THE PUBLIC TRUST DOCTRINE AND SUSTAINABLE ECOSYSTEMS: A GREAT LAKES FISHERIES CASE STUDY

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INTRODUCTION

The Laurentian Great Lakes contain nearly twenty percent of the world's fresh surface water.[1] They also provide habitat for a variety of fish species that have provided sustenance to indigenous peoples for centuries. Over roughly the last 200 years, they have spawned substantial commercial and recreational fisheries. Since white colonization of the region, human actions, including overfishing, habitat destruction and degradation, pollution, and introduction of exotic aquatic species, have challenged the health and viability of the fisheries. Repeated assaults have created a cascade of biological effects that have taken some species to extirpation or extinction and severely diminished others, resulting in a dramatically changed number and array of species. In addition to this threatening and dynamic biological context, a plethora of governmental jurisdictions in the Great Lakes Basin were established, increasing the complexity of emerging fisheries management. Today two national governments, several Native American tribes and First Nations groups, eight states, two provinces, a multitude of local governments, multiple international organizations, and many NGOs participate in fisheries management within the Basin, adding to the challenge of creating sustainable fisheries. As we look to the future of the fisheries, we must find effective mechanisms to work together to protect these precious resources. In this article, we describe and evaluate the

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[1] U.S. ENVTL. PROTECTION AGENCY, THE GREAT LAKES: AN ENVIRONMENTAL ATLAS AND RESOURCE BOOK, *available at* http://www.epa.gov/glnpo/atlas/glat-ch1.html#Physical%20Characteristics (last visited Jan. 25, 2006).

potential use of the public trust doctrine as a legal tool for this purpose.

The complexity of the public trust doctrine is astounding. Under the myth that it has been passed unaltered from learned judge to learned judge from ancient Rome to the present, one might suspect a fairly coherent doctrine to have arisen over the past few centuries. However, fairly substantial differences exist in the interpretation of the doctrine between jurisdictions even given guiding light cases like *Illinois Central*.[2] As with all laws, our understanding of the public trust doctrine has evolved through the ages to fit current circumstances and beliefs. In each jurisdiction that recognizes a public trust doctrine, the law has changed in different ways and at different paces, thus making any type of compilation or summary anything but simple.

Although this paper is written in a primarily positivist perspective by focusing on the law as it is found in legal opinions, the complexity of the doctrine also increases dramatically when one accounts for, for example, the opinions of scholars and those in state agencies who hold the duty to implement the public trust doctrine. Scholarly opinions are abundant and diverse in their attempts to describe the current or "correct" interpretation of the public trust.[3] At the same time, it has been our experience that state fishery managers often view the public trust doctrine as a single, simple grant of authority to the state to take any action that is in the best interest of the public. In light of these discrepancies, we begin, like many before us, by attempting to clarify the basic outline of the doctrine. We then analyze how the public trust doctrine relates to fishery management. In short, we will argue that the doctrine could help in the effort to create a sustainable Great Lakes fisheries through the protection of public access to fishing, by guarding against environmental degradation, and by providing a role for citizens in fishery management decision making and improving those processes.

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[2] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892), discussed *infra* text accompanying notes 26–32.

[3] *Compare, e.g.*, James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989) (arguing for a limited public trust doctrine that is in effect an easement held by the public), *and* Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573 (1989) (describing the public trust doctrine in terms of the broad array of remedies that a court could provide under the doctrine).

We begin our examination in Section I, with a brief history of the development of the public trust doctrine, and in Section II we emphasize its key features as a part of modern American law and outline some of the most salient theoretical and legal concerns. Finally, we analyze the doctrines of the eight Great Lakes States in Section III, Canada in Section IV, and Native American Tribes and First Nations in Section V. In the end, we conclude that the doctrine is far from uniform amongst the jurisdictions that manage Great Lakes fisheries and that judicious use of the public trust doctrine is needed in the future due to those inconsistencies and its inherent strengths and weaknesses.

