Co., 1865 WL 43, at *10 (Minn. 1865), 10 Minn. 82, *aff'd*, 74 U.S. 272 (1868).
[54] Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn. 1893).

mark, but the land between the high- and low-water marks is public trust land, qualifying a riparian owner's title.[55]

5.1 Tidal

Early in its history, the Minnesota Supreme Court, recognizing that Minnesota is bordered by the Mississippi on the east and Lake Superior on the north, expressed doubt concerning the traditional tidal test to determine the geographic scope of the PTD.[56] Later, the court ruled that the tidal test, because it was based on the geography of England, did not apply to the state of Minnesota.[57]

5.2 Navigable in fact

As early as 1893, Minnesota adopted the navigable-in-fact test for the purposes of the geographic scope of the state's public trust powers and duties.[58] In disputes over the navigability of a waterway for the purposes of title to submerged lands, the Minnesota Supreme Court has stated that navigability must have existed at the time of statehood.[59] The distinction between navigability for title and navigability for public trust purposes is important because public rights in Minnesota may extend to waters that were not navigable for purposes of title at statehood if they are put to uses the state now recognizes as public uses, like recreation.[60] Therefore, a court may refer to a water as navigable if the state asserts regulatory control over it, without

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[55] Mitchell v. St. Paul, 31 N.W.2d 46, 49 (Minn. 1948) (citing Carpenter v. Bd. of Comm'rs of Hennepin County, 58 N.W. 295, 296 (Minn. 1894)); *see also* Gniadek v. Northwestern Improvement & Boom Co., 75 N.W. 894, 894–95 (concluding that when log-driving company lawfully raises the water to the high-water mark, a riparian owner has no recourse unless flooding goes beyond that mark).

[56] *Schurmeier*, 1865 WL 43 at *9 (stating that "rivers navigable in fact are public highways" while not rejecting the tidal test outright).

[57] *Lamprey*, 53 N.W. at 1143.

[58] *Id.* (determining the test of navigability in Minnesota was "navigability in fact, and not the ebb and flow of the tide").

[59] State v. Adams, 89 N.W.2d 661, 686 (Minn. 1958) (concluding that a lake was nonnavigable, and thus ownership of its bed was not in the state, because it was not capable of being used for commerce at the time of statehood); *see also* U.S. v. Holt State Bank, 270 U.S. 49, 55 (1926) (recognizing federal navigability in fact at statehood test was controlling for purposes of state title to bedlands).

[60] *See Lamprey*, 53 N.W. at 1143; *see also* State v. Slotness, 185 N.W.2d 530, 552 (Minn. 1971).

necessarily declaring it was navigable in fact at the time of statehood.[61] Therefore, Minnesota's regulation of public waters, which in many cases overlaps with the PTD, relies not only on state title to those bedlands that are navigable in fact, but also those which are publicly used.

5.3 Recreational waters

As mentioned above concerning the purposes of the PTD in Minnesota,[62] Minnesota recognizes waters used for recreation as public.[63] As early as 1897, the Minnesota legislature declared that the public had rights to lakes greater in area than 160 acres and "deep enough for beneficial use for fishing, fowling" and "boating,"[64] suggesting a geographic reach beyond lakes and rivers large enough for commerce.

5.4 Wetlands

Minnesota exerts regulatory control over wetlands, but the state does not grant the public access rights to all the wetlands it regulates.[65] State regulation allows preservation by prohibiting certain uses of the wetlands.[66] However, Minnesota courts have not explicitly connected regulation of wetlands to the PTD, describing this control as part of the state's police power, rather than the state's powers and duties under the PTD.[67] But by recognizing that the public could "remotely or indirectly benefit[] from the continued existence" of a wetland on private

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[61] *Slotness*, 185 N.W.2d at 552.
[62] *See supra* note 46 and accompanying text.
[63] MINN. STAT. ANN. § 103A.208 (West 2009).
[64] *In re* County Ditch No. 34, 170 N.W. 883, 884 (Minn. 1919) (reversing a decision to permit drainage of a lake).
[65] MINN. STAT. ANN. § 103A.201(2) (stating that "the wetlands of Minnesota provide public value," and that "it is in the public interest to . . . achieve no net loss" of wetlands, but that designating an area as a wetland does not "grant the public additional or greater right of access to the wetlands").
[66] *In re* Eigenheer, 453 N.W.2d 349, 355 (Minn. Ct. App. 1990) (upholding MDNR Commissioner's order to remove fill from a wetland located on private property).
[67] *In re* Application of Christenson, 417 N.W.2d 607, 609 (Minn. 1987) (recognizing the MDNR's authority to prevent the draining of a wetland).

property, the Minnesota Supreme Court created the possibility for increased public trust application to privately-owned wetlands.[68]

5.5 Groundwater

The state of Minnesota regulates groundwater,[69] but its courts have not interpreted this regulation to mean that the state has public trust powers over the groundwater. The Minnesota Supreme Court has also ruled that groundwater use rights are subject to regulation as a valid exercise of the state's police power.[70] However, given the frequent conflation of police power and public trust duties in Minnesota statutory and case law,[71] a future court could rule that the regulation of groundwater is a trust duty, especially since the passage of the Great Lakes–St. Lawrence River Basin Water Compact that asserts trust responsibilities over the Great Lakes and prescribes groundwater management rules.[72]

5.6 Wildlife

A few Minnesota court cases refer to the state's relationship to wildlife as that of a "trustee."[73] By statute, Minnesota asserts ownership over wildlife "in its sovereign capacity for the benefit, of all the people of the state."[74] But Minnesota courts consider that regulation of the

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[68] *Id.* at 614.
[69] *See* MINN. STAT. ANN. §§ 103H.001–103H.280 (West 2009).
[70] Crookston Cattle Co. v. Minn. Dep't of Nat. Resources, 300 N.W.2d 769, 774 (Minn. 1980), *reh'g denied*, 1981 (upholding MDNR Commissioner's order permitting a city to appropriate groundwater but denying a similar permit to a private company because a state statute grants priority to domestic uses when allocating groundwater, which the court determined codified Minnesota common law granting priority to municipalities).
[71] *See, e.g.*, Lyman v. Chase, 226 N.W. 633, 633 (Minn. 1929) (upholding state statute creating wildlife preserve); *see also infra* note 76 and accompanying text.
[72] *See* MINN. STAT. ANN. § 103G.801 (West 2009); *see also* Bridget Donegan, *The Great Lakes Compact and the Public Trust Doctrine: Beyond Michigan and Wisconsin Common Law*, 24 J. Envtl. L. & Litig. (forthcoming 2009) (manuscript at 19–20, on file with author) (asserting that the Great Lakes Compact created a unique PTD for groundwater within the Great Lakes basin).
[73] Minn. Valley Gun Club v. Northline Corp., 290 N.W. 222, 224 (Minn. 1940) (clarifying the distinction between state ownership of wildlife and the landowner's right to wildlife on private land); Hanson v. Fergus Falls Natl. Bank, 65 N.W.2d 857, 862, 866 (Minn. 1954) (describing the state's relationship to game when settling a dispute over the right to hunt on private land).
[74] MINN. STAT. ANN. § 97A.025 (West 2009).

taking of wildlife derives from the police power, not the state's public trust duties.[75] Nevertheless, courts have a tendency to conflate the police power and the PTD; for example, one court stated that the state "holds [wildlife] for the use and benefit of all," implying a trust responsibility, while simultaneously stating that regulating wildlife is a valid exercise of police power.[76] Ultimately, Minnesota's assertion of ownership of wildlife may require the state to do more than merely regulate harvests but also to embrace affirmative duties to maintain the trust in wildlife.[77]

5.7 Uplands

Minnesota has yet to extend the PTD to uplands.[78] But if an individual dedicates land to public use, the state holds the land in trust and may not alienate or convert its use to anything other than the purpose for which the owner dedicated it.[79] The state legislature has also recognized the value of lands adjacent to scenic rivers when it declared state policy regarding scenic river preservation.[80] Thus, although the state does not uniformly assert a public trust right over land, the state could expand its reach to uplands, due to its recognition of its trust responsibilities over dedicated land and lands adjacent to scenic rivers.[81]

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[75] State v. Rodman, 59 N.W. 1098, 1099 (Minn. 1894) (asserting that state has the power to regulate the hunting of game to preserve the game for future citizens); *see also* State v. Tower Lumber Co., 110 N.W. 719, 720 (Minn. 1907) (referring to *Rodman*, which recognized wildlife regulation as an exertion of police power).

[76] *Lyman*, 226 N.W. at 633.

[77] *See* Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 709 n. 241, 713 (2005) (referring to Minnesota's statute as a codification of the state ownership doctrine and indicating a similarity between the state ownership and public trust doctrines).

[78] Larson v. Sando, 508 N.W.2d 782, 787 (opining that if the public trust doctrine *did* apply to land, the sale in this case would be violating it, but because the PTD in Minnesota does not extend to land the sale was valid).

[79] *See supra* note 37 and accompanying text; *see also* Zumbrota v. Strafford Western Emigration Co., 290 N.W.2d 621, 622–23 (Minn. 1980) (interpreting dedication of land to city as creating a trust responsibility and denying city the ability to alienate the land for a senior citizens' home).

[80] MINN. STAT. ANN. § 103A.208 (West 2009) ("[C]ertain of Minnesota's rivers and their adjacent lands possess outstanding scenic, recreational, natural, historical, scientific and similar values. It is . . . an authorized public purpose to preserve and protect these rivers.").

[81] The state also has a program administering state "Consolidated Conservation" lands, which, according to the MDNR, are "held in the public trust specifically for conservation purposes." *See* MINN. DEP'T OF NATURAL RES., CONSOLIDATED CONSERVATION [CON-CON] LANDS LEGISLATIVE REPORT 1, (Jan. 15, 2003) *available at*

6.0 Activities Burdened

Although the line between PTD powers and police powers is not always clear, the Minnesota PTD, as codified in state statutes and regulations, seems to encumber landowner attempts to use land in a way that could affect public rights or cause undue environmental harm. Such encumbrances extend to wetland destruction, water appropriation, and takings of wildlife.

6.1 Conveyances of property interests

As mentioned above,[82] a riparian owner in Minnesota has the ability to alienate riparian rights without alienating the entire parcel of riparian land. This ability to alienate the "sticks" in their riparian "bundle" includes, for example, selling the right to build a dock on the shore.[83] The alienated portion, however, will still be subject to the superior public trust rights of the state and the public.[84]

6.2 Wetland fills

Minnesota's express policy towards wetlands favors preservation.[85] As early as 1919, the Minnesota Supreme Court recognized that marshy areas once considered waste lands may actually be valuable public resources, which the state had the responsibility to protect.[86] Even though Minnesota statutes proclaim that wetland regulation does not impair "existing rights,"[87] an owner of a parcel containing a wetland may not, for example, enlarge drainage ditches that a predecessor in interest had created prior to the statute's enactment, where the enlargement would

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http://files.dnr.state.mn.us/input/mgmtplans/concon/legislativereport0103.pdf (last visited Dec. 2, 2009). However, neither the statutes nor the regulations concerning these lands refer to the lands as trust lands, and no Minnesota court has interpreted the laws as imposing a trust duty. *See* MINN. STAT. ANN. §§ 84A.55–.56 (West 2009); MINN. R. 6115.1510 (2009).

[82] *See supra* note 27 and accompanying text.

[83] Nelson v. DeLong, 7 N.W.2d 342, 346 (Minn. 1942).

[84] *Id.* at 347.

[85] MINN. STAT. ANN. § 103A.201(2)(b) (West 2009) ("[I]t is in the public interest to . . . achieve no net loss in the quantity . . . of Minnesota's existing wetlands.").

[86] *In re* County Ditch No. 34, 170 N.W. 883, 885 (Minn. 1919) (denying petition to drain a lake because it would damage public rights to the lake without providing measurable public benefit).

[87] MINN. STAT. ANN. § 103A.201(2).

result in the substantial draining of the wetland.[88] "Existing rights," according to the Minnesota Supreme Court, extend only to existing riparian rights, which do not include wetland destruction.[89] The courts have not specifically connected these statutes to the state's public trust duties, but the reasoning in the cases is similar enough to merit mentioning.

6.3 Water rights

In Minnesota, irrespective of who owns the beds of navigable waters, riparian owners have the right to use the entire surface of a lake, even if they only own part of the adjacent shore, subject to the same right of other riparian owners.[90] In this respect, Minnesota adheres to the reasonable use doctrine.[91] However, with respect to appropriations of water, the state legislature has expressly authorized the MDNR to regulate riparian rights.[92] Courts interpreting the water rights legislation have not specifically connected the statute to the state's trust duties, but the assertion of power is sufficiently analogous to a trust power that a court may do so in the future.

6.4 Wildlife harvests

As previously mentioned with respect to the PTD's extension to wildlife,[93] the state may regulate the taking of wild animals to preserve them for future generations.[94] Perhaps limited to

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[88] *In re* Application of Christenson, 417 N.W.2d 607, 614 (Minn. 1987) (affirming the MDNR's denial of a permit because the right to drain a wetland is not one of the "existing rights" the statute intends to protect). *But see* Krnpotich v. Duluth, 483 N.W.2d 55, 57 (Minn. 1992) (concluding that trial court did not err in deciding that where a wetland was already degraded, and development of the land would clean up existing waste, create jobs, and help the local economy the public benefits of development outweighed the importance of preserving a wetland, even though the wetland qualified as a natural resource as defined in the MERA).

[89] *Id.*

[90] Johnson v. Seifert, 100 N.W.2d 689, 697 (Minn. 1960) (deciding that riparian owners could not exclude other riparian owners from use of part of the lake by building a fence through it).

[91] Petraborg v. Zontelli, 15 N.W.2d 174, 182 (Minn. 1944) (upholding an injunction prohibiting a mining company from draining a lake because the activity constituted an unreasonable use of riparian property).

[92] MINN. STAT. ANN. § 103G.255 (West 2009).

[93] *See supra* § 5.6.

[94] MINN. STAT. ANN. § 97A.025 (West 2009).

Minnesota and a few other states, the taking of wild rice from a public water is also an activity the PTD, as codified in statute, may reach.[95]

7.0 Public standing

In Minnesota, the public's right to sue exists under the Minnesota Environmental Rights Act (MERA).[96] However, should a public trust claim arise in a situation unrelated to the MERA, the public's right to sue is less clear.

7.1 Common law-based

Although little case law exists on point, common law public standing in Minnesota under the PTD resembles that of common law nuisance in that the plaintiffs must allege an injury different from that of the general public.[97] Because of this special injury requirement, plaintiffs invoking the PTD may fare better using statute-based standing law.

7.2 Statutory basis

Under the Minnesota Environmental Rights Act (MERA) any person has the ability to sue any other person within the state for the protection of any natural resource within the state.[98]

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[95] Pratt v. Minn. Dep't of Nat. Resources, 309 N.W.2d 767, 774 (Minn. 1981) (remanding for fact-finding as to whether there was substantial diminution in the value of the property and, if not, determining the MDNR's barring of a riparian owner from using a mechanical rice harvester on a wetland newly designated as public under state statute would not be a taking); MINN. STAT. ANN. § 84.152 (West 2009). The state also regulates the taking of wild ginseng. MINN. STAT. ANN. § 84.093 (West 2009).

[96] MINN. STAT. ANN. § 116B.03 (West 2009).

[97] *See* Viebahn v. Bd. of Comm'rs of Crow Wing County, 104 N.W. 1089, 1094 (Minn. 1905) (business owners could maintain a public nuisance action, even though the general public suffered injury from a bridge obstructing passage on navigable waters, because the obstruction affected the businesses more acutely). *But see* Prior Lake Sportsmen's Club v. Prior Lake, No. C2-99-1552, 2000 WL 665638, at *1–2 (Minn. Ct. App. 2000) (stating that a club had no standing to sue for breach of public trust when a city erected a fence and narrowed a roadway that provided access to a lake because the club's injuries were not different from that of the general public); *accord* Channel 10, Inc. v. Indep. Sch. Dist. No. 709, 215 N.W.2d 814, 820 (Minn. 1974) ("Citizen standing to maintain actions in the public interest without express statutory authority has generally been disallowed absent some damage or injury to the individual bringing the action which is special or peculiar and different from damage or injury sustained by the general public.").

[98] MINN. STAT. ANN. § 116B.03 (West 2009) ("Any person . . . may maintain a civil action . . . for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of the . . . natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction."). Important to note, though, is that the public loses the right to sue an individual once the MDNR or

Citizens may also intervene in any administrative proceeding or judicial review when the state's environmental quality or natural resources may be in danger of impairment.[99] Similarly, any individual can bring an action against the state for declaratory or equitable relief; however, the plaintiff has the burden of proof to show that the state's action either causes or is ineffective in preventing harm to natural resources.[100]

7.3 Constitutional basis

The Minnesota constitution provides no explicit right of public standing to enforce the public trust doctrine.

8.0 Remedies

The remedies for violations of the PTD in Minnesota include injunctive relief and damages if the state is the party seeking the remedy. The state has also successfully used the PTD as codified in state statutes as a defense against takings claims.

8.1 Injunctive relief

Consistent with the public's right to intervene in any administrative action or judicial review, as well as the right to institute an action on behalf of the state, the public may seek to enjoin action that may constitute harm to the state's natural resources[101] and, by their implicit

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other appropriate agency issues a permit for any activity that may impair trust resources. However, citizens could still sue the agency challenging the issuance of the permit. *Id.* § 116B.10.

[99] MINN. STAT. ANN. § 116B.09 (West 2009).

[100] *Id.* § 116B.10. *See* Corwin v. Crow Wing County, 244 N.W.2d 482, 486 (Minn. 1976) (reversing the district court's grant of summary judgment to plaintiff seeking a conditional use permit because the county board put forth sufficient rebuttal evidence against an allegation of an abuse of discretion to raise factual issues requiring a trial), *overruled on other grounds by* Nw. College v. City of Arden Hills, 281 N.W.2d 865 (Minn. 1979); *see also* Schwardt v. City of Watonwan, 656 N.W.2d 383, 387 (Minn. 2003) (affirming county's approval of a hog farm because plaintiffs failed to carry their burden of showing that the proposal did not meet standards established in a county ordinance).

[101] MINN. STAT. ANN. § 116B.03, .07; *see also* County of Freeborn v. Bryson, 210 N.W.2d 290, 294 (Minn. 1973) (upholding statute's allowance of "[a]ny person" to sue for "declaratory or equitable relief").

inclusion in the MERA,[102] resources subject to the PTD. Indeed, if a reasonable alternative exists to a proposed activity that would damage protected resources, the court has an affirmative duty under the MERA to enjoin the activity.[103]

8.2 Damages for injuries to resources

Although a riparian landowner in Minnesota may recover damages for injuries to riparian property,[104] the only remedy available to citizens explicitly by statute for damages to PTD resources is equitable or declaratory relief, including the imposition of conditions necessary to protect state resources.[105] In addition, if the court grants a temporary injunction, it may also require the plaintiff to post a bond in the event the defendant prevails.[106] The MDNR, however, provides additional remedy in that it authorizes the state to sue private landowners for damage done to public waters, even if that means forcing landowners to incur costs to repair their own land.[107]

8.3 Defense to takings claims

The state has successfully employed the PTD, usually in the context of the MERA or state water laws, to defend against takings claims. Even when regulations limit existing riparian rights, courts have upheld the validity of the regulation because riparian rights are subordinate to

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[102] MINN. STAT. ANN. § 116B.01 ("[T]he legislature further declares its policy . . . that the present and future generations may enjoy clean air and water, productive land, and other natural resources."); *see also id.* § 116B.02 (defining "natural resources" to include all land and water resources).

[103] County of Freeborn v. Bryson, 243 N.W.2d 316, 321 (Minn. 1976) (enjoining a county from building a highway on a marsh because a practicable alternative existed).

[104] Torgerson v. Crookston Lumber Co., 144 N.W. 154, (Minn. 1913) (reversing for further factual findings, but determining that if a corporation responsible for operating dams and floating logs on a river either intentionally released water from a dam or negligently caused a log jam that resulted in the flooding of riparian lands, riparian plaintiffs could recover damages).

[105] MINN. STAT. ANN. § 116B.07 (West 2009).

[106] *Id.*

[107] *In re* Excavation of Erickson Lake, 392 N.W.2d 636, 640 (Minn. Ct. App. 1986) (recognizing that a statute prohibiting alteration of watercourses as providing MDNR Commissioner with power to "order . . . *any action* necessary to restore the waters" and upholding the Commissioner's order that landowners fill in dredging previously done).

those of the public.[108] However, certain actions, like the flooding of riparian lands above the high water mark, may constitute a taking warranting just compensation.[109] Additionally, if the state attempts to make use of trust lands in a way that simultaneously encroaches upon riparian rights and represents a use not within the scope of the PTD, Minnesota courts will find a compensable taking.[110] Thus, so long as the MDNR or the legislature act under the auspices of valid statutes, a court will uphold their actions, but if the regulation encroaches so extensively on riparian rights as to permanently eliminate them, as in the case of flooding riparian land, a court may find a taking.

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[108] State v. Kuluvar, 123 N.W.2d 699, 706 (Minn. 1963) (clarifying that enforcing a regulation authorizing the state to "fulfill its trusteeship over [public] waters by protecting against interference by . . . those who assert the common-law rights of a riparian owner" does not effect a taking); *see also* ; *but see* Pratt v. Dep't of Nat. Resources, 309 N.W.2d 767, 774 (Minn. 1981) (acknowledging that a taking may have occurred in the implementation of a regulation of wild rice harvesting because the regulation restricted the way the owner could harvest the rice, thus resulting in economic harm, and remanding to determine whether the regulation substantially diminished the value of riparian owner's land).

[109] Carpenter v. Bd. of Comm'rs of Hennepin County, 58 N.W. 295, 297 (Minn. 1894) (reversing prior proceedings allowing flooding of riparian lands without compensating the owners).

[110] State v. Slotness, 185 N.W.2d 530, 533 (Minn. 1971) (declaring that, when a riparian owner lawfully extended his dry land to the point of navigability, the state could not take that land to build a highway without paying just compensation); *see also supra* note 33 and accompanying text.

MISSISSIPPI

The Public Trust Doctrine in Mississippi

Lorena Wisehart

1.0 Origins

The public trust doctrine (PTD) originated in ancient times as a recognition that the public shares the air and certain waters.[1] English law adopted this concept and asserted that the Crown held title to submerged lands beneath navigable waters, subject to rights of public to use those waters for navigation and fishing.[2] This common-law doctrine was carried over into the United States, including Mississippi.[3] Mississippi received lands covered by tide waters, in trust, upon its admission to the Union in 1817 under the equal footing doctrine.[4] As a result, the state became vested as trustee, holding title to these lands "in trust for the people, for the purposes of navigation, fishing, bathing and similar uses." [5]

2.0 The Basis

The basis of the Mississippi PTD is the Mississippi Constitution, state statutes, and state common law. The state's constitution contains a provision protecting the public's "freedom to navigate,"[6] but the PTD has been expanded through acts of the state legislature recognizing tidelands and coastal wetlands as trust resources, and through the Mississippi Supreme Court's recognition of the PTD as an expansive doctrine.

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[1] *See, e.g.*, Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475–478 (1970) (discussing the historical background of the public trust doctrine).
[2] *Id.* at 476.
[3] *Id.*
[4] Stewart v. Hoover, 815 So. 2d 1157, 1160 (2002).
[5] Treuting v. Bridge & Park Comm'n of City of Biloxi, 199 So. 2d 627, 632 (Miss. 1967).
[6] MISS. CONST. art 4, § 81 ("The Legislature shall never authorize the permanent obstruction of any of the navigable waters of the State, but may provide for the removal of such obstructions as now exist, whenever the public welfare demands.").

In 1973, the state legislature passed the Coastal Wetlands Protection Act (CWPA),[7] declaring the "public policy" of the state to "favor the preservation of the natural state of the coastal wetlands and their ecosystems and to prevent the despoliation and destruction of them, except where a specific alteration of specific coastal wetlands would serve a higher public interest in compliance with the public purposes of the public trust in which coastal wetlands are held."[8] The CWPA expanded the PTD beyond navigable waters to include coastal wetlands and their ecosystems.

Mississippi courts have addressed application of the PTD to tidal waters. In *Cinque Bambini Partnership v. State* (*Cinque Bambini*), the Mississippi Supreme Court defined the extent of the PTD, ruling that the state owned "all lands naturally subject to tidal influence, inland to today's mean high water mark."[9] In *Phillips Petroleum v. Mississippi*, the United States Supreme Court upheld that decision and established that the PTD extends to all tidal waters, not just navigable tidewaters.[10] In response to *Phillips Petroleum*, the Mississippi legislature enacted the Public Trust Tidelands Act (PTTA) in 1989.[11]

By enacting the PTTA, the Mississippi legislature hoped to resolve uncertainty about the location of the boundary between the state's public trust tidelands and upland properties.[12] The

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[7] Miss. Code Ann. § 49-27-1 et seq. (West 2011).
[8] *Id.* § 49-27-3.
[9] 491 So. 2d 508, 510–511 (1986) *aff'd sub nom.* Phillips Petroleum v. Mississippi, 484 U.S. 469 (1988).
[10] Phillips Petroleum v. Mississippi, 484 U.S. 469 (1988).
[11] Miss. Code Ann. § 29-15-1 et seq. (West 2011).
[12] *Id.* § 29-15-3(2).

> It is hereby declared to be a higher public purpose of this state and the public tidelands trust to resolve the uncertainty and disputes which have arisen as to the location of the boundary between the state's public trust tidelands and the upland property and to confirm the mean high water boundary line as determined by the Mississippi Supreme Court, the laws of this state and this chapter.

Id.

PTTA directed the Mississippi Secretary of State to delineate the boundary of the public trust tidelands by designating public trust lands as everything below the mean high tide line as of the 1973, the year the CWPA was enacted.[13] The PTTA also explicitly provides "tidelands and submerged lands are held by the state in trust for use of all the people, and are so held in their character as the beds and shores of the sea and its tidally affected arms and tributaries for the purposes defined by common law and statutory law."[14] Mississippi law thus explicitly recognizes the PTD as it relates to tidelands and submerged lands of the state.

3.0 Institutional Application

The state constitution and common law recognize that the PTD restricts legislative and administrative actions of the state, largely through restraining the state's ability to alienate public trust lands.

3.1 Restraint on alienation

The state constitution and common law recognize restraint on alienation of trust lands. The Mississippi constitution states, "lands belonging to or under the control of the state, shall never be donated directly or indirectly to private corporations or individuals, or to railroad

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[13] *Id.* §§ 29-15-3(2); 29-15-7 (directing the Secretary of State to prepare a preliminary tidelands map "depict[ing] the boundary as the current mean high water line where shoreline is undeveloped and in developed areas or where there have been encroachments . . . depict[ing] the boundary as the determinable mean high water line nearest the effective date of the [CWPA]"). The Mississippi Supreme Court has twice upheld the constitutionality of the PTTA. *See* Secretary of State v. Wiesenberg, 633 So. 2d 983, 999 (Miss. 1994); Columbia Land Dev., v. Secretary of State, 868 So. 2d 1006, 1011 (Miss. 2004) (relying on *Wiesenberg* to reject littoral landowners claim that the PTTA was unconstitutionally vague).

[14] *Id.* § 29-15-5 amended by 2012 Miss. Laws Ch. 403 (S.B. 2557). Mississippi also recognizes that while "[l]ittoral and riparian property owners have common law and statutory rights . . . which extend into the waters and beyond the low tide line, . . . the state's responsibilities as trustee extends to such owners as well as to the other members of the public." *Id.*

companies."[15] The Mississippi Supreme Court has explained that once land is held by the state in trust, the state may alienate only with specific legislative authority, and then only consistent with the public purposes of the trust.[16] The state can dispose of fee simple title to property held in trust only to serve a "higher public purpose" that is not detrimental to the general public.[17] Mississippi courts have also recognized that the state's title to land for the public use or benefit cannot be lost via adverse possession, limitations, or by laches.[18]

3.2 Limit on legislature

The Mississippi legislature may authorize the state's public trust lands to be conveyed when such action is consistent with the purposes of the trust. In *Treuting v. Bridge and Park Commission of City of Biloxi*, the Mississippi Supreme Court upheld the legislature's sale of trust lands to the Biloxi Park Commission.[19] In *Treuting*, the state conveyed 12.58 acres of trust lands in fee simple pursuant to legislative authorization for a development project on Deer Island.[20]

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[15] MISS. CONST. Art. 4, § 95. *See also* Mississippi State Highway Comm'n v. Gilich, 609 So. 2d 367, 374 (Miss. 1992) (finding the language of section 95 of the constitution "plain and unequivocal" that once the state possesses public trust lands it is deemed to possess such property forever).

[16] *Cinque Bambini*, 491 So.2d at 519; *Wiesenberg*, 633 So. 2d at 999; Int'l Paper Co. of Moss Point v. Miss. State Highway Dep't., 271 So. 2d 395, 398 (Miss. 1972).

[17] *Wiesenberg*, 633 So. 2d at 987. *But see* Treuting v. Bridge & Park Comm'n of City of Biloxi, 199 So. 2d 627, 633 (Miss. 1967) (upholding sale of public trust tidelands because the proposed development would not substantially interfere with navigation or fishing and was consistent with the public trust). *See also* Miss. Code Ann. § 29-15-3(1) (2011) (stating that public policy of the state favors preserving trust tidelands in their natural state and that despoliation and destruction of those lands should be prevented except where specific alteration would serve a higher public interest); Illinois Central R.R. v. Illinois, 146 U.S. 387, 452–54 (1892) (explaining that "[t]he control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining").

[18] *Cinque Bambini*, 491 So. 2d at 519.

[19] 199 So. 2d at 634.

[20] *Id.* at 629. In 1960 the Mississippi legislature passed a statute that allowed for the "development of offshore islands in the Mississippi Sound lying within three leagues of the corporate limits of a municipality . . . [and] authorized the governing authorities of a

The Deer Island project included dredging of the adjacent channel and deposition of the dredged material on the submerged trust lands, increasing the size of Deer Island.[21] The court upheld the conveyance because the "totality of the development promotes the public interest in general," and therefore "the incidental private ownership" of some of the conveyed land was permissible given the overall purpose of the project to serve the public interest in accommodating an expanding population, commerce, tourism and recreation.[22] The court reasoned there would not be a "substantial interference with the original purposes of the trust."[23]

However, in *International Paper Co.*, the Mississippi Supreme Court decided that the legislature did not have the authority to convey, in fee simple for private purposes, marshlands as well as accreted lands which had risen above mean high tide.[24] International Paper sought to enjoin the state from entering or claiming title to certain lands on Lowry Island.[25] In 1884, the Mississippi Legislature had authorized sale of the lands, and in the late 1800's and early 1900's

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municipality to create a bridge and park commission, with the powers of eminent domain and the purchase and sale of land, including the right to purchase an island in whole or in part situated in the Mississippi Sound." *Id.*; Miss. Code. Ann. § 55-7-13 ("Said commission shall have the power to dredge, fill in and reclaim submerged lands adjacent to any such island or islands and to develop and utilize the same for any of the purposes set forth in this chapter, including the financing of the authorized public improvements.").

[21] *Id.*

[22] *Id.* at 633–634 (stating "[i]n short, because the overall purposes of the proposed development of Deer Island promote a large number of public interests and uses, the incidental private ownership of parts of the development is not inconsistent with the public trust in the submerged lands. In essence it is an effectual development and discharge of this trust").

[23] *Id.*

[24] Int'l Paper Co. of Moss Point v. Mississippi State Highway Dept., 271 So. 2d 395, 399 (Miss. 1972). At the time of statehood, the lands consisted of islands and marshes subject to overflow from the Gulf of Mexico during high tides, but between 1817 and 1884 natural accretion caused some of the lands to no longer be tidally inundated. *Id.* at 396. Because the accreted lands were not contiguous to any private property, the court reasoned "there would seem to be little doubt" that they were state property. *Id.* at 398.

[25] *Id.* at 396.

the state issued patents to the lands to International Paper's predecessor.[26] Titles to the lands were later conveyed to International Paper, but the state disputed that title to the lands was conveyed. [27] The State sought to construct a highway over the disputed lands and International Paper sued, seeking to cancel the state's claim to the land and enjoin Mississippi's Highway Department from constructing the highway without obtaining a proper right of way.[28] The Mississippi Supreme Court distinguished *Treuting*, characterizing that case as "an exception to the general rule which prohibits the sale by a trustee to anyone for a private purpose" and stating the holding in *Treuting* was restricted to the circumstances of that case and the legislature properly authorized the sale "because a public purpose resulted which was clearly paramount to the private interest." Finding no such public purpose behind the conveyance of the Lowry Island lands, the Mississippi Supreme Court concluded the legislature's authorization of the transfer was invalid.[29]

3.3 Limit on administrative action

In Columbia Land Dev., LLC v. Secretary of State (*Columbia Land*), the Mississippi Supreme Court determined that the Secretary of State, as "trustee for all public lands in Mississippi, including the public trust tidelands,"[30] is entitled to make independent decisions as to whether or not to grant lease approvals for public trust lands.[31] In *Columbia Land*, littoral

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[26] *Id.* at 396–97.
[27] *Id.* at 397 (stating that International Paper took possession of and paid taxes on the land starting in 1967 but several Attorney General opinions claimed that title to the lands "remains vested in the sovereign").
[28] *Id.*
[29] *Id.* (stating that *Treuting* " is not authority for nor does it lend validity to the act of the legislature in 1884 which attempted to authorize the sale of the state's trust lands lying between the east and west branches of the Pascagoula River to private persons for private purposes").
[30] *Columbia Land*, 868 So. 2d 1006, 1011 (Miss. 2004); Miss. Code Ann. § 7-11-11 (West 2011); *Wiesenberg*, 633 So. 2d at 997.
[31] 868 So. 2d at 1011.

property owners unsuccessfully challenged the Secretary of State's decision not to approve a proposed lease of public tidelands for gaming.[32] Even though the state gaming commission had approved use of the lands for gaming, the court determined that the Secretary of State was responsible for preserving the public trust tidelands and was not required to approve leases upon approval by other state agencies.[33]

4.0 Purposes

In Mississippi, the PTD historically recognized the traditional purposes of commerce, navigation and fisheries.[34] However, purposes of the Mississippi public trust have "evolved with the needs and sensitivities of the people and the capacity of trust properties through proper stewardship to serve those needs."[35] Consequently, the Mississippi PTD recognizes more than just the traditional public uses.

4.1 Traditional

Mississippi courts have long recognized that the PTD extends to traditional trust purposes of navigation, fishing, and commerce.[36] Floating logs downriver was a common practice used to

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[32] *Id.*

[33] *Id.* (reasoning that decisions of other agencies did not limit the Secretary's discretion to grant tidelands leases under the PTTA).

[34] Rouse v. Saucier's Heirs, 146 So. 291, 292 (1933) (recognizing that upon statehood, Mississippi became vested as trustee with "the title to all the land under tide-water, including the spaces between ordinary high and low water marks; this title of the state being held for public purposes, chief among which purposes is that of commerce and navigation, for which latter purposes the title of the state is subservient to such regulations as may be constitutionally made by the national government, in said matters of navigation and commerce").

[35] *Wiesenberg*, 633 So. 2d at 988–89; *see also Cinque Bambini*, 491 So. 2d at 511 ("The public purposes to which these lands and waters placed in the public trust may be devoted are not static.").

[36] *Rouse*, 146 So. at 292; Martin v. O'Brien, 34 Miss. 21 (1857); State ex rel Rice v. Stewart, 184 So. 44, 50 (1938). *See also* Dycus v. Sillers, 557 So. 2d 486, 498 (Miss. 1990) (recognizing that although purposes of the PTD have evolved, "fishing–whether for food, commerce, sport or recreation–has always been recognized and respected").

transport timber to market, and the Mississippi Constitution and Mississippi courts have thus recognized logging as a traditional use of public waters as well.[37]

4.2 Beyond traditional

The Mississippi PTD has expanded beyond traditional purposes to include recreational activities and mineral resource development.[38] The state has also extended the PTD to ecological preservation. The state legislature has created an ecological public trust by incorporating the PTD into state statutes that go beyond navigation or even fishing.[39] For example, the PTTA calls for the "preservation of the natural state of the public trust tidelands and their ecosystems."[40] As a result, Mississippi's PTD has evolved to include environmental protection, and preservation.[41] Similarly, Mississippi's Coastal Wetlands Protection Act (CWPA) recognizes a public trust in coastal wetlands and declares state policy to preserve them and their ecosystems, "except where a specific alteration of specific coastal wetlands would serve a higher public interest in compliance with the public purposes of the public trust in which coastal wetlands are held."[42] In 1986, citing to this Act, the Mississippi Supreme Court declared that the public uses protected through the public trust doctrine included environmental protection

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[37] Smith & Hambrick v. Fonda, 1 So. 757, 758 (1887); MISS. CONST. Art. 4, § 81 (providing for logs to have safe passage down rivers).
[38] Treuting v. Bridge & Park Comm'n. of City of Biloxi, 199 So. 2d 627, 632-33 (Miss. 1967); *see also* Miss. Code Ann. 49-27-8 (recognizing swimming, hiking, boating, and other recreation as traditional protected public uses not subject to permit requirements); Ryals v. Pigott, 580 So. 2d 1140, 1152 (Miss. 1990) (extending the PTD to cover canoeing and inner tubing in a river).
[39] Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 835 (2010).
[40] Miss. Code Ann. § 29-15-3(2) (West 2011).
[41] *Id.* §§ 49-27-3, 5(a).
[42] *Id.* § 49-27-3.

as well as preservation and enhancement of aquatic and marine life.[43] The CWPA thus expanded the scope of the Mississippi PTD beyond traditional uses.

5.0 Geographic Scope of Applicability

According to the Mississippi Supreme Court, public trust lands include "[t]he soil, and . . . the minerals therein contained, the beds of all its shores, arms and inlets of the sea, wherever the tide ebbs and flows."[44] Although the state owns the lands below tidewaters inward to the mean high tide line in trust for the public, lands below navigable fresh waters are susceptible of wholly private ownership and the public may be excluded from such waters.[45] The equal footing doctrine placed the "tidelands and navigable waters of the state together with the beds and lands underneath same" in trust held by the state. [46] The Mississippi public trust doctrine also applies to "sixteenth section" school lands.[47]

5.1 Tidal

Mississippi's PTD extends to all tidelands up to the mean high water level, regardless of whether those waters are navigable.[48] In 1988 the United States Supreme Court confirmed that

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[43] *Cinque Bambini*, 491 So.2d 508, 517 (Miss. 1986).
[44] State ex rel. Rice v. Stewart, 184 So. 44, 49 (Miss. 1938) (reversing the lower court and holding that a navigable tidal arm of the Mississippi Sound was owned by the state and within the public trust and that the State was therefore entitled to damages for trespass to trust property resulting from sand and gravel dredging in the waterway).
[45] *Cinque Bambini*, 491 So.2d at 517.
[46] *Id.* at 511.
[47] Bayview Land Ltd. v. State ex rel. Clark, 950 So.2d 966, 972 (Miss. 2006); *Wiesenberg*, 633 So.2d at 987; Turney v. Marion County Bd. of Educ., 481 So.2d 770 (Miss. 1985); State ex rel. Rice v. Stewart, 184 So. 44, 49 (Miss. 1938).
[48] Martin v. O'Brien, 34 Miss. 21, 36 (1857) ("[T]he shores of the sea below the high water mark belong to the [s]tate as trustee for the public."); *see also Cinque Bambini*, 491 So. 2d at 514 ("[A]s a matter of federal law, the United States granted to this State in 1817 all lands subject to the ebb and flow of the tide and up to the then mean high water level, without regard to navigability."); Columbia Land Dev. v. Secretary of State, 868 So. 2d 1006, 1011 (Miss. 2004) (explaining the Mississippi Supreme Court had "long recognized that the tidelands are a part of the public trust").

upon entering the Union, Mississippi received in trust all lands beneath tidewaters, regardless of navigability.[49] Title to all lands naturally subject to tidal influence, inland to the mean high water mark, is therefore held by the state of Mississippi in trust.[50] In *Cinque Bambini*, the Mississippi Supreme Court explained that excluding non-navigable tidewaters would be inconsistent with protecting the purposes of the public trust.[51]

In 1989, the Mississippi legislature passed the Public Trust Tidelands Act (PTTA),[52] which defined trust tidelands as "those lands which are daily covered and uncovered by water by the action of the tides, up to the mean line of the ordinary high tides."[53] The legislature directed the Secretary of State to provide further clarity on the extent of the public trust by mapping the boundary of the state's public trust tidelands.[54] The Act authorized the Secretary to prepare a preliminary tidelands map delineating the tideland boundary for undeveloped or unfilled areas as the current mean high water line, but setting the boundary at the 1973 mean high water line for filled lands.[55] Landowners challenged this boundary determination in *Secretary of State v. Wiesenberg*, but the Mississippi Supreme Court upheld the state's delineation of public trust

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[49] Phillips Petroleum v. Mississippi, 484 U.S. 469, 484–485 (1988).

[50] *Id.*; *Cinque Bambini*, 491 So. 2d at 517:

> "[T]he United States granted to the State of Mississippi in trust all lands . . . including their mineral and other subsurface resources, subject to the ebb and flow of the tide below the then mean high water level, regardless of whether the courses were commercially navigable at the time of Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea."

[51] *Id.* at 515 ("[E]xclusion of non-navigable tidewaters from the trust in 1817 would have been inconsistent, if not downright irrational, given then accepted public purposes . . . .").

[52] *See supra* notes 10–14 and accompanying text.

[53] Miss. Code Ann. § 29-15-1(g) (West 2011).

[54] *Id.* §§ 29-15-3(2); 29-15-7.

[55] *Id.* (explaining that the tidelands boundary for developed areas or where there had been encroachments was to be designated based on the "determinable mean high water line nearest [1973,] the effective date of the [CWPA]").

tidelands.[56] The court ruled that the delineation did not violate the Mississippi Constitution, which prohibits donation of public trust property,[57] because the authorizing act, the PTTA, served a "higher public purpose in reducing uncertainty concerning public land ownership."[58]

5.2 Navigable-in-fact

Mississippi's PTD also extends to navigable waters in the state.[59] Navigable waters are defined by statute as "all rivers, creeks and bayous . . . twenty-five (25) miles in length, and having sufficient depth and width of water for thirty (30) consecutive days in the year to float a steamboat with carrying capacity of two hundred (200) bales of cotton."[60] Additionally, the public has the "right[] of free transport" on public waterways, characterized as those "portions of all natural flowing streams . . . having a mean annual flow of not less than one hundred (100) cubic feet per second."[61] Mississippi courts rejected the navigable-in-fact test for title purposes;[62] however, at common law the state does apply a broad navigability test for determining what rights the public has in a given waterway.[63]

In 1970, in *Downes v. Crosby Chemicals, Inc.*, the Mississippi Supreme Court considered the statutory definition of navigability and determined the legislative intent was to "exclude small private creeks and streams, non-navigable in fact, and to declare navigable only streams

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[56] 633 So. 2d 983 (Miss. 1994).
[57] MISS. CONST. Art. 4, § 95.
[58] *Wiesenberg*, 633 So. 2d at 998. The court also recognized that the Act was a valid general legislative effort not legislation "enacted for the sole benefit of a few private coastal landowners who had influence on the legislature." *Id.* at 994–95.
[59] *Cinque Bambini*, 491 So. 2d 508, 511, 514 (Miss. 1986) (recognizing that at statehood, the United States conveyed to the State of Mississippi, "tidelands and navigable waters of the state together with the beds and lands underneath" to be held by the state in trust for the public).
[60] Miss. Code Ann. §§ 1-3-31, 51-1-1 (West 2011).
[61] *Id.* § 51-1-4.
[62] The Magnolia v. Marshall, 10 George 109, 1860 WL 4829, at *4 (Miss. Err. App. 1860)
[63] *See* Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 Penn St. Envtl. L. Rev. 1, 75 (2007).

actually capable of being navigated by substantial commercial traffic."[64] The *Downes* court construed earlier decisions on navigability to mean that navigability is to be "determined upon the basis of the stream's character and capability in 'its natural state' or 'its natural condition.'"[65] The court explained that the "question of whether or not a stream is or is not navigable is a factual one and is for the determination of the trier of fact," and finding sufficient evidence to support the chancery court's determination, held that riparian landowners could exclude fishermen from Hobolochitto Creek because it was not a "navigable" stream.[66] The court stated that navigability in fact depended upon the statutory definition[67] of navigable, and whether the body of water supported commercial traffic, and Hobolochitto Creek failed to meet either requirement.[68]

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[64] 234 So. 2d 916, 919 (Miss. 1970) (the court also stated that anyone "claiming that a stream is navigable has the burden of proving that fact by evidence").

[65] 234 So. 2d at 920. For example, in *Downes*, the court considered an 1887 determination that a stream is navigable "[i[f, for a considerable period of the year, its usual and habitual condition is such that the public may rely upon it as a safe and convenient means of transporting over it the logs which are cut from the forest on its banks; if this condition recurs with the season of our usual rains, and continues through it, even though occasionally interrupted by a decline of its waters." *Id.* (quoting Smith v. Fonda, 1 So. 757, 758 (Miss. 1887)). In *Smith v. Fonda*, the court explained that a water would not be navigable if it was only temporarily suitable for transportation of logs at "irregular and uncertain intervals." 1 So. 757, 758 (Miss. 1887).

[66] 234 So. 2d at 920, 922 ("Upon the evidence adduced, the chancellor decided that Hobolochitto Creek was not 'navigable waters'; and therefore was not a public stream to which appellants were entitled to access at will over the objection of the Crosbys who owned both banks and the bed of the stream. This was a factual question which lay peculiarly within the province of the chancellor as trier of facts. There was sufficient evidence to support this finding, and we cannot say that he was manifestly wrong.").

[67] *See supra* note 60 and accompanying text.

[68] 234 So. 2d at 920–21. Hobolochitto Creek was a small stream with "relatively little water in it except in various pools and holes and in times of excessive rainfall," it was also wadable at several points and contained numerous obstructions. *Id* . Additionally, the creek had never been used as a "water highway" by commercial or other traffic and the only boats to navigate the creek were "canoes, skiffs or light fishing boats." *Id.*

The holding in *Downes* was later called into question by the Mississippi Supreme Court in *Ryals v. Pigott*.[69] In *Ryals*, the court explained that the statutory definitions of navigability are not "the only criteria for identifying the public waters of the State of Mississippi,"[70] and common law tests of navigability are still relevant.[71] Recognizing a broader navigability test than the "substantial commercial navigation" test applied in *Downes*, the court explained that "waters navigable by loggers, fishermen and pleasure boaters are "navigable in fact."[72] The court explained "[o]ur founding and still central point is that at statehood the United States vested in all of the people in Mississippi access to those waters which by their natural capabilities could serve public interests and needs," and thus concluded that public rights existed in waterways capable of being used for fishing, transportation, recreation, log floating, commerce, or tourism.[73]

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[69] 580 So.2d 1140 (Miss. 1990) (holding the Bogue Chitto River was a public waterway and riparian landowners could not exclude lessors of canoes and innertubes from using the river).
[70] *Id.* at 1154.
[71] Craig, *supra* note 63, at 76.
[72] *Id.* at 1152.
[73] *Ryals*, So.2d at 1145-46, 1150-52 (discussing *Downes*, and explaining that when the legislative definition of navigability "is fleshed out to mean 'capable of being navigated by substantial commercial traffic,' surely no one will suggest exclusion of the navigation of commercial fishermen because their craft are customarily (though not always) smaller than the vessels of common and private carriers of cargo and passengers") (quoting Downes v. Crosby Chemicals, Inc., 234 So.2d 916, 919 (Miss.1970)). *See also* Rouse v. Saucier's Heirs, 146 So. 291, 292 (Miss. 1933) (recognizing that commerce and navigation are not the only purposes of the trust); Smith & Hambrick v. Fonda, 1 So. 757, 758 (Miss. 1887) (concluding that a stream is navigable if "for a considerable period of the year, its usual and habitual condition is such that the public may rely upon it as a safe and convenient means of transporting over it the logs which are cut from the forest on its banks; if this condition recurs with the season of our usual rains, and continues through it, even though occasionally interrupted by a decline of its waters").

The *Ryals* court considered the 1844 case of *Morgan v. Reading*,[74] recognizing that Congress "declared that the facilities afforded by the natural capacities of the rivers to the public, shall remain without interruption,"[75] and explained that the court has commonly recognized fishing as a "facility afforded by the natural capacity," and that fishing has been regularly identified "as among the uses to which public waters have been and shall forever remain dedicated." [76]

In *Cinque Bambini*, the Mississippi Supreme Court recognized that the beds of navigable-in-fact non-tidal waters were susceptible of private ownership. However, the public still has the right to use the waters above privately owned lakebeds and riverbeds.[77] The high water mark

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[74] The *Ryals* court considered the 1844 case of *Morgan v. Reading*, 11 Miss. 366 (Miss. Err. & App. 1844) recognizing that Congress "declared that the facilities afforded by the natural capacities of the rivers to the public, shall remain without interruption,"

[75] 11 Miss. at 406.

[76] Ryals at 1151–52:

> "The ordinary condition of waters evolves with time, albeit often imperceptibly. The customary modes of commerce and trade and travel on waters change as well. The record before us reflects that the customary mode of travel on the Bogue Chitto River in southeastern Pike County is through small outboard motor boats, fishing boats, canoes, tubes and other pleasure craft. The customary mode of commerce and trade is providing facilities for hire where persons can rent such vessels. Moreover, the Bogue Chitto is surely capable in its ordinary condition today of supporting commercial fishing. Taking the navigable-in-fact definition at face value and accepting the dynamic quality inescapably embedded in its language, the Bogue Chitto River passes the test; it is public!".

See also Dycus v. Sillers, 557 So.2d at 498; *Cinque Bambini*, 491 So.2d at 512, 515; Treuting v. Bridge and Park Commission of City of Biloxi, 199 So.2d at 632; State ex rel. Rice v. Stewart, 184 So. 44, 50 (1938); *Rouse v. Saucier's Heirs*, 146 So. at 292.

[77] *Cinque Bambini*, 491 So. 2d at 517 ("[W]hile the lands below tidewaters may not be alienated except for high public purposes and generally only with consent of the legislature, lands below navigable freshwaters are susceptible of wholly private ownership."). In *Cinque Bambini*, the court also acknowledged that "shallow, non-navigable freshwater streams and the beds beneath same are . . . susceptible of private ownership" but that this premise did not "exclude tidally influenced, non-navigable streams from the public trust." *Id.*

represents the public trust boundary for all navigable waters.[78] Thus, regardless of who owns the beds and bottoms of such waters, the public may not be excluded from using the surface.[79]

5.3 Recreational waters

The Mississippi Supreme Court has ruled that navigable waters include those waters that are navigable by fishermen, and pleasure boaters.[80] The Mississippi PTD extends to any waterway that could be used by canoes or motorboats or for fishing, or other recreation or tourism.[81] For example, in *Ryals v. Pigott*, the Mississippi Supreme Court held that because the Bogue Chitto River was a public waterway, riparian landowners could not exclude the public from using the river for recreational purposes because the landowners had "no rights in the surface or waters other than those they enjoy as members of the general public."[82]

In *Ryals*, lessors of canoes and inner tubes sued riparian landowners for excluding them from using the Bogue Chitto River for recreation.[83] The plaintiffs claimed that the river was a public waterway, and the Mississippi Supreme Court agreed, reversing the Chancery Court.[84] The Mississippi Supreme Court ruled the river was a public waterway because it was navigable-in-fact, explaining that the "navigable in fact" test includes "much more than traditional commercial navigation in the sense of carriage of goods for hire by water," and stated that it has

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[78] *Id.* at 515.
[79] Dycus v. Sillers, 557 So. 2d 486, 498 (Miss. 1990).
[80] *Id.*
[81] *See* Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 815 (2010); Ryals v. Pigott, 580 So. 2d 1140, 1145–46, 1150–52 (Miss. 1990).
[82] *Id.* at 1156.
[83] *Id.*
[84] *Id.*

"never meant exclusively 'navigable in fact by large commercial vessels,'" thus recognizing that waterbodys traversed by small recreational boats fall within the state's PTD.[85]

Additionally, in *Phillips Petroleum Co. v. Mississippi*, the Supreme Court explained that prior Mississippi Supreme case law recognized the state had interests in protecting public uses unrelated to navigation, including "bathing, swimming, recreation, fishing, and mineral development."[86] In *Cinque Bambinia*, the Mississippi Supreme Court explained that Mississippi could not limit the PTD to merely navigable waters and still maintain the trust purposes.[87] Because recreation is recognized as a protected public use of Mississippi's public waters,[88] the state's PTD may also extend to non-tidal waters not passable by canoes or other boats but suitable for other types of recreation (e.g., birdwatching).

5.4 Wetlands

The Mississippi PTD extends to wetlands subject to the influence of tidewater. The Mississippi legislature enacted the Coastal Wetlands Protection Act to preserve the natural state of coastal wetlands and their ecosystems and to prevent their despoliation and destruction.[89] The Act defines "coastal wetlands" as "all publicly-owned lands subject to the ebb and flow of the

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[85] *Id.* In *Ryals*, the court examined prior navigability cases and determined that "'navigable in fact' is and always has been a function of the source and (potential) natural capacities of the waters and the public need therefor, and these have been no more static than life itself." *Id.*
[86] Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 482 (1988) (citing Treuting v. Bridge and Park Comm'n of City of Biloxi, 199 So.2d 627, 632-633 (Miss. 1967).
[87] 491 So. 2d 508, 515 (Miss. 1986) aff'd sub nom. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, (1988) ("Waters that are valuable for fishing and bathing purposes often are not navigable in fact-at least not at the point where the fishing and bathing takes place . . . exclusion of non-navigable tidewaters from the trust in 1817 would have been inconsistent, if not downright irrational, given then accepted public purposes."); *Phillips Petroleum*, 484 U.S. at 476 (stating "[i]t would be odd to acknowledge such diverse uses of public trust tidelands, and then suggest that the sole measure of the expanse of such lands is the navigability of the waters over them").
[88] *See supra* note 38 and accompanying text.
[89] Miss. Code Ann. § 49-27-3 (West 2011).

tide; which are below the watermark of ordinary high tide; all publicly-owned accretions above the watermark of ordinary high tide and all publicly-owned submerged water-bottoms below the watermark of ordinary high tide and includes the flora and fauna on the wetlands and in the wetlands."[90] Therefore, the Mississippi PTD extends to tidally-influenced wetlands.

The PTD may also extend to non-tidal wetlands in Mississippi. Mississippi defines "waters of the state" as "[a]ll water, whether occurring on the surface of the ground or underneath the surface of the ground," and considers them "among the state's basic resources."[91] Mississippi designates "the people of the state" as owners of the waters, subject to regulation by the state.[92] The state's recognition of public ownership of all waters in the state supports extending the PTD beyond navigable and tidal waters.

5.5 Groundwater

The statutory language discussed above[93] also suggests that the Mississippi PTD extends to groundwater resources. Mississippi recognizes that "[a]ll water, whether occurring on the surface of the ground or *underneath the surface of the ground*" belongs to the people of the state, which indicates that groundwater belongs to Mississippi citizens, and therefore may be subject to the PTD.[94] Mississippi's 1976 Ground Water Capacity Use Act similarly supports extending the PTD to groundwater resources because it declares groundwater to be among the state's basic resources, subject to state control and development for the benefit of the people.[95]

The Mississippi Supreme Court has recognized that the state's PTD extends to below-ground resources generally. In *Cinque Bambini,* the court stated that upon statehood, the federal

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[90] *Id.* § 49-27-5.
[91] *Id.* § 51-3-1.
[92] *Id.*
[93] *See supra* notes 91–92 and accompanying text.
[94] *See* Miss. Code Ann. § 51-3-1 (West 2011) (emphasis added).
[95] *Id.* § 51-4-1.

government granted "the State of Mississippi in trust all lands, to which the United States then held title, including their mineral and other subsurface resources."[96] Although the court did not explicitly state that the PTD extended to groundwater, the recognition of its application to subsurface resources supports groundwater coverage.

The Mississippi Secretary of State has also claimed that the PTD extends to groundwater. In *Hood ex rel. Mississippi v. City of Memphis*,[97] the Secretary, as trustee of the state's groundwater resources, sued the city of Memphis for apportioning groundwater that was sovereign property of Mississippi and held in trust by the state for people of Mississippi.[98] The case was dismissed for failure to join an indispensible party, but is still noteworthy because of the state's explicit claim of authority to manage groundwater as a public trust resource.[99]

5.6 Wildlife

The PTD has not been explicitly extended to cover wildlife harvests beyond oysters and other aquatic wildlife.[100]

6.0 Activities Burdened

The evolving PTD in Mississippi suggests that the doctrine could be used to regulate or enforce activities involving wetland fills and wildlife harvest. Mississippi's police power authorizes, but does not mandate, the state to regulate natural resources, including wildlife, for the health and welfare of its citizens.[101]

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[96] *Cinque Bambini*, 491 So. 2d 508, 516 (Miss. 1986).
[97] 570 F.3d 625 (5th Cir. 2009).
[98] *Id.*
[99] *See id.*
[100] Miss. Code Ann. § 49-15-1 (West 2011) ("All of the wild aquatic life found in the waters of the State of Mississippi and on the bottoms of such waters, until taken therefrom in the manner hereinafter prescribed, is recognized as the property of the State of Mississippi.").
[101] *See* Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 Envtl. L. 673, 713 (2005).

6.1 Conveyances of property interests

The Mississippi Constitution states that public trust lands shall never be donated directly or indirectly to private corporations and can be sold only at fair market value or greater.[102] The Mississippi Supreme Court later recognized that the state may not convey fee simple title to public trust lands unless the conveyance is in furtherance of a higher public policy and is authorized by the legislature.[103] The Secretary may lease trust lands, but in order to convey a fee in trust lands to a private party he must receive approval for any conveyances by the Mississippi legislature, regardless of how compelling the public purpose may be.[104] The Mississippi legislature has authorized an exception for conveying certain "filled" lands.[105] Under this exception, the Secretary may convey lands substantially filled prior to enactment of the Coastal Wetlands Preservation Act of 1973 without specific legislative approval as long as the sale benefits the public trust.[106]

In 1996, the Mississippi Secretary of State conveyed 6.73 acres of trust lands to a casino developer but received over 4,225 acres of undisturbed coastal wetlands and upland habitat in exchange.[107] Instead of requesting to lease the lands needed for development of a casino, Mirage Resorts sought to purchase 4.03 acres of filled lands and 2.7 of unfilled lands that the casino

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[102] Miss. Const. art IV, § 95.
[103] *Cinque Bambini*, 491 So.2d at 513; *see also International Paper*, 271 So.2d 395, 399 (Miss.1972); *Treuting*, 199 So.2d 627, 633 (Miss.1967).
[104] Kristin M. Fletcher & Rebecca Jordan, *Biloxi Tidelands Subject of Unprecedented Land Exchange*, 17(4) WaterLog (1997) at 8, *available at* http://masglp.olemiss.edu/Water%20Log%20PDF/17.4.pdf. In 1989, the Mississippi legislature created the Public Trust Tidelands Fund to manage revenue collected from leases of the state's trust lands to casino barges. Miss. Code Ann. § 29-15-9 (1997).
[105] *See* Miss. Code Ann. § 29-15-7 (1) (1997).
[106] Fletcher, *supra* note 80, at 8–9; John Alton Duff & Kristen Michele Fletcher, *Augmenting the Public Trust: The Secretary of State's Efforts to Create A Public Trust Ecosystem Regime in Mississippi*, 67 Miss. L.J. 645, 655 (1998).
[107] *Id.*

planned to fill.[108] The filled lands were available for sale because of the legislative exception explained above,[109] so the casino agreed to purchase the 4.03 acres.[110] The Mississippi Department of Marine Resources and the Corps of Engineers granted Mirage a permit to fill the 2.7 acres, but these lands did not fit under the exception because they were not filled prior to 1973.[111] Instead, recognizing that the casino's acquisition of a fill permit meant the tidelands would no longer serve the purpose of the public trust, the Secretary, acting as trustee, approved the casino's purchase of the 6.73 acres in exchange for 4,225 acres of undeveloped coastal wetland habitat.[112] The legislature did not respond to the Secretary's actions, implicitly acknowledging that property held in trust for the public may be conveyed if the Secretary finds the result will better serve the purposes of the trust, despite the general rule that trust lands may only be conveyed in furtherance of a higher public policy and when authorized by the legislature.[113]

6.2 Wetland fills

Mississippi has not explicitly used the PTD to regulate wetland fills. However, as recognized above,[114] Mississippi enacted the CWPA to preserve the natural state of coastal wetlands and their ecosystems and to prevent their despoliation and destruction.[115]

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[108] *Id.*
[109] *See supra* notes 105–6 and accompanying text.
[110] Fletcher, *supra* note 104, at 8.
[111] *Id.* at 8–9.
[112] *Id.*
[113] *But see* THE MISSISSIPPI LEGISLATURE, JOINT COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW, NO. 444, A REVIEW OF MISSISSIPPI'S PUBLIC TRUST TIDELANDS PROGRAM AND SELECTED AREAS OF OPERATION OF THE DEPARTMENT OF MARINE RESOURCES (2003) *available at* http://www.peer.state.ms.us/444.html (stating the review committee "does not question the legality of the transfer of the tidelands to the Mirage Corporation, transfers without a specific legislative authorization, except for those necessary to settle claims to tidelands, deprive the Legislature of its traditional authority over the exchange of public lands").
[114] *See supra* notes 7–8 and accompanying text.

In *Mississippi Department of Marine Resources v. Brown*, the Mississippi Supreme Court reversed the court of appeals and affirmed the Mississippi Commission on Marine Resources' denial of a wetlands fill permit.[116] The landowners proposed to fill 1.64 acres of tidal marsh and add 200 feet to an existing pier.[117] The Commission denied the permit on the ground that the public interest in the expansion of the Browns' facilities did not outweigh the state's public policy in favor of preserving the natural state of coastal wetlands and their ecosystems.[118] Concluding that substantial evidence supported the agency's denial, and that the Court of Appeals exceeded its authority in substituting its judgment for the agency, the court reinstated the Commission's denial of the fill permit.[119]

6.2 Water rights

The Mississippi legislature has declared all water to be among the state's resources, and that all water belongs to the people of the state.[120] Mississippi regulates the control,

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[115] Miss. Code Ann. § 49-27-3 (West 2011).
[116] 903 So. 2d 675, 678 (Miss. 2005).
[117] *Id.*
[118] *Id.* at 676.

> The Commission, stated that it had never allowed the direct filling of Juncus grass in the past and found the public's interest in additional public boat launch facilities was unjustified since there were already two existing boat launches in the immediate area. Finally, the Commission considered the Browns' proposal as a commercial activity that would jeopardize the preservation of the adjoining wildlife reserves. As a result, the Commission unanimously voted to deny the Browns' application. Three days later, a letter was mailed to the Browns notifying them as to the Commission's decision. The letter stated that "[b]ased upon the findings, the DMR found that this project would severely impact coastal resources and alteration of coastal wetlands at this site would be permanent and would not serve a higher public interest as required by Mississippi Code § 49-27-3."

Id.
[119] *Id.* at 677–78.
[120] Miss. Code. Ann. § 51-3-1 (West 2011).

development and use of water for all beneficial purposes, and may use its police powers to ensure effective and efficient management, protection and use of its water resources.[121]

6.2 Wildlife harvests

In establishing the Mississippi Department of Environmental Quality and the Mississippi Department of Wildlife, Fisheries and Parks, the Legislature declared its intent "to conserve, manage, develop and protect [Mississippi's] natural resources and wildlife for the benefit of this and succeeding generations."[122] Mississippi has also declared that all lands belonging to the state "whether held in fee or in trust by the state, are hereby declared forest reserves and wild life refuges so long as the state so owns them, and no wild life shall be taken thereon except under regulations of the commission."[123] Mississippi's recognition of wildlife as a state-owned resource managed for current and future generations indicates the PTD may burden wildlife harvests.

Mississippi regulates the taking of aquatic wildlife because it "owns all of the wild life found in the waters of the State of Mississippi and on the bottoms of such waters."[124] All seafood in Mississippi's waters, including all naturally or commercially grown oysters and other

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[121] *Id.* The Mississippi Office of Land and Water Resources (OLWR) is the state agency tasked with conserving, managing, and protecting the state's water resources. Mississippi Department of Env. Quality, *The office of land and water resources*, http://www.deq.state.ms.us/mdeq.nsf/page/l%26w_home (last visited Nov. 3, 2012).

[122] Miss. Code Ann. § 49-4-1 (West 2011).

[123] *Id.* § 49-5-1.

[124] *Id.* § 49-15-1 (stating that "all of the wild aquatic life found in the waters of the State . . . , until taken therefrom in the manner hereinafter prescribed, is recognized as the property of the State of Mississippi because of its very nature, as well as because of the great value of the state of the aquatic life for food and other necessary purposes"). Mississippi statutes prohibit the public from taking state owned wildlife except when permitted or otherwise in compliance with state statutes and regulations. *Id.* § 49-15-7.

shellfish, are the property of the state " to be held in trust for the people thereof."[125] All shells of dead oysters, clams and other shellfish; all shellfish shells on the bottom of the state's tidelands, and all shell beds, banks and other accumulations on or under the bottoms of tidelands, are also designated property of the State of Mississippi.[126] The state's assertion of ownership over aquatic fish and shellfish indicates the PTD extends to harvest of these resources as well. The "proprietary power" of state ownership over wildlife is separate from the police powers Mississippi possesses allowing it to regulate wildlife.[127]

7.0 Public standing

Although no statutes or constitutional provisions specifically address citizen standing in relation to the PTD, courts have assumed standing, at least where the citizen's private property interests are injured.

7.1 Common-law based

Mississippi courts have generally assumed standing to sue in cases involving the PTD. For example, in *Ryals v. Pigott*, the Mississippi Supreme Court assumed that lessors of canoes and inner tubes had standing to sue riparian landowners for excluding them from using the Bogue Chitto River for recreational purposes.[128]

7.2 Statutory basis

There are no Mississippi statutes specifically providing for citizen standing to enforce public trust duties. The Mississippi Supreme Court has nevertheless allowed for judicial review

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[125] *Id.* § 49-15-5; *see also id.* § 49-9-3 ("The ownership and title of all mussels found in or upon the fresh water bottoms within this state, is hereby declared to be vested in the state.").
[126] *Id.* § 49-15-7.
[127] *See* Blumm & Ritchie, *supra* note 101, at 676, 713.
[128] Ryals v. Pigott, 580 So. 2d 1140, 1156 (Miss. 1990) (the court ruled the river was a public waterway because it was navigable in fact and riparian landowners had no right to exclude the public).

of state actions involving conveyance of public trust tidelands.[129] Absent a statute explicitly providing for citizen standing, a plaintiff has standing to sue when he is adversely affected by an action.[130]

7.3 Constitutional basis

The Mississippi constitution does not provide standing to challenge the state's actions concerning the PTD.

8.0 Remedies

Mississippi courts have been inconsistent in their treatment of injunctive relief and acceptance of the PTD as a defense to takings claims, although recent decisions have tended to provide aggrieved riparian and littoral landowners with equitable remedies.[131]

8.1 Injunctive Relief

In *Secretary of State v. Gunn*, the Mississippi Supreme Court ruled the PTD was not a defense to littoral landowners' claim of injury from a tidelands lease for a beach-sidewalk and request for injunctive relief.[132] The littoral landowners claimed ownership of the trust tidelands leased to the city from the state for construction of the sidewalk and sought to enjoin

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[129] *See, e.g., Wiesenberg*, 633 So. 2d 983, 997 (Miss. 1994) (finding that the Secretary of State's determination of the upland boundary of the public tidelands trust "is subject to judicial review"). The PTTA provides for judicial review after pursuing administrative review of tideland determinations. Miss. Code Ann. § 29-15-7 (West 2011).

[130] *See, e.g.*, Burgess v. City of Gulfport, 814 So.2d 149, 152-53 (Miss.2002) (quoting State v. Quitman County, 807 So.2d 401, 405 (Miss.2001)) (holding that residents had standing to challenge the city's approval of a conditional use permit and recognizing that "[i]n Mississippi, parties have standing to sue 'when they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law.'").

[131] *See infra* § 8.2.

[132] Secretary of State v. Gunn, 75 So. 3d 1015, 1022 (Miss. 2011) (recognizing that Mississippi holds the waters "in trust" but nonetheless upholding plaintiff's award of injunctive relief).

construction of the sidewalk.[133] The court affirmed the lower court's grant of injunctive relief delaying construction of sidewalk until the property dispute could be decided because the landowners demonstrated irreparable injury in the form of habitat destruction and damage to real property.[134] The court did not address the merits of the case, suggesting only that the PTD is not a defense to requests for injunctive relief.

8.2 Damages

Mississippi courts have yet to recognize damages as a remedy for injury to public trust resources.

8.3 Defense to takings claims

Mississippi has asserted the PTD a defense to taking claims but has yet to succeed in obtaining judicial recognition. The Mississippi Constitution provides that "private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law."[135] However, Mississippi courts recognize that rights of riparian owners are subject to the prior right of the state to impose public uses upon public trust lands without requiring compensation.[136]

Littoral owners have asserted takings claims where the state has built bridges or other transportation structure within tidelands. For example, in a 1953 suit, the Supreme Court held that Mississippi's construction of a bridge across the Bay of St. Louis was not a taking requiring compensation because it was merely the imposition of "an additional public use upon property

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[133] *Id.* (the court did not address whether the construction of a sidewalk was a protected public use).
[134] *Id.*
[135] MISS. CONST., art. 3, § 17.
[136] Xidis v. City of Gulfport, 72 So. 2d 153, 158 (Miss. 1954).

already set aside for public purposes."[137] By statute, the riparian landowners were granted the privilege of planting and harvesting oysters in the area where the bridge was constructed.[138] The court determined that the state legitimately exercised its power to impose an additional public use—transportation—upon the property already set aside for public oyster harvest, and therefore riparian landowners were not entitled to compensation because there was no taking.[139]

In a more recent case, the Mississippi Supreme Court rejected the PTD as a defense to a takings claim. In *Mississippi State Highway Commission v. Gilich*, landowners filed a takings claim against the State Highway Commission, alleging that their property, which included a sandy beach that extended to the edge of the water, was taken without compensation.[140] The landowners alleged that the state's construction of a highway bridge across public trust tidelands resulted in a wrongful taking of their riparian and littoral rights, and that other portions of their property, though not physically taken, were damaged by the project through loss of view and access to beach.[141] Although the Mississippi Supreme Court recognized that tidelands are held in public trust as "public highways," it ruled that the littoral landowners were still entitled to compensation upon a showing of diminution in property value from loss of view or access.[142] The court explained that in *Crary*, riparian landowners had a "revocable license" to use the affected property, and "where such privileges are revoked for the greater public good, in the exercise of the state's police power, the abutting property owners have no claim for damages."[143] The court thus concluded that the Giliches were not entitled to compensation for loss of "littoral

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[137] Crary v. State Highway Comm'n, 68 So. 2d 468, 472 (Miss. 1953).
[138] *Id.*
[139] *Id.*
[140] Mississippi State Highway Comm'n v. Gilich, 609 So. 2d 367, 375–77 (Miss. 1992).
[141] *Id.* at 369.
[142] *Id.* at 377.
[143] *Id.* at 375.

rights," but were entitled to compensation for actual encroachment onto their property or diminution of property value due to loss of view or access.[144] Thus, while Mississippi courts recognize the state's trust responsibilities, the PTD may not provide a defense against landowner claims of taking without compensation when such claims involve diminution of property value.[145]

The outcome of two additional takings claims filed in 2012 are still pending. In each case riparian landowners are suing the Mississippi Secretary of State for improperly classifying their private property as tidelands subject to the PTTA.[146] After determining the lands in question were subject to the PTTA, the Secretary leased the land to the City of Bay St. Louis for development of a marina.[147] The plaintiffs have claimed the Secretary's actions constituted a taking of their property without compensation.[148]

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[144] *Id.* at 375–76.
[145] *Id.* at 376.
[146] *See* April Hendricks Kilcreas, *Property Owners Dispute Harbor and Marina Construction*, WATER LOG, March 2012 at 11, 11–12, *available at* http://masglp.olemiss.edu/Water%20Log%20PDF/32.1.pdf; Geoff Belcher, *State wants marina lawsuits dismissed*, THE SEACOAST ECHO, Jul. 2012, http://12.68.233.230/40/article_6137.shtml#.UJR33o7lQuk (last visited Nov. 2, 2012).
[147] *Id.*
[148] *Id.*

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The Public Trust Doctrine in Missouri

Bob Menees

1.0 Origins of the Public Trust Doctrine in Missouri

Title to the beds of navigable waters passed from the United States to the state of Missouri on its admission into the union in 1821.[1] The state holds the beds of navigable waters in trust for the people for the purposes of navigation and commerce.[2] Missouri rejected the common law ebb-and-flow test for navigability as impractical for the state in 1875, adopting instead the federal navigability test.[3] First recognized in 1902, the public trust doctrine (PTD) in Missouri prevents riparian owners from interfering with the public right of navigation by erecting structures below the low water mark on navigable waters.[4] However, since first recognition of the PTD, Missouri has neither significantly expanded nor limited the doctrine, and case law presently remains minimal and poorly defined. The only court decisions discussing the

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[1] Hecker v. Bleish, 3 S.W.2d 1008, 1016 (Mo. 1927) (recognizing that the United States admitted the state of Missouri on "equal footing" with all other states in the Union, and thus the state gained title to all beds underlying navigable waters at statehood, including the Missouri River). The islands in these rivers may be transferred for school purposes by the state to counties where they form. Mo. Rev. Stat. § 241.290.

[2] State ex. rel. Citizens Electric Lighting and Power Co. v. Longfellow, 69 S.W. 374, 379 (Mo. 1902) (determining that Missouri holds the beds of navigable waters in trust for the benefit of the people for the purposes of navigation and commerce, which allows the state to deny permits to riparian owners attempting to erect structures that would impede public rights of navigation and commerce).

[3] Benson v. Morrow, 61 Mo. 345, 1875 WL 8052, *3 (Mo. 1875) (rejecting the ebb-and-flow test because Congress declared the Missouri River to be navigable, and the "ancient doctrine" distinguishing navigable and non-navigable rivers by their position rivers therefore has no application in Missouri); Cooley v. Golden, 23 S.W. 100, 104-05 (Mo. 1893) (rejecting the ebb-and-flow test as entirely inapplicable to the character of fresh water lakes and large rivers of the United States and adopting the navigability-in-fact test for the Missouri River).

[4] State ex. rel. Citizens Electric Lighting and Power Co. v. Longfellow, 69 S.W. 374, 379 (Mo. 1902) (preventing a St. Louis utility company from constructing a wharf which would extend 12 to 18 feet into the Mississippi River beyond the low water mark because the structure would impede the public right to navigation).

doctrine at any length involve public parks dedicated for public use.[5] Interestingly, the scope of public rights in Missouri waterways is not tied to ownership of submerged lands, and the public enjoys rights in these non-navigable waterways.[6]

2.0 The Basis of the Public Trust Doctrine in Missouri

Missouri courts have reluctantly recognized the public trust doctrine of the common law.[7] The state courts have not interpreted any statutory provisions as expressly applicable to the public trust doctrine. No provisions in the Missouri state constitution are relevant to the public trust doctrine.

2.1 Common Law Basis

The Missouri Supreme Court first recognized the public trust doctrine in 1902 in *State ex. rel. Citizens Electric Lighting and Power Co. v. Longfellow*,[8] where the Court ruled that title to the beds of navigable waters held by the state obligated the state to ensure that these waters remain as public highways forever.[9] Missouri courts since *Longfellow* have not definitively expanded the purposes to which the public trust doctrine applies or the activities the doctrine burdens, except that the Court of Appeals has extended the doctrine to parkland dedicated to public use.[10]

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[5] *See infra* §§ 5.7, 7.1, and 8.1.
[6] *See infra* § 5.3.
[7] Since recognition of the doctrine in the 1902 *Longfellow* decision (see *supra* note 2), the only two cases in Missouri that expressly mention the existence of the PTD are Citizens for Preservation of Buehler Park v. City of Rolla, 230 S.W. 3d 635, 639-40 (Mo. App. S.D. 2007); and Hinton v. City of St. Joseph, 889 S.W.2d 854, 860-61 (Mo. App. Ct. 1994). Both decisions are discussed below in § 5.7.
[8] State ex. rel. Citizens Electric Lighting and Power Co. v. Longfellow, 69 S.W. 374, 379 (Mo. 1902); *See supra* notes 2 and 4.
[9] Conran v. Girvin, 341 S.W.2d 75, 80 (Mo. 1960) (en banc).
[10] *See infra* §§ 5.7, 7.1, and 8.1.

2.2 Statutory Basis

Missouri courts have not explicitly interpreted any statutory provision to codify the PTD. The state's water resource law arguably contains weak trust language, but Missouri courts have not interpreted the provision to impose trust duties on the Department of Natural Resources.[11]

2.3 Constitutional Basis

Missouri courts have not recognized any state constitutional provision to reflect the public trust doctrine.[12]

3.0 Institutional Application

Missouri courts have not used the public trust doctrine to limit private conveyances, legislative activity, or administrative action.

3.1 Restraint on Alienation

No cases in Missouri use the public trust doctrine to limit private conveyances of land.

3.2 Limits on the Legislature

Missouri courts have not used the public trust doctrine to limit alienation of trust lands by the state legislature.

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[11] The statute states: "[t]he department shall ensure that the quality and quantity of the water resources of the state are maintained at the highest level practicable to support present and future beneficial uses. The department shall inventory, monitor and protect the available water resources in order to maintain water quality, protect the public health, safety and general and economic welfare." Rev. Mo. Stat. § 640.400-2.

[12] William Araiza argued that certain states, including Missouri, have enacted constitutional provisions that authorize legislative action through the contracting of indebtedness to pay for preservation of a certain resource, which might provide a weak basis for judicial recognition of the public trust doctrine. William Araiza, *Democracy, Distrust, and the Public Trust: Process-based Constitutional Theory, the Public Trust Doctrine, and the Search for Substantive Environmental Value*. 45 U.C.L.A. L. Rev. 385, 438-39 (1997). Missouri ratified a constitutional provision that allows for the legislature to contract indebtedness to preserve municipal water supply, which Araiza claimed provides a weak basis for judicial recognition of the public trust doctrine in the state. Mo. Const. art. II § 37(b), (c), (e).

3.3 Limits on Administrative Action

Missouri courts have not limited the actions of administrative agencies using the public trust doctrine.

4.0 Purposes

Missouri has not expanded the purposes to which the public trust encompasses beyond the traditional rights of those incidents to navigation.

4.1 Traditional (navigation, fishing, commerce)

Missouri recognizes the traditional rights of navigation and passage on navigable waters, including the rights to boat and wade.[13] Missouri courts also recognize the right to fish and float logs, even in non-navigable waters.[14] However, Missouri courts have not expressly recognized these rights as arising from the PTD.

4.2 Beyond Traditional (recreational/ecological)

Missouri courts do not expressly recognize recreational or ecological purposes under the PTD, but they have recognized public rights to fish, wade, and boat in non-navigable waters, many of which the public considers to be recreational waters.[15]

5.0 Geographic Scope of Applicability

The scope of the PTD in Missouri is poorly defined. The public has rights in both navigable and non-navigable waters, but the extent to which the PTD protects these rights is unclear because Missouri courts have not discussed these rights as arising under the doctrine. In

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[13] City of Springfield v. Mecum, 320 S.W.2d 742, 744 (Mo. Ct. App. 1959)
[14] Elder v. Delcour, 269 S.W.2d 17, 25 (Mo. 1954) (recognizing right to fish in non-navigable water); Hobart-Lee Tie Co. v. Grabner, 219 S.W. 975, 976 (Mo. Ct. App. 1920) (recognizing right to float logs in non-navigable water).
[15] *See infra* § 5.2 and 5.3.

Missouri, navigability of a waterway determines ownership of the underlying beds, but not the extent of public rights.[16]

5.1 Tidal

In 1875, Missouri rejected the common law ebb-and-flow test as impracticable for the state.[17] The state does not possess any tidal land to which the PTD could apply.

5.2 Navigable-in-fact

Missouri adopted the federal test of navigability for determining title to the underlying beds.[18] The Missouri Supreme Court has articulated the test to be whether a waterway, in its ordinary condition, has the capacity or is suitable for use as a highway for commerce.[19] The state adheres to this traditional rule with some aggressiveness, and thus the definition of navigability does not include rivers that may be floatable only by small rowboats and canoes.[20] On navigable waterways, a private landowner holds title to the soil to the low-water mark, below which the state holds title to the submerged beds.[21] On non-navigable waters, the riparian owner holds title to the submerged lands to the center of the waterway, or its "thread."[22]

Although a private landowner owns title to the submerged lands of non-navigable waters, this right is not absolute and is subject to certain limitations to preserve the public interest, such

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[16] Skinner v. Osage County, 822 S.W.2d 437, 444 (Mo. Ct. App. 1991).
[17] Benson v. Morrow, 61 Mo. 345, 1875 WL 8052, *3 (Mo. 1875) (rejecting the ebb-and-flow test because Congress declared the Missouri River to be navigable, and ruling the "ancient doctrine" distinguishing navigable and non-navigable rivers by their position rivers had no application in Missouri); Cooley v. Golden, 23 S.W. 100, 104-05 (Mo. 1893) (rejecting the ebb-and-flow test as entirely inapplicable to the character of fresh water lakes and large rivers of the United States and adopting the navigability-in-fact test for the Missouri River).
[18] Slovensky v. O'Reilly, 233 S.W. 478, 481-82 (Mo. 1921).
[19] *Id.* at 482.
[20] *Id.*
[21] *Id.*; E.D. Mitchell Living Trust v. Murray, 818 S.W.2d 326, 328-29 (Mo. Ct. App. 1991); Conran v. Girvin, 341 S.W.2d 75, 80; Bratschi v. Loesch, 51 S.W.2d 69,70 (Mo.1932); Sibley v. Eagle Marine Ind., Inc., 607 S.W.2d 431, 435 (Mo. 1980) (en banc).
[22] Hobart-Lee Tie Co. v. Grabner, 219 S.W. 975, 976 (1920).

as a limit on the right to exclude the public.[23] This limit on absolute ownership is subject to the existing law at the time of conveyance from the federal government, which almost always imposed a public servitude of access to waterways.[24] Thus, the public enjoys an easement to fish, wade, and boat, even in non-navigable waters because ownership of beds is not determinative of public rights.[25] Moreover, the public has a right to float logs, ties, and other merchandise on non-navigable waters.[26] Missouri also recognizes a public right to cut ice in navigable waters.[27]

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[23] Elder v. Delcour, 269 S.W.2d 17, 24 (Mo. 1954) (en banc) (concluding that a private landowner could not prevent the public from floating down a stream and fishing its waters, even though he owned bed to non-navigable stream under the federal navigation-for-title test); Bollinger v. Henry, 375 S.W.2d 161, 165 (Mo. 1964) (concluding that a private landowner on non-navigable stream owned the streambed but the owner did not have exclusive title to water flowing down the stream while on owners' land, did not have complete freedom of use or control of the water, and did not have right to divert water to the exclusion of others).

In *Elder*, the Missouri Supreme Court stated that its decision was not in conflict with the rule announced in *Dennig v. Graham*, 59 S.W.2d 699 (Mo. App. Ct. 1933), where the appeals court held that Greer Spring and Greer Spring Branch were private waters and the public did not have a right to enter the water or fish. *Elder*, 269 S.W.2d at 27. The court provided no discussion or rationale for its decision to adopt the *Dennig* decision. *Id.*

[24] This public access servitude appeared in an 1812 federal statute that established the territorial government of Missouri and stated that "the Mississippi and Missouri Rivers, and the navigable waters flowing into them, and the carrying places between [them] shall be common highways and forever free to the people of the said territory and to the citizens of the United States..." *Elder*, 269 S.W.2d at 23 (citing 2 Stat. 743, 747); *see also* John W. Ragsdale, Jr., *Greer Spring*, 67 U.M.K.C. L. Rev. 3, 23 (1998). The same provision appeared in subsequent federal statutes, the Missouri Enabling Act of 1820 (the statehood act), and renditions of the state constitution through 1875. *See Elder*, 269 S.W.2d at 24. Thus, a public servitude of access to waterways burdened nearly all land in Missouri disposed of by the federal government. *See* Ragsdale *supra* at 23-24.

[25] Elder v. Delcour, 269 S.W.2d 17, 23-25 (concluding that a private landowner did not have an absolute right to use a non-navigable stream on private property, and therefore could not exclude the public from floating, wading, or fishing on the stream). *See also* Benson v. Morrow 1875 WL 8052, *4, 61 Mo. 345 (Mo. 1875) (recognizing that ownership by a riparian owner to the central line or thread of a non-navigable river was subject to an easement for the public to pass along and over it with boats, rafts, and rivercraft).

[26] Hobart-Lee Tie Co. v. Grabner, 219 S.W. 975, 976 (Mo. Ct. App. 1920) (recognizing a public right to float logs, ties, and other merchandise in non-navigable waters where private landowner

5.3 Recreational Waters

Missouri courts have not expressly recognized the PTD in recreational waters, but they do recognize public rights in these waterways, including a right to fish, wade, and boat in non-navigable waters.[28]

5.4 Wetlands

Missouri courts have not recognized the PTD may apply to wetlands or swamplands.

5.5 Groundwater

Missouri courts have not extended the public trust doctrine to groundwater.

5.6 Wildlife

Missouri has not explicitly extended its PTD to wildlife, but the state claims title to wildlife for the purpose of control, management, restoration, conservation, and regulation of the resource.[29] In 1926, the Supreme Court of Missouri recognized that the state owns and holds wildlife in trust for the benefit of the people;[30] thus, the legislature has the duty to enact laws to preserve the resource to secure its beneficial use for the public into the future.[31] The court, however, did not explicitly recognize the PTD as applying to wildlife, and there is no recent case law on the issue.

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holds title to the submerged beds, but ruling that the right did not include hauling logs or ties over riparian owner's land to the highway).

[27] Hickey v. Hazard, 1877 WL 8976, *4, 3 Mo. App. 480 (1877) (recognizing a public right to cut ice from navigable waters without a license, so long as the activity did not interfere with public right of navigation and commerce).

[28] Elder v. Delcour, 269 S.W.2d 17, 25-26 (Mo. 1954) (en banc).

[29] Rev. Stat. Mo. § 252.030. *See* State v. Taylor, 214 S.W.2d 34 (Mo. 1948) (recognizing that the state owns fish even in a private pond, and therefore can preserve and protect fish from damage, such as by dynamite blasting).

[30] People v. Bennett, 288 S.W. 50, 52 (Mo. 1926) (citing Magner v. People, 97 Ill. 320, 8 (Ill. 1881)) (upholding laws restricting hunting to specified seasons to protect the resource from depletion).

[31] *Id.*

5.7 Uplands

The Missouri Court of Appeals has recognized the concept of a public trust where a private individual or trust has dedicated parkland for public use.[32] Another court of appeals decision recognized the possibility of a public trust burdening a park dedicated for public use, but declined to apply the PTD because the plaintiffs lacked standing as taxpayers.[33]

Missouri case law has not extended the PTD to apply to beaches of lakes, rivers, or streams or to highways.

6.0 Activities Burdened

No case law exists suggesting that the PTD burdens conveyances of property interests, wetland fills, or consumptive water rights. However, the Missouri Supreme Court has recognized that the state owns wildlife in trust for the public.[34]

6.1 Conveyances of Property Interests

The PTD does not burden conveyances of property interests in Missouri.

6.2 Wetland Fills

The PTD does not burden wetland fills in Missouri.

6.3 Water Rights

Missouri courts have not recognized the PTD's application to consumptive water rights.

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[32] Citizens for Preservation of Buehler Park v. City of Rolla, 230 S.W. 3d 635, 639-40 (Mo. App. S.D. 2007) (using the public trust doctrine to enjoin a municipal government from alienating a municipal park dedicated by private individual for a public park to private developers).

[33] Hinton v. City of St. Joseph, 889 S.W.2d 854, 860-61 (Mo. App. Ct. 1994) (refusing to impose a public trust on the land in question because the dedicator conditioned the proposed park on the city building recreational facilities, which the city failed to do; the court held that the property reverted to the trustees of the dedicator, and the plaintiffs lacked standing to enforce the dedication as taxpayers).

[34] *See supra* § 5.6 and accompanying text.

6.4 Wildlife Harvests

In Missouri, the state owns wildlife for the purpose of management, conservation, regulation, and restoration of the resource.[35] Although the Supreme Court of Missouri stated that the wildlife resource was held in trust by the state for the benefit of the people and recognized the authority of the state to regulate hunting of the resource,[36] it has yet to explicitly recognize that the PTD applies to wildlife harvests.

7.0 Standing

Missouri courts have recognized public standing to enforce the public trust doctrine only in relation to a governmental conveyance of a publicly dedicated park,[37] and have not recognized a statutory or constitutional basis to standing.

7.1 Common Law-Based

The Missouri Court of Appeals ruled that where a park has been dedicated to the public, and a municipal government attempted to convey such park to private entities, the PTD gave members of the public the right to sue the governmental entity.[38]

7.2 Statutory Basis

Missouri courts have not recognized any statutory provisions as conferring a public right to enforce the PTD.

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[35] *See supra* note 29.
[36] People v. Bennett, 288 S.W. 50, 52 (Mo. 1926).
[37] *See infra* § 7.1
[38] Citizens for Preservation of Buehler Park v. City of Rolla, 230 S.W. 3d 635 (Mo. App. Ct. 2007) (granting standing to citizens to challenge governmental conveyance of public park to private developers under the public trust doctrine). The court cited the Illinois Supreme Court, in *Paepcke v. Public Building Commission of Chicago*, 263 N.E.2d 11,18 (1970), for the proposition that if the public trust were to have meaning or vitality, the public, as beneficiaries of the trust, must be able to enforce it without waiting for governmental action potentially resulting in a complete denial of such right. Id.

7.3 Constitutional Basis

Missouri courts do not recognize a constitutional right to enforce the PTD under the state constitution.[39]

8.0 Remedies

Missouri courts have issued an injunction only once to protect public trust resources, but that was in a recent case.[40] The courts have yet to award damages or use the doctrine as a defense to a takings claim.

8.1 Injunctive Relief

In 2007, the Missouri court of appeals issued an injunction preventing the city of Rolla from conveying a parcel of land dedicated as a public park to private developers.[41]

8.2 Damages

Missouri courts have not awarded any damages for injuries to trust resources.

8.3 Defense to Takings Claim

Missouri courts have yet to recognize the PTD as a state defense to private takings claims.

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[39] According to William Araiza, Mo. Const. art. II § 37(b), (c), (e), provides a potential constitutional basis for recognition of the PTD in the state. *See supra* note 12. However, Missouri courts have not yet granted standing to enforce the PTD under this provision.
[40] Citizens for Preservation of Buehler Park, 230 S.W. 3d at 641 (granting an injunction to prevent a municipality from selling a public park to private developers).
[41] *See supra* § 8.1.

MONTANA

The Public Trust Doctrine in Montana

Erika A. Doot

1.0 Origins

Montana's highly developed public trust doctrine (PTD) has common law roots and was codified by Montanans in the innovative state constitution adopted in 1972.[1] During Montana's lengthy territorial period (1864–1889), the courts recognized that water is public property (*publici juris*) under the common law.[2] At statehood in 1889, Montana acquired sovereign ownership of the beds underlying navigable waterways under the equal footing doctrine, and recognized public trust obligations imposed on these lands.[3]

Although Montana's 1899 Constitution specified that all lands "granted to the state by Congress and all lands acquired by gift or grant or devise, from any person or corporation, shall be public lands of the State, and shall be held in trust for the people,"[4] the PTD developed as part of state common law.[5] The 1972 Constitution retained this public lands provision and codified public ownership of water long recognized at common law.[6] Thereafter, Montana courts began to further define the state PTD under the 1972 Constitution and statutes.[7]

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[1] *See* Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 167–68 (Mont. 1984) (explaining the common law and constitutional origins of the state PTD).

[2] Barkley v. Tieleke, 2 Mont. 59, 63 (1874); *see also* Mettler v. Ames Realty Co., 201 P. 702, 704 (Mont. 1921) (explaining that "[t]he corpus of running water in a natural stream is not the subject of private ownership .... Such water is classed with the light and the air in the atmosphere. It is publici juris or belongs to the public.").

[3] *Curran*, 682 P.2d at 167–68, *citing* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1844), *and* Shively v. Bowlby, 152 U.S. 1 (1894).

[4] MONT. CONST. OF 1889, art. XVII, § 1; MONT. CONST., art. X, § 11(1) (1972); *see supra* note 2, *infra* note 7.

[5] Early cases on the PTD in Montana made no mention of Article 12, section 1 of the 1889 Constitution. *See, e.g.*, Gibson v. Kelly, 39 P. 517, 518–20 (Mont. 1895) (holding that private landowners own to ordinary low water mark, but that their activities between low and high water mark cannot impair the public servitude); Herrin v. Sutherland, 241 P. 328, 331 (Mont. 1925) (recognizing that fishermen have the right to access land between ordinary low and high water mark, but do not have the right to damage private property).

[6] MONT. CONST., art. IX, § 3(3) ("All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people ..."); *see supra* note 2 and accompanying text.

[7] *See, e.g.*, *Curran*, 682 P.2d at 171 ("hold[ing] that under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes."); *In re* Adjudication of Existing Rights to the Use of All the Water, 55 P.3d 396, 404 (Mont. 2002) (explaining that "[u]nder the Constitution *and* the public trust

Montana's PTD has developed significantly since statehood,[8] evolving from protecting traditional public rights of navigation and fishing to protecting modern recreational and perhaps ecological rights.[9] The geographic scope of the PTD has expanded from navigable-in-fact waters to all waters capable of recreational use, and could arguably include groundwater and habitat for purposes of ecological protection.[10]

By expanding incrementally over time, Montana's PTD has mostly avoided conflicts with those who hold appropriated water rights.[11] Because the Montana Constitution acknowledges public ownership of water, water appropriators recognize that public trust obligations could burden water rights,[12] for example, through minimum streamflow regulations to protect fisheries.[13] Montana's PTD may thus serve as a model for prior appropriation states that seek to enhance the trust while balancing public and private water rights.

2.0 Basis

The PTD developed as a common law doctrine in Montana.[14] In 1874, the Supreme Court of the Territory of Montana acknowledged that water is *publici juris* at common law.[15] In 1895,

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doctrine, the public has an instream, non-diversionary right to the recreational use of the State's navigable surface waters.") (emphasis in original).

[8] *See generally* Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010); Al Stone, *Montana* (state survey), *in* 4 WATERS AND WATER RIGHTS § I(A)(3) (Robert E. Beck & Amy K. Kelley, eds., 2009) (discussing public recreational use rights in Montana).

[9] *See infra* § 4.0–4.2.

[10] *See infra* § 5.1–5.6.

[11] *See infra* §§ 5.4–5.6, 6.2–6.3.

[12] *See infra* § 6.3; PPL Montana, L.L.C. v. State, 229 P.3d 421, 460 (Mont. 2010). The *PPL Montana* court declined to address concerns of amici about the possible effects of the PTD on appropriated water rights, but affirmed that the state could charge rent to private dams on navigable waters for the use of trust lands. *Id.* The court commented that "[o]ther general laws may (or may not) provide an assessment method for irrigators, stockmen, recreationists, and other water users, in a manner that takes account of the "public trust" with respect to these different classes of usage." *Id.*

[13] *See, e.g.*, Joe Gutkoski, *Emergency Stream Flow Bill Defeated*, MONT. STANDARD, Mar. 20, 2009, *available at* http://www.mtstandard.com/news/opinion/article_a3a0181f-0647-5772-87e0-150bd5cda7cd.html (last visited May 1, 2011).

[14] *See supra* notes 4–5 and accompanying text.

[15] Barkley v. Tieleke, 2 Mont. 59, 63 (1874). Montana's territorial laws were incorporated into state law through the Statehood Act. Act of Feb. 22, 1889, 25 Stat. 676 (1889); *see also* Mettler v. Ames Realty Co., 201 P. 702, 704

the Montana Supreme Court recognized state ownership of the beds of navigable waters, acknowledging that private landowners own to low water mark, but noting that the public navigation and fishing easement burdens riparian land to high water mark.[16] In ensuing years, the PTD continued to develop at common law, until Montanans adopted the 1972 Constitution codifying public ownership of water long recognized at common law.[17]

Since 1972, the courts have interpreted the PTD and constitutional public land and water ownership provisions interchangeably.[18] Montana's 1889 and 1972 Constitutions contain identical language declaring that state public lands are "held in trust for the people."[19] Article IX, section 3 of the 1972 Constitution codifies public ownership of water,[20] declaring that "[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."[21] Consistent with these provisions, the state legislature has enacted statutes to further the public trust, notably the Natural Streambed and Land Preservation Act of 1975[22] and the Stream Access Law of 1985.[23] Montana courts review state and private actions affecting

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(Mont. 1921) (explaining that "[t]he corpus of running water in a natural stream is not the subject of private ownership .... It is publici juris or belongs to the public. A usufructuary right or right to use it exists, and ... is private property so long only as the possession continues.").

[16] Gibson v. Kelly, 39 P. 517, 518–20 (Mont. 1895).

[17] *See supra* notes 1–7, 50–58, and accompanying text.

[18] *See* Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 171 (Mont. 1984) ("hold[ing] that under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes."); *In re* Adjudication of Existing Rights to the Use of All the Water, 55 P.3d 396, 404 (Mont. 2002) (explaining that "[u]nder the Constitution *and* the public trust doctrine, the public has an instream, non-diversionary right to the recreational use of the State's navigable surface waters.") (emphasis in original).

[19] MONT. CONST., art. X § 11(1); MONT CONST. OF 1889, art. XVII, § 1; *see infra* § 3.1 (discussing how the provision requires the state to receive full market value when conveying interests in public trust lands).

[20] *See supra* note 15 and accompanying text.

[21] MONT. CONST., art. IX, § 3(3).

[22] MONT. CODE ANN. §§ 75-7-101 *et seq.* (2010).

[23] MONT. CODE ANN. §§ 23-2-301 *et seq.* (2010).

trust resources to ensure that they are consistent with the broad PTD established at common law and codified in the 1972 Constitution.[24]

3.0 Institutional Application

In Montana, the PTD serves as a check on the legislative and executive branches and a balance between public and private property interests. When conflicts arise between landowners and the public, the courts must balance their competing interests to the extent possible because both public and private property rights are constitutionally protected.[25] For example, in *Galt v. State Department of Fish, Wildlife, and Parks*,[26] the 1987 Montana Supreme Court affirmed provisions of the Stream Access Law of 1985[27] that recognized public rights to use all waters capable of recreational use under the PTD, including incidental rights to use beds and banks to high water mark, even when these lands are privately-owned.[28] However, the *Galt* court invalidated provisions of the Stream Access Law announcing public rights to camp overnight, hunt big game, and construct bird blinds as outside the scope of the PTD, explaining that public trust rights stem from public ownership of water, and "any use of the bed and banks must be of minimal impact."[29] Thus, the Montana PTD serves as a balance between public and private property rights.

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[24] *See infra* §§ 3.0–3.3, 4.0–4.2, 7.0–7.3.
[25] 731 P.2d 912, 916 (Mont. 1987) (commenting that the "property interests of private landowners are as important as the public's property interest in water.").
[26] 731 P.2d 912 (Mont. 1987).
[27] MONT. CODE ANN. §§ 23-2-301 *et seq.* (2010).
[28] *Galt*, 731 P.2d at 915 (explaining that "the public's right to use the waters includes the right of use of the bed and banks up to the high water mark even though the fee title in the land resides with the adjoining landowners.") (citing Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984) and Mont. Coal. for Stream Access v. Hildreth, 684 P.2d 1088 (Mont. 1984)).
[29] *Id.*

Montana courts also call on the PTD to reign in state action that unreasonably burdens the public trust.[30] In 1933, the Montana Supreme Court recognized that the public lands provision of the state constitution places "limitations on the power of disposal by the legislature," requiring the state to comply with general laws and obtain full market value when conveying interests in public trust lands.[31] In addition, the state cannot sever the application of the trust when conveying interests in trust resources.[32]

3.1 Restraint on Alienation of Private Conveyances

Article X, section 11(2) of the Montana Constitution, declares that public lands "shall not ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value … has been paid or safely secured to the state."[33] In the 2010 decision of *P.P.L. Montana, Inc. v. State*,[34] the Montana Supreme Court affirmed that this provision authorizes the state to charge rent for the use of public trust lands under private dams on navigable waters in accordance with general laws like the Hydroelectric Resources Act.[35] The *PPL* court explained that the state cannot sever the application of the trust when conveying interests in trust resources, commenting that "the riverbeds at issue … were never, nor could they be, alienated from the public trust."[36] During its 2011 term, the U.S. Supreme Court may

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[30] *See infra* §§ 3.1–3.3, 5.3–5.4.
[31] Montanans for the Responsible Use of the School Trust v. State, 989 P.2d 800 (Mont. 1999) (quoting Rider v. Cooney, 23 P.2d 261, 263 (Mont. 1933)).
[32] PPL Montana, Inc. v. State, 229 P.3d 421, 452 (Mont. 2010) (affirming that the state could charge rent for riverbeds underlying private dams under Article X, section 11(2) of the Montana Constitution, and remarking that "the riverbeds at issue … were never, nor could they be, alienated from the public trust.").
[33] MONT. CONST., art. X § 11(2).
[34] 229 P.3d 421 (Mont. 2010) (affirming the state's power to collect rents from private dam owners for the use of public trust riverbeds under MONT. CODE ANN. § 77-4-201 *et seq.* (2010)), *petition for cert. filed*, 79 U.S.L.W. 3102 (Aug. 12, 2010) (No. 10-218); *see infra* note 37 and accompanying text.
[35] *Id.* at 452.
[36] *Id.* Similarly, in the 1983 decision of *Jackson v. Burlington Northern, Inc.*, the Montana Supreme Court concluded that the state owns all minerals underlying the beds of navigable waters, even those acquired by accretion or erosion, because "development of privately owned minerals underlying navigable waterways could interfere with the public's right to navigate, whether for commercial or recreational purposes." 667 P.2d 406, 408 (Mont. 1983).

consider Montana's interpretation of its power to seek compensation for the use of riverbeds underlying private dams on navigable waters in the appeal of *PPL Montana, Inc. v. State*.[37]

3.2 Limit on the Legislature

Under Article X, section 11 of the Montana Constitution,[38] the state legislature must obtain full market value when granting interests in trust lands, including public trust lands.[39] In *Montanans for Responsible Use of School Trust v. State* ex rel. *State Land Board*,[40] the 1999 Montana Supreme Court invalidated three statutory provisions that would not obtain full market value for interests in trust resources. One provision required the State Land Board to use 1972 values for historic right-of-way leases;[41] another provided for free permits to remove dead, down, or inferior timber from school trust lands;[42] the third required new lessees of public lands to compensate former lessees for improvements before the state would issue the new leases.[43] Although the legislature has broad discretion to manage public trust resources, the courts review legislative actions affecting trust resources to ensure that the state obtains full market value as required by the state constitution, consistent with the state's "trust duty of undivided loyalty."[44]

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[37] PPL Montana, Inc. v. State, 229 P.3d 421, 447 (Mont. 2010), *petition for cert. pending*, 79 U.S.L.W. 3268 (U.S. Nov. 1, 2010) (No. 10-218) (inviting the Acting Solicitor General to file briefs in the case expressing the views of the United States); *See* Russell Prugh, *Supreme Court Invites Solicitor General's Comments on Montana Rent-for-Riverbed Case* (Jan. 26, 2011), *available at* http://www.martenlaw.com/newsletter/20110126-montana-rent-for-riverbeds-case (last visited May 2, 2011); Lawrence Hurley, *Supreme Court Asks Obama Admin to Weigh In on Riverbed Dispute*, N.Y. Times Greenwire (Nov. 1, 2010), *available at* http://www.nytimes.com/gwire/2010/11/01/01greenwire-supreme-court-asks-obama-admin-to-weigh-in-on-55210.html (last visited May 2, 2011).

[38] MONT. CONST., art. X, § 11(2) ("No such land or any estate or interest therein shall ever be disposed of ... until the full market value of the estate or interest disposed of ... has been paid or safely secured to the state.").

[39] *See infra* notes 41–45.

[40] 989 P.2d 800 (Mont. 1999)

[41] *Id.* at 805 (invalidating MONT. CODE ANN. § 77-1-130 because it "requires that full market valuations of right-of-way acreage be based on 1972 levels," which "clearly violates the State's constitutional obligation to obtain full market value for school trust lands.").

[42] *Id.* at 807–08 (invalidating MONT. CODE ANN. § 77-5-211 because it "authorize[d] the State to issue firewood permits to third parties without charging them for any commercially valuable wood that they collect.").

[43] *Id.* at 810 (invalidating MONT. CODE ANN. § 77-6-305 because it would "allow[] trust lands to idle indefinitely while former and new lessees determine the value of improvements.").

[44] *Id.* at 807.

In another 1999 decision, the Montana Supreme Court explained that statutes affecting citizen's rights to a clean and healthful environment will be subject to strict scrutiny, and it could apply or extend this holding to statutes affecting public lands enacted under Article X, section 11 of the state constitution.[45]

3.3 Limit on Administrative Action

As required by Article X, section 11 of the Montana constitution, state agencies must obtain "full market value" when conveying interests in public lands and follow "general laws providing for such disposition" because all public lands are held in trust for the people.[46] Further, any public lands exchanged for public or private land must be "equal in value and, as closely as possible, equal in area."[47] In *Montanans*, the 1999 Montana Supreme Court invalidated the Department of Natural Resources and Conservation (DNRC)'s policy of issuing cabin site leases with rentals based on 3.5 percent of appraised site value because DNRC did not contest the

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[45] Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 988 P.2d 1236, 1263 (Mont. 1999) (MONT. CONST., art. IX, § 9).
[46] MONT. CONST., art. X, § 11(2). Article 10, section 11 of the Montana Constitution provides,

> 1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.
>
> (2) No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.
>
> (3) No land which the state holds by grant from the United States which prescribes the manner of disposal and minimum price shall be disposed of except in the manner and for at least the price prescribed without the consent of the United States.
>
> (4) All public land shall be classified by the board of land commissioners in a manner provided by law. Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area.