I. HISTORICAL OVERVIEW OF THE PUBLIC TRUST DOCTRINE

Today, the public trust doctrine exists as part of the common law, as it has historically. The common law, like all law, evolves over time. Oliver Wendell Holmes, Jr. opined that "[t]he law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[4] Our circumstances and our beliefs change over time, and judicial expressions of the common law reflect those changes. This evolution is clearly evident in the history of the public trust doctrine.

A. *Justinian Rome to England*

"The source of modern public trust law is found in a concept that received much attention in Roman and English law–the nature of property rights in rivers, the sea, and the seashore."[5] This long, concrete history figures prominently in the opening paragraphs of articles by many commentators on the public trust.[6] However, the

[4] OLIVER WENDELL HOLMES JR., THE COMMON LAW 1 (1881).

[5] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

[6] *See, e.g.*, Nahil P. Antone, *The Public Trust Doctrine and Related Michigan Environmental Legislation*, 66 MICH. B. J. 894, 894 (1987); Mark Dowie, *In Law We Trust: Can Environmental Legislation Still Protect the Commons?*, ORION, July/Aug. 2003, at 18; Susan Morath Horner, *Embryo, Not Fossil: Breathing Life Into the Public Trust in Wildlife*, 35 LAND & WATER L. REV. 23, 31 (2000); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633–34 (1986); Sean T. Morris, Comment, *Taking Stock in the Public Trust Doctrine: Can States Provide for Public Beach Access Without*

exact nature of the rights and responsibilities required under this doctrine historically is not as clear as one might expect.

Most scholars identify the Justinian code of sixth century Rome as the initial occurrence of the public trust doctrine. The doctrine of *res communes*, as it was called, claims that some things are "common to mankind—the air, running water, the sea, and consequently the shores of the sea [and] the right of fishing in a port, or in rivers, is common to all men."[7] These rules appear in the Justinian Institutes which are thought to be legal textbooks.[8] Thus, there is some doubt as to their effect on Roman life, even though the Institutes drew upon formal laws found in the *constitutiones* and writings of Roman jurists compiled respectively in the Justinian Codex and Digests.[9] Whether formal law or moral imperative, the concept that certain resources are common to all is prevalent today in such diverse areas as the open sea, wildlife, parks, historic monuments, and the electromagnetic spectrum.

That legal or moral concept of common ownership later emerged as more of a reservation of "a series of particular rights to the public" to engage in certain activities, thus limiting "the prerogatives of private ownership."[10] In England, this concept appears in the common law, particularly through the writings of

Running Afoul of Regulatory Takings Jurisprudence?, 52 CATH. U. L. REV. 1015, 1018–19 (2003); Eric Pearson, *The Public Trust Doctrine in Federal Law*, 24 J. LAND RESOURCES & ENVTL. L. 173, 173 (2004); Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393, 397–98 (1991); Erin Ryan, Comment, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resources Management*, 31 ENVTL. L. 477, 477–78 (2001); Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 185 (1980); Melissa Kwarterski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 ECOLOGY L.Q. 135, 135 (2000); Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 195 (1980).

[7] *The Institutes*, *535 CE*, *in* INTERNET MEDIEVAL SOURCEBOOK §§ II.I.1–II.I.2 (Paul Halsall ed., 1998), http://www.fordham.edu/halsall/basis/535institutes.html [hereinafter *The Institutes*].

[8] *The Institutes*, *supra* note 7.

[9] Lazarus, *supra* note 6, at 634 (claiming that *res communes* reflected "less the true nature of public rights during the Roman Empire than Justinian's own idealization of a legal regime"); *see The Institutes*, *supra* note 7.

[10] Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE. L.J. 762, 769 (1970) [hereinafter *Submerged Doctrine*]; Lazarus, *supra* note 6, at 634.

Bracton and Flecta, England's Magna Carta, and commentary by Blackstone.[11] These sources are cited as precedent for the notions of common rights to navigation and fishing, but again questions arise over whether these statements accurately reflect the practices of the time given the prevalence of private fisheries.[12] In an attempt to acquire land and money for the crown, Queen Elizabeth I's lawyer, Thomas Digges, formulated a legal theory that created a presumption of crown ownership of the shore.[13] Non-crown ownership could be proven only by a categorical grant from the crown.[14] Roundly rejected at first, Digges' theory gained acceptance as the result of a generous reading of precedent in a treatise by the jurist Lord Matthew Hale.[15] To summarize, at this point in our chronology of the doctrine's development, the Roman concept of common ownership was ethereal if not absent and instead there existed common rights or easements to navigate and fish, and a presumption that the sovereign owned the submerged lands and the shores in trust for the people.[16]

B. *A Public Trust in the U.S.*

The principle of sovereign ownership of submerged lands and shores and the first public trust language in the U.S. both appeared in Equal Footing Doctrine cases. In *Shively v. Bowlby*, the U.S. Supreme Court states:

> At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States . . . . The new States admitted into the Union since the adoption of the Constitution

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[11] *Submerged Doctrine*, *supra* note 10, at 763–67.

[12] *Id*. at 767–68; *see* Lazarus, *supra* note 6, at 635 n.16.

[13] BONNIE J. MCCAY, OYSTER WARS AND THE PUBLIC TRUST: PROPERTY, LAW, AND ECOLOGY IN NEW JERSEY HISTORY 70 (1998); Lazarus, *supra* note 6, at 635.

[14] MCCAY, *supra* note 13, at 70.

[15] Lazarus, *supra* note 6, at 635; *see* MCCAY, *supra* note 13, at 71; James R. Rasband, *The Public Trust Doctrine: A Tragedy of the Common Law*, 77 TEX. L. REV. 1335, 1343 (1999) (reviewing MCCAY, *supra* note 13).

[16] *Submerged Doctrine*, *supra* note 10, at 771–72.

> have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions.[17]

In this quote we see references to both the equal footing and public trust doctrines. However, this initial connection did not last, and instead two distinct doctrines emerged.[18]

A discrete public trust doctrine stemmed from the case of *Arnold v. Mundy*.[19] In *Arnold*, the New Jersey Supreme Court in 1821 noted the infringement on the Romanesque common property rights that occurred in England and were somewhat restored through the Magna Carta.[20] Furthermore, the court found that no grant of such common properties by the King or subsequent authorities was possible preceding creation of the United States, and upon statehood, ownership of the water and underlying lands of navigable waterways passed to the citizens of New Jersey.[21] Also the court found that the New Jersey public had the right to use these waters for their own benefit, and that the State could reasonably regulate the public's use through the legislature and make improvements to the resource.[22] However, as common property, the State could not sell off navigable waterways or the underlying lands.[23] Thus, the doctrine swung back toward the original Roman conception of common ownership with broad rights of public access.

Important in its own right as probably the first outline of the public trust doctrine in a U.S. court, *Arnold* also significantly influenced the U.S. Supreme Court in its first case dealing with the public trust, *Martin v. Waddell*, which also involved ownership of

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[17] Shively v. Bowlby, 152 U.S. 1, 57 (1894).

[18] *See generally* James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 3–4 (1997) (arguing that the public trust doctrine should be limited in geographic scope and that its legal requirements are similar to those found under the equal footing doctrine).

[19] 6 N.J.L. 1 (1821).

[20] *Id*. at 77.

[21] *Id*. at 77–78.

[22] *Id*.

[23] The "sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right." *Id*. at 78.

oyster beds in New Jersey.[24] In *Martin*, the Supreme Court held that the states owned navigable and tidal waters and their underlying land for the common use of the people of the state.[25] In agreement with the *Arnold* decision, the Court in *Martin* held that the public enjoyed a common right to fish on state owned waters.[26] These two cases paved the way for the vanguard of the public trust doctrine, *Illinois Central Railway Co. v. State of Illinois* (*Illinois Central*).[27]