Id.

[47] *Id.* art X. § 11(4).

district court's finding that it resulted in rentals below market rate.[48] If state agencies do not follow constitutional or statutory requirements, the courts will void sales of trust resources and not recognize equitable defenses like laches.[49] Montana courts defer to reasonable agency decisions under an arbitrary and capricious standard of review,[50] but will remand decisions when agencies fail to observe procedural or substantive requirements, including the requirements to consider effects on trust resources in state water and environmental protection laws.[51]

4.0 Purposes

By 1900, the Montana Supreme Court recognized traditional public trust rights of navigation, fishing, and commerce in navigable-in-fact waters.[52] In the 1980s, the Montana Supreme Court explained that public recreational uses of waters are protected under both the PTD and the 1972 Constitution.[53] Although not yet faced with the issue, Montana courts may recognize ecological purposes of the PTD because the 1972 constitution recognizes public rights to a clean and healthful environment, and the state's duty to maintain a healthy environment for present and future generations.[54] Indeed, the 1999 Montana Supreme Court recognized that it

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[48] *Montanans*, 989 P.2d at 806; *see also State* ex rel. *Boorman v. State Board of Land Commissioners*, 92 P.2d 201, 203 (Mont. 1939) (invalidating s State Land Board sale of 160 acres of common school lands because the 1889 Constitution only permitted sales of alternate five-acre tracts).

[49] Boorman, 92 P.2d at 204 (explaining that "time does not confirm a void act," and rejecting the Board's arguments that the sale of school trust lands should be confirmed based on laches or the statue of limitations).

[50] Aspen Trails Ranch, L.L.C. v. Simmons, 230 P.3d 808, 820 (Mont. 2010) (describing the "hard look" standard of review of agency action in Montana).

[51] *Id.* at 821 (reversing the Helena City Commission's decision to approve a subdivision plat without considering effects of pollution on groundwater and a nearby creek in its Environmental Assessment, as required under the Montana Subdivision and Platting Act, MONT. CODE ANN. § 76-3-603(1)(a)); *see* Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 159 (2003) (explaining how constitutional provisions subject state legislation that risks environmental degradation to strict scrutiny) (citing Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality., 988 P.2d 1236, 1246 (Mont. 1999)).

[52] *See infra* § 4.1.

[53] *See infra* § 4.2; Mont. Coalition for Stream Access v. Curran, 682 P.2d 163, 171 (1983) ("hold[ing] that under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.").

[54] *See infra* § 4.2; MONT. CONST., art. II, § 3 ("All persons are born free and have certain inalienable rights … includ[ing] the right to a clean and healthful environment…"); MONT. CONST., art. IX, § 1(1) ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future

reviews statutes affecting public rights to a clean and healthful environment under a strict scrutiny standard of review.[55]

4.1 Traditional Purposes (Navigation/Fishing)

Shortly after statehood in 1889, Montana recognized public rights of navigation and fishing in navigable-in-fact waterways based on the U.S. Supreme Court's lodestar decision of *Illinois Central Railroad Co. v. Illinois*.[56] In the 1895 decision of *Gibson v. Kelly*,[57] the Montana Supreme Court held that riparian landowners own to ordinary low water mark, but recognized that the public navigation and fishing easement burdens riparian title to ordinary high water mark.[58] Then, in 1925, in *Herrin v. Sutherland*,[59] the Supreme Court explained that the public can also hunt waterfowl on navigable-in-fact waters.[60] Although the Montana Supreme Court did not consider the scope of public rights to use waters again until the 1980s, at that time it recognized public recreational rights under both the PTD and the 1972 Constitution.[61]

4.2 Beyond Traditional Purposes (Recreational/Ecological)

The Montana Supreme Court recognized recreational purposes of the PTD in its 1984 decision in *Montana Coalition for Stream Access v. Curran*.[62] Based on the codification of

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generations."). The Montana Supreme Court has recognized that "[t]he right to a clean and healthful environment constitutes a fundamental right" of all Montanans. Sunburst School Dist. No. 2 v. Texaco, Inc., 165 P.3d 1079, 1092 (Mont. 2007) (citing Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 988 P.2d 1236, 1263 (Mont. 1999)).

[55] Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality., 988 P.2d 1236, 1246 (Mont. 1999).

[56] Gibson v Kelly, 39 P. 517, 518 (Mont. 1895) (citing Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892)).

[57] 39 P. 517, 518 (Mont. 1895).

[58] *Id.* at 519 ("It is true that, while the abutting owner owns to the low-water mark on navigable rivers, still the public have certain rights of navigation and fishery upon the river and upon the strip in question [between low and high water mark].").

[59] 241 P. 328 (1925).

[60] *Id.* at 331 (explaining that "[i]n rowing his boat upon the river and fishing therein the defendant was well within his rights. He also had the right to shoot wild ducks ... if he did not trespass on the plaintiff's adjacent property.").

[61] *See infra* § 4.2; *Curran*, 682 P.2d at 171 ("hold[ing] that under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public...."); *In re* Adjudication of Existing Rights to the Use of All the Water, 55 P.3d 396, 404 (Mont. 2002) (explaining that "[u]nder the Constitution *and* the public trust doctrine, the public has an instream, non-diversionary right to the recreational use of the State's navigable surface waters.") (emphasis in original).

[62] 682 P.2d 163 (1984).

public ownership of water in Article 9, section 3 of the 1972 Constitution,[63] the court held that "any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes."[64] Shortly thereafter, in *Montana Coalition for Stream Access, Inc. v. Hildreth*,[65] the court clarified that there is no specific test for determining whether waters are capable of public use because "the State owns the waters for the benefit of its people," and the courts cannot restrict public rights to use water for recreational purposes "by inventing some restrictive test."[66]

Under the state constitution and PTD, Montana recognizes that the public has an instream, non-diversionary right to use state waters for recreational purposes.[67] After *Curran* and *Hildreth*, the legislature elaborated on recreational uses protected under the PTD in the Stream Access Law of 1985,[68] which recognized many public recreational uses within the scope of the PTD, including "fishing, hunting, swimming, floating in small craft or other flotation devises, boating in motorized craft … or craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses."[69] In *Galt v. State Department of Fish, Wildlife, and Parks*,[70] the 1987 Montana Supreme Court invalidated provisions of the Stream Access Law that allowed the public to camp overnight, hunt big game, and construct improvements like bird blinds on banks, explaining that these activities did not stem from public

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[63] MONT. CONST., art. IX, § 3 ("All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people ….").
[64] *Curran*, 682 P.2d at 170–71.
[65] 684 P.2d 1088 (1984).
[66] *Id.* at 1091.
[67] *In re* Adjudication of Existing Rights to the Use of All the Water, 55 P.3d 396, 404 (Mont. 2002) (discussing *Curran* and explaining that "[u]nder the Constitution *and* the public trust doctrine, the public has an instream, non-diversionary right to the recreational use of the State's navigable surface waters.") (emphasis in original).
[68] MONT. CODE ANN. §§ 23-2-301 *et seq.* (2010); *See generally* Deborah Beaumont Schmidt, *The Public Trust Doctrine in Montana: Conflict at the Headwaters*, 19 ENVTL. L. 675 (1989).
[69] MONT. CODE ANN. § 23-2-301(12).
[70] 731 P.2d 912 (Mont. 1987).

ownership of water, and therefore were outside the scope of the PTD.[71] Nevertheless, the Montana PTD protects public uses of beds and banks incidental to water-related uses, including public rights to portage around barriers "in the least intrusive manner possible." [72]

Montana courts have not considered whether the PTD includes ecological purposes. Consistent with the Montana Constitution,[73] the legislature enacted the Natural Streambed and Land Preservation Act of 1975 (or "310 Law), [74] which declares that "[i]t is the policy of the state of Montana that its natural rivers and streams and the lands … immediately adjacent to them … are to be protected and preserved,"[75] and requires any person planning to alter a stream to obtain approval from the local conservation district or board of county commissioners.[76] Based on the Constitution's recognition of public ownership of water, public rights to a healthy environment, as well as the state's duty to maintain a healthy environment,[77] the courts could recognize ecological purposes of the PTD, perhaps imposing a duty on the state to ensure that water resources are suitable for public uses including navigation, fishing, and recreation.[78]

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[71] *Id.* (striking down MONT. CODE ANN. § 23-2-302(d)–(f) as unconstitutionally "overbroad in giving the public right[s] to recreational use[s] … not necessary for the public's enjoyment of its water ownership."). Interestingly, the majority did not address the fact that the provisions required the public to receive permission from the landowner. *But see id.* at 923 (Sheehy, J., dissenting) ("The statute confers no right to big game hunting o[n] streambeds except by permission of the landlord. There is no unconstitutionality inherent in the provision.").
[72] MONT. CODE ANN. § 23-2-311; *Galt*, 731 P.2d at 914; *Curran*, 682 P.2d at 172; *Hildreth*, 684 P.2d at 1091.
[73] Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 198 P.3d 219, 227 (Mont. 2008) (explaining that "the 310 Law is one of a comprehensive set of laws enacted by the Legislature to accomplish the goals of the constitution, including Article IX, section 1, which requires legislative provision of remedies to prevent depletion and degradation of natural resources." (internal citations and quotation marks omitted)).
[74] MONT. CODE ANN. §§ 75-7-101 *et seq.* (2010).
[75] MONT. CODE ANN. § 75-7-102(1) (2010).
[76] *Id.* § 75-7-111; *see Bitterroot River Protective Ass'n*, 198 P.3d at 527–28 (holding that Mitchell Sough was subject to the 310 Law because the slough was historically suitable for hunting, boating, and fishing, and because it supports the diversion of a "huge volume of water" from groundwater, springs, return flows, and precipitation).
[77] MONT. CONST., art. IX, § 3(3) ("All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people …"); MONT. CONST., art. II, § 3 ("All persons are born free and have certain inalienable rights … includ[ing] the right to a clean and healthful environment…"); MONT. CONST., art. IX, § 1(1) ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.").
[78] *See infra* §§ 5.4–5.6, 6.2–6.4.

5.0 Geographic Scope of Applicability

Under common law and the 1972 Constitution, the geographic scope of the Montana PTD extends to all waters capable of recreational use[79] and includes incidental rights to use beds and banks to ordinary high water mark.[80] Montana also recognizes public rights to use uplands to portage around barriers in waterways in the least intrusive manner possible.[81] In Montana, all state-owned lands are held in trust whether "they have been or may be granted by congress, or acquired by grant or gift or devise from any person or corporation."[82] Article X, section 11 specifies that these lands "shall be public lands of the State," and "shall be held in trust for the people,"[83] and means that the state must obtain "full market value" when granting any estate or interest in these public trust lands.[84]

5.1 Tidal

Montana is a landlocked state that initially recognized public trust rights in navigable-in-fact waters. When first considering the geographic scope of the PTD in the 1895 decision of

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[79] Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 171 (Mont. 1984) ("hold[ing] that under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.").

[80] Galt v. State Dep't of Fish, Wildlife, and Parks, 731 P.2d 912, 915 (Mont. 1987) (explaining that "the public's right to use the waters includes the right of use of the bed and banks up to the high water mark even though the fee title in the land resides with the adjoining landowners.") (citing Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984) and Mont. Coal. for Stream Access v. Hildreth, 684 P.2d 1088 (Mont. 1984)).

[81] MONT. CODE ANN. § 23-2-311; *Galt*, 731 P.2d at 914; *Curran*, 682 P.2d at 172; *Hildreth*, 684 P.2d at 1091.

[82] MONT. CONST., art. X, § 11(1).

[83] MONT. CONST. OF 1889, art. XVII, § 1 ("All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people..."); MONT. CONST., art. X, § 11(1) ("All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people...."); *see* P.P.L. Montana, Inc. v. State, 229 P.3d 421, 460 (Mont. 2010) (holding that public trust lands are subject to the provisions of Mont. Const. art. 10, § 11); Norman v. State, 597 P.2d 715 (Mont. 1979) (explaining that the "Montana Constitution provides ... that all lands of the State acquired by grant shall be public lands held in trust for the people ... [and] "full market value" should be received for the property.).

[84] MONT. CONST., art. X, § 11(2) ("No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest ... [is] secured to the state.").

Gibson v. Kelly,[85] the Montana Supreme Court mentioned that the doctrine initially applied to tidal waters at common law but later expanded to include navigable-in-fact waters in the United States when "the great tide of immigration began to flow westward."[86] Based on public ownership of water, recognized in common law and codified in the 1972 Constitution,[87] the Montana Supreme Court has repeatedly explained that the geographic scope of the PTD encompasses all surface waters capable of recreational use, and is not confined to waters satisfying a pleasure-boat or commercial use test of navigability.[88]

5.2 Navigable in Fact

Montana applied the navigable-in-fact test to determine the geographic scope of the PTD until the state codified public ownership of water under the PTD in the 1972 Constitution.[89] In *Herrin v. Sutherland*,[90] the 1925 Montana Supreme Court explained that a member of the public had the right to navigate, fish, and hunt from his rowboat in a navigable stream.[91] Since the enactment of the 1972 Constitution, the Montana Supreme Court has applied a recreational use test broader than the pleasure-boat test, instead of the navigable-in-fact test, to determine the scope of the PTD.[92]

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[85] 39 P. 517 (Mont. 1895).
[86] *Id.* at 519.
[87] *See supra* §§ 1.0–2.0.
[88] *Hildreth*, 684 P.2d at 1091; *Galt*, 731 P.2d at 913 (explaining that in both *Curran* and *Hildreth*, the court "held that under the public trust doctrine … the public has a right to use any surface waters capable of use for recreational purposes up to the high water marks and may portage around barriers in the water in the least intrusive manner possible."); *see infra* § 5.3.
[89] *See supra* §§ 1.0–2.0.
[90] 241 P. 328 (1925).
[91] *Id.* at 331 ("In rowing his boat upon the river and fishing therein the defendant was well within his rights. He also had the right to shoot wild ducks … if he did not trespass on the plaintiff's adjacent property.").
[92] *See supra* note 87 and accompanying text; *infra* § 5.3.

5.3 Recreational Waters

Based on public ownership of water,[93] Montanans have the right to use all waters capable of recreational use for recreational purposes, and the right to incidental use of beds and banks.[94] In *Montana Coalition for Stream Access v. Curran*,[95] the 1984 Montana Supreme Court held that the public may use all waters capable of recreational use, regardless of streambed ownership or navigability for other purposes.[96] The same year, in *Montana Coalition for Stream Access v. Hildreth*,[97] the court rejected a "pleasure boat" or "commercial use" test as unduly restrictive because the state constitution declares that "[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people."[98] The court emphasized that there is no specific test for determining which waters are capable of recreational use because the constitution does not restrict public rights to use waters for recreational purposes.[99]

Montana does not exempt artificially created waters from the scope of the PTD.[100] In 2008, in *Bitterroot River Protective Association v. Bitterroot Conservation District*,[101] the Montana Supreme Court held that Mitchell Slough was open for recreational use under the

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[93] *See supra* §§ 1.0–2.0; Harrison C. Dunning, WATERS AND WATER RIGHTS § 30.04 (Robert E. Beck ed., 3d ed. 1988) (explaining that public ownership of water as a basis for the PTD in Idaho, Montana, New Mexico, South Dakota, and Wyoming "obviates the need for a finding as to bed ownership, for consideration whether land or water is held as an incident of sovereignty or for a discussion of navigability for title.").

[94] Galt v. State Dep't of Fish, Wildlife, and Parks, 731 P.2d 912, 915 (Mont. 1987) ("[T]he public has the right to use the water for recreational purposes and minimal use of underlying and adjoining real estate essential to its enjoyment of its ownership in water.").

[95] 682 P.2d 163 (Mont. 1984).

[96] *Id.* at 170–71

[97] 684 P.2d 1088 (Mont. 1984).

[98] *Id.* at 1091 (citing Mont. Const., art. IX § 3(3)).

[99] *Id.* ("The Montana Constitution clearly provides that the State owns the waters for the benefit of its people. The Constitution does not limit the waters' use. Consequently, this Court cannot limit their use by inventing some restrictive test.").

[100] *See infra* notes 101–03 and accompanying text.

[101] 198 P.3d 219 (2008).

Stream Access Law because it could be used for boating, fishing, and hunting.[102] The court explained that 1972 Constitution and the Stream Access Law recognize public rights to recreate in all waters capable of recreational use, even waters that have been substantially altered for large-scale irrigation diversions.[103]

5.4 Wetlands

Consistent with the 1972 Constitution,[104] the Stream Access Law[105] declares that "all surface waters capable of recreational use may be so used by the public without regard to ownership of the land underlying the waters."[106] In *Bitterroot River Protective Association*, the 2008 Montana Supreme Court held that the PTD applies to wetlands, including sloughs capable of recreational uses including boating, fishing, and hunting.[107]

Montana courts could interpret the Natural Streambed and Land Preservation Act of 1975 (or "310 Law")[108] as a reflection of the state's duty to maintain wetlands under the PTD and Article IX of the 1972 Constitution.[109] The 310 Law declares that "natural rivers and streams and the lands … adjacent to them … are to be protected and preserved,"[110] requiring any person planning to alter a stream to obtain a permit from the local conservation district or board of

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[102] *Id.* at 227 (citing MONT. ADMIN. R. 36.2.402(7)).

[103] *Id.* at 241 ("Thus, while the Mitchell has been improved primarily by irrigators, it is much more than an irrigation ditch. … Here, … [it] flows year-round and presents the characteristics of a stream throughout all seasons."). The court also noted evidence of extensive public use of the slough for fishing since 1928 when declaring the segment navigable for recreational use. *Id.* at 236.

[104] *See supra* § 2.0 (discussing public ownership of water recognized at common law and in the 1972 Constitution).

[105] MONT. CODE ANN. § 23-2-301 *et seq.* (2010).

[106] *Id.* § 23-2-302(1).

[107] Bitterroot River Prot. Ass'n, 198 P.3d at 241.

[108] MONT. CODE ANN. §§ 75-7-101 *et seq.* (2010).

[109] MONT. CONST., art. IX, § 3(3) ("All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people …"); MONT. CONST., art. II, § 3 ("All persons are born free and have certain inalienable rights … includ[ing] the right to a clean and healthful environment…"); MONT. CONST., art. IX, § 1(1) ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.").

[110] MONT. CODE ANN. § 75-7-102(1) (2010); *see* Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 198 P.3d 219, 227 (Mont. 2008) (explaining that "the 310 Law … [was] enacted by the Legislature to accomplish the goals of the constitution, including Article IX, section 1, which requires legislative provision of remedies to prevent depletion and degradation of natural resources.") (internal citations and quotation marks omitted).

county commissioners.[111] In *Bitterroot River Protective Association*, the Montana Supreme Court held that even though it had extensive improvements to maintain flows, the Mitchell Slough was a "natural, perennial-flowing stream" within the scope of the 310 Law.[112] The court rejected a narrow definition of natural streams that would exclude those that would not have continuous flows absent diversions or impoundments because that would exclude many streams, defeating the purpose of the 310 Law.[113] Based on the 1972 Constitution and 310 Law, Montana courts could recognize ecological purposes of the PTD, including wetlands protection.[114]

5.5 Groundwater

Montana courts have not addressed whether the PTD applies to groundwater. However, in 1985, the Montana Supreme Court commented that the state constitution and Water Use Act "make no distinction between groundwater and other water rights."[115] In 2008, the court recognized that ground and surface water resources are interconnected.[116] Therefore, Montana courts could recognize that the geographic scope of the PTD extends to groundwater because groundwater use has effects on trust resources, including surface waters, fish, and wildlife. Indeed, Montana's Conservancy District Law[117] allows the Department of Natural Resources and Conservation to designate "controlled ground water areas" for many trust-related purposes, including regulating stream flows and lake levels, promoting recreation, and conserving fish and

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[111] *Bitterroot River Protective Ass'n*, 198 P.3d at 527–28 (holding that Mitchell Slough was subject to the 310 Law because significant portions of the slough were historically suitable for hunting, boating, and fishing, and because it supports the diversion of a "huge volume of water" from groundwater, springs, return flows, and precipitation).
[112] *Id.* at 527.
[113] *Id.* ("[t]he conclusion that natural, perennial-flowing streams must have flows which have never been diverted, impounded, appropriated or otherwise manipulated by man was incorrect. That definition is unreasonably narrow as inconsistent with the 310 Law and the extensive, man-impacted condition of the state's waters.").
[114] *See infra* § 4.2 (discussing how the PTD could include ecological purposes based on the state constitution).
[115] Dep't of State Lands v. Pettibone, 702 P.2d 948 (Mont. 1985) (citing MONT. CONST., art. IX, § 3 and MONT. CODE ANN. § 85-2-102(14)).
[116] *Bitterroot River Prot. Ass'n*, 198 P.3d at 224 (quoting the conservation district's finding that "some of the water in the Mitchell [Slough] results from ground water, the likely source of which is diverted or irrigation water.").
[117] MONT. CODE ANN. § 85-9-101 *et seq.* (2010).

wildlife resources.[118] Consistent with the Conservancy District Law, the courts could recognize ecological purposes of the PTD that burden groundwater use in Montana.

5.6 Wildlife

In the 1920s, Montana recognized that wild fish and game belong to the people of the state in their sovereign capacity.[119] Like other states, Montana regulates wildlife harvests by requiring fisherman and hunters to obtain licenses and tags.[120] The Montana legislature may impose terms and conditions on wildlife harvests so long as they do not violate constitutional limitations like equal protection.[121]

In *Kafka v. Montana Department of Fish, Wildlife, and Parks*,[122] the Montana Supreme Court considered whether a 2000 ballot measure effected a taking of private rights to maintain licensed game farms.[123] Initiative Measure No. 143 modified the rights of "game farm" licensees by specifying that licensees "may not allow the shooting of game animals or alternative livestock … or of any exotic big game species for a fee or other remuneration."[124] The court characterized

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[118] *Id.* § 85-9-102. The purposes of the Conservancy Districts law are to:

(1) prevent and control floods, erosion, and sedimentation;
(2) provide for regulation of stream flows and lake levels;
(3) improve drainage and to reclaim wet or overflowed lands;
(4) promote recreation;
(5) develop and conserve water resources and related lands, forest, fish, and wildlife resources;
(6) further provide for the conservation, development, and utilization of land and water for beneficial uses, including but not limited to domestic water supply, fish, industrial water supply, irrigation, livestock water supply, municipal water supply, recreation, and wildlife.

[119] Rosenfeld v. Jakways, 216 P. 776 (Mont. 1923) (upholding a statute regulating the killing of beaver, commenting that "the ownership of wild animals is in the state, held by it in its sovereign capacity for the use and benefit of the people generally, and … [are not] subject to private ownership except in so far as the state may choose to make them so, are principles now too firmly established to be open to controversy.") (Geer v. Connecticut, 161 U.S. 519 (1896); Herrin v. Sutherland, 241 P. 328, 333 (Mont. 1925), (stating that "[t]he wild game in this state belongs to the people in their sovereign capacity.") (citing Geer v. Connecticut, 161 U.S. 519 (1896)).

[120] For an example of a challenge to a state statute regulating wildlife harvests, *see* State *ex rel.* Visser v. State Fish & Game Comm'n, 437 P.2d 373 (Mont. 1968) (upholding the confiscation of an elk carcass shot by an unlicensed guide and improperly tagged by two licensed hunters).

[121] State v. Jack, 539 P.2d 726, 728 (Mont. 1975) (striking down a statutory provision requiring a non-resident hunter to be accompanied by a resident guide on equal protection grounds).

[122] 201 P.3d 8 (Mont. 2008).

[123] *Id.* at 13.

[124] *Id.*

the initiative as misleading because it effectively banned game farm operations, but held that the measure did not result in a taking because the state owns wildlife in a sovereign capacity, so game-farm licenses were mere privileges, not compensable property rights.[125]

If confronted with the issue, Montana courts could recognize ecological purposes of the PTD, including fish and wildlife protection, based on the 1972 Constitution's recognition of public ownership of water, public rights to a healthy environment, and the state's duty to maintain a healthy environment.[126] Montana courts could recognize that the PTD requires the state to manage wildlife resources consistent with the Natural Streambed and Land Preservation Act (or "310 Law").[127] The 310 Law declares that "it is the policy of the state of Montana that its fish and wildlife resources and particularly the fishing waters within the state are to be protected and preserved … in their natural existing state except as may be necessary and appropriate after due consideration of all factors involved."[128]

5.7 Uplands (Beaches, Parks, Highways)

The Montana Supreme Court repeatedly has recognized public rights to use beds and banks of all waters capable of recreational use to ordinary high water mark.[129] In addition, both the Montana Supreme Court and the state legislature recognize ancillary public rights to portage around barriers in an unobtrusive manner, including the right to cross private uplands when

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[125] *Id.* at 20–23.

[126] MONT. CONST., art. IX, § 3(3) ("All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people …"); *Id.* art. II, § 3 ("All persons are born free and have certain inalienable rights … includ[ing] the right to a clean and healthful environment…"); *Id.* art. IX, § 1(1) ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.").

[127] MONT. CODE ANN. §§ 87-5-501 *et seq.* (2010).

[128] *Id.* § 87-5-501.

[129] Montana Coal. for Stream Access v. Hildreth, 682 P.2d 1088, 1091 (Mont. 1984) ("The public has the right to use the waters and the bed and banks up to the ordinary high water mark.") (citing Montana Coal. for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984)).

necessary.[130] Although the Montana Supreme Court reaffirmed the public right of portage in *Galt v. Montana Department of Fish and Wildlife*,[131] it invalidated a provision of the Stream Access Law of 1985 requiring private landowners to bear the costs of constructing portage routes as an unconstitutional taking.[132]

The modern Montana Supreme Court has emphasized that the PTD does not include public rights to cross private uplands to access recreational waters .[133] However, in *Herrin v. Sutherland*,[134] the 1925 Montana Supreme Court commented that a member of the public may have the right to cross private land to access public property out of necessity.[135] The *Herrin* court declined to apply the doctrine because the defendant was a repeat trespasser who broke the plaintiff's fence while crossing his property to access public land for fishing and hunting land.[136] However, the court explained that when exercising the right to cross private uplands to access public lands out of necessity, the public should ask the landowner for permission or should cross in an unobtrusive manner.[137]

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[130] MONT. CODE ANN. § 23-3-311(1) (2009) ("A member of the public making recreational use of surface waters may, above the ordinary high-water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land and violation of the landowner's rights."); *Curran*, 682 P.2d at 172; *Hildreth*, 684 P.2d at 1091.

[131] 731 P.2d 912 (Mont. 1987).

[132] *Id.* at 914, 916 (severing subsection (3)(e) from Mont. Cod. Ann. § 23-3-311 because "although the recreational user has a right to portage around obstructions ... there can be no responsibility on behalf to the landowner to pay for such portage right."); *see infra* § 8.3.

[133] Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 198 P.3d 219, 233 (Mont. 2008) (reiterating the "cautionary note that nothing herein contained in this opinion shall be construed as granting the public the right to enter upon or cross over private property to reach the State-owned waters hereby held available for recreational purposes.") (quoting *Curran*, 682 P.2d at 172, and *Hildreth*, 682 P.2d at 1091).

[134] 241 P. 328 (Mont. 1925).

[135] *Id.* at 333 (citing Herrin v. Sieben, 127 P. 323 (1912)).

[136] *Id.*

[137] *Id.* (commenting that "[i]f he were entitled to the privilege he should first have asked the plaintiff to designate the track or way to be pursued across the land, ... [or] might have made his own selection, with the restriction that he could not lawfully encroach upon the land ... further than circumstances rendered necessary.") (citing Herrin v. Sieben, 127 P. 323 (1912)); *see also* Sarah K. Stauffer, *The Row on the Ruby: State Management of Public Trust Resources, the Right to Exclude, and the Future of Recreational Stream Access in Montana*, 36 ENVTL. L. 1421, 1435–38 (2006) (arguing that the PTD in Montana should include access rights, but apparently overlooking *Herrin* and necessity as a basis for recognizing public rights to cross uplands to access trust resources).

As explained above,[138] the Montana Constitution requires the state to obtain full market value when conveying interests in public lands, like campsite leases or timber harvest rights.[139] In addition, Montana municipalities must hold elections to approve sales or leases of municipal property held in trust for specific purposes, like parks.[140] Montana courts closely review conveyances of state property to ensure that the state follows general laws and secures fair market value for the trust resources as required under Article X, section 11(2) of the state constitution.[141] In addition, Montana courts apply strict scrutiny when assessing the constitutionality of statutes affecting citizen's rights to a clean and healthful environment.[142]

6.0 Activities Burdened

Apart from the public lands disposition requirements in the state constitution,[143] Montana courts have yet to address how the PTD burdens conveyances of property interests, wetland fills, water rights, or wildlife harvests. However, the courts would probably uphold reasonable regulations of these activities as a valid exercise of the police power, consistent with public ownership of water, public rights to a healthy environment, and the state's duty to maintain a healthy environment for future generations in the 1972 Constitution.[144]

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[138] *See supra* §§ 3.0–3.3.
[139] MONT. CONST., art. X, § 11(2).
[140] Prezeau v. City of Whitefish, 646 P.2d 1186 (Mont. 1982) (declining to rule on whether a hunting club constituted a valid park purpose based on ripeness, until after the city held an election to approve the sale).
[141] *See* supra §§ 3.1–3.3; Montanans for the Responsible Use of the School Trust v. State, 989 P.2d 800 (Mont. 1999) (invalidating a statue allowing free permits for timber removal and an agency policy of allowing campground leases for 3.5% of assessed land value as violations of the constitutional requirement to obtain full market value for trust resources); *see also* MONT. CONST., art. X, § 11(1) ("All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people...."); *Id.* art. X, § 11(2) ("No such land or any estate or interest therein shall ever be disposed of ... until the full market value of the estate or interest ... [is] secured to the state.").
[142] Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 988 P.2d 1236, 1263 (Mont. 1999) (MONT. CONST., art. IX, § 9).
[143] *See supra* § 3.0–3.3.
[144] MONT. CONST., art. IX, § 3(3) ("All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people ..."); *Id.* art. II § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment ..."); *Id.* art. IX, § 1(1)

6.1 Conveyances of Property Interests

Montana courts recognize that the PTD burdens state conveyances of public trust lands, requiring the state to follow general laws and obtain full market value when granting interests in trust resources.[145] In addition, the courts have occasionally addressed how the PTD burdens conveyances of private property.[146] In *Jackson v. Burlington Northern, Inc.*,[147] the 1983 Montana Supreme Court explained that under the PTD, the government owns all minerals under the beds of navigable waters, even when a riverbed shifts, because unregulated private mineral development could interfere with public rights to fish, navigate, and recreate.[148]

6.2 Wetland Fills

Montana courts have not addressed whether the PTD burdens wetland fills.[149] However, as discussed above,[150] the courts could emphasize that, consistent with the 1972 Constitution,[151] the state must consider ecological purposes of the trust obligations when administering water resource protection statutes, like the Natural Streambed Land Protection Act (or "310 Law"),[152] the Stream Access Law of 1985,[153] and the Conservancy District Law.[154]

("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."); MONT. CONST., art. II § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment ...").

[145] *See supra* § 3.1.

[146] *See infra* notes 142–43.

[147] 667 P.2d 406 (Mont. 1983).

[148] *Id.* at 408 (recognizing public ownership of all minerals presently underlying navigable waters, and commenting that "development of privately owned minerals underlying navigable waterways could interfere with the public's right to navigate, whether for commercial or recreational purposes.").

[149] Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 198 P.3d at 222 (commenting that before trial, the trial court dismissed a challenge that the conservation district's decision violated the public trust doctrine, so it did not consider whether the PTD burdens wetland fills).

[150] See supra §§ 4.2, 5.6.

[151] *See supra* notes 142, 144, and accompanying text.

[152] MONT. CODE ANN. § 75-7-101 *et seq.* (2010); *see supra* §§ 5.3–5.4, 5.6.

[153] MONT. CODE ANN. § 23-2-302 *et seq.* (2010); *see supra* §§ 1–2, 4.2, 5.3–5.4 .

[154] MONT. CODE ANN. § 85-9-101 *et seq.* (2010); *see supra* § 5.6.

6.3 Water Rights

Within ten years of statehood, the 1896 Montana Supreme Court suggested in *Fitzpatrick v. Montgomery*[155] that public trust rights imposes limits on appropriated water rights.[156] The *Fitzpatrick* court upheld a jury verdict compensating a landowner for damages due to polluted runoff from appropriated water used by a placer mine.[157] The court explained that the "right to water… is not unrestricted. It must be exercised with reference to the … necessities of the people, and not so as to deprive a whole neighborhood or community its use, and vest an absolute monopoly in a single individual."[158] Thus, for over a century, the Montana Supreme Court has recognized that "beneficial uses" can change over time, and public necessities can burden appropriated water rights.[159]

In *PPL Montana, Inc. v. State*,[160] the 2010 Montana Supreme Court held that the legislature has a duty to seek compensation from private dam owners for the use of public trust riverbeds under Article X, section 11 of the Montana Constitution.[161] The court suggested that the legislature could also enact statutes requiring irrigators, ranchers, and recreationalists to pay compensation for the use of trust resources.[162]

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[155] 50 P. 416 (Mont. 1897).
[156] *Id.* at 417.
[157] *Id.*
[158] *Id.* (quoting Basey v. Gallagher, 87 U.S. (20 Wall.) 670, 675 (1874)).
[159] *Id.* The court stated that "a legitimate private business, founded upon a local custom [and relying on appropriated water rights], may grow into a force to threaten the safety of the people and destruction of public and private rights" that would make its continuation unlawful. *Id.*
[160] 229 P.3d 421 (Mont. 2010).
[161] *Id.* at 460 (holding that public trust lands are subject to the provisions of Mont. Const. art. 10, § 11 that govern the disposition of public lands); *see supra* § 3.1
[162] The *PPL* court declined to address the concerns of *amici* about the effect of the PTD on water rights because the case focused on whether the state could charge rent for the use of riverbeds under dams. *Id.* However, the court commented that "[o]ther general laws may (or may not) provide an assessment method for irrigators, stockmen, recreationists, and other water users, in a manner that takes account of the 'public trust' with respect to these different classes of usage."; *see supra* §§ 3.0–3.3 (discussing the constitutional mandate that the state obtain full market value when granting interests in trust lands).

6.4 Wildlife Harvests

Although Montana courts acknowledged state ownership of wildlife in early statehood,[163] they have not addressed how the PTD burdens wildlife harvests. Like other states, Montana regulates wildlife harvests with license and tagging requirements.[164] As discussed above,[165] Montana courts could conclude that the 1972 Constitution recognizes ecological purposes of the state PTD, requiring the state to regulate wildlife harvests to maintain public trust fish and wildlife resources for future generations.[166]

7.0 Public Standing

Montana provides broad standing rights to litigants seeking review of state actions that adversely affect trust resources or restrict public use of trust resources.

7.1 Common law-based

The Montana Supreme Court has yet to address common law standing to protect trust resources because litigants generally join state actors in lawsuits, and the court has stated that standing is "immaterial" when state agencies are joined in an action involving trust resources.[167] Many Montana public trust cases are ejectment actions that define the geographic scope of the

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[163] Rosenfeld v. Jakways, 216 P. 776 (Mont. 1923) (upholding a statute regulating the killing of beaver, commenting that "the ownership of wild animals is in the state, held by it in its sovereign capacity for the use and benefit of the people generally, and ... [are not] subject to private ownership except in so far as the state may choose to make them so, are principles now too firmly established to be open to controversy.") (Geer v. Connecticut, 161 U.S. 519 (1896); Herrin v. Sutherland, 241 P. 328, 333 (Mont. 1925), (stating that "[t]he wild game in this state belongs to the people in their sovereign capacity.") (citing Geer v. Connecticut, 161 U.S. 519 (1896)); *see generally* Michael C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 706 (2005) (identifying both the police power and sovereign ownership as the bases of the wildlife trust, and arguing that "the state ownership doctrine lives on ... in virtually all states, affording states ample authority to regulate the taking of wildlife and to protect their habitat."); *supra* § 5.6.

[164] State *ex rel.* Visser v. State Fish & Game Comm'n, 437 P.2d 373 (Mont. 1968) (upholding the confiscation of an elk carcass shot by an unlicensed guide and improperly tagged by two licensed hunters).

[165] *See supra* §§ 4.2, 5.4–5.5, 5.6.

[166] MONT. CONST., art. IX, § 3(3) ("All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people ..."); MONT. CONST., art. II § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment ..."); MONT. CONST., art. IX, § 1(1) ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."); MONT. CONST., art. II § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment ...").

[167] Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 171 (Mont. 1984).

trust when landowners attempt to exclude public water users.[168] In these cases, landowners have standing under the common law of property in Montana.[169]

7.2 Statute-based

As mentioned above,[170] the Montana Supreme Court has commented that standing is "immaterial" when the state is a party to an action involving trust resources.[171] Under a taxpayer standing theory, or by analogy to private trust law, the courts seem to recognize public standing rights to challenge state conveyances of trust resources to ensure that they meet constitutional requriements.[172] For example, in *Montanans for Responsible Use of the School Trust v. State*,[173] the Montana Supreme Court recognized that an advocacy group could challenge the validity of both statutes and agency policies for failing to meet the full market value requirement for public lands disposition in the state constitution.[174] As explained above,[175] the court declared a number of the provisions and policies unconstitutional because they violated the state's "duty of undivided loyalty" to the public by serving third party interests to the detriment of the trust.[176]

7.3 Constitutional Standing

In addition to recognizing that present and future generations of Montanans have the right to a healthy environment,[177] the Montana constitution specifies that "[t]he legislature shall provide adequate remedies for the protection of the environmental life support system from

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[168] *See, e.g.*, Herrin v. Sutherland, 241 P.3d 325, 328–29 (Mont. 1925) (ruling that the public has rights to fish and hunt on navigable waters, but cannot trespass onto private land when using waters for these purposes); *but see supra* § 5.3 (explaining that the modern Montana PTD extends to all waters capable of recreational use).
[169] *Herrin*, 241 P.3d at 330 (discussing landowner rights to exclude the public from water resources at common law).
[170] *See supra* § 7.1.
[171] *Curran*, 682 P.2d at 171.
[172] *See generally* 74 AM. JUR. 2D TAXPAYERS' ACTIONS § 6 (2010); 76 AM. JUR. 2D TRUSTS § 613 (2010).
[173] 989 P.2d 800 (Mont. 1999).
[174] *Id.* at 802.
[175] *See supra* § 3.2–3.3
[176] *Montanans*, 989 P.2d at 809.
[177] MONT. CONST., art. IX, § 1(1) ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."); MONT. CONST., art. II § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment ...").

degradation and … to prevent unreasonable depletion and degradation of natural resources."[178] Montana courts have yet to explain whether this provision creates public standing rights, but they might do so if litigants demonstrate that common law or statutory remedies would not adequately address potential damages to trust resources.[179] In addition, Montana's constitutional trust provisions discussed above may confer standing on members of the public as beneficiaries by analogy to private trust law.[180]

8.0 Remedies

Montana courts generally provide injunctive, declaratory, or procedural relief when ruling that state action harms the trust or unlawfully excludes the public from trust resources.[181]

8.1 Injunctive Relief

When the state or private landowners exclude the public from access to trust resources, Montana courts generally enjoin the exclusion of the public, requiring public trust lands and waters to be open for public use.[182]

8.2 Damages for Injuries to Resources

As explained above,[183] the Montana Constitution requires the state to obtain full market value when conveying interests in public lands held in trust for the people.[184] When courts conclude that the state has not obtained full market value for trust resources, they generally

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[178] MONT. CONST., art. IX, § 1(3).
[179] Tally Bissell Neighbors, Inc., v. Eyrie Shotgun Ranch, 228 P.3d 1134, 1142 (Mont. 2010) (refusing to consider whether the right to a clean and healthful environment in the state constitution supports a cause of action for money damages between two private parties because the petitioners failed to explain how common law or statutory remedies would fail to address injuries caused by the operation of a shooting range near their property) (citing Shammel v. Canyon Resources Corp., 167 P.3d 886 (Mont. 2007) and Sunburst School Dist. No. 2 v. Texaco, Inc., 165 P.3d 1079 (Mont. 2007)).
[180] *See* 76 AM. JUR. 2D TRUSTS § 613 (describing the rights of private beneficiaries under trust law); *see supra* notes 19–21, 77 and accompanying text (discussing trust provisions of the Montana Constitution).
[181] *See infra* §§ 8.1–8.3.
[182] *E.g.*, Mont. Coal. for Stream Access v. Hildreth, 682 P.2d 1088, 1090 (Mont. 1984) (describing the district court's grant of a preliminary injunction barring a private landowner from restricting public use of waters for recreational purposes).
[183] *See supra* §§ 3.1–3.3.
[184] MONT. CONST., art. X, § 11(2).

provide procedural relief by requiring agencies to reconsider their decision.[185] In 1897, the Montana Supreme Court recognized that landowners can recover damages under common law when appropriated water rights holders injure riparian land, affirming a jury award of $150 to a landowner injured by polluted runoff from a placer mine.[186] Although remaining an open question, Montanans may be able to obtain monetary relief for damage to trust resources under Article IX, section 1 of the state constitution if they can demonstrate that common law and statutory remedies would not provide adequate relief.[187]

8.3 Defense to Takings Claims

Montana has successfully asserted the PTD as a defense to takings claims. For example, in *Montana Coalition for Stream Access v. Curran*,[188] the Montana Supreme Court dismissed claims that the public ownership of water recognized in the 1972 Constitution was a taking of private property because the public only claimed title to water, not the beds underlying all waters.[189] And in *Montana Coalition for Stream Access v. Hildreth*,[190] the court similarly denied a claim of judicial takings because the district court's order merely upheld the public ownership of water recognized under common law and codified in the state constitution.[191] As a result, the Montana courts would likely hold that regulations implementing statutes protecting trust

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[185] Aspen Trails Ranch, L.L.C. v. Simmons, 230 P.3d 808, 821 (Mont. 2010) (holding that the District Court "did not err in concluding that the Commission's approval of the preliminary plat was unlawful for failure to provide available groundwater information as required under Mont. Code. Ann. § 76-3-603(1)(a), and arbitrary and capricious for failure to consider surface pollution impacts created by the subdivision.").

[186] Fitzpatrick v. Montgomery, 50 P. 416 (Mont. 1897) (affirming a jury verdict awarded in "an action to recover for damages to real estate").

[187] *Tally Bissell Neighbors, Inc.*, 228 P.3d at 1142 (explaining that the courts will refuse to consider whether the right to a clean and healthful environment in Article II, Section 3, and Article IX, Section 1 of the state constitution, support a cause of action for damages "where adequate alternative remedies exist under common law or statute.").

[188] 682 P.2d 163 (Mont. 1984).

[189] *Id.* at 171 ("the question of title to the bed is irrelevant to determination of navigability for use, and Curran has no claim to the waters. Since there is no claim to the waters, there is no taking and, therefore, no grounds for an inverse condemnation claim.").

[190] 684 P.2d 1088 (Mont. 1984).

[191] *Id.* at 1094 ("The ... issue is whether Hildreth has been deprived of a property right by the District Court. We hold that he has not. As discussed previously in this opinion and extensively in *Curran*, supra, ownership of the streambed is irrelevant to determination of public use of the waters for recreational purposes."); *see supra* § 2.0 (discussing judicial recognition of public ownership of water under common law in early statehood).

resources, like the Montana Streambed and Lands Preservation Act ("310 Law"),[192] do not constitute takings.

However, the PTD is not a complete defense to takings. In *Galt v. State Department of Fish, Wildlife, and Parks*,[193] the Montana Supreme Court rejected a provision of the Stream Access Law requiring landowners to pay for the construction of public portage routes around barriers as an unconstitutional taking.[194] The court explained that although private landowners "have their fee impressed with a dominant estate in favor of the public[,] [t]his easement must be narrowly confined so that impact to beds and banks owned by private individuals is minimal."[195] The *Galt* court concluded that the legislature went too far by requiring landowners to bear the costs of providing public portage routes.[196] Therefore, in order to avoid takings liability, the state must strike an appropriate balance between the public and private property rights protected by the Montana Constitution.[197]

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[192] MONT. CODE ANN. § 75-7-102(1) (2010).
[193] *Galt v. State Dep't of Fish, Wildlife, and Parks*, 731 P.2d 912 (Mont. 1987).
[194] *Id.* at 916.
[195] *Id.*
[196] *Id.* (striking down MONT. CODE ANN. § 23-2-311(3)(e) (1985), which required landowners to construct public portage routes around barriers as an unconstitutional taking).
[197] *Id.*; *see supra* § 3.0.

NEBRASKA

The Public Trust Doctrine in Nebraska

Melissa Parsons

1.0 Origins

Nebraska's public trust doctrine (PTD) dates to statehood, when Nebraska acquired title to the beds of navigable waters upon its admission to the Union in 1867.[1] Nebraska has since limited declarations of state ownership in these beds by adopting the common law tidal test of navigability to designate all state waters, with the exception of the Missouri River, as nonnavigable even where they are navigable-in-fact.[2] Consequently, Nebraska has declared that title to the beds of all waters attaches to abutting uplands, vesting bed title in the littoral owners.[3]

With the state's adoption of the restrictive federal tidal test of navigability and the rights of riparian owners running to the "thread of the stream,"[4] except for the Missouri River, streambeds and riparian areas are privately owned.[5] Still, both federal and state courts have acknowledged that ownership of the water overlying those beds remains in the public, limiting the rights of riparian owners and other appropriators of water to a mere usufruct.[6] Notwithstanding that

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[1] Kinkead v. Turgeon, 74 Neb. 573, 109 N.W. 744, 746 (1906) (noting that title to the beds of navigable streams passed to the states upon admission); *see also* Peter N. Davis, *State Ownership of Beds of Inland Water—A Summary and Reexamination,* 57 Neb. L. Rev. 665, 667 (1978) (explaining the "equal footing" of states upon admission to the union).

[2] *Kinkead*, 109 N.W. at 745–47 (adopting the tidal navigability test); *see also* Valder v. Wallis, 196 Neb. 222, 242 N.W.2d 112 (1976) (recognizing the common law rule that riparian ownership extends to the thread of the navigable stream).

[3] Krumwiede v. Rose, 129 N.W.2d 491, 496 (Neb. 1964) ("In Nebraska the rule as to ownership on the bottom of the river . . . is the same, whether the stream is navigable or nonnavigable. The only difference is that in case of a navigable stream, such as the Missouri River, it is subject to the superior easement of navigation"); *see also* Davis, *supra* note 1, at 674 n.50.

[4] *Kinkead*, 109 N.W. at 748 (adopting the common law rule that vests bed title in the riparian owner to the thread of the stream, subject to public navigation).

[5] *But see* Neb. Rev. Stat. § 37-333 (declaring "meandered lakes" to be the property of the state, held "for the benefit of the public," except where the U.S. issued patents to private owners).

[6] State ex rel. Cary v. Cochran, 138 Neb. 163, 292 N.W. 239, 247 (recognizing public ownership of water and attendant rights therein limited to use); United States v. Tilley, 124 F.2d 850, 861 (8th Cir. 1941) (citing *Cary v. Cochran*, reinforcing public ownership of water).

limitation, both the Nebraska legislature and state courts have been reluctant to recognize the PTD or to expand it beyond traditional applications.[7]

In the late nineteenth century, the Nebraska legislature began enacting several water-related statutes. Although numerous provisions in the water code[8] subject the regulation of water to considerations of the public interest,[9] these statutes contain no express recognition of the PTD. In 1920, Nebraska incorporated several provisions in the Irrigation Act into its constitution.[10] These constitutional provisions, dedicating the beneficial use of water to the people and subjecting appropriation to the interests of the public, could be reasonably interpreted to imply state ownership of water and to invoke the PTD.[11] Despite this implicit constitutional recognition of the PTD, Nebraska courts have remained largely silent on the issue.[12]

The Nebraska Supreme Court first explicitly discussed the PTD in *Crawford Co. v. Hathaway*, a 1903 dispute between riparian owners and appropriators in which the court recognized limitations on riparian ownership subject to the PTD, noting "[a]s to navigable

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[7] Danielle Spiegel, *Can the Public Trust Doctrine Save Western Groundwater?*, 18 N.Y.U. Envtl. L.J. 412, 436 (2010) (designating Nebraska a "silent state" in which the PTD is not formally recognized).

[8] Neb. Rev. Stat. ch. 46 (regulating appropriation, irrigation, construction of wells and dams, groundwater, and instream flows, subject to public interest considerations).

[9] *See, e.g.*, Neb. Rev. Stat. § 46-235 (conditioning approval of applications for water on public interest and public welfare); Neb. Rev. Stat. § 46-702 (recognizing public ownership of water "held by the state for the benefit of its citizens"); Neb. Rev. Stat. § 46-2,107 (declaring streamflow management in the public interest and "essential to the well-being of present and future generations"); Neb. Rev. Stat. § 46-2,116 (establishing a public interest determination requirement for instream appropriations).

[10] Neb. Const. art. 15, §§ 4-7.

[11] Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 Envtl. L. 573, 576 n.12 (1989) (claiming that Nebraska uses "constitutional language that implies state ownership of waters," citing Neb. Const. art. 15, §§ 4-6, declaring use of water to be a 'natural want,' dedicating water to the people for beneficial use, and allowing for the denial of the right to divert unappropriated waters 'when such denial is in the public interest').

[12] Spiegel, *supra* note 7, at 436 (recognizing that Nebraska courts, presumably not having been presented with arguments concerning the PTD, have remained silent on the matter).

streams, the doctrine seems to be that the water and the soil thereunder belong to the state, and are under its sovereignty and domain, in trust for the people, and cannot, therefore, be the subject of a claim of property therein, or the right to the use thereof by an adjoining landowner."[13] But subsequent Nebraska Supreme Court decisions have failed to acknowledge the PTD. For instance, in *Wasserburger v. Coffee*, which overruled *Crawford Co.*, the court acknowledged a necessary balance between appropriation and riparian rights and discussed the interests of the public in conservation and utilization of water, but never mentioned the PTD.[14]

Although some early state court decisions acknowledged and even embraced the PTD,[15] Nebraska courts have been reluctant to formally read the doctrine's applicability into any of the state's constitutional or statutory provisions. For example, there are no judicial interpretations of the 1992 Nebraska Environmental Trust Act (NETA),[16] which arguably represents the Nebraska legislature's clearest recognition of the PTD, with a stated purpose to conserve and restore state trust resources, including air, land, water, wildlife, and other natural resources for the well-being of current and future state citizens.[17] The NETA could reasonably be interpreted to implicate the PTD because it conserves state lands and natural resources for the use and enjoyment of the

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[13] 67 Neb. 325, 93 N.W. 781, 789 (1903) (acknowledging the common law PTD that vests title of streambeds in the state, held in trust for the people).

[14] Wasserburger v. Coffee, 180 Neb. 149, 159-162 (1966) *opinion modified on reh'g*, 144 N.W.2d 209 (Neb. 1966) (adopting balancing factors from Restatement, Torts, § 853 to resolve disputes between riparian owners and appropriators).

[15] *See, e.g., Crawford Co.*, 67 Neb. 325; *see also Kinkead*, 109 N.W. at 747 (explaining "[t]he public retains its easement of the right of passage along and over the waters of [a navigable] river as a public highway. This...interest of the public in connection with such rivers...is paramount, and...is, and should be, protected by the courts").

[16] Neb. Rev. Stat. §§ 81-15,167 to 81-15,176.

[17] Neb. Rev. Stat. § 81-15,168 ("It is the intent of the Legislature to establish the...Trust for the purpose of conserving, enhancing, and restoring the natural physical and biological environment in Nebraska, including the air, land, ground water, surface water, flora and fauna, prairies and forests, wildlife and wildlife habitat, and natural areas of aesthetic or scenic values. The current and future well-being of the state and its citizens is vitally dependent on a safe and clean environment and requires a dynamic, proactive approach to address environmental needs").

public and establishes state responsibilities for managing these trust assets.[18]

2.0 Basis

Nebraska's limited PTD is largely rooted in constitutional and statutory provisions that implicitly invoke the PTD,[19] which Nebraska courts could reasonably construe to contain PTD language. For example, Nebraska's constitution contains sections that, while not unequivocal recognitions of the PTD, imply state ownership of water, which could arguably form the basis for PTD rights in the state. The constitution declares domestic and agricultural use of water to be a "natural want,"[20] dedicates the state's water to the people for "beneficial use"[21] and injects a public interest consideration into the determination and regulation of water rights.[22] Similarly, state statutes like the NETA[23] and the water code[24] contain language which courts could read to reflect the PTD, although Nebraska courts have yet to do so.

3.0 Institutional Application

3.1 Restraint on Alienation (private conveyances)

Except for the Missouri River, riparian ownership of the beds of waterways extends to the thread of the stream and is subject only to the public easement of navigation.[25] Nebraska courts

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[18] Neb. Rev. Stat. § 81-15,173; Neb. Rev. Stat. § 81-15,175.
[19] *See supra* notes 9 - 11 and accompanying text.
[20] Neb. Const. art. 15, § 4.
[21] Neb. Const. art. 15, § 5. This provision establishes public ownership of water, effectively dividing ownership of Nebraska waterways, the beds of which are privately owned.
[22] Neb. Const. art. 15, § 6; *but see infra* note 68 (Nebraska Supreme Court's rejection of reading trust limits into the state's instream flow provision).
[23] *See supra* notes 16 - 18 and accompanying text.
[24] Neb. Rev. Stat. § 46-702 ("The Legislature finds that ownership of water is held by the state for the benefit of its citizens, that ground water is one of the most valuable natural resources in the state, and that an adequate supply of ground water is essential to the general welfare of the citizens of this state and to the present and future development of agriculture in the state. The Legislature recognizes its duty to define broad policy goals concerning the utilization and management of ground water and to ensure local implementation of those goals").
[25] *Kinkead*, 109 N.W. at 748 ("The interest of the public in the waters and bed of a navigable river is analogous to that of the public in a public road. It has the right of passage over the stream

have otherwise not limited private conveyances under the PTD.

3.2 Limit on Legislature

The PTD does not impose any express limits on Nebraska's legislature. In fact, some statutes containing trust-like language specifically decline to impose additional duties on the legislature.[26] However, state courts and the U.S. Supreme Court have recognized legislative authority to regulate public trust resources, concluding that state regulation of public waters in Nebraska is a proper exercise of the state's police power.[27] Although the exercise of police power does not necessarily implicate the PTD, the U.S. Supreme Court has viewed state claims of trustee ownership—the linchpin of the PTD—as related to exercise of police powers to regulate resources on behalf of citizens.[28]

3.3 Limit on Administrative Action

The Nebraska legislature has granted the state Department of Natural Resources (DNR) broad authority[29] to promulgate regulations managing water and other natural resources that are subject to statutory trust-like language.[30] For example, Nebraska's Ground Water Management

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as it had over the road. The owner of the land abutting upon a public road can do nothing in any way to interfere with the rights of the public in the same, nor can the riparian owner on the banks of a navigable stream exercise any dominion over its waters or over the bed thereof in any manner inconsistent with, or opposed to, the public easement.")

[26] *See, e.g.*, Neb. Rev. Stat. § 46-702, Nebraska's Ground Water Management and Protection Act, providing that, "consistent with the public ownership of water held by the state for the benefit of its citizens, any action by the Legislature, or through authority conferred by it to any agency or political subdivision, to provide economic assistance does not establish any precedent that the Legislature . . . must or should purchase water or provide compensation for any economic impact resulting from regulation necessary").

[27] *See, e.g.*, Enterprise Irr. Dist. v. Willis, 135 Neb. 827, 284 N.W. 326, 330 (1939) (acknowledging that the police power authorizes "reasonable" interference with vested water rights for the public good).

[28] Hughes v. Oklahoma, 441 U.S. 322, 324–25, 335–36 (1979) (recognizing that police powers, like regulation and control of wildlife, underlie the legal fiction of state ownership of wildlife).

[29] Neb. Rev. Stat. § 61-205 (assigning duties, including regulation of water and natural resources, to the DNR).

[30] *See, e.g.*, Neb. Rev. Stat. § 46-702; Neb. Rev. Stat. § 46-703 ("The management, conservation,

and Protection Act, which provides "that ownership of water is held by the state for the benefit of its citizens...and that an adequate supply...is essential to the general welfare of the citizens of this state,"[31] also authorizes natural resources districts to adopt and promulgate rules and regulations necessary to manage water resources in the state.[32] Similarly, the Nebraska Game and Parks Commission has statutory authority to promulgate rules and regulations to manage revenue from and "make proper use" of state-owned lakes, held "for the benefit of the public."[33] However, this statute does not expressly impose any duties on the agency pursuant to the PTD.[34] Nebraska courts have looked to statutory language to uphold[35] and to restrict[36] agency actions concerning the state's public resources arguably subject to the PTD.

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and beneficial use of...ground water and surface water are essential to the continued economic prosperity and well-being of the state, including the present and future development of agriculture in the state").

[31] Neb. Rev. Stat. § 46-702.

[32] Neb. Rev. Stat. § 46-707.

[33] Neb. Rev. Stat. § 37-333 ("Meandered lakes . . . and the beds thereof, are declared to be the property of the state for the benefit of the public"). This provision contains the only express declaration of state ownership of the beds of waterways in the Nebraska code.

[34] *Id.* The language in this statute concerning administrative action provides that "the revenue therefrom and resources therein shall be subject to the Game Law and the rules and regulations of the commission relative thereto. The commission shall have authority to improve meandered lakes and to adopt and promulgate such rules and regulations as may be necessary to make proper use of the same."

[35] *See, e.g.*, In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990) (upholding DWR approval of Game and Parks Commission's application for instream appropriation to maintain naturally reproducing rainbow and brown trout fishery); In re Hitchcock & Red Willow Irr. Dist., 226 Neb. 146, 149–50, 410 N.W.2d 101, 104 (1987) (affirming a DWR order denying a diversion application for failure to "meet the public interest test" under Neb. Rev. Stat. § 46-289, and for failure to meet requirements established by § 37-435(3) of the Nongame and Endangered Species Conservation Act).

[36] *See, e.g.*, Cent. Platte Natural Res. Dist. v. State of Wyo., 245 Neb. 439, 513 N.W.2d 847 (1994) (noting the duty of the Game and Parks Commission to submit a "nonjeopardy opinion" regarding threatened species to the DWR under Neb. Rev. Stat. § 37-435); Cent. Platte Natural Res. Dist. v. City of Fremont, 250 Neb. 252, 549 N.W.2d 112 (1996) (holding that the DNR director could not issue water diversion permits that would jeopardize threatened species).

4.0 Purposes

4.1 Traditional

Nebraska courts have not embraced the PTD, instead adhering to the "minimalist" PTD established in the U.S. Supreme Court's 1892 decision of *Illinois Central Railroad Company v. Illinois*,[37] which, according to one respected commentator, defined "the doctrine's minimal applicability in terms of waters covered, uses protected, and restraints on state authority to eliminate the public trust."[38] Nebraska courts have not even examined traditional PTD rights beyond the public right of navigation.[39]

4.2 Beyond Traditional

Although Nebraska courts have long recognized the traditional right of navigation,[40] state courts have not expanded the PTD beyond traditional rights.[41]

5.0 Geographic Scope of Applicability

5.1 Tidal

Despite the fact that Nebraska contains no waters subject to tidal influence, it employs the tidal navigability test, thereby designating all state waters that are navigable-in-fact as nonnavigable for bed title purposes.[42] The Missouri River is the only navigable river in

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[37] 146 U.S. 387 (1892) (holding that the state of Illinois did not possess the authority to grant fee title to submerged lands held in trust for the public).

[38] Robin Kundis Craig, *A Comparative Guide to the Western States Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L.Q. 53, 71 (2010).

[39] Nebraska does not recognize or statutorily protect these "beneficial uses" such as fishing and recreation under the PTD (*see, e.g.*, Neb. Rev. Stat. § 46-2,108), nor have Nebraska courts considered such uses in that context.

[40] *See, e.g.*, Kinkead v. Turgeon, 109 N.W. 744, 747 (Neb. 1906) (recognizing the common law public easement of navigation in navigable waters); Krumwiede v. Rose, 129 N.W.2d 491, 496 (Neb. 1964) (citing *Kinkead* and noting the Nebraska rule vests ownership in beds of waterways in the riparian owner, subject only to the "superior easement of navigation").

[41] *See* Craig, *supra* note 38, at 80–81.

[42] *Kinkead*, 109 N.W. at 745–47 (adopting the tidal navigability test).

Nebraska, a declaration based on its prior designation by Congress as commercially navigable.[43]

5.2 Navigable-in-Fact

After thorough examinations of both the navigable-in-fact and the tidal tests of navigability,[44] the Nebraska Supreme Court finally adopted the common law ebb-and-flow tidal test to determine title to the beds of waterways within the state.[45] Under this test, the state designates all waters as nonnavigable, even where those waters are navigable-in-fact.[46]

5.3 Recreational Waters

Nebraska courts do not recognize a public right of recreation in waters within the state, despite public ownership of the waters overlying private land.[47]

5.4 Wetlands

Nebraska does not recognize a public trust in wetlands.

5.5 Groundwater

Nebraska's 1975 Ground Water Management and Protection Act[48] provides that "ownership of water is held by the state for the benefit of its citizens, that groundwater is one of the most valuable natural resources in the state, and that an adequate supply of groundwater is essential to the general welfare of the citizens of this state."[49] Nebraska courts have considered this declaration and other provisions in the water code and have concluded that groundwater is

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[43] *Id.* at 747 (treating the Missouri River as navigable based on prior commercial navigability but ruling that the rights of riparian owners are the same as if the river were not navigable, the only difference here being that the ownership is subject to the easement of navigation).
[44] *Id.* at 744–46 (examining the common law tidal test and the commercial navigability tests).
[45] *Id.* at 745–47.
[46] Valder v. Wallis, 242 N.W.2d 112, 114 (Neb. 1976) (recognizing the Nebraska Supreme Court's use of the common law tidal test in *Kinkead*); *see also* Craig, *supra* note 38, at 143; Davis, *supra* note 1, at 674 n.50.
[47] Neb. Const. art 15 § 5 (dedicating water to public use); *Krumwiede*, 129 N.W.2d at 496 ("In Nebraska the rule as to ownership on the bottom of the river . . . is the same, whether the stream is navigable or nonnavigable").
[48] Neb. Rev. Stat. § 46-701 *et seq.*
[49] Neb. Rev. Stat. § 46-702.

indeed publicly owned, and that landowners are entitled only to use of underlying groundwater subject to regulations and limitations defined in the code.[50] Within this statutory framework, Nebraska establishes a preference for groundwater uses that seeks to effectuate the goals of conservation and protection of the interests of the public.[51] Nebraska's groundwater statutes are fashioned around this policy of conservation and protection of the "future well-being of th[e] state,"[52] an element essential to the PTD. Although the water code does not contain express "trust" language, it could therefore be interpreted to invoke the PTD.

5.6 Wildlife

Nebraska's legislature has not extended the PTD to wildlife. In 1975, the legislature enacted the Nongame and Endangered Species Act[53] for the purpose of conserving wildlife "for human enjoyment,"[54] but this statute does not include express trust language. Nebraska courts have interpreted this statute only in the context of water rights, concerning instream flow standards established by the Game and Parks Commission to protect fish and wildlife in the interest of the public.[55] For instance, in *Central Platte Natural Resources Dist. v. City of Fremont*, the Nebraska Supreme Court upheld a Department of Water Resources (DWR) denial of diversion

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[50] In re Application U-2, 413 N.W.2d 290, 298 (Neb. 1987) ("Ground water is owned by the public, and the only right held by an overlying landowner is in the use of the ground water"); Bamford v. Upper Republican Natural Res. Dist., 512 N.W.2d 642, 652 (Neb. 1994) (citing *In re Application U-2*, and declaring public ownership of groundwater); *cf.* Spiegel, *supra* note 7, at 422 (noting Nebraska's system of "regulated riparianism," which permits fixed quantities of groundwater use, subject to consideration of public interests and other statutory limitations).

[51] Neb. Rev. Stat. § 46-613 (establishing a preference for groundwater use that prioritizes domestic uses for health, sanitation, and agriculture, over manufacturing or industrial uses).

[52] Neb. Rev. Stat. § 46-601.

[53] Neb. Rev. Stat. §§ 37-801 to 37-811.

[54] Neb. Rev. Stat. § 37-803(1).

[55] *See, e.g.*, Cent. Platte Natural Res. Dist. v. State of Wyo., 513 N.W.2d 847, 852, 859–60 (Neb. 1994) (distinguishing between diversion and instream appropriation applications, the latter defined as "(1) an undiverted application (2) of the waters of a natural stream within or bordering upon the state (3) for recreation or fish and wildlife purposes," and holding that such applications require "fairly continuous and dependable" flow sufficient to maintain the wildlife habitat).

permits due to a threat to the endangered whooping crane,[56] protection of which is in the public interest.[57] Although this decision considered protection of this resource in the public interest, it did not mention the PTD. Conversely, the federal District Court for the District of Nebraska examined the PTD in its 1987 decision, *United States v. Burlington Northern R. Co.*, and expanded the scope of the doctrine to include damages asserted by the U.S. to wildlife public trust resources.[58] The U.S. brought suit against the Burlington Railroad Company for destruction of waterfowl caused by a fire for which the railroad was responsible.[59] The court determined that the waterfowl, which were maintained on federal land in Clay County, Nebraska, were public trust resources, held in trust for the people by the federal government.[60] Although they have not yet, Nebraska courts could rely on this decision to extend the PTD to wildlife resources in the state.

5.7 Uplands (beaches, parks, highways)

The Supreme Court of Nebraska first held in 1883 that streets are publicly owned and are held in trust for public use.[61] *Burlington & M.R.R. Co. v. Reinhackle* has since been cited extensively for this trust proposition.[62] Nebraska has otherwise not extended the PTD to uplands.

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[56] 549 N.W.2d 112, 115-18 (Neb. 1996) (acknowledging the whooping crane's designation as endangered under Nebraska's Nongame and Endangered Species Conservation Act (NESCA), which serves to protect endangered species pursuant to the federal Endangered Species Act).
[57] *Id.* at 118.
[58] 710 F. Supp. 1286, 1287 (D. Neb. 1989) (denying defendant railroad's motion for partial summary judgment on the issue of damages and allowing the federal government to recover damages to a wildfowl production area).
[59] *Id.*
[60] *Id.*
[61] Burlington & M.R.R. Co. v. Reinhackle, 18 N.W. 69, 70 (Neb. 1883) (explaining that the trust was created to give permanency to streets and dedicate them wholly to public use).
[62] *See, e.g.*, Valasek v. Bernardy, 495 N.W.2d 275, 279 (Neb. 1993) (holding that the city of Omaha retained title to the street, not private parties).

6.0 Activities Burdened

6.1 Conveyances of Property Interests

Nebraska recognizes a very limited PTD, and state courts have been reluctant to extend that recognition beyond the basic public right of passage in navigable waterways. In fact, Nebraska's tidal navigability test vests title to most waterways in private owners, subject only to a navigation easement.[63] Accordingly, state courts adhere to a minimalist PTD and have not limited private conveyances of riparian property. Even where a river is bounded on each side by states with conflicting ownership schemes, the Nebraska Supreme Court has held that the riparian owner owns to the thread of the stream, while the neighboring state owns the bed of the stream to the thread on its side.[64]

6.2 Wetland Fills

Nebraska has not applied the PTD to wetlands or wetland fills.[65]

6.3 Water Rights

Nebraska's Constitution and its water code provide that groundwater and surface water are

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[63] *See supra* note 40.

[64] *See, e.g.*, Krumwiede v. Rose, 129 N.W.2d 491, 496 (Neb. 1964) (quoting Independent Stock Farm v. Stevens, 259 N.W. 647, 648–49 (Neb. 1935) and Kinkead v. Turgeon, 109 N.W. 744, 748 (Neb. 1906) ("All states do not agree as to the ownership of land along navigable streams like the Missouri river." In Nebraska "riparian owners are entitled to the possession and ownership of the soil . . . as far as the thread of the stream, while in other states the title to the bed of the navigable river is in the state, and the grantee of land along the line of such stream owns only to the shore line"). Further, Nebraska courts have held that accretions and relictions do not change riparian property boundaries. Valder v. Wallis, 242 N.W.2d 112, 113 (Neb. 1976); *see also Krumwiede*, 129 N.W.2d at 492 ("Where by the process of accretion and reliction, or either, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner").

[65] The only Nebraska case considering wetland fills does not implicate the PTD. *See* U.S. Ecology, Inc. v. State Dept. of Envtl. Quality, 258 Neb. 10, 601 N.W.2d 775 (1999) (dismissing this action, brought to enjoin the potential denial of a wetland fill and mitigation application, in the absence of an actual controversy. The agencies reviewing the application had not yet issued a decision but had advised U.S. Ecology, Inc. that grounds for denial of its application existed).

publicly owned,[66] limiting rights of appropriators and riparian owners to consumptive uses, subject to public interest considerations.[67] Nebraska courts have acknowledged that the state's waters are held for the benefit of the people, although they have not recognized the applicability of the PTD.[68]

6.4 Wildlife Harvests

In 2012, Nebraska voters adopted a constitutional amendment granting public rights to harvest fish and wildlife, subject to regulations concerning management and conservation of these resources for future harvesting.[69] This recently adopted constitutional amendment could be interpreted to include wildlife harvesting as part of the state's PTD; however, Nebraska courts have yet to interpret this amendment.

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[66] Neb. Const. art. 15, § 5 ("The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state."); Neb. Rev. Stat. § 46-702 (recognizing public ownership of water "held by the state for the benefit of its citizens").

[67] State ex rel. Cary v. Cochran, 292 N.W. 239, 247 (Neb. 1940) (recognizing public ownership of water and attendant rights therein limited to use); Neb. Rev. Stat. § 46-2,116 ("In determining whether an application for an instream appropriation is in the public interest, the director shall consider the following factors: (1) The economic, social, and environmental value of the instream use or uses including, but not limited to, recreation, fish and wildlife, induced recharge for municipal water systems, and water quality maintenance; and (2) The economic, social, and environmental value of reasonably foreseeable alternative out-of-stream uses of water that will be foregone or accorded junior status if the appropriation is granted"); *see also* Wasserburger v. Coffee, 141 N.W.2d 738, 747 (Neb. 1966) (acknowledging the influence of the public interest in water rights determinations).

[68] In re Application A-16642, 463 N.W.2d 591, 604 (Neb. 1990) (considering a challenge to a Game and Fish instream appropriation application, the Nebraska Supreme Court noted that the state's statutory scheme "does not provide for the holding of unappropriated waters 'in trust for the people of the state' but, rather, authorizes an instream appropriation of the public water for particular beneficial uses").

[69] Neb. Const. art. 15, § 25 ("The citizens of Nebraska have the right to hunt, to fish, and to harvest wildlife, including by the use of traditional methods, subject only to laws, rules, and regulations regarding participation and that promote wildlife conservation and management and that preserve the future of hunting, fishing, and harvesting of wildlife. Public hunting, fishing, and harvesting of wildlife shall be a preferred means of managing and controlling wildlife").

7.0 Public Standing

7.1 Common Law-based

Nebraska courts adhere to traditional standing requirements and have not expressly recognized a public right to enforce the PTD.

7.2 Statutory Basis

Nebraska courts have not recognized a statutory public right to enforce the PTD.

7.3 Constitutional Basis

There is no constitutional basis for enforcement of PTD rights in Nebraska.

8.0 Remedies

8.1 Injunctive Relief

Nebraska courts have granted injunctive relief for wrongful diversions or other interferences with prior appropriation water rights. In considering appropriate remedies in water rights actions between riparian owners and appropriators, Nebraska courts have acknowledged the influence exerted by the public interest in the maximum conservation and use of water resources.[70] However, neither the state courts nor the legislature have recognized injunctive relief to remedy injury specific to PTD rights or resources.

8.2 Damages for Injuries to Resources

Nebraska courts have yet to award monetary damages for injuries to public trust resources. However, the federal District Court for the District of Nebraska has allowed the U.S. government to pursue damages for injuries to wildlife resources in the state.[71]

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[70] *See, e.g.*, Wasserburger v. Coffee, 141 N.W.2d 738, 747 (Neb. 1966), *opinion modified on reh'g*, 144 N.W.2d 209 (Neb. 1966) ("The public interest in the maximum conservation and utilization of water resources exerts a powerful influence upon the propriety of the remedy").

[71] United States v. Burlington N. R. Co., 710 F. Supp. 1286, 1287 (D. Neb. 1989) (allowing the federal government to recover damages to a wildfowl production area caused by a fire for which the railroad was responsible); *see supra* notes 58 - 60 and accompanying text.

8.3 Defense to Takings Claims

The Nebraska constitution provides that "[t]he property of no person shall be taken or damaged for public use without just compensation therefor."[72] Although Nebraska courts have frequently considered this constitutional provision,[73] they have recognized the PTD as a defense to takings claims only in cases concerning highways. For example, in *Hillerege v. City of Scottsbluff*, the Nebraska Supreme Court held that no taking was effected where private owners lost off-street parking when the city widened the public highway.[74] The court held that the plaintiff was not entitled to damages "in view of fact such parking could not be carried on without use of a part of the street which the city held in trust for use of the public."[75] Nebraska courts have otherwise not recognized the PTD as a defense to takings claims.

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[72] Neb. Const. art. 1, § 21.
[73] *See, e.g.*, Gottschalk v. Railroad Co., 14 Neb. 550, 16 N. W. Rep. 475; Railroad Co. v. Reinhackle, 15 Neb. 279, 18 N. W. Rep. 69; Railroad v. Rogers, 16 Neb. 117, 19 N. W. Rep. 603; Railroad v. Fellers, 16 Neb. 169, 20 N. W. Rep. 217; City of Omaha v. Kramer, 41 N. W. Rep. 295; Chicago, K. & N.R. Co. v. Hazels, 26 Neb. 364, 42 N.W. 93, 94 (1889).
[74] 83 N.W.2d 76, 87 (Neb. 1957).
[75] *Id.*; *see supra* notes 61 and 62 and accompanying text.

NEVADA

The Nevada Public Trust Doctrine

Ian Michael Brown

1.0 Origins

The public trust doctrine (PTD) in Nevada has remained relatively undeveloped throughout the state's history. Nevada achieved statehood in 1864[1] and, under the equal footing doctrine, the state took title to the beds of all the watercourses within its territory that were navigable on that date.[2] Despite the fact that neither the Nevada courts nor the Nevada legislature have articulated with any specificity what rights or duties are created by the PTD, the legislature did recognize the public trust in 1921 when it declared the Colorado River,[3] the Virgin River,[4] and Winnemucca Lake[5] to be navigable, and thus subject to the public trust.[6] These statutes are the only ones directly concerned with the PTD in Nevada.[7]

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[1] Pub. L. No. 38-12, 7 Stat. 708 (1864).
[2] *See* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).
[3] Nev. Rev. Stat. Ann. § 537.010 (West 2009).
[4] *Id.* at § 537.020.
[5] *Id.* at § 537.030. Winnemucca Lake has become entirely dry since the construction of Derby Dam in the 1930s. However, the Nevada Supreme Court ruled that despite the fact that the lake is now dry, the lakebed remains subject to the public trust because the legislature found the lake to be navigable in 1864. *See* State Engineer v. Cowles Brothers, 478 P.2d 159, 160-61 (Nev. 1970).
[6] Chapter 537 of Nevada's statutes lists these three watercourses that the state legislature determined to be navigable on the date of Nevada's statehood, thereby asserting state sovereign ownership to their beds.
[7] In *State v. Bunkowski*, the Nevada Supreme Court recognized the Ninth Circuit's declaration that Lake Tahoe is also one of Nevada's navigable waters. 503 P.2d 1231, 1238 (Nev. 1972) (citing *Davis v. United States*, 185 F.2d 938, 942-43 (9th Cir. 1950)); *see also* Shoemaker v Hatch, 13 Nev. 261, 265 (Nev. 1878) (ruling that the Truckee River is navigable because it was used as "a highway for the floatage of wood and timber, and has been treated by the officers of the government as a navigable stream.").

The sparse case law surrounding the PTD in Nevada centers on just a few issues: 1) clouded title resulting from land grants to waterbeds before and after statehood;[8] 2) reliction[9] of water, and whether the reliction doctrine runs against the state;[10] 3) meandering rivers and how title to land changes as meandering waters change;[11] and 4) to a small extent, the effect that the PTD has on appropriated water rights.[12]

The Nevada constitution has no pertinent provisions on the public trust. Nonetheless, the state legislature has affirmatively declared, as illustrated above, that Nevada has public trust resources.[13] Moreover, the Nevada Supreme Court, in *State v. Bunkowski,* stated that the list of "navigable waters" established by the state legislature was not exhaustive because the state judiciary is primarily responsible for determining to what watercourses the PTD applies.[14] Thus, the scope of Nevada's PTD is not fixed and is subject to expansion.

2.0 The Basis of the Public Trust Doctrine in Nevada

Achieving statehood in 1864, Nevada received the public trust upon its inception, just like all the other states that were created after the original thirteen states.[15]

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[8] *See generally Bunkowski*, 503 P.2d at 161.
[9] "Reliction" refers to the gradual retreat of water from its banks, permanently leaving dry land behind. 3 WATERS AND WATER RIGHTS § 6.02(b) at 6-99 (Robert E. Beck ed., Lexis Nexis ed. 1991, repl. vol. 2009). The common law doctrine of reliction vests title of newly dry waterbeds to adjoining landowners. State Engineer v. Cowles Brothers, 478 P.2d 159, 160-61 (Nev. 1970).
[10] *See Cowles Brothers*, 478 P.2d at 161-63.
[11] *See* Peterson v. Morton, 465 F.Supp. 986 (Nev. Dist. 1979).
[12] *See* Mineral County v. Department of Conservation and Natural Resources, 20 P.3d 800, 805-07 (Nev. 2001).
[13] *See supra* note 6.
[14] 503 P.2d at 1238; *see infra* note 20.
[15] *See Pollard*, 44 U.S. (3 How.) at 223 (ruling that "when Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the right of

The PTD in the state has roots in both statutory law and case law.[16] The legislature officially declared three watercourses in the state to be navigable, and thus subject to the PTD.[17] However, the Nevada courts have expanded the PTD beyond the legislature's list.[18]

The public trust extends to watercourses that the state's courts determine are navigable. In *State v. Bunkowski,* private landowners on the banks of the Carson River challenged the state's attorney general declaration that the river was navigable and subject to the public trust, since the river was historically used to float logs over long distances for milling.[19] The Nevada Supreme Court, reversing the lower court decision, noted that, even though the legislature had not included the Carson River in its list of navigable waters, because the PTD exists as a matter of common law, retained the ability to determine whether a watercourse is subject to the trust.[20] The *Bunkowski* court elaborated on the traditional federal test of navigability,[21] explicitly including log floating

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sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of cession.").

[16] *See* State Engineer v. Cowles Brothers, 478 P.2d 159, 160-61 (Nev. 1970) (holding that the state legislature as well as the courts have the authority to enumerate what water bodies are subject to the public trust).

[17] The statutes listing the watercourses the state legislature has determined were navigable did not explicitly refer to "public trust." Instead, they declared that "title to the lands below the high water mark thereof is held by the State of Nevada." Nev. Rev. Stat. Ann. § 537.010 (West 2009).

[18] *See Cowles Brothers*, 478 P.2d at 160-61; *see also infra* note 20.

[19] 503 P.2d 1231, 1232 (Nev. 1972).

[20] *Id.* at 1238 ("the issue of [determining] navigability is a judicial question [and] Chapter 537 is not a complete list." (footnote omitted)).

[21] *Id.* at 1234-35 (citing *United States v. Holt Bank,* 270 U.S. 49, 56 (U.S. 1926)) (stating watercourses are navigable "when they are used, or susceptible of being used, in their natural and ordinary 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.").

as a factor.[22] Thus, both the courts and the Nevada legislature may determine the applicability of the public trust to the state's watercourses.

Nevada also holds land granted to it by the federal government in "trust for the State Permanent School Fund."[23] This trust land is based in Nevada's Statehood Act,[24] which requires the state to sell and lease the land in order to fund the state schools.[25] The state also owns all wildlife within its borders in trust for the benefit of its citizens.[26] The state's ownership of the wildlife is also based in statute.[27]

3.0 Institutional Application

There is little law in Nevada articulating what burdens the PTD may impose on private parties or the state. Nevada courts have stated, however, that the state does owe the public a "fiduciary duty" as the trustee of the public trust,[28] but the courts have not elaborated as to what this duty entails.

3.1 Restraints on alienation (private conveyances)

In 1972, the Nevada Supreme Court established a presumption that the state owns

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[22] *Id.* (explaining that historical use of a watercourse for floating logs may be used as evidence that the watercourse is navigable, but that the log-floating test does not require that the watercourse was used historically to float logs. Instead, the log-floating test looks to whether a watercourse is susceptible to floating logs).

[23] Nev. Rev. Stat. § 321.0008 (West 1997).

[24] "Lands must be used in the best interest of the residents of this State, and to that end the lands may be used for recreational activities, the production of revenue and other public purposes." Nev. Rev. Stat. § 321.0008.

[25] *Id.*

[26] "Wildlife in this State not domesticated and in its natural habitat is part of the natural resources belonging to the people of the State of Nevada." Nev. Rev. Stat. § 501.100 (West 1969).

[27] *Id.*

[28] *See* Pyramid Lake Paiute Tribe of Indian v. Washoe County, 918 P.2d 697, 709 n.7 (Nev. 1996).

the beds of navigable waters, absent an explicit grant of title by the legislature.[29] According to the court in the *Bunkowski* case, the state can alienate public trust lands free of the trust burdens "upon proper legislative determinations."[30] Nevada courts have not elaborated on what "legislative determinations" are sufficient to relinquish the public trust burdens from trust land. Presumably, the legislature must justify that relinquishing PTD burdens from trust land is in the public interest.[31] Nevada courts have yet to address whether the state can grant private ownership of public trust land without relinquishing public trust burdens on the land.

3.2 Limit on legislature

The Nevada Supreme Court has stated that the state legislature has a "fiduciary obligation to the general public to maintain public uses unless an alternative use would achieve a countervailing public benefit."[32] To date, no Nevada court has decided what this "fiduciary obligation" requires or authorizes.

3.3 Limit on administrative action (hard look doctrine)

Neither the Nevada courts nor the state legislature has indicated what limits the PTD imposes on administrative agencies. However, according to an opinion letter issued by the Attorney General of Nevada in 1980, state agencies have the authority to clear navigable watercourses to improve their navigability and avoid flooding, but there is no

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[29] State v. Bunkowski, 503 P.2d 1231, 1237 (Nev. 1972) (ruling that "the state hold(s) title to the beds of navigable watercourses in trust for the people [and those] beds are normally inalienable") (citing *Alameda Conservation Association v. City of Alameda*, 264 Cal.App.2d 284 (1968)).

[30] *Bunkowski,* 503 P.2d at 1238 (citing *People v. California Fish Co.* 138 P. 79 (Calif. 1913)).

[31] *See generally* Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, 389-90 (1892).

[32] *Pyramid Lake Paiute Tribe,* 918 P.2d at 709 n.7.

affirmative duty to do so.[33]

4.0 Purposes

No Nevada courts have ruled on the purposes the PTD protects. Presumably, the PTD in Nevada protects the traditional purposes of navigation and fishing.[34] No court has ruled as to whether the public trust extends beyond these traditional purposes.

4.1 Traditional (navigation/fishing)

Nevada courts have not expressly decided what the state's role is as trustee of the public trust. The Nevada Supreme Court has, however, adopted the federal test of navigability, based on the assumption that federal case law on the PTD binds the state because the public trust exists as an obligatory condition of Nevada's statehood.[35] The logical extension is that state courts must protect the traditional uses of the public trust, such navigation and fishing.

4.2 Beyond traditional (recreational/ecological)

The Nevada Supreme Court has entertained the possibility that the PTD serves ecological and recreational purposes. In *Mineral County v. Department of Conservation and Natural Resources,* the court considered whether the state could permit the withdrawal of surface and groundwater from the Walker Lake Basin, a navigable lake,

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[33] "The State Engineer, irrigation districts, the Division of State Lands, the individual counties, and the United States all have the authority to seek removal of structures which encroach upon the natural channel of a navigable river. The United States, as well as the cities, counties, and public districts, including irrigation districts and flood control districts have the authority to improve a navigable river to maintain its water capacity or avoid flood damage to adjoining property. However, no federal or state statute sets forth a definite duty to undertake such projects." Op. Att'y Gen. 80-11 (Nev. 1980).

[34] State v. Bunkowski, 503 P.2d 1231, 1234-35 (Nev. 1972); *see infra* note 35.

[35] *Bunkowski,* 503 P.2d at 1234-35 (ruling that "all states, when admitted to the Union, have equal standing [under the equal footing doctrine, and, therefore,] a uniform federal test to title of watercourse beds must be maintained.").

which would cause the lake's water levels to drop, increasing water salinity and threatening the local ecosystem.[36] The court ultimately sidestepped the issue by affirming the district court's continuing jurisdiction over negotiations,[37] but the supreme court noted that the PTD has evolved to protect ecological and recreational uses of public trust resources.[38] Thus, it seems that the Nevada Supreme Court has recognized that ecological and recreational purposes are within the scope of the public trust.

5.0 Geographic Scope of Applicability

The PTD in Nevada extends to the beds of all watercourses that were navigable at statehood in 1864.[39] The public trust boundaries can change, however, under the common law doctrine of reliction, concerning gradual changes to waterbeds.[40] The state also holds wildlife in trust and also a small amount of acreage of uplands in trust for the common schools.[41]

5.1 Tidal

Nevada, a landlocked state, has no tidal waters.

5.2 Navigable in fact

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[36] 20 P.3d 800, 807 (Nev. 2001).

[37] In *Mineral County,* the Nevada Supreme Court explained that the disputes over water rights being argued before it had been going on for over eighty years, and the district court had been continuously dealing with these disputes throughout that entire period. Thus, the district court had developed a special "expertise" in the matter, and was therefore the most appropriate forum for further resolution. *Id.* at 806.

[38] *Id.* at 807 (explaining that "the trust has evolved to encompass additional public values – including recreational and ecological uses." (footnote omitted)).

[39] State v. Bunkowski, 503 P.2d 1231, 1238 (Nev. 1972); *see infra* note 42.

[40] The common law doctrine of "reliction" refers to the gradual retreat of water from its banks, which vests title of the newly dry land in riparian owners. 3 WATERS AND WATER RIGHTS § 6.02(b) at 6-99 (Robert E. Beck ed., Lexis Nexis ed. 1991, repl. vol. 2009).

[41] Nev. Rev. Stat. § 321.0008 (West 1997).

In *State v. Bunkowski*, the Nevada Supreme Court adopted the federal test of navigability for determining the scope of the PTD.[42] The courts have only ruled, however, that the federal test is a floor, establishing a minimum requirement for determining what resources are protected by the PTD. Nevada courts have dealt directly with the geographic scope of the PTD in only two contexts: 1) reliction, or the gradual and permanent recession or advance of water, and its effect on state sovereign ownership;[43] and 2) meandering rivers.[44]

Reliction occurs when water gradually recedes from its banks leaving behind permanently dry uplands.[45] In *State Engineer v. Cowles Brothers,*[46] the state denied riparian landowners a permit to drill a well in a portion of the navigable Winnemucca lakebed adjacent to their property that had become permanently exposed over the years due to the lake's gradual water loss.[47] The Nevada Supreme Court ruled that although the public trust exists in the beds of watercourses that were navigable in 1864, regardless of whether those watercourses are navigable or even still submerged now, the common law doctrine of reliction vests title in riparian landowners free of the public trust.[48] The court justified its conclusion that reliction runs against state ownership of trust land on the

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[42] *See* 503 P.2d at 1238 (citing *Davis v. United States*, 185 F.2d 938, 942-943 (9th Cir. 1950)), (In which, the Ninth Circuit determined that Lake Tahoe was a navigable watercourse despite the fact the Nevada legislature did not list it as one).
[43] *See* State Engineer v. Cowles Brothers, 478 P.2d at 160-61.
[44] *See* Peterson v. Morton, 465 F.Supp. at 986.
[45] *See supra* note 40.
[46] 478 P.2d at 159-62.
[47] *Id.* 161. In 1921, the Nevada legislature listed Winnemucca Lake as a navigable water. *See supra* note 5.
[48] *Cowles Brothers*, 478 P.2d at 162.

ground that private ownership of dry lakebeds furthers use, development, and tax revenue.[49] Thus, the scope of the public trust recedes as waters gradually recede.

Watercourses can also change due to subtle alterations in the landscape over time, causing rivers to change course. In *Peterson v. Morton*, the Colorado River, a navigable river, shifted east, eroding away a private party's land and eventually settling on the opposite side of the property.[50] The district court had to decide whether the state still held title to the old, dry, riverbed that had been left behind after the river migrated.[51] The court concluded that because the river's change was too abrupt to qualify as reliction, the doctrine of avulsion applied, and the state therefore retained title to the exposed riverbed as well as the new one.[52] This case suggests that the public trust can apply to dry riverbeds after rivers abruptly change course.

Nevada courts have not applied the PTD on any resources aside from the beds of navigable waters of the state. However, as the case law suggests, the courts have applied the doctrine to lands that are no longer submerged.[53]

5.3 Recreational waters

Neither the Nevada courts nor the state legislature have applied the PTD to recreational waters, but Nevada water law considers recreation to be a beneficial use of

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[49] *Id.* (stating that "every parcel of land should have an owner, for private ownership encourages use and development – usually much more quickly than public ownership.").
[50] 465 F.Supp. at 989.
[51] *Id.*
[52] *Id.* at 1003. The common law doctrine of avulsion refers to sudden changes of watercouses, which does not change riparian ownership. 3 WATERS AND WATER RIGHTS § 6.02(b) at 6-99 (Robert E. Beck ed., Lexis Nexis ed. 1991, repl. vol. 2009)

[53] *See Cowles Brothers*, 478 P2d at 159-62.

water for appropriation purposes.[54]

5.4 Wetlands

Neither the Nevada courts nor the state legislature have applied the PTD to wetlands.

5.5 Groundwater

Neither the Nevada courts nor the legislature have expressly applied the PTD to groundwater. However, Nevada statutes governing adjudication of water rights proclaim that all water above and beneath the ground's surface "belongs to the public."[55] This language led a concurring justice in *Mineral County v. Nevada Department of Conservation & Natural Resources* to argue that because of Nevada's aridity, the PTD extended to surface and groundwater rights in the state.[56] But state courts have yet to hold that the PTD applies to either ground or surface water in Nevada.

5.6 Wildlife

Nevada law declares that the state owns all wildlife within the state's borders in trust for its citizens.[57] Moreover, the Nevada code declares that the public interest in wildlife can be aesthetic, recreational, or economic and that the purpose of the trust is to

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[54] Nev. Rev. Stat. § 533.030(2) (West 2005) (Stating that "the use of water, for any recreational purpose, is hereby declared to be a beneficial use.").

[55] The statute reads: "the water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground, belongs to the public." *Id.* at § 533.025.

[56] 20 P.3d 800, 808 (Nev. 2001) (stating that "the extension of the [public trust doctrine to water rights] is natural and necessary where, as here, the navigable water's existence is wholly dependent on tributaries that appear to be over-appropriated...[and that water rights should be] forever subject to the public trust" (footnotes omitted)).

[57] "Wildlife in this State not domesticated and in its natural habitat is part of the natural resources belonging to the people of the State of Nevada." Nev. Rev. Stat. § 501.100 (West 1969).

conserve, protect, and restore wildlife populations in order to protect the public interest. [58] The Fish and Game Commission is responsible for adopting laws to effectuate these ends.[59] The Nevada Department of Wildlife, in agreement with private landowners and the Fish and Game Department, can designate hunting areas to facilitate access for licensed hunters to wildlife.[60] Unlike under the traditional PTD, Nevada's wildlife laws give no guarantee of access to wildlife, and state courts have yet to expressly recognize that the PTD applies to wildlife.

5.7 Uplands (beaches, parks, highways)

Nevada holds land that it received from several federal land grants "in trust for the State Permanent School Fund."[61] But the state has sold most this land and only has approximately 3,000 acres left.[62] Nevada law requires the state to manage these lands to raise revenue for the Permanent School Fund, and they may be sold only in a manner that would be in the public's best interest.[63] Although the land that Nevada holds in trust for Permanent School Fund does not fall within the scope of the traditional PTD, Nevada's

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[58] *Id.*

[59] Nev. Rev. Stat. § 503.584 (West 2008).

[60] Nev. Rev. State. § 504.140 (West 1993); *see also* Flick v. Nevada Fish and Game Commission, 335 P.2d 422, 423 (Nev. 1959) (Ruling that the state government could not authorize hunting on private land without the express permission of the land owners).

[61] Nev. Rev. Stat. § 321.0008 (West 1997).

[62] Nevada Division of State Lands, State Lands Department, *available at* http://lands.nv.gov/program/landoffice.htm (last updated June 5, 2009). The federal government retained nearly eighty-five percent of the surface of Nevada. The federal government gave the state the least amount of land of all the states admitted after 1864 - 2,572,478 acres - and the smallest percentage of its total area, 3.9 percent. Other states of similar topography and climate, such as Arizona, Utah, and New Mexico, received approximately eleven percent of their total area in federal land grants. Nev. Rev. Stat. § 321.596.

[63] "Lands must be used in the best interest of the residents of this State, and to that end the lands may be used for recreational activities, the production of revenue and other public purposes." Nev. Rev. Stat. § 321.0008.

duty to manage the land according the public interest is similar to a state's duty under the traditional PTD not to alienate public trust resources except to serve the public interest.[64]

6.0 Activities Burdened

The Nevada courts have not yet articulated what private or public activities are burdened by the public trust.

6.1 Conveyances of private property interests

Neither the Nevada courts nor the state legislature have applied the PTD to conveyances of property interests.

6.2 Wetland fills

Neither the Nevada courts nor the state legislature have applied the PTD to wetlands or wetland fills. The official position of the Nevada State Land Department is that the PTD does not extend beyond the high-water mark of the state's navigable waters into any wetlands.[65]

6.3 Water rights

Neither the Nevada courts nor the state legislature have applied the PTD as a burden on water rights.

6.4 Wildlife harvests

Nevada holds all wildlife in trust for its citizens, but statutory law also declares

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[64] *See* Illinois Central Railroad Co. v. Illinois, 146 U.S. 383, 391 (1892) (ruling that the state cannot "abdicate its trust over property in which the whole people are interested (public trust resources), [unless] parcels can be disposed of without impairment of the public interest in what remains.").

[65] Nevada Division of State Lands, State Lands Department, *available at* http://lands.nv.gov/program/landoffice.htm (last updated June 5, 2009). ("The State owns the beds and banks of these bodies of water (navigable watercourses), generally up to the ordinary and permanent high water mark. The State's ownership does not generally extend to wetlands, tributaries, ditches or flood overflows").

that the people of the state have a duty to conserve threatened species.[66] The Nevada Fish and Game Commission is responsible for determining whether to protect a species, and whether a species is threatened or endangered based upon factors such as disease, predation, and population sizes.[67] Hunters and fishermen must have a valid hunting license to hunt a member of any protected species or species listed as threatened or endangered.[68] No state courts have limited wildlife harvests based on the PTD, nor has the state's ownership of its wildlife been challenged.

7.0 Public Standing

There is no case law in Nevada articulating whether citizens have standing to enforce the PTD in court. The Nevada Supreme Court has ruled only that citizens cannot use equitable estoppel to prevent the state from asserting its public trust authority.[69]

7.1 Common law-based

No Nevada cases have addressed whether citizens have standing to enforce the public trust. Most of the litigation in the state surrounding the PTD has been by private citizens seeking to challenge the state's assertion of the public trust, rather than private citizens seeking to enforce the state's public trust obligations.

The only situation in which the Nevada courts have addressed whether citizens have standing to challenge the state's assertion of public trust ownership was in the

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[66] "The people of Nevada have an obligation to conserve and protect the various species of native fish and wildlife that are threatened with extinction." Nev. Rev. Stat. Ann. § 503.584.

[67] Nev. Rev. Stat. Ann. § 503.585.

[68] *Id.*

[69] *See* State v. Bunkowski, 503 P.2d 1231, 1238 (Nev. 1972) (ruling that the "failure of the state to assert its claim of ownership of the (Carson) river bed at earlier time did not estop [the] state from asserting [its] claim [to the public trust resource].").

context of equitable estoppel against state.[70] In *State v. Bunkowski,* private riparian landowners attempted to quiet title in an adjacent navigable river in part by asserting a claim of equitable estoppel against the state, since the riparian owners had been paying taxes on, and made improvements to the riverbed in which the state was asserting the PTD.[71] The Nevada Supreme Court conceded that the landowners had paid property taxes for a long period of time under the assumption that they were the rightful owners of the riverbed, but the court declared that estoppel did not run against the state when acting in the interest of the public trust.[72]

7.2 Statutory basis

The Nevada legislature has not addressed public standing to sue under the PTD.

7.3 Constitutional basis

The Nevada Constitution does not address public standing to sue under the PTD.

8.0 Remedies

There is no law in Nevada articulating what remedies are available should the state violate its public trust duties.

8.1 Injunctive relief

Remedies available to individuals challenging the state's assertion of public trust ownership include acquisition of public trust property through reliction.[73] The Nevada Supreme Court has also limited private parties ability to challenge the state's public trust

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[70] *Id.* at 1237-38.
[71] *Id.*
[72] *Id.*
[73] *See* State Engineer v. Cowles Brothers, 478 P.2d 159, 160-61 (Nev. 1970).

authority by forbidding the state's courts from considering equitable concerns.[74] No Nevada courts have addressed what remedies, injunctive or otherwise, may be available to plaintiffs should the state violate its public trust obligations.

8.2 Damages for injuries to resources

Neither the Nevada courts nor the state legislature have addressed what damages are available to plaintiffs for injuries to public trust resources.

8.2 Defense to takings claims

Nevada law presumes that the state holds sovereign ownership of all the beds of all navigable watercourses in the state, barring an express grant to a private party by the legislature.[75] There is no statutory law or case law demanding that the state pay any compensation to riparian landowners for past improvements or taxes paid when the state asserts its public trust authority.

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[74] *See* State v. Bunkowski, 503 P.2d 1231, 1238 (Nev. 1972) (ruling that the "failure of the state to assert its claim of ownership of the (Carson) river bed at earlier time did not estop [the] state from asserting [its] claim [to the public trust resource].").

[75] *Id.* at 1236-38 (holding that even though the plaintiff's predecessors had a federal grant to the beds of navigable watercourses prior to Nevada's statehood, the lands automatically vested in Nevada upon statehood under the equal footing doctrine because Nevada's statehood act did not expressly reserve those lands to private parties).

NEW JERSEY

The Public Trust Doctrine of New Jersey

David Allen

1.0 Origins

The New Jersey Supreme Court first applied the public trust doctrine in 1821 in the landmark case of *Arnold v. Mundy*.[1] In that case, the plaintiff Arnold planted oyster beds in soil underlying tidal water with the belief that he held valid title to the land.[2] When Mundy harvested oysters from the bed, Arnold sued in trespass.[3] The court ruled for Mundy, explaining that title to submerged land could not be held by an individual, but instead was held by the sovereign.[4]

Notwithstanding the language in *Arnold*, later cases began to recognize that a private landowner could obtain fee title to tidelands by artificially excluding tidal waters.[5] Moreover, in the decades following *Arnold*, the state legislature successfully granted corporate charters that included rights to occupy tidelands and in some cases conveyed fee title of tidelands to private parties.[6]

In 1851 the legislature enacted the Wharf Act,[7] which authorized counties to grant licenses to shoreline landowners for the construction wharves in tidal waters. The legislature

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[1] 6 N.J.L. 1 (N.J. 1821). The *Arnold* Court was the first court in the United States to apply the public trust doctrine. *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 637 n.28 (1986). The United States Supreme Court relied heavily on *Arnold v. Mundy* in deciding the lodestar public trust doctrine case *Illinois Central Railway Company v. Illinois*, 146 US 387, 456 (1892) (citing *Arnold* as "entitled to great weight, and in which the decision was made 'with great deliberation and research…'" (quoting Martin v. Waddell, 41 U.S. 367, 418 (1842))).

[2] *Arnold*, 6 N.J.L. at 8, 32.

[3] *Id.* at 8.

[4] *Id.* at 50.

[5] *See* Gough v. Bell, 22 N.J.L. 441, 441 (N.J 1850), *aff'd*, 23 N.J.L. 624 (N.J. 1852) (recognizing that a shoreline landowner may fill tidelands up to the low water mark and, unless prevented by the state, may take title up to the new high water mark); *see also* Ross v. Mayor of Edgewater, 180 A. 866 (N.J. Sup. Ct. 1935), *aff'd*, 184 A. 810 (N.J.), *cert. denied*, 299 U.S. 543 (1936) (affirming the ability of a shoreline land owner to fill the lands between the low and high watermarks to acquire title, so long as the fill does not interfere with navigation).

[6] *See Matthews v. Bay Head Imp. Ass'n*, 471 A.2d 355, 362 n.5 (N.J. 1984), *cert. denied*, 469 U.S. 821 (1984) (explaining that until 1851 the legislature conveyed fee title of tidelands to private parties with "no general supervision or control").

[7] 1851 N.J. Laws 335.

amended the Wharf Act in 1869 to exclude the Hudson River, New York Bay, and Kill Von Kull tidal straight.[8] Twenty years later, in 1871, the legislature authorized the sale of tidelands to "any riparian owner on tidewaters in this State."[9] Then, in 1891, the legislature repealed the Wharf Act and gave exclusive authority over the granting of tidelands to the Riparian Commission, a state agency.[10]

Over the following several decades, the state Riparian Commission conveyed fee title of tidelands to private parties without judicial objection.[11] Historians criticized this period of state administration of trust lands, citing numerous below market conveyances.[12]

In the second half of the twentieth century, New Jersey's legislative and judicial approach to trust lands began to shift. In 1967, the New Jersey legislature passed a law requiring that all proceeds from the sale of tidelands benefit public schools.[13] Then, in a progression of cases beginning in the late 1970s and continuing today, the New Jersey courts expanded the public trust doctrine to protect the public's right to access and enjoy trust lands and the dry sand beaches adjacent to trust lands.[14]

2.0 The Basis of the Public Trust Doctrine in New Jersey

In 1935, in *Ross v. Mayor and Council of Borough of Edgewater*, the New Jersey Supreme Court recognized that under common law "all the land below high-water mark

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[8] 1869 N.J. Laws 383, § 3.
[9] 1871 N.J Laws 256 (codified as amended N.J. STAT. ANN. §12:3–10, 11 (West 2008)).
[10] 1891 N.J. Laws 124, § 3; N.J. STAT. ANN. §12:3–4 (West 2008).
[11] *See* Leonard Jaffee, *The Public Trust Doctrine Is Alive and Kicking in New Jersey Tidalwaters:* Neptune City v. Avon-By-The Sea—*A Case of Happy Atavism?*, 14 NAT. RESOURCES J. 309, 310 (1974) (stating that the post-*Arnold* decisional law "acquiesc[ed] in legislative and private derogation of common tidalwater resource rights..."); *see also Mathews*, 471 A.2d at 362 n.5 (describing the commission's administration as "extremely lax," resulting in numerous below-market sales and leases of tidelands).
[12] *See Report of the New Jersey Committee to Investigate Granting of Riparian Lands by the State, Etc.* (1907); *see also* Herman K. Platt, *With Rivers and Harbors Unsurpassed: New Jersey and Her Tidelands*, 1860-1870, 99 N.J. HIST. 145 (1981); *see also* Jaffee, *supra* note 11.
[13] 1967 N.J. Laws 271 (codified as amended N.J. STAT. ANN. § 18A:56-5). *See also* N.J. CONST. VIII, § IV, par. 2 (establishing a perpetual fund for public schools).
[14] *See infra* Part 5.7.

belonged to the British nation, and was vested in the king, as the head thereof, in trust for the public. It was vested by the [American] Revolution in the sovereignty of the state, and is held under the guardianship of the Legislature."[15] State law regulates conveyances of tidelands from the state to private parties.[16]

3.0 Institutional Application

3.1 A Restraint on Alienation (private conveyances)

The public trust doctrine prevents the state from divesting trust lands to private interests in a manner that does not benefit the pubic.[17] The state's Tidelands Resource Council (Council) reviews all applications for tideland grants or leases from private interests.[18] State law requires all proceeds from the sales of trust lands to go to public schools.[19] New Jersey courts are deferential to a determination by the Council to divest trust lands.[20] As one court explained it, "As long as the Council does not attempt to convey property so far below a fair value that the conveyance impairs the assets for the support of public schools, it may exercise broad discretion in making conveyances or granting licenses and in determining the consideration appropriate for

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[15] 180 A. 866, 870 (N.J. Sup. Ct. 1935) *aff'd*, 184 A. 810 (N.J. 1936), *cert. denied*, 299 U.S. 543 (1936). *See also Mathews*, 471 A.2d at 360 (citing to Roman Law for the principle that "[b]y the law of nature, the air, running water, the sea, and consequently the shores of the sea,' were 'common to mankind.'"). Institutes of Justinian, 2.1.1 (529 A.D.).

[16] N.J. Stat. Ann. § 12:3 –28 (West 2008).