Illinois Central involved a 1869 grant of nearly the entire waterfront of Lake Michigan around Chicago from the State to the railroad company.[28] In 1873, the Illinois legislature rescinded the conveyance, and in 1892 the Court seemingly both invalidated the original grant and allowed for legislative rescission of any legitimate portion of the grant.[29] The Court so found because states hold the lands underlying navigable waters in trust for the public, and a state cannot relinquish that trust.[30] Furthermore, the Court declared that the public has the right to navigate, fish and engage in commerce over these waters.[31] Support for such a finding appears limited based on Roman law and the *Arnold v. Mundy* holding, but the Court's decision was easily supported under commentaries on English law. On the other hand the Court extended the doctrine compared to England to include the Great Lakes, even though the doctrine historically applied to tidally influenced waters.[32] The Court reasoned that this was necessary

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[24] Martin v. Waddell, 41 U.S. 367, 417 (1842).

[25] *Id*. at 416.

[26] *Id.* at 414; *see Arnold*, 6 N.J.L. at 76–77.

[27] Sax, *supra* note 4, at 489. *See also* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

[28] *Ill. Cent. R.R. Co.*, 146 U.S. at 448.

[29] The Supreme Court held that:

> [A]ny 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. There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.

Id. at 460.

[30] *Id.* at 453.

[31] *Id*. at 452.

[32] *Id*. at 437. Specifically, the Court stated that:

because of the prevalence of large inland navigable waterways necessary for commerce in the U.S. that did not exist in England.[33]

Beyond these general statements of the public trust doctrine, *Illinois Central* is cited for the two additional adaptations set out in the following quote:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States belong to the respective States within which they are found, with consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control the regulation of commerce with foreign nations and among the States.[34]

These two supplementary components are a limit on the state authority to alienate trust resources, and the federal government's overriding control of these resources.

As to the first component, although the Court holds that a state cannot abrogate the public's access rights or completely abdicate the state's trust authority, a state may make limited grants of trust resources. This is contrary to the Roman ideal and the original public trust decision in *Arnold* that prohibited any sale.[35] *Illinois Central* limits the state's ability to make such grants of submerged lands by only allowing it to the extent that the sale constitutes an improvement to the trust resource or where such actions do not greatly diminish the public's rights overall.[36] Under this rule, the Court held that Illinois abdicated its trust responsibilities by granting the entire waterfront of Chicago.[37] Such a grant certainly did not improve the remaining public trust and would have substantially impaired the public's rights and

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> [T]he same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters in the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.

Id.

[33] *Id*. at 436.

[34] *Id*. at 435.

[35] Arnold v. Mundy, 6 N.J.L. 1, 13 (1821).

[36] *Ill. Cent. R.R. Co.*, 146 U.S. at 453.

[37] *Id.* at 455.

limited the state's authority.

Second, *Illinois Central* discusses the supreme power of the U.S. federal government to regulate navigable waters. Under this power, known as the federal navigational servitude, the U.S. federal government has the authority to regulate navigation in navigable waters.[38] There are two reasons why this servitude is important for our discussion. First, the servitude is superior to state law so that even if the state was justified in abrogating the public's interest in trust resources, the federal navigation servitude remains, providing protection for only the rights of navigation.[39] Second, the servitude may represent a federal public trust doctrine. Although, the Court in *Illinois Central* claims that the servitude arises out of Commerce Clause powers, legal scholar Benjamin Longstreth, argues that the servitude "is part of the same public right to tidelands that is called the public trust doctrine" and could provide similar opportunities for conservation of natural resources.[40] However, such a discussion is beyond the scope of this article. We proceed with our analysis, focusing next on the current public trust doctrine and its possible implications for fishery management.

II. THE CURRENT PUBLIC TRUST DOCTRINE AND FISHERIES MANAGEMENT

To reiterate, following *Illinois Central*, the public trust doctrine applies to navigable waterways, which are owned and alienable by the state. There are, however, limitations on the state's ability to alienate such waterways, as they are held in trust for the use of the public to navigate, fish, and conduct commerce.[41]

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[38] *See* United States v. Rands, 389 U.S. 121, 122–23 (1967).

[39] *See* United States v. Cherokee Nation, 480 U.S. 700, 707 (1987).