[17] *See id.*; *see also* New Jersey Sports and Exposition Authority v. McCrane, 292 A.2d 580, 618 (N.J. Super. Ct. Law Div. 1971) (holding that the conveyance of tidelands as called for by a state law did not violate the public trust doctrine because the proceeds of the conveyance will benefit public schools and, "[m]ost importantly, the conveyance will promote a purpose which has been deemed beneficial to the public.").

[18] For a detailed explanation of the application process, see William E. Anderson, *Resolving State Title Claims to Tidelands: Practice and Procedure*, 168 N.J. LAW. 8, 11 (April 1995).

[19] L.1967, c. 271 (codified as amended N.J. STAT. ANN. § 18A:56-5). *See also* N.J. CONST. VIII, § IV, par. 2 (establishing a perpetual fund for public schools).

[20] *See* Atlantic City Elec. Co. v. Bardin, 368 A.2d 366, 370 (N.J. Super. Ct. App. Div. 1976) (upholding a determination by the Natural Resource Council to offer a revocable lease to lay cable in tidelands to an electric company in exchange for $40,851).

such transfers."[21] Even if the state conveys trust lands, the state never waives its right to regulate the trust lands.[22]

In 1974, in *LeCompte v. State*, a developer who had encroached on state tidelands applied to the Council to purchase the lands from the state.[23] The Council fixed a price based on the value of the land as well as a "use and occupancy assessment" for the time the developer illegally encroached on the lands.[24] The New Jersey Supreme Court ruled that the state may set a price that includes the "reasonable value of the riparian lands together with a sum deemed proper compensation for the use and occupancy of the property during the period of the trespass or purpresture."[25] Although the court found no statutory basis for the Council's "use and occupancy assessment" *per se*, the court explained that under state law the Council has both "broad power in determining the consideration for a grant of riparian lands" as well as the right to bring an action for trespass on submerged lands.[26]

3.2 A Limit on the Legislature

The state owns tidelands as a proprietor with all the incidents of ownership, "including the absolute discretion in making conveyances or granting licenses to its tidelands, subject to the governing statutory criteria and the demands of the public trust doctrine."[27] The public trust doctrine "requires that New Jersey beaches be open to all residents of the State on equal

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[21] *Id.*
[22] East Cape May Associates v. State, Dept. of Environmental Protection, 777 A.2d 1015, 1034 (N.J. Super. Ct. App. Div. 2001).
[23] 323 A.2d 481, 482 (N.J. 1974). Such conveyances are governed by N.J. STAT. ANN. § 12:3-10 (West 2008)). *See id.*
[24] *See LeCompte*, 323 A.2d at 483.
[25] *Id.* at 483, 484 (citing N.J. STAT. ANN. § 12:3-8 (West 2008)). Therefore, the court reasoned, the charge for past use is "seen as no more than an ingredient of the purchase price." *Id.*
[26] *Id.*
[27] In re Tideland's License 96-0114-T, 740 A.2d 1125, 1127 (N.J. Super. Ct. App. Div. 1999) (citing Atlantic City Elec. Co. v. Bardin, 368 A.2d 366, 368 (N.J. Super. Ct. App. Div. 1976)).

terms."[28] This charge empowers the legislature to pass laws to forward the purpose of beach access.[29] Potentially, the courts could use the public trust doctrine to restrict the legislature from passing laws that would result in management of trust lands in a manner that does not benefit the public.[30] To date, the state courts have not used the doctrine to limit the legislature.[31]

3.3 A Limit on Administrative Action

As described above,[32] the state owns tidelands as a proprietor with all the incidents of ownership, "including the absolute discretion in making conveyances or granting licenses to its tidelands, subject to the governing statutory criteria and the demands of the public trust doctrine."[33] State law authorizes the Tidelands Resource Council (Council) to make leases,

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[28] Naughton v. Borough of Spring Lake, 588 A.2d 459, 460 (N.J. Super. Ct. L. Div. 1989), *cert. denied*, 598 A.2d 886 (N.J. 1991) (citing *Neptune City Bor. v. Avon-by-the-Sea Bor.*, 294 A.2d 47, 54 (1972)).

[29] *Compare id.* (upholding a state law that allowed formally seasonal places of accommodation in a coastal municipality to operate year-round because the law rationally advanced the purpose of promoting beach access), *with* Cos-Lin, Inc. v. Spring Lake Bd. of Adjustment 534 A.2d 44, 48 (N.J. Super. Ct. App. Div. 1987) *cert. denied*, 540 A.2d 193 (N.J. 1988) (rejecting a claim that the public trust doctrine required a zoning review board to grant a year-long license to a seasonal restaurant operating in a residential neighborhood).

[30] *See generally* Jersey City v. State Dept. of Environmental Protection, 545 A.2d 774, 782 (N.J. Super. Ct. App. Div. 1988), *cert. denied*, 546 A.2d 551 (N.J. 1988) (finding DEP did not violate the public trust doctrine when it leased part of a state park for the development of a private marina because the marina would be open to the public on a first come, first serve basis, because the marina and some parking spaces would be open to the non-boating public, and because revenue from the lease would be used for the park or turned over to DEP). *See also* The Times of Trenton Pub. Corp. v. Lafayette Yard Community Development Corp., 846 A.2d 659, 667 (N.J. Super. App. Div. 2004) (relying in part on the public trust doctrine to conclude that a nonprofit redevelopment corporation was a public body).

[31] Arguably, the state Supreme Court came close to limiting the legislature in *Bailey v. Driscoll*, 117 A.2d 265 (N.J. 1955). In *Bailey*, the court interpreted a state law authorizing a state agency to sell tidelands to adjacent property owners. *Id.* at 269; N.J. STAT. ANN. § 12:3–10 (West 2008). The statue limited the horizontal extent of the tidelands that the agency was authorized to sell to those lands "in front of" the private land owner's property, but the law did not contain an express limit on the outward extent of the tidelands that the agency could sell. § 12:3–10. Therefore the state agency argued that the law authorized the agency to sell tidelands up to the centerline of an estuary or tidal tributary. *Bailey*, 117 A.2d at 269. The court, however, found an implied limit on the outward extent of the tidelands authorized for sale, explaining that the legislature only authorized the sale of tidelands within the confines of any bulkhead or pier lines established or to be established by the state. *Id.* at 269. Under the courts implied limit, the state did not authorize sale of tidelands under main navigation channels. *See id.* The court explained that it was not required to rule on the power of the legislature to sell trust lands, but the court's reading in of an outward limit on the lands authorized for sale under § 12:3–10 indicates an unwillingness of the state's highest court to permit the legislature to divest trust lands in a manner that could negatively affect navigation. *Id.* at 271.

[32] *See supra* Part 3.2.

[33] *Id. See* Jersey City v. State Dept. of Environmental Protection, 545 A.2d 774, 782 (N.J. Super. Ct. App. Div. 1988), *cert. denied*, 546 A.2d 551 (N.J. 1988) (finding DEP had not violated the public trust doctrine when it leased part of a state park for the development of a private marina because the marina would be open to the public on a first come, first serve basis, because the marina and some parking spaces will be open to the non-boating public and

grants, and licenses of tidelands.[34] New Jersey courts do not review determinations by the Council for abuses of discretion, but instead only ask whether the Council acted within its statutory authority.[35] Recommendations to grant or lease tidelands by the Council are subject to approval by the Commissioner of the Department of Environmental Protection (DEP) and the state Attorney General.[36]

In 2008, in *Borough of Avon v. State Dept. of Environmental Protection*, the state Superior Court, Appellate Division faced a challenge to DEP's "public access rule."[37] The rule required any municipality that applied for certain state funds to enter into an agreement with DEP under which the municipality could be required to provide additional restroom and parking facilities near the beach.[38] DEP argued that the public trust doctrine authorized the state agency to promulgate the public access rule.[39] The court rejected this argument, explaining that the public trust doctrine had never been used to require a municipality to provide a specific number of parking spaces or restrooms, as would be the case under the DEP rule.[40]

3.4 A Limit on Municipal Action

An oceanfront municipality is a trustee over the dry sand beach within its borders and the public is the beneficiary of the trust.[41] The public trust doctrine does not prevent the state or a

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because revenue from the lease will used for the park or turned over to DEP). *See also* The Times of Trenton Pub. Corp. v. Lafayette Yard Community Development Corp., 846 A.2d 659, 667 (N.J. Super. App. Div. 2004) (relying in part on the public trust doctrine to find a nonprofit redevelopment corporation to be a public body).

[34] N.J. STAT ANN. § 12:3-10 (West 2008).

[35] Taylor v. Sullivan, 292 A.2d 31, 33 (N.J. Super. Ct. App. Div. 1972) (citing Bailey v. Driscoll, 112 A.D.2d 3 (N.J. Super. Ct. App. Div. 1955), *rev'd on other grounds*, 117 A.2d 265 (N.J. 1955).

[36] N.J. STAT ANN. § 13:1B-13 (West 2008).

[37] 959 A.2d. 1215 (N.J. Super. Ct. App. Div. 2008); 39 N.J.Reg. 5222(a) (Dec. 17, 2007).

[38] 39 N.J.R. § 5222(a) (Dec. 17, 2007).

[39] *Avon*, 959 A.2d. at 1224, 1225.

[40] *Id.*

[41] Slocum v. Borough of Belmar, 569 A.2d 312, 317 (N.J. Super. Ct. L. Div. 1989) (citing N.J. STAT. ANN. § 40:61–22.20) (declaring a city to be in violation of the public trust doctrine for increasing beach access fees, rather than property taxes, as a way of increasing general revenue, and for discriminating against non-residents by charging higher fees for daily and weekly beach passes than for year passes).

municipality from acting under its police power.[42] Municipal "zoning districts do not end at the mean high water level where State owned land begins and private property ends."[43] However, a municipality must make its beaches available to the public on equal terms.[44]

4.0 Purposes

4.1 Traditional Purposes: Navigation/fishing

In 1821, in *Arnold v. Mundy*, the New Jersey Supreme Court concluded that the coast and the sea, "for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products . . . are common to all the people, and that each has a right to use them according to his pleasure, subject only to the laws which regulate that use..."[45] The right of the public to use tidally flowed lands for navigation and fishing is firmly rooted in New Jersey law.[46]

4.2 Beyond Traditional Purposes: Recreational/ecological

In 1972, in *Borough of Neptune City v. Borough of Avon-by-the-Sea*, the New Jersey Supreme Court explained that the public interest in tidelands was not limited to the "ancient prerogatives of navigation and fishing," but instead extended to recreational uses, "including bathing, swimming and other shore activities."[47] The public's recreational right extends to

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[42] *See* State v. Vogt, 775 A.2d 551, 561 (N.J. Super. Ct. App. Div. 2001), *cert. denied*, 785 A.2d 435 (N.J. 2001) (finding that a municipal ordinance that banned nude sunbathing did not violate the public trust doctrine); State v. Oliver, 727 A.2d 491, 496 (N.J. Supp. Ct. 1999), *cert. denied*, 736 A.2d 525 (N.J. 1999) (concluding that the public trust doctrine did not prevent a municipality from enforcing a beach closure against surfers during a hurricane).

[43] Anfuso v. Seeley, 579 A.2d 817, 823 (N.J. Super. Ct. App. Div. 1990) (explaining that "neither the State nor federal legislatures intended to preempt the municipalities' authority to regulate land use within its borders . . .").

[44] *Neptune City*, 294 A.2d at 54.

[45] 6 N.J.L. 1, 9 (N.J. 1821).

[46] *See* Bailey v. Driscoll, 117 A.2d 265, 267 (N.J. 1955) (attributing the "paucity of decisions in New Jersey relating to the proprietorship of the State as sovereign in submerged lands" to the fact that the public trust doctrine is "firmly embedded" in state law).

[47] *Neptune City*, 294 A.2d at 54. "The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Id.*

beaches above the high water line, both to municipally owned beaches[48] and even, in some cases, to privately owned beaches.[49]

5.0 Geographic Scope of Applicability

5.1 Tidal

In New Jersey, the state owns in fee all lands flowed by the tide below the high water mark that the state has not conveyed to others.[50] The state holds these tidelands in trust for the public and, as a general rule, these tidelands must be available to the public.[51] The state may lease, grant, or convey tidelands to another party, but any conveyance must comply with statutes[52] and the proceeds of the sale must benefit the public.[53] Even after a state conveys tidelands to another party, the lands remain subject to state regulation and to the public trust doctrine.[54] State title to tidelands cannot be lost through adverse possession.[55]

Although a beachside municipality's fee title to land extends only to the high water mark, the municipality may exercise its police power over the state owned tidelands below the high

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[48] *See infra* Part 5.72.

[49] *See infra* Part 5.71.

[50] Ross v. Mayor and Council of Borough of Edgewater, 180 A. 866, 870 (N.J. Sup. Ct. 1935) *aff'd*, 184 A. 810 (N.J. 1936), *cert. denied*, 299 U.S. 543 (1936). The high-water mark is defined as "the line formed by the intersection of the tidal plane of mean high tide with the shore. The mean (sometimes called 'ordinary') high tide is defined as the medium between the spring and the neap tides." O'Neill v. State Highway Dept., 235 A.2d 1, 9 (N.J. 1967).

[51] Capano v. Borough of Stone Harbor, 530 F.Supp. 1254, 1270 (D.N.J. 1982) (finding a violation of the public trust doctrine where a beachside municipality limited access to and use of a stretch of tidelands to only the nuns of a local convent).

[52] N.J. STAT. ANN. § 12:3–7, 9, 10, 16, 26, § 13:1B-13 (West 2008). § 12:3–10 grants authority to a state agency to sell or lease to any "riparian owner on tidewaters in this State . . . any lands under water in front of his lands." In Bailey v. Driscoll, 117 A.2d 265 (N.J. 1955), the state Supreme Court held that the phrase "in front of his lands" contained an implied restriction on the outward extent of the land the state agency could sell or lease. *Bailey*, 117 A.2d at 269. The court concluded that the agency could not sell or lease lands beyond any bulkhead or pier lines established by or to be established by the state. *Id.*

[53] L.1967, c. 271 (codified as amended N.J. STAT. ANN. § 18A:56-5). *See also* N.J. CONST. VIII, § IV, par. 2 (establishing a perpetual fund for public schools).

[54] East Cape May Associates v. State, Dept. of Environmental Protection, 777 A.2d 1015, 1034 (N.J. Super. Ct. App. Div. 2001).

[55] *O'Neill*, 235 A.2d at 8 (citing Quinlan v. Borough of Fair Haven, 131 A. 870, 870 (N.J.1926), Jersey City v. Hall, 76 A. 1058 (N.J. 1910), State v. Maas & Waldstein, 199 A.2d 248 (Super. Ct. App. Div. 1964)).

water mark.[56] A beachside municipality may require an individual to pay a fee for access to trust lands, but the fee cannot be more than is necessary to fund reasonable beach maintenance costs.[57]

5.2 Navigable in fact

In New Jersey "the test by which to determine whether waters are public or private, is the ebb and flow of the tide."[58] Lands under waters affected by the tide are owned by the state and submerged lands not affected by the tide are privately owned.[59] Unlike in other states—where the state owns the beds of navigable inland lakes and rivers—in New Jersey non-tidal navigable waters are burdened only by the public navigation servitude; their bedlands are privately owned.[60]

5.3 Recreational waters

In 1972, in *Borough of Neptune City v. Borough of Avon-by-the-Sea*, the New Jersey Supreme Court expanded the public's right in tidelands to "recreational uses, including bathing, swimming and other shore activities."[61] Therefore, the Supreme Court concluded, municipal beaches must be open to the public on a nondiscriminatory basis in order to protect the public's right to recreational waters.[62] Municipalities may charge a reasonable fee for beach access[63] and may use their police power to enforce reasonable regulations of recreational waters.[64]

5.4 Wetlands

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[56] State v. Oliver, 727 A.2d 491, 496 (N.J. Supp. Ct. 1999), *cert. denied*, 736 A.2d 525 (N.J. 1999) (concluding that the public trust doctrine did not prevent a municipality from enforcing a beach closure against surfers during a hurricane).
[57] State v. Mizrahi, 373 A.2d 433, 434 (N.J. Super. Ct. App. Div. 1977), *cert. denied*, 384 A.2d 820 (N.J. 1977) (upholding the conviction of an individual who laid on a towel below the high water mark and refused to purchase a beach badge, but declining to address the public's right to simply pass through an area below the high water mark).
[58] Cobb v. Davenport, 32 N.J.L. 369, 376 (N.J. Sup. Ct. 1867).
[59] *Id.*
[60] *Id.*
[61] *Neptune City*, 294 A.2d at 54.
[62] *Id.* at 55.
[63] *Id.*
[64] *See e.g.*, State v. Oliver, 727 A.2d 491, 496 (N.J. Supp. Ct. 1999), *cert. denied*, 736 A.2d 525 (N.J. 1999) (concluding that the public trust doctrine did not prevent a municipality from enforcing a beach closure against surfers during a hurricane).

The only New Jersey case addressing the application of the public trust doctrine to non-tidal wetlands is the 2008 case *In re Proposed Xanadu Redevelopment Project*.[65] In *Xanadu*, the state Superior Court, Appellate Division did not find a violation of the public trust doctrine when the New Jersey Meadowlands Commission (NJMC) and New Jersey Department of Environmental Protection (NJDEP) (both state agencies) approved the fill of non-tidal wetlands.[66] The court reasoned that the "opportunity to forever preserve [a] more expansive wetlands . . . is a valid means to serve the public interest concerning its lands below and adjacent to tidally flowing and fresh waters."[67]

5.5 Groundwater

New Jersey Courts have not applied the public trust doctrine to groundwater. However, the courts have grappled with the question of who owns groundwater in the insurance context.[68]

5.6 Wildlife

New Jersey Courts have not applied the public trust doctrine to wildlife.[69]

5.7 Uplands (beaches, parks, highways)

Most modern public trust doctrine cases in New Jersey address the public's right to use and cross upland dry sand beaches.[70] New Jersey courts have developed two lines of analysis for beach access cases; one for publicly owned beaches and another for privately owned beaches.[71]

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[65] 955 A.2d 976 (N.J. Super. Ct. App. Div. 2008), *cert. denied*, 962 A.2d 530 (N.J. 2008).
[66] *Id.* at 1002.
[67] *Id.*
[68] *See, e.g. Morrone v. Harleysville Mut. Ins. Co.*, 662 A.2d 562, 565, 566 (N.J. Super. Ct. App. Div. 1995) (concluding that groundwater "does not clearly fall within the category of 'owned property' for the purposes of" an owned property exception in an insurance policy. For a detailed survey of how other jurisdictions have resolved the question see Reliance Ins. Co. v. Armstrong World Industries, Inc., 678 A.2d 1152, 1159–1162, 1164 (N.J. Super. Ct. App. Div. 1996) (citing *Morrone* for the principle that a landowner does not own the groundwater beneath their land for the purposes of an owned property exception).
[69] In 2004, in *New Jersey Animal Rights Alliance (NJARA) v. New Jersey Dept. of Environmental Protection*, NJARA argued that a state plan authorizing a black bear hunt violated the public trust doctrine. 934 A.2d 52, 54 (N.J. Super. Ct. App. Div. 2007). The Superior Court, Appellate Division decided the case on other grounds and did not address the public trust issue. *Id.*

5.71 Municipal Beaches

In 1972, the New Jersey Supreme Court addressed a challenge brought by a municipality and two of its residents to a neighboring municipality's ordinance that charged non-residents a higher beach access fee than residents. [72] In a much discussed and cited opinion,[73] the court ruled in *Borough of Neptune City v. Borough of Avon-By-The-Sea* that the ordinance violated the public trust doctrine, explaining that when an upland beach area is owned by a municipality and is dedicated to public use, the public trust doctrine "dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible."[74]

In 1978, in *Van Ness v. Borough of Deal*,[75] the state Supreme Court reaffirmed the application of the public trust doctrine to municipally owned dry sand beaches, invalidating a

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[70] *See* Marc R. Poirier, *Modified Private Property: New Jersey's Public Trust Doctrine, Private Development and Exclusion, and shared public uses of Natural Resources*, 15 SOUTHEASTERN ENVTL. L.J. 71, 72 (2006).

[71] *Compare* Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 48, 49 (N.J. 1972) (holding that all publicly owned beaches must be open to the public on equal terms) *with* Matthews v. Bay Head Imp. Ass'n, 471 A.2d 355, 366 (N.J. 1984), *cert. denied*, 469 U.S. 821 (1984) (using a four-part test to determine the public's right to cross and enjoy in a private beach).

[72] *Neptune City*, 294 A.2d at 48, 49.

[73] *Neptune City* is the loadstar public trust doctrine case for New Jersey courts. For significant New Jersey public trust doctrine cases relying on *Neptune City* see Van Ness v. Borough of Deal, 393 A.2d 571 (N.J. 1978) (citing *Neptune City* and the public trust doctrine to invalidate a municipality's dedication of its beach to residents only); Matthews v. Bay Head Imp. Ass'n., 471 A.2d 355 (N.J. 1984), *cert. denied*, 469 U.S. 821 (1984) (citing *Neptune City* to find a public right in a quasi-public dry sand beach); Raleigh Avenue Beach Ass'n v. Atlantis Beach Club Inc., 879 A.2d 112 (N.J. 2005) (citing *Neptune City* to find a public right in a private dry sand beach). For cases from other jurisdictions discussing *Neptune City* see Archibald v. Cinerama Hawaiian Hotels, Inc., 140 Cal. Rptr. 599, 603 (Cal. Ct. App. 1977) (distinguishing *Neptune City* and not requiring a hotel to charge all individuals the same rate to access a beach); Leydon v. Town of Greenwich, 750 A.2d 1122, 1125 (Conn. App. Ct. 2000) (refusing to apply the *Neptune City* rule to a Connecticut town ordinance that limited access to a public park and beach to town residents); Department of Natural Resources v. Mayor and Council of Ocean City, 332 A.2d 630, 634 (Md. 1975) (distinguishing *Neptune City* and refusing to use the public trust doctrine to prevent the construction of a condominium on a privately owned dry sand beach).

[74] *Id.* at 54. In *Secure Heritage, Inc. v. City of Cape May*, the court relied on *Neptune City* to uphold a city ordinance that limited to five the number of "beach tags" that could be sold to any one individual, but did not discriminate between residents on nonresidents. 825 A.2d 534, 548 (N.J. Super. Ct. App. Div. 2003), *cert. denied*, 834 A.2d 405 (N.J. 2003). Through the ordinance, the city wished to prevent hotels, motels, inns, and bed and breakfasts from buying large numbers of beach tags to give or sell to its guests. *Id.* at 538. The court found reasonable the city's limit of five beach tags because the number five "may relate to the average nuclear family." *Id.*

[75] 393 A.2d 571 (N.J. 1978).

municipality's dedication of a portion of its beach to municipal residents only.[76] However, a municipality that owns uplands adjoining tidelands has "the right to adopt reasonable regulations as to the use and enjoyment of the [upland] beach area"[77] and is not required by the public trust doctrine to provide public access to trust lands at all times.[78] A municipality may charge a reasonable fee for access to the beach, but the fee must be applied in a nondiscriminatory manner and must only cover the expenses of maintaining the beach.[79] Where the municipality has constructed restroom facilities near a beach, these facilitates must be made available to the public in a non-discriminatory manner.[80] However, municipalities need not make similarly situated changing facilities available to the public in a non-discriminatory manner.[81]

5.72 Private Beaches

In 1984, in *Matthews v. Bay Head Imp. Ass'n*,[82] the New Jersey Supreme Court faced the issue of whether the public trust doctrine also required public access to and use of dry sand beaches owned by a "quasi-public" body with close ties to a municipality.[83] The court ruled that

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[76] *Id.* at 574.
[77] *Id.* at 573.
[78] Borough of Avalon v. New Jersey Dept. of Environmental Protection, 959 A.2d 1215, 1220 (N.J. Super. Ct. App. Dist. 2008), *cert. denied*, 970 A.2d 1049 (N.J. 2009) (invalidating a state Deportment of Environmental Protection (DEP) rule that required coastal municipalities to provide the public with beach access at all times or receive a permit from DEP).
[79] N.J. STAT. ANN. § 40:61–22.20; *Neptune City*, 294 A.2d at 48, 49. *See also* Hyland v. Long Beach Tp., 389 A.2d 494, (N.J. Super. Ct. App. Div. 1978), *cert. denied*, 396 A.2d 582 (N.J. 1978) (holding that pre-season or early season discounts on the sale of beach badges were a legitimate use of a municipality's power and did not violate the public trust doctrine as articulated in *Neptune City*); Sea Watch, Inc. v. Borough of Manasquan, 451 A.2d 192, 195 (N.J. Super. Ct. App. Div. 1982) (refusing to apply the public trust doctrine to a municipally owned beach boardwalk and reversing the finding of a lower court that the doctrine prevented a city from charging a fee for the use of a beach boardwalk).
[80] Hyland v. Borough of Allenhurst, 393 A.2d 579, 582 (N.J. 1978). The *Allenhurst* court did not rely on the public trust doctrine for its restroom ruling. Instead, the court held that "where municipal toilet facilities exist adjacent to a public beach area, it would be an abuse of municipal power and authority to bar the users of the public beach from access to this basic accommodation." *Id.*
[81] *Id.* The court distinguished between restrooms and changing facilities, explaining that the ladder are not related to the public health and welfare. *Id.*
[82] 471 A.2d 355 (N.J. 1984), *cert. denied*, 469 U.S. 821 (1984).
[83] *Id.* at 359. The defendant beach owner in *Mathews* was the Borough of Bay Head and the Bay Head Improvement Association, a nonprofit established to "own property, operate bathing beaches, hire life guards, beach cleaners and policemen." *See id.*

"where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner."[84]

To determine whether a particular privately-owned upland sand area was open to the public, the *Mathews* court considered four factors: "[1] location of the dry sand area in relation to the foreshore, [2] extent and availability of publicly-owned upland sand area, [3] nature and extent of the public demand, and [4] usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand."[85] Applying these four factors to the defendant's beach, the *Mathews* court concluded that the public trust doctrine prevented a private beach owner from discriminating against nonresidents in regulating access to his upland beach.[86]

In 2005, in *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club Inc.*,[87] the state Supreme Court held that the public trust doctrine required a private beach club to open its dry sand beach to the public, subject to a reasonable fee and approval of that fee by the state Department of Environmental Protection (DEP).[88] The *Raleigh* court reached this result after applying the *Mathews* factors to the private beach, highlighting the longstanding "public access to and use of the beach, the [beach club's operating] permit condition, the documented public demand, the

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[84] *Id.* at 365.

[85] *Id.* The court elaborated that although "the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand." *Id.* at 366.

[86] *Id.* at 358.

[87] 879 A.2d 112 (N.J. 2005).

[88] *Id.* at 113. The *Raleigh* court held that DEP had jurisdiction to review beach access fees charged by the private beach owner. *Id.* at 125. The court instructed DEP to use as a guide state law governing fees at public beaches and to not approve fees that would "limit access by placing an unreasonable economic burden on the public." *Id.* (citing N.J. ADMIN. CODE § 7:7E-8.11(b)4 (2008) and quoting Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 851 A.2d 19, 33 (2004)).

lack of publicly-owned beaches in [the area], and the type of use by the current owner as a business enterprise."[89]

According to a superior court, a private owner of uplands adjoining tidelands "who assumes responsibility for public safety in [the tideland] area may enforce reasonable regulations for this purpose."[90] But these same property owners may not limit the public's use of public trust lands "simply to enhance the enjoyment of their own property."[91]

6.0 Activities Burdened

6.1 Conveyances of property interests

The state may convey trust lands to private parties, subject to statutory requirements and the public trust doctrine.[92] As one court put it, "as long as the Council does not attempt to convey property so far below a fair value that the conveyance impairs the assets for the support of public schools, it may exercise broad discretion in making conveyances or granting licenses and in

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[89] *Id.* at 124.

[90] Bubis v. Kassin, 960 A.2d 779, 784 (N.J. Super. Ct. App. Div. 2008), *cert. denied*, 973 A.2d 944 (N.J. 2009) (explaining that a private owner of a dry sand beach adjoining tidelands "can prohibit persons using the area below the mean high water mark from standing or placing a beach chair in a location that would obstruct their lifeguards' observations of swimmers.").

[91] *Id.* "We recognize that members of the public who use the property below the mean high water mark adjoining the Kassins' property also may take advantage of certain services provided by the Kassins, such as lifeguards, without paying any fee, which may add to the Kassins' costs of operation of their beachfront property. However . . . the Kassins do not own or have any other property interest in the land below the mean high water mark. Therefore, any additional costs the Kassins may incur as a result of members of the public taking advantage of the services they provide in that area may be viewed as simply a quid pro quo for their own opportunity to use that State-owned public trust land without payment of any fee." *Id.* at 787. In *Bubis*, the dry sand beach owner did not attempt to charge a fee for the public to access the trust lands below their property. Under the *Bubis* reasoning, a reasonable fee to cover the cost of maintaining the beachfront property could be considered a "reasonable regulation" by the private property owner. *See id.* at 784. For a case addressing the enforcement of beach access fees for a public beach see State v. Mizrahi, 373 A.2d 433, 434 (N.J. Super. Ct. App. Div. 1977), *cert. denied*, 384 A.2d 820 (N.J. 1977) (upholding the conviction of an individual who laid on a towel below the high water mark and refused to purchase a beach badge, but declining to address the public's right to simply pass through an area below the high water mark).

[92] New Jersey Sports and Exposition Authority v. McCrane, 292 A.2d 580, 618 (N.J. Super. Ct. Law Div. 1971) (holding that the conveyance of tidelands, as called for by a state statute, did not violate the public trust doctrine because the proceeds of the conveyance will benefit public schools and, "[m]ost importantly, the conveyance will promote a purpose which has been deemed beneficial to the public.").

determining the consideration appropriate for such transfers."[93] Even if the state conveys trust lands, the state never waives its right to regulate the trust lands.[94]

6.2 Wetland fills

The only New Jersey case addressing the application of the public trust doctrine to the fill of a non-tidal wetland is the 2008 case *In re Proposed Xanadu Redevelopment Project*.[95] In *Xanadu*, the state Superior Court, Appellate Division declined to find a violation of the public trust doctrine when the New Jersey Meadowlands Commission (NJMC) and New Jersey Department of Environmental Protection (NJDEP) approved the fill of non-tidal wetlands.[96] The court reasoned that the "opportunity to forever preserve [a] more expansive wetlands . . . is a valid means to serve the public interest concerning its lands below and adjacent to tidally flowing and fresh waters."[97]

6.3 Water rights

According to a superior court, the public trust doctrine applies equally to the control of drinking water reserves as it does to the public use of water for navigation and fishing.[98]

6.4 Wildlife harvests

New Jersey Courts have not applied the public trust doctrine to wildlife harvests.[99]

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[93] Atlantic City Elec. Co. v. Bardin, 368 A.2d 366, 370 (N.J. Super. Ct. App. Div. 1976) (upholding a determination by the state Natural Resource Council to offer an electric company a revocable lease to lay cable in tidelands in exchange for $40,851).

[94] East Cape May Associates v. State, Dept. of Environmental Protection, 777 A.2d 1015, 1034 (N.J. Super. Ct. App. Div. 2001) (holding that landowners that received fee title to tidelands from the state were not free from state regulation of the land under the public trust doctrine).

[95] 955 A.2d 976 (N.J. Super. Ct. App. Div. 2008), *cert. denied*, 962 A.2d 530 (N.J. 2008).

[96] *Id.* at 1002.

[97] *Id. See also* Matter of Loveladies Harbor, Inc., 422 A.2d 107, 111, 112 (N.J. Super. Ct. App. Div. 1980), *cert. denied*, 427 A.2d 588 (N.J. 1981) (not requiring the state to compensate a would-be developer after the state denied a permit to develop fifteen acres of privately held tidelands).

[98] Mayor and Mun. Council of City of Clifton v. Passaic Valley Water Com'n. 539 A.2d 760, 765 (N.J. Super.L. Div. 1987) (relying in part on the public trust doctrine to void an agreement that allowed for the distribution of "surplus" funds from a water commission to its owner municipalities), *aff'd on other grounds*, 557 A.2d 299 (N.J. 1989).

7.0 Public standing

7.1 Common law-based

New Jersey courts recognize that citizens and citizen groups have standing to sue a landowner or land operator to protect public trust rights.[100] The public advocate may also challenge an alleged violation of the public trust doctrine on behalf of the public.[101] Finally, the state Attorney General also has standing to enforce the trust rights of the public.[102]

7.2 Statutory basis

The New Jersey Environmental Rights Act provides a cause of action for any person to challenge an alleged violation of any law, regulation, or ordinance designed to protect the

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[99] In 2004, in *New Jersey Animal Rights Alliance (NJARA) v. New Jersey Dept. of Environmental Protection*, NJARA argued that a state plan authorizing a black bear hunt violated the public trust doctrine. 934 A.2d 52, 54 (N.J. Super. Ct. App. Div. 2007). The Superior Court, Appellate Division decided the case on other grounds and did not address the public trust issue. *Id.*

[100] *See, e.g.*, Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112 (N.J. 2005) (finding standing for a citizen group to sue a beach club to access trust lands and an adjacent dry sand beach); Bubis v. Kassin, 960 A.2d 779, 784 (N.J. Super. Ct. App. Div. 2008), *cert. denied*, 973 A.2d 944 (N.J. 2009) (finding standing for a citizen to challenge an alleged public trust violation by a private land owner). For a detailed explanation of how to file a public trust doctrine claim see Stuart Lieberman & Shari Blecher, *Litigating A Public Trust Doctrine Case*, NEW JERSEY LAWYER, December 2005. For an appellate court to review issues related to public trust lands, facts regarding the character of the lands at issue must be included in the record. Toms River Affiliates v. Department of Environmental Protection, 55 A.2d 679, 689 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 364 A.2d 1077 (N.J. 1976) (refusing to address public trust doctrine issues because the issues were not before the lower court and the record did not resolve whether the lands where tidelands); Lusardi v. Curtis Point Property Owners Ass'n, 350 A.2d 242 (N.J. Super. Ct. App. Div. 1975) (reversing a lower court's finding of contempt for violation of an injunction against use of a landowner's beach because the finding was based on affidavits and pleadings only and requiring the development of a plenary record "in a matter so important as this, involving as it does the emerging 'Public trust' doctrine and 'a common law right of access to the ocean in all citizens of the state...'" (citing *Borough of Neptune City v. Borough of Avon-By-The-Sea* 294 A.2d 47 (N.J. 1972))); New Jersey Sports and Exposition Authority v. McCrane, 292 A.2d 545, 560 (N.J. 1972) (deciding not to hear claims that a conveyance of tidelands called for by a state law violated the public trust doctrine because no such conveyances had yet taken place and such an inquiry must "await a factual framework which makes judicial intervention appropriate.").

[101] *See, e.g.* Matthews v. Bay Head Imp. Ass'n., 471 A.2d 355 (N.J. 1984) (finding standing for the public advocate after the original plaintiff ceased to pursue the litigation and the public advocate became the primary party to the suit).

[102] Hyland v. Kirkman, 385 A.2d 284, 289, 290 (N.J. Super. Ct. Ch. Div. 1978) (finding standing and a cause of action for the state Attorney General to challenge alleged fraud in private property transactions in part because the transactions related to land in the Pine Barrens, or Pinelands, a wilderness area of unique natural resource value to the public).

environment from pollution.[103] Because the public trust doctrine is not codified in New Jersey, public trust cases are brought under a common law cause of action.[104]

7.3 Constitutional basis

The New Jersey Constitution does not address the standing of plaintiffs claiming a violation of the public trust doctrine.

8.0 Remedies

8.1 Injunctive relief

The most appropriate and typical form of relief for a public trust doctrine violation is injunctive relief to insure access to and enjoyment of trust lands.[105]

8.2 Damages for injuries to resources

The state has the right to collect damages for injuries to public resources and the environment.[106] The state also has the right to protect areas that are "vitally affected with public interest" from potential future damage, even if the areas are largely held in private ownership.[107]

8.3 Defense to takings claims

The state reserves the right to control private development on trust lands, even if the state has conveyed fee title to the lands to a private party.[108] Therefore, state regulation of

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[103] N.J. STAT. ANN. § 37:3 (West 2008).
[104] *See supra* Part 7.1.
[105] *See. e.g., Borough of Neptune City*, 294 A.2d at 48 (enjoining a municipality from charging the residents of another municipality higher beach access fess); *Van Ness*, 393 A.2d at 574 (voiding a municipal ordnance that dedicated a portion of its dry sand beach to residents only).
[106] Lansco, Inc. v. Department of Environmental Protection, 350 A.2d 520, 524 (N.J. Super. Ct. Ch. Div. 1975), *aff'd*, 368 A.2d 363 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 372 A.2d 322 (N.J. 1977) (issuing a declaratory judgment requiring an insurer to pay the cleanup costs incurred by an oil company after finding the oil company was legally obligated to fund the cleanup of an oil spill under the New Jersey Water Quality Improvement Act of 1971). *But see* Dept. of Environmental Protection v. Jersey Central Power & Light Co., 351 A.2d 337 (N.J. 1976) (reversing two lower courts and refusing to find a *parens patriae* cause of action against a power plant operator where a discharge of cold water from the plant into a creek killed fish because the state failed to prove proximate cause and because federal law preempted the state cause of action).
[107] Hyland v. Kirkman, 385 A.2d 284, 289, 290 (N.J. Super. Ct. Ch. Div. 1978) (finding standing and a cause of action for the state Attorney General to challenge alleged fraud in private property transactions in part because the transactions related to land in the Pine Barrens, or Pinelands, a wilderness area of unique natural resource value to the public).

development on privately owned tidelands likely does not qualify as a taking requiring just compensation.[109] However, if the state retakes title to privately owned tidelands, the state must pay the owner just compensation for the property.[110]

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[108] N.J. STAT. ANN. § 12:5–3; Matter of Loveladies Harbor, Inc., 422 A.2d 107, 111, 112 (N.J. Super. Ct. App. Div. 1980), *cert. denied*, 427 A.2d 588 (N.J. 1981) (not requiring the state to compensate a would-be developer after the state denied a permit to develop fifteen acres of privately held tidelands).

[109] *See, e.g*, National Ass'n of Home Builders of U.S. v. State of New Jersey Dept. of Environmental Protection, 64 F.Supp.2d 354 (D.N.J. 1999) (not finding a taking requiring just compensation where the Hudson River Waterfront Area Rule required waterfront developers to construct and maintain—at their own expense—a 30-foot wide walkway along the waterfront, as well as provide perpendicular access to the walkway, as a condition of approving construction).

[110] Jersey City Redevelopment Agency v. Tug and Barge Urban Renewal Corp., 548 A.2d 1167, 1174 (N.J. Super. Ct. L. Div. 1987) (requiring the state to pay just compensation for the taking of privately held tidelands because the state had originally granted fee title of the tidelands under the United Companies Act). *But see* New Jersey Turnpike Authority v. O'Neill, 337 A.2d 381, 385 (N.J. Super. Ct. App. Div. 1975) (ruling that the state, after condemning a portion of a plaintiff's property, did not owe the plaintiff consequential damages to the remainder of his property because the property was divided into three separate parcels by two tidal creeks, the beds of which were owned by the state, and no functional relationship existed between the three parcels).

NEW MEXICO

The Public Trust Doctrine in New Mexico

Rebecca Guiao

1.0 Origins

The New Mexico Supreme Court traces the state's public trust doctrine (PTD) to Spanish and Mexican law in place before New Mexico became a state.[1] New Mexico courts have mainly interpreted the PTD in the context of water. For example, the New Mexico Supreme Court has ruled that the public nature of water is based on "the rule and practice under Spanish and Mexican dominion."[2] Spain's civil law gave equal rights to people of the kingdom to fish in the public waters,[3] and "the ancient law of the Indian as well as Mexican law" recognized the public nature of water.[4]

The New Mexico Supreme Court also traced the origins of the PTD in American common law recognizing that "'the jus privatum, or right of the soil, [] vested in an individual owner does not necessarily exclude the existence of a jus publicum, or right of fishery in the public.'"[5] The court also looked to the dissenting opinion in one of the first PTD cases in the United States, *Martin v. Waddell's Lessee*, which stated, "'The sovereign power itself . . . cannot . . . make a true and absolute grant of the waters of the State divesting all the citizens of a common right. . . . [N]o grant of the sovereign power capable of any other should receive a

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[1] State et rel. State Game Commission v. Red River Valley, Co., 182 P.2d 421, 427 (N.M. 1946).
[2] *Id.*
[3] *Id.* at 428 (citing Ex parte Powell, 70 So. 392, 396 (Fla. 1915) ("'Under the civil law of Spain all those owing allegiance to the crown were equally entitled to the right to fish in the public waters of the kingdom.'")). Further, the New Mexico Supreme Court recognized that the laws under the Spanish kingdom included the right to fish in public "general use and right to fish upon and in the public waters." *Id.* at 429 (citing 1 Farnham's Water and Water Rights, 662 (quoting Las Siete Parditas (C.C.H. 1931), Part III, Title XXVIII, Law VI, p. 821)) ("'And although the banks of rivers are, so far as their ownership is concerned, the property of those whose lands include them, nevertheless, every man has a right to use them by mooring his vessels to the trees, by repairing his ships and his sails upon them, and by landing his merchandise there; and fisherman have the right to deposit their fish and sell them, and dry their nets there, and to use said banks for every other purpose like those which appertain to the calling and the trade by which they live.'").
[4] *Id.* at 430.
[5] *Id.* at 428 (citing Weston v. Sampson, 62 Mass. 347, 54 Am.Dec. 764 (Mass. 1851)).

construction that would destroy or impair any right held in trust for the common benefit of the people.'"[6] The court recognized that the PTD protected public use of the water resource by concluding the public has the right of access to public waters for fishing and recreation.[7]

New Mexico courts have also recognized wildlife as public trust resources managed by the state under the PTD.[8] The courts trace the origins of the PTD in wildlife to the common law of England, where the ownership of wildlife as *ferae naturae* vested in the sovereign for the benefit of the people.[9] The courts recognize that the ownership of wildlife passed to the states as an incident of sovereignty, and the states hold the wildlife in trust for the citizens.[10] Therefore, New Mexico holds wildlife in trust for the benefit of New Mexico citizens.[11]

2.0 Basis

The basis for the PTD in New Mexico is section 2 of Article 16 of the state constitution, which provides:

> The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state.[12]

The New Mexico Supreme Court has characterized this constitutional provision to be "merely declaratory of the prior existing law obtaining before New Mexico came under American sovereignty and continuing thereafter."[13] The public nature of both groundwater and surface

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[6] *Id.* (citing Martin v. Waddell's Lessee, 41 U.S. 367, 420 (1842) (Thompson, J., dissenting)).
[7] *Id.* at 429–31.
[8] State ex rel. Sofeico v. Heffernan, 67 P.2d 240, 243–44 (N.M. 1936).
[9] *Id.* (quoting Cawsey v. Brickey, 144 P. 938, 939 (Wash. 1914) ("'all property right in animals ferae naturae was in the sovereign for the use and benefit of the people. . . . This absolute power to control and regulate was vested in the colonial governments as a part of the common law. It passed with the title to game to the several states as an incident of their sovereignty, and was retained by the states for the use and benefit of the people of the states.'")).
[10] *Id.*
[11] *See id.*
[12] N.M. CONST. art. XVI, § 2.
[13] *Red River Valley*, 182 P.2d 421, 428 (N.M. 1946).

waters is reiterated in state statutes.[14] Therefore, the PTD as applied to water has its basis in the New Mexico Constitution and statutes but may be traced to the law existing in New Mexico before it became part of the United States. This PTD will be described as the constitutional PTD.

Section 21 of Article 20 of the New Mexico Constitution states that:

> The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The Legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.[15]

This language appears to impose a public trust on air, water, and other natural resources of the state. The provision requires the legislature to control pollution and despoilment of air, water, and other natural resources, imposing an apparent trust duty on the state to manage these resources accordingly. However, the New Mexico courts have yet to conclude that this provision imposes a public trust on air, water, and other natural resources.

The PTD in wildlife is grounded in New Mexico common law. In *State ex rel. Sofeico v. Heffernan*, the state prosecuted a hunter for "killing a bear out of season" under the rules and regulations of the state game commission.[16] The lower court sentenced the hunter to prison and imposed a fine, but shortly thereafter discharged Heffernan on a writ of habeas corpus on the

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[14] N.M. STAT. ANN. § 72-12-18 (1978) (stating that "all underground waters of the state of New Mexico are hereby declared to be public waters and to belong to the public of the state of New Mexico and to be subject to appropriation for beneficial use"); N.M. STAT. ANN. § 72-1-1 (1978) ("All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use."). *See* State ex rel. Erickson v. McLean, 308 P.2d 983, 987 (N.M. 1957) ("All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use, and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is beneficial use. The state as owner of water has the right to prescribe how it may be used."). In *Erickson*, the state sued to enjoin groundwater pumping by an irrigator after forfeiting the right to use the groundwater due to non-use and waste. *Id.* at 986–87. *See also* Yeo v. Tweedy, 286 P. 970, 972 (N.M. 1929) (stating that the statutes declaring the public nature of groundwater and surface water and the state "[c]onstitution in these affirmative provisions are merely declaratory of existing law.").

[15] N.M. CONST. art. XX, § 21.

[16] 67 P.2d 240, 241–42 (N.M. 1936).

basis that there was no crime of "killing a bear out of season" as stated in the complaint.[17] The state appealed the lower court's decision, and the hunter argued that "animals *ferae naturae* should rightfully be held to be in the owner of the land on which the animals are" and the state may not regulate taking wildlife.[18] The New Mexico Supreme Court agreed that game and fish are trust resources of the state, and the state may pass statutes to "carry out its trust."[19] The court noted the importance of game and fish as "a source of food supply," stating that "[w]ild animals are not of common right open to capture and possession by the public."[20] Instead, according to the court, "[i]t is now generally recognized that New Mexico's valuable wild animal life would soon be exterminated if the state should fail to conserve it and aid in its reproduction."[21] Therefore, under *Heffernan*, the state holds wildlife in trust for the public, and the state may exercise enact statutes to conserve this resource.[22]

Federal courts have also imposed a public trust on lands granted by the federal government to the state under the Arizona-New Mexico Enabling Act.[23] In this Act, Congress granted New Mexico public lands to be "held in trust" by New Mexico and "to be disposed of in whole or in part only in manner as herein provided."[24] According to the Eighth Circuit Court of

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[17] *Id.* at 241.
[18] *Id.* at 243 (emphasis added).
[19] *Id.* at 243–44 (The state of New Mexico under its police power, and *to carry out its trust*, passed the statute [] in question. . . . Here we have a statute aimed to conserve the property of the state which it holds in trust for the public. It should be given a liberal construction to sustain its validity, and it cannot be set aside unless it clearly violates the organic law of the nation or state.").
[20] *Id.* at 244.
[21] *Id.*
[22] *Id.* at 243–44 (The state of New Mexico under its police power, and *to carry out its trust*, passed the statute [] in question. . . . Here we have a statute aimed to conserve the property of the state which it holds in trust for the public. It should be given a liberal construction to sustain its validity, and it cannot be set aside unless it clearly violates the organic law of the nation or state.").
[23] Ervien v. United States, 251 U.S. 41, 47–48 (1919); United States v. New Mexico, 536 F.2d 1324, 1326–27 (10th Cir 1976).
[24] Arizona-New Mexico Enabling Act, § 10, 36 Stat. 557, 563 (1910), (stating the granted lands would be held "in trust, to be disposed of in whole or part only in the manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.").

Appeals, whose decision was affirmed by the United States Supreme Court, "Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom," for any other purpose not set out in the Act "shall be deemed a breach of trust."[25] The state consented to these conditions in section 9 of Article 21 of the state constitution.[26] The language of the New Mexico Enabling Act, and its inclusion in the state constitution, imposes a public trust upon these state trust lands, requiring the state to dispose of trust lands or use proceeds from state use of trust land only for the enumerated purposes provided in the Enabling Act.[27]

The following sections discuss the PTD in New Mexico and explain how it affects use and management of public trust resources of water, state trust lands, and wildlife.

3.0 Institutional Application

The constitutional PTD, based in section 2 of Article 16, does not appear to apply any limitations on the institutional application of the doctrine, as New Mexico courts have yet to address this issue.[28] However, the state trust lands PTD imposes limitations concerning the disposition and management of state trust lands.[29]

3.1 Restraint on Alienation of Private Conveyances

The constitutional PTD in New Mexico does not seem to restrain alienation of private conveyances of land. The constitutional PTD is not based on state title to the beds and banks of

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[25] *Id.*

[26] N.M. CONST. art. XXI, § 9. (stating, "Lands granted to state subject to Enabling Act: This state and its people consent to all and singular the provisions of the said act of congress, approved June twentieth, nineteen hundred and ten, concerning the lands by said act granted or confirmed to this state, the terms and conditions upon which said grants and confirmations were made and the means and manner of enforcing such terms and conditions, all in every respect and particular as in said act provided.").

[27] This type of public trust is discussed as "the state trust lands PTD." For further discussion on the history and evolution of state trust lands in the context of lands granted for school purposes, state management of these lands in other western states, and how states can work in conservation, preservation, and other environmental goals in management of these lands, see Sean O'Day, Note, *School Trust Lands: The Land Manager's Dilemma between Educational Funding and Environmental Conservation. A Hobson's Choice?*, 8 N.Y.U. ENVTL. L. J. 163 (1999).

[28] *See infra* §§ 3.1–3.3. The constitutional PTD is not dependent on state title to the beds of navigable waters and instead is based on the unappropriated, public nature of the water. *See infra* § 4.1.

[29] *See infra* §§ 3.2–3.3.

navigable waters but instead is based on the public nature of the water.[30] The state trust lands PTD limits the state's ability to alienate the lands to private parties because the state may alienate state trust lands only for the Enabling Act's enumerated purposes.[31]

3.2 Limit on the Legislature

The constitutional PTD, based in section 2 of Article 16, does not appear to impose limits on the legislature because its focus on public access and the public nature of water, and courts have yet to address these issues.[32] However, the state trust lands PTD imposes limits on the legislature because the state legislature may not dispose or use the lands for purposes not enumerated in the Enabling Act.[33]

The PTD in wildlife imposes limits on the legislature, since the state holds wildlife in trust for the citizens of the state.[34] According to the New Mexico Supreme Court in *Heffernan*, "It is now generally recognized that New Mexico's valuable wild animal life would soon be exterminated if the state should fail to conserve it and aid in its reproduction."[35] New Mexico courts have yet to restrain the state's management of the trust resource of wildlife. However, under *Heffernan*, it appears that the legislature has the power, although perhaps not the duty, to take action to conserve wildlife.[36]

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[30] *See infra* § 4.1.
[31] *See supra* § 2.0; *infra* § 5.7. *See also* Ervien v. United States, 251 U.S. 41, 47–48 (1919); United States v. New Mexico, 536 F.2d 1324, 1326–27 (10th Cir 1976).
[32] *See infra* § 4.1.
[33] *See supra* § 2.0; *see infra* § 5.7. *See also Ervien*, 251 U.S. 41, 47–48 (1919); *New Mexico*, 536 F.2d 1324, 1326–27 (10th Cir 1976).
[34] *See Heffernan*, 67 P.2d 240, 243–44 (N.M. 1936).
[35] *Id.* at 244.
[36] *Id.* at 243–44 (The state of New Mexico under its police power, and *to carry out its trust*, passed the statute [] in question. . . . Here we have a statute aimed to conserve the property of the state which it holds in trust for the public. It should be given a liberal construction to sustain its validity, and it cannot be set aside unless it clearly violates the organic law of the nation or state.").

3.3 Limits on Administrative Action

New Mexico courts have yet to limit administrative action under the constitutional PTD. New Mexico courts have yet to determine whether the constitutional PTD restrains the discretion of the water rights agency in granting groundwater or surface water rights.[37] The constitutional PTD, as restated in state statutes, declares the public nature of surface water and groundwater such that the state holds these waters in trust for the public.[38] As the trustee for the PTD resource of water, the state, through the water rights agency, likely does not have the authority to regulate vested water rights that may be detrimental to the trust resource. Once the water is appropriated, the water is no longer public[39] and the PTD does not burden those waters.

In the context of state trust lands, however, the state trust lands PTD limits administrative action because state agencies may use funds that are derived from state trust lands only for the enumerated purposes in the Enabling Act.[40] The Enabling Act requires the New Mexico State Lands Office, the state agency responsible for management of state trust lands,[41] to use the funds from the state trust lands only for the Enabling Act's specified purposes.[42]

In the wildlife context, as discussed previously,[43] the state holds wildlife in trust for citizens of the state.[44] In *Heffernan*, the New Mexico Supreme Court determined that the state game commission "has the power to establish open and closed seasons and prescribe the method of killing or capturing the same, and to establish bag limits. These are mere matters of fact to be

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[37] *See infra* § 4.1.
[38] *See* Bliss, State ex rel. v. Dority, 225 P.2d 1007, 1010 (N.M. 1950) (stating that "[t]he public waters of this state are owned by the state as trustee for the people").
[39] *See* N.M. CONST. art. XVI, § 2.
[40] *See infra* § 5.7. *See also* United States v. New Mexico, 536 F.2d 1324, 1326–27 (10th Cir 1976).
[41] New Mexico State Land Office, *About the Agency*, http://www.nmstatelands.org/About.aspx (last visited Nov. 26, 2011).
[42] *See* Arizona-New Mexico Enabling Act, § 10, 36 Stat. 557, 563 (1910).
[43] *See supra* notes 15–21.
[44] *See Heffernan*, 67 P.2d 240, 243–44 (N.M. 1936).

determined by the Game Commission incident to its administration of the trust."[45] Consequently, state's game commission has the power to manage wildlife resources "to conserve [] and aid in its reproduction"[46] but not necessarily the duty to manage these resources.

4.0 Purposes

New Mexico Supreme Court has concluded the traditional use of fishing is a purpose under the constitutional PTD.[47] The New Mexico Supreme Court has also determined the constitutional PTD includes recreational use.[48]

4.1 Traditional (Navigation/Fishing)

The constitutional PTD in New Mexico includes the traditional purpose of fishing.[49] In the 1946 New Mexico Supreme Court case, *State et rel. State Game Commission v. Red River Valley, Co.* (*Red River Valley*), the Red River Valley Company conveyed fee simple title to the state and members of the Interstate Stream Commission, as trustees for the state, for the site of the Conchas Dam and also conveyed easements to flood the land above the dam and impound water.[50] These conveyances were subject to reservations and conditions.[51] The state's Interstate Stream Commission then conveyed these fees and easements to the United States, and the Army Corps of Engineers constructed the Conchas Dam.[52] The U.S. Congress then granted an easement to the state of New Mexico "for public recreational purposes" over the land now owned by the United States, which was "expressly made subject to the reservations and

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[45] *Hefferman*, 67 P.2d at 246, 243–44 (stating that, "[a]ll the authorities are to the effect that the state holds title to the wild animals in trust for the people. . . It is now generally recognized that New Mexico's valuable wild animal life would soon be exterminated if the state should fail to conserve it and aid in its reproduction.").
[46] *Id.* at 244.
[47] *See infra* § 4.1.
[48] *See infra* § 4.2.
[49] *Red River Valley*, 182 P.2d 421, 429–31 (N.M. 1946).
[50] *Id.* at 425.
[51] *Id.* The reservations and conditions specified that the Red River Valley Company retained the right to use the areas "for all purposes not inconsistent with the prior rights" of the Red River Valley Company. *Id.*
[52] *Red River Valley*, 182 P.2d at 425.

conditions" in the Red River Valley Company's original conveyances.[53] Although the Secretary of War had not yet executed the easement, the state of New Mexico developed regulations according to the easement, allowing the public to use the lake for recreation and fishing.[54]

The state sued the Red River Valley Company to determine whether the state could open the area of the lake over the easements to the public for fishing and recreation.[55] The lower court ruled that the state, through the state game commissioner, could not legally allow the public to access the disputed areas of the Conchas reservoir because the contracts between the state, the federal government, and the Red River Valley Company prohibited the state from doing so. [56] The lower court also decided that, although not navigable waters, the waters were "in a limited sense, public waters."[57] The state appealed to the New Mexico Supreme Court to decide whether there was a "right of the public, when properly authorized by the State Game Commission, to participate in fishing and other recreational activities" in the waters of the reservoir created by the Conchas Dam.[58]

The New Mexico Supreme Court reversed the trial court.[59] The court based its decision on section 2 of Article 16 of the New Mexico Constitution, which provides that unappropriated water within the state of New Mexico "is hereby declared to belong to the public and to be subject to appropriation for beneficial use."[60] The court ruled that beneficial uses of water included fishing and recreation; thus, the public had fishing and recreational rights to use the

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[53] *Id.* at 426.
[54] *Id.*
[55] *Id.* at 424.
[56] *Id.* ("The lower court held that various contracts which had been entered into by the State of New Mexico, the United States, and The Red River Valley Company precluded the State Game Commission from being able to legally allow the public to go upon the disputed portion of the lake and participate in fishing or any other recreational activities.").
[57] *Id.*
[58] *Id.*
[59] *Id.* at 435.
[60] *Id.* at 427 (quoting N.M. CONST. art. 16, § 2). It appears that until the water is appropriated, the public has fishing and recreational rights. N.M. CONST. art. 16, § 2.

public waters of the state, even those artificially created by a federal dam.[61] Therefore, the public has the right of access for fishing and recreation to all unappropriated, public waters of the state. Further, the court determined that the federal test of navigability "is not the only test to be applied" in determining "the public character of water."[62] The *Red River Valley* decision established the scope of the constitutional PTD in New Mexico, including the purposes of fishing and recreation.

4.2 Beyond Traditional (Recreational/Ecological)

Beyond the traditional PTD uses recognized in the *Red River Valley* case, the New Mexico Supreme Court has determined that recreational uses are a PTD purpose.[63] Further, although New Mexico courts have yet to recognize ecological uses under its PTD, the state constitution has language that appears to suggest PTD resources include the "air, water and other natural resources of this state."[64] Section 21 of Article 20 of the New Mexico Constitution states:

> The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The Legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.[65]

This constitutional language seems to impose duties on the legislature to control pollution and despoilment of the natural resources of the state. Although state statutes or case law in New Mexico have yet to establish all natural resources of the state as trust resources, this

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[61] *Red River Valley*, 182 P.2d at 429–31. Therefore, any unappropriated water in New Mexico is public water under section 2 of Article 16 of the state constitution, and the public may use those waters for the beneficial uses of fishing and recreation due to the public and unappropriated nature of those waters. *Id.* In discussion of its holding, the Court looked to "ancient law of the Indian," Spanish law and Mexican law to determine the public nature of the water in New Mexico and to rule that section 2 of Article 16 of the state constitution is "only 'declaratory of prior existing law." *Id.* at 427, 429–30.

[62] *Red River Valley*, 182 P.2d at at 430. Thus, the scope of the constitutional PTD in New Mexico is not limited to title navigability.

[63] *Red River Valley*, 182 P.2d at 429–31.

[64] N.M. CONST. art. XX, § 21.

[65] *Id.*

constitutional provision appears to impose trust-like duties on the legislature to prevent pollution and deterioration of natural resources within the state.

5.0 Geographic Scope

In its various iterations under New Mexico law, the PTD spans a fairly large geographic scope. The constitutional PTD extends to all public waters, as interpreted by New Mexico courts to include surface water and groundwater, likely extends to wetlands, and applies to wildlife under the common law. In addition, the state trust lands PTD burdens the lands the federal government granted to New Mexico in its Enabling Act.

5.1 Tidal

As an inland state with no tidally influenced lands, the New Mexico PTD does not reach tidal lands.

5.2 Navigable in Fact

New Mexico does not emphasize the navigability-in-fact test for determining where constitutional PTD attaches.[66] Instead, under the constitutional PTD, all unappropriated waters in the state are public waters, and "[t]hese waters belong to the public until beneficially appropriated."[67] Thus, the public may use those waters for fishing and recreation until the water is beneficially appropriated, when it would no longer be public water subject to the PTD.[68]

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[66] The New Mexico Supreme Court stated, "[W]e need not here be concerned with the tests required in many of the decisions [of other states], the test of navigability." *Red River Valley*, 182 P.2d at 430 (concluding that the section 2 of Article 16 of the New Mexico Constitution, which provides that unappropriated water within the state of New Mexico "is hereby declared to belong to the public and to be subject to appropriation for beneficial use," protects public access to unappropriated waters for recreational and fishing uses.).

[67] *Id.* at 429–31.

[68] *Id.*

5.3 Recreational Waters

Under the New Mexico Supreme Court case, *Red River Valley*, discussed above,[69] the PTD extends to all public waters used for recreation and gives the public the right of public access to the public waters.[70]

5.4 Wetlands

New Mexico courts have not yet examined whether the constitutional PTD applies to wetlands. However, based off of the *Red River Valley* case[71] and the provision in the New Mexico Constitution providing for public ownership of all unappropriated waters in the state,[72] it is likely that the PTD applies to wetlands, providing public access for recreation and fishing, as those waters would be unappropriated, public waters. Although New Mexico courts have yet to address whether the constitutional PTD provides for environmental protection of wetlands, it is also likely that the constitutional PTD provides for environmental protection of the waters in wetlands as the state holds surface waters in trust for the public,[73] and thus can file suit to protect its interest or for public welfare.[74]

5.5 Groundwater

The New Mexico legislature enacted a statute[75] that declares underground waters as public waters.[76] This statute is a reiteration of the constitutional provision in section 2 of Article

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[69] *See supra* notes 50–61 and accompanying text.
[70] *Red River Valley*, 182 P.2d at 429–31.
[71] *Id.*
[72] N.M. CONST. art. XVI, § 2.
[73] *Id.*; *see supra* note 14 and accompanying text.
[74] *See Dority*, 225 P.2d 1007, 1010 (N.M. 1950) (where the New Mexico Supreme Court stated, "The public waters of this state are owned by the state as trustee for the people; and it is authorized to institute suits to protect the public waters against unlawful use, or to bring any other action whether authorized by any particular statute, if required by its pecuniary interests or for the general public welfare.").
[75] N.M. STAT. ANN. § 72-12-18 (1978).
[76] *Id.* ("The water of underground streams, channels, artesian basins, reservoirs or lakes, having reasonably ascertainable boundaries is declared to belong to the public and is subject to appropriation for beneficial use.").

16 of the state constitution declaring all unappropriated waters to be public waters.[77] The New Mexico Supreme Court addressed this statute in *Bliss, State ex rel. v. Dority*,[78] a case in which the state sued to enjoin irrigators from pumping groundwater.[79] Appealing a trial court decision enjoining them, the irrigators claimed that the state engineer could not sue for an injunction because the law did not permit him to do so.[80] Reviewing the groundwater statute[81] and other state authorities, the New Mexico Supreme Court concluded that the state holds public waters, including groundwater, in trust for the public, and the state "is authorized to institute suits to protect the public waters against unlawful use, or to bring any other action whether authorized by any particular statute, if required by its pecuniary interests or for the general public welfare."[82] Under this broad language, it is likely that the statutory PTD applies to the state's regulation of appropriation of groundwater rights and groundwater quality. The Tenth Circuit also recognized the state's authority to enforce the trust over the trust resource of groundwater to prevent contamination, where it decided that New Mexico had standing as trustee of the public waters of the state to sue General Electric Company for groundwater contamination.[83]

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[77] *See* McBee v. Reynolds, 399 P.2d 110 (N.M. 1965) (stating that, "it has been settled in this state that waters of underground streams, channels, artesian basins, reservoirs and lakes, the boundaries of which may be reasonable ascertained, are public and subject to appropriation for beneficial use. They are included within the term 'water' as used in Art. XVI §§ 1–3 of our Constitution.").

[78] 225 P.2d 1007 (N.M. 1950).

[79] *Id.* at 1009.

[80] *Id.*

[81] *See supra* note 76 and accompanying text.

[82] *Dority*, 225 P.2d at 1010.

[83] New Mexico v. General Elec. Co., 467 F.3d 1223, 1242–43 (10th Cir. 2006) ("No one doubts the State of New Mexico manages the public waters within its borders as trustee for the people and is authorized to institute suit to protect those waters on the latter's behalf. *See, e.g., State ex rel. Reynolds v. Mears*, 86 N.M. 510, 525 P.2d 870, 875 (N.M.1974); *Dority*, 55 N.M. 12, 225 P.2d 1007, 1010 (N.M.1950). In *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 362 P.2d 998, 1000 (N.M.1961), the New Mexico Supreme Court declared all underground waters within the State to be public waters subject to appropriation for beneficial use. *See* N.M. Stat. Ann. § 72-12-18 (codification of the public trust doctrine as to groundwaters). Similarly, no one doubts the duty of the State AG generally to prosecute a state law civil action in which the State is a party. *See id.* § 8-5-2.B. In view of the foregoing, neither G[eneral] E[lectric] nor ACF [Industries] challenges the State's Article III standing to pursue this state law action for harm to the public interest in its capacity as trustee of the State's groundwaters.").

5.6 Wildlife

As discussed above,[84] the state holds game and fish in trust for the public under New Mexico common law.[85] The state administers the wildlife trust through the state game commission.[86] In *Heffernan*, the New Mexico Supreme Court determined that the commission has the power to establish open and closed hunting and fishing seasons, determine the method of taking wildlife, and to set bag limits as part of its administration of the trust.[87] Therefore, the PTD in New Mexico extends to wildlife.

5.7 Uplands (beaches, parks, highways)

As discussed above,[88] in the Arizona-New Mexico Enabling Act Congress granted New Mexico around three million acres for use to fund specified purposes, such as "university purposes;" "legislative, executive, and judicial buildings;" "insane asylums;" and penitentiaries.[89] The Enabling Act required these lands to be "held in trust" by the state.[90] Compared to previous statehood acts, the Enabling Act "was extremely detailed specifying the terms and conditions" of the grants and it included an "express reference to a trust."[91] Federal

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[84] *See supra* § 2.0.
[85] *Heffernan*, 67 P.2d 240, 243–44 (N.M. 1936) (stating that, "[a]ll the authorities are to the effect that the state holds title to the wild animals in trust for the people. . . . It is now generally recognized that New Mexico's valuable wild animal life would soon be exterminated if the state should fail to conserve it and aid in its reproduction.").
[86] *See* N.M. STAT. ANN. § 17-1-14 (1978) (authorizing the commission to regulate wildlife in the state).
[87] *Heffernan*, 67 P.2d at 246 (stating that the commission "has the power to establish open and closed seasons and prescribe the method of killing or capturing the same, and to establish bag limits. These are mere matters of fact to be determined by the Game Commission incident to its administration of the trust.").
[88] *See supra* § 2.0.
[89] Arizona-New Mexico Enabling Act, § 7, 36 Stat. 557, 562 (1910).
[90] United States v. Ervien, 246 F. 277, 278 (8th Cir. 1917).
[91] O'Day, *supra* note 27, at 185–86; Arizona-New Mexico Enabling Act, § 10, 36 Stat. 557, 563 (1910) (stating the granted lands "shall be by the said state held *in trust*, to be disposed of in whole or part only in the manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.") (emphasis added).

courts concluded that if the state used these lands for any other purpose not enumerated in the Act, the state breached the trust.[92]

In *Ervien v. United States*, New Mexico attempted to use funds from the sale and lease of state trust lands for advertising the state to investors and people seeking to relocate.[93] The United States sued the Commissioner of Public Lands for New Mexico, to enjoin this "threatened breach," and the trial court dismissed the case.[94] The United States appealed to the Eighth Circuit, which reversed and concluded that the state breached the trust.[95] The state appealed this decision to the Supreme Court,[96] which affirmed the Eighth Circuit, rejecting the state's effort to use funds from the federally granted lands for advertising the state's resources to investors and those seeking to relocate.[97] The Court viewed the Enabling Act as "special and exact,"[98] thus interpreting the Enabling Act strictly in concluding that the state breached the trust.[99]

In the 1976 Tenth Circuit case of *United States v. New Mexico*, the federal government sued the state of New Mexico to enforce the trust provisions of the Enabling Act concerning land grants for "a miners' hospital for disabled miners," and the federal district court concluded the state breached the trust provisions.[100] New Mexico appealed to the Tenth Circuit,[101] which followed the reasoning of *Ervien* and narrowly interpreted the language of the Enabling Act. The court concluded that the state could not use the funds from the trust lands to consolidate the

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[92] *Ervien*, 251 U.S. 41, 47–48 (1919); *see* United States v. New Mexico, 536 F.2d 1324, 1326–27 (10th Cir. 1976); *see also infra* notes 100–04 and accompanying text.
[93] *Ervien*, 251 U.S. at 46.
[94] United States v. Ervien, 246 F. 277, 278 (8th Cir. 1917).
[95] *Ervien*, 251 U.S. at 47.
[96] *Id.* at 45.
[97] *Ervien*, 251 U.S. at 47–48.
[98] *Id.* at 47.
[99] *Id.* at 47–48.
[100] *New Mexico*, 536 F.2d at 1325.
[101] *Id.*

miners' hospital.[102] The Tenth Circuit stated, "The wording of the Enabling Act evidences a determination by Congress that the health needs of New Mexico miners could best be provided by a separate hospital for miners. To imply a more expansive purpose for the trust than stated in the Enabling Act is to indulge in a license of construction which Congress intended to prevent."[103] The court emphasized that the Enabling Act "unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be given only for the purposes for which the land was given."[104] Thus, following the Supreme Court, the Tenth Circuit narrowly interpreted the Enabling Act and ruled that the state may use the funds from the state trust lands only for the purposes specified in the Enabling Act.

In both *Ervien* and *New Mexico*, federal courts have strictly enforced the language of the Enabling Act. The PTD impressed on these federally granted trust lands requires the state to use the funds from these lands only for the purposes enumerated in the Enabling Act.

6.0 Activities Burdened

Because the PTD in New Mexico is not thoroughly developed by the state courts or statutes, few activities are burdened by the PTD. In fact, the courts have yet to interpret whether the constitutional PTD in New Mexico applies to any activities.[105] However, the state trust lands PTD burdens conveyances of property interests, and the common law PTD burdens wildlife harvests.[106]

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[102] *Id.* at 1327–28.
[103] *Id.* at 1328.
[104] *Id.*
[105] *See infra* § 6.1.
[106] *See infra* §§ 6.1, 6.4.

6.1 Conveyances of Property Interests

New Mexico's constitutional PTD does not apply to land, but instead extends only unappropriated, public water.[107] If, however, a private owner owns the beds of nonnavigable waters and chooses to sell that land, the public's rights to fishing and recreating in the water over that land continue even after the conveyance, as the PTD guarantees public access to all public waters in the state for fishing and recreating.[108]

The state trust lands PTD burdens conveyances of property interests in those trust lands.[109] New Mexico may convey state trust lands only for purposes enumerated in the Enabling Act.[110] New Mexico is limited in its ability to convey property interests in these trust lands because the Enabling Act requires the state to dispose of the state trust lands for the enumerated purposes.

6.2 Wetland Fills

New Mexico courts have yet to extend the constitutional PTD to wetland fills. Under the constitutional PTD, the public has the right of access for recreation and fishing to unappropriated, public waters, and the state may sue to protect that right of access.[111] However, once water is appropriated, the public no longer has a right to access the water.[112] It is possible that the constitutional PTD prevents filling of wetlands if the filling impairs public access for recreation and fishing to unappropriated public waters.

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[107] N.M. CONST. art. XX, § 2 ("The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of this state.").
[108] *See Red River Valley*, 182 P.2d 421, 429–31 (N.M. 1946).
[109] Arizona-New Mexico Enabling Act, § 10, 36 Stat. 557, 563 (1910); *see also Ervien*, 251 U.S. 41, 47–48 (1919); *see also New Mexico*, 536 F.2d 1324, 1326–27 (10th Cir 1976).
[110] Arizona-New Mexico Enabling Act, § 10, 36 Stat. 557, 563 (1910) (stating the trust lands are "to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."). *See supra* § 2.0.
[111] *See supra* § 4.1.
[112] *See supra* § 4.1.

6.3 Water Rights

Section 2 of Article 16 of the New Mexico Constitution, and state statutes reiterating the constitutional provision, permit the appropriation of the public waters by individuals for beneficial uses.[113] As discussed above,[114] New Mexico courts have determined that the constitutional PTD applies to unappropriated public groundwater or surface water.[115] Although courts have yet to address to what extent the constitutional PTD burdens water rights and the state administration of water rights, the constitutional PTD emphasizes that unappropriated, surface water and groundwater are public and are held in trust by the state. Therefore, based on the New Mexico Supreme Court's reasoning in *Dority* and the Tenth Circuit's decision in *New Mexico v. General Electric Co.*,[116] it is likely that the state, as trustee for the PTD resource of water, may sue to protect the trust resource from unlawful use and contamination. But once a water user appropriates water and the water becomes subject to private water rights, the water is no longer unappropriated public water.[117] Thus, the PTD no longer applies to that water and does not burden the water right.

6.4 Wildlife Harvests

As previously discussed,[118] New Mexico has the authority, but not necessarily the duty, to regulate the wildlife trusts resource through statute and case law.[119] Therefore, the PTD under

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[113] N.M. CONST. art. XX, § 2 ("The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of this state."); N.M. STAT. ANN. § 72-12-18 (2011) (stating that "all underground waters of the state of New Mexico are hereby declared to be public waters and to belong to the public of the state of New Mexico and to be subject to appropriation for beneficial use"); N.M. STAT. ANN. § 72-1-1 (2011) ("All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use.").

[114] *See supra* §§ 3.3 (Limits on Administrative Action), 5.5 (Groundwater).

[115] *See supra* §§ 3.3 (Limits on Administrative Action), 5.5 (Groundwater).

[116] *See supra* notes 78–83 and accompanying text.

[117] *See Red River Valley*, 182 P.2d at 429–31 (stating that "unappropriated water" is "declared to belong to the public").

[118] *See supra* §§ 2.0, 5.6.

common law burdens harvesting of wildlife because the state has the authority to regulate the taking of wildlife.

7.0 Public Standing

New Mexico courts have yet to address public standing to enforce the constitutional PTD. However, the New Mexico Supreme Court case of *McCarter v. City of Raton* permitted a resident taxpayer of a city to challenge the city's approval of changing the public use of a park to another public use for a highway.[120] Therefore, it is likely that a resident taxpayer may file suit alleging breach of either the constitutional or state trust lands PTD by a governmental entity.

In the state trust lands PTD cases of *Ervien* and *New Mexico*, the federal government sued New Mexico for the threatened breach of trust in *Ervien* and the actual breach of trust in *New Mexico*.[121] Under the Enabling Act, the U.S. Attorney General has the duty to file suit against the state to enforce the provisions of the Act.[122] There appears to be no authorization of public standing in the language of the Enabling Act to sue the state for enforcement of the Enabling Act provisions.

7.1 Common-law Basis

In *McCarter v. City of Raton*, the New Mexico Supreme Court determined that a resident taxpayer of the City of Raton could file a suit against the city challenging the city's attempt to

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[119] N.M. STAT. ANN. § 72-12-1 (1978); *Heffernan*, 67 P.2d 240, 246 (The state game commission "has the power to establish open and closed seasons and prescribe the method of killing or capturing the same, and to establish bag limits. These are mere matters of fact to be determined by the Game Commission incident to its administration of the trust."). *Id.* at 243–44 (stating that, "[a]ll the authorities are to the effect that the state holds title to the wild animals in trust for the people. . . It is now generally recognized that New Mexico's valuable wild animal life would soon be exterminated if the state should fail to conserve it and aid in its reproduction.").

[120] McCarter v. City of Raton, 115 P.2d 90, 90–91 (N.M. 1941) (citing Shipley v. Smith, 107 P.2d 1050, 1051–53 (N.M.1940) (holding that resident taxpayers of a particular county may sue to enjoin the county's payment of money under an illegal contract)).

[121] *Ervien*, 251 U.S. 41, 45 (1919); *New Mexico*, 536 F.2d 1324, 1325–26 (10th Cir. 1976).

[122] *See Ervien*, 251 U.S. at 45 (stating, "It is made the duty of the Attorney General of the United States to prosecute in the name of the United States such proceedings at law or in equity as may be necessary to enforce the provisions of the act 'relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.'"); *New Mexico*, 536 F.2d at 1325.

vacate a public park and instead use it for a highway.[123] The court relied on *Shipley v. Smith*, where the New Mexico Supreme Court determined that resident taxpayers of a county had standing to sue to enjoin the county's payment of money under an illegal contract.[124] Thus, a resident taxpayer likely has standing to enforce the both constitutional PTD and the state trust lands PTD. In the context of state trust lands, New Mexico or federal courts have not yet addressed whether the public has standing to enforce the state trust lands PTD.

7.2 Statutory Basis

There are no statutes that specifically authorize the public to enforce either the constitutional PTD or the state trust lands PTD. New Mexico courts yet to address whether there is a statutory basis for the public to enforce the constitutional PTD.

7.3 Constitutional Basis

New Mexico courts have yet to address whether there is any constitutional basis for the public to enforce the constitutional PTD.

8.0 Remedies

Under the state statute describing the duties of the state attorney general, it permits the attorney general (1) to prosecute and defend suits in the state supreme court and court of appeals where the state is a party or an interested party; and (2) to prosecute and defend in any other court suits where the state is a party or an interested party and the state's interest requires that action.[125] The New Mexico Supreme Court used broad language in interpreting this statute, and

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[123] *McCarter*, 115 P.2d at 91.
[124] *Id.* at 90–91 (citing *Shipley*, 107 P.2d 1050, 1051–53 (N.M.1940)).
[125] This statutory provision states that:

> [T]he attorney general shall:
>
> A. prosecute and defend all causes in the supreme court and court of appeals in which the state is a party or interested;
>
> B. prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor.

the court interpreted the statute to authorize the state, which holds unappropriated waters in trust for the people, to sue to protect those waters.[126] Thus, the state likely may seek injunctive, declaratory relief and monetary relief to protect public waters.

8.1 Injunctive Relief

The New Mexico Supreme Court has stated that, "The public waters of this state are owned by the state as trustee for the people," and in interpreting the state attorney general's duties as declared in the statutory provision, "[the state] is authorized to institute suits to protect the public waters against unlawful use, or to bring any other action whether authorized by any particular statute, if required by its pecuniary interests or for the public welfare."[127] This broad recognition seems to authorize the state to sue to protect public waters, surface water or groundwater, as these are PTD resources. The state's authority to sue likely includes a suit for injunctive and declaratory relief and monetary damages.

8.2 Damages for Injuries to Natural Resources

The statutory provision stating the duties of the attorney general likely authorizes the state through the attorney general to sue for damages to the PTD resource of water based on the state's trust interest in that resource.[128] The New Mexico Supreme Court, in interpreting this statutory provision, recognizes that the state, as trustee for the public waters, may "bring any other action whether authorized by any particular statute, if required by its pecuniary interests or for the public welfare."[129] Thus, the state may sue to protect the PTD resource of water to protect

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N.M. STAT. ANN. § 8-5-2 (1978).

[126] *See infra* § 8.1.

[127] *Dority*, 225 P.2d 1007, 1010 (N.M. 1950).

[128] *See id.*; N.M. STAT. ANN. § 8-5-2 (stating that "the attorney general shall . . . prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor.").

[129] *See id. See also* State ex rel. Reynolds v. Mears, 525 P.2d 870, 875 (N.M. 1974); New Mexico v. General Elec. Co., 467 F.3d 1223, 1243 (10th Cir. 2006).

the state's interest and the public welfare.[130] Although New Mexico courts have not directly addressed whether the state may sue for damages for injuries to public waters, the Tenth Circuit recognized the state had the authority to enforce the trust to prevent groundwater contamination, deciding that it had standing as trustee of the state's public waters of the state to sue General Electric for damages resulting from groundwater pollution.[131] Thus, it is likely the state may sue for damages to PTD resources.

To enforce the trust provisions of the federal land grants under the Enabling Act, the federal government may sue to enforce trust provisions, which is what occurred in the cases of both *Ervien* and *New Mexico*.[132] Thus, if New Mexico breaches its trust responsibilities with management of state trust lands, the United States may file suit against the state of New Mexico to require New Mexico to exercise its trust responsibilities to the state trust lands in accordance with the Enabling Act.

8.3 Defense to Takings Claims

New Mexico courts have yet to recognize the constitutional or state trust lands PTD as a state defense to takings claims.

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[130] *Dority*, 225 P.2d at 1010.

[131] New Mexico v. General Elec. Co., 467 F.3d 1223, 1242–43 ("No one doubts the State of New Mexico manages the public waters within its borders as trustee for the people and is authorized to institute suit to protect those waters on the latter's behalf. . . . Similarly, no one doubts the duty of the State AG generally to prosecute a state law civil action in which the State is a party. In view of the foregoing, neither G[eneral] E[lectric] nor ACF [Industries] challenges the State's Article III standing to pursue this state law action for harm to the public interest in its capacity as trustee of the State's groundwaters.") (citations omitted).

[132] *See New Mexico*, 536 F.2d 1324, 1325 (10th Cir. 1976); *Ervien*, 251 U.S. 41, 45 (1919) (stating that it is "the duty of the Attorney General of the United States to prosecute in the name of the United States such proceedings at law or in equity as may be necessary to enforce the provisions of the act 'relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.'").

NEW YORK

The Public Trust Doctrine in New York

Ellie Dawson

1.0 Origins

The Public Trust Doctrine (PTD) in the state of New York can be difficult to distinguish from other doctrines of property, such as the navigational servitude[1] and state sovereign ownership, but it still burdens land everywhere from the bed of Lake Ontario to Central Park in New York City. Although tracing its origins back to centuries-old common law, statutes from early statehood[2] through more recent times[3] continue to shape how the courts interpret the trust to either empower or restrain the state as the keeper of the trust. The extent to which the PTD burdens both submerged lands and other resources in New York is far from uniform, however; for example, some submerged lands that would traditionally be considered state property are actually held in trust by towns and other municipalities, as grants from colonial governors.[4] But even where a municipality holds an easement in trust, the state, via the Department of Environmental Conservation, has ultimate responsibility over coastal areas.[5] Thus, the applicability of the New York PTD is heavily dependent on the specific parcel in question.

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[1] Although typically considered to be a federal doctrine, New York courts speak of a state navigational servitude burdening navigable-in-fact waters that are not subject to the PTD because the state does not own the beds. *See infra* § 5.2. This navigational servitude is also sometimes called the public right of passage, or some equivalent thereof. *See* Douglaston Manor, Inc. v. Bahrakis, 678 N.E.2d 201, 203–04 (N.Y. 1997) (acknowledging a recognized distinction between "public trust interests" and "navigational servitudes" with respect to the public's greater rights in the former, and referring to the public right in navigable-in-fact rivers whose beds are owned by private parties as the "public easement of navigation"). Nevertheless, public trust principles seem to apply regardless of the ownership of the bed, although they may be more pronounced with respect to the beds of navigable-in-law waters. *See infra* § 5. Also important to clarify is that earlier courts distinguished between littoral (bordering the sea) and riparian (bordering rivers and streams) land; today, these words are used interchangeably and refer to the same bundle of rights. *See* Town of Oyster Bay v. Comdr. Oil Corp., 759 N.E.2d 1233, 1236 (N.Y. 2001) (clarifying the meaning of "littoral" and "riparian" and their usage in New York Law).

[2] *See, e.g.*, 1817 N.Y. Laws Ch. 262 (clarifying sovereign ownership of canal lands).

[3] *See, e.g.*, N.Y. ENVTL. CONSERV. LAW § 11-0317 (McKinney 2009) (declaring the environmental policy of the state, favoring conservation and resource protection).

[4] Katz v. Village of Southampton, 664 N.Y.S.2d 457, 459 (N.Y. App. Div. 1997) (dismissing action for failure to join the Freehold Trusteeship as an indispensable party because of its easement burdening the property in question).

[5] *Id.*

2.0 The Basis of the Public Trust Doctrine in New York

The PTD in New York is based in common law, the courts having recognized its existence for centuries.[6] Since New York is comprised of lands initially belonging to several different European countries, with titles that trace back to colonial times,[7] the courts must decipher the applicability of the PTD on a parcel-by-parcel basis. Thus, the common law, while the foundation of the PTD in New York, does not itself determine the scope of the PTD.

The New York legislature has modified the PTD by statute, and courts have interpreted both the statutes and the common law, adapting the PTD to the changing social and economic conditions of the state.[8] One New York statute clarifies that all land once vested in the crown of Great Britain transferred automatically to "the people of the state" upon statehood.[9] Statutes also articulate more specific policies regarding state lands. For example, the Environmental Conservation Law[10] declares that the environmental policy of the state is designed to "fulfill [the state's] responsibility as trustee of the environment for the present and future generations."[11] Additionally, trust-like language exists with respect to parks, instructing the Office of Parks, Recreation and Historic Preservation to "provide for the public enjoyment of and access to [park] resources in a manner which will protect them for future generations."[12] While the statutes do not

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[6] *See* Michael Seth Benn, *Towards Environmental Entrepreneurship: Restoring the Public Trust Doctrine in New York*, 155 U. Penn. L. Rev. 203, 218 (2006).
[7] *See* Romart Properties, Inc. v. City of New Rochelle, 324 N.Y.S.2d 277, 278–79 (N.Y. Sup. Ct. 1971) (explaining the land disputes between the English and the Dutch in the New World in the seventeenth century).
[8] Coxe v. State, 39 N.E. 400, 402 (N.Y. 1895) (discussing the evolution of the PTD as developing "for the purposes of the particular case").
[9] N.Y. PUB. LANDS LAW § 4 (McKinney 2009).
[10] N.Y. ENVTL. CONSERV. LAW § 1-0101(2) (McKinney 2009).
[11] *Id.*
[12] N.Y. PARKS REC. & HIST. PRESERV. § 3.02 (McKinney 2009).

specifically mention the PTD, they embrace some of the principles it espouses, specifically, the duty of the state as trustee of the resources and the right of the public to access trust land.[13]

Finally, the state constitution provides additional support for a robust PTD in New York, particularly with respect to parkland, although specific "public trust" language is again absent. For example, a "forever wild" provision seeks to preserve state forest land,[14] but this land may be alienated if the proceeds from the sale are used to acquire more land for the Adirondack and Catskill parks.[15] Another section of the same article declares state policy to "conserve and protect its natural resources" and calls for the acquisition and dedication of scenically or ecologically significant lands to be "preserved and administered for the use and enjoyment of the people," which implies a trust responsibility, especially because the legislature may not alienate these lands unless two successive sessions of the legislature authorize the alienation.[16]

3.0 Institutional Application

New York courts do not hesitate to hold other units of government, whether legislative, administrative, or municipal, accountable for their public trust responsibilities. In 1936, the Court of Appeals (the highest state court) went so far as to partially invalidate a patent dating from 1685 made by a lieutenant governor to a private individual, because it attempted to grant the

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[13] *See id.*; *see also infra* § 4.

[14] N.Y. CONST. art. 14 § 1 (amended 2007) ("The lands of the state . . . constituting forest preserve . . . shall be kept forever wild . . . They shall not be leased, sold or exchanged . . . nor shall the timber thereon be sold, removed or destroyed."). The New York Court of Appeals interpreted this provision so strictly in 1930 that Olympic planners could not fell trees to construct a bobsled run. *See infra* note 116 and accompanying text. However, subsequent amendments have created so many exceptions that the provision may not have the force it once did. *See* N.Y. CONST. art. 14 § 1 (excepting lands for the construction of highways, ski trails, refuse disposal, etc.).

[15] N.Y. CONST. art. 14 § 3.

[16] *Id.* § 4.

foreshore of what is now Queens.[17] The court limited the grant to the high-water mark.[18] This active approach manifests most obviously with respect to attempts to alienate trust land.

3.1 Restraint on Alienation of Private Conveyances

The PTD in New York does not act as a constraint on private landowners' alienation of private conveyances. Indeed, riparian owners may even convey riparian rights, along with a strip of land adjacent to a waterway, while simultaneously reserving the right to access the water.[19] Such conveyancing can lead to the increase of interests burdening the same riparian parcel.

3.2 Limit on the Legislature

New York courts have invoked the common law principles of the PTD to limit the legislature, most often when interpreting the validity of legislative grants, testing them for adherence to the traditional protections the PTD requires. For example, in *Coxe v. State*[20] the legislature granted marshlands to a corporation for draining, selling the beds and granting a right to assess private property that the draining would benefit.[21] After a subsequent legislature repealed the statute authorizing payment to the corporation only in the amount of damages incurred, the corporation sued for higher compensation.[22] The New York Court of Appeals held the original statute was invalid because it was not for "reasonable use which can fairly be said to be for the public benefit."[23] Because the court viewed the grant as improperly benefitting a private purpose instead of a public one, it ruled that the legislature had no authority to enact the

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[17] Marba Sea Bay Corp. v. Clinton St. Realty Corp., 5 N.E.2d 824, 825–26 (N.Y. 1936) (declaring as "inherent in the title and power of disposition" of the state, though not specifically enumerated in its constitution, that the state cannot "surrender[ ], alienate[ ], or delegate[ ]" its title "except for some public purpose").
[18] *Id.*
[19] Moenig v. New York Cent. R. Co., 175 N.Y.S. 665, 668–69 (N.Y. App. Div. 1919) (construing a grant to convey riparian rights to a railroad company notwithstanding the presumption that grants to railroads only convey rights-of-way, but clarifying that the portion of the grant that attempted to convey land under water was invalid because the land belonged to the state).
[20] 39 N.E. 400 (N.Y. 1895).
[21] *Id.* at 401.
[22] *Id.*
[23] *Id.* at 402.

statute. In another case involving a legislative grant to a private company, the Court of Appeals invalidated a grant that required the private company only to maintain the navigability of the channel in the same condition as was present during the initial transfer, because such a grant denied the state the right to undertake future improvements in the public interest.[24]

If the state does validly convey land adjacent to tidal submerged lands, a presumption exists that the grant only extends to the high water line.[25] The legislature may also grant municipalities control over trust lands,[26] as well as administrative agencies.[27] However, the legislature cannot alienate trust land where alienation would deprive the public of its rights of passage.[28] Therefore, the PTD in New York serves to check the legislature's power of alienation of trust lands, requiring legislative alienation to serve public trust purposes.

3.3 Limit on Administrative Action

Administrative agencies in New York wield a great deal of power over public trust resources. For example, the legislature has entrusted the Office of General Services with the stewardship of all state lands not previously entrusted to a different governmental body, including submerged lands.[29] The Commissioner of the Office of General Services has the authority to alienate state-owned submerged lands via "grants, leases, easements, and lesser

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[24] Long Sault Dev. Co. v. Kennedy, 105 N.E. 849, 852 (N.Y. 1914) (invalidating a legislative grant to a corporation because, similar to the Illinois legislature's grant of too much land in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 453 (1892), the New York legislature attempted to grant too much power, contrary to the public trust).

[25] John A. Humbach, *Public Rights in the Navigable Streams of New York*, 6 Pace Envtl. L. Rev. 461, 534 (1989). However, because the PTD does not necessarily burden freshwater streams, legislative grants of land adjacent to freshwater streams carry the presumption of granting to the middle thread of the stream, subject to the public right of passage. *Id.* at 534–35; *see also infra* § 5.2.

[26] People v. Poveromo, 359 N.Y.S.2d 848, 850 (N.Y. Sup. 1973) (ruling that town had the authority to issue permits for the filling of navigable waters when the state legislature had given the town control over the waterway, even though the title to the beds was still vested in the state).

[27] N.Y. ENVTL. CONSERV. LAW § 3-0101 (McKinney 2009) (continuing the state Department of Environmental Conservation).

[28] Aquino v. Riegelman, 171 N.Y.S. 716, 719 (N.Y. Sup. 1918) (denying riparian owner writ of mandamus against borough president to return property to owner because he did not have, nor could he acquire title to the land between the high and low water marks).

[29] N.Y. PUB. LANDS LAW § 3 (McKinney 2009).

interests," but only when "consistent with the public interest," which the state considers to include everything from navigation and commerce to environmental protection.[30] However, the commissioner must also consider private property owners' need to "safeguard" their property,[31] which may affect any attempted alienation. Additionally, should the commissioner grant land for "public park, beach, street, highway, parkway, playground, recreation or conservation purposes," such a grant can be made only to counties, cities, towns, or villages.[32]

The Office of General Services is not the only agency entrusted with public trust responsibilities. The Department of Environmental Conservation, with the duty to carry out the state's environmental policy,[33] acts as a trustee of the state's resources for future generations.[34] The department's duties include coordinating management of the state's "water, land, fish, wildlife and air resources."[35] When citizens question the agency's decisions regarding trust resources, New York courts will review the agency's procedure first for legality and then to determine whether the agency took a "hard look" at the environmental issues in question.[36] Thus, although New York agencies possess great regulatory power over trust resources, New York courts do not necessarily defer to their decision making.

3.4 Limit on Municipal Action

Possibly more so than its limitations on administrative agencies, the PTD in New York serves as a check on municipal action, because many municipalities in New York possess public trust responsibilities and powers, due to pre-statehood land grants. Should the Commissioner of

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[30] *Id.* § 75.
[31] *Id.*
[32] *Id.* § 75(10).
[33] N.Y. ENVTL. CONSERV. LAW § 3-0301(1) (McKinney 2009).
[34] *See supra* note 11 and accompanying text.
[35] N.Y. ENVTL. CONSERV. LAW § 3-0301(1)(b).
[36] Brander v. Town of Warren Town Bd., 847 N.Y.S.2d 450, 453 (N.Y. Sup. Ct. 2007) (deciding that the town board's permit issuance was arbitrary and capricious for failure to take a hard look at possible adverse environmental impacts).

General Services grant smaller units of government land for public purposes, a possibility of reverter exists if the land is not used for the purposes of the grant.[37] Cities, in turn, can entrust smaller units of government, like boards or districts, with public trust powers and duties as well.[38]

Where a municipality possesses land from a grant from the British crown, its powers over the land are like the state's in terms of absolute sovereignty and the ability to alienate. New York courts seems to distinguish cases based on the size of the conveyance attempted; for example, a large conveyance may be invalid, but a city could grant filled land to private owner even where the city did not own adjoining upland.[39] The permissibility of such a grant would turn on the "degree to which the public interest will be impaired."[40] With respect to interference with riparian rights, however, the Court of Appeals has described the public trust rights and duties of municipal bedland owners and the riparian landowner's right of access to the water as co-existing, neither one being subordinate to the other,[41] in contrast with the traditional PTD which considers public rights to be superior to riparian landowner rights. Thus, when the two rights holders disagree about the proper usage of the property, the courts must step in to balance the competing interests.[42]

In particular, New York City presents unique PTD circumstances due to its large land mass, its importance in state commerce, and the patchwork nature of the titles to the submerged

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[37] N.Y. PUB. LANDS LAW § 75(10) (McKinney 2009).
[38] *See* Langdon v. Mayor, Aldermen and Commonality of New York, 48 Sickels 129, 93 N.Y. 129 (N.Y. 1883) (equating the powers of New York City over lands granted from the British crown to the powers of the state legislature).
[39] Riviera Assn. v. Town of North Hempstead, 52 Misc.2d 575, 582 (N.Y. Sup. Ct. 1967) (upholding a municipality's conveyance of filled seabed to a private owner because such a grant would not unduly impinge upon public rights). Interestingly, the original riparian owner, the filler of the seabed, retained the riparian rights, meaning that the purchaser of the filled land could only access his property from the water. *Id.* at 583.
[40] *Id.* at 582.
[41] Town of Oyster Bay v. Commdr. Oil Corp., 759 N.E.2d 1233, 1236 (N.Y. 2001) (deciding that dredging to preserve riparian owner's access is permissible so long as it does not unreasonably interfere with town's rights).
[42] *Id.* at 1237.

lands within its jurisdiction. When the state legislature created a dock-and-wharfage department to allow the city to control water-related commercial activities, a private landowner sued to restrain the department from interfering with his wharf, built on land he owned prior to the statute.[43] The Court of Appeals concluded that, although the dock-and-wharfage department could regulate the landowner's wharf, it could not destroy its easement of access to it.[44] Municipalities in New York thus have public trust powers similar to that of the state itself, particularly if the municipality received the title to land prior to statehood.

4.0 Purposes

The PTD in New York encompasses not only the traditional purposes of navigation and fishing, but also extends to other uses of navigable waters such as recreation.[45] Additionally, because the PTD in New York extends to more land than traditional submerged tidelands,[46] uses such as "historical significance" and "natural beauty" receive PTD protection.

4.1 Traditional Purposes

The New York PTD protects the public rights of navigation and fishing on all waters submerging lands subject to the public trust.[47] If the water is only navigable-in-fact, though, as opposed to navigable-in-law,[48] only the public right of passage, that is, access for navigation, remains.[49] Thus, if an individual owns the bed of a navigable-in-fact waterway—whether a stream or a lake—the individual may exclude the public from fishing in the water also, though he

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[43] *Langdon*, 48 Sickels 129.
[44] *Id.*
[45] *See infra* § 4.2.
[46] *See infra* § 5.
[47] Douglaston Manor, Inc. v. Bahrakis, 678 N.E.2d 201, 204 (N.Y. 1997) (recognizing the public right of fishery and transportation in navigable-in-law waters as well as the Hudson and Mohawk rivers because of their considerable size).
[48] *See infra* § 5.2.
[49] *Douglaston*, 678 N.E.2d at 204.

or she may not exclude the public from traveling on the water.[50] Additionally, a private owner cannot construct an obstruction to navigation between the high- and low-water marks on navigable-in-fact waters, because such an obstruction would interfere with the superior public right of passage.[51] Therefore, although a distinction exists in New York law between the public trust doctrine and the public right of passage, functionally the only real differences may concern the ownership of the bed and the exclusivity of fishing rights, since the state can still prevent obstructions to navigation and maintain the channels in furtherance of the public right.[52]

4.2 Beyond Traditional Purposes

Both the New York courts[53] and the legislature[54] recognize that the state extends trust responsibilities and powers over activities beyond navigation and fishing. Recreational use of submerged lands in trust extends to "boating, bathing, fishing and other lawful purposes" when the tide is in, and passing over the foreshore to access the water when the tide is out, as well as "to lounge and recline thereon."[55] Although recreational use of bedlands alone may not be sufficient to create public trust responsibilities,[56] once subject to the PTD the state will protect the resource for recreational use in addition to the uses for which it was traditionally protected.[57]

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[50] Hooker v. Cummings, 20 Johns. 90, 11 Am. Dec. 249 (N.Y. 1822) (deciding that the fishery of a freshwater river resting entirely in private ownership similarly remained private); *see also Douglaston*, 678 N.E.2d at 204 (distinguishing navigable-in-law and tidal navigable-in-fact waters which are subject to the public trust from nontidal navigable-in-fact waters, which are not necessarily subject to the same trust). Nevertheless, the New York Court of Appeals has also opined that, even in rivers only navigable-in-fact, the state retains the right to improve the waterbody in furtherance of the navigational servitude, implying trust-like powers. Fulton Light, Heat & Power Co., 94 N.E. 199, 204 (N.Y. 1911) (holding that the state had to compensate landowners for taking their land for a barge canal, because it was an improvement not of the type contemplated within the state's existing rights to improve channels of navigation).

[51] Aquino v. Riegelman, 171 N.Y.S. 716, 718 (N.Y. Sup. Ct. 1918).

[52] *See Douglaston*, 678 N.E.2d at 203–04.

[53] Tucci v. Salzhauer, 336 N.Y.S.2d 721, 723 (N.Y. App. Div. 1972) (denying private landowner the right to prevent the creation of a pedestrian right of way to the foreshore abutting his property because of the public right of access).

[54] N.Y. ENVTL. CONSERV. LAW § 45-0101 (McKinney 2009).

[55] *Tucci*, 336 N.Y.S.2d at 723.

[56] *See infra* § 5.3.

[57] *See* Brant Lake Shores, Inc. v. Barton, 307 N.Y.S.2d 1005, 1012 (N.Y. Sup. Ct. 1970).

The legislature created a state historical and natural preserve trust to protect lands outside the above-mentioned forest preserve[58] that are "of special natural beauty, wilderness character or geological, ecological, or historical significance so that present and future generations may share their ecological, educational and recreational value."[59] Should the legislature place lands within the protection of this trust, the purposes of the trust extend far beyond the traditional uses of navigation and fishing, which may not even be possible on the trust lands. Instead, the land must be preserved for "natural areas," "field laboratories for scientific research," and "passive recreational opportunities."[60] Thus, depending on the designation of the resource, the application of the PTD in New York could cover a spectrum of uses that would benefit the public.

5.0 Geographic Scope of Applicability

Although the state of New York considers many resources to be valuable and worthy of protection, neither the legislature nor the courts have explicitly connected the PTD to all such resources. However, the legislature has declared that waters, in particular, are "valuable public natural resources held in trust by the state, and this state has a duty to manage its waters effectively."[61] Because of the difference between tidal and fresh waterways in New York with respect to ownership of the beds, though, the state still does not maintain complete power over waterways. Nevertheless, because of its extension to forest and parklands, the PTD in New York may still cover more ground than most states.

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[58] *See supra* note 14 and accompanying text.
[59] N.Y. ENVTL. CONSERV. LAW § 45-0101.
[60] *Id.* § 45-0117(3).
[61] *Id.* § 15-1601.

5.1 Tidal

As one of the original thirteen states emerging from British colonization, New York subscribes to the tidal test for navigability, classifying tidal waters as navigable "in law."[62] State title to these tidal lands extends to the high-water mark, excluding the foreshore, or the area between the high- and low-water marks.[63] An exception to the state's title over all tidal lands exists with respect to such lands in Nassau and Suffolk counties, because colonial grants had already ceded ownership to some Long Island townships; the townships, not the state, therefore own the land and hold it in trust.[64] However, the state still retains jurisdiction over "migratory" fish in those areas, and the public right of navigation still applies.[65]

5.15 Canals

In addition to recognizing the PTD's applicability to tidal waters, in its constitution New York asserts public trust powers over the state's canal system.[66] Although not employing trust language in the constitution itself,[67] courts have interpreted the legislature's assertion of ownership to be sovereign and for the benefit of the public.[68] However, unlike tidelands, once canals are no longer useful for such purposes, the legislature may alienate the lands.[69]

5.2 Navigable in fact

With respect to waters that are not tidal, New York distinguishes between the state's duties as trustee over submerged lands and the public right of access or navigational servitude,

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[62] Humbach, *supra* note 25, at 468.
[63] Marba Sea Bay Corp. v. Clinton St. Realty Corp., 5 N.E.2d 824, 826 (N.Y. 1936).
[64] Melby v. Duffy, 758 N.Y.S.2d 89, 93 (N.Y. App. Div. 2003) (explaining ownership of tidelands located adjacent to town when determining the town was not liable for a boater's injuries because the injury occurred in section of water open to the public but not maintained by the town as a public recreational area).
[65] *Id.* at 93–94.
[66] N.Y. CONST. art. XV § 1 (amended 2001) (stating that certain named canals and the barge canal system "shall remain the property of the state and under its management and control forever").
[67] *Id.*
[68] State v. Case, 381 N.Y.S.2d 210, 215 (N.Y. Sup. Ct. 1976) (upholding state's conversion of canal lands to a public park and pathway because such conversion "does not alter the sovereign nature of the State's holding . . . for sovereign public purposes").
[69] N.Y. CONST. art. XV § 2.

the latter applying to freshwater beds but the former not in so many words. In the mid-nineteenth century in the case of *Morgan v. King* the New York Court of Appeals recognized that the use of a stream for log-flotation, the transport of mine products, or agricultural products can make a stream navigable-in-fact.[70] Seasonal navigability suffices for a waterway to be navigable-in-fact, as well,[71] although it may be necessary to show that the waterway is navigable for more than a few months.[72] Additionally, the stream must be navigable in its natural state, free from any artificial conditions.[73] With respect to lakes and ponds, it may be important to show that points of entry and exit connect the water to other channels, evidencing usefulness for commerce in the traditional sense, to establish navigability-in-fact for the purposes of public access.[74] The Department of Environmental Conservation essentially codified common law descriptions of navigable-in-fact waters in its regulations, specifying also that where the land surrounding water is completely held in private ownership, the state does not consider the water to be navigable-in-fact.[75]

Although the beds of many freshwater streams in New York are navigable-in-fact, the New York courts do not recognize any public rights over privately-owned freshwater streambeds

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[70] Morgan v. King, 8 Tiffany 454, 35 N.Y. 454, 458-59 (N.Y. 1866).
[71] *Id.* at 459.
[72] *Id.* at 460.
[73] *Id.* at 459; *see also* Adirondack League Club v. Sierra Club, 706 N.E.2d 1192, 1196 (N.Y. 1998) (deciding that the trier of fact needed to determine whether or not river was navigable-in-fact, not the court). However, the occasional necessity of portaging due to obstacles or obstructions is not determinative of nonnavigability. *Id.* at 1197.
[74] Mohawk Valley Ski Club, Inc. v. Town of Duanesburg, 757 N.Y.S.2d 357, 360 (N.Y. App. Div. 2003) (denying ski club's appeal in a declaratory judgment action because it failed to prove that the lake on which it sought to operate a waterskiing school was navigable and hence beyond the zoning power of the town in absence of state legislative authorization).
[75] N.Y. COMP. CODES R. & REGS. tit. 6, § 608.1(u) (2009) (defining "navigable waters of the state" to be "all lakes, rivers, streams and other bodies of water in the state that are navigable in fact or upon which vessels with a capacity of one or more persons can be operated notwithstanding interruptions to navigation by artificial structures, shallows, rapids or other obstructions, or by seasonal variations in capacity to support navigation . . . not . . . waters that are surrounded by land held in single private ownership at every point in their total area"). Because the definition differs somewhat from the common law, though, it may not necessarily bear on the public right of passage. *See* Humbach, *supra* note 25, at 481.

beyond public access, and the right of the state to maintain that public access. Although some scholarship equates public access with the PTD,[76] New York courts do not seem to do so explicitly, implying that because beds of navigable-in-fact waters are usually owned by adjacent landowners the state cannot assert sovereign ownership, and by extension trust powers and duties, over the lands.[77] Because the rights of public access are more limited than the public's rights under the PTD, conflation of the two may be a misinterpretation. For example, even if a waterway is navigable-in-fact, the public cannot cross private land to reach the water, so if the land surrounding a lake is entirely privately-owned, the public may have no access.[78] Nevertheless, the ability of the state to maintain navigable-in-fact waters for ease of public access embodies one of the traditional purposes of the PTD, providing courts a window of opportunity to extend the doctrine's application over such waters in the future.