[40] *See* Benjamin Longstreth, *Protecting "The Wastes of the Foreshore": The Federal Navigational Servitude and its Origins in State Public Trust Doctrine*, 102 COLUM. L. REV. 471, 486 (2002).

[41] Given that the public trust doctrine is a matter of state law, the federal decisions should only apply to the individual state where the case arose. *Illinois Central* raises some interesting questions because the language of the case is couched in terms of nationwide applicability. However, the Supreme Court later made plain that *Illinois Central* is only binding in Illinois. Appleby v. City of New York, 271 U.S. 364, 395 (1926) (upholding a fee simple grant of submerged lands, the Court declared that the grant intended to annul public use rights, and was subject only to the federal navigation servitude, thus seemingly allowing sales of trust resources that "substantially impair" or even abdicate

In the following section, we analyze federal and state cases and the comments of scholars to identify how the public trust doctrine might be used as a legal tool to create sustainable Great Lakes fisheries. Specifically, we are interested in four aspects of the doctrine. First, we are interested in which waterways the doctrine applies to and the delineation between public waters or lands, and privately owned riparian lands. Second, we look at the nature of the public's rights to access and use public trust waters. Third, there is a growing need to protect the ecological integrity of trust resources, and thus we analyze the ability of the doctrine to provide such protection. Finally, we examine the doctrine's possible role in improving management of trust resources, including the fisheries.

A. *The Scope of the Trust Corpus*

What waterways fall under the public trust doctrine? The geographical scope of the public trust doctrine has changed considerably since its arrival in North America from England. For example, *Illinois Central* extended the doctrine to include the Great Lakes. The doctrine has also been expanded to apply to non-navigable, submerged lands which are influenced by tides. [42] The doctrine applied to navigable waters in England which, due to England's geography, consisted primarily of those waters influenced by the tides. However, in the U.S. there existed grand rivers and great lakes which were navigable yet not influenced by the tides. From early on, even before white colonists arrived, many of these rivers and lakes were used extensively for navigation and fishing, exactly the uses the doctrine was meant to protect. Thus, it seems only rational that the doctrine was so applied. In another example, the commercial importance of logging led to a determination of navigability based on the ability to float logs down a river.[43]

Beyond distinguishing trust protected waterways from other waterbodies, public trust litigation often concerns setting a demarcation between where a lake or river ends and where private

common use rights in New York).

[42] *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988). Whether such application of the doctrine was truly an expansion, or rather an application of existing law, was hotly debated in the case. *See id*. at 488–90 (O'Conner, J., dissenting).

[43] *See* Bott v. Comm'n of Natural Res., 327 N.W.2d 838, 844 (Mich. 1982).

land begins.[44] There are two common approaches to delineating the demarcation point. In the first method, a person who has property abutting a waterway (also known as a riparian land owner) will own all land to the water's edge as it exists at any particular moment in time. In the second method, the riparian owner's boundary could extend to some certain, non-fluctuating point. For example, one's land could end at the ordinary high water mark, the ordinary low water mark, at the edge of the wet sand line (signifying the edge of wave affected lands), at a survey line, or at the center or thread of a stream. From a biological and/or geographical perspective, these boundary lines could be defined in different ways.[45]

Both of these issues, which waterbodies are protected and where they end, cause problems for natural resource managers. Fishery managers are often interested in managing ecosystems and watersheds, including all rivers and lakes, regardless of size or navigational capacity, because of their biological and hydrological connections.[46] Thus, to the extent that the public trust doctrine may effectively improve fisheries and their management, it is beneficial to have the doctrine apply as widely as possible. For example, to adequately protect the Great Lakes fisheries, managers need some level of control over the lakes and all the tributary rivers, even the smallest, most unnavigable. Fisheries are also dependent on the chemical and biological composition of the waters they inhabit,[47] and the chemistry of these waters is greatly

[44] *See generally*, JEAN K. CAMPBELL, WHERE'S THE BEACH?: DRAWING A LINE IN THE SAND TO DETERMINE SHORELINE PROPERTY BOUNDARIES IN THE UNITED STATES AND THE RESULTING CONFLICT BETWEEN PUBLIC AND PRIVATE INTERESTS (Envtl. Law Program Univ. of Haw. at Mānoa, He Mau Mo'olelo Kanawai o ka 'Aina [Stories of the Law of the Land] Haw. Envtl. Program Paper Series, Summer 2000), *available at* http://www.hawaii.edu/elp/publications/moolelo/ELP-PS-Summer2000.pdf (describing disputes concerning shorelines under various state and federal doctrines).

[45] For example, the thread, or center, of the stream may be a point equidistant between the two shores or where the channel is deepest, and an ordinary water mark whether high or low may be based on any number of geological or biological characteristics.

[46] Malcolm MacGarvin, *Fisheries: Taking Stock*, *in* EUROPEAN ENV'T AGENCY, ENVIRONMENTAL ISSUE REPORT NO. 22, LATE LESSONS FROM EARLY WARNINGS: THE PRECAUTIONARY PRINCIPLE 1896–2000, at 17, 25 (2001), *available at* http://reports.eea.eu.int/environmental_issue_report_2001_22/en/Issue_Report_No_22.pdf.

[47] *See* Stephen R. Carpenter et al., *Cascading Trophic Interactions and Lake Productivity*, 35 BIOSCIENCE 634, 638 (1985).

affected by the surrounding landscape.[48] For example, riparian forests can substantially impact the chemistry of water bodies by acting as a buffer zone that retains nutrients.[49] Given these interdependencies, the legal divisions between navigable and non-navigable and the boundary between land and water are grossly inadequate means of delineating waterbodies under an ecosystem view.

This raises the issue of whether natural resources other than navigable waters are covered under this doctrine.[50] Fishery managers often see the fish themselves as protected by a public trust; a seemingly reasonable conclusion given the public's right to fish under the doctrine.[51] Historically, many courts felt that wildlife and fish were actually subject to an independent public trust type of protection, not simply as an ancillary of the trust over navigable waters. For example, in *Geer v. Connecticut*, the Supreme Court held that wildlife was subject to a public trust.[52]

> Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, *as a trust for the benefit of the people*, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals

[48] *See* MONICA G. TURNER ET AL., LANDSCAPE ECOLOGY IN THEORY AND PRACTICE: PATTERN AND PROCESS 262 (2001).

[49] *See* William T. Peterjohn & David L. Correll, *Nutrient Dynamics in an Agricultural Watershed: Observations on the Role of a Riparian Forest*, 65 ECOLOGY 1466 (1984). Discussing the importance of riparian forests, the authors state that "[n]utrient loss from diffuse sources (such as cornfields) can have significant ecological effects which are generally understood as a threat to most bodies of water. Therefore, the estimated removal in surface runoff of [the amounts of various nutrients measured in this study] per hectare of riparian forest is potentially an extremely important ecological function." *Id*. at 1474.

[50] A state could create public trust protections over almost any state controlled resource through statutes or constitutional amendments. For example, Pennsylvania has passed a constitutional amendment creating a public trust in all of Pennsylvania's natural resources. PA. CONST. art. I, § 27.

[51] One court agreed with this sentiment and stated that "[w]ild animals, including fish, within the jurisdiction of a State, as far as they are capable of ownership, are included in the public trust." N.J. Dep't of Envtl. Prot. v. Jersey Cent. Power & Light Co., 308 A.2d 671, 673 (N.J. Super. Ct. Law Div. 1973).

[52] Geer v. Connecticut, 161 U.S. 519, 529 (1896) (upholding Connecticut game laws and the conviction of the defendant for possession of game birds with intent to remove the birds from the state).

as distinguished from the public good.[53]

The Court came to the conclusion that the wildlife is held in a public trust by the state following nearly identical reasoning to that behind the public trust doctrine that applies to navigable waterways. Namely, the Court found that there exists a history of common ownership of wildlife under the law that arose in Rome and passed through Europe and England to the U.S.[54]