5.3 Recreational Waters

A notable lack of uniformity exists regarding whether recreation suffices to render a water subject to either the public right of access in the case of freshwater beds or the PTD in the case of tidal beds. If a streambed is not navigable-in-fact, the legislature can designate a water as public, but then it has to pay compensation to the private owners,[79] implying that nonnavigable waters may not be considered innately public regardless of use. While at least one court has indicated that recreational use alone can make a water navigable-in-fact, if not in law,[80] other

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[76] *See* Patricia E. Salkin, *Applying the Public Trust Doctrine in New York: A Management Tool for Protecting Public Resources Today and for Future Generations*, Alb. L. Envtl. Outlook, Winter 1996, at 5–6 (describing the PTD as extending to "many rivers and large and medium sized lakes"); *see also* Humbach, *supra* note 25, at 466 (considering the state's easement of public access as being owned "in trust").

[77] Morgan v. King, 8 Tiffany 454, 35 N.Y. 454, 458 (N.Y. 1866).

[78] Hanigan v. State of New York, 629 N.Y.S.2d 509, 511, 512 (N.Y. App. Div. 1995) (ruling that no evidence existed to establish a pond's navigability for purposes of the public right of access, rendering the determination that there could be no public access to it via private land "academic" but no less true).

[79] Humbach, *supra* note 25, at 466.

[80] Trustees of Freeholders and Commonality of Southampton v. Heilner, 84 Misc.2d 318, 328 (N.Y. Sup. Ct. 1975) (recognizing recreational use of waters as not "less important to society than commercial uses"). *But see* Lewis v.

courts consider such use to be merely instructive as to the potential for commercial use.[81] More recently, the Court of Appeals seemed to balance the two extremes, deciding that, due to changing times and societal needs, "recreational use should be part of the navigability analysis."[82] However, if a statute, as opposed to a court, declares a waterway navigable for certain purposes, like commerce, even though the water is then opened to the public, public use may not necessarily extend to other uses beyond the stated purpose.[83] Recreational use of the water can thus be a persuasive, if not necessarily a determinative, way to recognize public access to waters.

5.4 Wetlands

New York asserts regulatory control over wetlands,[84] but the Court of Appeals has not yet equated this regulatory control with the public trust doctrine. However, at least one lower court has,[85] and the language the legislature employs regarding the purpose of the regulatory control, such as protecting wetlands for "the general welfare . . . of the state,"[86] may one day encourage the state's highest court to do so.

Clark, 133 N.Y.S.2d 880, 898 (N.Y. Sup. Ct. 1954) (deciding that a water was not navigable because its use was not of "profitable utility" (citation omitted)).

[81] Fairchild v. Kraemer, 204 N.Y.S.2d 823, 826 (N.Y. App. Div. 1960) (remanding for a new trial to allow the parties to prove the navigability of a bay before it was dredged); *see also Hanigan*, 629 N.Y.S.2d at 512, n.* (determining that recreational use can "be relevant evidence on the issue of the waterway's suitability and capacity for trade, travel and commerce").

[82] Adirondack League Club v. Sierra Club, 706 N.E.2d 1192, 1196 (N.Y. 1998) (remanding to the trial court to decide whether river was navigable-in-fact because such a decision was not proper to determine at summary judgment).

[83] Brant Lake Shores, Inc. v. Barton, 307 N.Y.S.2d 1005, 1012 (N.Y. Sup. Ct. 1970) (ruling that, although plaintiff corporation only held record title to the high water mark, it acquired title to the low water mark, and hence to the center of the lake, via adverse possession).

[84] N.Y. ENVTL. CONSERV. LAW § 24-0103 (McKinney 2009) ("It is declared to be the public policy of the state to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the state."). Similar provisions exist for tidal wetlands. *See Id.* § 25-0102.

[85] *See* Bisignano v. Dept. of Envtl. Conservation, 505 N.Y.S.2d 555, 557 (N.Y. 1986) (stating that [j]udicial recognition of the significance of the public trust doctrine has resulted in the imposition of a special duty upon the DEC to safeguard wetlands" in deciding that the DEC's wetland map was valid).

[86] N.Y. ENVTL. CONSERV. LAW § 24-0103.

5.5 Groundwater

The legislature asserts a "sovereign duty to conserve and control its water resources for the benefit of all inhabitants of the state."[87] In the statement of findings for the statutes protecting Great Lakes waters, the legislature declared that "*[a]ll* the waters of the state are . . . held in trust."[88] At least with respect to waters from the Great Lakes Basin, the state may not permit any diversion which could be "detrimental to the public interest or the public trust."[89] Additionally, the state ratified the Great Lakes-St. Lawrence River Basin Water Resources Compact, which recognizes trust powers and duties over those waters.[90] However, case law explicitly interpreting these statutes in light of the PTD does not yet exist.

5.6 Wildlife

As a signatory to the Interstate Wildlife Violator Compact, New York recognizes that "[w]ildlife resources are managed in trust by the respective states."[91] Even before this compact, the state recognized state sovereign ownership of all "fish, game, wildlife, shellfish, crustacea and protected insects."[92] Although the Court of Appeals described the power of the state as a "police power,"[93] it also referred to the state as "a trustee for the people,"[94] thus implicitly, if not explicitly, recognizing a public trust over wildlife.

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[87] *Id.* § 15-0105.
[88] *Id.* § 15-1601 (emphasis supplied).
[89] *Id.* § 15-1613(4)(d).
[90] *Id.* § 21-1001. *See also* Bridget Donegan, *The Great Lakes Compact and the Public Trust Doctrine: Beyond Michigan and Wisconsin Common Law*, 24 J. Envtl. L. & Litig. (forthcoming 2009) (manuscript at 19–20, on file with author) (arguing that the Great Lakes Compact asserted a novel PTD for Great Lakes Basin groundwater).
[91] N.Y. ENVTL. CONSERV. LAW § 11-2503 (McKinney 2009).
[92] *Id.* § 11-0105; *see also* Barrett v. State, 116 N.E. 99, 100 (N.Y. 1917) (upholding state's right to regulate the beaver season because "the general right of the government to protect wild animals is . . . well established. Their ownership is in the state in its sovereign capacity, for the benefit of all the people.").
[93] *Barrett*, 116 N.E. at 101.
[94] *Id.* at 102.

5.7 Uplands (beaches/parks/highways)

New York has a robust jurisprudence concerning the public trust in uplands, particularly concerning parks. Perhaps the earliest recognition of the PTD in relation to uplands was an 1871 Court of Appeals case ruling that when a city takes private lands "for the public use as a park," the city then holds it "in trust for that purpose."[95] Although land held in trust must be used for park purposes, what constitutes a "park" use is a case-by-case basis determination.[96] For example, one court decided that an amphitheater could satisfy the requirement.[97] Should a non-park use be proposed, though, legislative approval is required, even if the purpose is in the public interest.[98]

The public trust in uplands extends not only to parks, but also to the previously mentioned forest preserve[99] and places of significant state importance.[100] Although the state may alienate the former lands in some cases,[101] the latter receive much stronger protections against alienation.[102]

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[95] Brooklyn Park Comm'rs v. Armstrong, 6 Hand 234, 243, 6 Am. Rep. 70 (N.Y. 1871) (determining that had the city taken title not for the particular purpose of a park it could have alienated the fee without a problem, but after taking the land in trust for use as a public park the legislature would have to approve any subsequent alienation, and if approved neighboring landowners would not be entitled to maintain an action for compensation).
[96] Benn, *supra* note 6, fn. 4.
[97] SFX Entertainment, Inc. v. City of New York, 747 N.Y.S.2d 91, 92 (N.Y. App. Div., 2002) (rejecting lower court's determination that proposed amphitheater was inconsistent with park purposes under the PTD but concluding that the concession was void as inconsistent with the approved proposal).
[98] Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050, 1055 (N.Y. 2001) (answering a question certified to the court by the U.S. Second Circuit by concluding that the use of public parkland for a water treatment plant constitutes a non-park use, even though the city would not be alienating any land, and therefore legislative approval was required). The court relied on *Williams v. Gallatin*, 128 N.E. 121, 122 (N.Y. 1920), as precedent for the requirement of legislative approval for any "substantial intrusion on parkland for non-park purposes." *Id.* at 1054. The court also allowed that *de minimis* exceptions to the PTD may exist, but a five-year intrusion did not warrant consideration of that issue. *Id.*
[99] *See supra* notes 14, 59 and accompanying text.
[100] N.Y. ENVTL. CONSERV. LAW § 45-0101 (McKinney 2009).
[101] N.Y. CONST. art. XIV § 3.
[102] *Id.* § 4.

6.0 Activities Burdened

Because New York law does not explicitly connect the PTD to many resources, the courts do not often employ the PTD as a rationale for restricting or imposing limitations on activities utilizing the resources. Nevertheless, where the PTD applies, courts will prevent the impairment of public rights.[103]

6.1 Conveyances of Property Interests

As mentioned above,[104] riparian owners in New York enjoy broad powers of alienation over their land, including the ability to alienate small portions of riparian land while retaining the right of access to the water. However, a riparian landowner who conveys a right-of-way easement to a neighbor does not convey the right to construct an aid of navigation on adjacent trust land, that right remaining exclusively with the riparian landowner.[105]

6.2 Wetland Fills

Because the PTD in New York does not yet extend to wetlands explicitly, the state regulates wetland fills, but courts have yet to rule on the regulations using the PTD as a rationale. Indeed, a constitutional provision still exists that declares the "drainage of a swamp" to create agricultural land to be a "public use."[106] However, cases regarding swamp draining appear primarily in the late nineteenth to the early twentieth centuries in the takings context,[107] and do

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[103] *See infra* § 6.3–4.

[104] *See supra* § 3.1.

[105] Allen v. Potter, 316 N.Y.S.2d 790, 792–93 (N.Y. Sup. 1970) (dismissing an easement holder's complaint requesting an injunction against a riparian landowner for interference with structures the easement holder built both near the land burdened by the easement and trust land held by the state of New York, because the easement could not include the right to build on trust land).

[106] N.Y. CONST. art. I § 7(d) ("The use of property for the drainage of a swamp or agricultural lands is declared to be a public use, and general laws may be passed permitting the owners or occupants of swamp or agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions, on making just compensation."). The New York legislature has introduced an amendment that would repeal the section entirely and replace it with a new section that would not contain the provision regarding drainage. *See* 2009 N.Y. AB 2985 (NS) (introduced Jan. 22, 2009).

[107] *See, e.g.* In re Cheesebrough, 33 Sickels 232, 1879 WL 10783 at *3 (N.Y. 1879) (affirming taking of landowner's property for the permanent maintenance of city drains on his land).

not specifically reference wetland fills. Especially given subsequent legislation, such as the Freshwater Wetlands Act that seeks to protect such areas,[108] the constitutional provision favoring draining may not have much applicability to wetland fills today. Regardless, courts ruling on the permissibility of wetland fills do not refer to the PTD in making their decisions.

6.3 Water Rights

Riparian landowners in New York are entitled to "the uninterrupted flow of . . . waters in the channel" adjacent to their property.[109] Although the owner of land adjacent to a freshwater navigable-in-fact stream takes title to the middle thread of the stream, subject to public right of passage, this right of passage does not give the state or any other governmental unit the power to divert water without paying just compensation.[110] Alterations of watercourses are also permitted, so long as no harm or interference with other riparian's rights results.[111] A riparian owner abutting a nonnavigable lake takes title to the middle of the lake unless otherwise specified,[112] and because the lake is nonnavigable, public access may also be limited, even prohibited altogether if all the land surrounding a lake is privately owned.[113] However, an owner of land adjacent to tidal waters may not build a barrier across the foreshore that would deprive the public the right to pass.[114] Additionally, a riparian owner can dredge to preserve access to a navigable water, even when not owning the adjacent bed, so long as the rights of the bed owner are not

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[108] N.Y. ENVTL. CONSERV. LAW § 24-0103 (McKinney 2009); *see also supra* § 5.4.
[109] Smith v. City of Rochester, 47 Sickels 463, 1883 WL 12612 at *4 (N.Y. 1883) (deciding that, regardless of ownership of the bed of a navigable lake, the state has the right to regulate the water within the lake, but the public easement does not extend to a municipal corporation's diversion of water for domestic use, and remanding to the trial court to determine the extent of the damages riparian landowner sustained from the diversion).
[110] *Id.* at *9.
[111] N.Y. ENVTL. CONSERV. LAW § 15-0701 (McKinney 2009).
[112] Knapp v. Hughes, 808 N.Y.S.2d 791, 795 (N.Y. App. Div. 2006) (remanding to lower court to address remaining adverse possession claims but reversing lower court's determination granting littoral rights to property owners where title described lot as extending only to the nonnavigable lake's "water's edge," a phrase the court determines to exclude the land underneath the water).
[113] *See supra* note 78 and accompanying text.
[114] Aquino v. Riegelman, 171 N.Y.S. 716, 718 (N.Y. Sup. 1918) (denying riparian owner writ of mandamus against borough president because owner did not have nor could he acquire title to the land between the high and low water marks).

harmed.[115] Thus, so long as the private owner preserves public rights, he or she has considerable powers over the land.

6.4 Wildlife Harvests

Where the PTD in New York extends to wildlife, it acts to protect the resources for the future against temporary exploitative interests. For example, the Court of Appeals prohibited the cutting of trees, because it was contrary to the state constitutional provision preventing any alteration to state forest lands, even to prepare for the winter Olympics in Lake Placid.[116] By statute, the state asserts regulatory duties over "all fish, game, wildlife, shellfish, crustacean and protected insects in the state,"[117] and has enacted laws to limit the taking of[118] and interference with[119] such resources. However, New York courts have not described these laws as reflecting the public trust in wildlife.

7.0 Public Standing

Public standing to enforce the PTD exists in the state constitution, insofar as the constitution can be understood to embody trust principles.[120] A state statute also provides citizens the ability to sue to enforce statutes that concern trust resources.[121] However, plaintiffs do not currently use state common law to enforce the PTD beyond traditional nuisance actions.[122]

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[115] Town of Oyster Bay v. Comdr. Oil Corp., 759 N.E.2d 1233, 1233, 1238 (N.Y. 2001) (reversing and remanding to the lower court to apply the correct rule).
[116] Assn. for the Protection of the Adirondacks v. MacDonald, 170 N.E. 902, 905 (N.Y. 1930) (striking down as unconstitutional a statute that would allow for the building of a bobsled run in the Adirondacks).
[117] N.Y. ENVTL. CONSERV. LAW § 11-0105 (McKinney 2009).
[118] *See, e.g., Id.* § 11-0317 (delegating to the Department of Environmental Conservation the creation of seasons, size limits, etc. for the taking of fish).
[119] *See, e.g., Id.* § 11-0505 (prohibiting the obstruction of fish passage).
[120] *See infra* § 7.3.
[121] *See infra* § 7.2.
[122] *See infra* § 7.1.

7.1 Common Law Basis

Citizens in New York can bring common law public nuisance actions to enforce the PTD when the public right of passage has been impeded. However, when private citizens bring suit to abate a public nuisance, they must allege some special injury to have standing,[123] which can be an impediment to citizens concerned with the use of trust resources but with no individualized injury arising from a violation of the PTD. Because currently the majority of cases brought to enforce the PTD are predicated upon article 78 of the New York Civil Practice Law and Rules,[124] plaintiffs seldom bring common law actions, leaving in question the effectiveness of public nuisance under the common law as a modern means to enforce the PTD.

7.2 Statutory Basis

Article 78 of the Civil Practice Law and Rules of the New York statutes grants citizens standing to sue governmental entities or officers after a final action.[125] The breadth of this statute allows all manner of suits against the government, but a plaintiff must still show some kind of special injury exists to maintain the action.[126] However, what a court considers a sufficient "injury" may extend to harm to a scenic view.[127]

7.3 Constitutional Basis

Section 5 of article 14 of the state constitution provides for citizens to sue to enforce the provisions of the rest of the article, which concern the forest preserve and conservation of natural

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[123] Van Cortlandt v. N.Y. Cent. R.R. Co., 192 N.E. 401, 406 (N.Y. 1934) (reversing the appellate court and dismissing a suit to declare a bridge a nuisance because "[s]pecial damage must be proved resulting from the public nuisance before relief will be afforded to a plaintiff," and plaintiffs failed to show such damage).

[124] *See infra* § 7.2.

[125] N.Y. C.P.L.R. 7801 (McKinney 2009).

[126] Bolton v. Town of South Bristol Planning Bd., 832 N.Y.S.2d 729, 730 (N.Y. App. Div. 2007) (upholding the dismissal of a suit because the plaintiff, a landowner who lived one mile from a proposed development, did not show that an "environmental impact in fact" would occur that was different from an injury to the rest of the public (citation omitted)).

[127] Ziemba v. City of Troy, 827 N.Y.S.2d 322, 326 (N.Y. App. Div. 2006) (determining that plaintiffs had standing where historic buildings proposed for demolition stood two blocks from their residence).

resources in general.[128] Under this provision, the New York Court of Appeals considers corporations as "citizens" for standing purposes.[129] However, the provision granting standing is conditional; the appellate division of the state court must consent for a citizen to sue,[130] and this consent seems most forthcoming when the state has declined to enforce the provision at issue.[131] Therefore, an article 78 proceeding may be the best avenue for citizens wishing to allege a violation of the PTD.

8.0 Remedies

Both injunctive and monetary relief are available when damages to trust resources have or may be about to occur. The state has also used the PTD as a defense to takings, explicitly regarding alterations to traditional trust resources like the beds of navigable waters, and implicitly with respect to wetlands regulations. However, New York courts tend to follow the shifting United States Supreme Court precedent on the issue of takings,[132] so the future ability of the state to defend takings claims on such grounds is uncertain.

8.1 Injunctive Relief

When trust resources are in jeopardy injunctive relief is available to both the state and private citizens as a remedy. For example, interference with the public right of passage is a nuisance remediable by injunction, but only the state may take action, unless a private party has

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[128] N.Y. CONST. art. 14 § 5 ("A violation of any provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen.").

[129] In re Oneida County Forest Preserve Coun. v. Wehle, 128 N.E.2d 282, 284 (N.Y. 1955) (upholding right of corporation to maintain an action against the state for a violation of the forest preserve provision of the state constitution).

[130] N.Y. CONST. art. 14 § 5.

[131] *See* People v. System Properties, 120 N.Y.S.2d 269, 280 (N.Y. App. Div. 1953) (explaining that citizen standing is a "secondary right . . . if the [a]ttorney [g]eneral defaults").

[132] *See, e.g.* Gazza v. State Dept. of Envtl. Conservation, 679 N.E.2d 1035, 1039–40 (N.Y. 1997) (citing *Lucas v. South Carolina Coastal Coun.*, 505 U.S. 1003 (1992), as support for not finding a taking when a landowner purchased land after the enactment of a regulation); Friedenburg v. State Dept. of Envtl. Conservation, 767 N.Y.S.2d 451, 458 (N.Y. App. Div. 2003) (recognizing that *Tahoe-Sierra Pres. Coun. v. Tahor Reg'l Planning Agency*, 535 U.S. 302 (2002) narrowed the holding of *Lucas* by deciding that a temporary deprivation of all economic use of property is not a per se taking).

sustained "special damage."[133] Additionally, article 78 proceedings allow injunctions for violations to the state's equivalent to NEPA, the State Environmental Quality Review Act ("SEQRA").[134] The commissioner of the DEC can also request that the state attorney general bring suit for an injunction for a violation of the pollution provisions of the environmental conservation laws.[135] Should the commissioner believe that "irreversible or irreparable damage to natural resources" is imminent; the commissioner can issue a summary abatement order to require the violator to take immediate action, provided that the opportunity for a hearing follows.[136]

8.2 Damages for Injuries to Resources

The New York DEC can sue to enforce the environmental conservation laws and receive damages when injury occurs, for example when a landowner alters the bed of a creek without a permit.[137] Additionally, out-of-season taking of fish can result in both monetary penalties and criminal sanctions.[138] Finally, if a citizen does not comply with a summary abatement order, civil penalties may ensue.[139]

8.3 Defense to Takings Claims

The state of New York has attempted to employ the PTD as a defense to takings claims with varying degrees of success. Because of the state's allowance of private ownership of riverbeds, the state cannot declare previously nonnavigable streams navigable without paying

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[133] *See* Humbach, *supra* note 25, at 552.
[134] N.Y. C.P.L.R. 7801 (McKinney 2009); N.Y. ENVTL. CONSERV. LAW § 11-0317 (McKinney 2009).
[135] *See* N.Y. ENVTL. CONSERV. LAW § 71-1931 (McKinney 2009).
[136] *Id.* § 71-0301.
[137] Portville Forest Prod., Inc. v. Comm'r, Dept. of Envtl. Conservation, 459 N.Y.S.2d 201, 202 (N.Y. Sup. 1982) (deciding that, notwithstanding ambiguous statutory language, state statute empowering DEC to bring an "action" for a violation of the Environmental Conservation Laws includes administrative proceedings).
[138] People v. Chimbers, 398 N.Y.S.2d 222,223 (N.Y. Sup. 1977) (recognizing the right of the state to "protect the fish population within the [s]tate").
[139] N.Y. ENVTL. CONSERV. LAW § 71-0301.

just compensation to the riparian owners.[140] However, courts have upheld state action against other types of takings claims; for example, with respect to maintaining trust resources for ease of navigation.[141] Courts have also upheld fees for the use of public access on privately-owned bedlands as not effecting a taking because the servitude of public access was "always there," predating private title. Additionally, one trial court, describing takings law as "a clash between . . . the collective right to preserve natural resources and the individual right of property," decided that no taking occurred when the state declared certain forest lands to be subject to the public trust.[142]

With respect to wetlands and other types of property development, though, the law is not as clear. A New York appellate court used trust principles to uphold state waterway regulations against a challenge that they violated a home rule amendment to the state constitution.[143] Further asserting the state's power to regulate, in 1997 the Court of Appeals denied a takings claim pursuant to the denial of a tidal wetlands permit because "a promulgated regulation forms part of the title to property as a preexisting rule of State law."[144] The court did not connect its decision to the state PTD, however. More recently, an appellate court called this decision into question

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[140] Morgan v. King, 8 Tiffany 454, 457, 35 N.Y. 454 (N.Y. 1866) (voiding a state statute for declaring a private stream public without paying just compensation).

[141] Stegmeier v. State, 191 N.Y.S. 894, 896 (N.Y. 1922) (deciding that a riparian owner could not recover for damage to his property that occurred when state sought to improve a navigable stream because his riparian rights are subject to both the superior public right of navigation and because the damage was not negligently caused).

[142] W.J.F. Realty Corp. v. State, 672 N.Y.S.2d 1007, 1007, 1009 (N.Y. Sup. 1998) (interpreting ancient common law to have recognized a type of public trust in forest land when deciding that a state statute setting aside certain lands as public trust lands subject to stricter regulation was not a taking).

[143] Salvador v. State, 618 N.Y.S.2d 142, 146 (N.Y. App. Div. 1994) (deciding that state regulations regarding waterways did not violate the state constitution because the laws were of state-wide application and related to the state's public trust duties).

[144] Gazza v. State Dept. of Envtl. Conservation, 679 N.E.2d 1035, 1039–40 (N.Y. 1997) (allowing that a landowner could challenge a regulation as "beyond government's legitimate police power" but that, because petitioner in this case did not do so, he could not recover solely because the DEC denied him a permit because "he never owned an absolute right to build on his land without a variance").

after the Supreme Court decided *Palazzolo v. Rhode Island*,[145] deciding that a the denial of a permit to develop tidal wetlands did effect some measure of a taking, if not a per se taking, because of the near total economic deprivation the denial created.[146] Because the Court of Appeals has not yet revisited takings in the wetlands context, though, the state of the law in New York is as yet uncertain.

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[145] 533 U.S. 606 (2001) (rejecting the notion that post-regulation acquisition of title barred a regulatory takings claim).

[146] Friedenburg v. State Dept. of Envtl. Conservation, 767 N.Y.S.2d 451, 458 (N.Y. App. Div. 2003) (deciding that a taking did occur when a landowner suffered a loss of greater than ninety percent of the value of his property due to a wetland regulation, notwithstanding his acquisition of ownership subsequent to the regulation's enactment); *see also* Middleland, Inc. v. City Council of New York, 836 N.Y.S.2d 486 (table), 2006 WL 3956610 (N.Y. Sup. Ct. 2006) (unreported disposition) (citing *Palazzolo* and clarifying *Gazza* to reaffirm that property owners can challenge the validity of state regulations as support for striking down a city council zoning declaration).

NORTH DAKOTA

Public Trust Doctrine in North Dakota

Carter Moore

1.0 Origins

The path of the North Dakota public trust doctrine (PTD) began with the Desert Land Act of 1877, which severed water rights from federal land patents.[1] This severance laid the foundation for both North and South Dakota to apply the PTD to all water in those states.[2] In 1905, the North Dakota legislature adopted the water law doctrine of prior appropriation, based upon public ownership of water.[3]

North Dakota recognizes two types of public trust: 1) the section-line trust and 2) the trust of waters and river- and lakebeds.[4] The section-line strain is older and more fully developed. Although the trust in waters is newer and less well developed, it has significant potential for evolution. The purposes of both are similar: to protect free access and use of trust resources. Although both are anti-monopolistic, there are significant differences in application. The section-line trust ensures that the public has an easement

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[1] Desert Lands Act of 1877, 43 U.S.C. § 321.

[2] Baeth v. Hoisveen, 157 N.W.2d 728, 730 (N.D. 1968) (deciding water from underground must have been put to beneficial use prior to 1955 to vest in the appropriator).

[3] *Baeth*, 157 N.W.2d at 731 ("This statute is the first official indication of the legislature's approval of the doctrine of prior appropriation, which doctrine, of course, must be based upon public ownership.").

[4] The section-line trust cases culminated in Saetz v. Heiser, 240 N.W.2d 67 (N.D. 1976) (holding the section-line is a trust and that gateways across public highways impermissibly burden free travel, violating the trust). The formal introduction of the PTD to North Dakota was United Plainsmen Association v. North Dakota State Water Conservation Commission, 247 N.W.2d 457, 461 (N.D. 1976) (applying the PTD to more than conveyances of land and stating that the PTD requires evidence of some planning before water allocation).

providing unimpeded access to public roads.[5] The water PTD, on the other hand, protects navigation, commerce, fishing, and possibly recreation from private interference.[6]

2.0 Basis of the Public Trust Doctrine in North Dakota

The North Dakota PTD is based in statute, common law, and, likely, the state constitution. In *United Plainsmen v. North Dakota Water Conservation Commission*, the United Plainsmen Association (United Plainsmen) challenged the North Dakota State Water Conservation Commission's (Commission) decision to issue a permit to a coal-fired power plant, on the ground that the Commission failed to undertake short- and long-term planning required by statutes and the common law PTD.[7] Before the North Dakota Supreme Court, the United Plainsmen sought a temporary restraining order against the Commission and the State Engineer pending trial on the merits.[8] After a lengthy a brief discussion of the United States Supreme Court decision *Illinois Central Railroad v. Illinois*,[9] the *United Plainsmen* court quoted the state constitution without elaboration,[10] then focused on three statutory provisions addressing water ownership.[11] The first of these three declares that all water in the state belongs to the public, subject to

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[5] *Saetz*, 240 N.W.2d at 73.
[6] *United Plainsmen*, 247 N.W.2d at 461 (quoting Illinois Central Railroad v. Illinois, 146 U.S. 387, 452 (1892)); *see also* Bigelow v. Draper, 69 N.W. 570, 573 (N.D. 1896) ("[The constitution] should be construed as placing the integrity of our water courses beyond the control of individual owners.")
[7] *Id.* at 458.
[8] *Id.*
[9] Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892).
[10] N.D. CONST. art. XVII, § 210 (1889) (current version at N.D. CONST. art XI, § 3) ("All flowing streams and natural water courses shall forever remain the property of the state for mining, irrigating and manufacturing purposes.")
[11] *United Plainsmen*, 247 N.W.2d at 461-62 (quoting N.D. CENT. CODE §§ 61-01-01 (1975), 61-04-06 (1965), and 61-04-07 (1975)).

appropriation.[12] The second provision establishes a procedure for granting water appropriation applications,[13] and the third provision authorizes the State Engineer to reject those applications.[14] Specifically, the State Engineer may deny an application to appropriate water if, in his opinion, "approval thereof would be contrary to the public interest."[15] The court reasoned that in allocating resources consistent with the public interest, the PTD requires a determination of the potential effect of the allocation on present supply and future needs of the state.[16] Consequently, the court concluded that the PTD imposed a mandatory minimum-planning requirement on the State Engineer before allocating precious state resources.[17]

The *United Plainsmen* court concluded that the statute defining public waters expressed the PTD,[18] by declaring all water in the state to belong to the public and requiring the State Engineer to evaluate the public interest before granting a water permit.[19] North Dakota law states that all water within the state belongs to the public.[20] The State Engineer may deny an application for any of three reasons: (1) if there is no water available,[21] (2) if the applicant did not comply with law, rules and regulations,[22] or

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[12] *United Plainsmen*, 247 N.W.2d at 461 (quoting N.D. CENT. CODE § 61-01-01 (1957)).
[13] N.D. CENT. CODE § 61-04-06.
[14] N.D. CENT. CODE § 61-04-07 (1975).
[15] N.D. CENT. CODE. § 61-04-07.
[16] *United Plainsmen*, 247 N.W.2d at 462.
[17] *Id.* at 463.
[18] *United Plainsmen*, 247 N.W.2d at 462.
[19] N.D. CENT. CODE § 61-01-01 (1957).
[20] N.D. CENT. CODE § 61-01-01 (1957). Water that has been put to beneficial use is not included in the statute as belonging to the public, indicating that the PTD may not apply to previously appropriated water.
[21] N.D. CENT. CODE § 61-04-07 (1965).
[22] *Id.*

(3) if the approval of the application would be contrary to the public interest.[23] Although the third reason for rejecting an application seemed to be permissive (the State Engineer "may" deny), the United Plainsmen court read it as a mandatory duty to allocate resources "consistent[ly] with the public interest."[24] In short, the court employed the PTD as a rule of statutory interpretation.

3.0 Institutional application

The North Dakota PTD serves both to limit the legislature's ability to alienate trust resources and to limit agency discretionary authority.

3.1 Restraint on alienation

No North Dakota cases directly address whether the PTD might restrain private individuals conveying trust lands. However, in at least one case, the North Dakota Supreme Court treats the trust as if it survives a sale of land.[25]

3.2 Limit on Legislature

Although the North Dakota Supreme Court has not yet ruled on the question, the PTD probably limits the legislature's ability to convey trust resources free of the trust. The court has suggested that the legislature cannot convey trust lands unless the conveyance furthers the purposes of the trust or the conveyance is *de minimus*.[26]

3.3 Limit on administrative action

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[23] *Id.*
[24] *Id.* at 462.
[25] Wenberg v. Gibbs Tp., 153 N.W. 440, 441-42 (N.D. 1917) (ruling PTD burdened land that a landowner bought from a railroad).
[26] *United Plainsmen*, 247 N.W.2d at 461 (quoting Illinois Central R.R. v. Illinois, 146 U.S. 387, 466-56 (1892)); *see also* In the Matter of the Ownership of the Bed of Devils Lake, 423 N.W.2d 141, 145-46 (N.D. 1988) (Pederson, J., concurring) ("It is now clearly determined that certain property held in trust for the public cannot be alienated.").

The PTD circumscribes discretionary authority of state administrative officials to allocate vital state resources.[27] The PTD requires the State Engineer to conduct "some planning" before allocating limited state resources.[28] The case law addressing the PTD as a limit on administrative action is poorly developed, and thus, the outlines of acceptable administrative planning and action are not well defined.[29] However, the amount of planning required may be related to the amount of money allocated by the legislature for the purpose of such planning.[30]

4.0 Purposes

The North Dakota PTD has traditionally protected unobstructed travel on highways[31] and waters,[32] but has expanded to include water allocation decisions and

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[27] *United Plainsmen*, 247 N.W.2d at 460.

[28] *Id.* at 463. *United Plainsmen* specifically addressed allocation of public water. For a discussion of the possibility of extending this planning principle, *see infra* §§ 5.0-5.7.

[29] Since the *United Plainsmen* court imposed the planning requirement in 1976, the North Dakota Supreme Court has not held an amount of planning to be deficient, defining the lower limit of the requirement. The court discussed the trust in Bottineau County Water Resource District v. North Dakota Wildlife Society, 424 N.W.2d 894, 903 (N.D. 1988), but the State Engineer's planning satisfied the PTD. In that case, the N.D. Wildlife Society filed suit against the State Engineer for granting a permit to drain several wetlands. The lower court resolved the case in favor of the Wildlife Society, but the North Dakota Supreme Court reversed, re-instating the State Engineer's decision because "[it] contained a detailed analysis of the evidence, discussed the potential impacts of the Project, and concluded that the drain should be permitted subject to various conditions" imposed by the State Engineer. *Id.*

[30] *United Plainsmen*, 247 N.W.2d at 464 ("We acknowledge, however, that there is merit in the argument that the extent of planning is somewhat related to the sums appropriated therefor by the Legislature.").

[31] Saetz v. Heiser, 240 N.W.2d 67, 72 (N.D. 1968) (deciding that "the Legislature did not intend to violate its trust by tolerating fencing in any form which would effectively deprive the public of its right to free passage over section lines.").

[32] J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production Co., 423 N.W.2d 130, 140 (N.D. 1988) (ruling that the PTD is inapplicable to mineral rights located in a dried oxbow of a navigable river that has since been diverted because the PTD traditionally served to "foster the public's right of navigation").

possibly public recreation rights[33] and ecological resources.[34] Further, the PTD ensures resource allocation decisions are made "without detriment to the public interest in the lands and waters remaining."[35]

4.1 Traditional purposes

Traditionally, the North Dakota PTD served to ensure free navigation[36] and restricted conveyances of real property that would obstruct or interfere with those rights.[37] For instance, the public has a right to unobstructed passage across section line easements. In *Saetz v. Heiser*, the North Dakota Supreme Court concluded that the PTD required the use of cattle guards in addition to gateways at each intersection between a fence and a section line easement because a gateway without a cattle guard would impermissibly obstruct the public's right of passage across a section-line easement.[38] The PTD applied because the state "merely holds [section lines] as trustee for the public."[39]

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[33] *Id.* (stating that activities "such as bathing, swimming, recreation and fishing" are important aspects of the PTD).
[34] *United Plainsmen*, 247 N.W.2d at 462 (quoting Payne v. Kassab, 312 A.2d 86, 93 (P.A. 1973)); *see also* Application for Authorization to Construct a Project Within . . . Lake Isabel, Recommended Findings of Fact, Conclusions of Law and Order 8 (Office of State Engineer, Sept. 8, 1999) (affirming the State Engineer's decision to deny a permit to fill a lake because the fill would "negatively impact specific uses protected by the public trust, including pure water, the aquatic vegetation of the area, the soil, the stability of the shoreline, the natural scenic, historic, and esthetic values of the environment in total, recreation in various forms in the area, and fishing.").
[35] *United Plainsmen*, 247 N.W.2d at 462 (quoting *Illinois Central*, 146 U.S. at 455-56.)
[36] *J.P. Furlong*, 423 N.W.2d at 140.
[37] *United Plainsmen*, 247 N.W.2d at 461 (explaining that the trial court was wrong to restrict the PTD to "conveyances of real property").
[38] Saetz v. Heiser, 240 N.W.2d 67, 72 (N.D. 1968) ("[Requiring cattle guards and gateways] permits free movement of vehicles over cattle guards and permits the bypass of the cattle guard for livestock movement through an adjacent gateway, which shall include a gate.").
[39] *Id.* (quoting Small v. Burleigh County, 225 N.W.2d 295, 298 (N.D. 1975)).

The North Dakota Supreme Court has not yet had the opportunity to address the traditional purposes of the PTD in navigable waters. However, the court would likely protect the right of the public to free passage on navigable waters because the court has quoted *Illinois Central Railroad v. Illinois*[40] in *United Plainsmen* at length and seemed to rely on its reasoning.[41] The *United Plainsmen* court suggested that ensuring free navigation is an essential part of the PTD.[42]

4.2 Beyond traditional purposes

The North Dakota PTD has expanded beyond navigation, commerce, and fishing, to include a planning requirement before water resource allocation.[43] The PTD requires agencies to take the public interest into account in allocating and managing public resources.[44] The North Dakota Supreme Court has suggested that the trust may apply to

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[40] Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892).
[41] *United Plainsmen*, 247 N.W.2d at 461.
[42] *Id.* ("[The state's ownership of the beds of navigable waters] is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." Quoting *Illinois Central*, 146 U.S. at 452).
[43] *United Plainsmen*, 271 N.W.2d at 463.
[44] *Id.* at 462 ("In the performance of this duty of resource allocation consistent with the public interest, 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."); *see also* N.D. Admin. Code § 89-10-01-08 (2008); N.D. Admin Code § 89-10-01-03 (2010).

recreation and ecological values,[45] but it has never ruled on those grounds.[46] The case law is not well developed in this area.[47]

5.0 Geographic scope of applicability

The geographic scope of the PTD in North Dakota is ambulatory: that is, it follows the water.[48] The trust extends to all unappropriated water in the state.[49] The case law has focused only on a few areas, namely water appropriation,[50] rights in the beds of lakes,[51] and the public right of passage on section-line easements,[52] but the PTD has the potential to impose planning requirements on the state for almost all trust resources.[53]

5.1 Tidal

North Dakota has no tidal waters.[54]

5.2 Navigable-in-fact

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[45] Sprynczynatyk v. Mills, 523 N.W.2d 537, 539 (N.D. 1994) [Mills I] (quoting the trial court, stating "in other words, the property is held for the benefit of all the people and for their use, including navigation, recreation, ecological and esthetic preservation, and other public purposes"); *see also* J.P. Furlong Enterprises v. Sun Exploration and Production Co., 423 N.W.2d 130, 140 (N.D. 1988) (stating that activities "such as bathing, swimming, recreation and fishing" are important aspects of the PTD).

[46] *J.P. Furlong*, 423 N.W.2d at 140.

[47] 2005 N.D. Op. Atty. Gen. L-01 (Jan. 3, 2005) ("The contours of the state's duties, however, are difficult to assess because the doctrine is not fully defined in North Dakota.").

[48] *J.P. Furlong*, 423 N.W.2d at 140.

[49] *United Plainsmen*, 247 N.W.2d at 461. N.D. CENT. CODE § 61-01-01 excludes from state ownership diffuse surface waters and waters that have been appropriated.

[50] *See id.*

[51] *See* Sprynczynatyk v. Mills, 523 N.W.2d 537 (N.D. 1994).

[52] *See* Saetz v. Heiser, 240 N.W.2d 67 (N.D. 1976).

[53] ND State Water Comm'n v. Board of Managers, 332 N.W.2d 254, 258 (N.D. 1983) (assuming that the PTD applies to a non-navigable lake).

[54] Roberts v. Taylor, 181 N.W. 622, 625 (N.D. 1949) ("There are no tidal waters within this state.").

If a water is navigable, the PTD applies both to the bed of that water and to the water itself.[55] The trust extends to the ordinary high water mark.[56] If the course of a navigable water changes in a relatively permanent way, the trust moves with the water.[57]

5.3 Recreational waters

The North Dakota Supreme Court has long assumed that the PTD allows the public to use non-title-navigable waters.[58] This right to use non-title-navigable waters extends to the ordinary high water mark; in the shore zone, the area between the ordinary high and ordinary low water mark, the state and riparian owner have "coexistent, overlapping interests," meaning that no interest in the shore zone is absolute.[59] However, although the North Dakota Supreme Court has not delineated the "precise extent of the parties' rights and interests vis-à-vis the shore zone,"[60] protecting the integrity of the waters is part of North Dakota's PTD duties, regardless of the ownership of the bed of the lake or stream.[61]

5.4 Wetlands

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[55] *United Plainsmen*, 247 N.W.2d at 461 ("The State holds the navigable waters, as well as the lands beneath them, in trust for the public.")

[56] Sprynczynatyk v. Mills, 523 N.W.2d 537, 543 (N.D. 1994) (ruling riparian owners and state have correlative rights between high and low water mark).

[57] *J.P. Furlong*, 423 N.W.2d at 140 (ruling oil and gas rights in the bed of the Missouri River are the landowner's after the river had been artificially diverted, not the state's, because the land was no longer subject to the PTD).

[58] Roberts v. Taylor, 181 N.W. 622, 626 (N.D. 1921) (adopting recreational navigability test, "a use public in its character may exist when the waters may be used for the convenience and enjoyment of the public, whether traveling upon trade purposes or pleasure purposes"); *see also* North Dakota State Water Comm'n v. Board of Managers, 332 N.W.2d 254, 258 (N.D. 1983).

[59] *Mills I*, 523 N.W.2d at 544.

[60] *Id.*; *see also* Hystad v. Industrial Commission, 389 N.W.2d 590, 596 (N.D. 1986) (explaining correlative rights in the context of gas mining).

[61] *N.D. State Water Comm'n*, 332 N.W.2d 254, 258 (1983) (declaring that the state retains authority over lakes with privately held beds and that protecting the integrity of the waters is part of the state's affirmative duty under the PTD).

The North Dakota Supreme Court has suggested, but not squarely decided, that the PTD extends to wetlands overlying private land.[62] In *Bottineau County v. North Dakota Wildlife Society*, the Supreme Court of North Dakota assumed that the PTD applied to wetlands on privately owned land, but concluded that the State Engineer's decision to grant a permit to drain wetlands contained enough detail and analysis of the evidence and the potential impacts of the drainage project to satisfy the PTD.[63] In that case, the North Dakota Wildlife Society, a non-profit environmental group, appealed the State Engineer's decision to grant a permit to build a fourteen mile drainage pipe, which would disrupt many wetlands.[64] The court reversed the trial court and affirmed the State Engineer's decision.[65] Opponents and proponents had debated the drain at issue in Bottineau County for nearly a decade, and the court reiterated that the PTD requires only controlled development of resources, not no development.[66]

5.5 Groundwater

The North Dakota PTD extends to groundwater,[67] but does not extend to groundwater appropriated before 1955, when the legislature explicitly declared public

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[62] *Id.* (the court expands the PTD to all water allocation decisions); *see also* Botteneau County Water Resources District v. North Dakota Wildlife Society, 424 N.W.2d 894, 903 (N.D. 1988) (assuming, but not deciding, that the PTD extends to wetlands on privately-owned lands).

[63] *Bottineau County*, 424 N.W.2d at 903 (deciding the State Engineer could issue a permit to drain wetlands on private property under which were prime agricultural lands).

[64] *Id.* at 895-96.

[65] *Id.* at 895.

[66] *Bottineau County*, 424 N.W.2d at 903 (quoting Payne v. Kassab, 312 A.2d 86, 94 (1973)).

[67] N.D. CENT. CODE § 61-01-01 (1988) ("[W]aters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating underground waters . . . belong to the public.").

ownership of groundwater.[68] In *Baeth v. Hoisveen,* the North Dakota Supreme Court concluded that this 1955 statute, claiming all groundwater as public property, was constitutional, but that the law did not extend to water put to beneficial use prior to 1955, as those water rights had vested in the appropriators.[69]

5.6 Wildlife

A North Dakota statute uses trust-like language in declaring game to be sovereign property of the state,[70] but the North Dakota Supreme Court has yet to interpret this language to impose duties on the state.[71]

5.7 Uplands

The trust applies to some uplands in North Dakota. The state owns the beds of navigable waters to the ordinary high water mark; riparian landowners own to the ordinary low water mark, subject to the public's rights.[72] The PTD burdens the shore zone: both the riparian owner and the state have correlative interests in this zone.[73] But as stated above,[74] the North Dakota Supreme Court has not explained the extent of the

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[68] Baeth v. Hoisveen, 157 N.W.2d 728, 732 (N.D. 1968).
[69] *Baeth*, 157 N.W.2d at 730.
[70] *See* N.D. CENT. CODE § 20.1-01-03 (2003) ("The ownership of and title to all wildlife within this state is in the state for the purpose of regulating the enjoyment, use, possession, disposition, and conservation thereof, and for maintaining action for damages as herein provided").
[71] State by Stuart v. Dickinson Cheese Company v. City of Dickinson, 200 N.W.2d 59, 61 (N.D. 1972) (treating protection of wild game as a function of the police power, not an obligation imposed by a public trust).
[72] Sprynczynatyk v. Mills, 523 N.W. 537, 544 (N.D. 1994).
[73] *Id.* ("[The PTD, equal footing doctrine, and N.D.C.C. § 47-01-15] do not contemplate absolute ownership of the shore zone by either party. Both parties have correlative interests in the shore zone.").
[74] *See supra* § 4.2.

parties' rights in this zone.[75] This upper line of state interest travels with the water, so long as the water has made a clear mark on the shore; the high water mark is not fixed at a certain date.[76] A landowner must obtain a permit before constructing on shore zone or beds of navigable rivers or lakes and the landowner cannot exclude the public on those lands.[77]

Upland, the PTD applies to section-line rights-of-way.[78] A section line is open as a public highway unless and until the appropriate board of township supervisors or county commissioners begins closing procedures under a state statute.[79] The section line extends for thirty-three feet on either side of a section line.[80] A section line easement requires subjacent and lateral support[81] and must remain relatively free of obstructions.[82]

6.0 Activities burdened

Case law concerning private activities burdened by the PTD is scarce. However, the North Dakota Supreme Court has decided that the PTD survives a private conveyance.[83]

6.1 Conveyances of property interest

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[75] *Mills I*, 523 N.W.2d at 544 ("The shore zone presents a complex bundle of correlative, and sometimes conflicting, rights and claims which are better suited for determination as they arise.").
[76] Sprynczatyk v. Mills, 592 N.W.2d 591, 592 (N.D. 1999) [Mills II] ("The ordinary high watermark is ambulatory, and is not determined as of a fixed date").
[77] *See Mills I*, 523 N.W.2d at 543 (N.D. 1994).
[78] Saetz v. Heiser, 240 N.W.2d 67, 72 (N.D. 1976); *see also United Plainsmen*, 247 N.W. at 462.
[79] Small v. Burleigh County, 225 N.W.2d 295, 300 (N.D. 1974) (deciding the public's right of use in section line easement exists until positive action taken).
[80] N.D. CENT. CODE 24-06-28 (2011).
[81] Minot Sand and Gravel v. Hjelle, 231 N.W.2d 716, 722-23 (N.D. 1975).
[82] *Saetz*, 240 N.W.2d at 72.
[83] Wenberg v. Gibbs Tp., 153 N.W. 440 (N.D. 1917).

The PTD burdens conveyances of property.[84] North Dakota courts believe they are bound by *Illinois Central*; therefore, the state may not privatize certain trust resources.[85] However, the PTD does permit privatization of water rights through the appropriation process after the state analyzes both present supply and future need.[86]

6.2 Wetland fills

No North Dakota cases address the PTD and wetland fills; however, the trust could burden this activity. The public owns water in wetlands,[87] and the North Dakota Supreme Court has stated that the State Engineer must complete some planning before allocation of public water resources.[88] If filling a wetland is a kind of water resource allocation, the PTD should apply to that activity.[89]

6.3 Water rights

As noted above,[90] the PTD requires the State Engineer to analyze present supply and future need before issuing new water allocation permits.[91] The North Dakota Supreme Court has not addressed whether the PTD would require reevaluation of past

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[84] United Plainsmen Association v. N.D. Water Conservation Commission, 247 N.W.2d 457, 461 (N.D. 1976); *see also* Wenberg v. Gibbs Tp., 153 N.W. 440, 441-42 (N.D. 1917) (ruling that the PTD burdened land that a landowner bought from a railroad because the state held it in trust as a public right-of-way).

[85] *United Plainsmen*, 247 N.W.2d at 461; *see also* In the Matter of the Ownership of the Bed of Devils Lake, 423 N.W.2d 141, 145-46 (N.D. 1988) (Pederson, J., concurring) ("It is now clearly determined that certain property held in trust for the public cannot be alienated.").

[86] *United Plainsmen*, 247 N.W.2d at 463.

[87] N.D. CENT. CODE § 61-01-01 (1957).

[88] *United Plainsmen*, 247 N.W.2d at 463.

[89] *See* North Dakota State Water Commission v. Board of Managers, 332 N.W.2d 254, 258 (N.D. 1983) (stating the state water commission "has the authority to control the drainage of waters from [a non-navigable lake].").

[90] *See supra* § 5.5.

[91] *United Plainsmen*, 247 N.W.2d at 463 ("[PTD] permits alienation and allocation of such precious state resources only after an analysis of present supply and future need.").

water allocation decisions; however, the court is unlikely to require such reevaluation because the structure of the PTD in North Dakota merely requires an analysis, which takes into account past water allocations in its "present supply" analysis.[92]

6.4 Wildlife harvests

As addressed above,[93] the last word from the North Dakota Supreme Court was the state's sovereign ownership of wildlife did not support a cause of action for damages for destruction of that sovereign property.[94] Although the statute declaring public ownership of wildlife uses trust language, no North Dakota court has interpreted that statute to impose planning obligations on the state Fish and Game Department or any private party.

7.0 Public standing

Although statutory-based standing is well established under the North Dakota Environmental Law Enforcement Act,[95] common law-based standing under the PTD is less clear. The Environmental Law Enforcement Act of 1975 allows public standing if the plaintiff suffered special injury "different from the harm to the general public."[96] Further, the North Dakota Supreme Court has decided only two cases based on the PTD brought

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[92] *Id.*
[93] *See infra* § 5.6.
[94] State v. Dickinson Cheese, 200 N.W.2d 59, 61 (N.D. 1972) (holding that the state statute declaring all wildlife to be property of the state does not give the state an ownership interest sufficient to support a civil action for damages).
[95] N.D. CENT. CODE § 32-40-03 (1975).
[96] N.D. CENT. CODE § 32-40-03 (1975) ("The injury is sufficient if it has harmed the party's use and enjoyment of the protected natural resources in a manner different from the harm to the general public").

by environmental non-profit groups, and in both cases, the court assumed, but did not discuss, standing.[97]

7.1 Common law-based

North Dakota may recognize public standing to enforce the PTD. The plaintiffs in *United Plainsmen* sued on two grounds: a statutory provision[98] and the common law PTD.[99] The plaintiffs lost on the first ground, and the court didn't directly address the second.[100] Instead of addressing the common law claim, the court used the PTD as a rule of statutory construction, concluding that the water code required the State Engineer to show some short and long term planning before granting permits for water rights.[101] The *United Plainsmen* Court stated the Environmental Law Enforcement Act required "more than a plenary dismissal of the action."[102] Because the court based its ruling on a statute and seemed to base standing on the Environmental Law Enforcement Act, it is unclear if the PTD supports public standing as a matter of common law.

7.2 Statutory basis

The North Dakota Environmental Law Enforcement Act of 1975 authorizes any aggrieved person to enforce an environmental law or for damages for violation of an environmental law.[103] According to the Act, an environmental law includes any "statute,

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[97] *United Plainsmen*, 247 N.W.2d 457 (assuming standing); Botteneau County Water Resources District v. North Dakota Wildlife Society, 424 N.W.2d 894, 896 (1988) (reserving the question of standing because the court reversed on other grounds).
[98] N.D. CENT. CODE § 61-01-26 (1965).
[99] *United Plainsmen*, 247 N.W.2d at 459.
[100] *Id.* at 462.
[101] *Id.*
[102] *United Plainsmen*, 247 N.W.2d at 463.
[103] N.D. CENT. CODE § 32-40-06 (1975) ("Any state agency, with the approval of the attorney general; any person; or any county, city, township, or other political subdivision, aggrieved by the violation of any environmental statute, rule, or regulation of this state

rule, or regulation of the state" for the protection of the environment.[104] The statute requires the person bringing the suit to have suffered in a different manner than the rest of the public because of the violation.[105] The North Dakota Supreme Court has not interpreted this provision, so the extent the plaintiff's injury must differ from the public's injury has not been clearly defined.

7.3 Constitutional basis

The North Dakota Supreme Court has not yet allowed public standing under the constitutional provision declaring that all water in the state is state-owned.[106]

8.0 Remedies

The North Dakota Supreme Court has looked to the Environmental Law Enforcement Act for remedies in the PTD context.[107] That act authorizes both declaratory

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may bring an action in the appropriate district court, either to enforce such statute, rule, or regulation, or to recover any damages that have occurred as a result of the violation, or for both such enforcement and damages. Such action may be brought against any person, state agency, or county, city, township, or other political subdivision allegedly engaged in such violation. However, no damages may be recovered against any state agency, county, city, township, or other political subdivision, except as otherwise provided by law").

[104] N.D. Cent. Code § 32-40-03(2) (2011) ("'Environmental statute, rule, or regulation' means any statute, rule, or regulation of the state for the protection of the air, water, and other natural resources, including land, minerals, and wildlife, from pollution, impairment, or destruction").

[105] N.D. CENT. CODE § 32-40-06 ("The injury is sufficient if it has harmed the party's use and enjoyment of the protected natural resources in a manner different from the harm to the general public").

[106] N.D. CONST. art. XI, § 3 ("all flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes.").

[107] United Plainsmen Association v. N.D. State Water Conservation Comm'n, 247 N.W.2d 547, 464 (1976).

and equitable relief.[108] Since 1973, when the legislature amended the statute declaring wildlife sovereign property, destruction of wildlife supports damages.[109]

8.1 Injunctive relief

The Environmental Law Enforcement Act allows both declaratory and equitable relief.[110] The *United Plainsmen* court denied plaintiff's motion for a temporary restraining order while the case was pending that would have prevented the State Engineer from granting water permits to coal-related energy production facilities until completing comprehensive short- and long-term planning because the court concluded the planning done by the Commission may well have satisfied the PTD.[111] However, the court left open the possibility that an injunction may issue under the proper circumstances.[112]

8.2 Damages for injuries to resources

Damages seem inconsistent with the North Dakota Supreme Court's existing treatment of the PTD because the trust in North Dakota requires only evidence of some planning of present supply and future need of that resource.[113] The court also concluded that the trust requires only controlled development, not no development.[114] The court has not indicated whether it would award damages for unplanned allocation of vital trust resources or for uncontrolled development. As a further restriction on damages, the

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[108] N.D. CENT. CODE § 32-40-06 (1975).
[109] N.D. CENT. CODE § 20.1-01-03 (1973) (authorizing the state to maintain an action for damages for unlawful destruction of wild animals).
[110] *Id.*
[111] *United Plainsmen*, 247 N.W.2d at 459.
[112] *Id.* at 463-64 ("We are not convinced that a temporary restraining order is necessary or advisable in this instance.").
[113] *Id.* at 463.
[114] Botteneau County Water Resources District v. North Dakota Wildlife Society, 424 N.W.2d 894, 903 (N.D. 1988).

Environmental Law Enforcement Act (ELEA) does not authorize a party to recover damages against the state.[115] To the extent that a party must sue the state to enforce the PTD, a party may not recover damages from private parties.[116]

Until 1975, the state did not have an interest in wild animals that would support an award of damages for unlawful destruction of those animals.[117] In 1975, the legislature amended the statute declaring state ownership of wild animals to authorize an award of damages for unlawful destruction of those animals.[118] Since its amendment, no case has interpreted the statute.

8.3 Defense to takings claims

Although no North Dakota court has addressed the issue, the structure of the North Dakota PTD seems to make it inapplicable to takings claims. Further, the North Dakota PTD does not affect vested water rights, which limits the possible application of takings claims.[119]

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[115] N.D. CENT. CODE § 32-40-06 (1975).
[116] *Id.*
[117] State v. Dickinson Cheese, 200 N.W.2d 59, 61 (N.D. 1972).
[118] N.D. CENT. CODE § 20.1-01-03 (2003) ("The state has a property interest in all protected wildlife. This interest supports a civil action for damages for the unlawful destruction of wildlife by willful or grossly negligent act or omission.")
[119] *See* North Dakota State Water Commission v. Board of Managers, 332 N.W.2d 254, 258 (1983) ("Should the commission authorize reflooding of a lake, it may of course, be subject to potential suits by affected landowners with vested rights."); *see also* Ozark-Mahoning Co. v. State, 37 N.W.2d 488, 493 (1949) ("The legislature may not adopt a retroactive definition of navigability which would destroy a title already vested under a federal grant, or transfer to the state a property right in a body of water or the bed thereof that had been previously acquired by a private owner."); Baeth v. Hoisveen, 157 N.W.2d 728, 731 (1968) (explaining that riparian owners who put water to beneficial use could not have their water right divested without just compensation).

OREGON

The Public Trust Doctrine in Oregon

Erika A. Doot

1.0 Origins

The Oregon public trust doctrine (PTD) is grounded in common law decisions from the late nineteenth century[1] In *Shively v. Bowlby*, the 1894 U.S. Supreme Court recognized that the PTD burdens both tidelands and navigable waters in Oregon.[2] Quoting Lord Hale, the Court explained that the state owns these lands in its sovereign capacity as "a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery."[3] The Court affirmed that the state can alienate the *jus privatum* of tidelands and beds under navigable-for-title waters,

[1] Weise v. Smith, 3 Or. 445 (1869) (stating that navigable waterways are "public highways" that each person has "an undoubted right to use ... for all legitimate purposes of trade and transportation."); Felger v. Robinson, 3 Or. 455, 455 (1869) (reiterating that loggers had the right to raft logs on waters overlying privately-owned beds because "any stream, on whose waters logs and timber can be floated to market, is navigable, and is a public highway for that purpose," and explaining that "[i]t is not necessary that the stream should be available during the whole year to constitute a navigable stream."); Hinman v. Warren, 6 Or. 408, 411–12 (1877) (commenting that "[as] owner of the tide lands, [the state] had the power ... to sell the same. It has, however, no authority to dispose of its tide lands in such a manner as may interfere with the free and untrammeled navigation of its rivers, bays, inlets and the like."); Parker v. Taylor, 7 Or. 435 (1879) ("A shore-owner, acting under the authority conferred by the statute, and conforming to the restrictions imposed, may construct wharves from his land into navigable water so far as is necessary or convenient to accommodate shipping, provided he does not impede navigation."); Parker v. Rodgers, 8 Or. 184 (1879) ("The owner of the shore, by virtue of such ownership, has a right to construct wharves, bridges, piers, and landing places below low-water mark, if he conforms to the regulations of the State, and does not obstruct the paramount right of navigation."); Shaw v. Oswego Iron Co., 10 Or. 371, 371 (1882) ("Where a stream is naturally of sufficient size to float mill logs--and, it may be, small boats over some portion of it--the public have a right to its free use for that purpose."); Wilson v. Welch, 7 P. 341 (Or. 1885) (observing that the state owns the "navigable river[s] within its boundaries, and the shore of its bays, harbors, and inlets between high and low water, but its ownership is a trust for the public. .... It cannot sell [the lands] so as to deprive the public of their enjoyment."); McCann v. Oregon Ry. & Navigation Co., 11 P. 236 (Or. 1886) (recognizing that the rights of riparian owners must accommodate navigation); Lewis v. City of Portland, 35 P. 256 (Or. 1893) (holding that a riparian owner is able to construct wharves, piers, landings, and booms "in aid of and not obstructing navigation" unless statutes regulate or prohibit the activity); Parker v. W. Coast Packing Co., 21 P. 822 (Or. 1889) (recognizing that a riparian landowner can construct wharves or "use the shore in front of his land for any purpose not inconsistent with the rights of the public.").

[2] 152 U.S. 1, 52–54 (1894), *affirming* Bowlby v. Shively, 30 P. 154 (Or. 1892) (holding that title to tidelands acquired from the state continues to be burdened by the *jus publicum* and "subject to the paramount right of navigation").

[3] *Id.* at 16 (quoting passages of Lord Hale's treatise discussed in *Arnold v. Mundy*, 6 N.J.L. 1 (1821)).

but title to these lands continues to be subject to the *jus publicum*, including paramount public rights of navigation, fishing, and commerce.[4]

In 1918, the Oregon Supreme Court held in *Guilliams v. Beaver Lake Club*[5] that the PTD protects recreation as commerce within the scope of the public easement.[6] The court further held that the public has the right to recreate in intermittently navigable waters on private land.[7] In 2005, Attorney General Hardy Myers issued an opinion affirming public rights to recreate on all navigable-in-fact waters in Oregon.[8]

Indeed, the Oregon legislature and state officers have also advanced the PTD,[9] especially concerning public beach access.[10] In 1913, after the state had conveyed 30 acres of tidelands, Governor Oswald West successfully lobbied the legislature to enact a bill to prevent further conveyances of tidelands by declaring Oregon beaches "public highways" based upon their longstanding use for travel along the rugged coast.[11] In 1966, the long-settled issue of public

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[4] *Id.* at 52 (citing several Oregon cases and commenting that private title in tidelands or navigable-for-title waters is subject to the "paramount right of navigation inherent in the public."); *see also* Weise v. Smith, 3 Or. 445 (1869) (recognizing public rights of navigation on the Tualatin River near Oregon City, and holding that a jury should consider whether loggers trespassed by constructing a boom on plaintiff's land or had a right to build it based on necessity).

[5] 174 P. 437 (Or. 1918).

[6] *Id.* at 441 (commenting that "we fail to see why commerce should not be construed to include the use of boats and vessels for the purposes of pleasure.").

[7] *Id.* at 438 (describing the water on private land at issue as "a small nontidal stream of insignificant size.").

[8] Office of the Atty. Gen., Op. No. 8281 (2005) (recognizing public rights to recreate in all waters of the state), *available at* http://www.oregon.gov/DSL/NAV/docs/ag_op-8281_navigability.pdf?ga=t.

[9] *See infra* §§ 5.3–5.7 (discussing statutes protecting scenic waterways, wetlands, and wildlife).

[10] *See generally Oregon Experience: The Beach Bill* (Or. Pub. Broad., Nov. 12, 2007), *available at* http://www.opb.org/programs/oregonexperiencearchive/beachbill/timeline.php. Oregon's Statehood Act includes language from the Northwest Ordinance of 1787 that "[a]ll navigable waters of said State shall be common highways and forever free." Brusco Towboat Co. v. State *ex rel.* State Land Bd., 589 P.2d 712, 725 (1978) (quoting Act of Feb. 14, 1859, 11 Stat. 383, 383 (1859)). Unlike some other states, Oregon has not interpreted this language as imposing trust obligations on the state government. *Compare* Diana Shooting Club v. Husting, 145 N.W. 816, 818 (Wis. 1914) (quoting the Northwest Ordinance and explaining that it imposes trust obligations on the state).

[11] GEN. LAWS OF OR. 1913, Ch. 47, at 80 ("...The shore of the Pacific Ocean, between ordinary high tide and extreme low tide, and from the Columbia River on the north to the Oregon and California State line on the south ... is hereby declared a public highway and shall forever remain open as such to the public."). *See* Or. State Archives, Oregon Blue Book, Notable Oregonians: Oswald West – Governor (2009) (describing how Governor West lobbied for legislation halting conveyances of tidelands after recovering 900,000 acres of school trust lands fraudulently acquired by speculators), *available at* http://bluebook.state.or.us/notable/notwest.htm.

beach access resurfaced when a few hotels fenced off sand for their guests.[12] Responding to citizen concerns, Secretary of State Tom McCall and State Highway Commissioner Glenn Jackson led efforts that prompted the legislature to enact the landmark 1967 Oregon Beach Bill.[13]

In *State* ex rel. *Thornton v. Hay*,[14] the 1969 Oregon Supreme Court affirmed Attorney General Robert Thornton's order directing a motel owner to remove a fence from his beachfront property, and upheld the beach bill's recognition of the public right to recreate on ocean beaches based on the doctrine of custom.[15] The court reiterated that "[t]hese rights of the public .... have been called 'jus publicum' and we have consistently and recently reaffirmed their existence," and emphasizing that "[t]he law regarding the public use of property ... must change as the public need changes."[16] As the Oregon Beach Bill demonstrated, the courts, the legislature, state officials, and the public all play a role in advancing public property rights under the state PTD.[17]

2.0 Basis

The Oregon PTD is anchored in state common law and statutes. By 1894, Oregon courts and the U.S Supreme Court recognized paramount public rights of navigation, fishing, and commerce in tidelands and navigable waters in Oregon.[18] Then, in the 1918 decision of *Guilliams v. Beaver Lake Club*,[19] the Oregon Supreme Court recognized the public right to

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[12] *Oregon Experience*, *supra* note 10; *see generally* KATHRYN A. STRATON, OREGON'S BEACHES: A BIRTHRIGHT PRESERVED (Or. State Parks & Rec. Branch 1977).
[13] *Id.*
[14] 472 P.2d 671 (Or. 1969).
[15] *Id.* at 673 (explaining that public recreational use of beaches was an established custom since not only "the beginning of the state's political history" but also "the time of earliest settlement.").
[16] *Id* at 679. *See generally* Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649 (2010) (arguing that "[e]quating diminished development rights with a loss of all private property rights is a categorical mistake" because a "conceptual division between public and private rights through distinguishing between jus publicum and jus privatum" allows the courts to impose trust obligations on private landowners without displacing their fee simple titles).
[17] *See generally Oregon Experience*, *supra* note 10; *see also supra* notes 7–12.
[18] Shively v. Bowlby, 152 U.S. 1, 52–54 (1892), *affirming* Bowlby v. Shively, 30 P. 154 (Or. 1893) (upholding the ruling that tidelands conveyed to private parties by the state continue to be burdened by the *jus publicum*, the paramount public rights of navigation and commerce).
[19] 174 P. 437 (Or. 1918).

recreate in all navigable-in-fact waters in the state,[20] holding that a landowner could not construct a flood control dam unless he avoided interrupting public use of a stream and lagoon intermittently navigable for fishing and row boating.[21] Thus, the PTD is a well-established component of Oregon property law.[22]

In addition, the Oregon legislature has recognized and advanced the PTD by statute. For example, in 1889, the legislature declared thirty miles of tidelands at the inlet of the Columbia River, including waters passing the port city of Astoria, to be a "public highway."[23] Later, at the urging of Governor West, the 1913 legislature announced that all of Oregon's ocean beaches were "public highways."[24] And, as discussed above,[25] the legislature enacted the Oregon Beach Bill in 1967, which recognized a public recreational easement on all beaches in the state that was affirmed by the Oregon Supreme Court in *State* ex rel. *Thornton v. Hay*.[26]

Since the 1960s, the Oregon legislature has enacted statutes to manage ecological purpose of trust resources, including waters, wetlands, and wildlife.[27] Indeed, Oregon voters enacted the Scenic Waterways Act of 1970 to protect public use of free-flowing waters in the

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[20] *Id.* at 442 (quoting *Lamprey v. State*, 52 N.W. 1139 (Wis. 1893) and extending the meaning of that term "public highways" to include "all waters ... which afford a channel for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year.").
[21] *Id.* at 439 (upholding the trial court's ruling that the defendant was "enjoined and restrained from turning the waters of said creek from its present channel until defendant... provided a new channel as suitable for navigation and affording an outlet for said waters as the present channel.").
[22] See generally Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005) (arguing that "by creating a categorical defense to takings claims at the threshold stage, grounded on background use restrictions inherent in the landowner's title, *Lucas* provided government defendants a powerful new way to defeat takings claims.").
[23] An Act to Make the Sea Shore of the Pacific Ocean, in Clatsop County, a Public Highway, LAWS OF OR. 1899, at 3 ("That the shore of the Pacific ocean, between ordinary high and extreme low tides, and from the Columbia river on the north to the south boundary line of Clatsop county on the south, is hereby declared a public highway, and shall forever remain open as such to the public."); *see Oregon Experience*, *supra* note 10.
[24] GEN. LAWS OF OR. 1913, Ch. 47, at 80 ("...The shore of the Pacific Ocean, between ordinary high tide and extreme low tide, ... is hereby declared a public highway and shall forever remain open as such to the public.")/
[25] *See supra* notes 10–13.
[26] 472 P.2d 671, 673 (Or. 1969). *See supra* notes 10–12.
[27] *See infra* §§ 5.3–5.7.

state for purposes including fishing and recreation.[28] Although remaining an open question, Oregon courts could recognize ecological purposes of the PTD based on a number of statutes protecting water and wildlife as trust resources.[29]

Oregon courts have not yet recognized a constitutional basis of the PTD.[30] However, the Oregon Supreme Court could recognize a constitutional basis of the PTD based on Article VIII, section 5 of the Oregon constitution, which requires the state to manage trust lands "with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management."[31]

3.0 Institutional Application

Oregon courts generally defer to legislative determinations regarding the disposition and management of public trust resources.[32] However, the courts do review agency actions to ensure that agencies defer to legislative policy decisions, follow statutory procedures, and make decisions supported by substantial evidence when their actions affect trust resources.[33]

3.1 Restraint on Alienation of Private Conveyances

In Oregon, the state can alienate public trust lands so long as the conveyances do not unreasonably interfere with public rights of navigation, fishing, commerce, and recreation.[34]

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[28] *See infra* § 4.2.
[29] *See infra* §§ 5.3–5.7.
[30] The cases surveyed in this chapter do not mention a constitutional basis of the state PTD. *See* Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 161 (2010) (same).
[31] *See* Brusco Towboat Co. v. State *ex rel.* State Land Bd., 589 P.2d 712, 717 (Or. 1978) (recognizing the State Land Board's authority to lease tidelands and navigable waters under its constitutional mandate to manage state lands "with the object of obtaining the greatest benefit for the people of this state...,") (citing OR. CONST., art. VIII, § 5(2) (amended 1967)).
[32] *See, e.g.*, Anthony v. Veach, 220 P.2d 493, 505 (Or. 1950) (upholding a statute prohibiting "fixed-gear" fishing equipment because the equipment caused unreasonable declines in fish populations).
[33] *See, e.g.*, Morse v. Or. Div. of State Lands, 590 P.2d 709, 715 (Or. 1979) (remanding the issuance of a permit for a fill of wetlands because the director of the Division of State Lands failed to make findings required under the dredge and fill statute).
[34] *See infra* notes 36, 43.

In *Shively v. Bowlby*,[35] the U.S. Supreme Court affirmed an Oregon Supreme Court decision upholding state conveyances of limited areas of tidelands, explaining that the state can convey these lands to private parties but cannot sever the public's "paramount right of navigation" from the title to these lands.[36] Since the late 1800s, Oregon courts have maintained that if the state conveys title to tidelands or beds of navigable-for-title waters, private title to these lands remains subject to the *jus publicum*, which preserves paramount public rights protected by the PTD.[37]

3.2 Limit on the Legislature

Oregon has broad discretion to manage and convey trust resources "subject only to the paramount [federal] right of navigation and the uses of commerce."[38] In *Shively*, the U.S. Supreme Court affirmed that when Oregon conveys tidelands in its proprietary capacity, it retains its sovereign power to protect paramount public navigation rights.[39] As the Oregon Supreme Court explained in *Bowlby v. Shively*,[40] the state has "no authority to dispose of its tidelands in such a manner as may interfere with the free and untrammeled navigation of its rivers, bays, inlets, and the like," so grantees of the state "took the land subject to every easement

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[35] 152 U.S. 1 (1982), *affirming* Bowlby v. Shively, 30 P. 154 (Or. 1893) (holding that title to tidelands acquired from the state as continues to be burdened by the *jus publicum* and "subject to the paramount right of navigation").
[36] *Id.* at 24 (explaining that "[t]he grantees of the state took the land subject to every easement growing out of the right of navigation in the public," which suggests that the purposes of the PTD can evolve over time to protect new public use purposes).
[37] Pac. Milling & Elevator Co. v. City of Portland, 133 P. 72, 83 (Or. 1913) ("Plaintiff has succeeded to the title which the state formerly had in the lots described [in the City of Portland under the Willamette River]. Its title is subject to the paramount right of navigation existing in the public...").When a railroad company requested assurance it would receive "unencumbered" title to riverbeds from the state in 1951, the attorney general emphasized that navigable rivers continue to be burdened by the PTD, even if the state conveys the riverbeds to private parties. 25 Op. Atty. Gen. 274 (1951).
[38] Morse v. Div. of State Lands, 590 P.2d 709, 712 (Or. 1979) (deciding that "the public trust doctrine does not prevent all fills for other than water-related uses"); *but see Shively*, 150 U.S. at 24 (explaining that private landowners take title "subject to every easement growing out of the right of navigation in the public.").
[39] 152 U.S. 1, 52–54 (1892), *affirming* Bowlby v. Shively, 30 P. 154 (Or. 1893) (holding that title to tidelands acquired from the state continues to be burdened by the *jus publicum* and "subject to the paramount right of navigation").
[40] Bowlby v. Shively, 30 P. 154 (Or. 1893), *aff'd*, 152 U.S. 1 (1892).

growing out of the right of navigation inherent in the public."[41] As a result, when the state conveys interests in trust resources to private parties, these lands continue to be burdened by the *jus publicum*.[42]

3.3 Limit on Administrative Action

Oregon courts will remand an agency decision concerning the use of trust resources if an agency fails to follow statutory procedures, disregards legislative policies, or exceeds its statutory authority.[43] Under the Submerged and Submersible Lands Act,[44] the Director of the Department of State Lands can issue a dredge or fill permit if he finds that the "public need" for a project outweighs damage to public trust resources.[45] In *Morse v. Department of State Lands*,[46] the 1979 Oregon Supreme Court remanded the director's decision to issue a permit authorizing a fill for an airport runway extension because he failed to determine whether the public need for the project outweighed damage to public use of trust resources,[47] despite the fact that the permit required the city to mitigate habitat to compensate for damages to estuary resources.[48] Thus, the director could authorize dredging or filling of trust lands only if he found on the record that the

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[41] *Id.* at 156 (affirming state conveyances of tidelands, subject to the public navigation easement) (citing Sess. Laws 1872, p. 129, Sess. Laws 1874 p. 77, Sess. Laws 1876 p. 70).

[42] *Shively*, 152 U.S. at 12 (explaining that "the jus privatum of the owner is... subject to th[e] jus publicum ... as the soil of a highway is ... [and] charged with a public interest ... which may not be prejudiced or damnified.").

[43] Morse v. Or. Div. of State Lands, 590 P.2d 709, 715 (Or. 1979) (remanding the Division of State Lands' decision to authorize a fill of wetlands for the extension of an airport runway because he failed to make findings required under the state dredge and fill statute).

[44] OR. REV. STAT. §§ 274.005 *et seq.* (2010).

[45] *Id.* § 196.825(1) ("The Director ... shall issue a permit ... if [he] determines that the project... (a) [i]s consistent with the protection, conservation, and best use of the water resources ... and (b) [w]ould not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing, and public recreation.").

[46] 590 P.2d 709 (Or. 1979).

[47] *Morse*, 590 P.2d at 715; After *Morse*, the Oregon legislature amended the Submerged and Submersible Lands Act to require the director to find that the "public need" for the project outweighs harm to public rights of navigation, fishery, and recreation. OR. REV. STAT § 196.825(3) ("The director may issue a permit for a project that results in a substantial fill in an estuary for a nonwater dependent use only if the project is for a public use and would satisfy a public need that outweighs harm to navigation, fishery and recreation and if the proposed fill meets all other criteria ... [in the Act].").

[48] *Morse*, 590 P.2d at 713 (explaining that the validity of a fill of trust resources is determined "by weighing the extent of the public need for the fill against the interference with the named water-related uses."). *See supra* note 47.

"public need" for the project outweighed the damage to public trust resources, and the public can seek judicial review to ensure that such decisions are supported by substantial evidence.[49]

4.0 Purposes

By the late nineteenth century, the PTD in Oregon protected public rights of navigation, fishing and commerce in tidelands and navigable waters,[50] and it has expanded to protect recreational use of all navigable-in-fact waters in the state.[51] As long ago as 1918, in *Guilliams v. Beaver Lake Club*,[52] the Oregon Supreme Court explained that the commerce protected by the PTD includes recreation.[53] Although Oregon courts have yet to consider ecological purposes of the trust,[54] the courts could recognize ecological purposes of the PTD based on statutes enacted to conserve trust resources, including scenic waterways, wetlands, and wildlife.[55]

4.1 Traditional (Navigation/Fishing)

Oregon's PTD has protected public navigation and fishing rights since early statehood.[56] For example, in the 1893 case of *Lewis v. City of Portland*,[57] the Oregon Supreme Court

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[49] *Morse*, 590 P.2d at 711. Although the court did not discuss standing, it recognized standing by entertaining the recreationalists' suit. *Id.* ("There is no claim in the present case that the fill for the airport covers a part of the bed of the bay over which the waters are used for other than very casual navigation of the recreational kind."). *See* OR. REV. STAT. § 183.480 ("[A]ny person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order, whether such order is affirmative or negative in form."); *Id.* § 183.484(5)(c) ("The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.").

[50] *See infra* § 4.1 (describing traditional purposes of the Oregon PTD); *infra* § 5.2 (describing how by 1869, the Oregon PTD protected public use of all navigable-in-fact waters in the state, regardless of bed ownership).

[51] Guilliams v. Beaver Lake Club, 174 P. 437, 441 (Or. 1918) (recognizing recreation within the scope of the PTD, and that the PTD extends to all navigable-in-fact waters in Oregon, regardless of bed ownership).

[52] 174 P. 437 (Or. 1918).

[53] *Id.* at 441 ("Even confining the definition of navigability, as many courts do, to suitability for the purposes of trade and commerce, we fail to see why commerce should not be construed to include the use of boats and vessels for the purposes of pleasure.").

[54] *See* Craig, *supra* note 30, at 167–70.

[55] *See infra* §§ 4.2, 5.3–5.7.

[56] *See, e.g.*, Weise v. Smith, 3 Or. 445 (1869) (explaining that regardless of bed ownership, all navigable-in-fact waters are "public highways" that each person has "an undoubted right to use ... for all legitimate purposes of trade and transportation."); Shaw v. Oswego Iron Co., 10 Or. 371, 371 (1882) ("Where a stream is naturally of sufficient size to float mill logs--and, it may be, small boats over some portion of it--the public have a right to its free use for that purpose."); Lewis v. City of Portland, 35 P. 256 (1893) (holding that a riparian owner can construct wharves,

explained that public navigation rights include rights of navigation, fishing, and commerce.[58] Although riparian landowners can construct improvements like wharves, booms or dams in accordance with statutes, they cannot impede public navigation.[59] Indeed, by the late 1800s, the Oregon Supreme Court ruled that landowner rights were subordinate to "paramount" public rights of navigation, commerce, and fishing.[60]

4.2 Beyond Traditional (Recreational/Ecological)

Oregon courts have recognized recreational purposes of the PTD since the early 1900s,[61] but have not yet recognized ecological purposes of the trust.[62] In *Guilliams*, the 1918 Oregon Supreme Court ruled that recreation is commerce protected by the PTD, and that irrespective of bed ownership, intermittent streams are within the geographic scope of the PTD if they are useful for log floats or floatation by small craft.[63] In 1936, the Oregon Supreme Court similarly held that Blue Lake is subject to public recreational use, even though its lakebed is privately owned.[64] Based on these cases, Attorney General Hardy Myers similarly recognized public rights to recreate on

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piers, landings, and booms "in aid of and not obstructing navigation" unless a statute regulates or prohibits the activity); Parker v. W. Coast Packing Co., 21 P. 822 (Or. 1889) (recognizing that a riparian landowner can construct wharves or "use the shore in front of his land for any purpose not inconsistent with the rights of the public.").

[57] 35 P. 256 (Or. 1893).

[58] *Id.* at 261 (explaining that "the state, by virtue of its sovereignty, is regarded as the owner of lands covered by tide waters, and, as an incident of such ownership, has the right to use or dispose of them in such way as will not impair or prejudice the public interests or privileges, such as fishing, navigation, and commerce.")

[59] *Id.*

[60] Bowlby v. Shively, 30 P. 154, 158 (Or. 1893) (explaining that private landowners took title to tidelands and lands under navigable waters from the state "subject only to the paramount right of navigation inherent in the public.").

[61] *See* Stephen D. Osborne, Jennifer Randle & Michael Gambrell, *Laws Governing Recreational Access to Waters of the Columbia Basin: A Survey and Analysis*, 33 Envtl. L. 399, 418–21 (2003) (describing recreational rights protected by the PTD in Oregon).

[62] Craig, *supra* note 30, at 167–70.

[63] *Guilliams*, 174 P. at 441–42 (explaining that "commerce ... include[s] the use of boats and vessels for the purposes of pleasure" because "because "[t]he vessel carrying a load of passengers to a picnic is in law just as much engaged in commerce as the one carrying grain."). The court did not find that private bed ownership was conclusive for determining the scope of public rights, explaining that "so long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule." *Id.* at 442.

[64] Luscher v. Reynolds, 56 P.2d 1158, 1162 (Or. 1936) (explaining that the public had the right to use privately owned lakes because "[r]egardless of the ownership of the bed, the public has the paramount right to the use of the waters ... for the purpose of transportation and commerce," including recreational boating).

all waters in the state in 2005.[65] The Scenic Waterways Act of 1970 also protects recreational uses of free-flowing waters in Oregon.[66] Thus, the Oregon PTD has long protected public recreational use of all navigable-in-fact waters in the state.[67]

Although Oregon courts have not yet considered ecological purposes of the PTD,[68] the legislature has arguably recognized ecological purposes of trust resources in statutes regulating appropriations of water, dredging and filling of wetlands, and wildlife harvests.[69] In addition, by enacting the Scenic Waterways Act of 1970 through a voter's initiative,[70] Oregon citizens have suggested that the PTD burdens all water uses that adversely affect public trust resources.[71] The Act declares that "the highest and best uses of the waters within scenic waterways are recreation, fish, and wildlife uses," and requires the Water Resources Commission to maintain water quantities necessary to ensure their free-flowing character and support public fishing, navigation, and recreational uses.[72] According to the Oregon Court of Appeals, the Act imposes a "no-diminishment standard," prohibiting water appropriations that will diminish public use of scenic waterways for navigation, fishing, or recreation.[73] Citizens can seek review of agency

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[65] Office of the Atty. Gen., Op. No. 8281 (2005) (recognizing public rights to recreate in navigable-for-title waters under the PTD, and public rights to recreate in all waters of the state capable of recreational use under the "public use" doctrine), *available at* http://www.oregon.gov/DSL/NAV/docs/ag_op-8281_navigability.pdf?ga=t.

[66] OR. REV. STAT. §§ 390.850 *et seq.* (2010); *see infra* notes 67–72.

[67] *See infra* § 5.1–5.3.

[68] *See* Craig, *supra* note 30, at 167–70.

[69] *See infra* §§ 5.3–5.7.

[70] *See generally* Charles C. Reynolds, *Protecting Oregon's Free-Flowing Water*, 19 Envtl. L. 841, 848–51 (1989) (describing the enactment of the Scenic Waterways Act of 1970).

[71] OR. REV. STAT. §§ 390.805 to 390.925 (2010). The Act designated many scenic waterways, including Waldo Lake and parts of the Metolius River, Klamath River, Clackamas River, McKenzie River, Deschutes River, Santiam River, John Day River, Illinois River, Rogue River, North Umpqua River, Grande Ronde River, Wallowa River, Minam River, Elk River, Owyhee River, and Willamette River. OR. REV. STAT. § 390.826. The statute allows the Oregon Parks and Recreation Department to establish additional scenic waterways, and the department has designated the Sandy River a scenic waterway. *Id.* § 390.865; Or. Parks & Rec. Dep't, Rules and Regulations, Scenic Waterways Program, http://www.oregon.gov/OPRD/RULES/waterways.shtml.

[72] OR. REV. STAT. § 390.835(1); *see* Waterwatch of Oregon, Inc. v. Water Res. Comm'n, 112 P.3d 443, 447 (Or. App. 2005) (explaining that the statute declares a state policy to "maintain" these waterways, not merely to "mitigate" their depletion).

[73] *Waterwatch of Oregon, Inc.*, 112 P.3d at 449 n.3.

actions adversely affecting scenic waterways, and the courts will invalidate private water uses that diminish public rights.[74] Based on the Scenic Waterways Act and other water and wildlife conservation statutes, the courts could recognize ecological purposes of the Oregon PTD.[75]

5.0 Geographic Scope of Applicability

Over time, the Oregon PTD has extended from tidelands and navigable waters to include all waters in the state capable of recreational use and wetlands.[76] In 1894, in *Shively v. Bowlby*,[77] the U.S. Supreme Court affirmed that Oregon holds tidelands and navigable waters in trust for the people, explaining that when landowners acquire private title to submerged lands from the state, the private title continues to be burdened by the *jus publicum*.[78] Then, in 1918, in *Guilliams v. Beaver Lake Club*,[79] the Oregon Supreme Court recognized that public navigation rights are an easement burdening private title when it explained that the public has the right to use all navigable-in-fact waters in the state for recreational purposes, regardless of bed ownership.[80]

5.1 Tidal

In *Shively*, the U.S. Supreme Court affirmed a long line of state common law decisions holding that tidelands and navigable waters are public trust resources in Oregon.[81] The Oregon Supreme Court's early decisions established that the state could alienate tidelands and the beds of

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[74] *Id.* at 452–53 (the court did not discuss the Commission's public trust responsibilities because it found it statutory interpretation dispositive and remanded the proposed groundwater appropriation rules); *see infra* § 7.0–7.2.
[75] *See supra* notes 69–74; *infra* §§ 6.2–6.4.
[76] *See infra* §§ 5.1–5.5.
[77] 152 U.S. 1 (1892), *affirming* Bowlby v. Shively, 30 P. 154 (Or. 1893)
[78] *Id.* at 54; *see supra* notes 2–4 (discussing the *jus publicum*).
[79] 174 P. 437 (Or. 1918).
[80] *Id.* at 339, 442 (explaining that in waters "which are navigable in fact for boats, vessels, or lighters ... the public has an easement for the purposes of navigation and commerce, they being deemed public highways for such purposes, although the title to the soil constituting their bed remains in the adjacent owner, subject to the superior right of the public to use the water for the purposes of transportation and trade.").
[81] *Shively*, 152 U.S. at 55–56.

navigable-for-title waters when not unreasonably interfering with public navigation.[82] The state could not extinguish public rights to navigate on public highways because the Oregon Statehood Act incorporates language from the Northwest Ordinance of 1787 that guaranteed public navigation rights, declaring that all navigable waters in the state are "public highways" and "forever free."[83] Thus, the PTD applies to tidelands in Oregon.

In the Submerged and Submersible Lands Act,[84] the state legislature codified the PTD by declaring paramount public rights of navigation, fishing, and recreation in tidelands and meandered lakes.[85] Before granting to private parties any interests in tidelands, the Department of State Lands (DSL) must determine that the grant is in the public interest after considering effects on (1) neighboring landowners, (2) residential and recreational areas, (3) aesthetic and scenic values, (4) air, water, and other pollution, (5) marine life and wildlife, (6) commerce and navigation, and (7) drainage of oil and gas.[86] Any person can seek judicial review of the director's decision under the Oregon Administrative Procedures Act.[87] Thus, the legislature requires DSL to consider effects of proposed conveyances of interests in tidelands on public trust resources.

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[82] *Id.* at 52 (citing several Oregon cases and commenting that private title in tidelands or navigable-for-title waters is subject to the "paramount right of navigation inherent in the public.")
[83] *Id.* at 51–52 (citing Act of February 14; 1859, ch. 33, 11 Stat. 383; Hinman v. Warren, 6 Or. 408 (1877); Parker v. Taylor, 7 Or. 435 (1879); Parker v. Rogers, 8 Or. 183 (1879); Shively v. Parker, 9 Or. 500 (1881); McCann v. Oregon Rwy. & Nav. Co., 11 P. 236 (Or. 1886); Bowlby v. Shively, 30 P. 154 (Or. 1892)).
[84] OR. REV. STAT. §§ 274.005 to 274.994 (2010).
[85] *Id.* § 274.060 ("The grantee of any submersible lands ... shall hold the same subject to the easement of the public, under the provisions and restrictions of law, to enter thereon and remove oysters and other shell fish therefrom."). *Id.* § 274.430 ("All meandered lakes are declared to be navigable and public waters.") .
[86] *Id.* § 274.760.
[87] Pete's Mtn. Homeowners Ass'n v. Or. Water Res. Dep't, 238 P.3d 395, 398–403 (Or. App. 2010) (discussing the broad standing rights afforded to the public under OR. REV. STAT. § 183.400 (2010)); *see infra* §§ 7.0–7.3.

5.2 Navigable in Fact

In 1869, Oregon courts recognized public rights to fish, navigate, and engage in commerce in all navigable-in-fact waters under the PTD, regardless of bed ownership.[88] In 1918, the Oregon Supreme Court also recognized public rights to recreate in all navigable-in-fact waters; that is, those capable of floatation by small craft.[89] As explained below, Oregon courts apply a broad test to determine navigability to protect paramount public rights to use all navigable waters capable of navigation, commerce, recreation, fishing, and other purposes.[90]

5.3 Recreational Waters

As explained above,[91] the Oregon Supreme Court recognized that a public navigation easement burdens private, non-navigable waterways in *Gulliams v. Beaver Lake Club*,[92] a 1918 decision in which it prevented a private landowner from building a dam without constructing a channel to accommodate public use of an intermittently-navigable lagoon on his land for recreation and fishing from small craft.[93] In the mid-1930s, the court extended this rule to lakes with privately-owned beds, explaining that "[r]egardless of the ownership of the bed, the public has the paramount right to the use of the waters … for the purpose of transportation and commerce," which includes recreational boating.[94] In 2005, the state attorney general reiterated

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[88] Weise v. Smith, 3 Or. 445, 445 (1869) (observing public rights to float logs on navigable waters, even those with privately-owned beds); Felger v. Robinson, 3 Or. 455, 455 (1869) (recognizing public rights to float logs in streams with privately-owned beds that were only seasonally navigable); *see also* Shaw v. Oswego Iron Co., 10 Or. 371, 371 (1882) (recognizing that even when "the title to the bed of such stream is in the riparian owners," the public has navigation rights "[w]here a stream is naturally of sufficient size to float mill logs--and, it may be, small boats over some portion of it--the public have a right to its free use for that purpose. Nor is it essential that such capacity continue through the year....").

[89] *Guilliams*, 174 P. at 442 (recognizing public rights to use a seasonally navigable stream and lagoon with privately-owned beds for navigation, fishing, and recreation).

[90] *Id.* at 442 (quoting *Lamprey v. State*, 52 N.W. 1139 (Wis. 1893), and ruling that the PTD encompasses "sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated.").

[91] *See supra* § 5.2 (explaining that the PTD burdens all navigable-in-fact waters in Oregon).

[92] 174 P. 437 (Or. 1918).

[93] *Id.* at 442–43.

[94] Luscher v. Reynolds, 56 P.2d 1158, 1162 (Or. 1936).

that the public has rights to navigate, fish, and recreate in all Oregon waters, not just those with state-owned beds.[95]

5.4 Wetlands

Oregon courts have not addressed whether the PTD applies to wetlands. However, the legislature acknowledged that wetlands protection is consistent with the PTD in the purpose statement of the Submerged and Submersible Land Act,[96] which declares that unregulated alteration of waters may injure or interfere with "public navigation, fishery and recreational uses of the waters."[97] To prevent unreasonable harm to the public trust, individuals must obtain a permit from the Department of State Lands before dredging or filling waters in the state.[98] To ensure the "best possible use of water resources," the department must determine the "public need" for a project outweighs harm to public uses of water before issuing a dredge or fill permit.[99]

5.5 Groundwater

Oregon courts have not considered whether the PTD applies to groundwater,[100] but Oregon voters recognized that groundwater affects trust resources by enacting the Scenic Waterways Act through an initiative in 1970.[101] The Act declares that new groundwater appropriations cannot adversely affect public fishing, navigation, and recreation rights in scenic waterways, and directs the state Water Resources Commission to deny permits that will reduce

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[95] Office of the Atty. Gen., Op. No. 8281 (2005) (recognizing public rights to recreate in navigable waters under the PTD, and the public right to navigate in all waters of the state under the "public use" doctrine), *available at* http://www.oregon.gov/DSL/NAV/docs/ag_op-8281_navigability.pdf?ga=t.
[96] OR. REV. STAT. §§ 196.795 to 196.990 (2010); *see supra* § 5.3.
[97] OR. REV. STAT. § 196.805.
[98] *Id.* § 196.815.
[99] *See* Morse v. Or. Div. of State Lands, 590 P.2d 709, 715 (Or. 1979) (remanding a permit decision to DSL because it did not make the required finding of whether the public need for the airport runway extension outweighed the damage to public use of trust resources).
[100] Waterwatch of Oregon, Inc. v. Water Res. Comm'n, 112 P.3d 443, 446 (Or. App. 2005) (declining to consider whether mitigation banking rules violated the Commission's public trust responsibility after determining that the rules were invalid as beyond the agency's statutory authority under the Scenic Waterways Act).
[101] OR. REV. STAT. §§ 390.805 to 390.925 (2010); *see* Charles C. Reynolds, *Protecting Oregon's Free-Flowing Water*, 19 Envtl. L. 841, 848–51 (1989) (describing how Oregon voters enacted the Scenic Waterways Act of 1970 through the initiative process).

flows of scenic waterways unless the applicant mitigates all damage to public uses in accordance with the Act's "no-diminishment standard."[102] Members of the public can seek review of the Commission's permitting decisions under the state Administrative Procedures Act.[103] Based on the Scenic Waterways Act's recognition that groundwater use can affect trust resources, the courts could recognize groundwater as within the geographic scope of the state PTD.

5.6 Uplands (Beaches, Parks, Highways)

Oregon courts have not expressly applied the PTD to uplands.[104] However, under the doctrine of custom, the Oregon Supreme Court recognized that the public has the right to recreate on the dry-sand area of beaches in *State* ex rel. *Thornton v. Hay*.[105] Indeed, Justice Denecke suggested in *Hay* that the PTD could serve as an independent basis for protecting public use of beaches for recreational purposes.[106] If Oregon courts recognize that the PTD encompasses ecological purposes,[107] they could also recognize that it applies to uplands when necessary to

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[102] *Waterwatch of Oregon, Inc.*, 112 P.3d at 447 (explaining that O.R.S. § 390.835 directs the Commission to deny an application for groundwater use if it finds that "the use of groundwater will measurably reduce the surface water flows necessary to maintain the free-flowing character of a scenic waterway in quantities necessary for recreation, fish, and wildlife" unless the application provides for "mitigation" of all effects on the waterway) (quoting OR. REV. STAT. § 390.835)).

[103] *Id.* at 444 (citing OR. REV. STAT. § 183.400, "[t]he validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases."); *see infra* §§ 7.0–7.3.

[104] *See generally* Osborne, Randle & Gambrell, *supra* note 61, at 421.

[105] 462 P.2d 671, 677 (Or. 1969) ("Finally, in support of custom, the record shows that the custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed."); *see supra* § 1.0–2.0.

[106] *Hay*, 462 P.2d at 679 (Denecke, J., concurring) (opining that he would recognize the public right to recreate on Oregon beaches based on another common law doctrine, and discussing the *jus publicum*); *see also* Erin A. Pitts, *The Public Trust Doctrine: A Tool for Ensuring Continued Public Use of Oregon Beaches*, 22 ENVTL. L. 731 (1992) (suggesting that based on Justice Denecke's comment, the court could recognize the PTD as an independent basis for protecting public rights to recreate on Oregon beaches); Michael C. Blumm & Erika A. Doot, *Oregon's Public Trust Doctrine: A Comprehensive Approach to Public Rights in Water, Beaches, and Wildlife*, 41 ENVTL. L. __ (forthcoming 2012) (arguing that the comprehensive Oregon PTD protects public usufructory rights in important natural resources, including public rights to access Oregon beaches recognized under the doctrine of custom).

[107] *See supra* § 4.2.

preserve the value of trust lands for purposes like wildlife habitat.[108]

6.0 Activities Burdened

The Oregon PTD burdens conveyances and uses of property subject to the public navigation easement, including tidelands and all navigable-in-fact waters, regardless of bed ownership.[109] In addition, Oregon courts could recognize that the PTD applies to water rights, wetlands, and wildlife harvests based on statutes protecting these public trust resources.

6.1 Conveyances of Property Interests

Oregon's PTD and the Submerged and Submersible Lands Act allow the state to convey the *jus privatum* of tidelands and navigable waters if the conveyance does not unreasonably interfere with public rights of navigation, fishing, and recreation.[110] For example, in *Shively v. Bowlby*,[111] the U.S. Supreme Court upheld the Oregon Supreme Court's ruling that the state conveyed the *jus privatum* of tidelands, but retained the *jus publicum*, its sovereign duty to protect "paramount" public rights of navigation and commerce.[112]

6.2 Wetland Fills

Under the Submerged and Submersible Lands Act,[113] the Oregon Division of State Lands (DSL) has discretion to issue dredge and fill permits if it determines that the "public need' for the proposed activity outweighs the damage to public fishing, navigation, and recreational

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[108] For example, the PTD could apply to structures on uplands that could damage trust resources. *See* Columbia Riverkeeper v. Clatsop County, 243 P.3d 82, 84 (Or. App. 2010) (affirming the Land Use Board of Appeals' decision to reject a county ordinance approving a natural gas pipeline as inconsistent with zoning laws).

[109] *See supra* §§ 4.1–4.2.

[110] Brusco Towboat Co. v. State *ex rel.* State Land Bd., 589 P.2d 712, 715 (Or. 1978) (affirming the state can lease tidelands for wharves); *see supra* § 4.1.

[111] 152 U.S. 1, 52–54 (1892), *affirming* Bowlby v. Shively, 30 P. 154 (Or. 1893).

[112] *Id.* at 52–54 (upholding the Oregon Supreme Court's decision that the state conveyed tidelands as private property subject to "paramount" public rights of navigation and commerce).

[113] OR. REV. STAT. § 196.795 *et seq.* (2010).

resources.[114] The courts will uphold the director's decision to issue or deny a permit if she follows statutory procedures and makes a decision supported by substantial evidence.[115] In *Morse v. Division of State Lands*,[116] the 1979 Oregon Supreme Court explained that the director must balance the public need for a project with the detriment to public use of the waters for fishing, navigation, and recreation before issuing or denying a wetland fill permit.[117] In 1977, the Oregon Court of Appeals affirmed the director's decision to deny a permit for a wetland for a campground, marina, and restaurant project based on adverse effects on casual public use of undeveloped trust resources for fishing, navigation, and recreation.[118] Therefore, based on the "statement of the public trust" in the Submerged and Submersible Lands Act,[119] Oregon courts could recognize ecological purposes of the PTD.[120]

6.3 Water Rights

Oregon courts have not yet recognized that the PTD burdens water rights, but the legislature has enacted statutes allowing some state agencies and the public to acquire instream flow rights to protect public trust resources.[121] The courts could recognize that the PTD burdens

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[114] *Id.* § 196.825(3) ("The director may issue a permit for a project that results in a substantial fill in an estuary for a nonwater dependent use only if the project is for a public use and would satisfy a public need that outweighs harm to navigation, fishery and recreation and if the proposed fill meets all other criteria ... [in the Act]."). In *Morse*, the court explained that the purpose of a dredge or fill project need not be water-related, but the director must balance the "public need" for the project with damage to public use of trust resources. 590 P.2d at 715. The legislature subsequently amended the statute to incorporate this balancing test. OR. REV. STAT. § 196.825(3).

[115] Saxon v. Div. of State Lands, 570 P.2d 1197, 1201 (Or. App. 1977) (affirming the DSL's denial of a permit for a fill of 32 acres of salt marsh estuary for a campground, restaurant, and marina because of the adverse effects of the project on public use of the estuary for fishing, navigation, and recreation).

[116] 590 P.2d 709 (Or. 1979) ("The statutes appear to be a statement of public trust, but because the statutory words might be regarded as general, we look to their common law antecedents and legislative history.").

[117] *Id.* at 715 ("In the absence of a finding that the public need [for a project] predominates, there is no basis for the issuance of the permit and the decision of the Court of Appeals setting aside the issuance of the permit by the Director of State Lands is affirmed.").

[118] *Id.*

[119] Morse v. Or. Div. of State Lands, 581 P.2d 520, 523 (Or. Ct. App. 1978), *aff'd with modifications*, 590 P.2d 709 (Or. 1979).

[120] *See supra* § 4.2.

[121] OR. REV. STAT. § 537.332 *et seq.* (2010); *see* Janet C. Neuman, *The Good, The Bad, and The Ugly: The First Ten Years of the Oregon Water Trust*, 83 NEB. L. REV. 432, 484 (2004) (describing how Oregon distinguished itself as the

water rights because the Oregon legislature has consistently recognized that maintaining instream flows is necessary to protect public trust resources.[122] For example, in the early 1900s, the legislature withdrew streams that feed waterfalls of the Columbia River Gorge from appropriations to protect recreational resources for public use.[123] In 1955, the legislature enacted a minimum streamflow amendment to the state water code because decades of appropriations for irrigation, dam building, and growth had adversely affected streams and fisheries.[124] However, the statute proved largely unsuccessful and insufficient to enhance trust resources because minimum streamflows set by the Water Resources Commission did not affect prior existing rights, and therefore could not remedy the problem of overappropriation.[125]

When the legislature amended the state water code in 1987, Oregon became the first state to allow specific state agencies and private parties to obtain instream flow rights from senior water

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first state to recognize instream water rights in 1987, and concluding that markets are useful tools that can allow water to move to legitimate demands voluntarily).

[122] *See* Michael C. Blumm & Erika A. Doot, *Oregon's Public Trust Doctrine: A Comprehensive Approach to Public Rights in Water, Beaches, and Wildlife*, 41 ENVTL. L. 1, 20–29 (forthcoming 2012) (arguing that the comprehensive Oregon PTD applies to appropriated water rights to protect public use of waterways for navigation, fishing, recreation, and ecological purposes); Scott B. Yates, *A Case for the Extension of the Public Trust Doctrine in Oregon*, 27 ENVTL. L. 663, 663–64 (1997) (same); *see also* Nat'l Audubon Soc'y v. Superior Ct. of Alpine County, 658 P.2d 709, 732 (Cal. 1983) ("*Mono Lake*") (explaining that "public trust doctrine and the appropriative water rights system are parts of an integrated system of water law."); *In re* Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waia'Hole Ditch, 9 P.3d 409, 448 (Haw. 2000) (recognizing that the PTD burdens water rights to protect public navigation, commerce, fishing, and recreation, including bathing, swimming, boating, and scenic viewing). The *Mono Lake* court explained that "[t]he public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources." 658 P.2d at 732; *see also* Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 711 (1995) (arguing that following *Mono Lake*, courts in prior appropriation states should "continuously supervise trust values" to avoid unreasonable damage to trust resources).

[123] *See* Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis, and Legislative History*, 17 ENVTL. L. 863, 870-71, 878 (1987).

[124] GEN. LAWS OF OR. 1955, ch. 707.

[125] *See* Neuman, *supra* note 121, at 438 (explaining that "The problem with instream rights created by conversion of minimum streamflows or by new state agency applications is that those two categories of instream rights have fairly junior priority dates," but instream rights purchased under the 1987 amendments retain senior priority dates); Joseph Q. Kaufman, *An Analysis of Developing Instream Water Rights in Oregon*, 28 WILLAMETTE L. REV. 285, 303–05 (1992) (same).

rights holders to protect habitat and waterways.[126] Although increased flows from these purchases have improved the health of some waters, purchases alone cannot rectify low flows because Oregon waterways are highly overappropriated.[127] Oregon's PTD arguably could expand to impose limits on existing water rights because since 1909, the Oregon Water Code has specified that "[a]ll water within the state from all sources of water supply belongs to the public."[128] Based on this public water ownership language and statutes recognizing the importance of maintaining public trust resources,[129] Oregon courts could recognize that based on public ownership of water, the PTD burdens appropriated water rights and requires the state to maintain minimum streamflows to preserve habitat and public uses of water resources.[130]

6.4 Wildlife Harvests

In the 1880s, Oregon courts recognized that the state owns wildlife within its borders in a sovereign capacity.[131] The courts traced state sovereign ownership of wildlife to Roman law,

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[126] OR. REV. STAT. § 537.332 *et seq.* (2010) (as amended); *see id.* § 537.336 (describing how the Oregon Department of Fish and Wildlife, Oregon Department of Environmental Quality, and Oregon Department of Parks and Recreation may request certificates for instream water rights from the Water Resources Commission); *see generally* Neuman, *supra* note 108, at 437–39 (explaining the history of instream flow rights and the 1987 amendments to the Oregon Water Code). To mitigate damages to fish and wildlife caused by federal dams, the Bonneville Power Administration created the Columbia Basin Water Transactions Program, which has resulted in $500 million in federal and non-federal instream flow right purchases to improve habitat under the state instream water rights statute. Columbia Basin Water Transaction Program, *The Program: The Partnership Approach* (2004), http://cbwtp.org/program.htm.

[127] *See* Neuman, *supra* note 121, at 484 (concluding that instream flow rights have improved the health of state waters somewhat, but "[s]ome level of voluntary water reallocation would seem to be a good thing, given the level of contentiousness surrounding the attempts to meet changing water needs through regulation and litigation"); Yates, *supra* note 122, at 694 (maintaining that based on common law and statutes, Oregon courts should recognize public rights to minimum instream flows under the PTD to protect the ecological health of overappropriated waters).

[128] OR. REV. STAT. §§ 537.010, 537.525.

[129] *See supra* §§ 4.2, 6.2.

[130] *See* HARRISON C. DUNNING, WATERS AND WATER RIGHTS § 30.04 (Robert E. Beck ed., 3d ed. 1988) (describing the evolution of the public ownership of water in Idaho, Montana, New Mexico, South Dakota, and Wyoming); Michael C. Blumm & Erika A. Doot, *Oregon's Public Trust Doctrine: A Comprehensive Approach to Public Rights in Water, Beaches, and Wildlife*, 41 ENVTL. L. __ (forthcoming 2012) (arguing that public water ownership is a component of a comprehensive PTD protecting public usufructory rights in important natural resources, which should be interpreted to burden appropriated water rights to maintain public water and wildlife resources).

[131] *See., e.g.*, State v. McGuire, 33 P. 666 (Or. 1883) (describing how the state may regulate fish and wildlife harvests, and holding that it was not unlawful for defendants to possess salmon in closed season that were lawfully caught in open season); State v. Schuman, 58 P. 661 (Or. 1889) (upholding the defendant's conviction for possessing trout imported from Washington under an Oregon law declaring "[i]t shall be unlawful to sell, offer for

including *The Digest of Justinian* and *Justinian's Institutes*.[132] The courts will uphold laws regulating fish and game harvests if they are non-discriminatory and advance a legitimate state purpose, such as the conservation of fish species.[133] Like most states, Oregon laws regulating wildlife harvests and distribution of fish or game during closed season carry criminal penalties.[134]

Although Oregon courts recognize the state's authority to regulate wildlife under the sovereign ownership doctrine, they could also recognize a duty to protect wildlife for future generations under the PTD.[135] In *Oregon Shores Conservation Coalition v. Oregon Fish and Wildlife Commission*,[136] the Oregon Court of Appeals ruled that it was unnecessary to consider whether the Commission erred in failing to consider the public trust doctrine before it issued a permit allowing oyster growers to treat tideland beds with a pesticide to prevent damage to oysters caused by shrimp.[137] The court explained that it was "unnecessary" for the Commission to consider the PTD because the legislature had specifically addressed rights to oyster lands.[138] If Oregon courts recognized that the state legislature imposed this duty to protect wildlife resources

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sale, or have in possession for sale, any species of trout at any time."); State v. Hume, 95 P. 808 (Or. 1908) (upholding defendant's conviction for carrying canned salmon without a license a valid exercise of the police power); State v. Fisher, 98 P. 713 (Or. 1908) (explaining that the defendant could be convicted for possessing deer out of season, but had a right to present evidence that he killed the deer during open season to avoid liability in based on an exception in the statute); State v. Pulos, 129 P. 128 (Or. 1913) (upholding the defendant's conviction for possessing a wild duck out of season because the statute did not except ducks captured during open season, and explaining that "title to wild game is in the state, and ... the taking of them is not a right, but is a privilege, which may be restricted, prohibited, or conditioned, as the lawmaking power may see fit.").

[132] *See* State v. Couch, 103 P.3d 671, 676 (Or. App. 2004) (tracing the origins of the sovereign ownership doctrine).

[133] *E.g.*, Anthony v. Veach, 220 P.2d 493, 510–11 (Or. 1950) (upholding a non-discriminatory statute banning the use of "fixed-gear" fishing equipment, including fish traps and seines, because they result in an unreasonable depletion of salmon, steelhead, and trout populations)

[134] *See, e.g.*, State v. Wood, 691 P.2d 116 (Or. App. 1984) (upholding the defendant's convictions under Or. Rev. Stat. §§ 506.991(3) and 509.011(2)(a) for purchases of sturgeon eggs in closed season after a sting operation).

[135] *See generally* Michael C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 706 (2005) (arguing that "the state ownership doctrine lives on ... in virtually all states, affording states ample authority to regulate the taking of wildlife and to protect their habitat."); Michael C. Blumm & Erika A. Doot, *Oregon's Public Trust Doctrine: A Comprehensive Approach to Public Rights in Water, Beaches, and Wildlife*, 41 ENVTL. L. 1, 29–32 (forthcoming 2012) (arguing that sovereign wildlife ownership is a component of a comprehensive PTD protecting public usufructory rights in important natural resources).

[136] 662 P.2d 356 (Or. 1983).

[137] *Id.* at 483 (describing the state's consultation with the Environmental Protection Agency before issuing the permit).

[138] *Id.*

under the PTD, the Commission would have to consider effects on trust resources before issuing permits related to wildlife harvests.[139]

7.0 Public Standing

The Oregon Supreme Court defines "standing" as "a legal term that identifies whether a party to a legal proceeding possesses a status or qualification necessary for the assertion, enforcement, or adjudication of legal rights or duties."[140] In Oregon, individuals have broad statutory standing rights to challenge government actions adversely affecting trust resources.[141] Oregon's Administrative Procedures Act (APA) allows "any person" to seek judicial review of agency rules or agency determinations in contested cases.[142] Members of the public also have broad standing to challenge private actions affecting their use of trust resources because in 2003, the state legislature adopted the Uniform Declaratory Judgments Act (UDJA), which provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed."[143] Individuals like birdwatchers or fly fishermen aggrieved by government or private actions affecting their use of trust resources can generally establish standing in Oregon.[144]

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[139] *See supra* § 6.2 (discussing how the Water Resources Commission must balance the "public need" with damage to trust resources before issuing dredge or fill permits under the Submerged and Submersible Lands Act).
[140] Kellas v. Dep't of Corrections, 145 P.3d 139, 142 (Or. 2006) (citing *Eckles v. State*, 760 P.2d 846 (Or. 1988)).
[141] *Id.*
[142] OR. REV. STAT. § 183.400 (2010); *see* Pete's Mtn. Homeowners Ass'n v. Or. Water Res. Dep't, 238 P.3d 395, 398–403 (Or. App. 2010) (discussing the broad standing rights of aggrieved parties under the state APA).
[143] OR. REV. STAT. § 28.010 (2009) (providing that "[n]o action or proceeding shall be open to objection on the ground that a declaratory judgment is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a judgment."). In 2006, the Oregon Supreme Court explained that the legislature can grant "any person" standing rights to challenge an agency rule or determination because the Oregon constitution does not include a cases and controversies requirement like the federal constitution. *Kellas*, 145 P.3d at 142. In 2010, the court clarified that the state APA requires a person must be "adversely affected or aggrieved" within the meaning of the statute. *Pete's Mtn. Homeowners Ass'n*, 238 P.3d at 401.
[144] *See* Waterwatch of Oregon v. Water Res. Comm'n, 112 P.3d 443, 444–46 (Or. App. 2005).(recognizing that a flyfisherman had standing to challenge rules for groundwater appropriations that could adversely affect his use of a river); Doty v. Coos County, 59 P.3d 50, 52 n.1 (Or. 2002), *clarified on recons.*, 64 P.3d 1150 (Or. 2003) (holding that a birdwatcher had standing to challenge an Oregon Land Use Board of Appeals order remanding a county's rezoning decision).

7.1 Common law-based

PTD plaintiffs can usually demonstrate standing based on government or private interference with their commercial or recreational use of public trust resources.[145] For example, in *Columbia River Fishermen's Protective Union v. City of Saint Helens*,[146] the 1939 Oregon Supreme Court explained that licensed commercial fishermen established standing to sue the City of Saint Helens and pulp and paper mills that deposited sewage, chemicals, and waste into the Columbia River that destroyed fish populations and their nets.[147] Thus, under common law, Oregon courts historically recognized broad public rights to challenge government and private actions with effects on public use of trust resources.[148] When examining standing of those seeking review of government action, the Oregon Supreme Court has explained that standing requirements are established by statute, not by common law.[149]

7.2 Statute-based

Oregon's Administrative Procedures Act (APA) allows any person aggrieved by agency rules or determinations in contested cases to petition for judicial review.[150] The courts recognize injured organizations as aggrieved "persons" within the scope of the APA, but they have concluded that the statute does not allow organizations to assert representational standing on

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[145] *See, e.g.*, Columbia River Fishermen's Protective Union v. City of St. Helens, 87 P.2d 195, 196–97 (Or. 1939) (describing the plaintiff-fishermen's injuries caused by the defendant city and paper mills' pollution of a river).
[146] 87 P.2d 195 (Or. 1939).
[147] *Id* at 196–97 (recognizing plaintiff's standing because in addition to depleting fish populations, "the pollution of said waters ... rott[ed] and destroy[ed] the nets and lead lines ... in the sum of $3,000.").
[148] *Id.*
[149] Pete's Mountain Homeowners Ass'n v. Or. Water Resources Dep't, 238 P.3d 395, 398 (Or. 2010) ("Precisely what status or qualification is required to establish standing is determined by legislation; standing is not a matter of common law.") (citing People for Ethical Treatment v. Inst. Animal Care, 817 P.2d 1299, 1302 (Or. 1991)); *see also* Benton County v. Friends of Benton County, 653 P.2d 1249, 1251 (Or. 1982) (same).
[150] OR. REV. STAT. § 183.400 (2010); *see* Pete's Mountain. Homeowners Ass'n v. Or. Water Res. Dep't, 238 P.3d 395, 398–403 (Or. App. 2010) (discussing the broad standing rights granted to the public under the state APA).

behalf of injured members.[151] However, if one petitioner demonstrates standing, like the aggrieved member of an organization, the courts deem the standing of other petitioners "immaterial" and will not dismiss their participation.[152] Members of the public can generally establish standing under the APA or the Uniform Declaratory Judgment Act (UDJA)[153] when government or private action affects their commercial or recreational use of trust resources.[154] As *Columbia River Fishermen's Protective Union* demonstrates, government and private activities can interfere with public use of trust resources by creating pollution that harms fish populations and habitat,[155] which suggests that the Oregon PTD includes ecological purposes.[156]

7.3 Constitutional Standing

The Oregon Constitution contains no "cases or controversies" requirement, and the 2006 Oregon Supreme Court has explained that it therefore does not limit the legislature's power to recognize public standing rights.[157] In Oregon, a member of the public can generally establish

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[151] Local No. 290, Plumbers and Pipefitters v. Or. Dep't of Envtl. Quality, 919 P.2d 1168, 1171 (Or. 1996) ("From context, ORS 183.310(7) ['s definition of "party"], we know that the concept of "person" in the APA includes associations and public and private organizations."). The court explained that organizations have standing if directly aggrieved, but not if representing the interests of their members. *Id.* However, if an injured member is also a party to the suit, the court will not dismiss an organization's participation. *See Waterwatch of Oregon, Inc.*, 112 P.3d 443, 445 (declining to consider the issue of petitioner-organization's standing as "immaterial" because an individual petitioner established standing); Barton v. City of Lebanon, 88 P.3d 323, 326 (Or. App. 2004) (same); deParrie v. State of Oregon, 893 P.2d 541, 542 (Or. App. 1995), *rev. den.*, 901 P.2d 858 (Or. 1995) (same); Thunderbird Motel v. City of Portland, 596 P.2d 994, 1001 (Or. 1979) (same).

[152] *See Waterwatch of Oregon, Inc.*, 112 P.3d at 445 (declining to consider an organization's standing because an individual petitioner established standing); *City of Lebanon*, 88 P.3d at 326 (same); *deParrie*, 893 P.2d at 542; *Thunderbird Motel*, 596 P.2d at 1001 (declining to consider whether one petitioner-business had standing because the City did not allege that other petitioners lacked standing).

[153] *See supra* § 7.0.

[154] *Waterwatch of Oregon*, 112 P.3d at 445 (recognizing that a fly-fisherman had standing under the state APA to challenge groundwater appropriation rules).

[155] *Columbia River Fishermen's Protective Union*, 87 P.2d at 196–97 (recognizing that licensed commercial fisherman have common law standing to sue municipalities and companies for damage to fish resources caused by pollution because they suffer a specialized injury distinct from that of the general public); *see supra* notes 146–47 and accompanying text.

[156] *See supra* § 4.2.

[157] *Kellas*, 145 P.3d at 467 (accepting the state's argument that "the legislature lawfully may authorize any person to seek judicial review to challenge the validity of a governmental action, such as an administrative rule, without a showing that the governmental action or the court's decision will have a practical effect on that person's individual rights or interests.").

standing under the APA or UDJA if he can demonstrate that government or private action will affect his use of trust resources for commerce, navigation, fishing, or recreation.[158] Indeed, the state APA affords broad public standing rights so a petitioner may not need to demonstrate any effect on his personal use of trust resources to establish standing.[159]

8.0 Remedies

Oregon courts generally grant declaratory relief in PTD cases rather than injunctive relief or damages for injuries to trust resources. In early public trust cases, the courts often adjudicated title to land underlying tidelands or navigable waterways,[160] and this title was usually determined to be qualified as subject to public navigation rights.[161] An Assistant Attorney General once explained that in these early cases, "[p]arties challenging the state's title were not bothered by the public's paramount right to navigation and commerce because the wharves, docks, and other structures augmented, rather than impaired, the public's rights."[162] Many cases involving public trust resources in Oregon have resulted in declaratory judgments of the respective rights of landowners and the public.[163]

8.1 Injunctive Relief

On occasion, Oregon courts have enjoined government or private actions involving waterways in order to protect trust resources. For example, the 1918 Oregon Supreme Court affirmed the lower court's order enjoining a landowner from constructing a dam that would

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[158] *See supra* notes 127–31 and accompanying text.
[159] *Kellas*, 145 P.3d at 467 ("the legislature lawfully may authorize any person to seek judicial review to challenge the validity of a governmental action, such as an administrative rule, without a showing that the governmental action … will have a practical effect on that person's individual rights or interests.").
[160] *See supra* notes 1–2.
[161] *See supra* notes 1–2; Michael B. Huston & Beverly Jane Ard, *The Public Trust Doctrine in Oregon*, 19 ENVTL. L. 623, 625, 629 (1989).
[162] *Id.* at 629.
[163] Oregon affords broad public standing rights under the UDJA. OR. REV. STAT. § 28.010 (2010) ("Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed."); *see supra* §§ 7.0, 7.3.

impede public navigation for recreational purposes, including row boating and fishing.[164] In the 1930s, the Oregon Supreme Court affirmed injunctions requiring private companies to remove fish traps that made gillnet fishing dangerous and were therefore an "unreasonable interference with the common right of fishery" under state statutes.[165] In the well-known case of *Columbia River Fishermen's Protective Union v. City of Saint Helens*,[166] the 1939 Oregon Supreme Court directed the lower court to enjoin the City of Saint Helens and two paper mills from polluting the Lower Columbia River in a manner that destroyed fish stocks and damaged the fishermen's equipment.[167] It is settled law in Oregon that plaintiffs can seek injunctive relief in courts of equity for repeat trespasses, including those damaging fish resources.[168]

8.2 Damages for Injuries to Resources

In the 1939 decision of *Columbia River Fishermen's Protective Union*, the Oregon Supreme Court ruled that an injunction was appropriate against the City of Saint Helens and two paper mills that polluted the Lower Columbia River and damaged fish populations, but refused to award damages.[169] The court explained that an injunction was the proper remedy to prevent repeat trespasses.[170] However, the state can seek damages or impose penalties for injuries to trust

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[164] Gulliams v. Beaver Lake Club, 174 P. 437, 443 (Or. 1918).
[165] Johnson v. Hoy, 47 P.2d 252, 256 (Or. 1935); Radich v. Frederickson, 10 P.2d 352, 387 (Or. 1932).
[166] 87 P.2d 195 (Or. 1939).
[167] 87 P.2d at 199 (explaining that on remand, "an injunction will be sustained in [this] case against all of the wrongdoers") (citing Miller v. Highland Ditch Co., 25 P. 550 (Cal. 1891); Gould on Waters, 3d Ed., 437, § 222; Smith v. Day, 65 P. 1055 (Or. 1891); 1 Sutherland on Damages, 2d ed.§ 140, at 267)).
[168] Lloyd Corp, Ltd. v. Whiffen, 773 P.2d 1294, 1311 (Or. 1979) ("It is well-settled, however, that an injunction is the proper remedy in the case of a repeated trespass.") (citing several cases, including *Columbia River Fishermen's Protective Union*, 87 P.2d 195 (Or. 1939)).
[169] *Columbia River Fishermen's Protective Union*, 87 P.2d at 197–98.
[170] *Id.* at 199 ("Under the allegations of the complaint, the plaintiffs cannot recover $3,000 damages against the several defendants. ... It is well-settled that one may maintain a suit in equity to prevent repeated trespasses, and the injunction should relate to a continuation of the injury to the nets.").

resources under many statutes,[171] and the courts could impose a duty on the state to seek damages for injuries to trust resources based on precedent from Washington.[172]

8.3 Defense to Takings Claims

The state of Oregon successfully relied on the PTD as a defense to takings claims in *Brusco Towboat Co. v. State*,[173] in which the 1978 Oregon Supreme Court affirmed that the state could charge rent for wharves and other structures constructed on tidelands or navigable waters owned by the state in its sovereign capacity.[174] Thus, the state can require riparian property owners to compensate the trust for the use of beds underlying navigable waters, and perhaps for damages that private projects cause to trust resources.[175]

Oregon must pay just compensation to landowners when it condemns private property for projects like bridges.[176] However, Oregon courts generally deny claims of regulatory takings.[177] For example, in *Stevens v. City of Cannon Beach*,[178] the 1993 Oregon Supreme Court held that the state did not take private property when it denied a landowner's application for a permit to

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[171] *E.g.*, OR. REV. STAT. § 496.705 (2010) (damages for unlawful killing of wildlife); *Id.* § 496.705 (damages to wildlife from contaminated food or water supply); OR. REV. STAT. § 468B.060 (damages to wildlife habitat); *Id.* § 468B.310 (damages from oil spills).

[172] *See* State v. Gillette, 621 P.2d 764, 767 (Wash. App. 1980) ("Representing the people of the state ... the Department of Fisheries thus has a right of action for damages. In addition, the state, through the Department, has the fiduciary obligation of any trustee to seek damages for injury to the object of its trust.").

[173] 589 P.2d 712 (Or. 1978).

[174] *Id.* at 717 ("The Court of Appeals correctly concluded that the Board has the authority to require users of these lands to enter into leases and to pay rental for their use.").

[175] *See id.* (recognizing that as owner of the lands under navigable-for-title waters, the state can charge rent for the use of the beds for wharves); *supra* note 171 and accompanying text (describing how the Washington PTD imposes a duty on the state, as trustee, to seek compensation for damages to trust resources).

[176] Lewis v. City of Portland, 35 P. 256, 264 (Or. 1893) ("[I]t is sufficient to say that we think the plaintiffs have a right of property in their wharf ... and, if it should be necessary that it should be taken or destroyed for the use of the bridge, that it cannot be done without due compensation therefor.").

[177] *See infra* notes 178–79 and accompanying text.

[178] *Id.* at 460 (rejecting a landowner's claim that the state's denial of a permit to construct a seawall was an unconstitutional taking).

construct a seawall.[179] When private landowners retain economically-viable uses of their property, Oregon courts are likely to deny regulatory claims.[180]

[179] *Id.*; *but see* Dolan v. City of Tigard, 512 U.S. 374, 394–95 (reversing the Oregon Supreme Court's decision affirming the city's requirement that, as a condition of a permit to expand commercial property, a landowner dedicate property for a storm drainage system and flood plain for a bicycle/pedestrian pathway).

[180] *See, e.g.*, Stevens v. City of Cannon Beach, 854 P.2d 449, 460 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) ("Because the administrative rules and ordinances here do not deny to dry sand area owners all economically viable use of their land and because 'the proscribed use interests' asserted by plaintiffs were not part of plaintiffs' title to begin with, they withstand plaintiffs' facial challenge to their validity under the takings clause of the Fifth Amendment.") (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (2003)). In *Lucas*, the U.S. Supreme Court commented that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."); *see also* Dodd v. Hood River County, 855 P.2d 608, 614 n.2, 617 (Or. 1993) (denying landowner claims of regulatory takings based on a county forest zoning ordinance, explaining that the zoning designation did not deprive landowners of all economically viable uses of their property because it allowed for "numerous forest and agricultural uses").

PENNSYLVANIA

The Public Trust Doctrine in Pennsylvania

David Allen

1.0 Origins

In 1862, in *Shrunk v. President, Managers & Co. of Schuylkill Navigation Co.*, the Supreme Court of Pennsylvania recognized the public's right to navigate and fish in public waterways.[1] The court declared that "there is no natural right of the citizen, except the personal rights of life and liberty, which is paramount to his right to navigate freely the navigable streams of the country he inhabits."[2] A half-century later, in 1915, in *Board of Trustees of Philadelphia Museums v. Trustees of University of Pennsylvania*, the Supreme Court held that when a governmental body has dedicated land to a public purpose, it may not divest the land to a private party.[3]

In 1971, the General Assembly passed and the voters of Pennsylvania ratified[4] Article I, section 27 of the state Constitution.[5] The amendment states:

> 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.[6]

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[1] 42 Pa. 219, 228 (Pa. 1826) (holding that a city may construct a bridge over a river, providing the city not violate the U.S. Constitution or prevent navigation).

[2] *Id.* at 228.

[3] 96 A. at 123, 123 (Pa. 1915) (enjoining a city from selling public museums built on public parks to a university because city ordinances dedicated the land to a public purpose and because the city had "appropriated money for the care, maintenance and improvement of at least portions of the land in question").

[4] Amending the Pennsylvania Constitution is governed by PA. CONST. art. XI, § 1.

[5] PA. CONST. art. I, § 27; *See* Com. by Shapp v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 596 (Pa. 1973) (Jones, J., dissenting). "The amendment received 1,021,342 votes: more than any candidate seeking state-wide office." *Id.*

[6] PA. CONST. art. I, § 27. One commentator has suggested that the amendment creates two rights. *See* John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part I—An Interpretive Framework for Article I, Section 27*, 103 DICK. L. REV. 693, 700 (1999). The first sentence of the

Two years later, in 1973, the Pennsylvania courts handed down two decisions that greatly limited the potential strength of the amendment.

In the first case, *Com. by Shapp v. National Gettysburg Battlefield Tower, Inc.*, the Pennsylvania Supreme Court heard a challenge brought by the Pennsylvania Governor to the proposed construction of a 300-foot observation tower on private land near the Gettysburg battle site.[7] The governor, acting under what he believed was his trust responsibility to the citizen's of the Commonwealth under Article I, section 27 of the Constitution, sought to enjoin construction of the tower because it would "disrupt the skyline, dominate the setting from many angles, and still further erode the natural beauty and setting which once was marked by the awful conflict of a brothers' war."[8]

In a fractured ruling, the Supreme Court voted five to two to deny the Commonwealth's request for an injunction against construction of the tower.[9] Although five of the seven justices rejected the requested injunction, a majority concluded that Article I, section 27 was self-executing and therefore the executive branch could sue under the amendment to protect citizen's interest in natural and cultural resources.[10] Two years later, in *Community College of Delaware*

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amendment establishes a constitutional right to clean air and clean water and to the preservation of the natural, scenic, historic and esthetic values of the environment. *Id.* The second part of the amendment establishes that the Commonwealth is a trustee over public natural resources. *Id.* As the author points out, however, Pennsylvania courts have not adopted this two-part approach to interpreting the amendment. *Id.* at 696. Instead, the courts treated the amendment as vaguely pro-environment and, as a result, "diminished its importance." *Id.*

[7] 311 A.2d at 589.

[8] *See id.* at 590 (quoting Dr. Milton E. Flower, Professor of Political Science, Dickinson College).

[9] *Id.* at 595.

[10] *Id.* Justice Roberts filed a concurring opinion joined by Justice Manderino to explain that he believed the executive branch had the "power to protect and preserve for its citizens the natural and historic resources now enumerated in Section 27." *Id.* at 595 (Roberts, J., concurring). Justice Roberts continued: "The express language of the constitutional amendment merely recites the 'inherent and independent rights' of mankind relative to the environment . . . *Id.* (quoting PA. CONST. art. I, § 1). Chief Justice Jones filed a dissenting opinion joined by Justice Eagen in which he concluded that the amendment was self-executing and that the court should enjoin construction of the tower. *Id.* at 597, 599 (Jones, J., dissenting). Justice Jones appeared apoplectic in his opinion, writing that the majority "emasculated" and "disemboweled" the amendment. *Id.* at 596, 599. The Justice concluded with two strongly punctuated words: "I dissent!!" *Id.* at 599. Announcing the result, Justice O'Brien explained his belief that the governor did not have a cause of action under Article I, section 27 because the amendment was not self-

County v. Fox, the Commonwealth Court[11] cited *Gettysburg Tower* in holding that Article 1, section 27 was self-executing.[12] Nevertheless, Pennsylvania courts have never granted the Commonwealth an injunction under the amendment.

Also in 1973, in *Payne v. Kassab*, the Commonwealth Court heard a challenge to a Department of Transportation (DOT) street-widening project that called for taking approximately half an acre of a public park.[13] The plaintiffs argued that the DOT project violated Article 1, section 27 because the Commonwealth was required to preserve the public park.[14] The court reasoned that "judicial review of the endless decisions that will result from balancing of environmental and social concerns [under Article 1, section 27] must be realistic and not merely legalistic."[15] The court then established a three-part test to determine whether a political body violated Article 1, section 27: (1) did the agency comply with all applicable statutes and

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executing. *Id.* at 595. Justice O'Brien explained that the General Assembly needed to pass supplemental legislation defining the values to be protected and the procedures to be followed before the executive branch could sue under the amendment. *Id.* at 594, 595. *See also* Com., Dept. of Environmental Resources v. Com., Public Utility Commission, 335 A.2d 860, 864 n.5 (Pa. Commw. Ct. 1975) (explaining that in *Gettysburg Tower* "four Justices expressed their views on the question of whether the provisions of Article I, Section 27 of the Pennsylvania Constitution are self-executing, and they were equally divided on this point. The three other Justices of the Court did not express opinions on this question but supported the affirmance on other considerations, thus reaching a majority result rather than a majority decision.").

[11] In the Pennsylvania judicial system, the Commonwealth Court hears original civil cases brought against or by the Commonwealth, appeals from the Common Pleas Court (a civil and criminal trial court) involving the Commonwealth or local agencies, and appeals from decisions by state agencies. *See* ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS, THE JUDICIAL BRANCH: A CITIZEN'S GUIDE 2 (2008). Only the Supreme Court of Pennsylvania may hear appeals of decisions by the Commonwealth Court. *See id.*

[12] 342 A.2d 468, 474 (Pa. Commw. Ct. 1975) (upholding a sewage permit issued by the state Department of Environmental Resources under the *Payne* test). *Fox* notwithstanding, subsequent case law continued to confuse the issue. In *O'Connor v. Pennsylvania Public Utility Com'n*, 582 A.2d 427 (Pa. Commw. Ct. 1990) property owner plaintiffs conceded that *Gettysburg Tower* held that Article I, section 27 was not self-executing and required supplemental legislation. *Id.* at 431. The plaintiff's then argued that a historic preservation law was supplemental to the constitutional amendment and therefore a historic commission advisory issued pursuant to the preservation law was binding on a public utility commission that sought to construct a substation. *Id.* at 429. The Commonwealth Court disagreed, concluding that a recommendation by the historic commission was merely advisory. *Id.* at 430. In *Harley v. Schuylkill County*, 476 F.Supp. 191 (D.C. Pa. 1979), a Federal District court made a passing reference to *Gettysburg Tower* for the holding that Article I, section 27 is not self-executing. *Id.* at 195 (ruling that a prison guard has the right to disobey a prison warden if obeying would deprive a prisoner of a constitutional right).

[13] 312 A.2d 86, 88 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263, 272, 273 (Pa. 1976).

[14] *Id.* at 94.

[15] *Id.*

regulations? (2) did the agency make a reasonable effort to minimize the environmental harm? and (3) would the environmental harm "so clearly outweigh the benefits" of the project that approval of the project was an abuse of discretion?[16] Applying the test, the court upheld the DOT project.[17] Under the *Payne* test, the public trust doctrine only requires the government to comply with statutes and attempt some mitigation of environmental harm. As discussed below in section 8.1, the only post-*Payne* case grant a private plaintiff an injunction against the government was overruled.[18]

In 1991, in *National Solid Wastes Management Ass'n v. Casey*, the Commonwealth Court delivered another blow to Article 1, section 27, ruling that the governor did not have authority to regulate landfills under the amendment.[19] In 1989, concerned about the state of existing landfills and problems of creating new landfills, the governor issued Executive Order 1989-8.[20] The executive order directed the Department of Environmental Resources (DER) to cease reviewing applications for new municipal landfills until DER developed a municipal waste plan that limited the amount of waste accepted at existing landfills and that set standards for the approval of new landfills.[21] The court invalidated the order, concluding that the amendment did not give the

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[16] *Id.* The three-part test was first proposed by the defendant DOT in a briefing document. *See* Dernbach, *supra* note 4 at 710.

[17] 312 A.2d at 94.

[18] In re Conveyance of 1.2 Acres of Bangor Memorial Park to Bangor Area School Dist. 567 A.2d 750 (Pa. Commw. Ct. 1989), *overruled by* In Re Golf Course, 963 A.2d 605, 612 (Pa. Commw. Ct. 2009) (en banc), *appeal granted*, 971 A.2d 490 (Pa. 2009). For other cases applying *Payne* to uphold action that would admittedly harm the environment, see, for example, Community College of Delaware County v. Fox, 342 A.2d 468, 482 (Pa. Commw. Ct. 1975) (denying a challenge to the issuance of a sewage permit by the state Department of Environmental Resource (DER) that involved running a pipe along a creek because DER satisfied the three *Payne* standards); Pennsylvania Environmental Management Services, Inc. v. Com., Dept. of Environmental Resources, 503 A.2d 477; (Pa. Commw. 1986) (reversing the denial of a permit by DER to construct a landfill and remanding to the Environmental Review Board to consider the *Payne* factors); Blue Mountain Preservation Ass'n v. Township of Eldred, 867 A.2d 692, 704 (Pa. Commw. Ct. 2005) (upholding a city plan to construct a race track for high speed vehicles adjacent to the Appalachian Trial because the city satisfied the *Payne* factors).

[19] 600 A.2d 260 (Pa. Commw. Ct. 1991), *aff'd per curiam* 619 A.2d 1063 (Pa. 1993).

[20] *See id.* at 261.

[21] *Id.*

governor authority "to disturb that legislative scheme" or "to alter DER's responsibilities pursuant to that scheme."[22]

2.0 The Basis of the Public Trust Doctrine in Pennsylvania

In 1973, in *Gettysburg Tower*, the Pennsylvania Supreme Court explained that since its ratification in 1971, Article 1, section 27 of the Pennsylvania Constitution had "install[ed] the common law public trust doctrine as a constitutional right to environmental protection susceptible to enforcement by an action in equity."[23] The right of the public to use navigable waters remains rooted in common law.[24] For all other purposes, Article 1, section 27 is the basis of the public trust doctrine in Pennsylvania.

3.0 Institutional Application

In the 1973 case *Payne v. Kassab*, discussed below in section 3.3, the Commonwealth Court established a three-part test for challenges to administrative action that all but erased the public trust doctrine as a tool for concerned citizens challenging government action.[25] Subsequent cases have further weakened the public trust doctrine's institutional application. In *In re Erie Golf Course*, discussed below in parts 3.1, the Commonwealth Court applied a state statute rather than the public trust doctrine to uphold a city's alienation of a public golf course.[26] In *Pilchesky v. Rendell*, discussed below in section 3.2, the Commonwealth Court upheld under the public trust doctrine legislative action approving the alienation of public land.[27]

3.1 A Restraint on Alienation (private conveyances)

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[22] *Id.* at 265.

[23] Com. by Shapp v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 596 (Pa. 1973); PA. CONST. art. I, § 27; *see supra* Part 1.0.

[24] *See* Shrunk v. President, Managers & Co. of Schuylkill Navigation Co., 42 Pa. 219 (Pa. 1826) (holding that a city may construct a bridge over a river, providing the city not violate the U.S. Constitution or prevent navigation).

[25] 312 A.2d 86, 88 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263, 272, 273 (Pa. 1976).

[26] 963 A.2d 605, 612 (Pa. Commw. Ct. 2009) (en banc), *appeal granted*, 971 A.2d 490 (Pa. 2009).

[27] 932 A.2d 287, 290 (Pa. Commw. Ct. 2007).

In 2009, in *In re Erie Golf Course*, concerning an attempted conveyance by a city of a public park to a school district for construction of a public school, an *en banc* panel of the Commonwealth Court of Pennsylvania addressed inconsistencies in several lower court opinions[28] over when a court should apply the public trust doctrine, rather than the state Donated or Dedicated Property Act (Act),[29] to determine a government's ability to alienate dedicated lands.[30] The lower court in *Erie Golf Course* applied the public trust doctrine to invalidate the city's attempted divestment of a dedicated public golf course.[31] The court reasoned that a restriction in the deed to the golf course that required the city to "keep and maintain the premises as a golf course or for public park purposes or both" constituted a "formal record," and therefore the Act did not govern the dispute.[32] Citing earlier cases that relied on the public trust doctrine to

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[28] *Compare* In re Conveyance of 1.2 Acres of Bangor Memorial Park to Bangor Area School Dist., 567 A.2d 750 (Pa. Commw. Ct. 1989), *overruled by* In Re Golf Course, 963 A.2d 605, 612 (Pa. Commw. Ct. 2009) (en banc), *appeal granted*, 971 A.2d 490 (Pa. 2009) (using the public trust doctrine to deny a city's attempt to convey a portion of a public park to a school district because there was a formal dedication of the park to a public purpose) *and* Vutnoski v. Redevelopment Authority of Scranton, 941 A.2d 54 (Pa. Commw. Ct. 2006), *overruled by* In Re Golf Course, 963 A.2d at 612 (refusing to apply the Act to a city's attempted conveyance a public sports complex to a university but upholding the conveyance under the state Urban Redevelopment Law) *with* White v. Township of Upper St. Clair, 799 A.2d 188 (Pa. Commw Ct. 2002) (applying the Act to the construction of a telecommunications tower on public land, notwithstanding a formal designation of the land to recreation, conservation, and historical purposes, and remanding for determinations under the Act) *and* Petition of Borough of Westmont, 570 A.2d 1382 (Pa. Commw Ct. 1990) (applying the Act to uphold a trial court's removal of a "municipal use only" restriction on city owned property.)

[29] 53 PA. CONS. STAT. §§ 3381–3386 (2008). Under the Act, a political subdivision may seek a court order to relinquish, sell, or substitute a dedicated property for another property if the subdivision determines the original use of the property is no longer possible or no longer serves the public interest. *Id.* § 3384.

[30] 963 A.2d 605, 612 (Pa. Commw. Ct. 2009) (en banc), *appeal granted*, 971 A.2d 490 (Pa. 2009). The court explained that the golf course was dedicated to public use because the golf course deed included a "restriction requiring the City or its successors or assigns to keep and maintain the premises as a golf course or for public park purposes or both." *See id.* at 606.

[31] *See id.* at 606, 609.

[32] *See id.* at 606, 608. Section 2 of the Act states: "All lands or buildings heretofore or hereafter donated to a political subdivision for use as a public facility, or dedicated to the public use or offered for dedication to such use, *where no formal record appears* as to acceptance by the political division, as a public facility and situate within the bounds of a political subdivision . . . shall be deemed to be held by such political subdivision, as trustee, for the benefit of the public with full legal title in the said trustee." 53 PA. CONS. STAT. § 3382 (2008) (emphasis added). The trial court relied on the phrase "where no formal record appears" to conclude that where there was a formal record dedicating the land to public use, as in the Erie golf course deed, the Act did not apply and the public trust doctrine provided the rule of decision. 963 A.2d at 608.

prevent cities from divesting public parks,[33] the court ruled that the city could not sell the golf course, but must keep and maintain the property for a public purpose.[34]

The Commonwealth Court reversed the trial court's application of the public trust doctrine, concluded that the proper law to apply was the state statute, and explained that the court must defer to the city's determination that the golf course no longer served the public interest.[35] The court remanded the case and ordered the lower court to consider the city's petition to sell the golf course under the proper standards.[36] The Pennsylvania Supreme Court agreed to hear an appeal of the Commonwealth Court's decision, which is pending.[37]

3.2 A Limit on the Legislature

In 2007, in *Pilchesky v. Rendell*, the Commonwealth Court ruled that the state general assembly did not violate a state statute,[38] the state Constitution,[39] or the common law public trust doctrine when the legislature passed a law approving the transfer of ten acres of public land from a city to a university.[40] The city of Scranton purchased the ten acres at issue in 1977 with state funds under the state Project 70 Land Acquisition and Borrowing Act (Act 70),[41] and the state legislature designated the ten acres for open space, historic, and recreational purposes. Under Act 70, the owner of land acquired and dedicated under the Act may not alienate the land without

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[33] Board of Trustees of Philadelphia Museums v. Trustees of University of Pennsylvania, 96 A. 123, 123 (Pa. 1915) (using the common law public trust doctrine to deny a city's attempt to convey property to a university because the city had dedicated the property to a public purpose through a city ordinance); In re Conveyance of 1.2 Acres of Bangor Memorial Park to Bangor Area School Dist., No. 1988-1138.WL 219723 (Pa. Ct. Com. Pleas 1988), *overruled by* In Re Golf Course, 963 A.2d at 612 (using the public trust doctrine to deny an attempt by a city to convey a portion of a park to a school district or the construction of a new school).

[34] 963 A.2d at 609. The trial court also analyzed the city's application if, *arguendo*, the Act was the proper law to apply. *Id.* Applying the Act, the trial court nevertheless concluded that the city's application to abandon the golf course failed. *Id.*

[35] *Id.* at 612–14; 53 PA. CONS. STAT. §§ 3381–3386 (2008).

[36] 963 A.2d at 614.

[37] *In re Erie Golf Course*, 971 A.2d 490 (Pa. 2009).

[38] Project 70 Land Acquisition and Borrowing Act, 72 PA. CONS. STAT. §§ 3946.1–3946.22 (2008).

[39] PA. CONST. art. 1, § 27.

[40] 932 A.2d 287, 290 (Pa. Commw. Ct. 2007).

[41] *See id.* at 288; 72 PA. CONS. STAT. §§ 3946.1–3946.22 (2008).

approval from the General Assembly.[42] In 2003, in response to a request from the city of Scranton, the legislature passed Act 52, authorizing the transfer of the ten acres from the city to the university free of Act 70 restrictions. A taxpayer sued alleging that Act 52 violated Act 70, Article I, section 27 of the Pennsylvania Constitution, and the common law public trust doctrine.

On the statutory claim, the Commonwealth Court ruled that Act 52 did not violate Act 70, reasoning that the legislature's express approval of the transfer in Act 52 satisfied the requirements of Act 70.[43] The court then dismissed plaintiff's constitutional claim with little discussion, concluding that the ten acres where not a "natural resource"[44] and therefore their alienation did not implicate Article I, section 27 of the Pennsylvania Constitution, requiring the state to maintain and conserve natural resources.[45] Finally, the court held that the public trust doctrine did not apply "in light of the legislative enactments concerning the [ten acres]."[46] The court did not elaborate in its reasoning for not applying the public trust doctrine, but *Pilchesky* indicates an aversion on the part of Pennsylvania courts to limit conveyances specifically approved by the General Assembly under either the public trust doctrine.

3.3 A Limit on Administrative Action

The leading Pennsylvanian case applying Article 1, section 27 of the Pennsylvania Constitution to administrative action is *Payne v. Kassab*, concerning a Department of Transportation (DOT) street-widening project that called for taking approximately half an acre of a public park.[47] In *Payne*, the Commonwealth Court established a three-part test to determine whether the agency project violated Article 1, section 27, which required the state to conserve

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[42] 932 A.2d at 290.

[43] *Id.*

[44] The court did not provide support or an explanation for its determination that the public land was not a "natural resource" as contemplated by constitutional amendment.

[45] *Id.* PA. CONST. art. I, § 27.

[46] *Id.*

[47] 312 A.2d 86, 88 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d 263, 272, 273 (Pa. 1976).

and maintain natural resources for the benefit of the public.[48] The court asked: (1) did the agency comply with all applicable statutes and regulations? (2) did the agency make a reasonable effort to minimize the environmental harm? and (3) would the environmental harm "so clearly outweigh the benefits" of the project that approval of the project was an abuse of discretion?[49] The court determined that the city had complied with historic preservation and environmental laws, had sufficiently mitigated environmental impacts by planting trees and using special construction materials, and that improved traffic was a sufficient benefit to justify taking the public land.[50] Since 1973, the *Payne* test has proved a substantial burden for plaintiffs alleging agency violations of Article 1, section 27 because agencies need only demonstrate that they complied with statutes and attempted environmental mitigation and because the court will defer to agency determinations regarding the benefits of their action.[51]

4.0 Purposes

As discussed below in part 4.1, Pennsylvania courts apply the common law public trust doctrine to protect the public's right to navigate and fish on waters that are navigable-in-fact.[52] Since its ratification in 1971, Article 1, section 27 of the Pennsylvania Constitution subsumed the

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[48] *Id.*

[49] *Id.* The three-part test was first proposed by the defendant DOT in a briefing document. *See* Dernbach, *supra* note 4 at 710.

[50] 312 A.2d at 94–96.

[51] For other cases applying *Payne* to uphold action that would admittedly harm the environment, see, for example, Community College of Delaware County v. Fox, 342 A.2d 468, 482 (Pa. Commw. Ct. 1975) (denying a challenge to the issuance of a sewage permit by the state Department of Environmental Resource (DER) that involved running a pipe along a creek because DER satisfied the three *Payne* standards); Pennsylvania Environmental Management Services, Inc. v. Com., Dept. of Environmental Resources, 503 A.2d 477; (Pa. Commw. 1986) (reversing the denial of a permit by DER to construct a landfill and remanding to the Environmental Review Board to consider the *Payne* factors); Blue Mountain Preservation Ass'n v. Township of Eldred, 867 A.2d 692, 704 (Pa. Commw. Ct. 2005) (upholding a city plan to construct a race track for high speed vehicles adjacent to the Appalachian Trial because the city satisfied the *Payne* factors).

[52] *See, e.g.*, Shrunk v. President, Managers & Co. of Schuylkill Navigation Co., 42 Pa. 219 (Pa. 1826) (holding that a city may construct a bridge over a river, providing the city not violate the U.S. Constitution or prevent navigation); 42 Pa. 219 (Pa. 1862) (upholding a state law that approved the construction of a bridge because the statute required a larger area beneath the bridge for navigation).

public trust doctrine for ecological purposes.[53] Unlike the flexible common law doctrines of other jurisdictions,[54] however, Pennsylvania courts have severely limited the potential scope of Article 1, section 27, as discussed below in part 4.2.

4.1 Traditional Purposes: Navigation/fishing

The primary rights recognized by the public trust doctrine are the public rights to fishing and navigation.[55] In 1862, in *Flanagan v. City of Philadelphia*, the Supreme Court of Pennsylvania, in upholding a state law that approved the construction of a bridge, declared: "There is no natural right of the citizen, except the personal rights of life and liberty, which is paramount to his right to navigate freely the navigable streams of the country he inhabits. It is superior even to the right of fishing, which contributes to the food on which the community subsists, for it has been judicially decided that when the rights of navigation conflict with the rights of fishing, the latter must give way to the former."[56] *Flanagan* was cited on this point as recently as 1997 by Judge Kelly of the state Superior Court, dissenting in *Pennsylvania Power & Light Co. v. Maritime Management, Inc.*[57] to explain his view that a dammed creek was navigable-in-fact because the creek was historically used to transport timber.[58]

4.2 Beyond Traditional Purposes: Recreational/ecological

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[53] *See* Com. by Shapp v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 596 (Pa. 1973) (stating that the Pennsylvania Constitution had "install[ed] the common law public trust doctrine as a constitutional right to environmental protection susceptible to enforcement by an action in equity."); PA. CONST. art. I, § 27; *see supra* Part 2.0.

[54] *See, e.g.* Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 48, 49 (N.J. 1972) (extending the public's right above the high water line to all publicly owned beaches). "The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Id.*

[55] 42 Pa. 219 (Pa. 1862).

[56] *Id.* at 228.

[57] 693 A.2d 592 (Pa. Super. Ct. 1997), *cert. denied* 705 A.2d 1310 (Pa. 1997) (concluding that a reservoir was not navigable-in-fact and that therefore a private party could restrict the use of alcohol on the water).

[58] 693 A.2d at 600 (J. Kelly, dissenting).

Article 1, section 27 of the Pennsylvania Constitution arguably expanded the public's rights as to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values, as well as expanded the Commonwealth's trust responsibilities over of Pennsylvania's public natural resources. But Pennsylvania courts have proved reluctant to recognize these rights and responsibilities.[59]

5.0 Geographic Scope of Applicability

As discussed below in sections 5.2, Pennsylvania courts apply the public trust doctrine to waters that are navigable in fact.[60] But, as explained below in sections 5.3 through 5.7, interpretations of Article 1, section 27 have greatly limited the potential scope of the public trust doctrine beyond navigable waters.

5.1 Tidal

Pennsylvania courts do not use the ebb-and-flow of the tide to determining the existence of state ownership or the application public trust doctrine.[61] As discussed below in section 5.2, the proper test to apply in Pennsylvania is the navigable-in-fact test.

5.2 Navigable in fact

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[59] *See* In re Erie Golf Course, 963 A.2d 605, 612 (Pa. Commw. Ct. 2009) (en banc), (refusing to apply the amendment to the alienation of dedicated public lands because a state statute authorized the alienation); Belden & Blake Corp. v. Com., Dept. of Conservation and Natural Resources, 969 A.2d 528, 531, 532 (Pa. 2009) (holding that a state agency could not prevent the owners of subsurface mineral rights from entering a state park to drill for oil and gas, notwithstanding the amendment). *See also supra* Part 1.0 (discussing Com. by Shapp v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 596 (Pa. 1973) (refusing to enjoin the construction of a 300-foot observation tower near the Gettysburg battlefield under the amendment) and Payne v. Kassab, 312 A.2d 86 (Pa. Commw. Ct. 1973) (establishing a three-part test and deferring to an agency to conclude that a road expansion project that required taking of part of a public park did not violate the amendment)).

[60] Cleveland & Pittsburgh Railroad Co. v. Pittsburgh Coal Co., 176 A. 7, 9 (Pa. 1935) (applying the navigable in fact test to rule that lands flooded by a federal dam became the property of the state).

[61] Fulmer v. Williams, 15 A. 726, 727 (Pa. 1888) (explaining that "on this continent the early settlers found large rivers with navigable tributaries, forming vast systems of internal communication, extending hundreds and in some instances thousands of miles above the reach of tide-water. The common-law definition of a navigable river [based on the ebb and flow of the tide] was unsuited to this state of things, and seems never to have been adopted in Pennsylvania.").

In Pennsylvania, for the purpose of determining state title to submerged lands and the scope of the public trust doctrine, "navigable waters" are waters that are navigable in fact.[62] In 2001, in *Mountain Properties, Inc. v. Tyler Hill Realty Corp.*, the state Superior Court explained that "the rule for determining whether bodies of water are navigable is whether they are 'used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes and trade and travel on water.'"[63] A body of water is not navigable if it is only used for recreation or tourism.[64] But if a portion of a river is navigable, its entire length is navigable.[65] The public's rights in navigable waters extend to the high-water mark.[66]

5.3 Recreational waters

In Pennsylvania, the public trust doctrine does not extend to recreational waters that are not navigable in fact.[67]

5.4 Wetlands

Article 1, section 27 of the Pennsylvania Constitution provides a basis for state action to protect wetlands. In 1989, in *Appeal of Gaster*, the Commonwealth Court upheld the taking of a private wetland by the state Department of Transportation (DOT) for a wetland mitigation

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[62] Cleveland & Pittsburgh Railroad Co. v. Pittsburgh Coal Co., 176 A. 7, 9 (Pa. 1935) (applying the navigable in fact test to rule that lands flooded by a federal dam became the property of the state).
[63] 767 A.2d at 1100 (Pa. Super. Ct. 2001) (quoting Lakeside Park Co. v. Forsmark, 153 A.2d 486, 487 (Pa. 1959)) (applying the navigable-in-fact test and concluding that a lake was non-navigable).
[64] *Id.* at 1100.
[65] Lehigh Falls Fishing Club v. Andrejewski, 735 A.2d 718, 722 (Pa. Super. Ct. 1999) (concluding that a portion of a river that ran through private property was navigable because the state Supreme Court previously determined that another portion was navigable. Fulmer v. Williams, 15 A. 726, 727 (Pa. 1888)).
[66] Fulmer v. Williams, 15 A. 726, 727 (Pa. 1888) (stating that the beds of navigable rivers "continue to be held and controlled by and for the public"). On navigable waters, a riparian landowner owns the land to the low-water mark. *Id.* at 727–28.
[67] *See Mountain Props., Inc.*, 767 A.2d at 1100 (limiting inquiry into the scope of the public trust doctrine to the navigable-in-fact test).

project.[68] The court explained that Article 1, section 27 "provides a rationale" supporting DOT's condemnation of lands for wetland mitigation.[69] But when the state destroys wetlands, or when the state fails to prevent private parties from destroying wetlands, the *Payne* test, discussed above in section 3.3, sets a low bar for agency compliance with the amendment. As a result of *Payne*, private plaintiffs have not successfully used Article 1, section 27 to protect wetlands.

5.5 Groundwater

Compliance with state statutes and the *Payne* test,[70] discussed above in section 3.3, governs issues related to groundwater contamination from landfills and pollution discharges.[71]

5.6 Wildlife

Article, 1, section 27 of the Pennsylvania Constitution is the basis for several laws and regulations protecting wildlife.[72] But plaintiffs have not successfully used Article, 1, section 27 to challenge governmental action regarding wildlife because the *Payne* test, discussed above in section 3.3, sets a low bar for agency compliance with the public trust doctrine.

5.7 Uplands (beaches, parks, highways)

In 2009, in *Belden & Blake Corp. v. Com., Dept. of Conservation and Natural Resources (DCNR)*, the state Supreme Court ruled that a state agency could not prevent the owner of

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[68] Appeal of Gaster, 556 A.2d 473, 478 (Pa. Commw. Ct. 1989) (citing *Shapp v. National Gettysburg Battlefield Tower, Inc.* 302 A.2d 886, 892, *aff'd.* 311 A.2d 588 (1973) for the rule that section 27 is "more than a declaration of rights not to be denied by government: it establishes rights to be protected by government," and that because "the despoliation of the environment is an act to be expected ... from private persons . . . government must act in the people's interest.") (affirming the dismissal of an objection by a landowner to a declaration of taking of private wetlands by the Commonwealth Department of Transportation for a mitigation project).

[69] *Id.* at 477.

[70] Payne v. Kassab, 361 A.2d 263 (Pa. 1976); *see supra* Part 1.0.

[71] Szarko v. Department of Environmental Resources, 668 A.2d 1232, 1239, 1240, (Pa. Commw. Ct. 1995) (holding an agency's permitting of a landfill did not violate Article I, section 27 because the agency followed all applicable laws and because the permit satisfied the *Payne* test).

[72] Com. v. Gavlock, 964 A.2d 455 (Pa. Commw. Ct. 2008) (explaining that the conservation of "natural resources, such as elk, is an important common right enjoyed by all citizens and is protected by" the amendment and that the game code satisfies the Commonwealth's trust obligation for preserving wildlife). *Id.* at 457 n.6.

subsurface oil and gas rights from entering state park lands to drill.[73] The Supreme Court reasoned that although DCNR had both a statutory duty to preserve state parks[74] and a constitutionally imposed fiduciary duty to conserve state parks as a public natural resource,[75] owners of subsurface interests had the same right to access their property beneath park lands as they did under privately owned lands.[76] Therefore, the public trust doctrine did not empower DCNR to condition either access to or drilling for privately owned subsurface oil and gas in state parks.[77]

6.0 Activities Burdened

As discussed in sections 6.1 through 6.4, Pennsylvania courts view the public trust doctrine as a valid basis for legislative and administrative action.[78] However, under the *Payne* test, discussed in section 3.3, citizens have not successfully used the public trust to limit state action that harms the environment.

6.1 Conveyances of property interests

In 2009, in *In re Erie Golf Course*, an *en banc* panel of the Commonwealth Court ruled that the Donated or Dedicated Property Act (Act),[79] not the public trust doctrine, governed the conveyances of lands dedicated to a public purpose by the legislature.[80] When applying the Act to a conveyance, the court will defer to determinations made by the public entity wishing to

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[73] 969 A.2d 528, 531, 532 (Pa. 2009).
[74] 71 PA. CONS. STAT. § 1340.303 (2008).
[75] PA. CONST. art. 1, § 27.
[76] 969 A.2d at 532, 533 (citing Chartiers Block Coal Co. v. Mellon, 25 A. 597 (Pa. 1893)).
[77] *Id.* at 531.
[78] *See* John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part I—An Interpretive Framework for Article I, Section 27*, 103 DICK. L. REV. 693, 695, 696 (1999) (concluding that the Article 1, section 27 "has been realized more by the enactment and implementation of legislation and regulations addressing specific problems than by the Amendment itself").
[79] 53 PA. CONS. STAT. §§ 3381–3386 (2008).
[80] 963 A.2d 612; *see supra* Part 3.1.

divest the lands.[81] Taken together, the Act and judicial deference emasculate the public trust doctrine regarding conveyances.

6.2 Wetland fills

As discussed above in section 5.4, Article 1, section 27 of the Pennsylvania Constitution provides a basis for state action to protect wetlands. But when the state destroys wetlands, or when the state fails to prevent private parties from destroying wetlands, the *Payne* test, discussed above in section 3.3, sets a low bar for agency compliance with the amendment. As a result of *Payne*, private plaintiffs have not successfully used Article 1, section 27 to protect wetlands.

6.3 Water rights

Pennsylvania courts have not applied the public trust doctrine to water rights.[82]

6.4 Wildlife harvests

Article, 1, section 27 of the Pennsylvania Constitution is the basis for several laws and regulations protecting wildlife. [83] But when private plaintiffs challenge the state's failure to protect wildlife under the amendment, the court will use the *Payne* test, discussed above in section 3.3, and defer to the agency. Therefore, plaintiffs have not successfully used the amendment to challenge governmental action regarding wildlife.

7.0 Public standing

Article 1, section 27 of the Pennsylvania Constitution, which guarantees a citizen's rights to a clean environment and requires the state to conserve natural resources, is self-executing.[84]

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[81] 963 A.2d 613, 614. A challenge to *In re Erie Golf Course* will be heard by the Pennsylvania Supreme Court. *In re Erie Golf Course*, 971 A.2d 490 (Pa. 2009).

[82] For Pennsylvania water statutes, see 27 PA. CONS. STAT. §§ 3101–3136 (2008) (governing water resources planning); 32 PA. CONS. STAT. §§ 631–641 (2008) (governing water rights).

[83] Com. v. Gavlock, 964 A.2d 455 (Pa. Commw. Ct. 2008) (explaining that the conservation of "natural resources, such as elk, is an important common right enjoyed by all citizens and is protected by" the amendment, and that the game code satisfies the Commonwealth's trust obligation for preserving wildlife). *Id.* at 457 n.6.

[84] *See infra* part 7.3.

As explained below in section 7.1 through 7.3, this means citizens and the government may sue under the amendment to protect the environment.

7.1 Common law-based

Pennsylvania courts recognize standing for residents and taxpayers to sue a city or the state for alleged violations of the public trust doctrine.[85] In 1915, in *Board of Trustees of Philadelphia Museums v. Trustees of University of Pennsylvania*, the state Supreme Court ruled that when a governmental body has dedicated land to a public purpose "every citizen and taxpayer has an interest, not only by virtue of his being one of the public to whom the property has been donated but also by virtue of his contribution as a taxpayer."[86]

7.2 Statutory basis

Under Pennsylvania law, any person aggrieved by and with an interest in a state agency adjudication has the right to appeal the result of the adjudication in the Commonwealth Court.[87] The same right applies for any person aggrieved by and with an interest in a local agency adjudication.[88]

7.3 Constitutional basis

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[85] Pilchesky v. Redevelopment Authority of City of Scranton, 941 A.2d 762, 765 (Pa. Commw Ct. 2008) (finding standing under the public trust doctrine for a resident and taxpayer to sue a city when the city proposed to convey a sports complex to a university because the city formally dedicated the property for public use); White v. Township of Upper St. Clair, 799 A.2d 188 (Pa. Commw Ct. 2002) (finding standing for taxpayers and residents to sue a city over the construction of a telecommunications tower on publically owned land that had been dedicated to recreation, conservation, and historical purposes); Board of Trustees of Philadelphia Museums v. Trustees of University of Pennsylvania, 96 A. 123, 123 (Pa. 1915) (finding standing for taxpayers to sue a city to challenge the sale to a university of public museums built on public parks because there were city ordinances that dedicated the land to a public purpose, and because the city had "appropriated money for the care, maintenance and improvement of at least portions of the land in question"). *See also* Pilchesky v. Doherty, 941 A.2d 95, 101 (Pa. Commw. Ct. 2008) (finding standing for a taxpayer to sue the city over the proposed sale of a public golf course, but dismissing the case for failure to join the city and the purchaser of the golf course to the case).

[86] 96 A. at 123.

[87] 2 PA. STAT. ANN. § 702 (West 2008).

[88] 2 PA. STAT. ANN. § 752 (West 2008).

Article I, section 27 of the Pennsylvania Constitution is self-executing for citizens and for the state.[89] Therefore, both the Pennsylvania Attorney General[90] and individual citizens[91] may sue to natural, scenic, historic, or aesthetic resources.[92]

8.0 Remedies

As explained below in sections 8.1 through 8.3 and above in section 1.0, Pennsylvania courts have only once granted relief under the public trust doctrine since early interpretations of Article 1, section 27 of the state Constitution.

8.1 Injunctive relief

Since the Commonwealth Court established the *Payne* test in 1973, the only Pennsylvania court that granted an injunction under the public trust doctrine was the Commonwealth Court in *In re Conveyance of 1.2 Acres of Bangor Memorial Park to Bangor Area School Dist.*[93] *Bangor*, decided in 1989, was overruled twenty years later by *In Re Golf Course* in 2009.[94]

8.2 Damages for injuries to resources

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[89] Payne v. Kassab, 361 A.2d 263, 272 (stating that "the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn), and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these broad purposes and establish these relationships: the amendment does so by its own *Ipse dixit.*").

[90] *See* Com. by Shapp v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 594–6 (Pa. 1973) (J. Roberts concurring) & (Jones, J., dissenting) (denying the state an injunction to stop the construction of an observation tower, but supporting for Attorney General's authority to bring a case under the amendment); *see supra* part 1.0.

[91] Payne v. Kassab, 361 A.2d 263, 272, 273 (Pa. 1976) (finding standing for a coalition of residents and college students to sue the state Department of Transportation over a proposed road expansion, but denying plaintiff's request or an injunction because the Commonwealth did not violate its trust duties under Article 1, section 27 of the Pennsylvania Constitution). *See supra* Part 1.0.

[92] *But see* Bruhin v. Com., 320 A.2d 907 (Pa. Commw. Ct. 1974) (stating that the amendment was self-executing, but that "the Secretary of the Department of Environmental Resources [did not have] the primary responsibility of seeing to its enforcement."

[93] In re Conveyance of 1.2 Acres of Bangor Memorial Park to Bangor Area School Dist. 567 A.2d 750 (Pa. Commw. Ct. 1989), *overruled by* In Re Golf Course, 963 A.2d 605, 612 (Pa. Commw. Ct. 2009) (en banc), *appeal granted*, 971 A.2d 490 (Pa. 2009).

[94] In Re Golf Course, 963 A.2d 605, 612 (Pa. Commw. Ct. 2009) (en banc), *appeal granted*, 971 A.2d 490 (Pa. 2009).

No Pennsylvania court has awarded damages for a violation of the public trust doctrine.

8.3 Defense to takings claims

In 1989, in *Appeal of Gaster*, the Commonwealth Court stated that Article I, section 27 of the Pennsylvania Constitution "provides a rationale supporting the purpose of condemnation of lands" by the Commonwealth Department of Transportation to mitigate the loss of wetlands from road construction projects.[95] Section 27 does not, however, relieve the Commonwealth of its duty to provide just compensation when it takes private property.[96]

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[95] Appeal of Gaster, 556 A.2d 473, 478 (Pa. Commw. Ct. 1989) (citing *Shapp v. National Gettysburg Battlefield Tower, Inc.* 302 A.2d 886, 892 (Pa. Commw. Ct. 1973), *aff'd*, 311 A.2d 588 (Pa. 1973) for the rule that section 27 is "more than a declaration of rights not to be denied by government; it establishes rights to be protected by government," and that because "the despoliation of the environment is an act to be expected ... from private persons . . . government must act in the people's interest.") (affirming the dismissal of an objection by a landowner to a declaration of taking by the Commonwealth Department of Transportation because the land was for a wetland mitigation project).

[96] *See Id.*

RHODE ISLAND

The Public Trust Doctrine in Rhode Island

Brian Sheets

1.0 Origins

The origins of the public trust doctrine (PTD) in Rhode Island lie in early colonial patents and grants from the English crown.[1] Public rights in navigation and fishing passed from the crown to the state upon independence from England.[2] Later cases recognized public rights in fishery, commerce, and navigation.[3] Although Rhode Island's PTD has origins in Massachusetts law,[4] Rhode Island has taken a different approach to access rights, with Rhode Island more in favor of public access.

2.0 The Basis of the Public Trust Doctrine in Rhode Island

Rhode Island's Constitution provides the basis for the PTD in Rhode Island:

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment

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[1] *See* Providence Steam-Engine Co. v. Providence & S.S.S. Co., 12 R.I. 348, 357 (1879) (Potter, J., concurring) ("By the Code of 1647, it was voted to 'receive and be governed by the laws of England, together with the way of administering of them so far as the nature and constitution of this plantation will permit.'"); Riley v. Rhode Island Dept. of Envtl. Mgmt., 941 A.2d 198, 208 (R.I. 2008) (the 1663 Charter by King Charles II "[p]rovided also, and our express will and pleasure is, and we do, by those presents, for us, our heirs and successors, ordain and appoint that these presents, shall not, in any manner, hinder any of our loving subjects, whatsoever, from using and exercising the trade of fishing upon the coast of New England, in America; but that they, and every or any of them, shall have full and free power and liberty to continue and use the trade of fishing upon the said coast, in any of the seas thereunto adjoining, or any arms of the seas, or salt water, rivers and creeks, where they have been accustomed to fish * * *." The Royal Charter (granted by King Charles II, July 8, 1663, and in force until the Constitution, adopted in November, 1842, became operative on the first Tuesday of May, 1843.).

[2] Payne & Butler v. Providence Gas Co., 77 A. 145, 153 (R.I. 1910); Champlin's Realty Associates, L.P. v. Tillson, 823 A.2d 1162, 1166 (R.I. 2003).

[3] Nugent ex rel. Collins v. Vallone, 161 A.2d 802, 805 (R.I. 1960) ("It is true that the state holds title to the soil under the public waters of the state. However, it holds such title not as a proprietor but only in trust for the public to preserve their rights of fishery, navigation and commerce in such waters."); Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1041 (R.I. 1995); Champlin's Realty Associates, L.P. v. Tillson, 823 A.2d 1162, 1165 (R.I. 2003).

[4] *See* Michelle A. Ruberto & Kathleen A. Ryan, *The Public Trust Doctrine and Legislative Regulation in Rhode Island: A Legal Framework Providing Greater Access to Coastal Resources in the Ocean State*, 24 SUFFOLK U. L. REV. 353, 378 (1990).

> of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state. [5]

According to the Rhode Island Supreme Court in its 1991 decision of *Hall v. Nascimento*, "[i]t is well settled in Rhode Island that pursuant to the public trust doctrine the State maintains title in fee to all soil within its boundaries that lies below the high-water mark, and it holds such land in trust for the use of the public."[6] Four years later, the Supreme Court stated, in *Greater Providence Chamber of Commerce v. State*, that the PTD has never been cast aside in Rhode Island,[7] although concluding that an 1870 grant of filled submerged lands from the legislature to the Providence Chamber of Commerce and Rhode Island School of Design was a valid grant, free of the PTD.[8] The court decided that because the lands had been filled since the late 1700's, a legislative grant of the filled lands from the legislature effectively extinguished the public rights

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[5] R.I. Const. art. I, § 17. *Cf.* Carr v. Carpenter, 48 A. 805, 808 (R.I. 1901) (right to gather seaweed is a right of the adjacent littoral landowner). In *Cavanaugh v. Town of Narragansett*, No. WC 91-0496, 1997 WL 1098081, *6 (R.I. Super. Oct. 10, 1997), the Superior Court interpreted the 1986 addition of language "the right of passage along the shore" to art. I, § 17 from the original 1842 language was "to guard against possible future Rhode Island Supreme Court decisions which might erode away or diminish, through definition, the 'people's rights.'"

[6] Hall v. Nascimento, 594 A.2d 874, 877 (R.I. 1991); Champlin's Realty Associates, L.P. v. Tillson, 823 A.2d 1162, 1166 (R.I. 2003) ("The *jus privatum* relates to the state's title to tidal lands. That ownership interest, however, is subject to a public right or *jus publicum*. These two characteristics form the basis of the public trust doctrine, which first was embodied in this state in the Rhode Island colonial charter and currently is codified in article 1, section 17, of the Rhode Island Constitution.") (citations omitted).

[7] 657 A.2d 1038, 1042–43 (R.I. 1995) (The court noted that "[a]s a matter of fact, this court has consistently cited federal decisions that embrace this well-articulated body of general law" and listed Rhode Island cases embracing the PTD from federal decisions including *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473, (1988), *Shively v. Bowlby*, 152 U.S. at 57, *Illinois Central R.R. v. Illinois*, 146 U.S. 387, (1892), *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842). *See also* Palazzolo v. State, No. WM 88-0297, 2005 WL 1645974 (R.I. Super. July 5, 2005) ("There can be no doubt that the doctrine remains viable law in Rhode Island.").

[8] *Greater Providence Chamber of Commerce*, 657 A.2d at 1045.

in the properties.[9] Rhode Island courts recognize that the legislature may convey lands with PTD rights to private individuals, provided the conveyance meets the conditions of a two-part test:

> A littoral owner who fills along his or her shore line, whether to a harbor line or otherwise, with the acquiescence or the express or implied approval of the state *and* improves upon the land in justifiable reliance on the approval, would be able to establish title to that land that is free and clear. The littoral owner may pursue a course of action seeking to convey the deed to that property to himself or herself and become owner in fee-simple absolute *provided* that the littoral owner has not created any interference with the public-trust rights of fishery, commerce, and navigation. Once the littoral owner acquires title to the land in this manner, the state cannot reacquire it on the strength of the public-trust doctrine alone. The state can, however, at any time, place restrictions on the filling in of shoreline provided it does so before a landowner has changed position in reliance on government permission.[10]

Further extending private ownership of lands[11] that are typically held by the public, Rhode Island recognizes the riparian right to wharf out from coastal lands.[12] Harbor line statutes can even allow expansion of private rights into tidal lands.[13] However, the Coastal Resources Management Council[14] (CMRC) balances these public rights on a case by case basis when making decisions about lands impressed with public rights.[15]

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[9] *Id.* at 1040.

[10] Providence & Worcester R. Co. v. Pine, 729 A.2d 202, 204–05 (R.I. 1999) (quoting *Chamber of Commerce*, 657 A.2d at 1044).

[11] R.I. Admin. Code 16-2-300.4 (A)(12) (2011) ("Public Trust Resources (PTR) are defined as the tangible physical, biological matter substance or systems, habitat or ecosystem contained on, in or beneath the tidal waters of the state, and also include intangible rights to use, access, or traverse tidal waters for traditional and evolving uses including but not limited to recreation, commerce, navigation and fishing.").

[12] As early as 1707, a colonial ordinance allowed for "each town in this colony now established, or that may hereafter be established, may be, and have hereby granted unto them full power and authority to settle such coves, creeks, rivers, waters, banks bordering upon their respective townships, as they shall think fit for the promotion of their several towns and townships, by building houses, and warehouses, wharfs, laying out lots, or any other improvements, &c., as the body of freeholders and freemen of each town shall see cause for. . . ." Armour & Co. v. City of Newport, 43 R.I. 211, 110 A. 645, 646 (1920) (citing 4 R. I. Col. Rec. 24); New York, N.H. & H.R. Co. v. Horgan, 56 A. 179, 181 (R.I. 1903).

[13] R.I. GEN. LAWS § 46-4-1 (2011) ("The director of the department of environmental management may mark out harbor lines suitable to be established in any of the public tidewaters of the state. . .").

[14] R.I. GEN. LAWS § 46-23-6 (2011) (defining duties of the CMRC to include taking into account PTD concerns).

[15] *See* R.I. Admin. Code 16-2-300.4 (B.1)(e) ("The construction of marinas, docks, piers, floats and other recreational boating facilities located on tidal lands or waters constitutes a use of Rhode Island's public trust resources. Due to the CRMC's legislative mandate to manage Rhode Island's public trust resources for this and subsequent generations, the Council must assess all proposed uses of public trust lands or waters on a case-by-case basis, examine reasonable alternatives to the proposed activity, and ensure that the public's interests in the public

3.0 Institutional Applications

3.1 Restraint on Alienation (private conveyances)

The Rhode Island PTD prevents the transfer of private property impressed with PTD rights absent an express legislative grant. In *Hall v. Nascimento*, The Rhode Island Supreme Court decided that the absence of an express grant of a ten-foot strip of submerged lands impressed with public rights prevented the littoral landowners from obtaining private title to a 260-foot extension of private property rights when dredged fill was deposited between the property owner's land and the sea.[16] The court noted that "filled or submerged land owned in fee by the State and subject to the public trust doctrine may be conveyed by the State to a private individual by way of legislative grant, provided the effect of the transfer is not inconsistent with the precepts of the public trust doctrine."[17] Because the submerged lands were owned by the state prior to having the Army Corps of Engineers depositing dredged fill on top of it, the filled lands retained their public rights, and without a legislative grant to the private party extinguishing the public rights, the lands must be used in a manner consistent with the PTD.[18] The Rhode Island Supreme Court also concluded that private parties could not extinguish public rights in PTD-impressed lands through adverse possession.[19]

3.2 Limit on the Legislature

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trust resources are protected."). R.I. Admin. Code 16-1-13:B (defining public access, meaning "a general term used to describe the way the public legally reaches and enjoys the coastal areas and shoreline of the State which are held in public trust," and includes physical access, visual access, and interpretive access).

[16] 594 A.2d 874 (R.I. 1991).

[17] *Id.* at 877.

[18] *Id.*

[19] *Id.*; *see also* Armour & Co. v. City of Newport, 110 A. 645, 648–49 (R.I. 1920) ("In Rhode Island the doctrine 'nullum tempus occurrit regi' [time does not run against the king] prevails.").

Rhode Island courts have adopted the rule in *Illinois Central Railroad Co. v. Illinois*[20] that a private grant of land from the legislature must be consistent with the PTD, and the legislature cannot abdicate its responsibility of control over public trust resources to a private party.[21] However, if there is an express grant from the legislature that extinguishes the public rights in land, the reach of the state is much more limited.[22]

3.3 Limit on Administrative Action

Rhode Island statutes delegate responsibility to the CMRC to administer development activities on traditional public trust lands.[23] These statutes require the CMRC to take into account PTD considerations on proposed leases, licenses, and permits.[24] However, the CMRC is limited to the power to oversee methods of filling tidal waters if the private party is wharfing out as authorized by a harbor line statute.[25]

3.4 Limit on Municipal Action

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[20] 146 U.S. 387, 453 (1892) ("The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.").

[21] *See* Hall v. Nascimento, 594 A.2d 874, 877 (R.I. 1991); Champlain's Realty Associates L.P. v. Tillson, No. CIV.A.01-0330, 2001 WL 770810 (R.I. Super. July 10, 2001); City of Providence v. Comstock, 65 A. 307, 308 (R.I. 1906) ("The court insists on a limitation of the power of the state to convey these lands growing out of its paramount obligation to preserve to the public the rights of navigation, but admits that the state may convey parcels of tide-flowed lands to individuals for the promotion of navigation or 'when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.'").

[22] Champlain's Realty Associates L.P. v. Tillson, No. CIV.A.01-0330, 2001 WL 770810 (R.I. Super. July 10, 2001) ("However, according to Rhode Island case law once the public-trust doctrine has been extinguished by an express conveyance by the state, the reach of the state and its agencies becomes limited.").

[23] R.I. GEN. LAWS § 46-23-6(ii)(A) (2011) ("The council shall have exclusive jurisdiction below mean high water for all development, operations, and dredging, consistent with the requirements of chapter 6.1 of this title and except as necessary for the department of environmental management to exercise its powers and duties and to fulfill its responsibilities pursuant to §§ 42-17.1-2 and 42-17.1-24 . . .").

[24] R.I. GEN. LAWS § 46-23-1 (2011) ("Accordingly, the CRMC will develop, coordinate, and adopt a system for the leasing of submerged and filled lands, and licenses for the use of that land, and will ensure that all leases and licenses are consistent with the public trust.").

[25] *See* Providence & Worcester R. Co. v. Pine, 729 A.2d 202, 208–09 (R.I. 1999) ("The fact that P & W was required to seek a permit from CRMC is of no consequence in this matter because CRMC had only the power to oversee and direct the method by which P & W could fill in the tide waters to the harbor line established in 1896. Once P & W filled-in and improved that land below the mean high-water mark, it established title thereto, free and clear of the public trust claim asserted by the state.").

Municipalities are quite limited in administrating activities on tidal lands, as exclusive jurisdiction rests with the CMRC.[26] Although the state could delegate authority to regulate tidal lands to municipalities, the state cannot relinquish the state's public trust responsibilities.[27] In *Champlin's Realty Associates, L.P. v. Tillson*, the Rhode Island Superior Court upheld the CMRC's jurisdiction over a municipality's effort to enforce zoning regulations in the tideland below the high water mark by attempting to enjoin a ferry from docking at a marina.[28] Although the municipality could regulate the upland through zoning ordinances, the CMRC retains exclusive jurisdiction in the lands below the high water mark.[29] On appeal, the Supreme Court of Rhode Island agreed, deciding that "any municipal attempt to prohibit commercial ferries from docking at a particular location is an invasion of CRMC's exclusive jurisdiction over 'development, operation, and dredging' activities and is preempted."[30] Thus, the CMRC retains jurisdiction over tidal activities independent of municipal zoning.[31]

4.0 Purposes

4.1 Traditional Purposes: Navigation/Fishing

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[26] Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1261 (R.I. 1999) ("Our holding merely recognizes that municipalities are not empowered to enact zoning ordinances aimed solely at the regulation of tidal land."). *See* Kooloian v. Town Council of Bristol, 572 A.2d 273, 276 (R.I. 1990) (when a permit is required by the CMRC for activities in CMRC jurisdiction, "[a]ny permit received from the [municipal] building official alone remained ineffective until final approval [by the CMRC].").

[27] *See* Champlin's Realty Associates, L.P. v. Tillson, 823 A.2d 1162, 1167 (R.I. 2003).

[28] Champlain's Realty Associates L.P. v. Tillson, No. CIV.A.01-0330, 2001 WL 770810,*1, *9. (R.I. Super. July 10, 2001).

[29] *Id.* at *8.

[30] Champlin's Realty Associates, L.P. v. Tillson, 823 A.2d 1162, 1170 (R.I. 2003).

[31] *See* Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1261 (R.I. 1999) (The fact that "CRMC has exclusive jurisdiction over tidal waters does not make futile all local efforts at zoning or planning along the coast. Our holding merely recognizes that municipalities are not empowered to enact zoning ordinances aimed solely at the regulation of tidal land."). *Cf.* State ex rel. Town of Westerly v. Bradley, 877 A.2d 601, 607 (R.I. 2005) (A municipality has the authority to exercise police powers in areas under the jurisdiction of the CMRC if the ordinances are for public health and safety. In this case, the defendant was swimming in a breachway, in violation of a local ordinance. In rejecting a public trust doctrine defense, the court held that "[a] prohibition against swimming in the Weekapaug Breachway does not infringe upon the right of fishery or the privilege of the shore; nor does it entail leaving the shore to swim in the sea or implicate the right of passage along the shore.").

Rhode Island courts balance navigational uses of public trust resources in Rhode Island between private littoral owners and the public use of navigation.[32] Littoral landowners have a common law right to wharf-out from their private property in order to provide access to the sea.[33] The Rhode Island Supreme Court in *Engs v. Peckham* stated that "at common law the erection of a wharf in tide waters is not indictable as a nuisance unless it obstructs navigation."[34] Legislative harbor line statutes that facilitate navigation and access to the sea allow a littoral landowner to fill land to the harbor line because these statutes are "equivalent to a legislative declaration that navigation will not be straitened or obstructed by any such filling out."[35] So long as a boat pilot can exercise reasonable care to avoid the built out wharf, courts will not consider the wharfing to be a nuisance to navigation.[36]

The right to fish belongs to the general public, not to a particular individual.[37] As early as 1850, Rhode Island recognized public rights in coastal oyster and quahog fishing by upholding legislation aimed at preserving oyster stocks for the public.[38] Public fishing rights are embedded

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[32] *See* Providence Steam-Engine Co. v. Providence & S.S.S. Co., 12 R.I. 348, 369 (1879) ("That it may sometimes be a nice question as to when the right of the riparian owner is to be held to conflict with the rights of the public, is no sound reason for denying the right. In the language of Best, J., in *Blundell* v. *Catterall*, 5 B. & A. 268, 277, 'The law in these, as in all other cases, limits and balances opposing rights, that they may be so enjoyed as that the exercise of one is not injurious to the other.'").

[33] *See* Nugent ex rel. Collins v. Vallone, 161 A.2d 802, 805–06 (R.I. 1960) (common-law right as a riparian owner to wharf out in order to obtain suitable access to the sea).

[34] 11 R.I. 210, 223–24 (1875).

[35] *Id.* at 224. *See also* Rocky Point Oyster Co. v. Standard Oil Co. of New York, 265 F. 379, 383 (D.R.I. 1920) ("the defendant had the right, as riparian owner, and by authority of the harbor commissioners and the Secretary of War, to wharf out over the oyster lands of the defendant to the new harbor line, and thereby to exclude the plaintiff from such part of its leased oyster grounds as were within the location approved by the harbor commissioners.").

[36] Folsom v. Freeborn, 13 R.I. 200, 204–05 (1881) ("They may also erect other structures in or over tide-water in front of their lands, where they do not interfere with the public right of navigation, and maintain and enjoy them against everybody but the State. And even if such a structure should happen to encroach upon the public right so as to be a nuisance at common law, the owner of it would nevertheless be entitled to the protection of the law against a mere trespasser, or even against persons navigating the water, if they could by the exercise of reasonable care avoid it and still enjoy the public right."). *See also* Murphy v. Bullock, 37 A. 348, 350 (R.I. 1897) (wharfing out is a nuisance if it "obstruct[s] and deflect[s] the flow of the water . . .").

[37] Riley v. Rhode Island Dept. of Envtl. Mgmt., 941 A.2d 198, 208 (R.I. 2008) ("this Court's long-standing view that the right of fishery in Rhode Island belongs to the general public, and to no particular individual.").

[38] State v. Cozzens, 2 R.I. 561, 564 (1850) (restrictions in the method and time of harvesting oysters "show that legislative restriction is indispensable to secure to the public the benefit of the oyster fishery.").

in the Rhode Island Constitution.[39] However, courts uphold regulations restricting fishing designed to ensure that there is a continuing public benefit in sustainable fish stocks.[40]

4.2 Beyond Traditional Purposes: Recreation/Ecological

Public rights under the PTD in recreational activities are mostly confined to the sea shore.[41] Although public bodies may receive recreational easements by adverse possession, it is unclear whether these prescriptive rights are tied to the PTD.[42] The Superior Court in *Palazzolo v. State* related ecological concerns to issues of private and public nuisance, rather than linking the PTD to ecological concerns.[43]

5.0 Geographical Scope of Applicability

5.1 Tidal

In Rhode Island, the state holds title to lands below the high water mark, which is the mean-high-tide line.[44] Tidal movement over lands indicates that the waters are navigable, and

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[39] R.I. Const. art. I, § 17 ("The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore . . .").

[40] *Cozzens*, 2 R.I. at 564 ("In other words, the constitutional right is so regulated as to reserve to the public the greatest benefit."); *see also* Riley v. Rhode Island Dept. of Envtl. Mgmt., 941 A.2d 198, 207–08 (R.I. 2008) (discussing the historical context of seventeenth century colonial ordinances opening the coasts to free fishing). "The General Assembly regulates fisheries in trust for the public, and it is precisely because 'the rapacity of man' remains a legitimate concern to the economic viability of this important industry that there is a need for conservation and preservation for future generations." *Id.* at 213.

[41] *See infra* § 5.7.

[42] *See* Reitsma v. Pascoag Reservoir & Dam, LLC, 774 A.2d 826, 840 (R.I. 2001) (Goldberg & Lederberg, JJ., dissenting) (although the State argued that the PTD allowed for a prescriptive easement of a lakebed when there had been a public boat ramp allowing public access for a number of years, the court decided that adverse possession allowed the state to gain title to the lakebed of a privately owned lake).

[43] No. WM 88-0297, 2005 WL 1645974, *5 (R.I. Super. July 5, 2005) ("This Court finds that the effects of increased nitrogen levels constitute a predictable (anticipatory) nuisance which would almost certainly result in an ecological disaster to the pond.").

[44] State v. Ibbison, 448 A.2d 728, 732 (R.I. 1982) (the high-water mark over an 18.6 year average should be determined to account for monthly tide fluctuations). "Additionally, we feel that our decision best balances the interests between littoral owners and all the people of the state. Setting the boundary at the point where the spring tides reach would unfairly take from littoral owners land that is dry for most of the month. Similarly, setting the boundary below the mean-high-tide line at the line of the mean low tide would so restrict the size of the shore as to render it practically nonexistent." *Id.*; Cavanaugh v. Town of Narragansett, No. WC 91-0496, 1997 WL 1098081 (R.I. Super. Oct. 10, 1997) ("Rhode Island has consistently followed the United States Supreme Court decisions of *Shively v. Bowlby*, 152 U.S. 1, 26, 14 S.Ct. 548, 38 L.Ed 331 (1894) and *Phillips Petroleum v. Mississippi*, 484 U.S.

therefore impressed with public rights.[45] Rhode Island courts distinguish the "beach" from the "shore," as "when the term 'beach' is used in any legal context that bears on property rights, it will be held to apply to that area of land that lies between the high-water mark and the beginning of the upland."[46] The "shore" is the land between the high and low water marks.[47]

Harbor line statutes extend seaward the private property line beyond the traditional boundary of the natural high water mark.[48] When a fill is authorized by a harbor line act, it extinguishes the public rights in the filled lands, including public access rights.[49] Yet, the ability of the landowner filling in the lands is limited so that, once filled pursuant to a harbor line act, "the littoral owner [cannot create] any interference with the public-trust rights of fishery,

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469, 479 (1988) and defined the shore as being bounded on the landward side at the mean high tidemark as established over a period of 18.6 years."). *See also* Bailey v. Burges, 11 R.I. 330, 331–32 (1876) ("In this state, at common law, the fee of the soil in tide waters below high water-mark is in the state.").

[45] Rhode Island Motor Co. v. City of Providence, 55 A. 696, 697 (R.I. 1903) ("But wherever the tide water flows, and so long as it flows, it is a portion of the great highway. So long as the dock is not filled by the owner of the bank, it is subject to the jus publicum of being used for passage by the whole public."); Palazzolo v. State, No. WM 88-0297, 2005 WL 1645974, *7 (R.I. Super. July 5, 2005) (evidence of lands below the high-water mark and subject to the ebb and flow of the tide impressed the lands with public trust rights of commerce, fishing, and navigation).

[46] Waldman v. Town of Barrington, 227 A.2d 592, 595 (R.I. 1967).

[47] *Id.* at 595 (quoting Jackvony v. Powel, 21 A.2d 554, 558 (R.I. 1941)).

[48] Allen v. Allen, 19 R.I. 114, 32 A. 166 (1895) ("The establishment of a harbor line permits the riparian owner to carry the upland or high-water mark out a certain distance from the natural shore. Actual extension of the upland to the new line extinguishes all public rights within it. The land which was formerly shore becomes upland, and, while the rights to shore and upland are not changed, they are carried further out into the tidal stream or sea."); Bailey v. Burges, 11 R.I. 330, 331–32 (1876) ("It is true the riparian proprietor may fill out in front of his land, but, if he does so, he fills out by the permission or acquiescence of the state, - the establishment of a harbor line being at the least equivalent to such a permission expressly given."); Engs v. Peckham, 11 R.I. 210, 223–24 (1875) ("The establishment of a harbor line, when so construed, means that riparian proprietors within the line are at liberty to fill and extend their land out to the line. A harbor line is in fact what it purports to be, the line of a harbor. It marks the boundary of a certain part of the public waters which is reserved for a harbor.").

[49] *Id.*; DeLeo v. Coastal Res. Mgmt. Council, C.A. NO. 86-5127, 1988 WL 1016794 (R.I. Super. Aug. 9, 1988) ("Rhode Island has consistently recognized that the public's rights to submerged lands can be made extinct by a grant of state and federal authority to reclaim land."); Providence Steam-Engine Co. v. Providence & S.S.S. Co., 12 R.I. 348, 369 (1879) ("That where land is reclaimed from the tide-waters it may be held, at least to a certain extent, as private property, cannot well be doubted. The lands have to actually be filled to extinguish public rights."); Rhode Island Motor Co. v. City of Providence, 55 A. 696, 697 (R.I. 1903) ("So long as the dock is not filled by the owner of the bank, it is subject to the jus publicum of being used for passage by the whole public."); Champlain's Realty Associates L.P. v. Tillson, No. CIV.A.01-0330, 2001 WL 770810 (R.I. Super. July 10, 2001).

commerce, and navigation."[50] Courts recognize that regulating the filling of tidelands is a valid activity by the state.[51]

5.2 Navigable-in-Fact

Rhode Island courts consider waters navigable when they are subject to tidal influence. In *Rhode Island Motor Co. v. City of Providence*, the Rhode Island Supreme Court upheld an injunction prohibiting the construction of a bathhouse in a harbor that impeded navigation, noting that "wherever the tide water flows, and so long as it flows, it is a portion of the great highway."[52] So long as the riparian owner has not filled the tidelands with legislative approval, it is subject to the *jus publicum* right of free passage by the public.[53]

5.3 Recreational Waters

Rhode Island courts consider bodies of water subject to the tide as navigable-in-fact;[54] however, absent tidal influence, the PTD probably does not attached to other submerged lands.[55] Artificial bodies of water are not subject to the PTD unless there is a preexisting legal PTD right prior to the creation of the artificial water body.[56]

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[50] Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1044 (R.I. 1995) ("The harbor lines were a legislative determination, generally made in conjunction with the local government, that encroachment on the waters to the harbor line would not constitute interference with fishery, commerce, or navigation.").

[51] City of Providence v. Comstock, 65 A. 307, 309 (R.I. 1906) ("the building of wharves and the filling of flats was regulated and controlled by the town government from the earliest times."); *Greater Providence Chamber of Commerce*, 657 A.2d at 1044 ("The state can, however, at any time, place restrictions on the filling in of shoreline provided it does so before a landowner has changed position in reliance on government permission.").

[52] Rhode Island Motor Co. v. City of Providence, 55 A. 696, 697 (R.I. 1903) (quoting Clark v. Peckham, 10 R.I. 35, 38 (1871)).

[53] Clark v. Peckham, 10 R.I. 35, 38 (1871).

[54] *See supra* § 5.2.

[55] *See* Reitsma v. Pascoag Reservoir & Dam, LLC, 774 A.2d 826, 840 (R.I. 2001) (the Rhode Island Supreme Court had the opportunity to tie the PTD to recreational waters in deciding whether the state's construction of a dock onto a private lake, thereby allowing recreational boating on the water and tying recreational uses to the PTD, yet the court decided the claim on adverse possession grounds).

[56] McLeod v. Pascoag Reservoir Dam, LLC, No. PC 98-1946, 2000 WL 504162, *11 (R.I. Super. Apr. 3, 2000) ("The Public Trust Doctrine is a legal mechanism for recognizing a preexisting right."). *See also* Hood v. Slefkin, 143 A.2d 683, 687 (R.I. 1958) *opinion adhered to on reargument sub nom.* Winsten v. Slefkin, 150 A.2d 648 (R.I. 1959) ("Those owners of land which is overflowed by the erection of a dam, the owner of which has acquired the right by prescription to so continue to overflow their land, gain no reciprocal right to require that owner to maintain the dam or the water level of the pond formed thereby."); Goloskie v. La Lancette, 163 A.2d 325, 329 (R.I. 1960).

5.4 Wetlands

In *Palazzolo v. State*, on remand to the Rhode Island Superior Court from the United States Supreme Court,[57] the superior court found that tidal influence made the wetland subject to the PTD.[58] Because over fifty-percent of the land at issue was below the mean-high-water mark, and there was no express permission by the legislature to fill the lands, Palazzolo had no right to fill the wetlands because the public retained PTD rights in the wetlands.[59]

5.5 Groundwater

Rhode Island statutory language includes protections of groundwater for future drinking water supplies.[60] Arguably, this could present a duty to protect groundwater in trust for future generations and could therefore link the PTD to this resource, although Rhode Island courts have not yet addressed the issue.

5.6 Wildlife

Under the Hazardous Waste Management Act, Rhode Island is the trustee of the air, water, fish, and wildlife of the state.[61] Although the state has "absolute control" over fish and fisheries within the public domain,[62] courts have not explicitly linked state sovereignty of wildlife to the PTD.[63]

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[57] Palazzolo v. Rhode Island, 533 U.S. 606, 606 (2001) (noting that the lands were in a salt marsh, subject to tidal flooding).
[58] Palazzolo v. State, No. WM 88-0297, 2005 WL 1645974, *2, *6 (R.I. Super. July 5, 2005) ("there is substantial geologic evidence which shows this pond to have been tidal for more than 2000 years.").
[59] *Id.* at *7.
[60] R.I. GEN. LAWS § 46-13.1-2(3) (2011) ("It is a paramount policy of the state to protect the purity of present and future drinking water supplies by protecting aquifers, recharge areas, and watersheds . . .").
[61] R.I. GEN. LAWS § 23-19.1-22 (c) (2011) ("The state, by and through the department of environmental management, is the trustee of the air, water, fish, and wildlife of the state.").
[62] Coggeshall v. Harbor Comm'n, 146 A. 482, 484 (R.I. 1929) ("The state has absolute control over fish and fisheries within the public domain, and the General Assembly may exercise this control through a board or a commission.").
[63] *See* Cherenzia v. Lynch, 847 A.2d 818, 823 (R.I. 2004) (in deciding whether the public right of fishing under the Rhode Island Constitution allowed a restriction on SCUBA equipment used to gather shellfish, the court found that the legislature had the ability to limit the type of equipment uses without infringing on the constitutionally protected right to access to fishing). "This power includes the ability to regulate the public or private fisheries, prohibit certain

5.7 Uplands (beaches, parks, highways)

5.7.1 Highways/Public Dedication

According to the 1978 decision of the Rhode Island Supreme Court in *Robidoux v. Pelletier*, public dedications of uplands are effectively put to a public use when two elements are satisfied: "(1) a manifest intent by the landowner to dedicate the land in question, called an incipient dedication or offer to dedicate; and (2) an acceptance by the public either by public use or by official action to accept the same on behalf of the municipality."[64] Rhode Island courts consider the dedication of private land to public use to be "an exceptional and unusual method of passing title" to land.[65] The public can accept a roadway for public use by decades of continuous use.[66] Once accepted as a public use, a dedicated property cannot be revoked so long as the public use continues.[67]

5.7.2 Municipal Beaches

The Rhode Island Constitution protects "privileges of the shore," which include access to the sea and passage along the shore. In *Jackvony v. Powel*, the Attorney General sued three members of the Easton's Beach Commission of the City of Newport when the city sought to fence a beach from the mean high-water mark to the low-water mark, with the fence's purpose "[t]o keep nonresidents from using the beach for nothing and thus protect Newport taxpayers."[68]

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fishing methods, prescribe the duration of free fishing, and withhold from the public the use of shellfish beds." *Id.* at 824.

[64] 391 A.2d 1150, 1154 (R.I. 1978).

[65] Volpe v. Marina Parks, Inc., 220 A.2d 525, 529 (R.I. 1966).

[66] Newport Realty, Inc. v. Lynch, 878 A.2d 1021, 1042 (R.I. 2005) ("through over eight decades of continuous use, the public accepted this offer."). *See also* Talbot v. Town of Little Compton, 160 A. 466, 469 (R.I. 1932) (a long and uninterrupted public use of a beach raises a presumption of dedication with the municipality holding the title to the land in trust for the inhabitants and the public).

[67] Almy v. Church, 26 A. 58, 59 (R.I 1893) (public use of property as a road); Union Co. v. Peckham, 12 A. 130, 132 (R.I. 1888) ("dedication, once complete, cannot be revoked, so long as the public use is maintained and public accommodation and private right might be affected by an interruption of the enjoyment").

[68] Jackvony v. Powel, 21 A.2d 554, 555–56 (R.I. 1941).

The Rhode Island Supreme Court held that the Commission lacked power to restrict passage along the shore because one of the privileges of the shore is the public right of passage.[69]

5.7.3 Private Beaches

As noted above,[70] a private or public entity cannot prevent all passage along the land between the high and low water marks. But so long as the land involved is upland of the high water mark, the PTD does not interfere with a littoral property owner's ability to exclude absent a private dedication for a public use.[71]

6.0 Activities Burdened

6.1 Conveyance of Property interests

In Rhode Island, lands subject to the PTD pass to private parties only jus privatum rights; reserved interests by the state held in superior trust for the public.[72] Lands subject to the flow of the tides are impressed with *jus publicum* rights, and only a grant from the legislature, either in the form of an express grant or a harbor line statute, will remove PTD rights.[73] Public rights are not subject to loss by adverse possession.[74]

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[69] *Id.* at 558. ("The decision of this court is that public laws 1940, chap. 848, is unconstitutional and void because it is in violation of article I, section 17, of the constitution of this state.").
[70] *See supra* § 5.7.2.
[71] *See* Waldman v. Town of Barrington, 227 A.2d 592, 595 (R.I. 1967) ("[W]e are persuaded that when the term 'beach' is used in any legal context that bears on property rights, it will be held to apply to that area of land that lies between the high-water mark and the beginning of the upland.").
[72] Palazzolo v. State, No. WM 88-0297, 2005 WL 1645974 (R.I. Super. July 5, 2005) (because 50% of the land in question was subject to the tide, "as against the State, Palazzolo has gained title and the corresponding property rights to only one-half of the parcel in question").
[73] *See id.*; Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1044 (R.I. 1995); Allen v. Allen, 32 A. 166 (R.I. 1895); Bailey v. Burges, 11 R.I. 330, 331–32 (1876).
[74] Hall v. Nascimento, 594 A.2d 874, 877 (R.I. 1991) ("Statutorily private individuals cannot adversely possess shoreline or waterfront property located within the State of Rhode Island because such property is maintained for public use . . . [but] is not limited to shoreline property.").

6.2 Wetlands

The PTD in Rhode Island encumbers wetlands subject to the tides with the PTD rights of navigation, commerce, and fishing.[75] Without a valid grant by the state in the form of express legislation or a harbor line act, wetlands cannot be filled.[76] A Rhode Island criminal statute defines an "intertidal salt marsh" as containing several different species of plants; their existence in a specified area is prima facie evidence of an intertidal salt marsh.[77]

6.3 Water Rights

A riparian land owner possesses a common law right to wharf out for access to the sea,[78] so long as the wharf does not impede navigation or the rights of adjacent riparian owners.[79] The right attaches only to lands that actually extend to the water.[80] Under the current statutory scheme, the legislature has limited wharfing out by requiring CMRC approval for filling tidal waters.[81] Although the public enjoys the rights to access water for navigation, fishing, and commerce under the PTD of Rhode Island,[82] the PTD imposes no apparent limitation on the amount of water diverted from streams.[83]

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[75] *See* Palazzolo v. State, No. WM 88-0297, 2005 WL 1645974, *13 (R.I. Super. July 5, 2005).
[76] *Id.*
[77] R.I. GEN. LAWS § 11-46.1-1(e) (2011) ("For the purposes of this chapter an intertidal salt marsh shall be prima facie presumed to be those areas upon which grow some, but not necessarily all, of the following: salt marsh grass (Spartina alterniflora), black grass (Juncus gerardi), seaside lavender (Limonium carolinianum), saltwort (Salicornea europaea), salt meadow grass (Spartina patens), spike grass (Distichlis spicata), salt marsh bullrush (Scirpus maritima) and sand spurrey (Spergularia marina), and upon which exists salt marsh peat.").
[78] Clark v. Peckham, 10 R.I. 35, 38 (1871) ("the riparian owner has a right of access to the great highway of nations, of which he cannot be deprived, is recognized by a great number of cases").
[79] Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1260 (R.I. 1999). *See also* Nugent ex rel. Collins v. Vallone, 161 A.2d 802, 806 (R.I. 1960) (a permit from the Army Corps of Engineers was evidence that a structure built in the waterway was not an impediment to navigation).
[80] City of Providence v. Comstock, 65 A. 307, 310 (R.I 1906) ("Riparian rights do not attach to any lands, however near, which do not extend to the water. Nor do they necessarily attach to a state grant of lands lying below the tidal high-water mark.").
[81] *Town of Warren*, 740 A.2d at 1260; Nugent ex rel. Collins v. Vallone, 161 A.2d 802, 805 (R.I. 1960). R.I. GEN. LAWS § 46-23-6(2) (2011).
[82] *Supra*, note 72.
[83] *Cf.* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983) ("The public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state to protect public trust

6.4 Wildlife Harvests

As early as 1850, Rhode Island courts recognized that the legislature may enact restrictions on fishing harvests for the protection of a public fishery.[84] The Rhode Island Constitution qualifies access to public fisheries by imposing duties on the legislature to preserve and protect fishing stocks.[85] The legislature can regulate the methods of harvest without impeding public rights to access fisheries, so long as the regulation is for conservation measures.[86]

7.0 Public Standing

7.1 Common Law-Based

Only the attorney general can bring suit to enforce public rights at common law because only the proper public officer can enforce public rights.[87] In *Mowry v. City of Providence*, the Rhode Island Supreme Court upheld the dismissal of a petition for an injunction when citizens sued to prevent the City of Providence from filling portions of ponds formerly held by the state.[88] The court decided that "private individuals cannot maintain a suit to prevent injury to a public right, when they will suffer simply in common with the rest of the people; but a suit for such purpose, if brought, must be brought by the attorney general, or some other officer thereunto

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uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources.")

[84] State v. Cozzens, 2 R.I. 561, 564 (1850) ("the constitutional right is so regulated as to reserve to the public the greatest benefit").

[85] Riley v. Rhode Island Dept. of Envtl. Mgmt., 941 A.2d 198, 208 (R.I. 2008) ("Our canons of constitutional interpretation require that we look at the plain language of section 17, and it is clear to us that the 'right of fishery' is qualified by the concomitant language of the 1970 amendment, which imposes a duty on the General Assembly to preserve, regenerate, and conserve through resource planning.").

[86] *See* Cherenzia v. Lynch, 847 A.2d 818, 823–24 (R.I. 2004) (no constitutional right to take shellfish with SCUBA gear).

[87] Nugent ex rel. Collins v. Vallone, 161 A.2d 802, 804 (R.I. 1960) ("Without the permission of the attorney general the relators could not maintain a bill for such relief on the grounds alleged therein, since suit for the enforcement of purely public rights may be brought only by the proper public officer."); Dupre v. Doris, 26 A.2d 623, 625 (R.I. 1942) ("'Suits for the public should be placed in public and responsible hands. This is the rule in quo warranto *** the practice of requiring the intervention of a public officer in that proceeding is uniform.'") (quoting O'Brien v. Members of Bd. of Aldermen of City of Pawtucket, 25 A. 914, 915 (R.I. 1892).

[88] 16 A. 511 (R.I. 1889).

duly authorized."[89] Absent special injury,[90] asserting purely public rights is reserved for the attorney general.[91]

7.2 Statutory Basis

Under the Rhode Island Administrative Procedures Act,[92] a person or organization can gain standing by demonstrating "injury in fact" from agency action, which includes adverse environmental degradation of PTD resources if a person or member of the public uses the affected PTD resources.[93] However, under the Fresh Water Wetlands Act,[94] only the director of the Department of Environmental Resources may enforce causes of action under the Wetlands Act.[95]

7.3 Constitutional Basis

The Rhode Island Constitution provides that it is the duty of the general assembly to protect the "air, land, water, plant, animal, mineral and other natural resources of the state."[96] Although Rhode Island courts have determined that the legislature retains plenary power in

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[89] *Id.* at 915; O'Brien v. Members of Bd. of Aldermen of City of Pawtucket, 25 A. 914, 915 (R.I. 1892) ("If individuals may be prosecutors, and a suit should be brought by one, which should fail, it would be no bar to a suit by another who was not a party to the first one.").

[90] *See* Rhode Island Motor Co. v. City of Providence, 55 A. 696, 697 (R.I. 1903).

[91] *See* DeLeo v. Coastal Res. Mgmt. Council, C.A. NO. 86-5127, 1988 WL 1016794 (R.I. Super. Aug. 9, 1988) ("plaintiff as a private citizen is precluded from asserting purely public rights."). Similarly, public nuisances are to be brought by prosecution of the Attorney General. Rhode Island Motor Co. v. City of Providence, 55 A. 696, 698 (R.I. 1903).

[92] R.I. GEN. LAWS § 42-35 *et seq.* (2011).

[93] *See* E. Greenwich Yacht Club v. Coastal Res. Mgmt. Council, 376 A.2d 682, 685 (R.I. 1977) ("They contend that construction will damage the coastal environment and that their use of waters surrounding Chepiwanoxet Island will thereby be affected. Use by and injury to its members provides the organizational plaintiff with the essential element of an 'injury in fact.'").

[94] R.I. GEN. LAWS § 2-1-18 *et seq.* (2011).

[95] *See* Citizens for Pres. of Waterman Lake v. Davis, 420 A.2d 53, 57 (R.I. 1980) ("In view of the express statutory scheme of enforcement, we conclude that all enforcement powers are vested in the director. Moreover, nothing in the legislation indicates either expressly or implicitly an intent to create a remedy for a private citizen or a town or city to enforce the provisions of the wetlands act.").

[96] R.I. Const. art. I, § 17 ("it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.").

protecting the resources announced in the constitution,[97] the courts have not stated that breaches of the duty to protect the state's resource are actionable by the public. But arguably, by placing a duty on the legislature, gross deviations or abdications of the duty to protect the state's natural resources should be judicially enforceable by the public.

8.0 Remedies

8.1 Injunctive Relief

Courts typically apply injunctive relief for violations of public rights under the PTD.[98] For example, in *Rhode Island Motor Co. v. City of Providence*, the Rhode Island Supreme Court recognized the difference between a public right enforced by the Attorney General and a private right enforceable by a private party.[99] Comparing placing an obstruction to private land and obstructing a private wharf, the court noted that "[i]f that obstruction was of such a nature and so placed as to prevent the access of any proprietor to his own land, then there would be a special damage to him for which he might sue."[100] Special injury is therefore eligible for injunctive relief as an exception to the rule that purely public rights can only be enforced by the Attorney General.[101]

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[97] In re Request for Advisory Opinion from House of Representatives (Coastal Res. Mgmt. Council), 961 A.2d 930, 942 (R.I. 2008) ("[W]e would also emphasize that the General Assembly remains fully empowered to carry out its constitutional duty to protect the natural environment of the state through the vigorous and proactive exercise of its legislative powers.").

[98] Jackvony v. Powel, 21 A.2d 554 (R.I. 1941) ("The substantial relief prayed for in this bill was that the respondents and their servants and agents be permanently enjoined from erecting or causing to be erected a fence or other barrier on such portion of the shore between the high and low water lines . . ."); Rhode Island Motor Co. v. City of Providence, 55 A. 696, 697 (R.I. 1903) ("In the case of a highway on land there may be an obstruction of the right of the public for which the remedy would be by indictment . . . [s]o in the case of the highway on tide waters.").

[99] 55 A. 696, 697 (R.I. 1903).

[100] *Id.*

[101] *See supra* notes 87–91.

8.2 Damages for Injuries to Resources

Rhode Island criminal law provides criminal and civil penalties for damaging intertidal salt marshes.[102] While the court can impose fines for acts that disturb the ecology of a salt marsh or daily violations of orders from the director of environmental management,[103] the court can also order that a party that damages the salt marsh ecology to restore the salt marsh to the extent practical upon complaint by the director.[104]

8.3 Defense Against Takings Claims

The Rhode Island Constitution provides that "private property shall not be taken for public uses, without just compensation."[105] However, in the same article, the Constitution states that when the state and municipalities exercise control and regulation of land and waters for preservation, regeneration, restoration of the natural environment, public rights of fishing, and privileges of the shore, state control is not deemed to be a public use of private property.[106] Therefore, these regulatory controls of private property would not be a taking.

Illustrative of PTD defense to takings is the case of *Palazzolo v. State*.[107] On remand from the United States Supreme Court, the superior court found that the PTD impressed public rights on the tide-flowed lands of the littoral landowner, thereby reducing the plaintiff's investment-backed expectations.[108] The Superior Court noted that Palazzolo did not have an actionable takings claim because background principles of the PTD and requirements for CRMC assent for wetland fills demonstrated that he had only modest investment backed expectations.[109]

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[102] R.I. GEN. LAWS § 11-46.1-1 (2011) (titled "Disturbing intertidal salt marshes--Penalty").
[103] *Id.* at (b), (c).
[104] *Id.* at (d).
[105] R.I. Const. art. I, § 16.
[106] *Id.*
[107] *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974 (R.I. Super. July 5, 2005).
[108] *Id.* at *7.
[109] *Id.* at *14.

But the PTD in that case was not a complete bar to takings to all of his property, because half of the property was above the high-water line, and therefore not subject to the PTD.[110]

[110] *Id.* at *13–14.