In 1979, the U.S. Supreme Court overturned the *Geer* ownership of wildlife theory.[55] Overruling the idea of state owned fish and wildlife caused considerable concern over states' ability to implement conservation measures.[56] However, the Court said that "[t]he overruling of *Geer* does not leave the States powerless to protect and conserve wild animal life within their borders."[57] Still, the Court's opinion does not specify the extent or source of this power, and even though the Court overruled *Geer*, the perception of Great Lakes fisheries as subject to trust protections persists. We see this explicitly in the Joint Strategic Management Plan for Management of Great Lakes Fisheries, a non-binding agreement amongst fishery management agencies to create consistent sustainable fisheries management policies.[58]

In the end, the common law doctrine has a limited scope in light of the concerns of fishery managers. This is due to a lack of an ecosystem management perspective in the specification and

[53] *Id*. at 529 (emphasis added). Although this case involved birds, it likely applied to fish and aquatic organisms given language in the opinion and subsequent cases. *See id.* at 523, 526, 533. Oddly, given the trust language found in the case, *Geer* and the resulting line of cases are usually analyzed in terms of commerce clause issues. *See, e.g.*, Michael D. Axline, Note, *Constitutional Law—The End of a Wildlife Era:* Hughes v. Oklahoma, 60 OR. L. REV. 413, 413 (1981) ("For nearly a century, *Geer v. Connecticut* shielded state programs regulating wildlife from scrutiny under the commerce clause of the United States Constitution."); Note, Hughes v. Oklahoma *and* Baldwin v. Fish and Game Commission: *The Commerce Clause and State Control of Natural Resources*, 66 VA. L. REV. 1145 (1980). *But see* Horner, *supra* note 5, at 40–41.

[54] *Geer*, 161 U.S. at 522–28.

[55] Hughes v. Oklahoma, 441 U.S. 322, 329–36 (1979).

[56] For example, it was questioned whether states could charge higher fees for out of state hunters and anglers. *See* Note, *supra* note 53, at 1154–55. *But see* Horner, *supra* note 5, at 41, (arguing that *Hughes* did not overrule the public trust duties of the state to wildlife).

[57] *Hughes*, 441 U.S. at 338.

[58] GREAT LAKES FISHERY COMM'N, A JOINT STRATEGIC PLAN FOR MANAGEMENT OF GREAT LAKES FISHERIES (1997), *available at* http://www.glfc.org/fishmgmt/jsp97.htm.

delineation of protected waterbodies, and the inapplicability of the doctrine to the fish found in navigable waterways. We now turn to our overview of the common law public trust doctrine and take a look at the public's right to use navigable waterways.

B. *Public Access Rights*

As mentioned, in ancient Rome there existed apparently broad access to common resources, and in English and early U.S. cases this was limited to the right of the public to navigate, fish and conduct commerce on navigable waters. Reading *Arnold v. Mundy*,[59] discussed above, one easily reaches the conclusion that the doctrine protects primarily the right of the public to fish. However, in many U.S. cases, the rights to navigate and carry on commerce over navigable waters are probably considered to be at least as fundamental.[60]

In recent years, recreational use of navigable waters has increased dramatically. A right to navigate easily encompasses recreational boating, but not other types of recreation, for example, swimming, bathing, hunting, and skating. In states where the public has a broad right to conduct commerce on navigable waterways, one might argue that non-boating recreation is protected given the commercial nature of recreation today. A few states have explicitly incorporated recreational usage into their public trust doctrine, including California,[61] Wisconsin,[62] and Montana.[63] Thus, to varying degrees in the different states, the public trust doctrine protects public access to navigable waterways

[59] *See* Arnold v. Mundy, 6 N.J.L. 1, 19 (1821).

[60] For example, in *Illinois Central*, the Court lists navigation, commerce and fishing without mention of a ranking of those three uses and proceeds to discuss the importance of navigation. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892). Interestingly, the Court quotes another case that mentions that navigation and commerce trump the right of fishing, although the *Illinois Central* court does not quote the case for the purpose of proving that particular point. *Id.* at 457 (quoting Stockton v. Baltimore and N.Y.R.R. Co., 32 F. 9, 19–20 (C.C.D.N.J. 1887)).