SOUTH DAKOTA

Public Trust Doctrine in South Dakota

Carter Moore

1.0 Origins

The evolution of the South Dakota public trust doctrine (PTD) begins with the passage of the Desert Land Act of 1877, which severed water rights from federal land patents, setting the stage for South Dakota to adopt the water rights doctrine of prior appropriation in 1905.[1] The South Dakota legislature expanded the public ownership of water until,[2] in 1955, the legislature declared all unappropriated water public property.[3] The South Dakota Supreme Court construed this broad declaration of public ownership of water to apply the PTD to all unappropriated water in the state.[4]

Uses protected by the South Dakota PTD date to 1915 when the South Dakota Supreme Court fashioned a state navigable-in-fact test.[5] By then, PTD uses had evolved from traditional navigation, commerce, and fishing to include recreational activities.[6]

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[1] Desert Land Act, 43 U.S.C. § 321; *see also* Parks v. Cooper, 676 N.W.2d 823, 831-832 (S.D. 2004).

[2] 1905 S.D. Laws ch .132 § 1 ("All waters within the limits of the state from all sources of water supply not navigable, belong to the public and are subject to appropriation for beneficial use.").

[3] 1955 S.D. Laws ch. 430, § 61.0101 (codified as amended at S.D. CODIFIED LAWS §§ 46-1-1- 5 (2011); *See also Parks*, 676 N.W.2d at 831-832 (tracing history of legislative enactments concerning water ownership). For an analysis of South Dakota water law, *see* John H. Davidson, *South Dakota Ground Water Protection Law*, 40 S.D. L. Rev. 1 (1995).

[4] *Parks*, 676 N.W.2d at 838-39. Notwithstanding expansive language the *Parks* Court used to describe its holding, the opinion addressed only unappropriated waters.

[5] Flisrand v. Madson, 152 N.W. 796 (S.D. 1915) (adopting the "pleasure boat" navigability test).

[6] *Id.* at 801 (stating a landowner may not obstruct the public's right to access the navigable water and shores for "navigating, boating, fishing, fowling, and like public uses").

However, the extent that the public may use non-navigable water bodies on private lands for recreation remains unsettled.[7]

2.0 The Basis of the Public Trust Doctrine in South Dakota

The South Dakota PTD is both a common law doctrine and codified in statute.[8] As the South Dakota Supreme Court stated in *Parks v. Cooper*, "while we regard the [PTD] and Water Resources Act as having shared principles, the Act does not supplant the scope of the [PTD]."[9] The *Parks* court stated that the state Water Resources Act[10] embodies the "core principles" of the PTD: public interest in the use of all water of the state, state authority to define beneficial use of water, and public ownership of water.[11] That statute calls for regulation of appropriative and consumptive uses of water, while also requiring the state to preserve water for public use.[12] That court also identified the Environmental Protection Act as reflecting the PTD;[13] however, it stated the PTD "exists independent of any statute."[14] The *Parks* court concluded that both the state's sovereign powers and the legislative mandate provide that all waters in the state be held in trust for the public.[15]

3.0 Institutional application

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[7] *Parks*, 676 N.W.2d, at 841. *See infra* § 4.2.
[8] *Id.* at 838.
[9] *Id.*
[10] S.D. CODIFIED LAWS § 46-1.
[11] *Parks*, 676 N.W.2d at 838.
[12] *Id.* at 837.
[13] S.D. CODIFIED LAW § 34A-10-1; *Parks*, 676 N.W.2d at 838 ("[W]e find the [PTD] manifested in the South Dakota's Environmental Protection Act . . . .").
[14] *Parks*, 676 N.W.2d at 838.
[15] *Id.* at 838-39 ("Today we acknowledge, in accord with the State's sovereign powers and the legislative mandate, that all waters within South Dakota, not just those waters considered navigable under the federal test, are held in trust by the State for the public.").

The South Dakota PTD originally protected unobstructed navigation, and has expanded to include protection of public recreation rights. Beyond recreation rights, the South Dakota Supreme Court has suggested that the PTD may protect ecological resources as well.[16]

3.1 Restraint on alienation in private actions

Although the South Dakota Supreme Court has not addressed the PTD in the private conveyance context, the court is unlikely to allow a private conveyance to extinguish the trust. In *Parks v. Cooper*, the South Dakota Supreme Court stated that the PTD applies to all waters in the state, irrespective of bed ownership.[17] *Parks* arose after several years of wetter than average weather created lakes on privately owned land where previously there was no deep standing water.[18] Public rights-of-way allowed the public access to these new lakes for recreational purposes.[19] The underlying landowners filed suit against the state, seeking to enjoin public access to the lakes.[20] The trial court agreed with the landowners and granted an injunction, reasoning that because the bodies of water were not "meandered" (meaning not platted as lakes when the government surveyed the area before the time of statehood), the waters were not navigable.[21] Thus, the state did not take title to the bed at statehood, and they therefore were private.[22] The South Dakota

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[16] *Id.* at 841 ("Other, more useful public purposes may be assigned to these lakes, such as wildlife habitat.").
[17] *Id.* at 838-39 ("Today we acknowledge, in accordance with the State's sovereign powers and the legislative mandate, that all waters within South Dakota, not just those waters considered navigable under the federal test, are held in the trust by the State for the public.").
[18] *Id.* at 824-25.
[19] *Id.* at 826- 28.
[20] *Id.* at 824-25.
[21] *Id.* at 828.
[22] *Id.*

Supreme Court reversed, declaring that all water in the state is public.[23] In the course of its decision, the South Dakota Supreme Court relied on *Illinois Central Rail Road v. Illinois* for the proposition that if the state owns the bed of a lake, the state cannot convey that interest "unless it would promote a public purpose."[24] Due to the court's reliance on *Illinois Central*, it is unlikely that the PTD would allow large-scale privatization of trust resources.

3.2 Limit on Legislature

The South Dakota Supreme Court has not had the opportunity to directly address the issue of the PTD restraining the legislature; however, the court would likely strike down alienation of trust resources unless that conveyance promoted a public purpose.[25] Few, if any, conflicts have arisen in South Dakota over state alienation of trust resources, in part because there are few navigable-for-title waters in South Dakota.[26] However, the *Parks* court noted that the beds of navigable waters are held in trust for the public and cannot be conveyed "unless [the conveyance] would promote a public purpose."[27]

Further, the legislature may lack the power to restrict public access on public waters where the state owns both the water and the lakebed.[28] In *Parks*, the court specifically addressed only the question whether non-meandered, non-permanent water

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[23] *Id.* at 838-39.
[24] *Id.* at 829.
[25] *Id.*
[26] Hillebrand v. Knapp, 274 N.W. 821, 824 (S.D. 1937) (Polley, J., dissenting) ("If any lake in South Dakota is a navigable lake, then every lake in the state is a navigable lake; and if any lake in the state is non-navigable, then every lake in the state in non navigable for they are all exactly alike, all flat bottomed shallow lakes. During wet seasons they fill with water to highwater mark, and during dry seasons the water recedes from the high-water mark until, if the drought continues long enough they dry up altogether.").
[27] *Parks*, 676 N.W.2d at 829.
[28] *Id.* at 839-40.

bodies were public or private. The court held that such water bodies are public, but reserved the question of the extent that the public may use those waters for recreation.[29]

3.3 Limit on administrative action

The South Dakota Supreme Court has determined that the PTD does not always limit administrative action. In *South Dakota Wildlife Federation v. Water Management Board*, the court concluded that the PTD did not constrain the Water Management Board's determination of the ordinary high water mark (OHWM) for Waubay Lake, a meandered navigable lake.[30] The South Dakota Wildlife Federation (Federation) argued that the PTD required the OHWM of Wauby Lake to be set at the level of the lake upon statehood.[31] The trial court reversed the Water Management Board's determination of OHWM and sided with the Federation, setting the OHWM about twelve feet higher than the board's decision.

The supreme court disagreed, reasoning that (1) the riparian owner has title to accretions, and that this was an accretion; and (2) there was insufficient evidence to support overturning the Water Management Board's decision on the OHWM.[32] The South Dakota Supreme Court therefore reversed the trial court and reinstated the Water Management Board's determination because the board's decision was not "clearly erroneous,"[33] a standard of review significantly more deferential than the "hard look" standard of review. Although the PTD does not always limit administrative action, the

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[29] *Id.* at 841.
[30] South Dakota Wildlife Federation v. Water Management Board, 382 N.W.2d 26 (S.D. 1986).
[31] *Id.* at 32.
[32] *Id.*
[33] *Id.* at 29.

South Dakota Supreme Court has yet to address the circumstances under which the PTD might constrain administrative action.

4.0 Purposes

In *Parks v. Cooper*, the South Dakota Supreme Court stated that the Water Resources Act embodies the core principles of the PTD: (1) the people of the state have a paramount interest in the use of all the water of the state; (2) the state must determine how the water of the state, both surface and ground, should be developed for the greatest public benefit; and (3) all water within the state is the property of the people of the state.[34] That court decided that the PTD "imposes an obligation on the State to preserve water for public use."[35] Public use is determined by whether water is capable of being used for public purposes; and, public purposes, in turn, are defined as including, "boating, fishing, swimming, hunting, skating, picnicking and similar recreational pursuits."[36] Beyond these listed public purposes, the legislature may designate other, useful public purposes, such as wildlife habitat.[37]

4.1 Traditional purposes

The South Dakota Supreme Court has stated that the PTD is anti-monopolistic, in that it is intended to place "the integrity of our water courses beyond the control of individual owners."[38] As stated above,[39] there are few waters in South Dakota to which the traditional purposes apply.[40]

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[34] *Parks*, 676 N.W.2d at 838.
[35] *Id.* at 841.
[36] S.D. CODIFIED LAWS § 43-17-21 (2004).
[37] *Parks*, 676 N.W.2d at 841.
[38] *Id.* at 835 (quoting State v. Brace, 36 N.W.2d 330, 335 (N.D. 1949)).
[39] *See supra* § 3.2.
[40] Hillebrand v. Knapp, 274 N.W. 821, 824 (S.D. 1937) (Polley, J., dissenting).

4.2 Beyond traditional purposes

The South Dakota Supreme Court has expanded the PTD to protect recreational uses of water bodies.[41] In 1915, in *Flisrand v. Madson*, the South Dakota Supreme Court stated that a private riparian landowner could use the water abutting his property, so long as he did not interfere with public uses of the water and the zone between the ordinary high water mark and the ordinary low water mark, including recreation.[42] One year later, in *Anderson v. Ray*, the court upheld a statute permitting the construction of artesian wells for the purpose of maintaining water levels sufficient to allow public recreation on meandered navigable lakes.[43] However, although the court in *Parks v. Cooper* ruled that all unappropriated water in the state is subject to the PTD,[44] by not resolving the extent of the public's use right, the court left open the possibility that the PTD may not protect recreation on every water body in the state.[45]

The role of the PTD in relation to ecological concerns is unclear. Beyond the recreational uses suggested by the *Flisrand* court,[46] the *Parks* court suggested that wildlife habitat could be a public purpose, and therefore protected by the PTD, but ultimately left that determination to the legislature.[47] Neither the legislature, nor the courts have revisited this issue.

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[41] *Id.* at 840.
[42] Flisrand v. Madson, 152 N.W. 796, 801 (S.D. 1915) (ruling the public has the right to use public waters for "navigating, boating, fishing, fowling, and like public purposes").
[43] Anderson v. Ray, 156 N.W. 591 (S.D. 1916).
[44] *Parks*, 676 N.W.2d at 838-39.
[45] *Id.* at 841.
[46] *Flisrand*, 152 N.W. 796, 801 (S.D. 1915).
[47] *Parks*, 676 N.W.2d at 841. The breadth of *Parks* is unclear because the South Dakota Supreme Court upheld the lower court's injunction against public access despite the lower court's incorrect reasoning. The supreme court stated "the trial court erred in declaring these waters to be private and in granting an injunction on that basis. In the

5.0 Geographic scope of applicability

The South Dakota PTD applies to all unappropriated water in the state, to the ordinary high water mark.[48] The trust is ambulatory, following the permanent movements of waters.[49] Although the trust has potential to expand, it has stayed close to the waters of South Dakota.

5.1 Tidal

South Dakota has no tidal waters.

5.2 Navigable in fact

As early as 1915, in *Flisrand v. Madson*, the South Dakota Supreme Court recognized that the PTD extends to navigable-in-fact waters.[50] *Flisrand* was a quiet title action brought by a riparian landowner against a person living on an island located 297 feet from shore.[51] The trial court concluded that because the island was not relicted land (meaning that the island was not caused by gradual recession of the waters), which the riparian would own as incident to his riparian ownership,[52] the riparian had no claim to the island.[53] The South Dakota Supreme Court affirmed the trial court because the lake

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meantime, in the interest of maintaining the status quo, we leave the injunction intact until such time as, on remand, the trial court has the opportunity to consider the positions of the parties . . . ." *Id.* Because the *Parks* court expected the lakes at issue to recede in the near future, the supreme court was persuaded that leaving the injunction in place was appropriate. It is an open question if a similar situation would now result in the same order.

[48] South Dakota Wildlife Federation v. Water Management Board, 382 N.W.2d 26, 31-32 (S.D. 1986).

[49] Hillebrand v. Knapp, 274 N.W. 821, 823 (S.D. 1937) (stating "we cannot concede that temporary nonnavigability divests the state of title to the lake bed").

[50] *Flisrand*, 152 N.W. at 800.

[51] *Id.* at 797.

[52] H*illebrand*, 274 N.W. at 823.

[53] *Flisrand*, 152 N.W. at 801.

was navigable, and therefore the state, not the riparian landowner, owned the bed.[54] To resolve this case, the *Flisrand* court departed from the traditional common law rule that only tidal waters are navigable.[55]

5.3 Recreational waters

Relying on public ownership of water, in *Parks v. Cooper*, the South Dakota Supreme Court decided that the PTD applied to all water in the state regardless of bed ownership.[56] Although the *Parks* court ultimately declined to lift an injunction that barred the public from accessing the three non-navigable lakes at issue in the suit, it did so to "maintain[] the status quo," not because the lakes were private.[57] The court drew a distinction between the public right of recreation on meandered waterbodies,[58] which the public may use for recreation, and non-meandered waterbodies - which were at issue in *Parks* - which the court had never previously addressed.[59] The court discussed "beneficial use" and its relation to public recreational use,[60] saying that the legislative reason for abolishing private ownership of "standing water" was to preserve water for "beneficial uses," which the court said was within the discretion of the legislature.[61] The court

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[54] *Id.* at 800-01.
[55] *Id.* at 799 (reasoning that because the legislature included 'navigable in the statute and no tidal navigable water exist in the state, 'navigable' must mean something other than tidal navigable).
[56] Parks v. Cooper, 676 N.W.2d 823 at 838-39; *see also* Harrison C. Dunning, 2 WATERS AND WATER RIGHTS § 30.04 (Amy K. Kelley ed., 3d ed. 2011) (explaining that the theory of public ownership of water "obviates the need for a finding as to bed ownership").
[57] *Parks*, 676 N.W.2d at 841.
[58] *Id.* at 828 (explaining that meandered lakes are those lakes that were plotted out as lakes when the federal government surveyed the land before statehood).
[59] *Id.* at 839 ("[A]lthough state law in both South and North Dakota makes all water public property, neither state has gone so far as to hold that non-meandered lakes navigable under the state test are open for public recreational uses.").
[60] *Id.* at 840-41.
[61] *Id.*

observed that the legislature, or the Department of Environment and Natural Resources (which has authority over public water lying on or under private land), may designate recreation as a "beneficial use," which would conclusively define the extent of the public rights to recreate in non-navigable, non-meandered water bodies.[62]

5.4 Wetlands

Although no South Dakota Court has addressed the PTD's applicability to wetlands, the PTD extends to all unappropriated waters in the state.[63] To the extent a court would consider a wetland a non-meandered waterbody, the PTD would seem to apply. However, the activities the trust would allow in wetlands is an open question.

5.5 Groundwater

No South Dakota Court has addressed the PTD's applicability to groundwater; however, the PTD likely extends to groundwater. The Water Resources Act which, according to *Parks v. Cooper*, embodies the "core principles" of the PTD,[64] explicitly extends to groundwater.[65] The *Parks* court made no exception for groundwater in declaring, "all waters within South Dakota . . . are held in trust by the state for the public."[66]

5.6 Wildlife

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[62] *Id.*
[63] *Id.* at 838-39 ("Today we acknowledge, in accord with the State's sovereign powers and the legislative mandate, that all waters within South Dakota, not just those waters considered navigable under the federal test, are held in trust by the State for the public.")
[64] *Id.* at 838.
[65] S.D. CODIFIED LAWS § 46-1-3 (1983) ("It is hereby declared that all water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation as provided by law.").
[66] *Parks*, 676 N.W.2d at 839.

In 1909, South Dakota codified the common law doctrine that the state owns wild game in its sovereign capacity.[67] This rule was confirmed in 1919 when the South Dakota Supreme Court stated that the state had a duty to "preserve game from the greed of hunters."[68] Since 1919, the South Dakota Supreme Court has reiterated the state's duty to preserve wild game a number of times.[69]

5.7 Uplands

With respect to a navigable waterbody, the riparian owns to the ordinary low water mark, but the title to the area between ordinary low and high water mark is subject to the public's superior use right.[70] The ordinary high water mark is the furthest upland reach of the trust.

6.0 Activities burdened

The activities that the PTD burdens are not well defined. However, the South Dakota Supreme Court has determined that the PTD burdens the exploitation of trust resources.

6.1 Conveyances of property interests

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[67] *See* 1909 SD Laws Ch. 420, § 19 (declaring birds, animals and fish are property of the state).
[68] State v. Pollock, 175 N.W. 557, 558 (S.D. 1919) ("it is not only the right but it is the duty of the state to take such steps as shall preserve the game from the greed of hunters").
[69] *See, e.g.*, *Pollock*, 175 N.W. at 558; State v. Halverson, 277 N.W. 2d 723, 724 (1979) ("The citizens of this state have an interest in the management of wildlife so that it can be effectively conserved"); Reis v. Miller, 550 N.W.2d 78, 84 (S.D. 1996) (Gilbertson, J., concurring) (confirming validity of State v. Pollock, 175 N.W. 557 (S.D. 1919); Benson v. State, 710 N.W.2d 131, 145 (S.D. 2006) (upholding legislation allowing hunting on section-line easements and retrieval of downed game from private property).
[70] Anderson v. Ray, 156 N.W. 591, 595 (S.D. 1916) (holding that a riparian's title is "subject to the superior right to the public" in the shore zone).

No South Dakota cases address the PTD burdening property transfers. However, a landowner can own the shore zone, subject to the public's superior rights impress the title.[71] No case indicates that a conveyance would extinguish the public's use rights.

6.2 Wetland fills

Although no South Dakota case addresses wetland fills directly, the PTD applies to all unappropriated waters in the state.[72] The *Parks* court indicated that the PTD may extend to ecological protection, which may burden wetland fills, but the court left determination of the best uses of non-navigable, non-meandered waters to the legislature.[73]

6.3 Water rights

The South Dakota Supreme Court has yet to address whether the PTD may require or authorize reexamination of vested water rights. But the court has indicated that vested water rights are within the prevue of Fifth Amendment takings claims.[74]

6.4 Wildlife harvests

The South Dakota PTD burdens wildlife harvests.[75] The South Dakota Supreme Court confirmed this rule in 1919, in *State v. Pollock*, upholding a conviction for fishing out of season.[76]

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[71] *Id.* at 594-95.
[72] *Parks*, 676 N.W.2d at 838.
[73] *Id.* at 841 ("Other, more useful public purposes may be assigned to these lakes, such as wildlife habitat. It remains finally for the Legislature to decide these questions.").
[74] St. Germain Irrigating Co. v. Hawthorn Ditch Co., 143 N.W.2d 124, 127 (1913) ("Vested property rights in waters in this state, whether held as riparian or by prior appropriation, could not thus be taken or confiscated or interfered with by any such act of the Legislature.")
[75] State v. Pollock, 175 N.W. 557, 559 (S.D. 1919) ("[A]s an exercise of its police powers and *to protect its property for the benefit of its citizens*, it is not only the right, but it is the

7.0 Public standing

Although no case holds that the South Dakota PTD supports an independent private cause of action, the South Dakota Environmental Protection Act[77] empowers private individuals to file suit to protect "the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."[78]

7.1 Common law-based

No South Dakota case articulates a common law-based standing doctrine. The *Parks* court stated that the Water Resources Act did not totally displace the PTD, but the court did not clarify if, and to what extent, the common law PTD may authorize public standing.[79]

7.2 Statutory basis

Since 1973, when the South Dakota Legislature passed the Environmental Protection Act, private individuals have had the ability to sue any person for declaratory or equitable relief to protect the air, water, and other natural resources from pollution, impairment, or destruction by any person.[80] This statute does not require public nuisance-

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duty of the state to take such steps as shall preserve the game from the greed of hunters." (emphasis added)).

[76] *Id.*

[77] S.D. CODIFIED LAWS § 34A-10-1 (1994).

[78] *Id.*

[79] *Parks*, 676 N.W.2d at 838. The plaintiffs in *Parks v. Cooper* were landowners who sought to enjoin the state from allowing the public to use the waters overlying their respective lands. Because these plaintiffs had standing in a traditional sense, the case offers little insight into the extent of public standing under the South Dakota PTD. In *South Dakota Wildlife Federation v. Water Management Board*, 382 N.W.2d 26 (S.D. 1986), the South Dakota Supreme Court assumed standing, which suggests that an individual or group that is active in the administrative process leading to the issuance of a permit may challenge that permit once it is issued.

[80] The attorney general, any political subdivision of the state, any instrumentality, or agency of the state or of a political subdivision thereof, any person, partnership,

like special injury to support standing.[81] However, a prospective plaintiff may have to participate in an administrative hearing before bringing suit.[82] The public has not used this statute to confer standing, so the contours of the PTD in this context are undefined.

7.3 Constitutional basis

South Dakota does not have a constitutional standing provision relating to the PTD.

8.0 Remedies

In South Dakota, the law concerning remedies is not well developed because few plaintiffs have filed suits on the basis of the PTD. However, it is likely that the PTD supports injunctive relief, declaratory relief, and may work as a defense to takings claims. But the PTD will likely not support an award of money damages.

8.1 Injunctive relief

Injunctive relief is available both as a remedy under the South Dakota Environmental Protection Act and as a common law remedy. Under the South Dakota

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> limited liability company, corporation, association, organization, or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, limited liability company, corporation, association, organization, or other legal entity for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment, or destruction. This section does not confer a right of action to challenge the issuance of a permit or license where the plaintiff has been notified of an agency proceeding in which the issues of environmental harm complained of might have been considered unless the agency refused to hear the complaint at such hearing. Actual notice or notice specified in the statute or rule governing the agency proceeding shall be sufficient.

S.D. CODIFIED LAWS § 34A-10-1 (2011).

[81] *Id.*

[82] *See Id.* (barring plaintiffs from bringing suits based on arguments that could have been raised at a hearing, but were not).

Environmental Protection Act, the state or any person may seek declaratory or injunctive relief to protect trust resources from pollution, impairment, or destruction.[83] No case law interprets this statute as it relates to the PTD.[84]

Prior to the passage of the Environmental Protection Act in 1973, the South Dakota Supreme Court used state ownership of the beds of navigable waters to uphold an injunction for interference with the trust.[85] For example, in *State v. Deisch*, a riparian landowner installed a drain between the ordinary high water mark and the ordinary low water mark,[86] land to which the riparian landowner held title.[87] The attorney general sued, seeking injunctive relief.[88] South Dakota is a low water state, meaning that the riparian landowner owns to the ordinary low water mark,[89] but the public has the right to ingress and egress on the land between the ordinary low water mark and the ordinary high water mark.[90] Without much discussion, the court affirmed a trial court order enjoining Deisch from draining the lake and requiring him to repair the bank he destroyed.[91] Although Deisch owned the land on which he installed the drain, his ownership was subject to the public's superior PTD rights.[92] These rights in the shore zone supported an injunction.

8.2 Damages for injuries to resources

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[83] S.D. CODIFIED LAWS § 34A-10-2 (1994).
[84] *See supra* § 7.2.
[85] State el rel. Clark v. Deisch, 162 N.W. 365, 366 (S.D. 1917) (state attorney general brought suit seeking, and obtaining, an injunction to prevent Deisch from draining a navigable lake).
[86] *Id.* at 365.
[87] *Id.* at 366 (explaining that a riparian landowner owns to the ordinary low water mark, but has only a qualified ownership between the ordinary low water mark and the ordinary high water mark).
[88] *Id.*
[89] Anderson v. Ray, 156 N.W. 591, 595 (S.D. 1916).
[90] *Deisch*, 162 N.W. at 366.
[91] *Id.*
[92] *Anderson*, 156 N.W. at 594-95.

There are no cases imposing damages for injury to trust resources.

8.3 Defense to takings claims

The South Dakota PTD is a defense to takings claims in several contexts. The state may artificially maintain water levels up to the ordinary high water mark, and any subsequent damage is non-compensable.[93] Similarly, the right to hunt small game and birds from improved public rights-of-way does not work a taking.[94] Further, although the South Dakota Supreme Court did not address the question of takings in *Parks v. Cooper*, it implied that extending the trust to include recreation on non-meandered lakes over private property, or ecological protection, would not work a taking.[95] The court stated that public funds spent on "services and infrastructure" supporting recreational uses may not be wisely spent, as the water in the lakes was likely to recede in the near future. The court also suggested that these lakes may be more useful as wildlife habitat.[96] At no point in its discussion did the court suggest that designating either wildlife habitat or public recreational use on temporary, non-meandered lakes over private land would work a taking.[97]

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[93] *Id.* at 595 (1916) (ruling the state may artificially or naturally keep the water level at or near the high water mark because the public has "superior right" in the land between high water and low water mark).

[94] S.D. CODIFIED LAWS § 41-9-8 (2009) (decriminalizing trespass for the purpose of retrieving game if under certain circumstances); *see also State v. Benson*, 710 N.W.2d 131 (S.D. 2006) (holding that S.D CODIFIED LAWS § 41-9-1.1(2) did not work a taking because it was merely a decriminalization of certain activities, and if there was any kind of taking of property, it was individual hunters, not the state, which took the property).

[95] *Parks v. Cooper*, 676 N.W.2d 823 at 838-39 (declaring state ownership of all unappropriated water within the state without discussing the implications for takings claims).

[96] *Id.* at 841 ("Other, more useful public purposes may be assigned to these lakes, such as wildlife habitat.").

[97] *Id.* ("However, it is ultimately up to the Legislature to decide how these waters are to be beneficially used in the public interest.").

TEXAS

The Public Trust Doctrine in Texas

Alexis Andiman

1.0 Origins

Texas courts have long acknowledged citizens' rights in navigable waters and their underlying lands,[1] consistent with legislative pronouncements[2] and a broadly-applicable constitutional provision.[3] Since 1942, the state's common law public trust doctrine (PTD) has slowly expanded,[4] as judicial opinions broadened the doctrine's traditional purposes[5] and increased its geographic scope.[6] However, a recent Texas Supreme Court decision interrupted this progress, severely curtailing the public's ability

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[1] *See, e.g*, City of Galveston v. Menard, 23 Tex. 349, 392 (1859) ("From the very nature of the property, which the government possesses in its navigable waters, and bays, and bayshores, it can be ordinarily best appropriated, by devoting it to public use; and by not granting away any exclusive right to it to any one."); *see also* State v. Bradford, 50 S.W.2d 1065, 1069 (Tex. 1932) ("From its earliest history this state has announced its public policy that lands underlying navigable waters are held in trust for the use and benefit of the public."); *see also* Butler v. Sadler, 399 S.W.2d 411, 415 (Tex. Civ. App. 1966) ("The courts of this state ... have consistently held that [tidal] waters ... and the lands and bottoms underlining [these waters] are the property of the State and are held by it in trust for the benefit of its inhabitants.").

[2] *See, e.g.*, TEX. WATER CODE ANN. § 11.0235 (2011) (asserting that "[t]he waters of the state are held in trust for the public").

[3] TEX. CONST. art. XVI, § 59(a) ("[T]he preservation and conservation of all ... natural resources of the State are each and all hereby declared public rights and duties."); *see also* Cummins v. Travis Cnty. Water Control and Improvement Dist., 175 S.W.3d 34, 49 (Tex. App. 2005) (quoting this provision to illustrate the necessity of Texas's public trust doctrine).

[4] *See* Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Trust*, 37 Ecology L.Q. 53, 89-90 (2010) (recognizing a nascent ecological PTD in Texas).

[5] *See* Goldsmith & Powell v. Texas, 159 S.W.2d 534, 535 (Tex. Civ. App. 1942) (indicating that Texas holds "all fish and other aquatic life ... in trust for the people" and, therefore, condemning the "pollution of streams and water courses").

[6] *See Cummins*, 175 S.W.3d at 49 (indicating that the PTD authorizes Texas to protect "all of the natural resources of this State" (quoting TEX. CONST. art. XVI, § 59(a))); *see also* Bonser-Lain v. Tex. Comm'n on Envtl. Quality, 2012 WL 3164561, at *1 (Tex. Dist. Aug. 2, 2012) (explaining that the PTD "includes all natural resources of the State including the air and atmosphere").

to access and enjoy the state's Gulf Coast beaches.[7] As a result, the future of the PTD in Texas remains uncertain.[8]

2.0 Basis

Although Texas's PTD is primarily a common law doctrine,[9] state courts have recently identified a constitutional basis for its expansion. Specifically, the Texas Constitution stipulates that "[t]he conservation and development of all of the natural resources of this State … are each and all hereby declared public rights and duties."[10] In 2005, the Texas Court of Appeals indicated that this provision required the state to hold its "scarce natural resources," including "the beds and waters of all navigable bodies," in trust for the public.[11] More recently, a Texas district court concluded that this clause

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[7] Severance v. Patterson, 370 S.W.3d 705, 725 (Tex. 2012) (finding that "avulsive events such as storms and hurricanes that drastically alter preexisting littoral boundaries" might eliminate existing public easements across dry sand).

[8] *Compare* Robin Kundis Craig, *Public Trust and Public Necessity Defenses to Takings Liability for Sea Level Rise Responses on the Gulf Coast*, 26 J. Land Use & Envtl. L. 395, 418 (2011) ("[A]s the recent cases in Texas emphasize, public trust boundaries migrate with changing sea levels, at least so long as the changes are natural and gradual.") *with* Richard J. McLaughlin, *Rolling Easements as a Response to Sea Level Rise in Coastal Texas: Current Status of the Law After Severance v. Patterson*, 26 Land Use & Envtl. L. 365, (2011) (arguing that *Severance* "has caused legal turmoil along much of the Texas coast and will likely subject the state to years of litigation") *and Open Beaches FAQ*, TEX. GEN. LAND OFFICE, http://www.glo.texas.gov/what-we-do/caring-for-the-coast/_documents/open-beaches/faq-open-beaches.pdf (last visited Mar. 6, 2013) (explaining that *Severance* created uncertainty that "may hamper the public's ability to visit the beach").

[9] *See* sources cited *supra* note 1; *see also* Goldsmith & Powell v. Texas, 159 S.W.2d 534, 535 (Tex. Civ. App. 1942) (recognizing a public trust in "fish and other aquatic life").

[10] TEX. CONST. art. XVI, § 59(a) (listing "the navigation of … inland and coastal waters" among the natural resources to be "conserv[ed]," "develop[ed]," and "preserv[ed]").

[11] *Cummins*, 175 S.W.3d at 49 ("The importance of the State's duty to protect its natural resources is demonstrated by article 16, section 59 of the Texas Constitution.").

"incorporated" the PTD, and thus afforded protection to all natural resources, including the state's air and atmosphere.[12]

The Texas legislature has explicitly recognized the PTD and otherwise advanced citizens' interests in natural resources through statute.[13] For example, a provision of the state's water code declares that "[t]he waters of the state are held in trust for the public."[14] In addition, the Texas Coastal Public Lands Management Act of 1973 requires the preservation of "[t]he natural resources of the surface estate in coastal public land," including "the natural aesthetic values of those areas and the value of the areas in their natural state for the protection and nurture of all types of marine life and wildlife."[15] This Act mandates that public uses take priority over "those uses which are limited to fewer individuals"[16] and protects "[t]he public interest in navigation in the intracoastal water."[17] Finally, the Texas Open Beaches Act acknowledges the public's "free and unrestricted right of ingress and egress to and from the state-owned beaches bordering the seaward shore of the Gulf of Mexico ... extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico."[18] As discussed below,[19] this Act has been the subject of recent litigation.

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[12] Bonser-Lain v. Tex. Comm'n on Envtl. Quality, 2012 WL 3164561, at *1 (Tex. Dist. Aug. 2, 2012).

[13] The Texas Constitution directs the legislature to "pass all ... laws as may be appropriate" to conserve, develop, and preserve "all of the natural resources of the state." TEX. CONST. art. XVI, § 59(a).

[14] TEX. WATER CODE ANN. § 11.0235.

[15] TEX. NAT. RES. CODE ANN. § 33.001(b). "Coastal public land" refers to "state-owned submerged land, the water overlying that land, and all state-owned islands of portions of islands in the coastal area." *Id* § 33.004(6). This definition explicitly excludes "beaches bordering on and the water of the open Gulf of Mexico and the land lying beneath this water." *Id.* § 33.004(11).

[16] *Id.* § 33.001(c).

[17] *Id.* § 33.001(d).

[18] *Id.* § 61.011.

3.0 Institutional Application

3.1 Restraint on Alienation (Private Conveyances)

Because the Texas legislature may convey trust property free of public rights,[20] the PTD is unlikely to burden private conveyances between the state's grantees and their successors.[21]

3.2 Limit on Legislature

Although the Texas legislature presumptively owns navigable waters and submerged lands, it may alienate this property unencumbered by the public trust.[22] The exercise of this authority requires "a specific grant, directly made by the government, for a specific object."[23] According to the Texas Supreme Court, "nothing short of express and positive language can suffice to evidence the intention to grant exclusive private privileges or rights in that held for the common use and benefit."[24] Moreover, in the absence of such "plan and positive language," courts will strictly construe legislative acts purporting to alienate trust resources against the grantee.[25]

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[19] *See infra* notes 56-58, 74 and accompanying text.
[20] *See infra* § 3.2.
[21] *See, e.g.*, Natland Corp. v. Baker's Port, Inc. 865 S.W.2d 52, 60 (Tex. App. 1993) (refusing to recognize "implied reservations for the benefit of the public" in a patent transferring submerged lands).
[22] TH Invs., Inc. v. Kirby Inland Marine, L.P., 218 S.W.3d 173, 182-83 (Tex. App. 2007) ("[T]wo presumptions arise regarding submerged lands: (1) they are owned by the State and (2) the State has not acted to divest itself of title to them."); *see also* City of Galveston v. Menard, 23 Tex. 349, 349 (1859) ("By the civil law, the shores of the sea, bays, and rivers belong to the nation that possess the country, of which they are a part. But, while they are of the class of public things, common to all, to which no exclusive right will ordinarily be granted, yet, it often happens, that the public use may be promoted, by allowing portions of them to become private property.").
[23] *City of Galveston*, 23 Tex. at 397.
[24] Landry v. Robison, 219 S.W. 819 (Tex. 1920).
[25] State v. Bradford, 50 S.W.2d 1065, 1075 (Tex. 1932) ("In view of the importance of this matter to the state and the whole people, the courts of this state have consistently held that all grants with respect to lands under navigable waters, such as river beds and

3.3 Limit on Administrative Action (Hard Look)

Unlike some other states,[26] Texas has not explicitly imposed public trust duties on state administrative agencies.[27] However, in *Bonser-Lain v. Texas Commission on Environmental Quality*, a state district court concluded that an agency could not avoid promulgating a comprehensive rule to reduce carbon dioxide emissions by narrowly construing the state's PTD.[28] The court explained that Texas recognizes a public trust in "all natural resources of the State including the air and atmosphere."[29] Thus, the *Bonser-Lain* decision indicates that Texas's administrative agencies have a PTD obligation to preserve trust resources.

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channels, are strictly construed against the grantee; that, if there is any ambiguity in the act, it will be construed in favor of the state; and, unless the act contains plain and unmistakable language expressly conveying the land under river beds and channels, it will not be construed to include them. In other words, before a statute will be construed to include land under navigable waters, such as river beds and channels, it will have to be expressed in plain and positive language and not in general language.").

[26] *See* Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 727-28 (Cal. 1983) (en banc) ("[T]he Legislature, acting directly or through an authorized agency such as the Water Board" has the power to allocate water resources, as well as "an affirmative duty to take the public trust into account … and to protect public trust uses whenever feasible"); *see also* Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1095 (Idaho 1983) ("[T]he Department of Lands … has the power to dispose of public lands. This power is not absolute, however, and is subject to the limitations imposed by the [PTD]."); *see also* United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 463 (N.D. 1976) ("[W]e think the [PTD] requires, as a minimum, evidence of some planning by appropriate state agencies and officers in the allocation of public water resources ….").

[27] *But cf. TH Invs., Inc.*, 218 S.W.3d at 183 (explaining that the Texas Land Commissioner lacks authority to alienate trust property).

[28] 2012 WL 3164561, at *1 (Tex. Dist. Aug. 2, 2012) (ruling that the Commission could exercise its discretion not to proceed with the petition for rulemaking "in light of other state and federal litigation").

[29] *Id.*

4.0 Purposes

4.1 Traditional (Navigation/Fishing)

As the Texas Court of Appeals has explained, "[t]he purpose of maintaining title to the beds and waters of all navigable bodies is to protect the public's interest in these scarce natural resources."[30] Citizens' rights include "navigation, fishing, and other lawful purposes."[31] Thus, Texas preserves the traditional uses of trust waters.

4.2 Beyond Traditional (Recreational/Ecological)

Texas's PTD has gradually expanded to encompass ecological values.[32] For example, state courts recognize a public trust in aquatic life, and thus condemn pollution of relevant habitat.[33] In addition, a recent district court decision concluded that the Texas Constitution broadens the PTD's scope to "include[] all natural resources of the State including the air and atmosphere."[34] If the Texas Supreme Court adopts this construction, the PTD will become influential in combatting climate change and other emerging environmental concerns.

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[30] Cummins v. Travis Cnty. Water Control and Improvement Dist., 175 S.W.3d 34, 49 (Tex. App. 2005).

[31] Diversion Lake Club v. Heath, 86 S.W.2d 441, 445 (Tex. 1935); *see also* Carrithers v. Terramar Beach Cmty. Improvement Ass'n, Inc., 645 S.W.2d 772, 774 (Tex. 1983) ("The waters of public navigable streams are held by the state in trust for the public, primarily for navigation purposes." (citing *Motl v. Boyd*, 286 S.W. 458 (Tex. 1926)).

[32] *See* Craig, *supra* note 4, at 89-90.

[33] Goldsmith & Powell v. Texas, 159 S.W.2d 534, 535 (Tex. Civ. App. 1942) ("[A]ll fish and other aquatic life contained in fresh water rivers, creeks, streams and lakes, or sloughs subject to overflow from rivers or other streams within the borders of this State, are declared to be the property of the State .... The ownership is in trust for the people and pollution of streams and watercourses is condemned ...."); *see also* TEX. PARKS & WILD. CODE ANN. § 1.011(b) (declaring state ownership of "[a]ll fish and other aquatic animal life").

[34] Bonser-Lain v. Tex. Comm'n on Envtl. Quality, 2012 WL 3164561, at *1 (Tex. Dist. Aug. 2, 2012) (citing TEX. CONST. art. XVI, § 59(a)); *see also* Cummins v. Travis Cnty. Water Control and Improvement Dist., 175 S.W.3d 34, 49 (Tex. App. 2005) (indicating that the state's constitutional duty to protect natural resources is related to its common law public trust responsibilities).

5.0 Geographic Scope of Applicability

5.1 Tidal

In conformity with a "settled principle of the English common law,"[35] Texas courts recognize citizens' rights in tidal waters and shorelands below the ordinary high-water mark.[36] However, as discussed above,[37] the state may alienate such submerged property unencumbered by the public trust.[38]

5.2 Navigable-in-Fact

Texas courts apply a "broad" navigability test, which encompasses "streams that are navigable in law or fact," in addition to tidal waters.[39] Generally, only waterbodies that are susceptible to commercial use qualify as navigable under Texas common law,[40]

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[35] City of Galveston v. Menard, 23 Tex. 349, 358 (1859) ("[I]t is a settled principle of the English common law, that the right of soil of the owners of land bounded by the sea, or on an arm of the sea, bay, or navigable stream, extends only to the ordinary high-water make; and that the shore belongs *prima facie*, and of common right, to the public; in England, to the king; and in this country, to the state; unless it has, by grant, become the property of individuals.").

[36] *See, e.g.*, Natland Corp. v. Baker's Port, Inc., 865 S.W.2d 52, 57 (Tex. App. 1993) ("Title to land covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater limits is in the State, and those lands constitute public property that is held in trust for the use and benefit of the people."); *see also* Butler v. Sadler, 399 S.W.2d 411, 415 (Tex. Civ. App. 1966) ("The courts of this state ... have consistently held that the waters of the bays, inlets and arms of the Gulf of Mexico and the lands and bottoms underlining lakes, and bays, and the islands, reefs, shoals, marshes, and other areas along the Gulf of Mexico within the tidewater limits are the property of the State and are held by it in trust for the benefit of all its inhabitants.").

[37] *See supra* § 3.2.

[38] *See Natland Corp.*, 865 S.W.2d at 60 ("This doctrine that the sovereign holds submerged lands in trust for the benefit and use of the public, thereby imposing on submerged lands granted by the State implied restrictions on their use and development, has not fared well in Texas jurisprudence.").

[39] TH Invs., Inc. v. Kirby Inland Marine, L.P., 218 S.W.3d 173, 182 n. 7 (Tex. App. 2007).

[40] Taylor Fishing Club v. Hammett, 88 S.W.2d 127, 129 (Tex. Civ. App. 1935) ("Every inland lake or pond that has the capacity to float a boat is not necessarily navigable. It must be of such size and so situated as to be generally and commonly useful as a highway for transportation of goods or passengers between the points connected thereby."); *but*

although public rights in these waters include "navigation, fishing, and other lawful purposes."[41]

5.3 Recreational Waters

The Texas legislature has defined the phase "navigable river or stream" to include any "river or stream that retains an average width of 30 or more feet from the mouth or confluence up."[42] According to the Texas Court of Appeals, "[t]he effect of this statute is to render all streams navigable in law that have an average width of 30 feet, regardless of whether they are actually navigable."[43] In other words, as the Texas Supreme Court has explained,

> statutory navigable streams in Texas are public streams, and ... their beds and waters are owned by the state in trust for the benefit and best interests of all the people, and subject to use by the public for navigation, fishing, and other lawful purposes, as fully and to the same extent that the beds and waters of streams navigable in fact are so owned and so held in trust and subject to such use.[44]

Because the waters of "statutory navigable" rivers and streams are public, citizens retain the right to use these waters even if the rivers or streams at issue are

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see, e.g., Welder v. State, 196 S.W. 868 (Tex. Civ. App. 1917) (explaining that evidence of public use for log floatation or pleasure boating could establish navigability).

[41] Diversion Lake Club v. Heath, 86 S.W.2d 441, 444 (Tex. 1935).

[42] TEX. PARKS & WILD. CODE ANN. § 90.001; *see also* TEX. NAT. RES. CODE ANN. § 21.001 ("'Navigable stream' means a stream which retains an average width of 30 feet from the mouth up.").

[43] Texas River Barges v. City of San Antonio, 21 S.W.3d 347, 352 (Tex. App. 2000) (concluding that the San Antonio River is "navigable in law, even though its natural and ordinary base flow within the corporate limits of San Antonio is insufficient to support navigation of any kind except during periods of extraordinary rainfall"); *see also Diversion Lake Club*, 86 S.W.2d at 444-45 (explaining that an earlier version of Texas' 30-foot rule "[did] not undertake to accomplish the impossible and convert nonnavigable streams actually into navigable waters," but rather "state[d] that streams of the average width of 30 feet 'shall be considered' navigable streams, thus placing them by the force of the statute in the same class as streams navigable in fact, and giving them the same quality and character as streams actually navigable, in respect to the title to their beds and their enjoyment and use by the public").

[44] *Diversion Lake Club*, 86 S.W.2d at 445.

"artificially changed" as a result of dam construction.[45] Thus, state courts will preserve public rights in certain rivers, streams, and artificial lakes, even if those waterbodies are not susceptible to commercial use.

5.4 Wetlands

The Texas Supreme Court has not explicitly recognized wetlands as trust resources. However, the legislature has declared that "[t]he waters of the state are held in trust for the public."[46] Moreover, the Texas Court of Civil Appeals acknowledged a public trust in tidal marshes.[47] Thus, Texas's PTD might preserve citizens' rights in wetlands.

5.5 Groundwater

Texas courts have not explicitly recognized a public trust in groundwater. Nonetheless, given the legislature's general indication that "[t]he waters of the state are held in trust for the public,"[48] a future court could extend the state's PTD to encompass this resource.

5.6 Wildlife

As discussed above,[49] Texas owns fish and other aquatic life in trust for its citizens.[50] The state legislature has declared its intent to preserve "the value of [coastal areas] in their natural state for the protection and nurture of all types of marine life and

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[45] *Id.* at 446 (finding that the construction of a dam across a navigable river amounted to a "voluntary act," which caused "the flood waters of the river, public waters, to spread over [private] land ... giving the public waters a new bed," but not "affect[ing] the public nature of the waters [nor] tak[ing] away the right of the public to use them for fishing").
[46] TEX. WATER CODE ANN. § 11.0235.
[47] Butler v. Sadler, 399 S.W.2d 411, 415 (Tex. Civ. App. 1966).
[48] TEX. WATER CODE ANN. § 11.0235.
[49] *See supra* note 33 and accompanying text.
[50] *See* Goldsmith & Powell v. Texas, 159 S.W.2d 534, 535 (Tex. Civ. App. 1942).

wildlife"[51] and asserted public ownership over "[a]ll wild animals, fur-bearing animals, wild birds, and wild fowl."[52]

5.7 Uplands (beaches, parks, highways)

As indicated above,[53] the Texas legislature has preserved public access to the state's Gulf Coast beaches.[54] "Extensive" erosion resulting from hurricanes and tropical storms threatens to impede this access.[55] Until recently, relevant judicial decisions indicated that the public's easement kept pace with erosion by "'roll[ing]' or mov[ing] with the shifting line of mean low tide and the line of vegetation."[56] However, in 2012, the Texas Supreme Court overruled decades of appellate precedent[57] and severely

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[51] TEX. NAT. RES. CODE ANN. § 33.001(b).
[52] TEX. PARKS & WILD. CODE ANN. § 1.011(a).
[53] *See supra* note 18 and accompanying text.
[54] TEX. NAT. RES. CODE ANN. § 60.011(a) (declaring that citizens "shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or … the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico"); *see also id.* § 61.018 (providing that specified state authorities may "remove or prevent any improvement, maintenance, obstruction, barrier, or other encroachment on a public beach, or … prohibit any unlawful restraint on the public's right of access to and use of a public beach"); *see also id.* § 61.001(8) (defining "public beach" as "any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized by law and custom").
[55] *Hurricanes*, TEX. GEN. LAND OFFICE, http://www.glo.texas.gov/what-we-do/caring-for-the-coast/hurricanes/index.html (last visited Mar. 8, 2013); *see also Coastal Erosion*, TEX. GEN. LAND OFFICE, http://www.glo.texas.gov/what-we-do/caring-for-the-coast/coastal-erosion/index.html (last visited Mar. 8, 2013) ("Coastal erosion threatens public beaches, natural resources, coastal development, public infrastructure, and public and private property.").
[56] Brannan v. State, 365 S.W.3d 1, 22, 26 (Tex. App. 2010), *vacated*, 2013 WL 297831 (Tex. 2013) (concluding that the Texas Open Beaches Act required the removal of preexisting houses after "the [public's] easement rolls to a portion of the property that had before not been located on the easement").
[57] *See, e.g.*, Arrington v. Tex. Gen. Land Office, 38 S.W.3d 764, 766 (Tex. App. 2001), *overruled by* Severance v. Patterson, 370 S.W.3d 705, 730 (Tex. 2012) ("[O]nce a public

curtailed citizens' access rights, by concluding that the state "does not recognize a 'rolling easement'" across previously unencumbered property after avulsive events, like hurricanes, alter littoral boundaries.[58] In the wake of this decision, the future of the PTD in Texas is unclear.[59]

6.0 Activities Burdened

6.1 Conveyances of property interests

As discussed above,[60] the Texas legislature, its grantees, and their successors may convey trust property unencumbered by public rights.

6.2 Wetland fills

As discussed earlier,[61] Texas's PTD does not explicitly extend to wetlands, and thus might not restrain wetland fills.

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beach easement is established, it is implied that the easement moves up or back to each new vegetation line, and the State is not required to repeatedly re-establish that an easement exists up to the new vegetation line (but only that the line has moved)."); *see also* Feinman v. State, 717 S.W.2d 106, 111 (Tex. App. 1986), *overruled by Severance*, 370 S.W.3d at 730 (concluding that "a rolling easement is implicit in the [Texas Open Beaches Act]"); *see also* Matcha v. Mattox on Behalf of People, 711 S.W.2d 95, 100 (Tex. App. 1986), *overruled by Severance*, 370 S.W.3d at 730 (explaining that "the theory of a migratory public easement is compatible with the doctrine of custom and the situations that often give rise to a custom"); *see also* Moody v. White, 593 S.W.2d 372, 379 (Tex. App. 1979), *overruled by Severance*, 370 S.W.3d at 730 ("The rule has been established that easements may shift from time to time, just as navigable rivers may change course by avulsion.").

[58] *Severance*, 370 S.W.3d at 724-25 ("[I]f an avulsive event moves the mean high tide line and vegetation line suddenly and perceptible, causing the former dry beach to become part of State-owned wet beach or completely submerged, the adjacent private property owner is not automatically deprived of her right to exclude the public from the new dry beach.").

[59] *See* sources cited *supra* note 8.

[60] *See supra* §§ 3.1-3.2.

[61] *See supra* § 5.4.

6.3 Water rights

Texas recognizes riparian and littoral rights only in rare circumstances,[62] which are unlikely to significantly affect the PTD.[63] Moreover, in providing for the administration of appropriative water rights, the state legislature has acknowledged the importance of preserving the ecological values of trust waters. For example, the Texas Natural Resource Conservation Commission must "consider and, to the extent practicable, provide for the freshwater inflows and instream flows necessary to maintain the viability of the state's streams, rivers, and bay and estuary systems" when permitting the use of state waters.[64] In certain circumstances, the state will limit future appropriations to satisfy ecological needs.[65] Although "[t]he legislature has not expressly authorized granting water rights exclusively for … instream flows dedicated to environmental needs or inflows to the state's bay and estuary systems,"[66] existing water users may amend their rights to serve "environmental purposes."[67] Thus, while certain

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[62] *See* Cummins v. Travis Cnty. Water Control & Improvement Dist. No. 17, 175 S.W.3d 34, 43-45 (Tex. App. 2005) (describing the evolution of Texas' law governing riparian rights and explaining that a landowner seeking to establish such rights must "(1) be able to trace his title back to a grant from the sovereign between 1823 [and] 1895 and/or present a certificate of adjudication from the State" and (2) demonstrate that his property is adjacent to the "normal flow" of a "natural" waterbody).

[63] *See, e.g.*, Diversion Lake Club v. Heath, 86 S.W.2d 441, 444 (Tex. 1935) (explaining that a riparian landowner did not possess an exclusive right to fish in the navigable stream abutting his property).

[64] TEX. WATER CODE ANN. § 11.0235(c). However, "all permit conditions relating to freshwater inflows to affected bays and estuaries and instream flow needs must be subject to temporary suspension if necessary for water to be applied to essential beneficial uses during emergencies." *Id.*

[65] *Id.* § 11.023(a) (listing the uses for which state water may be appropriated, stored, or diverted "[t]o the extent that state water has not been set aside by the commission … to meet downstream instream flow needs or freshwater inflow needs").

[66] *Id.* § 11.0235(d)(1).

[67] *Id.* § 11.0235(d-1). Moreover, "[t]he legislature has determined that [such amended rights] should be enforced in a manner consistent with the enforcement of water rights for other purposes." *Id.*

existing water rights might conflict with the PTD, the Texas legislature has imposed provisions to minimize future interference.

6.4 Wildlife harvests

As described above,[68] Texas owns wildlife in trust for the public. In its capacity "as trustee," the state legislature has authorized the Texas Parks and Wildlife Commission to regulate "the taking and acquisition of property in wild animals."[69] Thus Texas's PTD burdens wildlife harvests.

7.0 Public Standing

7.1 Common law-based

Under Texas common law, citizens have standing to assert their rights as beneficiaries of the public trust. For example, in *Hix v. Robertson*, the state court of appeals affirmed a trial court's decision finding that "members of the general public ... have standing to seek injunctive relief prohibiting a riparian owner from obstructing ... the public's right to use and enjoy the waters of a navigable stream."[70] Texas courts have found standing under similar circumstances on multiple occasions.[71]

7.2 Statutory basis

The Texas legislature has not addressed public standing to sue under the PTD.

7.3 Consitutional basis

The Texas Constitution does not address public standing to sue under the PTD.

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[68] *See supra* § 5.6.
[69] State v. Bartee, 894 S.W.2d 34, 43 (Tex. App. 1994).
[70] 211 S.W.3d 423, 426 (Tex. App. 2006).
[71] *See, e.g.*, Diversion Lake Club v. Heath, 86 S,W.2d 441, 444-46 (Tex. 1935) (affirming injunctive relief prohibiting a private club from interfering with the public's right to fish in a lake formed by a dam constructed on a navigable stream); *see also* Port Acres Sportsman's Club v. Mann, 541 S.W.2d 847, 849-50 (Tex. Civ. App. 1976) (affirming injunctive relief prohibiting a private club from interfering with the public's use a navigable stream).

8.0 Remedies

8.1 Injunctive Relief

Texas courts may enjoin littoral property owners from interfering with citizens' rights under the PTD.[72]

8.2 Damages for injuries to trust resources

Texas courts have yet to recognize a damages remedy for injury to trust resources.

8.3 Defense to takings claims

Texas's administrative agencies have successfully employed the PTD as a defense to takings claims. For example, in 2005, in *Cummins v. Travis County Water Control and Improvement District*, the Texas Court of Appeals concluded that the district's denial of the Cumminses' application to construct a boat dock encroaching on navigable waters "[did] not constitute a taking of the Cumminses' land because the activity prohibited would have occurred on property that is held by the State in trust for the public, to which the Cumminses have no rights...."[73] Although decades of appellate precedent similarly refused takings claims associated with rolling beach easements, the extent to which recent case law will alter this trend remains unresolved.[74]

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[72] *Id.*
[73] 175 S.W.3d 34, 56 n. 13 (Tex. App. 2005).
[74] *See* sources cited *supra* note 8.

UTAH

THE PUBLIC TRUST DOCTRINE IN UTAH

Mac Smith

1. Origins of the PTD in Utah

The public trust doctrine (PTD) in Utah dates to January 4, 1896, when the state was admitted into the Union.[1] The idea that the public shares the air and certain waters is an ancient doctrine that emerged in sixth century Roman law, perhaps earlier.[2] English civil law adopted this concept and asserted that the Crown held title to submerged lands beneath navigable waterways, subject to certain rights of the public, such as navigation and fishing.[3] When America won independence from Britain, title to these submerged lands vested in the thirteen original colonies, and later to each state subsequently admitted to the Union, under the equal footing doctrine.[4] Thus, in 1896, Utah gained sovereign title to lands beneath the Great Salt Lake and other navigable waterways within the state, subject to certain federal restrictions and duties owed to the public.[5]

Since statehood, Utah has recognized and expanded on the PTD in its state constitution, statutes, and case law. Specifically, Utah has implemented several constitutional provisions that impose trust duties on the state.[6] The state legislature has also codified the trust in Utah statutes, primarily delegating management responsibilities of public trust resources to the Division of Forestry, Fire and State Lands (FFSL) and, to

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[1] Utah State Road Comm'n v. Hardy Salt Co., 486 P.2d 391, 392 (Utah 1971).
[2] For historical background on PTD, see, e.g., Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 475-78 (1970); Michael Blumm and Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water* 37 Ariz. L. Rev. 701, 713-16 (1995); Charles Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 Envtl. L. 425 (1989).
[3] *See* Frank P. Grad, TREATISE ON ENVIRONMENTAL LAW § 10.05 (1995).
[4] Utah v. United States, 403 U.S. 9, 10 (1971).
[5] *Id.*
[6] *See infra* § 2.0.

a lesser degree, other state agencies.[7] FFSL and other state agencies have in turn promulgated regulations pertaining to the management of state lands held in trust for Utah citizens.[8] Further, the Utah Water Code states that all state waters are property of the public, subject to existing use rights.[9]

Utah courts have built on these constitutional provisions, statutes, and regulations to shape the contemporary Utah PTD. The Utah Supreme Court has stated that the essence of Utah's PTD is that navigable waters "are held by the State, by virtue of its sovereignty…[and] should not be given without restriction to private parties and should be preserved for the general public for uses such as commerce, navigation, and fishing."[10] Other decisions have expanded the scope of the concept to preserve trust property for recreational uses, such as hunting, fishing, floating, and other legal activities,[11] as well as for ecological protection.[12]

2. The Basis of the PTD in Utah

Utah has preserved several fundamental public trust values in its constitution. For example, Article 20 requires that state public lands "shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired."[13] Article 11 directs municipalities to preserve and refrain from selling their water supplies in order to

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[7] UTAH CODE ANN. § 65A-10-1, *et. seq.* (West 2010); *see infra* § 2.0 for a list of relevant statutes and § 3.3 for a discussion of the agency responsibilities.
[8] *See, e.g.*, UTAH ADMIN. CODE r. 652-1, *et. seq.* (2010).
[9] UTAH CODE ANN. § 73-1-1 (West 2010) ("All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof… The Legislature shall govern the use of public water for beneficial purposes, as limited by constitutional protections for private property.")
[10] Colman v. Utah State Land Bd., 795 P.2d 622, 635 (Utah 1990).
[11] Conatser v. Johnson, 194 P.3d 897, 899-900 (Utah 2008), *citing* J.J.N.P. Co. v. State, 655 P.2d 1133, 1137 (Utah 1982). *See also* UTAH CODE ANN. § 73-1-1 (West 2010).
[12] Nat'l Parks & Conservation Ass'n v. Bd. of State Lands, 869 P.2d 909, 919 (Utah 1993) ("The public trust doctrine [in Utah]...protects the ecological integrity of public lands.")
[13] UTAH CONST. art. XX, § 1.

provide for their residents.[14] Similarly, Article 17 recognizes and confirms all existing water uses for a useful or beneficial purpose.[15] Further, Article 18 requires the legislature to enact laws to preserve forests existing on state public lands.[16]

The Utah legislature has built on these constitutional principles and enacted a number of statutes that protect the public trust. For example, the Utah Water Code states that all state waters are property of the public, subject to existing use rights.[17] Further, Utah law announces that the FFSL must manage "sovereign lands" -- lands lying below the ordinary high water mark of navigable bodies of water at the date of Utah's statehood[18] – using multiple-use sustained-yield principles and comprehensive land management policies.[19] The FFSL may exchange, sell, or lease these sovereign lands only in a manner that does not interfere with public interest or long-term land protection and conservation values.[20] In addition to the traditional uses of navigation and commerce, Utah law also reserves a public right of access for hunting, trapping, or fishing, on all lands owned by the state.[21]

3. Institutional Application

The Utah PTD imposes a number of checks on private individuals, the legislature, and agencies in managing trust properties.[22] For example, the Utah legislature has

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[14] *Id.* art. XI, § 6.
[15] *Id.* art. XVII, § 1.
[16] *Id.* art. XVIII, § 1.
[17] UTAH CODE ANN. § 73-1-1 (West 2010) ("All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof... The Legislature shall govern the use of public water for beneficial purposes, as limited by constitutional protections for private property.")
[18] UTAH ADM. CODE r. 652-1-200 (2010).
[19] UTAH CODE ANN. § 65A-1-2 (West 2010).
[20] *Id.* § 65A-10-1.
[21] UTAH CODE ANN. § 23-21-4 (West 2010); *but see infra* § 5.3 for new legislation possibly limiting this scope.
[22] *See infra* §§ 3.1-3.3.

declared that FFSL must manage state "sovereign lands" in a way that does not violate the PTD.[23]

3.1 Restraint on the alienation of private conveyances

When the state alienates trust properties to a private individual or entity, the public retains a right to access the property. After the state alienates sovereign property to a private party, the private party must keep the property open to the public for hunting, trapping, or fishing during the lawful season, unless the lessee can show that public access substantially interferes with the lease.[24] This restriction runs with the land.[25]

3.2 Limit on the legislature

In 1990, the Utah Supreme Court held, in *Colman v. Utah State Land Board,*[26] that the state may grant private rights in public trust property, but only if those rights do not affect the public interest that remains.[27] In *Colman,* Utah granted a lease and easement to extract minerals from the bed of the Great Salt Lake.[28] Although the court ultimately ruled that the lease did not violate the public interest, it established specific limitations on the state's ability to alienate land under the PTD.[29] The court held that the state may not alienate sovereign land unless doing so would improve the public interest in the property or would not otherwise impair that public interest.[30]

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[23] *Id.* §§ 63A-1-1; 65A-10-1.
[24] *See infra* § 3.3.
[25] *Id.*
[26] 795 P.2d 622, 635 (Utah 1990).
[27] *Id.* at 635-36, *citing* Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892) (in which the United States Supreme Court held that the Illinois legislature's earlier grant to a private railroad of lands submerged under Lake Michigan could later be revoked because the grant violated the PTD).
[28] *Id.* at 623-24.
[29] *Id.* at 635-36, *citing* Illinois Central R.R. Co., 146 U.S. at 455-56 ("The trust with which they are held, therefore, is governmental and cannot be alienated, *except* in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.")
[30] *Id.*

3.3 Limit on administrative action

The legislature has placed limits on agencies concerning the management of property held in public trust. For example, the FFSL may exchange, sell, or lease sovereign lands only in a manner that does not interfere with the public trust.[31] Further, whenever a state agency alienates sovereign lands, the contract of sale or deed must contain a provision that keeps the land open to the public for hunting, trapping, or fishing during the lawful season.[32] This contract or deed in turn restricts the lessee or buyer of trust property from excluding the public and from charging the public for access to the property.[33] However, the FFSL may limit public access if the lessee can show that unrestricted use would substantially interfere with the primary activities authorized under the lease.[34]

4. Purposes

Utah courts and legislature have traditionally taken an expansive view of the purposes the PTD encompasses, extending it beyond the traditional navigation and fishing rights to include rights such as ecological and recreational purposes.[35] It also appears that the PTD protects all state water sources.[36]

4.1 Traditional – Commerce, Navigation, and Fishing

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[31] UTAH CODE ANN. § 65A-10-1 (West 2010) ("(1) The division is the management authority for sovereign lands, and may exchange, sell, or lease sovereign lands but only in the quantities and for the purposes as serve the public interest and do not interfere with the public trust. (2) Nothing in this section shall be construed as asserting state ownership of the beds of nonnavigable lakes, bays, rivers, or streams.")
[32] *Id.* § 23-21-4.
[33] *Id.*
[34] *Id.* § 65A-2-5 ("The director of the Division of Forestry, Fire, and State Lands, in conjunction with the Wildlife Board, may restrict or limit public use of leased parcels of sovereign lands for hunting, trapping, or fishing: (1) upon the petition of the affected lessee; (2) after a public hearing; and (3) upon a determination that unrestricted public use for hunting, trapping, or fishing substantially interferes with the primary activities authorized by the lease.")
[35] *See infra* § 4.2, but *see also infra* notes 59-63 discussing Utah Public Waters Access Act, which limits recreational access.
[36] *See infra* note 43 and accompanying text.

In *Colman v. Utah State Land Board*, the Utah Supreme Court stated that the essence of the PTD is that navigable waters should be preserved for the general public for uses such as commerce, navigation, and fishing.[37] The *Colman* court recognized that the state PTD allows the public to use state navigable waterways for the purposes of commerce, navigation, and fishing.[38]

4.2 Beyond Traditional – Recreational, Ecological, and Water Rights

Utah's PTD has evolved to encompass recreational purposes. For example, a Utah statute creates a public right of access for hunting, trapping, or fishing, on all lands owned by the state.[39] Until recently, the public also held an easement over all state waters, regardless of who owns the waterbed, for lawful recreational activities, such as floating or fishing.[40] Similarly, state public lands are open to the public for recreational uses.[41]

It also appears that Utah has expanded its PTD to include "ecological" and water resource protection. The Utah Supreme Court has suggested that the PTD protects the ecological integrity of state public lands.[42] Also, it is arguable that the PTD protects all water resources in Utah because the Utah Water Code declares that the public owns all

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[37] Colman v. Utah State Land Bd., 795 P.2d 622, 635 (Utah 1990).
[38] *Id.*
[39] UTAH CODE ANN. § 23-21-4 (West 2010).
[40] *Conatser*, 194 P.3d at 899-900; *but see infra* § 5.3 regarding new legislation that limits this scope.
[41] Nat'l Parks & Conservation Ass'n v. Bd. of State Lands, 869 P.2d 909, 919 (Utah 1993) ("The public trust doctrine...protects the...public lands and their public recreational uses for the benefit of the public at large.")
[42] *Id.* ("The public trust doctrine, discussed in *Colman*...protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large. The public trust doctrine, however, is limited to sovereign lands and perhaps other state lands that are not subject to specific trusts, such as school trust lands.")

water in the state, and Utah courts have subsequently held that the state owns the water as a trustee for all Utahans, subject to existing rights.[43]

5. Geographic Scope of Applicability

The geographical scope of Utah's PTD extends beyond the beds of navigable waters to include sovereign lands, recreational waters, wildlife, and arguably wetlands and groundwater.[44]

5.1 Tidal Waters

Utah, a land-locked state, has no tidal waters. By the late 1920s, the Utah Supreme Court has expressly rejected the English ebb and flow tidal test of navigability in favor of a navigable-in-fact test.[45]

5.2 Navigable in Fact

According to the Utah Supreme Court, a body of water is navigable for title purposes "if it is useful for commerce and has 'practical usefulness to the public as a public highway.'"[46] Under this test, the Utah Supreme Court concluded in 1946 that Scipio Lake was non-navigable because the lake was not, and was unlikely to become, "a valuable factor in commerce"[47] because the lake is not large, and it is easier to go around it than to cross it.[48] On the other hand, in 1971, the U.S. Supreme Court concluded that the Green, Grand, and Colorado Rivers were navigable in Utah because they are "navigable in fact when they are used...in their ordinary condition, as highways for

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[43] *See infra* § 6.3 for discussion. *See also* Theresa Mareck, *Searching for the Public Trust Doctrine in Utah Water Law*, 15 J. ENERGY NAT. RESOURCES & ENVTL. L. 321 (1995) (arguing that the PTD should explicitly be applied to existing and future water uses and appropriation, and applying the PTD would be consistent with the state's duty to regulate and control water use for the benefit of the public).
[44] *See infra* §§ 5.1-5.7.
[45] State v. Rolio, 262 P. 987, 991 (Utah 1927).
[46] *Conatser*, 194 P.3d at 897, *citing* Monroe v. State, 175 P.2d 759, 761 (Utah 1946).
[47] *Monroe*, 175 P.2d at 761.
[48] *Id.*

commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[49]

A Utah landowner owns up to the high water mark of navigable waters.[50] The high water mark is "the mark on the land where valuable vegetation ceased to grow because the land was inundated by water for long periods of time."[51] Lands lying below the ordinary high water mark of navigable water bodies are classified as sovereign lands owned by the state.[52]

5.3 Recreational Waters

Because under the Utah Water Code[53] the public owns the water itself, the public has rights to use both navigable and non-navigable waters for recreational purposes.[54] Utah recognizes a public interest in using state waters for recreational purposes and extends this easement to a number of recreational purposes, including "the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing the water."[55] Until recently, the public held an easement to use water regardless of who owned the waterbed or whether the water is navigable.[56] Further, Utah courts did not limit the public easement to activities that can be performed on the water, so the public held "the right to touch privately owned beds of state waters in ways incidental to all recreational

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[49] Utah v. United States, 403 U.S. 9, 10 (1971).
[50] Provo City v. Jacobson, 217 P.2d 577, 578 (Utah 1950).
[51] *Id.*
[52] The Utah Trust Land Management Act defines state "sovereign lands" as "those lands lying below the ordinary high water mark of navigable bodies of water at the date of statehood and owned by the state by virtue of its sovereignty." UTAH CODE ANN. § 65A-1-1(5) (West 2010).
[53] UTAH CODE ANN. § 73-1-1 (West 2010). *See also* Harrison C. Dunning, WATERS AND WATER RIGHTS § 30.04 (Robert E. Beck ed., 3d ed. 1988) (describing the evolution of the concept of public ownership of water in other Western states).
[54] *Conatser*, 194 P.3d at 899.
[55] *Id.* (quoting J.J.N.P. Co. v. State, 655 P.2d 1133, 1137-38 (Utah 1982)).
[56] *Conatser*, 194 P.3d at 899 *but see infra* notes 59-63.

rights provided for in the easement."[57] In *Conatser v. Johnston,* a 2008 decision, the Utah Supreme Court recognized this public easement and reversed a charge of criminal trespass against a recreationist who had rafted across and walked along a private riverbed to fish in an unobtrusive manner.[58]

However, in 2010 the Utah legislature passed the Utah Public Waters Access Act,[59] eroding the right to recreate in private, non-navigable waters granted in *Conatser.* The Act prohibits sportsmen from using nonnavigable streams running through private property,[60] unless they have landowner permission,[61] or can establish that the property has historically been used as a public recreation access.[62] Recently, a Utah nonprofit filed suit, challenging the Act as a violation of the Utah public trust obligation to hold and manage state waters in trust for the public.[63] A successful result could restore the public recreation rights granted by *Conaster* and other Utah decisions.

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[57] *Id.* at 901-2.
[58] *Id.* at 898-99.
[59] UTAH CODE ANN. §§ 73-29-101, 101-208 (West 2010).
[60] *Id.* at § 73-29-201 ((1) The public may use a public water for recreational activity if: (a) the public water: (i) is a navigable water; or (ii) is on public property; and (b) the recreational activity is not otherwise prohibited by law... (3) A person may not access or use a public water on private property for recreational purposes if the private property is property to which access is restricted, unless public recreational access is established under Section 73-29-203.)
[61] *Id.* ((2) A person may access and use a public water on private property for any lawful purpose with the private property owner's permission.)
[62] *Id.* § 73-29-203 (effective May 10, 2011) (Public recreational access is established if: (a) the private property has been used by the public for recreational access requiring the use of the public water for a period of at least 10 consecutive years that begins after September 22, 1982; and (b) the public use has been: (i) continuous during the season conducive to the recreational access; (ii) open and notorious; (iii) adverse; and (iv) without interruption.)
[63] Utah Stream Access Coalition v. Victory Ranch, 2010 UT ____ (4th Dist. Ct., Wasatch Cty.). Specifically, the suit alleges, among other things, that the Act violates Art. XX of the Utah Constitution and the PTD "to the extent it purports to abrogate or relinquish, to the enrichment of private landowners, the public easement, right-of-way and servitude to lawfully access and use Utah's public water and related public resources for recreational and other lawful purposes . . . and to reasonably touch and use the bed of such waters when doing so, as recognized in *Conatser* and other Utah Supreme Court decisions.

5.4 Wetlands

Neither the Utah courts nor state legislature have specifically recognized a public trust in wetlands, although it appears they could fall under the PTD because the Utah Water Code declares that the public owns all waters in the state. As discussed elsewhere,[64] Utah courts have interpreted this statute as recognizing the state's ownership of water as a trustee for the Utah public, subject to existing rights.[65]

5.5 Groundwater

Neither the Utah courts nor state legislature have specifically recognized a public trust in groundwater, although it appears groundwater could also fall under the PTD due to the Utah public's ownership of all water in the state.[66]

5.6 Wildlife

Utah claims sovereign ownership of all wildlife within its borders, except animals legally held by private ownership, like dogs and other domesticated animals.[67] The state has delegated wildlife management responsibilities to the Utah Wildlife Board and the Utah DNR, Division of Wildlife Resources,[68] which in turn regulates the taking of wildlife.[69]

5.7 Uplands (beaches, parks, and highways)

The Utah PTD protects "public lands," which includes any state lands granted to

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[64] *See supra* § 4.2 and *infra* § 6.3.
[65] *See, e.g., Oldroyd v. McCrea*, 235 P. 580, 583-84 (Utah 1925) ("Under the statute, and before its enactment, it is and was settled doctrine in arid and semiarid sections of our country that the corpus of water of a natural stream was not subject to private ownership but was the property of the public or of the state, subject to existing and vested rights of those appropriating them and making a beneficial use of them").
[66] UTAH CODE ANN. § 73-1-1 (West 2010).
[67] *Id.* § 23-13-3.
[68] *Id.* § 23-14-1, *et seq.*
[69] *See infra* § 6.4.

Utah by Congress, or any other entity.[70] The Utah Constitution provides that state public lands "shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired."[71]

Utah case law states that under the PTD, public lands must be open to the Utah public for lawful recreational uses.[72] However, the Utah PTD in narrower when applied to "school trust lands" -- the properties granted to Utah in trust from the United States to be managed for the benefit of the state's public education system[73] -- than when applied to state sovereign lands.[74] This is because the state may consider economic values over recreation and aesthetic outcomes when managing school trust purposes.[75]

6. Activities Burdened

The PTD in Utah burdens the alienation of property in a number of ways, including restricting the state's ability to alienate sovereign lands,[76] restricting the public's right to take wildlife,[77] and imposing a duty on the state to control water use.[78] These restrictions arise out of the state constitution, statutes, and case law.

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[70] UTAH CONST. art. XX, § 1 ("All lands of the State that have been, or may hereafter be granted to the State by Congress, and all lands acquired by gift, grant or devise, from any person or corporation, or that may otherwise be acquired, are hereby accepted, and declared to be the public lands of the State; and shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired.")
[71] UTAH CONST. art. XX, § 1.
[72] *Nat'l Parks & Conservation Ass'n*, 869 P.2d *at* 919.
[73] UTAH CODE ANN. § 53C-1-103(7).
[74] *Nat'l Parks & Conservation Ass'n*, 869 P.2d at 918-24 (In acting as trustee on behalf of public schools, the state has a duty to maximize the value of school trust properties, and does not breach its duty by refusing to consider aesthetic and recreational values over economic values on behalf of the Utah public).
[75] *Id.*
[76] *See infra* § 6.1
[77] *See infra* § 6.4.
[78] *See infra* § 6.3.

6.1 Conveyances of property interests

As discussed above,[79] the state may not alienate trust property if doing so would negatively affect the public interest in these lands.[80] Utah courts employ a case-by-case factual test to determine whether the legislature's alienation of land violates the public trust.[81] The legislature has also placed limits on agencies' ability to manage property held in public trust. For example, the FFSL may exchange, sell, or lease sovereign lands only in a manner that does not interfere with the public trust.[82] As previously mentioned,[83] whenever a state agency alienates sovereign lands, the contract of sale or deed must contain a provision that keeps the land open to the public for hunting, trapping, or fishing during the lawful season, unless doing so substantially interferes with the lease.[84]

6.2 Wetland fills

Neither the legislature or courts have explicitly recognized that the PTD applies to wetlands, but it appears that the PTD could extend to them due to the fact that they fall under the definition of "waters of the state," and the Utah public owns state waters.[85] The

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[79] *See supra* § 3.1
[80] *See supra* § 3.2.
[81] *See, e.g., Colman*, 795 P.2d at 635-36.
[82] UTAH CODE ANN. § 65A-10-1; *see also supra* § 3.3.
[83] *See supra* § 3.3.
[84] UTAH CODE ANN. § 23-21-4 (West 2010).
[85] The Utah water pollution regulations define "wetlands" as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstance do support, a prevalence of vegetation typically adapted for life in saturated soil conditions... [and] generally include swamps, marshes, bogs, and similar areas." UTAH ADM. CODE r. 317-8-1.5(61) (2010). In turn, the definition of "waters of the state" includes wetlands. *Id.* r. 317-8-1.5(60). It therefore seems logical to include wetlands within the waters owned by the public under UTAH CODE ANN § 73-1-1.

Utah Water Quality Board has responsibility, under the Utah Water Quality Act,[86] to regulate wetland fills.[87] A person filling wetland must obtain a permit.[88]

6.3 Water rights

The Utah Water Code proclaims that all waters of the state are property of the public, and that the state must act as a trustee to regulate the use of the water for the benefit of the public. Specifically, section 73-1-1 of the Utah Code states:

> (1) All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof...
> (3) The Legislature shall govern the use of public water for beneficial purposes, as limited by constitutional protections for private property.

The statute is based on the principle that water is scarce in Utah and is indispensible to the welfare of the people, so the state must assume the responsibility of allocating water use for the welfare of the public as a whole.[89]

In *Wrathall v. Johnson*, a 1935 decision, the Utah Supreme Court interpreted this statute to extend the prior appropriation doctrine to groundwater,[90] and in doing so imposed trust duties on the state.[91] The court noted that groundwater is community property, and that members of the public have a right to appropriate groundwater as long

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[86] UTAH CODE ANN. § 19-5-104 (West 2010).
[87] *See generally* UTAH ADM. CODE r. 317-8-1, *et. seq.*
[88] *Id.*
[89] *J.J.N.P. Co. v. State*, 655 P.2d at 1136. *See also Oldroyd v. McCrea.* 235 P. at 584 ("Under the statute, and before its enactment, it is and was settled doctrine in arid and semiarid sections of our country that the corpus of water of a natural stream was not subject to private ownership but was the property of the public or of the state, subject to existing and vested rights of those appropriating them and making a beneficial use of them").
[90] 40 P.2d 755 (Utah 1935).
[91] *Id.* at 777 ("The statutory declaration that 'The water of all streams and other sources in this State *** is hereby declared to be the property of the public' does not vest in the state title or ownership of the water as a proprietor. It is a community right available to all upon compliance with the law by which that which was once common to all may be brought within the domain of private right to use, or under certain circumstances private and exclusive possession and ownership.").

as they do not interfere with the quantity or quality of other appropriation rights.[92] The decision thus imposed a trust duty on the state that specifically included a duty to control the appropriation of groundwater in a manner that served the public interest.[93]

In *Tanner v. Bacon*, the Utah Supreme Court ruled that the state engineer could reject or limit the priority of a power company's application to appropriate waters after the engineer determined that the appropriation would be detrimental to the interests of the public.[94] The court explained that both the state engineer and the reviewing courts are the guardians of the public welfare in the appropriation of the public waters of the state, and possess the authority to qualify or limit appropriations of water on behalf of the public trust.[95]

Utah courts have not specifically addressed whether the PTD extends to all waters of the state under the Water Code. But because this code imposes trust duties on the state to protect all waters of the state,[96] arguably all waters of the state, including groundwater and nonnavigable waters, should be protected by the PTD.

6.4 Wildlife Harvests

Utah claims ownership of all wildlife within its borders, except for domesticated animals, and regulates the public harvesting of wildlife.[97] The state has delegated wildlife management responsibilities to the Utah Wildlife Board and the Utah DNR, Division of Wildlife Resources.[98] The Division of Wildlife Resources has in turn

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[92] *Id.* at 777.
[93] *Id.*
[94] 136 P.2d 957 (Utah 1943).
[95] *See Id. at* 966-67 (Larson, J., concurring).
[96] UTAH CODE ANN. § 73-1-1 (West 2010).
[97] *Id.* at § 23-13-3.
[98] *Id.* § 23-14-1, *et seq.*

promulgated regulations restricting the taking of wildlife to certain limits and seasons.[99] The Division of Wildlife may legally take wildlife for the purposes of wildlife conservation.[100]

7. Public Standing

There is sparse case law in Utah law touching on the rights of the public to sue under the PTD. However, Utah has fairly liberal standing requirements for bringing environmental suits.[101]

7.1 Common law

In *National Parks & Conservation Association v. Board of State Lands*,[102] the Utah Supreme Court allowed an environmental group to challenge a state land transfer under the theory that the state violated its trust duties to the public.[103] The *National Parks* court established a list of factors Utah courts must consider in determining whether a plaintiff has standing to challenge a government action:

> (1) the existence of an adverse impact on the plaintiff's rights, (2) a causal relationship between the governmental action that is challenged and the adverse impact on the plaintiff's rights, and (3) the likelihood that the relief requested will redress the injury claimed.[104]

If a plaintiff cannot meet this standard, third-party standing may still exist concerning important "public issues" if "no one else has a greater interest in the outcome[,] the issues are unlikely to be raised at all unless that particular plaintiff has standing to raise the

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[99] UTAH CODE ANN. § 23-13-1, *et. seq.* The Utah Court of Appeals ruled that an owner of a peregrine falcon who permitted his bird to take a duck out of season was prohibited by a criminal statute that disallowed a person or his dog from illegally taking an animal. Utah v. Chindgren, 777 P.2d. 527 (Utah Ct. App. 1989).
[100] UTAH CODE ANN. § 23-13-6.
[101] *See infra* § 7.1.
[102] 869 P.2d 909 (Utah 1993).
[103] *Id.*
[104] *Id. at* 913 (*quoting* Society of Professional Journalists, Utah Chapter v. Bullock, 743 P.2d 1166, 1172-73 (Utah 1987)).

issues, and the legal issues are sufficiently crystallized to be subject to judicial resolution."[105] The same decision also noted that a plaintiff may maintain a suit against governmental action in circumstances that are so "unique and of such great importance that they ought to be decided in furtherance of the public interest."[106]

The court applied these factors in *National Parks* and concluded that an environmental group plaintiff had standing to challenge a state land transfer because the state allegedly violated its trust duties to the public.[107] In *National Parks,* the state approved a land transfer that would have allowed the paving of a trail on school trust lands within Capital Reef National Park.[108] The plaintiff, organized to protect national parks, claimed that the transfer would negatively affect the scenic and recreational qualities of the park.[109] The court determined that the group had a great interest in bringing the claim and that the matter was important to the public, the state, and the state public schools.[110] Therefore, the court upheld the group's standing to challenge the Utah Land Board's proposed action.[111]

However, a subsequent Utah Supreme Court case stated that the "public issues" test used in *National Parks* is not supposed to be a separate and distinct standing test.[112] So although helpful for a plaintiff to show that it is bringing a case of significant public importance, the plaintiff cannot rely solely on the grounds of its public importance when

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[105] *Id.* (quoting Terracor v. Utah Bd. of State Lands, 716 P.2d 796, 799 (Utah 1986)).
[106] Nat'l Parks & Conservation Ass'n, 869 P.2d at 913.
[107] *Id.*
[108] *Id.* at 911.
[109] *Id.* at 913.
[110] *Id.*
[111] *Id.*
[112] Utah Chapter of Sierra Club v. Utah Air Quality Bd., 148 P.3d 960, 73 (Utah 2006).

asserting standing.[113] A party must establish standing by meeting the three factors discussed in *National Parks*.

7.2 Statutory basis

There are no Utah statutes specifically recognizing citizens standing to enforce the state's public trust duties. However, a party may be able to challenge government actions under the Utah Administrative Procedures Act,[114] which allows citizens to seek judicial review of agency action.[115]

7.3 Constitutional basis

There are no specific Utah constitutional provisions that give citizens standing to enforce the state's trust duties. However, an aggrieved party may be able to assert standing under Article 20 of the state constitution, which declares that state public lands "shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired."[116] This provision seems to allow a citizen to sue the government for not properly managing land held in trust for the public.

8. Remedies

In Utah, a plaintiff may seek injunctive relief under the PTD. The PTD may also be a defense to takings.

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[113] *Id.*
[114] UTAH CODE ANN. § 63G-4-101, *et seq.* (West 2010).
[115] *Id.* §§ 63G-4-401, 401-405.
[116] Utah Const. Art. XX, § 1. *See, e.g., supra* note 63 and accompanying text for an example of a suit that cites this provision.

8.1 Injunctive relief

In Utah, plaintiffs may challenge a state's failure to properly manage public trust property.[117] Because a trustee owes a fiduciary duty to the beneficiaries of the trust, the duty of loyalty requires a trustee to act for the benefit of the beneficiaries.[118] Utah courts have recognized this as a legally binding duty, enforceable by those with a sufficient interest in trust lands that have standing.[119] Also, the Utah Water Code clearly imposes on the state the duty to control the appropriation of public waters in a manner that serves the best interests of the public.[120] The public can challenge state action under this statute.[121]

8.2 Damages for injuries to resources

Utah courts have yet to recognize a damages remedy for injury to trust resources.

8.3 Defense to takings claims

The PTD may be a defense to takings claims in Utah. For example, in *Colman v. Utah State Land Board*, the Utah Supreme Court held that the state's initial lease of a portion of the Great Salt Lake lakebed to a private underwater brine canal operator could violate the PTD.[122] If the state initially exceeds its authority in granting the lease, the state may later revoke the lease without compensation to canal operator.[123] In reaching this decision, the *Colman* court noted that the essence of the PTD is "that navigable

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[117] *See supra* § 7.1.
[118] *Nat'l Parks & Conservation Ass'n.* 869 P.2d at 918, *citing* William F. Fratcher, *Scott on Trusts* § 170 (4th ed. 1987).
[119] *Id.* at 918, *referencing Terracor v. Utah Bd. of State Lands.* 716 P.2d 796, 799 (Utah 1986).
[120] Tanner v. Bacon. 136 P.2d 957, 962 (Utah 1943).
[121] *Id.* at 959.
[122] *Colman*, 795 P.2d at 623-25, 34-36.
[123] *Id.* at 634.

waters should not be given without restriction to private parties and should be preserved for the general public for uses such as commerce, navigation, and fishing."[124]

[124] *Id. discussing* Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892).

VERMONT

The Public Trust Doctrine in Vermont

Alexis Andiman

1.0 Origins

Vermont acknowledges the "antediluvian nature" of the public trust doctrine (PTD),[1] tracing its evolution through Roman and English law[2] and recognizing its protections in the state's constitution.[3] Despite this long history, Vermont's PTD retains an "undiminished vitality," as state courts incorporate broad statements of public trust law from other jurisdictions,[4] and the legislature extends the doctrine's traditional reach.[5]

2.0 The Basis of The Public Trust Doctrine in Vermont

As the state supreme court has explained, "[i]n Vermont, the critical importance of public trust concerns is reflected both in case law and in the state constitution."[6] Since 1777, Vermont's Constitution has recognized citizens' rights "to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) …."[7] The parenthetical phrase "not private property" modifies only "other waters," thus preserving public rights in any privately

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[1] State v. Cent. Vt. Ry., Inc., 571 A.2d 1128, 1130 (Vt. 1989).
[2] New England Trout & Salmon Club v. Mather, 35 A. 323, 324 (Vt. 1896)).
[3] *See* City of Montpelier v. Barnett, 49 A.3d 120, 128 (Vt. 2012) ("Since 1777, the [PTD] has been entrenched in the Vermont Constitution.").
[4] *Cent. Vt. Ry.*, 571 A.2d at 1130 (citing Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984); and Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 719 (Cal. 1983) (en banc)).
[5] *See, e.g.*, VT. STAT. ANN. tit. 10, § 1390 (declaring that Vermont's groundwater resources are "held in trust for the public").
[6] *Cent. Vt. Ry.*, 571 A.2d at 1130-31 (discussing the evolution of the PTD in Vermont).
[7] VT. CONST. ch. II, § 67.

owned "boatable" waters.[8] In Vermont, the term "boatable" encompasses all bodies of water that are susceptible to navigation for purposes of business or pleasure.[9]

Vermont courts have long protected public rights in navigable waters.[10] Although a 1986 decision indicated that constitutional principles might prevent the PTD's further expansion,[11] the Vermont Supreme Court has since acknowledged the doctrine's "undiminished vitality" and adopted broad articulations of public trust law from other jurisdictions.[12] For example, in *State v. Central Vermont Railway*, the court quoted landmark judicial opinions from New Jersey and California to illustrate the continuing evolution of the public trust.[13]

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[8] *Cent. Vt. Ry.*, 571 A.2d at 1131 n.2 (citing New England Trout & Salmon Club v. Mather, 35 A. 323, 325 (Vt. 1896)).

[9] *See New England Trout & Salmon Club*, 35 A. at 324-26 (explaining that "boatable waters, within the meaning of the Constitution, are waters that are of 'common passage' as highways," and applying case law from other jurisdictions to conclude that such "highways" include all streams seasonally capable of supporting commercial navigation); *see also* Hazen v. Perkins, 105 A. 249, 250 (Vt. 1918) (referencing recreational use as evidence of a lake's "boatability").

[10] *New England Trout & Salmon Club*, 35 A. at 326; *see, e.g.*, *Hazen*, 105 A. at 251 (acknowledging that Vermont's citizens, as sovereign, hold the beds of boatable waters in trust for public use); *see also* In re Lake Seymour, 91 A.2d 813, 818 (Vt. 1952) (explaining that private parties may not acquire the right to control the height of public waters); State v. Quattropani, 133 A. 352, 353 (Vt. 1926) (concluding that a littoral landowner has no claim to trust waters or their underlying lands).

[11] Cabot v. Thomas, 514 A.2d 1034, 1038 (Vt. 1986) ("By attaching 'boatable waters' and 'lands not enclosed' limitations on the respective rights of fishing and hunting, the Vermont Constitution has designated those points beyond which private property becomes inviolate for fishing and hunting purposes—nonboatability for the former and enclosure for the latter. Development of the common law must, of course, accommodate these constitutional principles.").

[12] *Cent. Vt. Ry.*, 571 A.2d at 1130.

[13] *Id.* (acknowledging that "[t]he [PTD] is not 'fixed or static, but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit," and explaining that "[t]he very purposes of the public trust have 'evolved in tandem with the changing public perception of the values and uses of waterways'" (quoting Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984); and Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 719 (Cal. 1983) (en banc), respectively)).

In addition to its constitutional and common law origins, Vermont's PTD is also codified in statute. The state legislature has enacted a variety of provisions that either contain explicit trust language or implicitly impose trust duties. For example, a statute pertaining to the management of Vermont's lakes and ponds declares that the state's "public waters ... and the lands lying thereunder are a public trust, and it is the policy of the state that these waters and lands shall be managed to serve the public good."[14] Similarly, the legislature has acknowledged the state's duty to manage fish and wildlife populations "as a trustee for the citizens of the state"[15] and articulated a policy of holding Vermont's groundwater resources "in trust for the public."[16] Other statutory provisions indicate that citizens, in their sovereign capacity, own all mines and quarries discovered on public lands or beneath public waters[17] and establish an objective of administering natural resources in a manner consistent with the public interest.[18]

3.0 Institutional Application

3.1 Restraint on Alienation (Private Conveyances)

Under Vermont common law, citizens may neither acquire nor convey title to public trust property for private purposes. For example, in *Hazen v. Perkins*, the Vermont Supreme Court considered whether a miller could control the flow of water

[14] VT. STAT. ANN. tit. 29, § 401 (2010).
[15] *Id.* tit. 10, § 4081.
[16] *Id.* tit. 10, § 1390.
[17] *Id.* tit. 29, § 301.
[18] *See, e.g., id.* tit. 10, § 901 (declaring Vermont's policy to protect, regulate, and control water resources "in the public interest and consistent with the public welfare"); *see also id.* tit. 10, § 1421 ("To aid in the fulfillment of the state's role as trustee of its navigable waters," Vermont will establish rules to "further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish, and aquatic life; control building sites, placement of structures, and land uses; reduce fluvial erosion hazards; reduce property loss and damage; preserve shore cover, natural beauty, and natural stability; and provide for multiple use of the waters in a manner to provide for the best interests of the citizens of the state.").

from a boatable lake in connection with the use of his lawful water privilege.[19] Although the supreme court ultimately affirmed the chancellor's dismissal of the action, concluding that neighboring landowners failed to allege injuries sufficient to support damages, it also rejected the miller's claimed right to manipulate water levels.[20] Specifically, the court explained that the miller's predecessors could not have conveyed any ownership rights to the lake's waters or underlying land[21] because Vermont's grants of littoral property for private purposes extend only to the low-water mark of navigable waters.[22] Courts have subsequently applied this principle on multiple occasions.[23]

Although Vermont's legislature may alienate trust property for public purposes, Vermont courts have interpreted these grants to require the preservation of public rights, thereby restricting future private conveyances.[24] For example, in *State v. Central Vermont Railway*, the Vermont Supreme Court applied this principle of statutory construction to determine that a railroad company, which acquired title to certain trust

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[19] 105 A. 249, 250 (Vt. 1918).
[20] *Id.* at 251 (citing Fletcher v. Phelps, 28 Vt. 257 (1856), Jakeway v. Barrett, 38 Vt. 316 (1865), and Austin v. Rutland R. Co., 45 Vt. 215 (1873)).
[21] *Id.* (reasoning that the waters at issue were "held by the people in their character as sovereign in trust for public uses for which they are adapted" and concluding that "[t]he defendant did not therefore acquire any title to the waters of the lake, as such, nor to the lands covered by such waters, by grants from private sources").
[22] *Id.* ("[G]rants of land bounding upon [public] lakes pass title only to the water's edge, or to low-water mark if there be a definite low-water line.").
[23] *See, e.g.*, In re Lake Seymour, 91 A.2d 813, 818 (Vt. 1952) (finding that the establishment of water levels in a boatable lake did not constitute an unconstitutional confiscation of private property because "[n]o right can be acquired by or granted to private persons to control the height of the water of the lake or the outflow therefrom by artificial means for private purposes"); *see also* State v. Quattropani, 133 A. 352, 353 (Vt. 1926) (explaining that an individual can "ha[ve] no ownership" of waters subject to the public trust); *see also* In re: Williams Point Yacht Club, 1990 WL 10009082, at *2 (Vt. Super. Ct. Apr. 16, 1990) ("[A] long line of Vermont Supreme Court cases, defining and interpreting the [PTD], state in unequivocal terms that public or navigable waters may not be used for private purposes.").
[24] State v. Cent. Vt. Ry., Inc., 571 A.2d 1128, 1133 (Vt. 1989).

lands under two nineteenth-century legislative acts, held the property in fee simple subject to a condition subsequent, rather than fee simple absolute.[25] As a result, the state possessed a right of reentry,[26] which it could exercise if the company or its successors failed to obtain legislative approval, subject to judicial review, before subjecting the property to "[a]ny substantial change."[27] Thus, Vermont's PTD burdens the private transfer of trust resources by limiting the future uses of such lands.

3.2 Limit on Legislature

The Vermont legislature may not convey trust property for private purposes.[28] Moreover, the Vermont Supreme Court has expressed "significant doubts" concerning the state's authority to alienate such property free of the trust, even if the transfer serves public purposes.[29] Although the extent of legislative power remains unresolved,[30] the supreme court has strictly construed statutes purporting to abandon the public trust, adopting any "reasonably possible" interpretation to preserve the public's interest.[31]

In *Central Vermont Railway*, state and local governments challenged the railroad's effort to sell its waterfront property for private residential development, arguing that the proposed conveyance was inconsistent with the PTD.[32] The company

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[25] *Id.* at 1135. In addition to restricting the future uses of privately-conveyed trust property, the *Central Vermont Railway* court also considered the state's authority to alienate such resources free of the trust. See discussion *infra* § 3.2.
[26] *Id.*
[27] *Id.* at 1136.
[28] *Id.* at 1131 ("[T]he legislature cannot grant rights in public trust property for private purposes." (citing Hazen v. Perkins, 105 A. 249, 251 (Vt. 1918)).
[29] *Id.* at 1132.
[30] *See* Cmty. Nat'l Bank v. State, 782 A.2d 1195, 1197-98 (Vt. 2001) (refusing to recognize the legislature's power to abandon the public trust in the absence of clearly expressed legislative intent).
[31] *Cent. Vt. Ry.*, 571 A.2d at 1128, 1133 (quoting City of Berkeley v. Super. Court of Alameda Cnty., 606 P.2d 362, 369 (Cal. 1980)).
[32] *Id.* at 1129.

countered that nineteenth-century legislation had granted it unqualified ownership of the relevant parcel.[33] Determining that the railroad held title in fee simple subject to the trust, the superior court approved the sale, but retained jurisdiction to ensure that future owners would preserve the property's public purpose.[34] On appeal, the Vermont Supreme Court modified this decision,[35] concluding that the legislation conveyed to the railroad only a fee simple "subject to the condition subsequent that the lands be used for railroad, wharf, or storage purposes," because the statute neither clearly expressed nor otherwise implied an intent to abandon the public trust.[36] Thus, the state retained a right of reentry, which it could exercise if the railroad or its successors managed the land in a manner inconsistent with approved public uses.[37]

3.3 Limit on Administrative Action (Hard Look)

Although Vermont's administrative agencies have, in many instances, replaced the legislature as chief managers of trust resources, the extent to which these agencies have also assumed responsibility for fulfilling common law public trust duties remains unclear.[38] Unlike some other states, the Vermont Supreme Court has not explicitly

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[33] *Id.* at 1133. The legislation at issue authorized littoral landowners to erect structures encroaching on Lake Champlain; provided that such landowners, as well as "their heirs or assigns, shall have the exclusive privilege of the use, benefit and control of [such construction], forever;" and explicitly extended similar rights and a promise of legal title to railroad companies and their successors. *See id.* at 1131-32.
[34] *Id.* at 1129.
[35] *Id.* at 1137.
[36] *Id.* at 1135.
[37] *Id.*
[38] *Compare id.* at 1136 (concluding that the legislature may not delegate its authority to designate appropriate public uses for trust property) *with* City of Montpelier v. Barnett, 49 A.3d 120, 128 (Vt. 2012) (explaining that "delegation of the State's role as trustee" is not necessarily incompatible with the PTD).

imposed specific duties on state administrators.[39] Moreover, lower court and agency decisions have yielded somewhat conflicting guidance with respect to the allocation and scope of public trust responsibilities.[40]

Prior to 1995, several agency appellate boards concluded that permit decisions could not incorporate an analysis of potential impacts to trust resources in the absence of an explicit statutory directive.[41] For example, in *Okemo Mountain, Inc.*, the Vermont Environmental Board considered a ski resort's application to lower a navigable river's minimum flow requirement, allowing the resort to increase water withdrawals for its snowmaking operation.[42] Applying the principle that administrative agencies may

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[39] *See* Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 727-28 (Cal. 1983) (en banc) ("[T]he Legislature, acting directly or through an authorized agency such as the Water Board" has the power to allocate water resources, as well as "an affirmative duty to take the public trust into account ... and to protect public trust uses whenever feasible"); *see also* Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1095 (Idaho 1983) ("[T]he Department of Lands ... has the power to dispose of public lands. This power is not absolute, however, and is subject to the limitations imposed by the [PTD]."); *see also* United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 463 (N.D. 1976) ("[W]e think the [PTD] requires, as a minimum, evidence of some planning by appropriate state agencies and officers in the allocation of public water resources ....").

[40] *See infra* notes 41-47 and accompanying text.

[41] *See, e.g.*, In re: Appeal of Vt. Natural Res. Council, 1993 WL 13006319, at *30 (Vt. Water Res. Bd. Feb. 8, 1993) (concluding that the PTD does not preclude consideration of a ski resort's application to dam a navigable river, because the task of the Water Resources Board is merely "to evaluate a project in light of the considerations contained within the applicable statutes and to issue or deny a permit or certification as appropriate"); *see also* In re: Aquatic Nuisance Control, 1994 WL 16007530, at *16 (Vt. Water Res. Bd. Apr. 12, 1994) (explaining that Vermont's Water Resources Board lacks authority to address "the public trust issue" in evaluating an application to apply an untested herbicide to a boatable lake).

[42] Okemo Mountain, Inc., 1990 WL 174977, at *1 (Vt. Envtl. Bd. September 18, 1990). Environmental organizations intervened and moved to dismiss the application for lack of jurisdiction, arguing that the Board's authority to decide the issue "is dependent upon an express determination by the Vermont General Assembly that withdrawal of waters for this purpose is consistent with the public's rights under the common law [PTD], that such legislative approval has not been enacted, and further that the General Assembly has not

exercise power only in connection with an express legislative grant, the Board concluded that it lacked authority to decide common law and constitutional issues pertaining to the public trust.[43] However, this limited jurisdiction did not preclude the Board from addressing the proposed withdrawal's remaining environmental impacts, consistent with its statutory mandate.[44]

More recently, the Vermont Water Resources Board determined that administrative agencies have a "fiduciary obligation" to ensure that permitted activities will not impair public use of trust resources.[45] As the Board explained in *In re: Dean Leary*, agencies evaluating the extent of citizens' rights "may rely on the guidance provided by case law both from this jurisdiction and other jurisdictions recognizing the [PTD.]"[46] Although several subsequent decisions have also required consideration of the public trust, Vermont's administrative agencies have not yet established consistent procedures to govern this analysis.[47]

4.0 Purposes

4.1 Traditional (Navigation/Fishing)

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expressly delegated to the Environmental Board the power to make public trust determinations." *Id.* at *2.

[43] *Id.* at *3.

[44] *Id.* at *4.

[45] In re: Dean Leary, 1995 WL 17008400, at *3 (Vt. Water Res. Bd. Apr. 12, 1995).

[46] *Id.*

[47] *See* Re: Clyde River Hydroelectric Project, 2003 WL 21649807, at *27 (Vt. Water Res. Bd. July 11, 2003) (reasoning that the Board may satisfy its duties under the PTD by ensuring that proposed projects comply with Vermont's water quality standards); *see also* In re Omya Solid Waste Facility Final Certification, 2011 WL 2610151, at *2 (Vt. Super. May 16, 2011) (explaining that the Vermont Agency of Natural Resources "must develop its own methodology for analyzing the new statutory public trust in groundwater, bearing in mind the principles developed both in the case law and the administrative decisions interpreting the related common law public trust doctrine").

Under the Vermont Constitution, citizens may "fish in all boatable and other waters (not private property) …."[48] Since 1896, courts have interpreted this provision to require that the state hold all seasonally navigable waters in trust for the public.[49] Moreover, according to relevant case law and statutes, Vermont must facilitate the traditional use of these waters by maintaining healthy fish stocks.[50] Thus, the PTD in Vermont preserves the public's right to use trust waters for navigation and fishing purposes.

4.2 Beyond Traditional (Recreational/Ecological)

As discussed above,[51] Vermont's Constitution recognizes citizens' rights "to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) …."[52] According to Vermont courts, this provision authorizes public use of any water body that is susceptible to

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[48] VT. CONST. ch. II, § 67. As discussed in section 2.0 above, the phrase "not private property" does not restrict the public's rights in privately-owned "boatable" waters. Moreover, the term "boatable" includes any water susceptible to seasonal navigation.
[49] New England Trout & Salmon Club v. Mather, 35 A. 323, 324-26 (Vt. 1896); *see also* Parker v. Town of Milton, 726 A.2d 477, 481 (Vt. 1998) ("[T]he purpose of the [PTD] is to preserve the public's interest in Vermont's navigable waterways.").
[50] *See* State v. Malmquist, 40 A.2d 534, 538 (Vt. 1944) ("[T]he State has not only the right but the duty to preserve and increase the supply of fish, which, being *ferae naturae*, are the common property of the public."); *see also* VT. STAT. ANN. tit. 10, § 1421 (2010) (directing the state, in its capacity "as trustee of its navigable waters," to "protect spawing grounds, fish, and aquatic life"); *see also id.* tit. 10, § 4081 (stipulating that "[t]he state of Vermont, in its sovereign capacity as a trustee for the citizens of the state, shall have ownership, jurisdiction, and control of all of the fish … of Vermont" and finding that "[t]he protection, propagation, control, management, and conservation of fish … in this state [is] in the interest of the public welfare.").
[51] *See supra* notes 7-9, 48-49 and accompanying text.
[52] VT. CONST. ch. II, § 67.

seasonal navigation for commercial or recreational purposes,[53] thus establishing the scope of the state's PTD concerning waterways.[54]

Although Vermont's Supreme Court previously suggested constitutional limits to the PTD's expansion,[55] more recent decisions have embraced the doctrine's "undiminished vitality."[56] In 1989, the court adopted broad articulations of public trust law from several other jurisdictions, including an acknowledgement that the PTD protects public "rights of navigation, passage, portage, commerce, fishing, recreation, conservation and aesthetics."[57] This interpretation is consistent with a state statutory provision requiring Vermont, "as trustee of its navigable waters," to preserve the ecological, aesthetic, and recreational values of public resources.[58] Moreover, the

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[53] *New England Trout & Salmon Club*, 35 A. at 324-36.

[54] *See, e.g.*, City of Montpelier v. Barnett, 49 A.3d 120, 128 (Vt. 2012) (quoting this provision to demonstrate that "[s]ince 1777, the [PTD] has been entrenched in the Vermont Constitution"); *see also* Richard O. Brooks, *Speaking (Vermont) Truth to (Washington) Power*, 29 Vt. L. Rev. 877, 885 (2005) (explaining that Vermont courts have applied this provision "to establish a public trust in Vermont's natural resources which is now recognized in her statutes and regulations").

[55] Cabot v. Thomas, 514 A.2d 1034, 1038 (Vt. 1986) ("By attaching 'boatable waters' and 'lands not enclosed' limitations on the respective rights of fishing and hunting, the Vermont Constitution has designated those points beyond which private property becomes inviolate for fishing and hunting purposes—nonboatability for the former and enclosure for the latter. Development of the common law must, of course, accommodate these constitutional principles.").

[56] State v. Cent. Vt. Ry., 571 A.2d 1128, 1130 (Vt. 1989).

[57] *Id.* (quoting United States v. 1.58 Acres of Land, 523 F. Supp. 120, 122-23 (D. Mass. 1981)).

[58] VT. STAT. ANN. tit. 10, § 1421 (2010) (declaring the public interest in enacting rules "to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish, and aquatic life; control building sites, placement of structures, and land uses; reduce fluvial erosion hazards; reduce property loss and damage; preserve shore cover, natural beauty, and natural stability; and provide for multiple use of the waters in a manner to provide for the best interests of the citizens of the state").

purposes for which Vermont's citizens may use trust resources are likely to continue to evolve to accommodate the public's changing needs and values.[59]

5.0 Geographic Scope of Applicability

5.1 Tidal

There are no tidal waters in Vermont.[60]

5.2 Navigable in Fact

Vermont's Constitution establishes a public trust in "all boatable and other waters (not private property)."[61] As previously explained,[62] courts have interpreted this provision to protect public rights in any waterbody that is seasonally capable of supporting commercial or recreational navigation.[63] Moreover, Vermont's legislature has indicated that the state's navigable waters include "Lake Champlain, Lake Memphremagog, the Connecticut River, all natural inland lakes within Vermont and all streams, ponds, flowages, and other waters within the territorial limits of Vermont, including the Vermont portion of boundary waters, which are boatable under the laws of

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[59] *Cent. Vt. Ry.*, 571 A.2d at 1130 (quoting Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) and Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 719 (Cal. 1983) (en banc)).

[60] *See* New England Trout & Salmon Club v. Mather, 35 A. 323, 325 (Vt. 1896) (explaining that the drafters of Vermont's Constitution employed the term "boatable," because the state contained no "navigable waters" within the meaning of English common law, which equated navigability with tidal influence).

[61] VT. CONST. ch. II, § 67.

[62] *See infra* notes 8-9, 49 and accompanying discussion.

[63] *New England Trout & Salmon Club*, 35 A. at 324-26. In certain circumstances, Vermont's PTD may extend to artificial ponds. *See* Re: Kent Pond, 2004 WL 1090633, at *5 (Vt. Water Res. Bd. May 12, 2004).

this state."[64] To preserve the trust, Vermont grants private title only to the edge, or low-water mark, of navigable water bodies.[65]

5.3 Recreational Waters

Vermont's PTD does not extend to non-navigable waters overlying private land.[66]

5.4 Wetlands

Vermont courts have not expressly recognized wetlands as trust resources. However, the legislature has acknowledged that wetlands protection is consistent with the PTD,[67] and requires individuals to obtain permits before altering such ecosystems.[68] Moreover, the Vermont Constitution implicitly preserves citizens' rights in publicly-owned wetlands.[69]

5.5 Groundwater

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[64] VT. STAT. ANN. tit. 10, § 1422.
[65] State v. Cent. Vt. Ry., 571 A.2d 1128, 1131 (Vt. 1989) (quoting *Hazen v. Perkins*, 105 A. 249, 251 (Vt. 1918)).
[66] *See* Cabot v. Thomas, 514 A. 1034, 1038 (Vt. 1986) (explaining that Vermont's Constitution holds private property underlying non-navigable waters "inviolate for fishing and hunting purposes"); *see also New England Trout & Salmon Club*, 35 A. at 326 (concluding that non-navigable waters "are not public, but private, and the state has no jurisdiction over them").
[67] *See* VT. STAT. ANN. tit. 10, § 1421 (instructing the state to "fulfill[] [its] role as trustee of its navigable waters" by developing rules, which, *inter alia*, "protect spawning grounds, fish, and aquatic life; ... reduce fluvial erosion hazards; ... preserve shore cover, natural beauty, and natural stability; and provide for multiple use of the waters in a manner to provide for the best interests of the citizens of the state").
[68] *Id.* tit. 10, § 913 (stipulating that "no person shall conduct or allow to be conducted an activity in a significant wetland or buffer zone of a significant wetland except in compliance with a permit, conditional use determination, or order issued by the secretary").
[69] VT. CONST. ch. II, § 67 ("The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl in the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly.").

In 2008, Vermont's legislature declared groundwater to be a trust resource, and required the state to manage withdrawals for the public's benefit.[70] Although many citizens, including environmentalists and opponents of proposed bottled water production facilities, applauded the subsequently enacted withdrawal program's reporting and permitting requirements,[71] others argued that its broad exemptions for domestic and agricultural uses fail to adequately protect groundwater supplies.[72]

5.6 Wildlife

Vermont owns wildlife in trust for the public.[73] Under the state constitution, Vermont's legislature has asserted "ownership, jurisdiction, and control" over such resources for the benefit of all citizens.[74] Relevant case law and statutory provisions recognize the state's affirmative duty to preserve and increase wildlife populations.[75]

5.7 Uplands (beaches, parks, highways)

Although Vermont has not explicitly extended the PTD to uplands, the state constitution preserves citizens' rights to hunt on public and unenclosed private property.[76]

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[70] VT. STAT. ANN. tit. 10, § 1390.
[71] *Id.* tit. 10, §§ 1417(a), 1418.
[72] *See* Noah D. Hall, *Protecting Freshwater Resources in the Era of Global Water Markets: Lessons Learned from Bottled Water*, 13 U. Denv. Water L. Rev. 1, 41 (2009).
[73] VT. STAT. ANN. tit. 10, § 4081 ("As provided by Chapter II, § 67 of the Constitution of the State of Vermont, the fish and wildlife of Vermont are held in trust for the benefit of the citizens of Vermont and shall not be reduced to private ownership. The state of Vermont, in its sovereign capacity as trustee for the citizens of the state, shall have ownership, jurisdiction, and control of all of the fish and wildlife of Vermont.").
[74] *Id.*
[75] *See id.* ("The protection, propagation, control, management, and conservation of ... wildlife[] and fur-bearing animals in this state are in the interest of the public welfare. The state, through the commissioner of fish and wildlife, shall safeguard the ... wildlife[] and fur-bearing animals of the state for the people of the state, and the state shall fulfill this duty with a constant and continual vigilance."); *see also* State v. Malmquist, 40 A.2d 534, 538 (acknowledging that "the State has not only the right but the duty to preserve and increase the supply of ... *ferae naturae*").
[76] VT. CONST. ch. II, § 67.

6.0 Activities Burdened

6.1 Conveyances of property interests

As discussed above,[77] neither Vermont's legislature nor its private citizens may convey title to trust resources for private purposes.[78] Although the state's authority to alienate trust property unencumbered by public rights remains unresolved,[79] Vermont courts strictly construe any statute that purports to abandon the trust, and will adopt any reasonable interpretation that would preserve the public's interest.[80]

6.2 Wetland fills

As discussed above,[81] Vermont's PTD does not explicitly extend to wetlands. However, in *Central Vermont Railway*, the state supreme court interpreted legislation authorizing a railroad company to erect structures encroaching on Lake Champlain, concluding that the company and its successors must manage the resulting filled lands to serve only legislatively approved public purposes.[82] Presumably, similar constraints would apply to efforts to fill trust wetlands as well.

6.3 Water rights

As discussed above,[83] Vermont's citizens may neither acquire nor convey title to trust property for private purposes. In *Hazen v. Perkins*, the state supreme court

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[77] *See supra* §§ 3.1, 3.2.
[78] *See, e.g.*, State v. Cent. Vt. Ry., Inc., 571 A.2d 1128, 1131 (Vt. 1989) ("[T]he legislature cannot grant rights in public trust property for private purposes." (citing Hazen v. Perkins, 105 A. 249, 251 (Vt. 1918)); *see also* In re Lake Seymour, 91 A.2d 813, 818 (Vt. 1952) ("No right can be acquired by or granted to private persons to control the height of the water of [a navigable lake] or the outflow therefrom by artificial means for private purposes.").
[79] *See supra* notes 29-31 and accompanying text.
[80] *Cent. Vt. Ry.*, 571 A.2d at 1133.
[81] *See supra* § 5.4.
[82] *Cent. Vt. Ry.*, 571 A.2d at 1135.
[83] *See supra* notes 19-23 and accompanying text.

concluded that a lawful water privilege[84] did not authorize its owner to control the level of a navigable lake, if such use would be inconsistent with the PTD.[85] Similarly, in *State v. Quattropani*, the court explained that an order prohibiting boating on a navigable pond did not invade a riparian owner's rights, because riparians "ha[ve] no ownership of navigable waters or the land beneath them; these belong to the people in their sovereign character, and are held for the public uses for which they are adapted."[86] Thus, Vermont's PTD prohibits private parties from asserting rights to trust waters that are detrimental to the public interest.

6.4 Wildlife harvests

In its capacity as public trustee,[87] Vermont's legislature has authorized the state Fish and Wildlife Board to adopt regulations governing wildlife harvests.[88] Under these regulations, citizens have no possessory rights to animals killed in contravention of state law.[89] For example, in *Jones v. Metcalf*, the Vermont Supreme Court reversed an order permitting a hunter to recover damages associated with the seizure of an illegally

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[84] Under Vermont law, the term "water privilege" describes the right to operate a mill on a particular stream. *See* Paul S. Gillies, Ruminations, *Grinding Well and Sufficiently: The Grist-Mill in Vermont Law*, 32 Vt. B.J. 11, 12 (Spring 2006).

[85] 105 A. at 251 (citations omitted) (finding that the manipulation of water levels constituted a public nuisance, but affirming the chancellor's dismissal of the action, because the plaintiffs failed to allege adequate injuries).

[86] State v. Quattropani, 133 A. 352, 353 (Vt. 1926).

[87] VT. STAT. ANN. tit. 10, § 4081 ("The state of Vermont, in its sovereign capacity as a trustee for the citizens of the state, shall have ownership, jurisdiction, and control of all of the fish and wildlife of Vermont.").

[88] *Id.* tit. 10, § 4082; *see also* Bondi v. Mackay, 89 A. 228, 230-31 (Vt. 1913) (recognizing the legislature's power to take measures to preserve, increase, or decrease populations of wild game).

[89] *See* VT. STAT. ANN. tit. 10, § 4193 (directing game wardens to seize unlawfully harvested fish and wild animals); *but see* Langle v. Bingham, 447 F.Supp. 934, 940 (D. Vt. 1978) (determining that the warrantless seizure of deer hide and version violated a hunter's civil rights, because "there was no judicial determination that the game … was unlawfully taken").

captured bear.[90] As the court explained, "[t]he general property in the bear when it was at large was in the people of the state in their sovereign capacity," and "[t]hey could protect it[,] invite its destruction[, or] regulate the means of capture ... for the common good."[91] Thus, Vermont's PTD preserves the public interest in maintaining healthy wildlife populations by burdening the harvest of such resources.

7.0 Public Standing

7.1 Common law-based

To establish standing, citizens alleging a violation of the PTD must demonstrate actual injury.[92] In *Parker v. Town of Milton*, residents and labor unions challenged issuance of a permit authorizing construction of a bridge across a public lake, arguing that the PTD requires a prior determination that encroachment on trust resources will serve a public use.[93] The superior court dismissed this claim, finding that the plaintiffs failed to plead actual injury.[94] In affirming, the Vermont Supreme Court relied on an early twentieth century decision, which concluded that nominal impairment of aesthetic enjoyment and use of a trust resource was insufficient to establish standing in the context of a public nuisance claim.[95] As the *Parker* court explained, "[i]t does not advance the [PTD] to permit litigants without a personal stake in the proceedings to claim harm to some generalized interest that they alone articulate, purportedly on behalf of the public

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[90] 119 A. 430, 431 (Vt. 1923).
[91] *Id.* at 432-33.
[92] Parker v. Town of Milton, 726 A.2d 477, 481 (Vt. 1998). In contrast, the PTD "require[s]" the state to preserve public property, including boatable waters and wild animals. *See* State v. Malmquist, 40 A.2d 534, 538 (Vt. 1944) (concluding that Vermont had standing to challenge the drawing down of water in a public lake).
[93] *Id.* at 479.
[94] *Id.*
[95] *Id.* at 481 ("[S]tanding is not conferred on individuals merely by virtue of their status as beneficiaries of the interest protected by the [PTD]." (citing Hazen v. Perkins, 105 A. 249, 252 (Vt. 1918))).

interest."[96] Instead, according to the court, citizens should direct such widespread grievances to the state legislature.[97]

7.2 Statutory basis

The Vermont legislature has not addressed public standing to sue under the PTD.

7.3 Constitutional basis

The Vermont Constitution does not address public standing to sue under the PTD.

8.0 Remedies

8.1 Injunctive Relief

Vermont courts equate actions to preserve trust resources with public nuisance claims. Thus, although plaintiffs may seek to enjoin a violation of the PTD, courts will not award such relief in the absence of "special and substantial injury, distinct and apart from the general injury to the public."[98]

8.2 Damages for injuries to resources

As described earlier,[99] Vermont courts will award damages under the PTD if citizens establish injuries consistent with a public nuisance standard.[100]

8.3 Defense to takings claims

Vermont's agencies have successfully employed the PTD as a defense against takings claims. In *In re Lake Seymour*, for example, the state supreme court affirmed an administrative order establishing the natural minimum and maximum water levels of a navigable lake.[101] Specifically, the court rejected a utility's claim that the order effected

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[96] *Id.*
[97] *Id.*
[98] *Hazen*, 105 A. at 251.
[99] *See* discussion *supra* § 8.1.
[100] *Id.* at 252.
[101] 91 A.2d 813, 818 (Vt. 1952).

an unconstitutional confiscation of property, because Vermont's PTD precludes individuals from acquiring or controlling trust waters for private purposes.[102] Vermont courts have refused to find takings of trust property even with respect to regulations that limit existing riparian rights.[103]

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[102] *Id.* (citing *Hazen*, 105 A. at 249 and State v. Malmquist, 40 A.2d 534 (Vt. 1944)).
[103] *See* State v. Quattropani, 133 A. 352, 354 (Vt. 1926) (In the context of trust resources, "[a] valid exercise of the police power does not amount to a taking of property as by eminent domain, and compensation is not required, though property values are impaired."); *see also* In re Silver Lake, 2005 WL 6357909, at *12 (Vt. Natural Res. Bd. Oct. 25, 2005) ("[O]nly something that a person owns can be taken, and … shoreline owners' riparian rights do not give them an ownership interest in the waters of the lake; that interest is held by the State under the [PTD].").

VIRGINIA

The Public Trust Doctrine in Virginia

Elizabeth Zultoski

1.0 Origins

The Commonwealth of Virginia inherited English common law and, along with it, the public trust doctrine (PTD).[1] Through the Common Lands Acts of 1780 and 1802, the Virginia legislature expanded upon the basic PTD principle that the Commonwealth holds title to the submerged lands beneath tidal waters, claiming the title to the unreserved submerged lands[2] beneath waterways that the public used in common.[3] Early Virginia common law connected the Commonwealth's ownership of submerged lands to the public trust, noting that the legislature has the discretion to control these lands "for the benefit of the people."[4] Cases in the early 1900s explored the boundaries of the legislature's discretion to authorize or impair public uses of trust resources.[5]

Virginia common law has provided the Commonwealth, through the legislature, with significant discretion to manage submerged lands.[6] In *Newport News Shipbuilding & Dry Dock, Co. v. Jones*, the Supreme Court of Virginia concluded that the constitution provides the only

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[1] VA. CODE § 1-200 ("The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."); *see also* Evelyn v. Commonwealth, 621 S.E.2d 130, 135 (Va. Ct. App. 2006) ("Arguably, then, unless explicitly altered by the General Assembly, the public trust doctrine as it existed within the English common law lives on in the laws of Virginia.")

[2] Through the common law, statutes, and the state Constitution, Virginia uses several terms to refer to submerged lands. *See, e.g.*, VA. CONST. Art. XI, § 3 (referring to "[t]he natural oyster beds, rocks, and shoals"); *But cf.*, VA. CODE § 28.2-1200.1(A) (2009) (using the terms "submerged lands" and "state-owned bottomlands").

[3] *See infra* § 5.0 (discussing the Common Lands Acts).

[4] Taylor v. Commonwealth, 47 S.E. 875, 879 (Va. 1904); McCready v. Commonwealth, 68 Va. (27 Grat.) 985, 987 (Va. 1876)("[W]hen the revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them, for their own common use." (internal citations omitted); *see also* Sharon M. Kelly, *The Public Trust Doctrine and the Constitution: Routes to Judicial Overview of Resource Management Decisions in Virginia*, 75 VA. L. REV. 895, 901-902 (1989) (noting *McCready* as the first Virginia decision to use trust language).

[5] *See infra* § 4.0 (discussing the purposes for which the Commonwealth held the resources in trust).

[6] *See infra* § 3.2 (discussing the legislature's authority to manage submerged lands).

restraint on the legislature's decisions to manage trust resources.[7] Later cases, such as *City of Hampton v. Watson*, upheld a city's right to disposal of sewage into a waterway, even though the pollution impaired an individual's right to oyster in the waters, because sewage disposal was a public use that the legislature had the authority to eliminate.[8] But the legislature's discretion is not unlimited; for example, the Commonwealth may not transfer the title to trust lands to private parties.[9]

Although the Virginia common law provides a rich source of the history of the PTD, the Virginia legislature has codified much of the doctrine in constitutional and statutory provisions and transferred the Commonwealth's authority to manage submerged lands to the Virginia Marine Resources Commission ("the Commission").[10] The Commission has the discretion to determine the appropriate public and private uses of Commonwealth-owned submerged lands, although the legislature has required that the Commission consider the PTD when permitting uses of submerged lands.[11] Virginia courts now give the Commission significant deference in making decisions about how to manage Commonwealth trust resources.[12]

2.0 The Basis of the Public Trust Doctrine in Virginia

Virginia has expanded the PTD as it originated in English law, shaping the doctrine through land grants, common law, and statutes. The Common Lands Acts of 1780 and 1802 expanded the scope of the Commonwealth's ownership of submerged lands from tidal waters to

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[7] 54 S.E. 314, 317 (Va. 1906).
[8] City of Hampton v. Watson, 89 S.E. 81 (Va. 1916); *see also* Kelly, *supra* note 4, at 904 (analyzing cases that have explained the legislature's requirement to management trust resources for the public benefit).
[9] *See infra* § 3.1 (discussing how the public trust restrains the Commonwealth from alienating trust resources); *see also* VA. CODE § 28.2-1200.1(A) ("In order to fulfill the Commonwealth's responsibility under Article XI of the Constitution of Virginia to conserve and protect public lands for the benefit of the people, the Commonwealth shall not convey fee simple title to state-owned bottomlands covered by waters.")
[10] *See infra* § 2.0 (discussing the constitutional and statutory provisions that address Virginia's public trust).
[11] *See infra* § 2.0 (citing VA. CODE § 28.2-1205 ("[t]he Commission . . . shall exercise its authority under this section consistent with the public trust doctrine)).
[12] *See, e.g., Evelyn*, 621 S.E. 2d at 133 ("Although the outcome of this appeal turns to some extent on an interpretation of the common law, the law has been codified by the General Assembly in statutes it has entrusted the VMRC to apply. Thus, we give the agency's interpretation 'special weight.").

encompass waters used in common.[13] In 1876, the Supreme Court of Virginia in *McCready v. Commonwealth* recognized that the Commonwealth's ownership encompassed the submerged lands beneath navigable waters.[14] Later court decisions and constitutional and statutory provisions have explicitly recognized the PTD in Virginia.

2.1 Common Law

In *McCready v. Commonwealth,* the Supreme Court first discussed the PTD, rejecting a constitutional challenge to a state statute that prohibited non-Virginian residents from planting oysters in Commonwealth-owned waterways.[15] The court avoided the issue of whether the Commonwealth owned navigable waterways absolutely or merely held the title in trust for the public because it determined that the Commonwealth's proprietary interest in the waterways was sufficient to exclude citizens of other states.[16]

After *McCready*, Virginia experienced an increase in litigation over waterways and submerged lands, implicating the PTD.[17] In 1904, in *Taylor v. Commonwealth,* the Supreme Court explained that the PTD, rooted in both traditional common law principles and state statutes, is the source of the Commonwealth's ownership of the navigable waters and submerged lands.[18] The *Taylor* court stated:

> The Commonwealth holds as trustee a vast body of land covered by the flow of the tide . . . for the benefit of her citizens. It is not only her right, but her duty, as such trustee, to render this property productive. [19]

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[13] *See infra* note 25 (citing Bradford v. Nature Conservancy 294 S.E. 2d 866, 873 (Va. 1982).
[14] 68 Va. at 987.
[15] 68 Va. at 987-988; *see* Kelly, *supra* note 4 (discussing how *McCready* was the first case to employ trust language).
[16] *Id.*
[17] *See* Kelly, *supra* note 4, at 902 (noting a "thirty-year 'surge' of public trust litigation" during the early twentieth century).
[18] 47 S.E at 875 -876 (addressing a dispute between a riparian landowner and a water company over water and property rights below the low-water mark and concluding that the riparian landowner's fee-simple title ended at the low-water mark).
[19] *Id.* at 879.

The court concluded that because of the PTD a riparian landowner did not have the title to the water or the submerged lands below the low-water mark.[20] Subsequent courts often cite to these early common law decisions when discussing the Commonwealth's ownership of trust resources.[21]

2.2 Constitutional Provisions

Article XI of the Virginia Constitution of 1970 recognizes that the Commonwealth holds the submerged lands in trust for the public:

> The natural oyster beds, rocks, and shoals in the waters of the Commonwealth shall not be leased, rented, or sold but shall be held in trust for the benefit of the people of the Commonwealth, subject to such regulations and restriction as the General Assembly may prescribe.[22]

The constitution also articulates a general conservation policy for the Commonwealth's natural resources,[23] which the Virginia Marine Resources Commission must consider when issuing permits for Commonwealth-owned submerged lands. [24]

2.3 Statutory Provisions

Although early Virginia statutes claimed ownership over waterways and submerged lands, current Virginia statutes explicitly link that ownership to the PTD. The Common Lands Acts of 1780 and 1802 declared that the Commonwealth held the title to non-tidal waterways and

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[20] *Id.*

[21] *See, e.g., Evelyn*, 621 S.E. at 134; Avery v. Beale, 195 Va. 690, 720 (Va. 1954); *see also* Kelly, *supra* note 4, at 901-902 (1989) (discussing how *McCready* and *Taylor* were among the first PTD decisions).

[22] VA. CONST. art. XI § 3; *see* Patrick J. Connolly, *Saving Fish to Save the Bay: Public Trust Doctrine Protection for Menhaden's Foundational Ecosystem Services in the Chesapeake Bay*, 36 B.C. ENVTL. L. REV. 135, 149 (2009) (noting that section 3 was carried over from the 1902 Constitution (citing VA. CONST., art. VII, § 175 (1902))).

[23] VA. CONST. art. XI § 1 (stating that "[t]o the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.")

[24] VA. CODE. § 28.2-1205; *see infra* § 3.3 (discussing Article XI's requirements for the Virginia Marine Resource Commission).

submerged lands.[25] These common lands acts did not explicitly use trust language, but they increased the Commonwealth's ownership to include navigable waterways, thus expanding the PTD.[26]

Currently, the Virginia code describes the Commonwealth's ownership of and trust duties over waterways and submerged lands as follows:

> All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth, not conveyed by special grant or compact according to law, shall remain the property of the Commonwealth and may be used as a common by all the people of the Commonwealth for the purpose of fishing, fowling, hunting, and taking and catching oysters and other shellfish. No grant shall be issued by the Librarian of Virginia to pass any estate or interest of the Commonwealth in any natural oyster bed, rock, or shoal, whether or not it ebbs bare.[27]

Other statutes describe the Commonwealth's trust duties over and the extent of the public's rights to use the submerged lands.[28] For example, one provision prohibits the Commonwealth from conveying title to Commonwealth-owned submerged lands unless the lands are lawfully filled.[29] Other provisions describe the rights of riparian landowners[30] and proscribe certain private actions on submerged lands.[31] The code gives the Virginia Marine Resources Commission the authority to issue permits for specified uses of submerged lands owned by the Commonwealth and establishes criteria for permit issuance scheme.[32]

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[25] In the Common Lands Act of 1780, the Virginia legislature reserved the title of the ungranted shores and beds of rivers and creeks in the Eastern part of the Commonwealth that "have been used as common to the good people thereof." The legislature provided for a similar reservation of the title to the banks, shores and beds of rivers and creeks in the Western part of the Commonwealth through the Common Lands Act of 1802. *Bradford v. Nature Conservancy*, 294 S.E. 2d at 873 (citing 10 Hening, Statutes at Large, 226-27).

[26] Larry W. George, *Public Rights in West Virginia Watercourses: A Unique Legacy of Virginia Common Lands and the Jus Publicum of the English Crown*, 101 W.VA. L.REV. 407, 421 (1998) (citing *Bradford v. Nature Conservancy*, 294 S.E.2d at 866).

[27] VA. CODE § 28.2-1200.

[28] *Id.*

[29] *See infra* § 3.1 (discussing the trust's limitations on the Commonwealth's ability to alienate submerged lands).

[30] *See infra* § 6.1 (discussing the rights of riparian landowners to Commonwealth-owned submerged lands).

[31] *See infra* § 4 (discussing public uses of Commonwealth-owned submerged lands).

[32] VA. CODE § 28.2- 1204 -1207; *see infra* § 3.3 (discussing the Virginia Marine Resources Commission permitting scheme for uses of Commonwealth-owned submerged lands).

3.0 Institutional Application

Virginia recognizes the basic public trust principle that the Commonwealth cannot convey the title to the submerged lands beneath Commonwealth-owned waterways.[33] Yet the legislature has established exceptions to this restraint on alienation, allowing the legislature to convey title to lawfully filled submerged lands.[34] The courts have always afforded the legislature significant discretion to manage the submerged lands and authorize appropriate public uses, provided the uses are for the public benefit.[35] The legislature has delegated its management discretion over submerged lands to the Virginia Marine Resources Commission.[36]

3.1 Restraint on alienation

Article XI, section 3 of the Virginia Constitution prohibits the Commonwealth from leasing, renting, or selling the submerged lands owned by the Commonwealth,[37] proclaiming that submerged lands are "held in trust for the benefit of the people of the Commonwealth."[38] Relying upon its constitutional authority to enact regulations for submerged lands as necessary, the legislature enacted a series of statutes authorizing the Commonwealth to convey less-than-fee property interests to private parties in submerged lands or fee interests to government entities for public purposes.[39] The legislature also authorized the Commonwealth to convey fee simple title of filled submerged lands.[40]

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[33] *See infra* § 3.1 (citing VA. CONST. art. XI, § 3; VA. CODE § 28.2-1200.1(A)).
[34] VA. CODE § 28.2-1200.1(B) ("The Commonwealth may convey fee simple title to specified parcels of state-owned bottomlands that have been lawfully filled. For the purpose of this section, "lawfully filled" means the deposit of fill was (i) authorized by statute, (ii) pursuant to valid court order, (iii) authorized or permitted by state officials pursuant to statutory authority subsequent to July 1, 1960, or (iv) under apparent color of authority prior to July 1, 1960.")
[35] *See infra*, § 3.2 (citing *Taylor*, 47 S.E. at 879).
[36] See *infra* § 3.3 (citing *Evelyn*, 621 S.E. at 134).
[37] See *supra* § 2.2 (citing VA. CONST. art. XI, § 3).
[38] *Id.*
[39] VA. CODE § 28.2-1200.1(A) ("In order to fulfill the Commonwealth's responsibility under Article XI of the Constitution of Virginia to conserve and protect public lands for the benefit of the people, the Commonwealth shall not convey fee simple title to state-owned bottomlands covered by waters. However, the Commonwealth may grant a lease, easement, or other limited interest in state-owned bottomlands covered by waters pursuant to § 28.2-1208 or

3.2 Limit on the legislature

Almost invariably, Virginia courts have upheld the legislature's authority to determine how to use and protect trust resources.[41] Although the courts have given significant discretion to the legislature, they have often stated that the uses of trust resources must be "for the public benefit."[42] For example, relying on the *Taylor* court's requirement that the legislature authorize uses that are in the public benefit, the Supreme Court in *City of Hampton v. Watson* held that a city could dump sewage into a waterway because sewage disposal was in fact a public benefit.[43] Even though the sewage damaged a private oyster lease, the court determined that the city's sewage dumping benefited the public, stating "[i]t is for the state to say what uses shall be made thereof and by whom, subject always to the right of the public."[44] In *Commonwealth v. City of Newport News*, the court reached the same conclusion that the legislature could prioritize sewage dumping over oystering, but noted that the legislature could not "relinquish, surrender or destroy, or substantially impair the *jus publicum*, or the rights of the people which are so grounded therein as to be inherent and inseparable incidents thereof," unless otherwise authorized under state or federal constitutions.[45] The result suggested Virginia retained the "public benefit" restriction established in the 1904 *Taylor* case.[46]

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as long as the property is used by a governmental entity for the performance of a governmental activity, as defined in §§ 28.2-1300 and 28.2-1400.")

[40] VA. CODE § 28.2-1200.1(B) (allowing the Commonwealth to "convey fee simple title to specified parcels of state-owned bottomlands that have been lawfully filled.")

[41] *Taylor*, 47 S.E. at 879 (concluding that "the state's right to grant these resources is absolute and uncontrollable.")

[42] *Id.* (stating that the legislature has the discretion to control trust resources "for the benefit of the people"); *see also* Kelly, *supra* note 4, at 903-904 (discussing the variations in court decisions concerning the "public benefit" requirement for the legislature's decisions)

[43] *City of Hampton v. Watson*, 89 S.E. at 83; *see also* Darling v. City of Newport News (96 S.E. 307 (Va. 1918) (inferring that the legislature had the authority to completely eliminate the public's right to oystering, or other public rights, if it so desired).

[44] *Id.*

[45] 164 S.E. 689, 696 (Va. 1932) (determining that the legislature is free to determine "what is for the benefit of the people," without interference from the judicial or executive branches, unless otherwise provided through three limitations: 1) an implicit or explicit constitutional provision; 2) a limit to the government's sovereign powers, or the

Modern limits on the legislature's management discretion reside in the constitution and statutes authorizing the Commission to determine how to permit uses of submerged lands.[47] The legislature expressly required the Commission to consider the PTD when issuing permits for activities on submerged lands.[48] Relying on these provisions in *Evelyn v. Commonwealth*, the Virginia Court of Appeals noted that "the legislature's express *duty* to safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the public as conferred by the PTD and the Constitution."[49] The *Evelyn* court concluded that the PTD provided the legislature with wide discretion to manage trust resources.[50] However, the legislature, through the Virginia Marine Resources Commission, should manage submerged lands in accordance with the Constitution's conservation policy.[51]

3.3 Limit on administrative action

The legislature delegated the Commonwealth's duty to manage submerged lands to the Virginia Marine Resources Commission, expressly requiring the Commission to consider the PTD when issuing permits for activities on submerged lands.[52] The Commission now has the authority to permit reasonable public uses of Commonwealth-owned submerged lands, such as dredging, taking material, and recovering historical resources.[53] However the legislature did not provide the Commission with boundless discretion, establishing three restrictions on the Commission's decision-making. First, the legislature enumerated six factors the Commission

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jus publicum; or 3) a limit to the public's right to enjoy a right deeply rooted in the *jus publicum*); *see also* Kelly, *supra* note 4, at 905-906.

[46] *See supra* notes 18-20 and accompanying text

[47] *See generally* §§ 2.2 and 2.3 (describing statutory and constitutional provisions establishing the public trust).

[48] VA. CODE § 28.2-1204

[49] *Evelyn*, 621 S.E. 2d at FN3 (emphasis added) (internal citations omitted)

[50] *Id.*

[51] *Id.* at 135-136 citing VA. CONST. Art. XI § 1.

[52] VA. CODE § 28.2-1204; *see also* Virginia Marine Resources Commission Subaqueous Guidelines, available at http://www.mrc.state.va.us/regulations/subaqueous_guidelines.shtm.

[53] VA. CODE § 28.2-1204.

must consider concerning the proposed uses of submerged lands.[54] Second, the legislature required the Commission to consider Article XI, section 1 of the constitution, which establishes the state's general conservation policy. [55] Finally, the legislature required the Commission to "exercise its authority [] consistent with the PTD."[56]

Reviewing the Commission's decision to issue a permit for a structure on a pier, the Virginia Court of Appeals, in *Boone v. Harrison v. Virginia Marine Resources Commission*, upheld the decision because the Commission considered both the statutory factors and the PTD, even though its consideration was nominal.[57] The Court of Appeals concluded that the Commission, not the court, had discretion to determine whether a permit was consistent with the PTD.[58] The court stated: "[u]nder VAPA, the courts have no authority to make a de novo judgment on [the public trust doctrine]," and opined that a court could overturn a Commission permit only if it violated a statutory or constitutional provision.[59] *Evelyn* suggests that Virginia courts will defer to the Commission as to whether a use of submerged lands is compatible with the public trust.

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[54] VA. CODE § 28.2-1205 (requiring the Commission to consider the effects of a project on other uses of lands, fisheries, tidal wetlands, neighboring properties, water quality, and vegetation).

[55] VA. CODE § 28.2-1205 ("the Commission shall be guided in its deliberations by the provisions of Article XI, Section I of the Constitution of Virginia. . . and shall consider the public and private benefits of the proposed project and shall exercise its authority under this section consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to section 1-200 in order to protect and safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the people as conferred by the public trust doctrine and the Constitution of Virginia.")

[56] *Id.*

[57] 660 S.E. 2d 704, 709 (Va. App. 2008).

[58] *Id.* at 711. The lower court had found that the pier "merely duplicate[ed] already-permitted uses," and thus it violated the public trust doctrine because the "proper application of the public trust doctrine requires avoidance of redundant non-water dependent uses at close proximity on the same pier." But the Court of Appeals rejected the lower court's reasoning and overturned the trial court's decision.

[59] *Id.* at 712. Other Virginia courts have upheld Commission permitting decisions in several other cases. *See, e.g.*, Palmer v. Virginia Marine Resources Commission, 628 S.E. 2d 84 (Va. App. 2006) (affirming the Commission's denial of a permit for a pier and storage shed because the storage shed was not water dependent).

4.0 Purposes

Under the PTD, the Commonwealth holds the title to tidal and navigable waterways and submerged lands with the obligation to preserve certain public uses and rights, subject to the discretion of the legislature.[60] Although the legislature has significant flexibility to determine the appropriate public uses of trust resources, Virginia courts have made clear that there is one public right of which the legislature may not dispose: the public right to navigation.[61]

4.1 Traditional (navigation/fishing)

A central purpose of the PTD is the Commonwealth's duty to maintain the public's right to navigation in Commonwealth-owned waterways.[62] As early as its 1904 *Taylor v. Commonwealth* decision the Supreme Court of Virginia connected the public's right to navigation to the public trust, determining that the Commonwealth's ownership of the navigable waters and submerged lands was subject to the "paramount right of navigation."[63] The Commonwealth has a duty to not deprive the public of the right to navigation, as the Supreme Court explained in 1924, in *James River and Kanawha Power Co. v. Old Dominion Iron and Steel Corp*: "[u]ndoubtedly there are certain public uses of navigable waters which the state does hold in trust for all the public, and of which the state cannot deprive them, such as the right of navigation."[64]

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[60] *Evelyn*, 621 S.E. 2d at 135 (referring to the legislature's express duty to safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the public as conferred by the public trust doctrine and the Constitution.").
[61] *See Commonwealth v. City of Newport News*, 164 S.E. at 698 (explaining that the right to navigation "is so grounded in the jus publicum of the state as to be an inherent and inseparable incident thereof").
[62] *Id.*
[63] 47 S.E. at 878.
[64] 122 S.E. 344, 346 (Va. 1924).

In addition to navigation, the public's right to use trust resources extends to the purposes of fishing, hunting, and oystering.[65] But in cases such as *City of Hampton v. Watson* in 1916, the Supreme Court held that the state could impair a private right to oystering by authorizing a city to dump sewage into a waterway because sewage disposal was a public use.[66] Moreover, the Supreme Court in 1932, in *Commonwealth v. City of Newport News*, held that the Commonwealth may dispose of the public's right to fishing unless restrained by the constitution.[67] Courts have also limited the public's right to fish in waterways owned by riparian landowners.[68] However, perhaps in response to these decisions, the legislature enacted a statute explicitly listing fishing as a permissible use for the commonwealth-owned waterways.[69]

4.2 Beyond traditional (recreational/ecological)

Virginia has not expressly recognized that the public trust protects non-traditional uses of trust resources. In fact, in 1982 the Supreme Court suggested the opposite, in *Bradford v. Nature Conservancy*, when the court agreed with the Nature Conservancy's argument that the public's right to use beaches "is strictly limited to those uses mentioned in the statute (fishing, fowling, and hunting) and may not be extended to include other recreational pursuits."[70] Thus, the

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[65] VA. CODE § 28.2-1200 (stating that the beds of Commonwealth-owned waterways "may be used as a common by all the people of the Commonwealth for the purpose of fishing, fowling, hunting, and taking and catching oysters and other shellfish."); *see also* Bradford v. Nature Conservancy, 294 S.E. 2d 866, 874 (1982) (stating "the shore is subject to the public's right to fish, fowl, and hunt."); Miller v. Commonwealth, 166 S.E. 557, 558 (Va. 1932) (stating that in the strip of land between the low and high water mark "the people had the use thereof for purposes of navigation and fishing, and upon the same principles, it would seem, also for fowling.")

[66] 89 S.E. at 81; *see also Darling v. City of Newport News*, 96 S.E. at 308 (implying that the legislature could destroy this ancient right only with a "clear and explicit statute indicating such purpose").

[67] 164 S.E. at 698 (holding that the City had a right to dispose of sewage into a waterway, even though it interfered with an individual's right to oyster in the water, because the right to fishing is rooted in the *jus privatum*, not the *jus publicum*).

[68] Kraft v. Burr, 476 S.E. 2d 715 (Va. 1996) (holding that the King that the right to grant exclusive fishing rights in waterways through pre-1770 patents to private parties); *see also* Boerner v. McCallister, 89 S.E. 2d 23, 24 (Va. 1955) (concluding that a land grant included exclusive fishing rights in waterways because it was granted before the Common Lands Acts).

[69] VA. CODE. § 28.2-1200 (stating that the beds of Commonwealth-wealth owned waterways "may be used as a common by all the people of the Commonwealth for the purposes of fishing, fowling, hunting, and taking and catching oysters and other shellfish.")

[70] 294 S.E. 2d at 874.

Supreme Court in *Bradford* held that sportsmen did not have the right to drive motor vehicles on the beaches.[71] However, the Court of Appeals relied upon an individual's non-traditional interest in a trust resource in *Biddison v. Virginia Marine Resources Com'n.*,[72] ruling that a riparian landowner's recreational and aesthetic interests in Commonwealth-owned waterways provided standing to challenge a Commission-issued permit for activities in the waterway.[73]

5.0 Geographic Scope of Applicability

The Commonwealth holds the title to tidal and navigable waters and the submerged lands beneath in trust for the public.[74] Although the Commonwealth's ownership is rooted in English common law, the legislature claimed title to submerged lands in the Common Lands Acts of 1780 and 1802, exempting previously granted lands.[75] But the Commonwealth's ownership does not extend to the beds of lakes or non-navigable waters.[76]

5.1 Tidal Waters

The Commonwealth has the title of the beds of tidal waters in trust for the public.[77] When discussing the scope of the Commonwealth's trust duties in the 1932 case of *Commonwealth v. City of Newport News*, the Virginia Supreme Court recognized that the Commonwealth held title to the submerged tidal lands.[78] Explaining that "[i]t is the duty of the General Assembly to make proper provision for the protection and enforcement of the common rights of the people in the

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[71] *Id.*
[72] 680 S.E. 2d 343, 347 (Va. Ct. App. 2009).
[73] *Id.* (relying upon evidence that the permitted activities affected the landowner's ability to picnic, kayak, and swim, and thus the landowner was an "aggrieved person[]" within the meaning of the Virginia statutory requirement for standing), citing VA. CODE § 28.2-1205(F) (providing judicial review to a person aggrieved by a decision of the Commission pursuant to the Virginia Administrative Procedure Act).
[74] VA. CONST. ART. XI § 3; VA. CODE § 28.2-1200; *See, e.g., McCready*, 68 Va. at 987.
[75] *See* § 2.0 (discussing the Common Lands Acts of 1780 and 1802).
[76] *See infra* § 5.3.
[77] VA. CONST. ART. XI § 3; *See also McCready v. Commonwealth*, 68 Va. at 987.
[78] 164 S.E. 689 (1932).

tidal waters,"[79] the court determined that the state had a duty to restrain individuals or municipalities from "destroying or substantially impairing the right of the people to exercise their common rights" in these tidal waters.[80] The Commonwealth's title does not include beds of tidal waters that private individuals received through land grants prior to the Common Lands Acts.[81]

5.2 Navigable in fact Waters

As early as *McCready* in 1876, Virginia recognized that the public trust extended beyond tidal waters to include the beds beneath navigable waterways,[82] relying on Supreme Court cases such as *Martin v. Waddell*.[83] Courts have relied upon the Commonwealth's ownership of navigable waters to conclude that the Commonwealth does not own non-navigable waterways, however.[84] Although the Commonwealth inherited the title to navigable waters and submerged lands from the English Crown upon entry into the Union, the legislature declared state ownership of navigable waters and submerged lands in the Common Lands Acts of 1780 and 1802.[85] These statutes provided an exception for submerged lands under navigable waterways conveyed through prior land grants.[86] Landowners who received these land grants may convey to subsequent landowners title to these submerged lands.[87]

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[79] *Id.* at 698.
[80] *Id.*
[81] *See* supra § 2.0 (discussing the exception for prior conveyances in the Common Lands Acts of 1780 and 1802).
[82] *McCready*, 68 Va. at 987.
[83] *Id.* (internal citation omitted); *see also Hampton v. Watson*, 89 S.E. at 81 (noting that non-navigable waterways are owned by the riparian landowners while the state holds navigable and tidal waterways in trust for the public).
[84] Jennings v. Marston, 92 S.E. 821, 823 (Va. 1917) (presuming that owners of riparian land along non-navigable streams own to the middle of the stream, unless a grant of riparian land expressly exempts ownership of submerged lands); *Boerner*, 197 Va. at 170.
[85] *See supra* § 2.0 (discussing the Common Lands Acts); *see also Bradford v. Nature Conservancy*, 294 S.E. 2d at 874 (holding that a grant made after 1780 that included the title to the Atlantic shore of Hog Island was invalid).
[86] *See, e.g.*, Kraft v. Burr, 476 S.E. 2d 715 (Va. 1996) (determining that the English Crown had the power to grant the title to submerged lands under navigable waters through 1750 and 1769 patents to private individuals).
[87] *See, e.g., Boerner v. McCallister*, 89 S.E. 2d at 24 (determining that a private landowner had validly received the title to the bed of a navigable waterway through a land grant issued prior to 1780 because the Common Lands Acts of 1780 and 1802 did not disturb previously granted titles to waterways).

Whether the Commonwealth holds title to the beds of waterways is a function of a navigability test. In *Boerner v. McCallister*, the Supreme Court articulated the following navigability test:

> whether the stream is used or is susceptible of being used in its natural and ordinary condition 'as a highway for commerce on which trade and travel are or may be conducted in the customary modes of trade and travel on water'.[88]

Similarly, the Commission's test for navigability, described its guidelines, is a question of fact: "whether a stream is being, or has been historically used as a highway for trade or travel or whether it is capable of such use in its ordinary and natural condition (i.e., disregarding artificial obstructions such as dams which could be abated)."[89] In *Crenshaw v. Slate River Co.,* the Supreme Court used a different version of the navigability test, asking whether a waterway "can be used as a common passage for the public."[90] Both versions of the navigability test require significant factual evidence to determine whether a waterway is navigable for the purpose of encroaching upon a private landowner's rights.

5.3 Recreational waters

In *Smith Mountain Lake Yacht Club v. Ramker*, the Supreme Court determined that the Commonwealth's ownership of waterways does not extend to lakes.[91] The court concluded that Virginia statutes did not include "lakes" within the express list of Commonwealth-owned waterways; thus, the Commonwealth did not intend lakes to fall within the property of the Commonwealth.[92]

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[88] 89 S.E. 2d at 27 (Va. 1955) (refusing to assume that the Jackson River was navigable and placing the burden on the plaintiff to prove navigability as an issue of fact).
[89] Virginia Marine Resources Commission Subaqueous Guidelines. http://www.mrc.virginia.gov/regulations/subaqueous_guidelines.shtm (last visited April 27, 2010).
[90] 6 Rand. 245, 255-256 (Va. 1828).
[91] 261 Va. 240, 243 (Va. 2001) (addressing a yacht club's claim for injunctive relief against a neighboring property owner for constructing a dock that extended into an inlet surrounding the lake).
[92] *Id.* at 246 (citing VA. CODE 28.2-1200) (finding that because a yacht club held a fee-simple title to the submerged lands of a lake, neighboring landowner riparian rights did not include the right to build a dock).

5.4 Wetlands

The legislature has asserted ownership over ungranted tidal lands and vegetated wetlands and has required that those wetlands used in common "shall continue as a commons for the purpose of fishing, fowling, hunting, and the taking and catching of oysters and other shellfish."[93] The Commonwealth is required to manage these lands as a "steward for the property interests of the Commonwealth."[94]

5.5 Groundwater

The Commonwealth has not linked groundwater to the PTD.

5.6 Wildlife

Virginia relied upon the PTD to justify protecting wildlife in *Complaint of Steuart Transp. Co.*,[95] in which both the Commonwealth and the federal government sought damages for injuries to migratory waterfowl from an oil spill.[96] The federal district court determined that the PTD gave both governments "the right and the duty to protect and preserve the public's interest in natural wildlife resources."[97]

5.7 Uplands

Virginia has not extended the PTD to reach upland areas. The Supreme Court of Virginia in *Bradford v. Nature Conservancy* upheld a trial court holding that a Virginia statute did not extend the PTD to uplands.[98]

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[93] VA. CODE § 28.2-1500 et.seq. ("All ungranted shores of the sea, marsh and meadowlands shall remain the property of the Commonwealth."); VA. CODE § 28.2-1500 (defining marsh and meadowland as vegetated wetlands).
[94] VA. CODE § 28.2-1503; *see also* Erin Ryan, *New Orleans, the Chesapeake, and the Future of Environmental Assessment: Overcoming the Natural Resources Law of Unintended Consequences*, 40 U. RICH. L. REV. 981, 1007 (2006) (citing Act of Apr. 10, 1972, ch. 711, 1972 Va. Acts 989) (suggesting that the state's permit program for tidal wetlands was an attempt to balance private interests with public interests under the public trust doctrine).
[95] 495 F.Supp. 38 (E.D. Va. 1980).
[96] *Id.* at 39.
[97] *Id.* at 40 (dismissing the defendant's motion for summary judgment in case where Virginia and the federal government sued to recover damages to wildlife).
[98] 294 S.E. 2d at 870, 872.

6.0 Activities Burdened

The PTD restricts the Commonwealth's ability to convey title to the submerged lands and waterways in land grants. However, prior to the Common Lands Acts of 1780 and 1802, both the King and Commonwealth had the authority to convey title, resulting in disputes over riparian landowner's rights to these trust resources.

6.1 Conveyances of property interests

Several cases have addressed whether early land grants included the land between the high and low water mark or other submerged lands or waterways, which is a function of the time that the grant was made, and whether the grant explicitly included these resources.[99] Originally, the King and the Commonwealth had the authority to convey title to the submerged lands between the high and low water mark of a tidal waterway to private parties, although courts presume that a grant did not include these lands.[100] After the legislature passed the Common Lands Acts of 1780 and 1802, the Commonwealth had no authority to grant the beds of streams to private parties.[101] Thus, the Commonwealth's ownership of submerged lands places a burden on a conveyance of a property interest because the PTD, codified in Virginia statutes, restricts a riparian landowner's rights to these lands.[102]

6.2 Wetland fills

Virginia courts have not explicitly recognized the connection between wetland fills and the public trust. But the legislature has made it illegal to makes it illegal to "build, dump, trespass or encroach upon or over, or take or use any materials from the beds of the bays, ocean,

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[99] Commonwealth v. Morgan, 303 S.E. 2d 899 (Va. 1983); Kraft v. Burr, 476 S.E. at 715 (recognizing that the Commonwealth's ownership does not extend to beds of waterways conveyed by special grant because the King had the right to grant the beds of rivers to private parties); City of Virginia Beach v. Nala Corp., 2000 WL 33340689 at *16 (Va. Cir. Ct. 2000) (concluding that there was no evidence the King or the Commonwealth conveyed the title to the submerged lands between the high and low water mark of the Atlantic Ocean along Virginia Beach).

[100] *See, e.g., Miller v. Commonwealth*, 166 S.E. at 558.

[101] *See supra* § 3.1; *Boerner v. McCallister*, 89 S.E.2d at 27.

[102] VA. CODE § 28.2-1200 (restricting the Commonwealth's ability to convey submerged lands).

rivers, streams, or creeks" owned by the Commonwealth, unless the Commission has issued a permit or the activity falls into one seven enumerated exceptions.[103]

6.3 Water rights

In *Taylor v. Commonwealth* the Supreme Court relied upon the PTD to deny a riparian landowner's claim for relief against a water company that was withdrawing water from a well located beneath a navigable channel adjacent to the riparian landowner's property.[104] After discussing the PTD, the Supreme Court determined that the Commonwealth, not the riparian landowner, held title to the navigable waters and submerged lands up to the low-water mark.[105] Thus, the court concluded that the water company was entitled to pump the well water under a lease granted by the legislature.[106]

6.4 Wildlife harvests

Early Virginia case law upheld a city's right to dump sewage into a waterway that interfered with the public's right to oystering or fishing because the city's use of the waterways to dump sewage was a necessary public use. For example, in *Hampton v. Watson*, the 1916 the Supreme Court upheld the city's right to dump sewage into waterways owned by the Commonwealth that damaged the Commonwealth-granted oyster leases to private individuals.[107]

7.0 Public standing

Neither Virginia statutes, its constitution, nor its common law have addressed whether the public has standing to enforce any violation of the Commonwealth's duties under the PTD. However, the legislature has explicitly provided standing to any person aggrieved by the

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[103] VA. CODE § 28.2-1203. The exceptions include: 1) dam construction; 2) otherwise authorized uses; 3) congressionally-approved navigation and flood-control projects; 4) Commonwealth-owned or leased piers, docks, marine terminals, and port facilities; 5) non-commercial piers placed by riparian landowners; 6) agricultural, horticultural or silvicultural irrigation, or animal watering on riparian lands; and 7) recreational gold mining.[103]
[104] 47 S.E. at 875.
[105] *Id.* at 882.
[106] *Id.* at 876
[107] 89 S.E. at 81; *see supra* § 4.1 (discussing the legislature's ability to dispose of the public's right to fish).

Commission's permitting decisions in submerged lands.[108] Additionally, the courts have implicitly recognized the standing of the Attorney General in suits concerning activities that harm trust resources.[109]

7.1 Common law-based

Virginia courts have not addressed whether a private citizen has standing to protect trust resources, absent a specific statutory grant.[110] But they have allowed the Attorney General, on behalf of the Commonwealth, to seek injunctions and damages for activities that harm trust resources. In *Commonwealth v. City of Newport News*, the Supreme Court did not question that the Attorney General had standing to bring a suit to restrain a city from dumping untreated sewage into the beds of waterways.[111] Although the court ultimately denied the Attorney General's request for an injunction, it did so on the merits, implying that the Attorney General had standing to protect trust resources.[112] Additionally, the federal Eastern District of Virginia allowed the Attorney General and the federal government to proceed with a suit to obtain damages for damages to wildlife.[113]

7.2 Statutory-Based

Since the Commission is now responsible for the Commonwealth's management of submerged lands, the public, via an aggrieved person, may challenge Commission permitting

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[108] VA. CODE § 28.2 -1205(F) (providing judicial review "in accordance with the provisions of the Administrative Procedure Act" to "any person aggrieved by a decision of the Commission under this section").
[109] *See Commonwealth v. City of Newport News*, 164 S.E. at 690; *see also* In re: Complaint of Steuart Transp. Co., 495 F.Supp. 38 (E.D. Va. 1980).
[110] Virginia courts have addressed the PTD in cases where private parties have disputed land boundaries or rights to trust resources. *See, e.g., Taylor v. Commonwealth*, 47 S.E. at 875-876 (involving a property dispute between a riparian landowner and a water company).
[111] 164 S.E. at 690.
[112] *Id.* at 691.
[113] *In re: Complaint of Steuart Transp. Co.*, 495 F.Supp. at 38 (dismissing the defendant's motion for summary judgment where Virginia and the Federal government brought a suit to recover damages to wildlife).

decisions concerning trust resources.[114] Virginia courts have recognized that applicants for permits fall within the "aggrieved person" requirement for standing,[115] as do third parties who are affected by the permitting decisions.[116] For example, in *Biddison v. Virginia Marine Resources Com'n*, the Court of Appeals ruled a person whose interest is "to advance some perceived public right or to redress some anticipated public injury when the only wrong he has suffered is in common with other person similarly situated" is not an "aggrieved person" for standing.[117] To have standing, a person must show "an immediate, pecuniary and substantial interest in the litigation," including the Commission's denial of "some personal or property right, legal or equitable."[118] Nevertheless, the court ruled the plaintiffs had standing because they owned property adjacent to the permit area, and the Commission's decision would adversely impact their recreational and aesthetic interests of their property.[119]

7.3 Constitution-Based

The Virginia constitution does not provide standing to challenge the Commonwealth's actions concerning the PTD.

8.0 Remedies

Virginia courts have the power to issue injunctive or declaratory relief based upon the PTD, as case law has suggested.[120] But courts have yet to grant damages to parties for violations of the PTD.

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[114] VA. CODE § 28.2-1205(F) citing VA. CODE § 2.2-4000 et seq.
[115] *See Evelyn v. Commonwealth*, 621 S.E. at 130.
[116] *See Biddison v. Virginia Marine Resources Com'n*, 680 S.E. 2d at 346.
[117] *Id.* at 347 (internal citation omitted).
[118] *Id.* (internal quotations omitted).
[119] *Id.* at 529.
[120] *See supra* § 8.1, citing *Bradford v. Nature Conservancy*, 294 S.E. 2d at 870, 875.

8.1 Injunctive Relief

In *Bradford v. Nature Conservancy*, the Supreme Court relied upon the common lands statutes and the PTD to uphold a trial court injunction requiring sportsmen and the Nature Conservancy to not interfere with each other's rights on Hog Island.[121] Specifically, the court held that the Nature Conservancy had no title to the beach, and that sportsmen had no right to use motor vehicles on certain roadways or the beach.[122] Additionally, in *Commonwealth v. City of Newport News*, the Attorney General sought injunctive relief, which the court denied after reaching the merits, but implying that it could award injunctive relief if it were warranted.[123]

However, in no cases concerning the Commission's permitting decisions affecting trust resources have the courts concluded that the Commission violated the PTD, and thus awarded injunctive relief. Requiring the Commission to withdraw a permit and consider the PTD seems to be the only injunctive relief available to a party aggrieved by a permit decision.[124]

8.2 Damages for injuries to resources

Virginia courts have yet to award damages for injuries to trust resources, although the U.S. Eastern District of Virginia, in *In re: Complaint of Steuart Transp. Co.*, concluded that the Attorney General had the authority under the PTD to seek damages for harm to wildlife.[125]

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[121] 294 S.E. 2d at 874-875.
[122] *Id.*
[123] *See supra* note 61.
[124] *See supra* note 57 (citing *Boone*, 660 S.E. 2d at 712 (finding that "the courts have no authority to make a de novo judgment on [the PTD]" and that a court could only overturn a Commission decision if it has violated a statutory provision)).
[125] 495 F.Supp.at 40. *See supra* note 95. The parties subsequently entered into a proposed settlement, which the U.S. Department of Justice determined was barred by a U.S. statute that requires money damages be paid to the U.S. treasury, noting that the settlement would be valid if all of the damages were directed to the Commonwealth. Office of Legal Counsel, U.S. Department of Justice. *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, 4B U.S. Op. Off. Legal Counsel 684, 688-689, 1980 WL 20970 (June 13, 1980).

8.3 Defense to takings claims

Virginia has not used the PTD as a defense to takings claims. However, the Supreme Court, in *Crenshaw v. Slate River Co.*, discussed both the Commonwealth's ownership of waterways and the public's right to navigation in a takings case. The court ruled that a mill owner was denied just compensation due to a regulatory requirement to construct locks in a waterway.[126]

[126] 8 Va. (4 Call) 441, 447 (1798); *see also* Kelly, *supra* note 4, at 900-901 (1989) (discussing *Crenshaw* in relation to takings).

WASHINGTON

The Public Trust Doctrine in Washington

Rebecca Guiao

1.0 Origins

The public trust doctrine (PTD) of Washington is based in the Washington Constitution, although the Washington Supreme Court has found the origins of the PTD principle "that the public has an overriding interest in navigable waterways and lands under them" in Roman law and the Code of Justinian.[1] The court then traced this principle to English common law, which the individual states in the United States adopted through common law.[2] From the Code of Justinian and English common law, Washington courts recognized two aspects of the state sovereign ownership. First is the *jus privatum*, the "private property interest" where "[a]s owner, the state holds full proprietary rights in tidelands and shorelands and has fee simple title to such lands."[3] The second aspect is the *jus publicum*, the "public authority interest" which in both English common law and the early common law of Washington included the rights of navigation and fishing.[4]

On November 11, 1889, the United States admitted Washington into the union, and Congress and the president approved the state constitution.[5] In section 1 of Article XVII of the 1889 state constitution, the state declared ownership to the beds and shores of tidal waters and

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[1] Caminiti v. Boyle, 732 P.2d 989, 994 (Wash. 1987) ("The principle that the public has an overriding interest in navigable waterways and lands under them is at least as old as the Code of Justinian, promulgated in Rome in the 5th Century A.D.").
[2] *Id.* at 994 ("It is also found in the English common law, from whence our own common law is derived, as early as the 13th Century A.D.").
[3] *See id.* at 993.
[4] *Id.* at 994 (citing Shively v. Bowlby, 152 U.S. 1, 13 (1894); Hill v. Newell, 149 P. 951, 952 (1915)).
[5] Washington Secretary of State, *Washington History – Washington State Constitution*, http://www.sos.wa.gov/history/constitution.aspx (last visited November 11, 2011).

navigable lakes and rivers.[6] The Washington Supreme Court confirmed the scope of this constitutional declaration of state sovereign ownership of the beds and shores of navigable waters as early as the 1891 case of *Eisenbach v. Hatfield*.[7] In *Eisenbach*, a riparian owner abutting tidal navigable waters sued to enjoin neighbors from building structures on adjacent tidelands below the ordinary high tide, [8] claiming that as the riparian owner, he "ha[d] certain rights in the shore beyond those of the general public," including rights to wharf out, access to navigable water, and to receive accretions.[9]

The Washington Supreme Court reversed a lower court's decision granting a permanent injunction that enjoined the neighbors from building structures on the tidelands.[10] The court held that "riparian proprietors on the shore of navigable waters of the state have no special or peculiar rights therein as an incident to their estate," and therefore the riparian owner could not enjoin his neighbor's development on adjacent tidelands.[11] Noting that the states succeeded to the rights of the crown of England to both the *jus privatum* and *jus publicum*, the court concluded the state became the "absolute owner of all navigable waters, and soils under them, within its territorial limits."[12] It explained the difference between *jus privatum*, which could be alienated to private

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[6] WASH. CONST. art. XVII, § 1 ("The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes.").
[7] 26 P. 539 (Wash. 1891).
[8] *Id.* at 544.
[9] *Id.* at 541.
[10] *Id.* at 544. The neighbors who built structures on the tidelands did so under a state legislative act that gave the right to owners of lands adjacent to tidelands to build upon tidelands and then to purchase the tidelands within sixty days of the state's appraisal of the tidelands. *Id.* At the time of the case was being considered by the court, the neighbors who built structures on the tidelands had not yet purchased the tidelands from the state but the court noted that they would be "authorized to purchase the lands from the state. *Id.* The legislative act stated, "'the owner or owners of any lands abutting, or fronting upon, or bounded by, the shore of the Pacific ocean, or of any bay, harbor, sound, inlet, lake, or water-course, shall have the right for sixty (60) days following the filing of the final appraisal of the tidelands to purchase all or any part of the tide-lands in front of the lands so owned: provided, that if valuable improvements, in actual use for commerce, trade, or business, have been made upon said tide-lands, by any person, association, or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved for period aforesaid.'" *Id.*
[11] *Eisenbach*, 26 P. at 544.
[12] *Id.* at 540.

individuals, and *jus publicum*, which could not be alienated but included the "public right of navigation and fishing."[13] The court cited to section 1 of Article XVII of the Washington state constitution to support its conclusion that the state owned title to the lands beneath navigable waters.[14] Washington court decisions following *Eisenbach* embrace state ownership of lands beneath navigable waters and the applicability of PTD principles by distinguishing between the *jus privatum* and the *jus publicum*.[15]

Another major PTD case concerning the scope of the PTD is the Washington Supreme Court's 1969 decision in *Wilbour v. Gallagher*.[16] In *Wilbour*, the waters of a navigable Lake Chelan submerged part of the Gallaghers' land for approximately three months each year for some thirty-five years due to the changing levels of the lake from a dam.[17] After the Gallaghers filled their property so that it was no longer submerged and prevented public access,[18] the Wilbours, neighbors of the Gallaghers, filed a class action suit for themselves and for the public, requesting that the Gallaghers remove the fill.[19] The trial court ruled that the Gallaghers did not have to remove their fill.[20]

The Washington Supreme Court reversed the trial court, requiring that the Gallaghers remove fills that interfered with the rights of navigation.[21] The court concluded that the right of the public to navigation, along with the incidental rights of "fishing, boating, swimming, water

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[13] *Id.*
[14] *Id.* at 541.
[15] *See infra* note 33 and accompanying text.
[16] 462 P.2d 232 (Wash. 1969).
[17] *Id.* at 233.
[18] *Id.* at 235.
[19] *Id.*
[20] *Id.* at 236.
[21] *Id.* at 239–40. The *Wilbour* court required that the Gallaghers remove the fills, "insofar as they obstruct the submergence of the land by navigable waters" at the high water level caused by the dam. *Id.* at 239. The court also set aside the judgment for damages for reconsideration by the lower court. *Id.*

skiing, and other related recreational purposes,"[22] extended to lands submerged by the navigable waters, artificially or naturally, including the Gallaghers' submerged lands.[23] The *Wilbour* court did not explicitly rely on the PTD as a basis for this holding, but its reasoning reflected PTD principles. The court looked to case law from other jurisdictions to rule that when water levels of a navigable body of water fluctuate due to natural reasons, the public has the right to use the water between the high water mark to the low water mark, and the private riparian owner has no right to obstruct navigation.[24] It also recognized that when a riparian owner's land is submerged, the owner has only "a qualified fee subject to the right of the public to use the water over the lands consistent with navigational rights, primary and corollary."[25] However, when the lands are not submerged, riparian owners retain the right to exclude others from trespassing on their lands between high and low water marks but they may not interfere with "the public right of navigation."[26] Therefore, under *Wilbour*, the PTD burdens private and public lands submerged by navigable waters, artificially or naturally, so that the lands are subject to the right of navigation and its incidental rights.[27]

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[22] *Wilbour*, 462 P.2d at 239 (explicitly recognizing public purposes of lands submerged by navigable waters to be "subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.").

[23] *Id.*

[24] *Id.* at 238 ("The law is quite clear that where the level of a navigable body of water fluctuates due to natural causes so that a riparian owner's property is submerged part of the year, the public has the right to use all the waters of the navigable lake or stream whether it be at the high water line, the low water line, or in between. In such situations the riparian owners whose lands are periodically submerged are said to have the right to prevent any trespass on their land between the high and the low marks when not submerged. However, title between those lines is qualified by the public right of navigation and the state may prevent any use of it that interferes with that right." (citations omitted)).

[25] *Id.* (citations omitted).

[26] *Id.* ("In such situations the riparian owners whose lands are periodically submerged are said to have the right to prevent any trespass on their land between the high and low marks when not submerged. However, title between those lines is qualified by the public right of navigation and the state may prevent any use of it that interferes with that right.").

[27] *Id.* at 239 ("[W]e hold that when the level of Lake Chelan is raised to the [artificial high water mark] (or such level as submerges the defendants' land), that land is subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters. When the level of the lake is lowered so

Washington courts did not explicitly mention the term "public trust doctrine" until the Washington Supreme Court's 1987 decision in *Caminiti v. Boyle*.[28] In *Caminiti*, a member of the public, Bella Caminiti, and an association, the Committee for Public Shorelines Rights, petitioned directly in the Washington Supreme Court for a mandamus directing the Commissioner of Public Lands and the State Treasurer to collect fees for waterfront property owners who build private docks on state-owned tidelands.[29] They challenged the constitutionality of the state statute that permitted the waterfront property owners to build private docks without paying fees to the state.[30] The Caminiti plaintiffs claimed a recreational interest in the state-owned lands that would be affected by the docks, and they also asserted an interest in the revenue from the lost rental amounts from the state's failure to charge the private owners to maintain the docks.[31] The court ruled that the statute in question, which allowed waterfront property owners to build recreational docks without paying the state, did not violate the PTD,[32] because under the PTD, "the sovereignty and dominion over this state's tidelands and shorelands, as distinguished from *title*, always remains in the state, and the state holds such dominion in trust for the public."[33] The court concluded that its "review of Washington law establishes that the doctrine has always existed in the State of Washington."[34] Although the

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that the defendants' land is no longer submerged, then they are entitled to keep trespassers off their land, and may do with the land as they wish consistent with the right of navigation when it is submerged.").

[28] *Caminiti*, 732 P.2d 989 (Wash. 1987).

[29] *Id.* at 991. Caminiti and the association were not challenging a particular project, rather they filed a petition for a writ of mandamus directly in the Washington Supreme Court under the court's original jurisdiction to challenge the statute itself. *Id.*

[30] *Caminiti*, 732 P.2d at 992 (citing WASH REV. CODE ANN. § 79.90.105).

[31] *Id.*

[32] *Id.* at 997 (finding the statute "did not violate either the 'public trust doctrine' or article 17, section 1 of [the] state constitution relating to state tidelands and shorelands").

[33] *Caminiti*, 732 P.2d at 994.

[34] *Id.*

Washington Supreme Court had previously decided cases demonstrating PTD principles,[35] it explicitly recognized the Washington PTD in *Caminiti*.

The Washington Supreme Court addressed the PTD's effect on privately owned tidelands in another 1987 decision, *Orion Corporation v. Washington*,[36] where the Orion Corporation (Orion) purchased tidelands in Puget Sound to build a residential development.[37] However, the Shoreline Management Act's regulations and programs prohibited Orion from developing those tidelands.[38] Orion did not seek a permit to develop and instead sued the state alleging several takings claims.[39] The trial court ruled in favor of Orion, holding that: (1) a regulatory taking occurred because that the Shoreline Management Act and its program prohibited Orion from making reasonable use of its property;[40] and (2) although the PTD has always existed in Washington, the doctrine did not prohibit a taking from occurring but instead limited the damages available for the regulatory taking.[41] The state and Skagit County appealed to the Washington Supreme Court,[42] which agreed with the trial court that the PTD burdened Orion's property[43] such that Orion could not "substantially impair the trust" and the trust purposes of navigation and fishery.[44] The court remanded the case to the trial court to determine whether "Orion's property, burdened by the trust, is functionally and economically adaptable to some

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[35] *See, e.g., Eisenbach*, 26 P. 539, 544 (Wash. 1891); *Wilbour*, 462 P.2d 232, 233 (Wash. 1969).
[36] 747 P.2d 1062 (Wash. 1987).
[37] *Id.* at 1065.
[38] *Id.* at 1066.
[39] Orion based its takings claims on the statutory and regulatory limits imposed on its tidelands development. *Id.* at 1067 ("In filing this action, Orion alleged a taking of its tidelands by excessive regulation without just compensation, a taking by physical invasion, a taking by abusive precondemnation conduct, and violation of its federal civil rights under 42 U.S.C. § 1983.").
[40] *Id.* at 1068.
[41] *Id.* at 1067.
[42] *Id.* at 1067.
[43] *Id.* at 1072 ("Orion argues that no public trust exists in Washington . . . . Given our recent decision in *Caminiti v. Boyle*, 107 Wash.2d 662, 732 P.2d 989 (1987), Orion's argument is no longer tenable. In *Caminiti*, we held that a public trust doctrine has always existed in Washington.").
[44] *Id.* at 1073 (stating "at the time it purchased its tidelands, Orion could make no use of the tidelands which would substantially impair the trust" and the trust purposes of navigation and fishery.)

present, possible, and reasonably profitable use."[45] Thus, the court in *Orion* recognized that the PTD burdens private tidelands,[46] and that a takings claim might succeed if the PTD prohibits a landowner's reasonably profitable use.[47]

In 1993, the Washington Supreme Court explicitly rejected the application of the PTD to groundwater in *Rettkowski v. Department of Ecology*.[48] In *Rettkowski*, Department of Ecology (Ecology) determined that the irrigators' groundwater withdrawals were connected to the decreased flow of a non-navigable creek[49] and issued administrative orders prohibiting the irrigators from withdrawing groundwater[50] after ranchers in the area petitioned Ecology for regulation. [51] The trial court ruled in favor of the irrigators, holding that Ecology had no statutory authority to issue the orders because that amounted to an "extrajudicial adjudication of water rights."[52] The ranchers, Ecology, and the Pollution Control Hearings Board appealed the decision to the Washington Supreme Court,[53] which affirmed the trial court's decision and concluded that Ecology lacked statutory authority to determine the priority of rights and it could not issue orders to enforce priority.[54]

A few of the appellants, but not Ecology, argued that the PTD, as a separate authority, authorized Ecology to regulate water resources, including groundwater.[55] The *Rettowski* court

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[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] 858 P.2d 232, 239 (Wash. 1993).
[49] *Id.* at 233.
[50] *Id.* at 235. Ecology issued these orders after unsuccessful negotiations between the ranchers and the irrigators. *Id.*
[51] *Id.* at 234–35.
[52] *Rettkowski*, 858 P.2d at 235 ("The court also held that Ecology exceeded the scope of its statutory authority by conducting an extrajudicial adjudication of water rights.").
[53] *Id.* Specifically at issue was whether Ecology had statutory authority to determine the water rights priorities in the Sinking Creek Basin and to issue orders to enforce those priorities. *Id.*
[54] *Id.* at 236–37 (basing its decision on a review of statutes, case law, and the administrative law principle that "an agency may only do that which it is authorized to do by the legislature.").
[55] *Id.* at 239.

did not find the PTD dispositive,[56] instead noting two major problems.[57] First, the court had never applied the PTD to non-navigable waters or groundwater.[58] Second, the state retains the trust duties imposed by the PTD, and these duties not devolve to any specific state agency, including Ecology, unless authorized by statute.[59] Thus, the *Rettkowski* court concluded that the state itself has the duty to enforce the PTD, not state agencies unless the agency's enabling statute specifically gives the agency that authority, and the PTD does not apply to groundwater.

Washington courts trace the origins of the PTD as applied to wildlife to English common law and its treatment of animals *ferae naturae*.[60] The English king had property rights in *ferae naturae*, and "[t]he killing, taking, and use of game was subject to absolute governmental control for the common good."[61] Washington courts recognize that title to wild animals passed to the states based on their sovereignty, and wildlife is owned by the states to benefit their citizens.[62]

2.0 Basis

The Washington PTD is based on the state constitution, which states, "The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and

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[56] *Id.* (also stating that "[t]he doctrine prohibits the [s]tate from disposing of its interest in the waters of the state in such a way that the public's right of access is substantially impaired, unless the action promotes the overall interests of the public.").
[57] *Id.*
[58] *Id.*
[59] *Id.* ("[T]he duty imposed by the public trust doctrine devolves upon the State, not any particular agency thereof. Nowhere in Ecology's enabling statute is it given the statutory authority to assume the State's public trust duties and regulate in order to protect the public trust."). The *Rettkowski* court also concluded that even if the PTD required Ecology to take affirmative action to protect the water resources, the PTD gave no guidance as to how the agency must act. *Id.* at 239–40 ("Even assuming for the sake of argument that the public trust doctrine places on Ecology some affirmative duty to protect and preserve the waters of the state, the doctrine could provide no guidance as to *how* Ecology is to protect those waters.").
[60] Graves v. Dunlap, 152 P. 532, 533 (Wash. 1915).
[61] *Id.*
[62] *Id.* ("[T]he recognized doctrine is that the title to game belongs to the several states as incident of their sovereignty, and was retained by the states for the use and benefit for the people of the states.").

lakes."[63] The Washington Supreme Court concluded that this provision "was but a formal declaration by the people of rights which our new state possessed by virtue of its sovereignty."[64] Since the state enacted this constitutional provision in 1889, Washington courts have repeatedly confirmed the constitution's declaration of state sovereign ownership of the beds and submerged shores of navigable waters.[65]

Both common law and state statutes establish the basis for the Washington PTD in wildlife. The Washington Supreme Court concluded that "title to game belongs to the state in its sovereign capacity, and that the state holds this title in trust for the use and benefit of the people of the state."[66] This language makes clear that wildlife is a PTD resource that the state holds in trust for the public. A state statute also declares that "wildlife, fish, and shellfish are property of the state" and requires the Department of Fish and Wildlife, and Fish and Wildlife Commission to manage these public trust resources.[67]

3.0 Institutional Application

According to the Washington Supreme Court, only the state may exercise the trust responsibilities under the PTD to manage PTD resources; without specific statutory authorization, state agencies may not exercise the state's PTD trust responsibilities.[68] However, under the Shoreline Management Act, Aquatic Lands Act, and the Seashore Conservation Act,

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[63] WASH. CONST. art. XVII, § 1.
[64] *Caminiti*, 732 P.2d 989, 993 (Wash. 1987).
[65] *See supra* § 1.0.
[66] Graves v. Dunlap, 152 P. 532, 533 (Wash. 1915).
[67] WASH. REV. CODE § 77.04.012 (2010) (stating "[w]ildlife, fish, and shellfish are the property the state. The commission, director, and the department shall preserve, protect, perpetuate and manage the wildlife and food fish, game fish, and shellfish in state waters and offshore waters.").
[68] Rettowski v. Department of Ecology, 858 P.2d 232, 239 (Wash. 1993) ("[T]he duty imposed by the public trust doctrine devolves upon the State, not any particular agency thereof. Nowhere in Ecology's enabling statute is it given the statutory authority to assume the State's public trust duties and regulate in order to protect the public trust.").

the state has delegated management of particular PTD resources to specific state agencies, authorizing the agencies to exercise the state's PTD responsibilities.[69]

3.1 Restraint on Alienation of Private Conveyances

As discussed below,[70] the state legislature under Washington's PTD may alienate trust lands of the tidelands and shorelands of navigable waters.[71] However, the state may not abdicate its trust responsibilities over those trust lands.[72]

3.2 Limit on the Legislature

According to the Washington Supreme Court, "[s]ince statehood, the Legislature has had the power to sell and convey title in, and dominion over, its tidelands and shorelands."[73] Even if the state conveyed title to tidelands and shorelands of navigable waters, the court concluded "[t]he Legislature has never had the authority . . . to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands."[74] The state may convey only the *jus privatum* in the trust lands; the state retains the *jus publicum* and may not convey it.[75]

In *Caminiti v. Boyle*, the Washington Supreme Court considered whether a legislative provision regarding state-owned tidelands violated the PTD.[76] The court asked: "(1) whether the state, by the questioned legislation, has given up its right of control over the *jus publicum* and (2) if so, whether by so doing the state (a) promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it."[77] The *Caminiti* court adopted this test from the first United

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[69] *See infra* § 3.3.
[70] *See infra* § 3.2.
[71] *See infra* § 3.2.
[72] *Caminiti*, 732 P.2d at 993.
[73] *Id.* at 992.
[74] *Id.*
[75] *Id.* at 994. (stating the state may not "convey or give away th[e] *jus publicum* interest."). In 1971, the Legislature passed the SMA and codified a policy of not selling tidelands. *Id.*; Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 524 (1992).
[76] *Caminiti*, 732 P.2d at 994.
[77] *Id.*

States Supreme Court PTD case, *Illinois Central Railroad v. Illinois*.[78] The *Caminiti* test imposes limitations on the legislature's ability to alienate public trust resources of tidelands and submerged lands of navigable waters, authorizing a judicial inquiry as to whether the legislature properly exercised its trust responsibilities over those PTD resources.[79]

3.3 Limits on Administrative Action

According to the Washington Supreme Court, the PTD limits administrative action by state agencies only if the state has specifically authorized a state agency through statute to exercise the state's PTD responsibilities.[80] Thus, the PTD by itself does not limit administrative action; however, the state through statutes has authorized state agencies to exercise the state's PTD duties by delegating the management of PTD resources of beds and shores of navigable waters. The following statutes authorize state agencies to exercise the state's PTD duties these trust resources: 1) the Shoreline Management Act (SMA),[81] 2) the Aquatic Lands Act,[82] and 3)

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[78] *Id.* (quoting *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892) ("The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.")).

[79] *Id.*

[80] *Rettowski*, 858 P.2d 232, 239 (Wash. 1993) ("[T]he duty imposed by the public trust doctrine devolves upon the State, not any particular agency thereof. Nowhere in Ecology's enabling statute is it given the statutory authority to assume the State's public trust duties and regulate in order to protect the public trust.").

[81] WASH. REV. CODE ANN. § 90.58.010 et seq. As Professor Ralph Johnson stated, "While the Shoreline Act represents an exercise of state regulatory power, the public trust doctrine supplements execution of the Act. . . . [W]hile the Shoreline Act may reflect elements and policies of the public trust doctrine, it does not supersede it." *See* Johnson et al., *supra* note 75, at 544. The SMA establishes a state policy over the development of both private and publicly owned shorelines. WASH. REV. CODE ANN. § 90.58.020.

The SMA authorizes the Department of Ecology and local governments to manage the use and development of the state's shorelines. *Id.* The Washington Supreme Court determined the SMA reflected public trust values in its policy of "'protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.'" Orion Corp. v. State, 747 P.2d 1062, 1073 n.11 (Wash. 1987) (citing Portage Bay-Roanoke Park Community Council v. Shorelines Hearings Bd., 593 P.2d 151, 153 (Wash. 1979)) (quoting WASH REV. CODE ANN. § 90.58.020)). This policy "insure[s] the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in navigable waters, will promote and enhance the public interest." WASH. REV. CODE ANN. § 90.58.020. The state legislature, through the SMA, recognized the public's right in navigation under the constitutional PTD and authorized the Department of Ecology and local governments to manage the state shorelines in the "public interest." *Id.* The Washington Supreme Court concluded that "the requirements of the [PTD] are fully met by the legislatively drawn controls imposed by the Shoreline Management Act of 1971." *Caminiti*, 732 P.2d 989, 995 (1987).

the Seashore Conservation Act.[83] The SMA delegated management of state shorelines to Ecology and local governments;[84] the Aquatic Lands Act delegated management of tidelands and shorelands and beds of navigable waters to the Department of Natural Resources (DNR);[85] and the Seashore Conservation Act delegated management of ocean shores to the Washington State Parks and Recreation Commission.[86]

The SMA limits Ecology's administrative actions concerning the PTD resources of shorelines of tidal waters. The Washington Supreme Court in *Caminiti* acknowledged the SMA as a legislative recognition of the PTD: "the requirements of the 'public trust doctrine' are fully met by the legislatively drawn controls imposed by the [SMA] of 1971." [87] The purpose of the SMA was to establish a comprehensive planning process for shoreline management. [88] Ecology

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[82] WASH. REV. CODE ANN. § 79.105.010 et seq. (2008). The ALA authorizes the Department of Natural Resources to exercise PTD duties by managing the PTD resources of tidelands, shorelands, and beds of navigable waters for the public benefit. WASH. REV. CODE ANN. § 79.105.030. The ALA's purpose is to establish a policy for managing the state's ownership of aquatic lands, giving the Department of Natural Resources authority to manage, sell, and lease these lands. WASH. REV. CODE ANN. § 79.105.020 (stating the purpose of the ALA "is to articulate a management philosophy to guide the exercise of the state's ownership interest and the exercise of the department's management authority and to establish standards for determining equitable and predictable lease rates for users of state-owned aquatic lands."). The ALA defines aquatic lands as "all tidelands, shorelands, harbor areas, and the beds of navigable waters" belonging to the state. WASH. REV. CODE ANN. § 79.105.060(1)–(5), recognizing that aquatic lands "are a finite resource of great value and an irreplaceable public heritage . . . ." *Id.* § 79.105.010. The language of the ALA reflects PTD values by recognizing the value of aquatic lands and the necessity to manage them for the public benefit. The ALA delegates management of the PTD resources of aquatic lands of tidelands and shorelines to the Department of Natural Resources.

[83] WASH. REV. CODE ANN. § 79A.05.600-.695 (2008). The SCA emphasizes access and protection of the PTD resource of ocean shores below the ordinary high tide and low tide water marks. WASH. REV. CODE ANN. § 79A.05.605. The SCA establishes the Seashore Conservation Area which includes all lands owned or controlled by the state along the Pacific Coast.WASH. REV. CODE ANN. § 79A.05.605. Under the SCA, ocean shores "are hereby declared a *public* highway and shall remain *forever open to the use of the public.*" *Id.* § 79A.05.693 (emphasis added). The SCA policy was based upon the importance of the "unspoiled seashore" of Washington that "provide[s] the public with almost unlimited opportunities for recreational activities, like swimming, surfing and hiking; for outdoor sports . . . ; for the observation of nature . . . ; and for relaxation." *Id.* § 79A.05.600. The SCA emphasizes the application of the PTD to ocean shores through the statutory language describing the ocean beaches as "a public highway" that must remain open to the use of the public in perpetuity. *Id.* § 79A.05.693.

[84] WASH. REV. CODE ANN. § 90.58.020.

[85] WASH. REV. CODE ANN. § 79.105.030.

[86] WASH. REV. CODE ANN. § 79A.05.610.

[87] *Caminiti*, 732 P.2d 989, 995 (1987).

[88] WASH. REV. CODE ANN. § 90.58.020 (2004) (stating the SMA is "a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines."). The SMA's geographical scope "extends from extreme low tide to two

is in charge of "adopting guidelines for shorelines of statewide significance,"[89] and local governments carry out the SMA through master programs.[90] The SMA forbids the administrative sale of tidelands and shorelands,[91] thus imposing limits on the administrative action by Ecology and local governments when they act to manage the state trust resource of shorelines of tidal waters through the comprehensive planning process.

The Aquatic Lands Act authorizes the DNR to exercise PTD duties through its management of state-owned tidelands and shorelands and beds of navigable waters for the public benefit.[92] The Act states that "[t]he legislature recognizes that the *state owns* these aquatic lands in fee and has delegated to the department [of natural resources] the responsibility to manage these lands for the *benefit of the public*."[93] The statute directs the DNR's management by establishing a priority of uses for water-dependent uses on state-owned aquatic lands, prioritizing "uses which enhance renewable resources, water-borne commerce, and the navigational and biological capacity of the waters."[94] The statute prohibits nonwater-dependent use of state-owned aquatic lands "except in exceptional circumstances" when the use is compatible with water-dependent uses.[95] The Aquatic Lands Act also requires the DNR to consider the PTD values of aquatic lands for "wildlife habitat, natural area preserve, representative ecosystem, or spawning area" before it may issue any lease to the aquatic lands or permit a change in use of aquatic lands.[96] Thus, the Act imposes PTD duties on the DNR's management of state-owned aquatic

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hundred feet inland from the high water mark," and includes wetlands, streams and rivers with flows greater than twenty cubic feet per second and lakes greater than twenty acres. Johnson et al., *supra* note 75, at 542.

[89] WASH. REV. CODE ANN. § 90.58.020.

[90] WASH. REV. CODE ANN. § 90.58.070–.090.

[91] WASH. REV. CODE ANN. § 90.58.020; *see* Johnson et al., *supra* note 75, at 524.

[92] WASH. REV. CODE ANN. § 79.105.030.

[93] *Id.* § 79.105.010 (emphasis added).

[94] *Id.* § 79.105.210(1).

[95] *Id.* § 79.105.210(2).

[96] *Id.* § 79.105.210(3).

lands, requiring the DNR to consider public benefits when determining the use of aquatic lands and in the selling or leasing these lands.

The Seashore Conservation Act assigns jurisdiction over the "seashore conservation area" to the Washington State Parks and Recreation Commission.[97] This area includes all the lands owned or controlled by the state along the Pacific Coast that "occup[y] the area between the line of ordinary high tide and the line of extreme low tide."[98] The statute states that ocean shores "are hereby declared a *public* highway and shall remain *forever open to the use of the public*."[99] This declaration reflects the PTD by establishing the public nature of the ocean shores and calling for management in perpetuity for public use. The SCA states the seashore conservation area "shall be maintained in the best possible condition for public use [and] [a]ll forms of public outdoor recreation shall be permitted and encouraged in the area," with the "primary purpose" being recreational use.[100] The Act limits the commission's actions by requiring the commission to manage ocean shores for the PTD use of public recreation, thereby preventing the commission from approving actions interfering with recreational use.

4.0 Purposes

Washington's PTD protects the public interest, or *jus publicum*, in navigation, fishing, and recreational uses for the public trust resource of the tidelands and shorelands of navigable waters. Although the Washington Supreme Court has mentioned environmental quality as a PTD purpose,[101] it has yet to apply the PTD to protect environmental quality.

4.1 Traditional (Navigation/Fishing)

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[97] *Id.* § 79A.05.610.
[98] *Id.* § 79A.05.605.
[99] *Id.* § 79A.05.693 (emphasis added).
[100] *Id.* § 79A.05.615.
[101] Weden v. San Juan County, 958 P.2d 273, 283 (Wash. 1998) (quoting Johnson et al., *supra note* 75, at 524).

The PTD protects the traditional purposes of navigation and fishing. As stated by the Washington Supreme Court: "This *jus publicum* interest as expressed in the English common law and in the common law of this state from earliest statehood, is composed of the right of navigation and the fishery."[102] Therefore, the Washington PTD clearly includes the traditional PTD purposes of navigation and fishing.

4.2 Beyond Traditional (Recreational/Ecological)

The Washington Supreme Court has expanded the PTD's *jus publicum* beyond the purposes of navigation and fishery. The court considers the *jus publicum* to include "navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as a corollary to the right of navigation and the use of public waters.'"[103] The court has stated that the PTD "protects . . . 'environmental quality[;]'"[104] however, Washington courts have yet to apply the PTD to protect environmental quality.

5.0 Geographic Scope

The geographic scope of the PTD is quite complex. Based on the language of the constitution, the PTD applies to the beds and shores of all navigable waters to the ordinary high tide line or ordinary high water mark, whichever is applicable.[105] For tidal waters, the PTD applies to the beds and shores where the tide "ebbs and flows."[106] To determine navigability for state title, and thus for PTD purposes, the Washington Supreme Court has used the "susceptible of navigation" test.[107] As for other resources, the PTD applies to wildlife and shellfish on public

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[102] *Caminiti*, 732 P.2d 989, 994 (Wash. 1987) (citing Shively v. Bowlby, 152 U.S. 1, 13 (1894); Hill v. Newell, 149 P. 951, 952 (Wash. 1915)).
[103] *Wilbour*, 462 P.2d 232, 239 (Wash. 1969).
[104] *Weden*, 958 P.2d at 283 ("The doctrine protects 'public ownership interests in certain uses of navigable waters and underlying lands, including navigation, commerce, fisheries, recreation, and environmental quality.'") (quoting Johnson et al., *supra* note 75, at 524).
[105] WASH. CONST. art. XVII, § 1.
[106] *Id.*
[107] *See infra* notes 116–18 and accompanying text.

lands.[108] Washington courts have explicitly excluded the PTD from applying to shellfish on private lands and groundwater, however.[109]

5.1 Tidal

Under the Washington constitution, "[t]he state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes."[110] In its early decisions on the PTD, the Washington Supreme Court confirmed the state's ownership of these lands under the constitution, stating that "[t]he provision of art. 17, § 1 of the constitution was evidently for the purpose of establishing the right of the state to the beds of all navigable waters in the state, whether lakes or rivers, or fresh or salt, to the same extent the crown had in England."[111] Thus, under the state constitution, Washington's PTD extends to the beds and shores of all tidelands and shorelands where the "tide ebbs and flows," up to ordinary high tide.[112]

5.2 Navigable-in-Fact

As stated above,[113] the Washington Constitution proclaims state ownership to "the beds and shores of all navigable waters in the state . . . up to and including the line of ordinary high within the banks of all navigable rivers and lakes."[114] Therefore, the state owns the beds and

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[108] *See infra* § 5.6.
[109] *See infra* §§ 5.5 (groundwater), 5.6 (shellfish).
[110] WASH. CONST. art. XVII, § 1.
[111] City of New Whatcom v. Fairhaven Land Co., 64 P. 735, 737–8 (Wash. 1901) (stating "[t]he new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them.").
[112] WASH. CONST. art. XVII, § 1. *See* Brace v. Hergert Mill Co. v. State, 95 P. 278, 280 (Wash. 1908) (stating that under this constitution provision "the state asserted ownership in the beds and shores of all navigable waters . . . up to and including the lien of ordinary high tide in waters where the tide ebbs and flows.").
[113] *See supra* § 2.0.
[114] WASH. CONST. art. XVII, § 1.

shores below the ordinary high water mark of navigable rivers and lakes in trust.[115] In determining whether rivers and lakes are navigable, the Washington Supreme Court uses the "susceptible of navigation" test to determine navigability for state ownership:[116]

> Navigability is always a question of fact. Whether a body of water is navigable in the true sense of the word depends, among other things, upon its size, depth, location, and connection with, or proximity to, other navigable waters. It is not navigable simply because it is floatable for logs or other timber products or because there is sufficient depth of water to float a boat of commercial size. . . . In order to be navigable, it must be capable of being used to a reasonable extent in the carrying on of commerce in the usual manner by water.[117]

Simply floating logs and timber does not make the body of water navigable for purposes of state title to the beds and banks.[118]

Once a court determines a body of water is navigable, the public's right to use it for PTD purposes continues with the natural or artificial fluctuations of water levels.[119] According to the Washington Supreme Court in *Wilbour*, "where the level of a navigable body of water fluctuates due to natural causes so that a riparian owner's property is submerged part of the year, the public has the right to use all the waters of the navigable lake or stream whether it be at the high water line, the low water line, or in between."[120] When the navigable water's level fluctuates due to artificial means, the *Wilbour* court stated "the artificial fluctuation should be considered the same

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[115] *Id.*

[116] Proctor v. Sim, 236 P. 114, 116 (Wash. 1925) (citing Oklahoma v. Texas, 258 U.S. 574, 586 (1922) (stating the test as "'whether it is used, or is susceptible of being used, in its natural and ordinary condition, as a highway of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water'"); *Brace & Hergert Mill Co.*, 95 P. 278, 281 (Wash. 1908) (concluding that Lake Union in Seattle was navigable in fact, based on evidence that it "is capable of being navigated, and is used by the public for that purpose.").

[117] *Proctor*, 236 P. at 116.

[118] Watkins v. Dorris, 64 P. 840, 843 (Wash. 1901) (stating that "[t]his stream is of such a character that its use as a public highway is restricted to one purpose, viz. that of floating lots or timber, and we think a distinction must be drawn between such streams and those which are highways for general trade and commerce. The title to the bed of the stream, therefore, passed from the government to the landowner, but it is subject to the right of the public to use the stream for floating logs and timber.").

[119] *Wilbour*, 462 P.2d 232, 238 (Wash. 1969) (citations omitted).

[120] *Id.* Further, the court stated, "When the land is submerged [of a riparian landowner], the owner has only a qualified fee subject to the right of the public to use the water over the lands consistent with navigational rights, primary and corollary." *Id.* (citations omitted).

as a natural fluctuation with the rights of the public being the same in both situations."[121] Thus, "the public has the right to go where the navigable waters go," even where the waters are over privately held lands, and even when due to artificial manipulation.[122]

5.3 Recreational Activities

As discussed above,[123] under the PTD, the public has the right to use the tidelands and shorelands beneath navigable waters for purposes of navigation, fishing, boating, swimming, water skiing, and other recreational uses.[124] The PTD protects these public uses as part of the *jus publicum* interest, even if the lands under the navigable waters are private.[125]

5.4 Wetlands

Washington courts have yet to address whether freshwater wetlands are subject to the PTD. However, if the wetlands are influenced by the ebb and flow of the tide or they are navigable waters, the PTD applies to them.[126]

5.5 Groundwater

The Washington Supreme Court explicitly decided that the PTD did not apply to groundwater resources in *Rettkowski v. Department of Ecology*.[127] As previously discussed,[128] the court cited "two threshold problems" with applying the PTD to the Department of Ecology's regulation of groundwater: 1) the court had never applied the PTD to non-navigable waters or to

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[121] *Wilbour*, 462 P.2d at 238.
[122] *Id.*
[123] *See supra* § 4.2.
[124] *Wilbour*, 462 P.2d at 239 (stating the public right of "navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as a corollary to the right of navigation and the use of public waters.'").
[125] *See id.* at 238 ("When the land is submerged [of a riparian landowner], the owner has only a qualified fee subject to the right of the public to use the water over the lands consistent with navigational rights, primary and corollary.")
[126] *See* WASH. CONST. art. XVII, § 1 ("The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes.").
[127] 858 P.2d 232, 239 (1993).
[128] *See supra* notes 50–63 and accompanying text.

groundwater; and 2) the duty the PTD imposed upon the state was not to a specific agency but on the state as a whole.[129] Therefore, the Washington PTD does not apply to groundwater resources.

5.6 Wildlife

Washington courts recognize *ferae naturae,* or wildlife, as a public trust resource through common law and as codified in state statutes. The Washington Supreme Court stated that "title to game belongs to the state in its sovereign capacity, and that the state holds this title in trust for the use and benefit of the people of the state."[130] According to the court, in exercising its trust responsibilities over the game resource, state legislature "has the right to control for the common good the killing, taking, and use of game."[131] State statutes codify the PTD as applied to wildlife, declaring that the state owns wildlife.[132]

Both state statutes and common law treat shellfish differently than wildlife. The Washington Supreme Court has differentiated shellfish from other wildlife, such as fish, birds, and animals, [133] stating that "[s]hellfish are not animals *ferae naturae*."[134] Further, the state legislature explicitly excludes "shellfish" from the statutory definition of wildlife.[135] Because shellfish have "fixed habitation," when the state grants tidelands to a private owner, shellfish on

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[129] *Id.* The court also stated, "Nowhere in Ecology's enabling statute is it given the statutory authority to assume the State's public trust duties and regulate in order to protect the public trust." *Id.*
[130] Graves v. Dunlap, 152 P. 532, 533 (Wash. 1915).
[131] *Id.*
[132] WASH. REV. CODE § 77.04.012 (2010) ("Wildlife, fish, and shellfish are the property the state. The commission, director, and the department shall preserve, protect, perpetuate and manage the wildlife and food fish, game fish, and shellfish in state waters and offshore waters.").
[133] State v. Van Vlack, 172 P. 563, 564 (Wash. 1918).
[134] State v. Longshore, 5 P.3d 1256, 1262 (Wash. 2000) (emphasis added).
[135] WASH. REV. CODE § 77.08.010(65) (2010) (stating that "'wildlife' means all species of the animal kingdom whose members exist in Washington in a wild state. [Wildlife] includes but is not limited to mammals, birds, reptiles, amphibians, fish, and invertebrates. The term 'wildlife' does not include feral domestic mammals, old world rats and mice of the family Muridae of the order Rodentia, or those fish, shellfish, and marine invertebrates classified as food fish or shellfish by the director.").

privately-owned tidelands are property of the landowner.[136] Therefore, the PTD does not protect the right to gather shellfish on privately owned tidelands.[137]

According to the Washington Court of Appeals, whether the state or private landowner owns the tidelands is a determinative factor in whether the PTD applies.[138] In *Washington State Geoduck Harvest Association v. Washington State Department of Natural Resources*, the court addressed whether the PTD applies to commercial geoduck[139] harvesting on public lands.[140] Under the authority of state statutes, the DNR developed an auction process to manage commercial geoduck harvesting on public tidelands.[141] The harvesters' association argued that the DNR's auction of geoduck harvesting rights violated the PTD because the PTD gives the public a right to fish, including harvesting geoducks, and the DNR's sale of harvesting rights precluded this right.[142] The trial court upheld the DNR, and the association appealed.[143]

The Washington Court of Appeals affirmed the trial court,[144] holding that the DNR did not violate the PTD by conducting an auction of harvesting rights.[145] The court ruled that "the public trust doctrine applies to DNR's sale of commercial geoduck harvesting on public

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[136] *Longshore*, 5 P.3d at 1261 ("because of the peculiar characteristics of the clam-its fixed habitation when imbedded in the soil-clam beds may become the subject of private ownership which passes to the grantee by a conveyance from the state of tide lands in which the beds are located. . . In this respect clams differ from fish, game birds, and game animals in their wild of natural state."). Under Washington law, "naturally occurring clams on private tidelands are exclusive property of the tideland owner." *Id.* at 1260 (citing Sequim Bay Canning Co. v. Bugge, 94 P. 922 (Wash. 1908)).

[137] *See Longshore*, 982 P.2d 1191, 1195–96 (Wash. App. 1999) ("the public trust doctrine does not include the right to gather clams on private property").

[138] Wash. State Geoduck Harvest Ass'n v. Wash. State Dep't of Natural Res., 101 P.3d 891, 896 (Wash. App. 2004) (stating Washington "case law concluding that embedded shellfish 'belong with' the land indicates that whether the state or a private entity owns the land is of critical importance in assessing whether the public trust doctrine applies.").

[139] A geoduck clam (*Panopea abrupta*) is a mollusk that lives in the intertidal and subtidal areas of Puget Sound. Washington Department of Ecology, *Puget Sound Shorelines – Geoduck Clam*, http://www.ecy.wa.gov/programs/sea/pugetsound/species/geoduck.html (last visited Nov. 26, 2011).

[140] *Wash. State Geoduck Harvest Ass'n*, 101 P.3d at 895.

[141] *Id.* at 893–94.

[142] *Id.* at 895.

[143] *Id.* at 893–94.

[144] *Id.* at 898.

[145] *Id.* at 897 ("DNR's procedures and regulation of commercial geoduck harvesting serves the public, satisfies the public trust doctrine's requirements, and is not an unconstitutional infringment on the public's rights.").

lands,"[146] and because the state owns the navigable tidelands: "DNR has a continuing obligation under the public trust doctrine to manage the use of the resources on the land for the public interest."[147] But when the court analyzed whether DNR's management of commercial geoduck harvesting violated the *Caminiti* test,[148] – whether the state gave up the right of control over the *jus publicum* – the court determined that the state did not lose control over the *jus publicum* under the DNR's management of geoduck resources on public lands.[149] The court of appeals reasoned that the state conveyed no title to the state land for geoduck harvesting, the state may require terms and conditions in the commercial geoduck harvest agreements to protect the state's interests, and the DNR had the right to revoke or suspend an agreement for commercial geoduck harvesting.[150] Therefore, the court concluded that the state's sale of commercial clam harvesting rights on public lands did not violate the PTD.

5.7 Uplands (beaches, parks, highways)

Washington courts have yet to address whether the PTD extends to privately owned dry sand beaches, and in 2000 the Washington Supreme Court explicitly reserved the issue as to "whether and under what circumstances the public has a right to enter upon or cross over private tidelands on foot" under the PTD.[151] However, the Washington Court of Appeals, in 2005 and again in 2009, addressed this issue in two unpublished opinions. In *City of Bainbridge v. Brennan*, the court ruled that there is no public right to "travel over privately-owned tidelands

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[146] *Id.* ("The principal question is whether the public trust doctrine applies to DNR's sale of commercial geoduck harvesting rights on public lands. We hold that it does.").
[147] *Id.* at 896.
[148] *See Caminiti*, 732 P.2d 989, 994 (Wash. 1994). Under this test, the inquiry is: "(1) whether the state, by the questioned legislation, has given up its right of control over the *jus publicum* and (2) if so, whether by so doing the state (a) promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it." *Id.*
[149] *Wash. State Geoduck Harvest Ass'n*, 101 P.3d at 897. ("Thus, under the relevant statutory framework, the state has not given up its right of control over the state's geoduck resources.")
[150] *Id.*
[151] *Longshore*, 5 P.3d 1256, 1265 n.9 (Wash. 2000).

when not covered by water."[152] The court reasoned that the language in its previous decisions that the right of a private owner of tidelands "'to exclude others [] remains unaffected' suggests that our Supreme Court did not contemplate pedestrian passage over tidelands."[153] Although the court "recogniz[ed] the right under the public trust doctrine of 'navigation, commerce, fisheries, recreation, and environmental quality,'" it did not think that PTD protected the public's right to travel over privately owned beaches when not covered by water.[154]

In another unpublished opinion, the Washington Court of Appeals, in *Kellogg v. Harrington,* affirmed a trial court's decision[155] and "h[e]ld that, under existing authority, the public trust doctrine does not allow pedestrian use of private beach property without the owner's permission."[156] The court reviewed the Washington PTD cases, recognizing that the PTD in Washington protects "certain rights to use navigable waters," and thus does not extend to permitting pedestrian use of private beach property.[157] These decisions appear to be consistent with the Washington Supreme Court's *Wilbour* decision that ruled the PTD burdens private and public lands submerged by navigable waters, artificially or naturally, so that the lands are subject to the right of navigation and its incidental rights.[158]

On the other hand, an Attorney General opinion in 1970 "conclude[d] that the public, vis-à-vis the private upland owner, has the right to the free and unhindered use and enjoyment of the wet and dry sand areas of the Pacific Ocean beaches, by virtue of a long established customary

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[152] City of Bainbridge v. Brennan, No. 31816-4-II, 2005 Wash. App. LEXIS 1744, at *3 (Wash. App. July 20, 2005); Kellogg v. Harrington, 149 Wash.App. 1054 (Wash. App. 2009).
[153] *Id.* at *62–63.
[154] *Id.* (quoting Weden v. San Juan County, 958 P.2d 273, 283 (Wash. 1998) (quoting Johnson et al., *supra* note 75, at 524)).
[155] *Kellogg*, 149 Wash.App. at *7 (The trial court PTD held that the PTD "does not grant members of the public the right to walk along the beach on privately owned tidelands of the Columbia River.").
[156] *Id.* at *10.
[157] *Id.* at *8–9 ("recogniz[ing] that, in Washington, the public trust doctrine expressly protects certain rights to use navigable waters.").
[158] *See Wilbour*, 462 P.2d 232, 239 (Wash. 1969). For additional discussion of *Wilbour*, see notes 18–27 and accompanying text.

use of those areas."[159] The Attorney General did not employ the PTD to determine the public's right of access to dry sand beaches. Instead, he based his conclusion on the Oregon Supreme Court case, *State ex rel. Thornton v. Hay*,[160] in which the Oregon Supreme Court determined that the doctrine of custom gave the public a right to use the dry sand beaches adjacent to the ocean. According to this Attorney General's opinion, the public the right to access and use dry sand beaches along the Pacific coast, whether in private or public ownership.[161]

Washington courts are not bound by Attorney General opinions, although they are "entitled to considerable weight."[162] The Washington Court of Appeals decisions in *City of Bainbridge* and in *Kellogg* did not address the Attorney General's 1970 opinion, nor did they address the theory of custom on which the Attorney General relied.[163] There appears to be an obvious inconsistency between the scope of the PTD, as determined by the Washington Court of Appeals's unpublished decisions and the Attorney General's 1970 opinion.

6.0 Activities Burdened

The PTD burdens the conveyances of property interests, harvesting of shellfish on public lands, and hunting wildlife. But the Washington Supreme Court concluded that the PTD does not apply to surface water rights allocation.[164] Washington courts have yet to address whether the PTD burdens wetland fills.

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[159] Water – Public Lands – Rights of Public to Use of Ocean Beaches, Op. Att'y Gen. 27, at 21–22 (December 14, 1970), *available at* http://atg.wa.gov/AGOOpinions/opinion.aspx?section=archive&id=5886.
[160] 462 P.2d 671 (Ore. 1969).
[161] *See supra* Op. Att'y Gen., note 158, at 21–22.
[162] Elovich v. Nationwide Ins. Co. 707 P.2d 1319, 1324 (Wash. 1985) ("Attorney General opinions, though not controlling, are entitled to great weight."); Prante v. Kent School Dist. No. 415, 618 P.2d 521, 527 (Washington Court of Appeals stating, "Opinions of the Attorney General are not binding on the court and they have been disregarded by the court.") (citations omitted).
[163] *See generally City of Bainbridge*, No. 31816-4-II, 2005 Wash. App. LEXIS 1744.
[164] R.D. Merrill Co. v. State, Pollution Control Hearings Bd., 969 P.2d 458, 467 (Wash. 1999) (rejecting plaintiff's argument of applying the PTD to water allocations and instead adhering to the analysis in *Rettkowski* such that

6.1 Conveyances of Property Interests

As discussed above,[165] the PTD permits the state to convey the *jus privatum* to private landowners, and private landowners may also convey that title to others.[166] However, the *jus publicum* of the PTD remains with the state trustee.[167] According to the Washington Supreme Court, the PTD burdens the tidelands or shorelands, with the result being that an owner of the *jus privatum* of tidelands and shorelines of navigable waters does not have the right to use property to "substantially impair" the rights of fishing and navigation and its incidental rights.[168] However, in *Orion Corporation v. State*, the Washington Supreme Court stated an exception: "We do not mean to suggest that once the state conveys to a private party property subject to the trust the property will always be burdened by trust requirements,"[169] such as in the situation when the land is "substantially valueless for [trust] purposes."[170]

6.2 Wetland Fills

Washington courts have yet to address directly whether the PTD burdens wetland fills. Under the Washington Supreme Court's *Wilbour* decision,[171] it is likely that the PTD burdens wetland fills of navigable waters. In *Wilbour*, the court concluded that the right of the public to navigation, along with the incidental rights to navigation of "fishing, boating, swimming, water

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"[t]he [Department of Ecology's] enabling statute does not grant it authority to assume the public trust duties of the state" regarding water).

[165] *See supra* §§ 3.0–3.1.

[166] *See supra* §§ 3.0–3.1.

[167] *See supra* §§ 3.0–3.1.

[168] *Orion*, 747 P.2d at 1073 (Owners of *jus privatum* tidelands and shorelands have "no right to make any use of its property that would substantially impair the public rights of navigation and fishing, as well as incidental rights.").

[169] 747 P.2d 1062, 1072 n. 9 (Wash. 1987).

[170] *Id.* at 1072. The court gave an example of a decision by the California Supreme Court in which that court "held that although the trust originally applied to all tidelands in the San Francisco Bay, properties already dredged and filled under earlier grants were no longer subject to the trust." *Id.* (citing Berkeley v. Superior Court, 606 P.2d 362 (Cal. 1980)). The Washington court cited the California Supreme Court's reasoning approvingly, where it applied the PTD to "'property that is still physically adaptable for trust uses, whereas [grantees and successors] should prevail insofar as the tidelands have been rendered substantially valueless for those purposes.'" *Id.* (quoting *Berkeley*, 606 P.2d at 373).

[171] *See* notes 17–27 and accompanying text.

skiing, and other related recreational purposes,"[172] extended to lands submerged by the navigable waters, artificially or naturally, prohibiting riparian owners of lands of a navigable lake from filling lands and impairing the PTD purpose of navigation and the incidental rights.[173] Thus, the PTD likely prohibits filling wetlands where filling will impair the PTD purposes of navigation, fishing, and recreation.

6.3 Water Rights

Water rights in Washington are not burdened by the PTD.[174] According to the Washington Supreme Court, the PTD imposes public trust duties on the state as a whole, not particular agencies unless they have statutory authorization to exercise those public duties. The court announced in its 1993 *Rettkowski* decision that agencies may not "assume the [s]tate's public trust duties and regulate in order to protect the public trust."[175] Since the Department of Ecology, which regulates water rights, is not statutorily authorized to assume the state's public trust duties in regulating surface and groundwater resources and such regulation is "found only in the Water Code,"[176] "the public trust doctrine does not serve as an independent source of

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[172] *Wilbour*, 462 P.2d at 239. The *Wilbour* court explicitly recognized public purposes of lands submerged by navigable waters to be "subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other recreational purposes generally regarded as corollary to the right of navigation and the use of public waters." *Id.*

[173] *Wilbour*, 462 P.2d at 239.

[174] *R.D. Merrill Co.*, 969 P.2d at 467 (adhering to the *Rettkowski* decision regarding all water law issues and stating that "[t]he [Department of Ecology's] enabling statute does not grant it authority to assume the public trust duties of the state" regarding water, and "the public trust doctrine does not serve as an independent source of authority for the Department to use in its decision-making apart from the provisions in the water codes.").

[175] *Rettowski*, 858 P.2d 232, 239 (Wash. 1993).

[176] *See supra* note 175 and accompanying text; *Rettkowski*, 858 P.2d at 241–40 (generally discussing that the PTD does not apply to Ecology's regulation of water resources, stating "we have never previously interpreted the doctrine to extend to non-navigable waters or groundwater," and "[e]ven assuming for the sake of argument that the public trust doctrine places on Ecology some affirmative duty to protect and preserve the waters of this state, the doctrine could provide no guidance as to *how* Ecology is to protect those waters. That guidance, which is crucial to the decision we reach today, is found only in the Water Code.").

authority for the [Ecology] to use in its decision-making apart from the provisions in the water codes."[177] Therefore, the PTD in Washington does not apply to water rights.[178]

6.4 Wildlife Harvests

As discussed above,[179] wildlife and shellfish are treated differently in Washington case law and statutes.[180] Wildlife, excluding shellfish, are public trust resources under both case law and state statutes.[181] As part of the state's wildlife trust responsibilities, the state "has the right to control for the common good the killing, taking, and use of game."[182] The PTD in wildlife burdens taking on both private and public lands, excluding shellfish.[183]

The PTD burdens only shellfish harvesting on public lands, not on private lands.[184] Because the PTD applies to shellfish harvesting on public lands, courts must analyze the state's actions concerning management of shellfish on state-owned lands under the *Caminiti* test.[185] The PTD does not burden private harvesting of shellfish on private lands, as Washington courts have determined that the PTD does not apply to shellfish harvesting on privately-owned tidelands.[186]

7.0 Public Standing

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[177] *R.D. Merrill Co.*, 969 P.2d at 467.
[178] Prior to the Washington Supreme Court decisions in *R.D. Merrill* and *Rettkowski*, Professor Ralph Johnson argued that "[b]ecause no explicit intent to abolish the public trust doctrine is evident in the 1917 [Water] Code, or permits issued thereunder, the public trust doctrine should still be applicable to prior appropriation water rights." *See supra* Johnson et al., note 75, at 545.
[179] *See supra* § 5.6.
[180] *See supra* § 5.6.
[181] *See supra* § 5.6.
[182] *Graves*, 152 P. 532, 533 (Wash. 1915).
[183] *See id.* at 533–534 (determining that all "animals ferae naturae belong to the state" until "they are reclaimed by the art and power of man" and recognizing the "absolute power to control and regulate [animals ferae naturae]" that passed to the state as a sovereign from the English common law).
[184] *See supra* § 5.6. The Washington Supreme Court has concluded the PTD applies to the state's sale of commercial geoduck harvesting on public lands. *Wash. State Geoduck Harvest Ass'n*, 101 P.3d 891, 895 (Wash. App. 2004).
[185] *See Wash. State Geoduck Harvest Ass'n*, 101 P.3d at 896–97 ("Because the public trust doctrine applies, we must determine whether DNR has violated the doctrine through its management regime. We ask: (1) whether the State, by the questioned legislation, has given up on its right of control over the jus publicum; and (2) if so, whether by doing the State (a) has promoted the interests of the public in the jus publicum; or (b) has not substantially impaired it.") (citing *Caminiti*, 732 P.2d 989, 994 – 95 (Wash. 1987)).
[186] *See supra* § 5.6.

Washington courts have not directly addressed the issue of the public's standing in order to enforce the PTD. However, they have frequently permitted private causes of actions against public officials to enforce the PTD.[187] Washington courts have yet to address whether there are statutory or constitutional bases for public standing to enforce the PTD.

7.1 Common-law Basis

Washington courts have not directly addressed the issue of public standing; however, the courts have frequently permitted individuals and organizations to file suit against the state for alleged violations of the PTD.[188] Even the leading Washington Supreme Court case discussing the modern PTD, *Caminiti*, did not directly address the issue of public standing.[189] The court assumed standing of an individual, Bella Caminiti, and an association, the Committee for Public Shorelines Rights, to sue the Commissioner of Public Lands and the State Treasurer,[190] challenging the constitutionality of a state statute that which allowed waterfront property owners to build recreational docks without paying the state.[191] Under Washington common law, both private citizens and organizations appear to have standing to sue if their interests in PTD resources are affected by the action of a state or private party.[192]

7.2 Statutory Basis

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[187] *See infra* § 7.1.

[188] *See. e.g.*, Citizens for Responsible Wildlife Management v. State, 103 P.3d 203, 204 (Wash. App. 2004) (in which the Washington Court of Appeals assumed standing for 13 citizens' groups challenges to initiatives prohibiting certain hunting and trapping practices); *Wilbour*, 462 P.2d 232, 235 (Wash. 1969) (assuming standing for individual plaintiffs "who brought a class action on behalf of themselves and the public" for injunctive relief and damages to their property for the defendant's filling of a navigable lake).

[189] *Caminiti*, 732 P.2d 989, 991 (Wash. 1987). *See supra* notes 28–35 and accompanying text, discussioning of *Caminiti*.

[190] *Caminiti*, 732 P.2d 989, 991 (Wash. 1987).

[191] *Id.*

[192] Johnson et al., *supra* note 75, at 589 ("[I]if private citizens or citizens' groups allege that their interests in public trust resources are affected by state or private action, and if they specifically list their personal interests, then standing should not be a barrier to a suit."); *see, e.g. Citizens for Responsible Wildlife Management*, 103 P.2d 203, 204 (Wash. App. 2004) (where thirteen organizations challenged initiatives claiming that the "[i]nitiatives violate the State's duty to control and manage wildlife for the public's benefit (public trust doctrine)."); *see Eisenbach*, 26 P. 539, 539–40 (Wash. 1891) (where a private landowner challenged another private landowner use of tidelands beneath navigable waters).

Washington courts have yet to address whether there is a statutory basis for public standing in Washington.

7.3 Constitutional Basis

Washington courts have yet to address whether there is a constitutional basis for public standing in Washington.

8.0 Remedies

Washington courts have not explicitly addressed remedies available to enforce the common law or statutory-based PTD or to obtain damages to PTD resources. However, broad statutory language permitting the state to bring actions may serve as authority for the Attorney General to bring suits for injunctive, declaratory, or monetary relief for violations of the PTD.[193] In addition, Washington courts recognize the PTD is a background principle of state law that the state may invoke as a defense to a private landowner's takings claim.[194]

8.1 Injunctive Relief

To enforce the PTD, private individuals and organizations may seek injunctive relief against activities that affect public rights to use PTD resources.[195] The Attorney General may also bring injunctive suits to enforce the PTD under broad statutory language authorizing the Attorney General to "[i]nstitute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer."[196] Consequently, private individuals or the Attorney General may seek an injunction to enjoin activities of private parties or the state that affect the rights of the public under the PTD.

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[193] *See infra* § 8.1.
[194] *See infra* § 8.3.
[195] *See Wilbour*, 462 P.2d 232, 235 (Wash. 1969) (individual plaintiffs "who brought a class action on behalf of themselves and the public" obtained injunctive relief and damages to their property for the defendants' filling of a navigable lake).
[196] WASH REV. CODE ANN. § 43.10.030(2) (2009) ("The attorney general shall . . . [i]nstitute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer.").

8.2 Damages

Washington courts have yet to address whether the PTD permits parties to seek damages for injuries to PTD resources. However, the Attorney General has the authority to "[i]nstitute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer."[197] This language appears to authorize the Attorney General to bring a claim for damages for injuries to PTD resources.

8.3 Defense to Takings Claims

Washington courts have concluded the PTD is a defense to takings claims. The Washington Supreme Court has maintained that PTD "has always existed in the state of Washington."[198] Under U.S. Supreme Court takings case law, "a deprivation by the government of all beneficial uses of one's property results in a taking unless [] the 'background principles' of state law already serve to deprive the property owner of such users."[199] Both the Washington Supreme Court and the Ninth Circuit Court of Appeals have interpreted Washington law to recognize the PTD as a background principle of state law that the state may defeat a takings claim by a private landowner.[200]

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[197] *Id.*

[198] *Caminiti*, 732 P.2d 989, 994 (Wash. 1987).

[199] Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978, 985 (9th Cir. 2002) (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992)).

[200] *See Orion*, 747 P.2d 1062, 1073 (Wash. 1987); *Esplanade Properties, LLC*, 307 F.3d at 986 (stating "that Washington's public trust doctrine ran with the title to the tideland properties" and finding the PTD to preclude a takings claim by a private owner of tidelands in Seattle). *See also* notes 38-47 and accompanying text.

WISCONSIN

The Public Trust Doctrine in Wisconsin

Elizabeth B. Dawson

1.0 Origins

The Public Trust Doctrine (PTD) in Wisconsin has a lengthy history with origins in the Northwest Ordinance of 1787.[1] The ordinance states that "[t]he navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free."[2] Incorporating this language into its 1848 constitution, Wisconsin recognized its dominion over the navigable waters within its borders.[3] Over time, the legislature codified this trust in statutes,[4] delegating much of its responsibility over the trust to what is now the Wisconsin Department of Natural Resources (WDNR).[5] These statutory and constitutional provisions provide the basis for continuing administrative and judicial enforcement of the PTD in the state.

With these constitutional and statutory provisions as a foundation, the Wisconsin courts have explored the boundaries of the PTD, both as a tool for state stewardship of trust resources and as a check on state overreach. But the PTD has not remained a fixed concept; instead, Wisconsin courts have recognized that as times and social norms change, so must the state's

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[1] CONFEDERATE CONGRESS, ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT (July 13, 1787).
[2] *Id.* art. IV; *see also* Diana Shooting Club v. Husting, 145 N.W. 816, 818 (Wis. 1914) (quoting the Northwest Ordinance of 1787 and stating that the right of the public to hunt on navigable waters, between the ordinary high-water marks, is an incident of the right of navigation).
[3] WIS. CONST. art. IX, § 1 ("The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor [sic].").
[4] *See, e.g.*, WIS. STAT. ANN. §§ 30.01–99 (West 2009).
[5] *See* WIS. STAT. ANN. § 23.11 (West 2009) (stating that the WDNR "shall have and take the general care, protection and supervision of all . . . lands owned by the state or in which it has any interests").

ability to steward its natural resources.[6] In determining how to apply the PTD, Wisconsin courts have attempted to develop a substantive test that includes the weighing of different factors, such as the public nature of the use and the impact on the trust property as a whole, to govern their decision making regarding the alienation or use of trust lands.[7]

The geographic scope of the Wisconsin PTD and the uses to which it applies have evolved over time, extending beyond the traditional scope of tidal waters and the traditional uses of navigation and fishing.[8] In the 1952 case of *Muench v. Public Service Commission,*[9] the Wisconsin Supreme Court described at length the roots of the PTD in the state, from its first iteration in the Northwest Ordinance, through the use of the "saw-log" test for navigability, the subsequent statutory adoption of the "navigable in fact" test, as well as the inclusion of the "enjoyment of scenic beauty" as a protectable public trust right.[10] After summarizing the state public trust law as it had evolved, the *Muench* court ruled that citizens have the right to sue to protect the public trust under the state's administrative procedure laws,[11] and that the legislature cannot delegate its state-wide trust duties to smaller units of government,[12] signaling the direction in which the PTD in Wisconsin would develop in the future. After the *Muench* decision, the Wisconsin courts have continued to employ the PTD using both its common law roots and statutory modifications in light of the evolving public interest in navigable waters and related resources.

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[6] City of Milwaukee v. State, 214 N.W. 820, 830 (Wis. 1923) ("The trust reposed in the state is not a passive trust; it is governmental, active, and administrative.").
[7] *See* State v. Pub. Serv. Comm'n, 81 N.W.2d 71, 73–74 (Wis. 1957).
[8] *See* Diana Shooting Club v. Husting, 145 N.W. 816, 818 (Wis. 1914) (recognizing that hunting is an incident of navigation and hence protectable under the PTD).
[9] 53 N.W.2d 514 (Wis. 1952) (remanding to the Public Service Commission the question of whether a proposed dam would violate the public rights of enjoyment of the stream in its natural condition).
[10] *Id.* at 516–521.
[11] *Id.* at 523.
[12] *Id.* at 524.

2.0 The Basis of the Public Trust Doctrine in Wisconsin

Wisconsin grounds its PTD in its constitutional codification of the Northwest Ordinance.[13] From early in the state's history courts invoked the state's right to improve and ensure access to the beds of navigable waters by referring to the constitution as the source of the doctrine.[14] Perhaps the earliest explicit recognition of the state's trust powers came in 1875, in a case in which the Wisconsin Supreme Court rejected a legislative act authorizing a city to construct a dam that could provide power for wholly private purposes.[15] Since then, the courts have made widespread use of the PTD because, as the Wisconsin Supreme Court stated in 1923, "[t]he trust reposed in the state is not a passive trust; it is governmental, active, and administrative."[16] Thus, courts in Wisconsin have taken an active approach in recognizing and administering the judiciary's duties under the PTD as initially embodied in the state constitution, serving as a check on legislative and administrative actions that might interfere with the public's rights in trust resources.

Although at its most fundamental level the PTD exists in the state constitution, the legislature has taken the general principle and molded it to shape the changing needs of the public, enacting legislation to reflect shifting societal goals and priorities. As early as 1853, the Wisconsin legislature clarified the state policy towards navigability and the state's function to preserve such navigability, while recognizing common law principles governing the rights of

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[13] CONFEDERATE CONGRESS, ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT art. IV (July 13, 1787); *see also Diana Shooting Club*, 145 N.W. at 818.

[14] Wisconsin River Improvement Co. v. Manson, 1877 WL 3676, at *3 (Wis. 1877) (upholding the right of the state to grant a private company the power to erect a dam and charge reasonable tolls for its use); *In re* Crawford County Levee & Drainage Dist. No. 1, 196 N.W. 874, 875–76 (Wis. 1924) (invoking both the Northwest Ordinance and the state constitution in denying the Railroad Commission the power to reclaim wetlands for agricultural use).

[15] Attorney Gen. v. City of Eau Claire, 1875 WL 3527, at *21, *24, 37 Wis. 400 (Wis. 1875) (recognizing that the state's power and duty over navigable waters are trust obligations, and therefore without state approval local governments cannot alter navigable waters).

[16] City of Milwaukee v. State, 214 N.W. 820, 830 (Wis. 1923).

riparian landowners.[17] Today, the statutory codification of the PTD is quite comprehensive, recurring throughout chapters 23 through 33 of the Wisconsin Statutes, encumbering both traditional navigable waters and wildlife,[18] as well as overcoming the presumption of some common law riparian rights such as the granting of most kinds of easements.[19]

In addition to recognizing constitutional and statutory provisions as the sources of the PTD in Wisconsin, the courts long ago recognized navigable waters as "public highways" under the common law.[20] However, because the Northwest Ordinance, as codified in the Wisconsin Constitution, provides for the PTD so explicitly, most courts rely on the constitutional PTD and legislation enacted pursuant to it when invoking the PTD.

3.0 Institutional Application

The majority of the institutional application of the PTD in Wisconsin focuses on the legislature's enabling of the Wisconsin Department of Natural Resources (WDNR) to administer the PTD, both requiring the WDNR to protect PTD resources as well as authorizing the agency to permit the reasonable use of trust lands. Although Wisconsin courts are highly deferential to the legislature's delegation of its trust duties to the WDNR, they take a "hard look" at agency action that might alienate or restrict the public's use of the trust, as well as any legislative action that might do the same.[21]

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[17] State v. Sutherland, 166 N.W. 14, 17 (Wis. 1918) (determining that, although a statute redefining what constituted a nuisance was constitutional, the state could not order the removal of a building that was a nuisance under the new law without paying just compensation, because it was built prior to the law's enactment). Today, the amended statute exists in section 31.10 of the Wisconsin Statutes.

[18] *See infra* § 5.0.

[19] *See infra* § 3.1.

[20] *See, e.g.*, Whisler v. Wilkinson, 1868 WL 1625, at *3, 22 Wis. 572 (Wis. 1868) (recognizing the public right to float logs down navigable waters).

[21] *See infra* §§ 3.2, 3.3.

3.1 Restraint on alienation of private conveyances

Wisconsin places no restraint on a riparian owner's right to convey the entire fee simple, subject to the trust already burdening it. Since 1994, though, the Wisconsin legislature has restricted riparian owners' rights to convey riparian interests in their land beyond the right to cross the land to access the water.[22] These restraints serve to limit development on the shoreline, preventing landowners from selling access to the shoreline that would result in the building of structures on the water like docks not appurtenant to dwellings.[23]

3.2 Limit on the legislature

Courts in Wisconsin examine with skepticism legislation alienating or limiting public trust rights in order to ensure that the public purpose for which the trust lands are to be put protects public rights.[24] Even when legislating under the auspices of protecting public health and welfare, if the effect of a law is to vest title to the trust lands in wholly private hands, a court will

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[22] WIS. STAT. ANN. § 30.133 (West 2009) ("[N]o owner of riparian land that abuts a navigable water may grant by an easement or by a similar conveyance, any riparian right in the land to another person, except for the right to cross the land in order to have access to the navigable water."); *see also* ABKA Ltd. P'ship v. Dep't of Natural Res., 648 N.W.2d 854, 866 (Wis. 2002) (voiding "dockominium" development because the attempt to create a property interest in "lock boxes" was a violation of a condominium statute, thus making conveyance of an interest in boat slips a violation of section 30.133 of the Wisconsin Statutes, which prohibits such a conveyance). The Wisconsin legislature reacted to this case by clarifying the law, explicitly prohibiting the creation of "marina condominiums" after January 1, 2007, but grandfathering existing developments, with the caveat that any marina condominium with more than 300 boat slips must make 40% of them available to the public for rent or other use. WIS. STAT. ANN. § 30.1335 (West 2009).

[23] *See* WIS. STAT. ANN. §§ 30.1335(1), (2) (West 2009). The legislature did not characterize this particular restraint on alienation as an exercise of its trust duties, however.

[24] *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 514 (1970); *see also* Hixon v. Pub. Serv. Comm'n, 146 N.W.2d 577, 583 (Wis. 1966) (upholding the Public Service Commission's denial of a permit to maintain a breakwater, while defining the legislature's responsibility in authorizing activities affecting the beds of navigable waters to be "to weigh all the relevant policy factors including the desire to preserve the natural beauty of our navigable waters, to obtain the fullest public use of such waters, including but not limited to navigation, and to provide for the convenience of riparian owners").

rule that the law is invalid.[25] However, when a cession of a portion of trust land may improve commerce as a whole through better navigation, a court is likely to uphold such a conveyance.[26]

Over time the Wisconsin courts came to consider more uses to be sufficiently public to warrant alienation or alteration of trust lands. In *State v. Public Service Commission,*[27] the Wisconsin Supreme Court developed a five-factor test to determine what constitutes a permissible use of trust lands: 1) continuation of public control of the area; 2) devotion of the area and its use to the public; 3) the size of the alienation in relation to the size of the body of water as a whole; 4) continued ability to maintain all public uses on the body of water; and 5) the new public use outweighing the detriment to the public currently using the area.[28] The PTD in Wisconsin, then, does not act as a complete bar to the legislature's attempts to alienate or alter trust lands; however, any alienation must demonstrate a sufficiently public purpose to pass judicial muster.

The PTD in Wisconsin encumbers the legislature not only concerning the alienation of trust lands but also with respect to its ability to delegate its PTD duties to agencies and smaller

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[25] Priewe v. Wis. State Land & Improvement Co., 67 N.W. 918, 922 (Wis. 1896) (reversing a lower court's dismissal of a claim and remanding for further proceedings because the legislature had no power to grant the title of an entire lakebed to a developer for draining under the guise of protecting the public health and welfare).

[26] *See* City of Milwaukee v. State, 214 N.W. 820, 830 (Wis. 1923) (relying on language in *Illinois Central Railroad v. Illinois,* 146 U.S. 387 (1892), that explains when alienation would be permissible in upholding the legislature's right to grant Milwaukee trust lands, so the city could alienate the lands to develop a more commerce-friendly harbor); Merwin v. Houghton, 131 N.W. 838, 841–42 (Wis. 1911) (upholding a legislative scheme and related administrative action for swamp draining along the Mississippi River that would improve navigation, even though the court was concerned about effects on hunting and fishing, because such effects would not be substantial). In *Merwin,* however, the court declined to rule on the validity of an incidental result of the drainage scheme: the creation of "a large area of dry and tillable land." *Id.* at 840. Had improving agriculture been the sole purpose of the legislation, the court may have struck it down because agriculture is not one of the public purposes of the Wisconsin PTD. *Id.* at 841.

[27] 81 N.W.2d 71 (Wis. 1957).

[28] *Id.* at 73–74. Interestingly, although these factors seemed important to Professor Sax as an indication of the future of the Wisconsin PTD, *see* Sax, *supra* note 24 at 518, only two courts have explicitly relied upon the factors. State v. Village of Lake Delton, 286 N.W.2d 622, 629 (Wis. Ct. App. 1979) (approving village zoning ordinance reserving a small area of a lake for the use of water skiing exhibitions); City of Madison v. State, 83 N.W.2d 674, 678 (Wis. 1957) (upholding city's right to fill a portion of a lake to construct a civic center). Only nine cases cite it at all. Thus, though they remain a sign of the court's tendencies, the extent to which courts use the factors as determinative is questionable.

units of government like local governments.[29] Under the state constitution, the legislature can delegate some powers to localities,[30] but the Wisconsin Supreme Court has held that the PTD requires that this delegation not extend to matters of state-wide importance.[31] Thus, the Wisconsin judiciary sees the PTD as not only imposing limits on the legislature concerning alienation, alteration, and restriction of public rights in trust lands, but also limiting the legislature's authority to delegate the control over these lands to smaller forms of government.

3.3 Limit on administrative action

The Wisconsin legislature has empowered the WDNR (previously known as the Railroad Commission, then the Public Service Commission)[32] to steward lands subject to the PTD,[33] but the legislature controls the policies the WDNR must consider carrying out its trust responsibilities.[34] Even though the state supreme court has adopted a deferential standard of review of agency actions — seeking only to ascertain whether there is a reasonable basis for the agency's action based on substantial evidence[35] — it will take a "hard look" at actions that might alienate trust resources or abrogate the trust altogether and closely examine the process the agency took in arriving at its decision.[36] If the WDNR seeks to alter the character of the trust lands, changing their use from a public trust purpose to some other public purpose not within the

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[29] City of Madison v. Tolzmann, 97 N.W.2d 513, 516 (Wis. 1959) (reversing a lower court judgment upholding a city ordinance that required boat licenses because licensing was not implicit in the state legislation authorizing the city to impose police power regulations).
[30] *See* WIS. CONST. art. IV, § 22; *see also Village of Lake Delton*, 286 N.W.2d at 629.
[31] Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 524 (Wis. 1952) (deciding it was the role of the Public Service Commission, not the county, to determine whether or not to erect a dam because "interference with public rights of hunting, fishing, and scenic beauty by the erection of a dam on a navigable stream is of state-wide concern, even though the dam . . . [is] located in one or more particular counties").
[32] *See* Flambeau River Lumber Co. v. Gettle, 236 N.W. 671, 678 (Wis. 1931) (upholding the Railroad Commission's authority to set water levels for log-floating in a river).
[33] *See, e.g.* WIS. STAT. ANN. §§ 23.01–99, 30.01–99 (West 2009); Hilton v. Wis. Dep't of Natural Res., 717 N.W.2d 166, 173 (Wis. 2006) (affirming WDNR's ability to determine appropriate size of a pier).
[34] Hixon v. Pub. Serv. Comm'n, 146 N.W.2d 577, 583 (Wis. 1966).
[35] *Id.* at 587.
[36] *Id.* at 588 (looking at the entire agency record to determine its sufficiency).

scope of the PTD, a court will reject such an alteration.[37] Moreover, Wisconsin courts will carefully scrutinize the agency's environmental assessments for projects that may affect trust resources, even if the project does not occur directly on trust land.[38] However, when a conflict arises between the WDNR's actions pursuant to legislative grant and local provisions, courts generally rule in favor of the WDNR.[39]

Wisconsin courts also closely examine actions that may alter public trust rights when the legislature entrusts smaller units of government, such as counties and municipalities, with public trust duties, perhaps even more so than administrative actions.[40] The courts strictly construe legislative grants to localities and will not infer that the grants delegated trust duties absent clear language.[41] Although courts afford the WDNR a considerable amount of deference in its decision making, Wisconsin courts do not merely rubber-stamp actions that may have a negative effect on trust lands.

4.0 Purposes

Wisconsin takes a fairly expansive view of the purposes the PTD encompasses, extending beyond the traditional navigation and fishing rights to include rights such as the protection of "scenic beauty." However, while such aesthetic purposes receive protection under the PTD,

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[37] *In re* Crawford County Levee & Drainage Dist. No. 1, 196 N.W. 874, 875–76 (Wis. 1924) (reversing a lower court's holding that the Railroad Commission could reclaim wetlands for agricultural use).

[38] Town of Centerville v. Wis. Dep't of Natural Res., 417 N.W.2d 901, 906 (Wis. Ct. App. 1987) (affirming a trial court decision that the WDNR's environmental assessment provided an insufficient record for judicial review under the Wisconsin Environmental Policy Act, in order to determine whether an environmental impact statement was necessary regarding the potential wetland effects of a landfill development).

[39] Wis. Envtl. Decade v. Dep't of Natural Res., 271 N.W.2d 69, 77 (Wis. 1978) (striking down a city ordinance governing chemical treatment of aquatic nuisances conflict with legislature's grant of such power to WDNR).

[40] State v. Trudeau, 408 N.W.2d 337, 345 (Wis. 1987) (denying that a county board of adjustment had the authority under its floodplain ordinance to grant a variance for development below the ordinary high water mark, and remanding for findings as to whether the parts of the proposed development above the high water mark would be permissible under the ordinance).

[41] *See* Village of Menomonee Falls v. Wis. Dep't of Natural Res., 412 N.W.2d 505, 512 (Wis. Ct. App. 1987) (rejecting the notion that a "home rule amendment" granted the village the power to channelize a navigable water without a permit from the WDNR).

Wisconsin still requires that any protected activity be related to the traditional purpose of navigation in some way.

4.1 Traditional (navigation/fishing)

The right of the public to use the beds of navigable waters for the purposes of navigation and fishing was important to the historical PTD in Wisconsin.[42] Included in the traditional purposes of navigation and fishing is any "incident" of navigation, when used in connection with navigation.[43] For example, laying traps in the bed of a river to catch muskrat is not an incident of navigation, although other uses of the bed, such as dropping an anchor, is an incident of navigation and therefore falls under the protection of the PTD.[44] Wisconsin courts also consider hunting to be incident to the right of navigation, even when the underlying bed belongs to a riparian owner.[45]

4.2 Beyond traditional (recreational/ecological)

Wisconsin's PTD evolved rapidly to encompass purposes beyond the traditional purposes of the PTD.[46] Indeed, in *Muench* the Wisconsin Supreme Court said in 1952 that the public could use the PTD to enforce "any other public purpose," without specifically defining those terms.[47] By statute, when the state considers permitting a dam or bridge project, it must also consider and maintain the public right to "[t]he enjoyment of natural scenic beauty and environmental

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[42] McLennan v. Prentice, 55 N.W. 764, 770 (Wis. 1893) (asserting that "the right which the state holds in [the beds of navigable waters] is in virtue of sovereignty, and in trust for the public purposes of navigation and fishing").
[43] Willow River Club v. Wade, 76 N.W. 273, 277 (Wis. 1898) (deciding that defendant, who fished on a navigable river where plaintiff owned both banks, was not guilty of trespass for the taking of fish from that river).
[44] Munninghoff v. Wis. Conservation Comm'n, 38 N.W.2d 712, 715–716 (Wis. 1949) (determining that a riparian owner, not the public, had the right to set traps for muskrats because in Wisconsin the riparian owner owns the bed of a river).
[45] Diana Shooting Club v. Husting, 145 N.W. 816, 818 (Wis. 1914).
[46] Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 520 (Wis. 1952) (recognizing that Wisconsin law as of 1915 protected "other public rights" in addition to navigation when considering permitting actions on navigable waters).
[47] *Id.* at 520 (citing Nekoosa-Edwards Paper Co. v. Railroad Comm'n, 228 N.W. 144, 147 (Wis. 1930)).

quality."[48] By considering scenic beauty to be a right on par with hunting and fishing, the Wisconsin Supreme Court effectively incorporated scenic beauty into the state's PTD.[49] Recognition of such a subjective, vague right may be an indication that Wisconsin courts may extend the state's duties under PTD extends to other activities. However, because neither trapping,[50] nor beachcombing[51] are protectable incidents of navigation, the *Muench* court's assertion of the public's ability to enforce "any other public purpose" may have been an overstatement. Instead, what emerges from Wisconsin PTD jurisprudence is that the doctrine protects traditional purposes and any other purpose the legislature explicitly recognizes.

5.0 Geographic Scope of Applicability

The geographical scope of Wisconsin's PTD extends beyond the beds of navigable waters to include recreational waters, wetlands, wildlife, and some uplands. However, Wisconsin courts have indicated reluctance to expand further the bounds of the PTD.

5.1 Tidal

Unlike many other states, Wisconsin did not adopt the tidal test for navigability.[52] Instead, just after statehood the Wisconsin Supreme Court recognized the "saw-log" test as determinative of navigability.[53] This test acknowledged the commercial benefit that Wisconsin gained from the ability to float timber cut from its considerable forest lands downriver to market

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[48] WIS. STAT. ANN. § 31.06 (West 2009).

[49] *Muench*, 53 N.W.2d at 524 (declaring the "public rights to the enjoyment of fishing, hunting, and scenic beauty" to be matters of statewide concern when considering the permitting of a dam); *see also* Hilton v. Wis. Dep't of Natural Res., 717 N.W.2d 166, 174 (Wis. 2006) (confirming that the effect on scenic beauty is a relevant factor to consider in determining what constitutes the reasonable use of lakebed).

[50] *See supra* note 44 and accompanying text.

[51] Gianoli v. Pfleiderer, 563 N.W.2d 562, 572 (Wis. Ct. App. 1997) (reversing the portion of an injunction that prohibited feuding riparian neighbors from excluding each other from their respective beaches because the right to use the beach, when not incident to navigation, is not a public right under the PTD).

[52] *Muench*, 53 N.W.2d at 516 (citing Adolph Kanneberg, *Wisconsin Law of Waters*, 1946 WIS. L. REV. 345, 349–50 (1946)).

[53] Whisler v. Wilkinson, 1868 WL 1625, at *3, 22 Wis. 572 (Wis. 1868) (declaring that rivers capable of floating logs are "by the common law public highways"); Olson v. Merill, 1877 WL 3623, at *5, 42 Wis. 203 (Wis. 1877) (recognizing the "saw-log" test as the prevailing state law determining the navigability of a waterway).

via the many streams and rivers in the state.[54] Nevertheless, the "saw-log" test merely determined that, if navigable, the public had a use right in the form of an easement over the water.[55] Title to the bed of a navigable stream did not vest in the state due to this navigability; instead, private landowners could still own the bed.[56] Although the Wisconsin courts used the terms "public easement" in lieu of "public trust," the courts made clear that the public had protectable rights to those waters navigable for the purpose of floating logs.[57]

5.2 Navigable in fact

Although initially using the "saw-log" test for navigability, Wisconsin came to recognize the navigable-in-fact test in 1911 through an act of the state legislature.[58] A stream was navigable in fact if it could float "any boat, skiff or canoe, of the shallowest draft used for recreational purposes."[59] The navigable-in-fact test thus implicitly recognizes recreational waters as subject to the PTD. The Wisconsin legislature now recognizes that "[a]ll lakes wholly or partly within this state which are navigable in fact are declared to be . . . public waters."[60] An entire body of water need not be navigable for the PTD to extend to it in its entirety.[61] For example, if aquatic vegetation covers a portion of a lakebed, the entire lakebed is subject to the PTD, not just the part without vegetation.[62]

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[54] *See Muench*, 53 N.W.2d at 517.
[55] Jones v. Pettibone, 1853 WL 3615, at *7, 2 Wis. 308 (Wis. 1853) (clarifying that the riparian landowner holds title to the middle of the stream regardless of navigability).
[56] *Olson*, 1877 WL at *4.
[57] *Id.* at *5; *Jones*, 1853 WL at *7.
[58] *Muench*, 53 N.W.2d at 519 (quoting the Water Power Act, ch. 652, Laws of 1911). A subsequent version of the statute said that any waters "navigable in fact for any purpose whatsoever are hereby declared navigable." *Id.*
[59] *Id.*
[60] WIS. STAT. ANN. § 31.10(1) (West 2009). Navigable in fact streams and rivers receive the same designation. *Id.* § 31.10(2).
[61] State v. Trudeau, 408 N.W.2d 337, 342 (Wis. 1987) (citing Houslet v. Natural Res. Dep't, 329 N.W.2d 219, 223 (Wis. Ct. App. 1982)).
[62] *Id.*

An important distinction between Wisconsin lakes and rivers exists concerning riparian ownership and the geographic scope of the PTD. Riparian owners bordering navigable lakes have exclusive title above the high water mark,[63] but have only qualified title between the high and low water marks, because that land is subject to the public trust along with the rest of the lakebed.[64] In contrast, those owners whose land borders streams and rivers take qualified title to the middle of the stream, the land below the high watermark being subject to the public trust,[65] and unqualified title above the high water mark.[66] Thus, the state's sovereign ownership of the beds of navigable lakes is absolute, while the sovereign ownership of the beds of navigable rivers and streams coexists with, but is still superior to, the qualified title of riparian owners.[67]

Even if navigable in fact, though, the bed of an artificial body of water does not belong to the state in its sovereign capacity to hold in trust for the public.[68] However, if an artificial

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[63] Ill. Steel Co. v. Bilot, 84 N.W. 855, 856 (Wis. 1901) (recognizing that a grant of land from the United States to a private owner does not vest title to the bed of the lake, because the bed was never in the United States' possession to grant).

[64] Doemel v. Jantz, 193 N.W. 393, 398 (Wis. 1923) (affirming public's right to use the strip of land between the high and low water marks on a navigable lake when incident to navigation).

[65] *Id.* at 857; *see also* Mariner v. Schulte, 1860 WL 4662, at *9, 13 Wis. 692, (Wis. 1860); FAS, LLC v. Bass Lake, 733 N.W.2d 287, 292 (Wis. 2007) (concluding that, in the case of a landowner owning land on both banks of a stream, the logical extension of a riparian owner's qualified title to the middle of the stream extends to the entire bed).

[66] *Ill. Steel*, 84 N.W. at 856; *Trudeau*, 408 N.W.2d at 341 (quoting *Illinois Steel*).

[67] *FAS, LLC*, 733 N.W.2d at 292. Some case law indicates that the state may claim ownership in the bed of navigable lakes not only in a purely sovereign capacity but also in a proprietary capacity. *See* Mayer v. Grueber, 138 N.W.2d 197, 203 (Wis. 1965) ("title to the submerged lands beneath a permanent body of natural water *belongs* to the state" (emphasis added), citing Ne-Pee-Nauk Club v. Wilson, 71 N.W. 661, 662 (Wis. 1897) (stating that in the case of lakes "the title to the land which is under the water is in the state")). Indeed, one commentator has interpreted such judicial pronouncements to mean that "Wisconsin *owns* up to the high-water mark of navigable lakes and the Great Lakes, but competes with the private landowner's "qualified title" in navigable streams and rivers." Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1, 17 (emphasis added). However, the word "proprietary" does not appear in Wisconsin public trust cases, and at in least one case the Wisconsin Supreme Court indicates specifically to the contrary. Diana Shooting Club v. Lamoreaux, 89 N.W. 880, 884 (Wis. 1902). (confirming the trial court's assertion that the state has "no proprietary right in [trust] lands").

[68] *Mayer*, 138 N.W.2d at 204 ("In the case of artificial bodies of water, all of the incidents of ownership are vested in the owner of the land.")

construction or action on a natural body of water submerges private lands, the PTD extends to those lands, although the riparian owner still retains title to the underlying lands.[69]

5.3 Recreational waters

Although the PTD in Wisconsin unquestionably covers those waters that are navigable-in-fact, the geographical reach of the PTD in Wisconsin does not require proof of navigability. Instead, due at least in part to the statutory protection of scenic beauty, all waters capable of providing recreational enjoyment also fall under its scope.[70]

5.4 Wetlands

If adjacent to a navigable water, wetlands are within the geographic scope of the Wisconsin PTD.[71] Wisconsin law also extends the state's regulatory reach to non-adjacent wetlands, beyond the reach of federal Clean Water Act jurisdiction.[72] But the Wisconsin courts have not yet expressly interpreted this statutory extension to constitute an extension of the PTD.[73] This lack of judicial interpretation notwithstanding, the WDNR considers its duties under

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[69] Klingeisen v. Wis. Dep't of Natural Res., 472 N.W.2d 603, 605 (Wis. Ct. App. 1991) (recognizing WDNR's jurisdiction over an artificial channel connected to a natural body of water); *see also* Haase v. Kingston Co-op. Creamery Ass'n, 250 N.W. 444, 445 (Wis. 1933) (determining that the state does not acquire by adverse possession title to an artificial lake created when a dam overflowed private land, because the public's right to enjoy navigable waters is not dependent upon state title to the bed of a lake). Wisconsin statutes also recognize that any artificial connection a municipality creates for public use is the equivalent to a natural navigable in fact water. WIS. STAT. ANN. § 31.10(1) (West 2009).

[70] Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 521 (Wis. 1952); *see also supra* note 48 and accompanying text.

[71] Just v. Marinette County, 201 N.W.2d 761, 769 (Wis. 1972) (upholding a county's shoreland zoning ordinance as not effectuating a taking of private property, even though it prevented private landowners from filling a wetland).

[72] WIS. STAT. ANN. § 281.36 (West 2009). No case law exists interpreting this statute yet, perhaps because this law was enacted in 2001.

[73] *See* Zealy v. City of Waukesha, 548 N.W.2d 528, 534 n.7 (Wis. 1996) (implying that non-adjacent wetlands may be distinct from adjacent wetlands with respect to the PTD by stating that *Just v. Marinette County* is applicable not only to "cases involving the public trust doctrine," but also to "wetland regulations"); *accord* M & I Marshall & Ilsley Bank v. Town of Somers, 414 N.W.2d 824, 830 (Wis. 1987) (indicating that the PTD as stated in *Just* only reaches wetlands in a shoreland area, while acknowledging that in a takings case, regardless of whether the land in question is subject to the PTD or not, the takings analysis from *Just* that asks whether a regulation seeks to convey a public benefit or prevent a public harm still controls).

the PTD to extend to all wetlands.[74] An important caveat with respect to wetlands, though, is that the legislature has enacted separate legislation for cranberry bogs,[75] a significant part of the state's economy, and an industry that undoubtedly has effects upon state waters. Because of this legislation private owners of wetlands used as cranberry bogs have more discretion over their use of the land than other private landowners.[76] However, if a proposed cranberry operation may affect navigable waters or wetlands, whether federally-designated as a wetland or not, the WDNR asserts certain permit jurisdiction over the project, indicating that the state does not completely exempt cranberry bogs from the PTD.[77] Wisconsin, then, unquestionably regulates all wetlands within the state, although whether they are all subject to the same PTD protection remains an open question.

5.5 Groundwater

Wisconsin exerts considerable legislative and regulatory power over groundwater; however, the courts have not interpreted these measures to reflect an exercise of the state's public trust duties. But the term "[w]ater resources," in a statute in which the legislature claims to be acting "as trustee" of the state's navigable waters, includes "all water whether in the air, on the earth's surface or under the earth's surface."[78] This definition would seem to allow a court to recognize an extension of the PTD to groundwater, at least as insofar as it "relate[s] to lands

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[74] WIS. ADMIN. CODE NR § 1.95 (2009) (referring to the state's "history of active water resource protection under the public trust doctrine" as authority for "making and enforcing regulatory and management decisions which . . . affect the quantity and quality of many Wisconsin wetlands"); *see also* MICHAEL J. CAIN, STAFF ATTY., WIS. DEP'T OF NATURAL RES., WISCONSIN'S WETLAND REGULATORY PROGRAM 2–3 (2008) *available at* http://dnr.wi.gov/wetlands/documents/OverviewWIRegulatoryProg.pdf (last visited Nov. 14, 2009) (citing *Just* as judicial recognition of the state's public trust duties towards wetlands).

[75] WIS. STAT. ANN. § 94.26 (West 2009); *see also infra* note 114 and accompanying text.

[76] Tenpas v. Wis. Dep't of Natural Res., 436 N.W.2d 297, 302 (Wis. 1989) (reversing the appellate court and reinstating trial court's determination that chs. 30 and 31 of the Wisconsin Statutes do not apply to cranberry bogs due to the existence of section 94.26 that specifically governs them).

[77] *See* WIS. ADMIN. CODE NR chs. 103, 116 (2009); *see also* WIS. DEP'T OF NATURAL RES., CRANBERRY CONSTRUCTION PROJECTS COE AND WDNR REGULATIONS AND PERMIT INFORMATION 1–2 *available at* http://dnr.wi.gov/waterways/permit_apps/CranberryInfoPacket.pdf (last visited Nov. 14, 2009).

[78] WIS. STAT. ANN. § 281.31(2)(g) (West 2009).

under, abutting, or lying close to navigable waters," because the statute narrows its application to such lands.[79] Additionally, Wisconsin's groundwater protection statutes provide that remedies included in the law do not preclude suits based upon other statutes or common law principles,[80] potentially another avenue for a plaintiff to persuade a court to extend the PTD to reach groundwater. Especially since the passage of the Great Lakes–St. Lawrence River Basin Water Resources Compact[81] that legisla tes a trust responsibility over the Great Lakes Basin,[82] Wisconsin courts may soon extend trust responsibilities over groundwater, at least as it relates to usage within the basin.

5.6 Wildlife

By statute, Wisconsin asserts that the "legal title to, and the custody and protection of, all wild animals within this state is vested in the state for the purposes of regulating the enjoyment, use, disposition, and conservation of these wild animals."[83] Although the statute does not assert such ownership as an extension of the state's trust duties, several Wisconsin Supreme Court cases have interpreted state ownership of wildlife to be in trust.[84] Additional statutory support for the state's trust duties extending to wildlife lies in the Wisconsin statute extending the purpose of

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[79] *Id.* § 281.31(1).
[80] *Id.* § 160.32.
[81] *See* WIS. STAT. ANN. § 281.343 (West 2009).
[82] *Id.* § 281.343(1m); *see also* Bridget Donegan, *The Great Lakes Compact and the Public Trust Doctrine: Beyond Michigan and Wisconsin Common Law*, 24 J. Envtl. L. & Litig. (forthcoming 2009) (manuscript at 19–20, on file with author) (asserting that groundwater in the basin is now subject to a distinct PTD that the Great Lakes Compact created).
[83] WIS. STAT. ANN. § 29.011.
[84] Krenz v. Nichols, 222 N.W. 300, 303 (Wis. 1928) (stating that "the state holds title to the wild animals in trust for the people" and "[a]s trustee for the people, the state may conserve wild life and regulate or prohibit its taking . . . for the public welfare" when upholding a statute regulating muskrat farms); Munninghoff v. Wis. Conservation Comm'n, 38 N.W.2d 712, 715 (Wis. 1949) (citing *Krenz*); *accord* Monka v. Mauthe, 231 N.W. 273, 274 (Wis. 1930) (citing *Krenz*). The court in *Monka* also cited *Ex parte Fritz*, which stated that "[i]t is not only the right of the state, but also its duty, to preserve for the benefit of the general public the fish in its waters, in their migrations and in their breeding places, from destruction or undue reduction in numbers." 38 So. 722, 723 (Miss. 1905) (citations omitted) (upholding state statute regulating the taking of fish from navigable waters). *Monka* is the only Wisconsin case to cite *Ex parte Fritz*, however, so whether future Wisconsin courts will import a duty to protect wildlife under the PTD, as opposed to the power to do so, is unclear.

the PTD to the protection of "spawning grounds, fish and aquatic life."[85] Even absent a separate common law PTD concerning wildlife, the existing PTD could apply to any wildlife connected with navigable waters.

5.7 Uplands (beaches, parks, highways)

Consistent with the Northwest Ordinance of 1787, the PTD in Wisconsin extends to those "carrying places," also known as portages, used to bridge navigable waters for the purpose of commerce at the time of the enactment of the ordinance.[86] The Wisconsin Supreme Court reasoned in 1938 that limiting carrying places to those in existence in 1787 derived from the idea that while navigable waterways remain navigable apart from human use, "carrying places" existed only to the extent that humans used them at the time.[87] This limitation also means that no presumption exists in Wisconsin that the public owns roads providing access to a navigable water.[88]

With respect to other uplands, early Wisconsin case law held that the riparian owner had exclusive access to the water from his riparian property.[89] The Wisconsin legislature then amended the common law to allow public access over private land appurtenant to streams without the permission of the riparian owner "only if it is necessary to exit the body of water to prevent an obstruction."[90] For lakes, the common law doctrine of exclusivity for riparian owners

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[85] WIS. STAT. ANN. § 281.31(1) (West 2009) ("To aid in the fulfillment of the state's role as trustee of its navigable waters . . . it is declared to be in the public interest to . . . authorize . . . regulations for the efficient use, conservation, development and protection of the state's water resources . . . . The purposes of the regulations shall be to . . . protect spawning grounds, fish and aquatic life.").

[86] CONFEDERATE CONGRESS, ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT art. IV (July 13, 1787); Lundberg v. Univ. of Notre Dame, 282 N.W. 70, 75 (Wis. 1938) (denying an injunction to restrain a landowner from placing a fence across a trail because plaintiffs could not prove the trail was used as a "carrying place" under the meaning of the Northwest Ordinance).

[87] *Lundberg*, 282 N.W. at 75.

[88] Mushel v. Town of Molitor, 365 N.W.2d 622, 625 (Wis. Ct. App. 1985) (affirming title of private landowners to a road leading from a public highway to a navigable lake).

[89] Priewe v. Wis. State Land & Improvement Co., 67 N.W. 918, 920 (Wis. 1896).

[90] WIS. STAT. ANN. § 30.134(2) (West 2009).

remains unchanged. The WDNR does have regulations, though, providing for the establishment of public access to navigable waters by either purchasing the access itself or providing municipalities with financial assistance.[91]

Notwithstanding these limited statutory provisions on public access, courts in Wisconsin seem open to taking a different view of public rights to access uplands. One Wisconsin appellate court declared that "it is appropriate to extend the public trust doctrine to include navigable waters and the shore appurtenant in order to ensure the public's continued access and free use of the waters."[92] However, because the facts of that case concerned an area where the WDNR already had established public boating access, uncertainty remains as to whether Wisconsin courts will extend the PTD to privately-owned shoreland where necessary for access to trust resources.

The Wisconsin legislature has assigned to the WDNR the responsibility of managing state forests "to benefit the present and future generations."[93] Although consistent with language implicating the PTD, the law does not explicitly state that the WDNR is exerting trust duties. In an unpublished opinion, one appellate court determined that, insofar as state forests are sources of revenue for the state, and this revenue goes into trust funds for the benefit of the public, "[i]t follows that the state forests . . . are indeed held in trust for the public."[94] However, on appeal the Wisconsin Supreme Court made no mention of this declaration. Additionally, because in a subsequent case the Wisconsin Supreme Court stated that "[t]he public trust in navigable waters

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[91] WIS. ADMIN. CODE. NR § 1.90–91 (2009).
[92] State v. Town of Linn, 556 N.W.2d 394, 402 (Wis. Ct. App. 1996) (invalidating a town ordinance that charged non-residents parking and launching fees at a public boating access site but did not charge residents).
[93] WIS. STAT. ANN. § 28.04(2) (West 2009).
[94] State v. Barkdoll, 287 N.W.2d 853 (Table) (Wis. Ct. App. 1979), *aff'd* 298 N.W.2d 539 (Wis. 1980) (quieting title in the state because no one may acquire trust lands by adverse possession).

is not to be expanded and diluted to cover downtown preservation,"[95] Wisconsin courts may be reluctant to embrace an expanded geographic scope of the PTD. Nevertheless, should someone wish to dedicate land to the state of Wisconsin, by statute the state would hold such land in trust for the benefit of the public.[96]

6.0 Activities Burdened

The Wisconsin PTD imposes several limitations on the activities of private landowners, including their ability to alienate riparian rights, fill wetlands, make reasonable use of traditional riparian rights, and harvest wildlife on trust lands. These limitations arise out of state statutory and regulatory codification of the PTD, rather than the common law.

6.1 Conveyances of property interests

As mentioned above,[97] by statute Wisconsin prohibits the conveyance of less-than-fee interests in riparian property, other than the right to cross the land to access the water.[98] This restriction both limits the rights of riparian owners to alienate riparian interests and helps to ensure continued public access to navigable waters.[99]

6.2 Wetland fills

Wisconsin's PTD, in conjunction with state statutes and regulations protecting wetlands, serves as a strong check against any riparian owner's attempt to fill a wetland adjacent to a navigable water.[100] The WDNR asserts in its regulations that its authority to protect all wetlands

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[95] Wis. Envtl. Decade v. Wis. Dep't of Natural Res., 340 N.W.2d 722, 737 (Wis. 1983) (upholding WDNR's decision to not issue an environmental impact statement for a shopping mall).
[96] WIS. STAT. ANN. § 23.29(8) (West 2009) ("The department may not accept land for dedication . . . unless the land dedication provides that the interest in land which is transferred to or held by the state is to be held in trust for the people by the department.").
[97] *See supra* note 21 and accompanying text.
[98] WIS. STAT. ANN. § 30.133.
[99] *Id.* § 30.1335.
[100] Just v. Marinette County, 201 N.W.2d 761, 769 (Wis. 1972).

stems from the PTD[101] but, as mentioned above, [102] the courts have not specifically connected the PTD to this permitting system. The state's wetland protection policy does not prevent all adverse effect on wetlands; instead, courts will carefully examine the WDNR's statutory mandates with respect to the permitting of uses, and if the WDNR followed all proper procedures, the court will generally uphold the WDNR's actions.[103]

6.3 Water rights

Wisconsin adheres to the riparian system of water law, sometimes known as reasonable use, which controls when no statute exists on point.[104] Riparian rights exist appurtenant to ownership of the bank abutting the waterway, regardless of whether or not the landowner owns the bedlands.[105] These rights include the use of the water for recreational, agricultural, and domestic use, to accretions or relictions, to the free flow of the water, to protect the land from erosion, and to construct aids of navigation.[106] Wisconsin riparian rights also extend to the ice that forms on the waters in the winter.[107] According to the Wisconsin Supreme Court, riparian rights are "subject to and limited by" the public trust doctrine.[108] Hence where the legislature, pursuant to its public trust duty, passes laws requiring permits for such traditional riparian

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[101] WIS. ADMIN. CODE NR § 1.95 (2009); *see also supra* note 74 and accompanying text.
[102] *See* Zealy v. City of Waukesha, 548 N.W.2d 528, 534 n.7 (Wis. 1996); *see also supra* note 73 and accompanying text.
[103] *See* State v. Wis. Dep't of Natural Res., 497 N.W.2d 445, 452 (Wis. 1993) (upholding WDNR's conclusion that an environmental impact statement was not necessary regarding a proposed landfill that may affect two acres of wetland).
[104] State v. Zawistowski, 290 N.W.2d 303, 309 (Wis. 1980) (upholding cranberry growers' right to divert water from a navigable lake to his adjacent cranberry marshes without a permit as part of his riparian right of reasonable use).
[105] City of Milwaukee v. State, 214 N.W. 820, 827 (Wis. 1927) (upholding the legislature's grant of a parcel of trust lands to the city).
[106] R.W. Docks & Slips v. State, 628 N.W.2d 781, 788 (Wis. 2001) (affirming as not a taking the WDNR's decision to deny a permit for the further construction of 71 boat slips where over 200 already existed) (citations omitted).
[107] Rossmiller v. State, 89 N.W. 839, 842 (Wis. 1902) (concluding that while the legislature can regulate the taking of ice to protect the use for the entire public, it cannot institute a criminal penalty for the taking of ice without paying a fee because the right to take ice is protected under the PTD); *see also* Haase v. Kingston Co-op. Creamery Ass'n, 250 N.W. 444, 445 (Wis. 1933) (ruling that continued public use of an artificial lake created on private land by the damming of a river did not vest title in the state so as to allow it to prohibit the landowner from taking ice from the lake).
[108] *Id.* at 787.

activities as the construction of a dock, Wisconsin courts will not determine such legislation to be invalid.[109] Through such legislation the state codifies what it considers to be "reasonable" riparian use.

The state also regulates the diversion of water via a permitting system, effectively abrogating the traditional riparian rights to an extent.[110] Although some courts have interpreted the right to regulate as an exercise of police power,[111] others have decided that the PTD empowers the legislature to regulate for its effectuation,[112] indicating that in Wisconsin the two concepts are intertwined in their application.[113] Interestingly, though, the Wisconsin legislature has exempted cranberry growers from this permitting system, allowing them to divert water under common law principles instead of statutory law, even though other agricultural and irrigation uses require permits.[114] The PTD thus informs water law in Wisconsin, in conjunction with common law riparian and reasonable use principles, but only to the extent that the legislature and WDNR codify it in statutes and regulations.[115]

6.4 Wildlife harvests

Because the PTD in Wisconsin extends to wildlife, and the state also asserts ownership over wildlife, the state has the ability to regulate the taking of wildlife in order to protect the viability of the wildlife for future use.[116] Although a constitutional amendment adopted in 2003

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[109] *Id.* at 788.
[110] Omernik v. State, 218 N.W.2d 734, 743 (upholding Wis. Stat. Ann. § 30.18 as a valid exercise of state police power).
[111] *See id.*
[112] R.W. Docks & Slips v. State, 628 N.W.2d 781, 788 (Wis. 2001) ("The legislature . . . may use the power of regulation to effectuate the intent of the trust." (citations omitted)).
[113] Additionally, amendments to the diversion statute in 1985 also indicate that the legislature considered the PTD as authority to regulate the use of the state's water resources. WIS. ACT 60 § 1, 1985.
[114] State v. Zawistowski, 290 N.W.2d 303, 311 (Wis. 1980); *see also* WIS. STAT. ANN. § 94.26 (West 2009).
[115] *See* Hilton v. Wis. Dep't of Natural Res., 717 N.W.2d 166, 173–74 (Wis. 2006) (describing the administration of the PTD as primarily a legislative duty, with the WDNR authorized to enforce the codified laws according to an analysis of the proposed activity's effect on the PTD).
[116] WIS. STAT. ANN. § 29.011; *see also supra* §5.6.

guarantees citizens the right to hunt and fish,[117] the amendment did not limit the WDNR's power to reasonably regulate such hunting and fishing.[118] Wisconsin also asserts title over and regulates the takings of wild rice, except over "privately owned beds of flowages or ponds,"[119] but the courts have not specifically connected the PTD to this regulation.

7.0 Public standing

Wisconsin provides robust, though not unlimited, rights of standing to the public to protect the resources subject to the PTD. Primarily, these standing rights emanate from state statutes regarding navigable waters and environmental protection.[120]

7.1 Common law-based

Although the common law provides part of the basis for the PTD in Wisconsin, it does not provide independent standing for the public to enforce it. Citizens must ground any assertion of a violation of the public trust doctrine on statutory law.

7.2 Statute based

Any suit a citizen files to enforce the PTD must have a foundation in existing substantive law.[121] Courts generally look to the codification of the PTD in statute to determine this existing law.[122] Although Wisconsin statutes do not provide "public trust doctrine standing," they do

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[117] WIS. CONST. art. I § 26 (amended 2003).
[118] Wis. Citizens Concerned for Cranes and Doves v. Wis. Dep't of Natural Res., 677 N.W.2d 612, 629 (Wis. 2004) (affirming an appellate court's decision confirming WDNR's authority to establish a hunting season for mourning doves).
[119] WIS. STAT. ANN. § 29.607 (West 2009). Wisconsin also regulates the taking of wild ginseng. *Id.* § 29.611.
[120] *See, e.g.*, WIS. STAT. ANN. § 30.294 (West 2009).
[121] State v. Deetz, 224 N.W.2d 407, 413 (Wis. 1974) ("The public trust doctrine merely establishes standing for . . . any person suing in the name of the state for the purpose of vindicating the public trust, to assert a cause of action recognized by the existing law of Wisconsin."); Robinson v. Kunach, 251 N.W.2d 449, 455 (Wis. 1977) (denying cause of action for violation of the public trust regarding a proposed highway); Borsellino v. Dep't of Natural Resources, 606 N.W.2d 255, 261 (Wis. Ct. App. 1999) (affirming trial court's decision that plaintiffs did not state a cause of action when asserting that WDNR violated the public trust by granting a permit for a legal use of the bed of a navigable water).
[122] Gillen v. City of Neenah, 580 N.W.2d 628, 636 (Wis. 1998) (deciding that one citizen may sue another for a violation of the PTD even if the WDNR has chosen to forgo taking action).

authorize the public to sue to abate violations of state water law as public nuisances.[123] Under this statute, citizens may direct their actions at either the government or the private person or entity alleged to be violating the law.[124] Because of the limited scope of PTD standing in Wisconsin, though, courts are reluctant to recognize PTD standing under other statutes with less explicit enforcement provisions.[125]

Another statutory avenue for citizen standing is seeking judicial or administrative review under Wisconsin's administrative procedure laws, should the citizen believe the WDNR has violated the PTD.[126] The Wisconsin Environmental Policy Act[127] (WEPA) also requires agencies to undertake environmental impact analyses when considering actions that may affect the environment,[128] and citizens can sue the relevant agency challenging the sufficiency of these analyses.[129] Although not pertaining exclusively to trust resources, when trust resources are in jeopardy, WEPA can serve as another citizen enforcement mechanism. Interestingly, the public may have more standing rights to enforce the PTD than the state attorney general, who has the ability to sue only when the legislature grants the authority by statute, and who has no authority

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[123] *Id.* at 637; *see also* WIS. STAT. ANN. § 30.294 (West 2009) (declaring violations of chapter 30 to be public nuisances and allowing any person to sue to abate such nuisances).
[124] *Gillen*, 580 N.W.2d at 638.
[125] Friends of Richland County v. Richland County, 2006 WL 3782971, at *5, n.6, 727 N.W.2d 374 (table) (unpublished) (Wis. Ct. App. 2006) (citing *Gillen* for the proposition that private enforcement actions under the PTD must have a statutory basis, but declining to extend standing to enforce the PTD under the Farmland Preservation Act, a statute that does not authorize citizen enforcement in the way Wisconsin's water law provisions do).
[126] WIS. STAT. ANN. §§ 227.40–60 (West 2009).
[127] WIS. STAT. ANN. § 1.11 (West 2009).
[128] *Id.*
[129] Wis. Envtl. Decade, Inc. v. Pub. Serv. Comm'n, 230 N.W.2d 243, 252 (Wis. 1975) (ruling that, although WEPA did not create a new public trust in the environment, it does allow citizens to sue where a proposed state action "will harm the environment in the area where the person resides").

to challenge the constitutionality of a statute, because the duty of the attorney general is to defend the state's laws, not attack them.[130]

7.3 Constitutional basis

No constitutional basis for PTD standing exists in Wisconsin.[131]

8.0 Remedies

In Wisconsin, remedies for violations of the PTD typically involve injunctions to abate violations of state water law, whether via citizen suit or enforcement actions the WDNR initiates. The WDNR has also successfully used the PTD as a defense to takings claims.

8.1 Injunctive relief

Any person may sue for an injunction to abate a violation of the PTD as a public nuisance in Wisconsin, as codified in chapter 30 of the Wisconsin Statutes.[132] Because the nature of injunctive relief is that it is an immediate action, when a plaintiff seeks an injunction, Wisconsin courts will overlook statutory provisions establishing waiting periods before filing suit.[133]

8.2 Damages for injuries to resources

The statute providing for injunctive relief also authorizes "legal action[s]," implying the possibility of damages.[134] However, in citizen suits to abate violations of the PTD, courts have

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[130] State v. City of Oak Creek, 605 N.W.2d 526, 541 (Wis. 2000) (affirming circuit court's reversal of a decision granting standing to attorney general to use the PTD to challenge the constitutionality of a statute exempting city from law governing alteration of creek).

[131] Although not explicitly creating citizen standing to enforce the PTD, the codification of the PTD in the state constitution via the Northwest Ordinance may have helped citizens to sue to abate public nuisances in navigable waters prior to the enactment of the state statute doing so, effectively constituting a type of public trust standing. *See* Woodman v. Kilbourn Mfg. Co., 30 F. Cas. 503, 506 (D. Wis. 1867) (refusing to enjoin the construction of a dam where it was alleged the dam would obstruct navigation because the obstruction had not yet been proven).

[132] WIS. STAT. ANN. § 30.294 (West 2009) ("Every violation of this chapter is declared to be a public nuisance and may be prohibited by injunction and may be abated by legal action brought by any person.").

[133] Gillen v. City of Neenah, 580 N.W.2d 628, 634 (Wis. 1998).

[134] WIS. STAT. ANN. § 30.294 (West 2009).

not granted damages for injuries to the resources themselves. The WDNR may seek penalties for violations of the PTD pursuant to state statutes,[135] though, including damages to wildlife.[136]

8.3 Defense to takings claims

The state of Wisconsin has successfully used the PTD as a defense to takings claims. Takings law in Wisconsin looks to the property as a whole to determine whether the state has deprived the property owner of all beneficial use of such property;[137] thus, where a landowner asserts that the state has taken property that the state believes is subject to the public trust, a court will look at the landowners' entire property, not just the trust lands. Wisconsin takings law also recognizes that a private landowner, especially one owning property adjacent to navigable waters, does not have an absolute right to alter the natural character of the land.[138] The ultimate inquiry in Wisconsin takings jurisprudence is whether the state is taking land to confer a public benefit or to prevent a public harm; the former may result in a compensable taking whereas the latter will not, unless the diminution in value of the land amounts to a constructive "confiscation" of the land.[139]

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[135] State v. Kelley, 629 N.W.2d 601, 605 (Wis. 2001) (reversing and remanding to the circuit court to determine whether a permit is necessary for filling land because of uncertainty regarding the ordinary high water mark).
[136] State v. Denk, 345 N.W.2d 66, 66 (Wis. 1984) (upholding WDNR's authority to assess damages for unlawful taking of fish).
[137] R.W. Docks & Slips v. State, 628 N.W.2d 781, 784 (Wis. 2001) (ruling that no taking occurred when the WDNR prohibited construction of boat slips because the developer "retained the benefit of all or substantially all of its property"); *see also* Zealy v. City of Waukesha, 548 N.W.2d 528, 534 (Wis. 1996) (citing *Just* for the proposition that the loss of property value is only one of the factors to consider in a takings analysis, but not specifically deciding that no taking occurred on PTD grounds).
[138] Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972) ("An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.").
[139] M & I Marshall & Ilsley Bank v. Town of Somers, 414 N.W.2d 824, 830–31 (Wis. 1987) (dismissing the case for naming the incorrect defendant but resolving the question about the application of *Just* to a takings claim by upholding the public benefit/private harm analysisas); *see also* Village of Sussex v. Wis. Dep't of Natural Res., 228 N.W.2d 173, 179 (Wis. 1975) (ruling a WDNR order that contaminated private wells be sealed was not a taking because the purpose was to prevent a public harm).

WYOMING

The Public Trust Doctrine in Wyoming

Melissa Parsons

1.0 Origins

Wyoming entered the Union in 1890,[1] acquiring title to waterways held in trust for the people.[2] Wyoming's constitution declares state ownership of all water within Wyoming's boundaries, regardless of navigability.[3] The interest of the public in state-owned waters is enshrined in the Wyoming Constitution, which calls for state control of water, including a duty to "guard all the various interests."[4] Wyoming's Supreme Court has construed this state constitutional provision to create a public trust in the waters of the state.[5]

Shortly after statehood, the Supreme Court of Wyoming examined navigability of state waterways.[6] The court later adopted the federal commerce definition for purposes of defining title navigability.[7] The court noted, however, that while this test determines title to land underlying the waters, it does not determine uses to which the state may put the waters.[8] Because Wyoming's constitution vests ownership of all waters in the state, Wyoming courts have had

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[1] U.S. Statutes at Large, 51 Cong. Ch. 664, July 10, 1890, 26 Stat. 222.
[2] Day v. Armstrong, 362 P.2d 137, 145 (Wyo. 1961) (interpreting the state's title to waters to be held in trust for the public benefit).
[3] Wyo. Const. art. 8, § 1 ("The water of all natural streams, springs, lakes or other collection of still water within the boundaries of the state, are hereby declared to be the property of the state").
[4] Wyo. Const. art. 1, § 31 ("Water being essential…[and] of limited amount…, its control [is] in the state, which, in providing for its use, shall equally guard all the various interests involved").
[5] *Day*, 362 P.2d at 145; *see also* Hunziker v. Knowlton, 322 P.2d 141, 145 (Wyo. 1958) (concurring with plaintiff's contention that water is the property of the state, is under the state's control, and is held by the state in trust for its people).
[6] Farm Inv. Co. v. Carpenter, 61 P. 258, 264 (Wyo. 1900) (acknowledging the common law analogy between public and navigable waters, and the attendant public rights of navigation and fishing in those waters).
[7] Robin Kundis Craig, *A Comparative Guide to the Western States Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L.Q. 53, 196 (2010) (citing *Day v. Armstrong*, which announced Wyoming's use of the commercial navigability definition for bed title purposes).
[8] *Day*, 362 P.2d at 144.

little opportunity to actively apply the adopted federal navigability test to determine title to riverbeds. Further the Supreme Court of Wyoming, in *Day v. Armstrong*, declared navigability and bed title irrelevant in determining public trust doctrine (PTD) rights, since the constitution and the state legislature placed all state waters in public ownership with public rights incident to, even where the bed is privately owned.[9] Finally, the Supreme Court of Wyoming has acknowledged that state ownership of the waters themselves necessarily implicates public trust obligations.[10]

Even before statehood, Wyoming's territorial legislature began enacting a series of statutes focused on water, establishing preferences under the state's prior appropriation doctrine, announcing a vested right in certain uses, and declaring a public interest in both surface and groundwater.[11] Later statutes concerning planning and development of water projects[12] and even individual permitting for construction of wells[13] require consideration of the interests of the public. Despite these public interest considerations, Wyoming's water code does not contain express trust language. The closest statutory recognition of the PTD concerning water expressly prohibits obstruction and pollution of navigable waterways, imposing penalties for violations.[14]

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[9] *Id.* at 143-44 (quoting Ne-Bo-Shone Ass'n v. Hogarth, D.C. Mich., 7 F.Supp. 885, 889, *aff'd* 6 Cir., 81 F.2d 70, which stated that public rights in water are not determined by navigability, but rather by the characterization of the water as "public").

[10] *Id.* at 145 ("This court has interpreted the State's title to the waters to be one of trust for the benefit of the people," citing *Farm Inv. Co. v. Carpenter*, 61 P. 258, 265, which declared "[t]he ownership of the state is for the benefit of the public or the people").

[11] Wyo. Stat. Ann. Title 41, ch. 3 (addressing water rights, administration, and control).

[12] Wyo. Stat. Ann. § 41-2-115.

[13] Wyo. Stat. Ann. §§ 41-3-932(a)-(c), 41-3-933.

[14] Wyo. Stat. Ann. § 35-10-401 (prohibiting pollution or obstruction of a "public river or stream, declared navigable by law," potentially invoking the PTD when considered together with the constitution's and court's express recognition of the PTD in the state's waters).

2.0 Basis

Beyond vesting ownership of all waters within Wyoming's boundaries in the state, Wyoming's constitution establishes a board of control,[15] water divisions,[16] and codifies the prior appropriation doctrine, with private rights subject to the interests of the public.[17] The constitution calls for conservation of the state's water resources, granting legislative authority to construct or improve works designed to conserve or utilize water.[18] Wyoming courts have looked to these state constitutional provisions to apply and to expand the PTD beyond traditional interpretations.

The earliest iteration of public trust principles in Wyoming courts came in 1900 in a suit to quiet title to water rights.[19] In *Farm Inv. Co. v. Carpenter*, the Wyoming Supreme Court recognized the traditional rights of the public to navigation and fishery under the common law PTD alongside consumptive rights of appropriation, which the court deemed an essential public use.[20] The court explained that both the PTD and public rights of appropriation are "founded upon the necessities growing out of natural conditions, and are absolutely essential to the development of the material resources of the country."[21] The court's assertion of the PTD has expanded over time to encompass a public right to recreate in the state's waters,[22] grounded in the state constitutional provisions impliedly recognizing the PTD.[23]

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[15] Wyo. Const. art. 8, § 2 (supervising "the waters of the state and of their appropriation, distribution and diversion").
[16] Wyo. Const. art. 8, § 4.
[17] Wyo. Const. art. 8, § 3 ("No appropriation shall be denied except when such denial is demanded by the public interests").
[18] Wyo. Const. art. 16, § 2.
[19] *Farm*, 61 P. at 264 (adopting the modern common law PTD); *see supra* note 6.
[20] *Id.*
[21] *Id.*
[22] *Day*, 362 P.2d at 151.
[23] *Id.* at 142, 145 (affirming *Farm*'s interpretation of state title to waters granted under Wyo. Const. art. 8, § 1 as held in trust for the benefit of the public); *see supra* notes 3 and 4 and accompanying text.

Wyoming's legislature has also enacted several statutes asserting state ownership of certain lands, including parks and reserves, and attendant public rights in those lands.[24] In fact, Wyoming's State Lands Act provides that these lands shall be held and managed "in trust for the optimum benefit and use of all the people of Wyoming."[25] Finally, Wyoming's Environmental Quality Act (WEQA), with its central purpose to protect public health and welfare, including recreational and other beneficial uses of state natural resources, appears grounded in the PTD.[26] The WEQA applies broadly to the state's water and land, both of which are subject to the PTD.[27] However, the WEQA contains no express trust language.

3.0 Institutional Application

Wyoming courts have applied the PTD to limit private conveyances, subordinating the rights of private owners to the rights of the public.[28] Likewise, the Wyoming legislature has recognized the PTD where state lands are concerned[29] and has imposed duties on administrative agencies accordingly.[30]

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[24] Wyo. Stat. Ann. Title 36 (also known as the State Lands Act).
[25] Wyo. Stat. Ann. § 36-12-102(a).
[26] Wyo. Stat. Ann. § 35-11-102. The Wyoming Supreme Court, in People v. Platte Pipe Line Co., 649 P.2d 208, 212 (Wyo. 1982), noted the WEQA is entitled to liberal construction. The court allowed the attorney general, on behalf of Wyoming citizens, to recover damages for harm to wildlife and habitat resulting from oil discharge. Although the court, like the statute, did not expressly invoke the PTD, when read with overlapping statutes and in light of permissive court interpretations of other statutes, the WEQA could reasonably be interpreted to implicate the PTD because of the availability of damages to remedy injuries to trust resources like land and water.
[27] *See supra* note 5 and accompanying text; *see infra* § 5.7.
[28] *See infra* note 32 and accompanying text.
[29] *See supra* note 24 and accompanying text.
[30] Wyo. Stat. Ann. § 36-12-102(b) (specifying state trust land management requirements including policies for disposal, lease, or exchange of lands, public access to use of lands, and conservation for wildlife habitat and recreational purposes); Wyo. Stat. Ann. § 36-9-101 (enumerating requirements for sales of state trust land).

3.1 Restraint on Alienation

Despite the fact that Wyoming is one of few states in which courts have not acknowledged the U.S. Supreme Court decision in *Illinois Central Railroad Company v. Illinois*,[31] Wyoming legislature and courts have nonetheless used the PTD to limit private conveyances. Wyoming's PTD includes state lands and state ownership of waters with attendant public rights in those waters. Accordingly, any conveyance encompassing state waters is subject to the rights of the public.[32] Under the State Lands Act, Wyoming's legislature has provided for management[33] and disposal[34] of state trust lands subject to public uses and benefit. Concerning sales of state trust land, the Board of Land Commissioners (BLC) must assess economic benefits of the sale; sales are prohibited unless they will (1) make remaining lands more manageable, (2) meet a specific school or community need, (3) better meet "multiple use objectives"[35] of the beneficiaries of the

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[31] 146 U.S. 387 (1892) (establishing a model for judicial skepticism where public rights and resources are limited in favor of private interests).

[32] *See Day*, 362 P.2d at 151 (holding that the public has access rights in all state waters, including those overlying privately owned beds); *see also* Davison v. Wyoming Game and Fish Commission, 238 P.3d 556 (2010) (preserving an easement over private property for public access to a stream bed for the purpose of effectuating PTD rights including fishing, hunting, and boating); *see supra* note 9 and accompanying text.

[33] Wyo. Stat. Ann. § 36-12-102 (directing the BLC to manage state lands "in an orderly manner in trust for the optimum benefit and use of all the people of Wyoming" and requiring development of a management plan that conforms to specified criteria).

[34] Wyo. Stat. Ann. § 36-9-101(a) (the BLC "shall sell such subdivisions as it shall deem for the best interests of the state land trust"); Wyo. Stat. Ann. § 36-1-111 (applying the same standards for sales of state trust lands to exchanges of state trust lands); *see also* Wyo. Stat. Ann. § 36-5-105(a) ("all state lands leased…shall be leased in such manner and to such parties as shall inure to the greatest benefit to the state land trust beneficiaries").

[35] Wyo. Stat. Ann. § 36-12-102 ("Multiple use means the management of the land in a combination of balanced and diverse resource uses that takes into account the long-term needs for renewable and nonrenewable resources, including but not limited to recreation, range, timber, minerals, watershed, wildlife and fish, natural, scenic, scientific and historical values, and the coordinated management of the resources without permanent impairment of the productivity of the land or the quality of the environment").

trust, or (4) realize a long-term benefit to the trust.[36] The Wyoming Supreme Court has interpreted this statutorily-created state land trust to be limited to proceeds from land sales and leases, rather than a trust in the land itself.[37] This means sales and leases of these lands must return fair market value.[38] The court has validated statutes permitting sales, exchanges, mineral and other leases of state trust lands.[39]

3.2 Limit on Legislature

The PTD imposes no express limitations on the Wyoming legislature. Instead, the legislature has imposed duties on the BLC concerning management and disposal of trust resources.[40]

3.3 Limit on Administrative Action

Wyoming courts have looked to statutes to determine agency authority and responsibility to adopt regulations.[41] For instance, Wyoming statutes impose upon the State Engineer and the Board of Control a number of responsibilities relating to responsible management of water—a public trust resource[42]—for the benefit of the public.[43] Statutes authorizing the BLC to

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[36] Wyo. Stat. Ann. § 36-9-101(a).
[37] Riedel v. Anderson, 70 P.3d 223, 232-33 (Wyo. 2003) (examining the genesis of the statutorily-created "state land trust," comparing Wyoming's land trust to those in other states, and interpreting Wyoming's trust to be limited to proceeds from the land, not in the land itself – the court has not interpreted this trust to include public rights to access and use these state lands).
[38] *See infra* notes 87 and 88 and accompanying text.
[39] *See, e.g., Riedel*, 70 P.3d at 235 (upholding the constitutionality of a statute allowing preference in lease renewals of state trust land); Dir. of Office of State Lands & Investments v. Merbanco, Inc., 70 P.3d 241, 262 (Wyo. 2003) (holding the statute controlling exchange of school lands constitutional).
[40] *See supra* notes 33 and 34 and accompanying text.
[41] *See, e.g.,* Jergeson v. Board of Trustees of School Dist. No. 7, Sheridan County, 476 P.2d 481, 483-84 (Wyo. 1970) (directing agencies to adopt rules per legislative mandate); Rissler and McMurry v. Environmental Quality Council, 856 P.2d 450 (Wyo. 1993) (ordering EQC to adopt rules as directed by statute).
[42] *See supra* notes 3 - 5 and accompanying text.
[43] *See, e.g.*, Wyo. Stat. Ann. § 41-4-503 (imposing a duty on the State Engineer to reject appropriation applications "where proposed use…[may] prove detrimental to the public interest").

promulgate rules and regulations necessary to manage, control, and dispose of state trust land,[44] subject to public interest considerations and the fiduciary duties of the state land office, arguably implicate the PTD.[45]

Similarly, Wyoming's Department of Environmental Quality (DEQ) is responsible for enforcement of the WEQA, including protecting public health and natural resources to which the act applies. The WEQA further imposes duties on the DEQ Director to conduct ongoing surveillance, inspections, and investigations where necessary to determine existence and extent of violations.[46] Finally, the Game and Fish Commission must promulgate rules and regulations to manage and protect fish and wildlife.[47] Although the WEQA and the Game and Fish code do not contain express trust language, both statutes aim to preserve and protect recognized public trust resources—water, land, and wildlife[48]—for the benefit of state citizens.[49]

4.0 Purposes

4.1 Traditional

Wyoming courts have long recognized the traditional PTD and incidental rights, including navigation, fishing, and commerce,[50] and have protected the public's right to access and use of

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[44] *See supra* § 3.1.
[45] Wyo. Stat. Ann. § 36-2-107 (charging the BLC with care and preservation of the value of the land pursuant to its fiduciary duties and granting authority to promulgate rules and regulations to execute those duties); *see supra* § 3.1.
[46] Wyo. Stat. Ann. § 35-11-109 (granting powers and imposing duties to provide for prevention, reduction, and elimination of pollution where public health and welfare is imperiled).
[47] Wyo. Stat. Ann. § 23-1-302 (granting powers and imposing duties to provide for control, propagation, management, protection and regulation of all Wyoming wildlife).
[48] *See supra* notes 3 - 5 and accompanying text (water); *see infra* § 5.7 (land); *see infra* § 5.6 (wildlife).
[49] *See, e.g.*, Wyo. Stat. Ann. § 35-11-102; Wyo. Stat. Ann. § 23-2-101(a).
[50] Farm Inv. Co. v. Carpenter, 61 P. 258, 264 (Wyo. 1900) (recognizing public rights of navigation and fishing in public waters); Day v. Armstrong, 362 P.2d 137, 151 (Wyo. 1961) (recognizing public recreational rights in addition to traditional PTD rights in the state's waters).

all waterways within the state, even those that are nonnavigable or that are privately owned.[51] Wyoming has expanded the PTD beyond its traditional scope to include certain recreational uses of waterways,[52] although these rights are limited, as noted below.[53]

4.2 Beyond Traditional

In the seminal *Day v. Armstrong* decision, the Supreme Court of Wyoming recognized a public trust right to float free from obstruction upon the waters within the state, irrespective of the ownership or navigability of the beds of the waterways.[54] This right of transportation and recreation also includes rights to hunt, fish, or make other public uses of the surface waters not prohibited by law.[55] These rights extend to all waters defined as public waters based on usability, which does not require traditional navigability, but only the capability of floating items, such as saw logs and other recreational craft.[56] Although the *Day* decision represents the greatest expansion of the PTD in Wyoming, the public's right to use the water does not include occupation of the bed or channel, *e.g.*, wading or walking.[57] The *Day* court clearly limited the right to touching incident to navigation, including disembarking to pull craft over shoals and

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[51] *Day*, 362 P.2d at 145, 151 ("The navigable or nonnavigable classification of waters does not…lessen any use to which they may be put by the public." "[W]e hold: That the portion of the river in dispute is nonnavigable; that its riparian owners have title to the bed and channel of the river, but that this title is subject to an easement for a right of way of the river's waters…, [which] are property of the State and are held by it in trust for the equal use and benefit of the public; that the waters of the river may be used by the public for floating usable craft…for transporting in such craft persons or property").

[52] *See Id.*

[53] *See infra* notes 57 and 58 and accompanying text.

[54] *Day*, 362 P.2d at 147.

[55] *Id.* at 151.

[56] *Id.* at 143; *see supra* note 9 and accompanying text.

[57] *Id.* at 146 ("Even a right to disembark and pull, push or carry over shoals, riffles and rapids accompanies this right of flotation as a necessary incident to the full enjoyment of the public's easement…On the other hand, where the use of the bed or channel is more than incidental…such wading or walking is a trespass upon lands belonging to a riparian owner and is unlawful").

rapids.[58]

5.0 Geographic Scope of Applicability

5.1 Tidal

Wyoming is a land-locked state containing no waters subject to tidal influence; therefore the ancient ebb-and-flow or tidal test of navigability does not apply. The state has adopted the federal commercial navigability test to determine title to beds of waterways, although Wyoming courts have limited the applicability of this test,[59] as discussed below.

5.2 Navigable-in-Fact

The Supreme Court of Wyoming recognizes navigability-in-fact as the modern test by which bed title is determined; however, this determination is irrelevant to an examination of public rights to the use of surface waters in Wyoming, as the court has interpreted public rights to extend beyond navigable waters.[60] For example, in *Day*, the Supreme Court of Wyoming made several sweeping pronouncements. With the exception of federally navigable waters, the state retains exclusive control of the waters within its borders[61] – it may define the navigability of such waters "as it sees fit," and it may also determine bed title regardless of the water's navigable character.[62] Wyoming courts have seldom considered the PTD post-*Day*,[63] but the assertions in *Day* seem to indicate the court's willingness to expand Wyoming's PTD.

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[58] *Id.* at 151.
[59] *Id.* at 143.
[60] *Id.* at 151.
[61] *Id.* at 143.
[62] *Id.* ("the state may lay down and follow such criteria for cataloging waters as navigable or nonnavigable, as it sees fit, and the state may also decide the ownership of submerged lands, irrespective of the navigable or nonnavigable charter of waters above them"). Although this flexibility in determining bed title could work to exclude the public from privately owned waterways, that has not happened in the more than fifty years since the *Day* decision.
[63] Wyoming courts have cited *Day* only in cases not concerning the PTD. The only post-*Day* cases expressly invoking the PTD involve lands and wildlife, not public rights in water.

5.3 Recreational Waters

In the landmark *Day* decision, the Wyoming Supreme Court declared the public right to recreational use of all waters within the state as protected under the PTD, subject only to regulations promulgated by the state legislature.[64] Although the court defined this public right broadly to include floating and "other uses of public water,"[65] the public right is limited to uses that do not constitute occupation of the bed.[66]

5.4 Wetlands

Wyoming does not recognize a constitutional, statutory, or common law PTD in wetlands.

5.5 Groundwater

Wyoming's constitution and code clearly define water rights.[67] The prior appropriation doctrine establishes allocations of surface water pursuant to Article 8, § 3 of the state constitution.[68] Although applicability of this constitutional provision to the state's groundwater remains unclear, Wyoming has enacted a series of statutes dedicated solely to underground water,[69] subjecting its use to a permitting system and recognizing the interests of the public as germane to state agency decisions about groundwater.[70] Under this code, Wyoming has extended the prior appropriation doctrine and the reasonable beneficial use standard to groundwater rights.[71] The water code appears protective of public rights to groundwater[72] and could be

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[64] *Day*, 362 P.2d at 151.
[65] *Id.* (leaving open the possibility of declaring wide-ranging uses, but those other uses here remaining undefined and limited only by statutory prohibition).
[66] *See supra* notes 57 and 58 and accompanying text
[67] *See* Wyo. Const. art. 8, §§ 1-5; Wyo. Stat. Ann. Title 41.
[68] Article 8, § 3 provides "Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interest."
[69] Wyo. Stat. Ann. § 41-3-901 *et seq.*
[70] Wyo. Stat. Ann. §§ 41-3-908(a)-(b), 41-3-912(a), 41-3-915(c)-(d), 41-3-931-33.
[71] Wyo. Stat. Ann. § 41-3-906; *see also* Lawrence J. MacDonnell, *Integrating Use of Ground and Surface Water in Wyoming*, 47 Idaho L. Rev. 51 (2010).

interpreted to apply the PTD to groundwater.[73] However, such a broad interpretation is not currently supported by the case law or by implementation of protective regulatory measures.[74]

5.6 Wildlife

The Wyoming legislature declared state ownership of all wildlife within state boundaries in 1977[75] and has adopted statutes to manage, protect, and regulate all wildlife[76] with express trust language.[77] Federal and state courts have recognized PTD principles adhering to the state's ownership of wildlife, acknowledging that wildlife within the state is subject to common ownership and is held in "trust for the benefit of the people."[78] In the face of constitutional

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[72] Wyo. Stat. Ann. § 41-3-115(a) ("[A]ll water being the property of the state and part of the natural resources of the state, it shall be controlled and managed by the state for the purposes of protecting, conserving and preserving to the state the maximum permanent beneficial use of the state's waters"). The code further establishes use preferences that prioritize public uses. Wyo. Stat. Ann. § 41-3-102.

[73] Public trust rights in Wyoming's surface waters are well established through state constitutional provisions and common law. Wyo. Stat. Ann. § 41-3-906 provides in part that "[r]ights to underground water shall be subject to the same preferences as provided by law for surface waters." Thus, the PTD could reasonably be applied to groundwater.

[74] *See, e.g.*, Thomas F. Darin & Amy W. Beatie, *Debunking the Natural Gas "Clean Energy" Myth: Coalbed Methane in Wyoming's Powder River Basin*, 31 Envtl. L. Rep. 10,566 (2001); Jack Tuholske, *Trusting the Public Trust: Application of the Public Trust Doctrine to Groundwater Resources*, 9 Vt. J. Envtl. L. 189, 198-99 (2008) (examining significant waste of groundwater resources via extraction during coalbed methane production in Wyoming).

[75] Wyo. Stat. Ann. § 23-1-103 ("all wildlife in Wyoming is the property of the state").

[76] Wyo. Stat. Ann. Title 23; *see also* Wyo. Stat. Ann. § 41-3-1001 *et seq.* (establishing minimum streamflow standards to protect fish and wildlife); Wyo. Stat. Ann. § 36-12-102 (State Lands Act) (requiring management of state lands to protect fish and wildlife and their habitat); Wyo. Stat. Ann. § 35-11-101 *et seq.* (establishing protections for fish and wildlife from harmful effects of pollution to air, water, and land).

[77] *See* O'Brien v. State, 711 P.2d 1144, 1148-49 (Wyo. 1986) ("The declaration of ownership ...by the state...of all Wildlife in Wyoming has constitutional sanction...the wildlife within the borders of a state are owned by the state in it is sovereign capacity of the common benefit of all its people...this ownership is one of trustee with the power and duty to protect, preserve and nurture the wild game").

[78] *See, e.g.*, Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1426 (10th Cir. 1986) (quoting *Geer v. State of Conn.*, 161 U.S. 519, 529 (1896), overruled on other grounds by *Hughes v. Oklahoma*, 441 U.S. 322 (1979)); Clajon Production Corp. v. Petera, 854 F. Supp. 843, 850-51 (D. Wyo. 1994) (quoting *Geer's* trust language used in *Hodel*, 799 F.2d at 1426,

challenges, these courts have used explicit public trust language to validate Wyoming laws protecting and managing this resource in the interest of state citizens.[79]

5.7 Uplands

Wyoming's state lands, including parks and reserves, are subject to agency regulation and control under the State Lands Act, which contains provisions implicating the PTD.[80] Wyoming courts have recognized a "state land trust" established by the Wyoming legislature under the State Lands Act.[81] The State Lands Act requires the BLC to manage state lands "in trust for the optimum benefit and use of all the people of Wyoming"[82] and includes provisions for public access to and use of state lands, as well as for conservation of state lands to protect wildlife habitat and public recreational uses.[83] Despite its explicit trust language, the State Lands Act does not grant the public a right of access to these state trust lands, but instead grants a privilege that allows the public access to state lands for hunting, fishing, and other recreational purposes,

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"[i]t is well-settled that wild animals are not the private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised 'as a trust for the benefit of the people' ") *aff'd in part, appeal dismissed in part*, 70 F.3d 1566 (10th Cir. 1995); Schutz v. Wyoming, 2003 WL 25293276 (D. Wyo. May 28, 2003) ("Big or trophy game animals, while they are alive, are under state ownership, held in trust for the people of the state") *aff'd sub nom.* Schutz v. Thorne, 415 F.3d 1128 (10th Cir. 2005).

[79] *O'Brien*, 711 P.2d at 1153-54 (holding guide requirement statute distinguishing between residents and nonresidents does not violate equal protection); *Clajon*, 854 F.Supp. at 860-62 (holding state declaration of ownership of wildlife and attendant licensing regulations constitutional); *Schutz*, 415 F.3d at 1136, 1139 (holding Wyoming's preferential fee and quota statutes rationally related to legitimate state purposes like protecting wildlife resources for the benefit of state citizens); *supra* note 78.

[80] *See supra* notes 33 - 36 and accompanying text.

[81] *See, e.g.*, Riedel v. Anderson, 70 P.3d 223, 232-33 (Wyo. 2003) (examining the genesis of the statutorily-created "state land trust").

[82] Wyo. Stat. Ann. § 36-12-102(a) ("Upon transfer to the state of Wyoming [of] the jurisdiction and ownership of lands and mineral resources subject to this act, the board shall manage such in an orderly manner in trust for the optimum benefit and use of all the people of Wyoming…It shall be managed in such a manner as to permit the conservation and protection of watersheds and wildlife habitat, and historic, scenic, fish and wildlife, recreational and natural values").

[83] Wyo. Stat. Ann. §§ 36-1-119(a)-(c), 36-1-120, 36-12-102 (b)(iii)-(iv).

subject to state regulation.[84] Additionally, although it does not expressly invoke the PTD, the WEQA also serves to protect the rights of the public and applies broadly to lands within the state, including those held in trust for the benefit of the public.[85]

6.0 Activities Burdened

6.1 Conveyances of Property Interests

Any property containing state waters is subject to the rights of the public—including commerce, navigation, fishing, and recreation—pursuant to the PTD.[86] With regard to state lands, the statutorily-created state land trust imposes a duty upon the BLC to manage and dispose of state lands with consideration for the interests of the public.[87] The state land trust carries with it an attendant fiduciary duty, under which the BLC may authorize sales, leases, and exchanges of property under a "total asset management policy" which imposes a duty upon the BLC to ensure leases of trust land return fair market value and to ensure sound investment policies that will maintain the earning power of the trust.[88] Like sales of state lands, transfers of water rights

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[84] *See, e.g.*, Wyo. Admin. Code Land LC ch. 13 § 3 ("The Board hereby extends the privilege of hunting and fishing on legally accessible state lands").
[85] Wyo. Stat. Ann. § 35-11-102; *see supra* notes 33 - 36 and accompanying text.
[86] *See supra* § 3.1.
[87] Wyo. Stat. Ann. § 36-12-102 (directing the BLC to manage state trust lands "for the optimum benefit and use of all the people of Wyoming"); Wyo. Stat. Ann. § 36-9-101(a) (the BLC must execute sales "for the best interests of the state land trust"); Wyo. Stat. Ann. § 36-1-111 (applying the same standards for sales of state trust lands to exchanges of state trust lands); Wyo. Stat. Ann. § 36-5-105(a) ("all state lands ...shall be leased in such manner and to such parties as shall inure to the greatest benefit to the state land trust beneficiaries"); *see supra* § 3.1.
[88] 1997 Wyo. Sess. Laws ch. 200, § 3; *see also Riedel*, 70 P.3d at 233-35 (examining the state's fiduciary duties with respect to the state land trust and determining that the trust is governed not by the common law but by the legislature, which, as architects of the trust, retain broad authority to establish rules and preferences for managing it).

are burdened to the extent that exchanges of rights to this state resource should not negatively impact the rights of other appropriators or violate the public interest.[89]

6.2 Wetland Fills

Wyoming does not recognize a constitutional, statutory, or common law PTD in wetlands. Although the WEQA contains substantive provisions regarding wetlands,[90] state courts have yet to interpret these provisions or otherwise apply the PTD to wetlands.

6.3 Water Rights

Under Wyoming's constitutionally- and statutorily-created appropriation system, water remains the property of the state but the state may grant individual usufructuary rights, which can be transferred subject to state regulations.[91] Wyoming's comprehensive water code regulates water rights in the state[92] and establishes a standard of "beneficial use"[93] as the basis, measure and limit of both surface and underground water rights.[94] The plain language used in the state's water code indicates that its purpose is to preserve this scarce resource and to protect the rights of the public; however, the water code does not contain express public trust language.

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[89] Wyo. Stat. Ann. §§ 41-3-104(a), 41-3-106(d); *see also* Hunziker v. Knowlton, 322 P.2d 141, 144 (Wyo. 1958) (quoting Frank v. Hicks, 4 Wyo. 502, 35 P. 475, 480 (1894) and Johnston v. Little Horse Creek Irrigating Co., 13 Wyo. 208, 79 P. 22, 24 (1904)).

[90] Wyo. Stat. Ann. §§ 35-11-309 – 11, 35-11-103(c)(x), (xi), (xiii)-(xvi).

[91] Wyo. Stat. Ann. § 41-3-101 *et seq.*

[92] *See* Wyo. Stat. Ann. Title 41.

[93] While "beneficial use" is not explicitly defined under Wyo. Stat. Ann. Title 41, ch. 3, Wyo. Stat. Ann. § 41-3-102(a) defines *preferred* uses as those for "domestic and transportation purposes, steam power plants, and industrial purposes" and establishes this order of preference: (1) drinking water, (2) municipal purposes, (3) other domestic purposes (bathing, cooking, steam heating and powering including railway use), (4) industrial purposes.

[94] Wyo. Stat. Ann. §§ 41-3-101, 41-3-906 (applying surface water preferences to groundwater).

6.4 Wildlife Harvests

Wyoming's legislature has enacted a comprehensive code regulating takings of wildlife, ownership of which is vested in the state.[95] Federal and state courts have explained that Wyoming's wildlife is in fact subject to common ownership and is held in trust for the benefit of state citizens, and have upheld the constitutionality of applicable Wyoming statutes in the face of equal protection and takings claims.[96] Under this statutory framework, the public may take fish and wildlife subject to restrictions and regulations promulgated by the Wyoming Game and Fish Department, which has a duty to protect wildlife for the benefit of state citizens.[97] Despite clear judicial recognition of a wildlife trust,[98] Wyoming citizens enjoy only a privilege—not a right—to hunt.[99]

7.0 Public Standing

7.1 Common Law-based

Wyoming courts are generally amenable to public standing under the PTD. The Wyoming Supreme Court has enunciated a four-part test to establish standing where a plaintiff has (1) an existing tangible interest (2) that is legally protectable (3) through a judicial determination with the force and effect of a final judgment (4) upon a genuinely adversarial controversy.[100]

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[95] Wyo. Stat. Ann. Title 23; Wyo. Stat. Ann. § 23-1-103; *see supra* § 5.6.

[96] *See supra* § 5.6; Clajon Production Corp. v. Petera, 854 F. Supp. 843, 860-62 (D. Wyo. 1994) (holding that a taking is not effected where regulations do not grant private landowners the exclusive right to hunt game on their property or where state-owned wildlife occupy and graze on private land); O'Brien v. State, 711 P.2d 1144, 1153-54 (Wyo. 1986) (holding that a guide requirement statute distinguishing between residents and nonresidents does not violate equal protection).

[97] Wyo. Stat. Ann. § 23-1-302 (granting powers and imposing duties to provide for management and protection of all Wyoming wildlife, including implementing control measures like season and bag limits); *see also* Wyo. Stat. Ann. Title 23, ch. 2 (requiring hunting and fishing permits).

[98] *See supra* § 5.6.

[99] Wyo. Admin. Code Land LC ch. 13 § 3 (extending a *privilege* to hunt and fish on state lands).

[100] Brimmer v. Thomson, 521 P.2d 574, 578 (Wyo.1974); *see also* William F.W. Ranch, LLC v.

Although it did not consider this test in its influential *Day* decision, in that case the Wyoming Supreme Court assumed that sport fishermen had standing to sue on behalf of the public, seeking to enforce public rights in water, even where those rights burdened private property.[101] In fact, the *Day* court treated this dispute between private parties as a class action for purposes of adjudicating far-reaching public rights.[102]

In a more recent Wyoming Supreme Court decision, *Director of State Lands & Investments v. Merbanco, Inc.*, the court held that a state resident and his children, as beneficiaries of the state land trust, as well as the nonprofit Wyoming Education Association, had standing to challenge the exchange of school lands subject to the trust, a matter the court designated as "of great public importance."[103] Conversely, the court also ruled that a corporation that was a prospective bidder on the land lacked standing to challenge the exchange because it had no legally protected interest in the land.[104] Further, the court noted that the public auction requirement seeks to protect the interests of the permanent school fund and its beneficiaries (the public), not those who seek to purchase school lands. The public, as beneficiaries of the state land trust, has standing to challenge disposal of state lands subject to the trust.

7.2 Statutory Basis

In many cases, Wyoming courts look first to the Uniform Declaratory Judgments Act (UDJA) in determining standing, as the UDJA defines parties who may seek declarations of

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Tyrrell, 206 P.3d 722, 727 (Wyo. 2009).

[101] 362 P.2d at 138-39.

[102] *Id.* at 151; *see also* Tuholske, *supra* note 74, at 224.

[103] 70 P.3d at 246, 249 (noting the court's relaxed justiciability requirements in several cases in which a justiciable controversy was found to exist based on the court's designation of the issues as "matters of great public importance," here designated as such because the exchange of state lands impacts numerous stakeholders, including beneficiaries of the state land trust).

[104] *Id.* at 249 (declaring *Merbanco* had no legally protected interest entitling it to bid on the school lands and thus did not meet the first prong of the court's standing test); *see also* Wyo.Stat.Ann. §§ 36-1-107, 36-1-110, 36-1-111.

defined rights.[105] The Wyoming legislature expressly provides for public standing under code provisions invoking the PTD, including the State Lands Act and the Game and Fish Code.[106]

7.3 Constitutional Basis

The state constitution provides broadly for redress of injury and for suits against the state, as directed by the legislature.[107] Wyoming's constitution provides that decisions of the Board of Control and the State Engineer, in their supervision of state waters, are subject to judicial review.[108] However, there are no express constitutional bases under which to enforce PTD rights in Wyoming.

8.0 Remedies

8.1 Injunctive Relief

Some Wyoming statutes invoking the PTD—like the Game and Fish Code and the WEQA—expressly provide for injunctive relief where conduct violates those statutes.[109] Further, Wyoming courts have long recognized a right to injunctive relief, even where other statutory

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[105] Wyo. Stat. Ann. §§ 1-37-101 – 1-37-115 (defining legal rights for which parties may seek declaratory relief to include constitutional, statutory, and common law rights); *see also Tyrrell*, 206 P.3d at 726.

[106] *See, e.g.*, Wyo. Stat. Ann. Title 41, ch. 4, Art. 3; Wyo. Stat. Ann. § 36-12-108(b) (regarding violations of the State Lands Act, "[a]n individual may institute a civil action to recover damages for injury or loss sustained as the result of a violation of the provisions of this act"); Wyo. Stat. Ann. § 23-3-405(e) (regarding interference with lawful taking of wildlife, "any person who has suffered injury by reason of the conduct of any person violating this section is entitled to recover damages in a civil action"). Additionally, the WEQA provides for individual standing where underground water supplies are affected by pollution or diminution. "An owner of real property…who holds a valid adjudicated water right… may maintain an action against an operator to recover damages for pollution, diminution, or interruption of such water supply resulting from surface, in situ mining or underground mining." Wyo. Stat. Ann. § 35-11-416(b).

[107] Wyo. Const. art. 1, § 8.

[108] Wyo. Const. art. 8, § 2.

[109] *See, e.g.*, Wyo. Stat. Ann. § 23-3-405(f) (authorizing private actions to enjoin conduct interfering with lawful taking of wildlife); Wyo. Stat. Ann. § 35-10-401 (providing for removal of obstructions and pollution from waterways and highways).

remedies exist.[110]

8.2 Damages for Injuries to Resources

Wyoming's State Lands Act expressly provides for damage suits where conduct violates the Act.[111] Wyoming's most expansive remedial provision for injuries to public resources is found in the WEQA.[112] In addition to authorizing real property owners to bring individual actions for money damages for injury resulting from pollution, diminution, or interruption of water rights, the WEQA includes a sweeping remedial provision that allows for penalties and injunctive relief where the WEQA—which applies broadly to the state's lands, air, waters, and wildlife—has been violated.[113] Although the WEQA does not contain express trust language, it provides for money damages where the interests of the public are injured.[114] For example, in *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, owners of a pipeline were held strictly liable to the state for discharge of oil into waters in violation of the WEQA.[115]

8.3 Defense to Takings Claims

Federal courts have recognized the PTD as a valid defense against takings claims arising in

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[110] *See, e.g.*, Stoner v. Mau, 72 P. 193 (Wyo. 1903) (holding statutory provisions for appointment of a distributor of water to settle disputes of joint owners did not bar actions for damages or injunction); Willey v. Decker, 73 P. 210 (Wyo. 1903) (recognizing the rights of an appropriator to enjoin conduct that interferes with appropriative rights).

[111] Wyo. Stat. Ann. § 36-12-108(b).

[112] *See, e.g.*, Wyo. Stat. Ann. § 35-11-901(a) ("Any person who violates, or…who willfully and knowingly authorizes, orders or carries out the violation of any provision of this act, or any rule, regulation, standard or permit adopted hereunder…is subject to a penalty not to exceed ten thousand dollars ($10,000.00) for each violation for each day during which violation continues, a temporary or permanent injunction, or both a penalty and an injunction").

[113] *Id.*; Wyo. Stat. Ann. § 35-11-903 ("Any person who violates this act, or any rule or regulation promulgated thereunder, and thereby causes the death of fish, aquatic life or game or bird life is, in addition to other penalties provided by this act, liable to pay to the state, an additional sum for the reasonable value of the fish, aquatic life, game or bird life destroyed. Any monies so recovered shall be placed in the game and fish fund").

[114] Wyo. Stat. Ann. § 35-11-903 (c) ("All actions pursuant to this article…shall be brought…by the attorney general in the name of the people of Wyoming").

[115] 669 P.2d 505 (1983).

Wyoming. For instance, in *Clajon Production Corp. v. Petera*, the federal District Court for the District of Wyoming relied on earlier federal Court of Appeals and U.S. Supreme Court decisions recognizing common ownership of wildlife, held in trust for the people.[116] Based on this reasoning, the court roundly rejected the takings claim brought by property owners asserting an exclusive right to hunt animals present on their property.[117] In addressing the alternative claim that a taking is effected where state-owned wildlife occupy and graze on private property, the court further ruled that the wildlife is in fact held in common by the people, thus, the state was not liable for the presence of and forage damage caused by wildlife on private lands.[118] In contrast, Wyoming courts have yet to recognize the PTD as a defense to takings claims.

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[116] 854 F. Supp. 843, 850-51 (quoting trust language used in *Mountain State Legal Foundation v. Hodel*, 799 F.2d at 1426 and in *Geer v. Connecticut*, 161 U.S. 519, 528-29 (1896), "[i]t is well-settled that wild animals are not the private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised 'as a trust for the benefit of the people' ").

[117] *Id.* at 852 (holding the state's declaration of ownership of wildlife constitutional and the attendant regulation of wildlife within its borders a proper exercise of the state's trust duties and its police powers "to regulate important resources on behalf of its citizens").

[118] *Id.* at 852-53.