[61] Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971); Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 712 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983).

[62] Wisconsin's Envtl. Decade, Inc. v. Dep't of Natural Res., 271 N.W.2d 69, 72 (Wis. 1978).

[63] Mont. Coal. for Stream Access, Inc. v. Hildreth, 684 P.2d 1088, 1093 (Mont. 1984); Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 171 (Mont. 1984).

for the purposes of navigation, fishing, commerce, and recreation.

Public access to navigable waterways presents a dilemma for fishery managers. It is generally thought that increasing opportunities for outdoor experiences for members of the public will lead to a better understanding of and increased support for resource management protection.[64] Resource managers can expand such opportunities using the public trust doctrine as a tool for providing access to public waterways obstructed by private individuals.[65] On the other hand too much public access may lead to the overuse of a resource, which presents a problem for managers who are charged with protecting those resources. In this way, increased public access creates a double-edged sword by possibly promoting amongst more people a conservation ethic in natural resources or by leading to resource degradation through overuse. We can see this tension within disputes over the public trust doctrine. For example, aquatic reserves are sometimes promoted as solutions to overuse, namely overfishing. However, opponents of aquatic reserves have argued that the public access requirements of the public trust doctrine prohibits the creation of such reserves.[66] Thus, not only has the doctrine at a minimum not prohibited actions leading to an environmental problem by

[64] For example, one can look at some of the lesson plans created by the Wisconsin Department of Natural Resources for teachers that place substantial emphasis on outdoor activities, like conducting fish surveys and trips to wetlands. *See* Wis. Dep't of Natural Res., EEK! Teacher Pages: Teaching Activities, http://dnr.wi.gov/org/caer/ce/eek/teacher/activity.htm (last visited Nov. 16, 2005). Research has also shown that "respondents repeatedly attribute their environmental interests or action to a similar set of sources [including] extended time spent outdoors in natural area." Louise Chawla, *Life Paths into Effective Environmental Action*, 31 J. ENVTL. EDUC. 15, 15 (1999). In another study, it was shown that residential programs, which included at least an overnight stay in a natural environment, "are still more effective in fostering positive attitude changes toward wildlife than a single in-class program." Detra Dettmann-Easler & James L. Pease, *Evaluating the Effectiveness of Residential Environmental Education Programs in Fostering Positive Attitudes Toward Wildlife*, 31 J. ENVTL. EDUC. 33, 38 (1999). And finally, scientists found the adolescent youths that "played in wild environments had more positive perceptions of natural environments." Robert D. Bixler et al., *Environmental Socialization: Quantitative Tests of the Childhood Play Hypothesis*, 34 ENV'T & BEHAV. 795, 795 (2002).

[65] *See, e.g.*, Du Pont v. Miller, 141 N.E. 423, 427 (Ill. 1923) (appellant private land owner enjoined from building a bulkhead across an unused public waterway).

[66] Donna R. Christie, *Marine Reserves, the Public Trust Doctrine and Intergenerational Equity*, 19 J. LAND USE & ENVTL. L. 427, 431–32 (2004).

granting such broad use, it was actually used as a legal argument against proposed restorative actions. Increasing the rights of the public to access navigable waterways could both help and hinder efforts to conserve the natural resources covered by the public trust doctrine. In the end, though, the public trust doctrine should protect against overuse by allowing for reasonable restrictions on public use in order to protect the resource and its capacity to entertain future use.[67]

Expansion of access rights may precipitate at least one other possible dilemma. In a book on the public trust doctrine and its application to New Jersey oystering, anthropologist Bonnie McCay states:

> The idea that those dependent on common resources have particular use rights has also weakened. The common right of fishing was once imbued with the notion that fishing, like navigation, was an economic pursuit and thus worthy of protection even with the rise of industrial capitalism. With the rise of recreational and environmental interests, this has changed. In the 1980s politically active sports fishers and their lobbyists began to argue that since all fish within U.S. waters are a public resource, no one should have the privilege of profiting from fish. It became a rallying cry for groups trying to outlaw commercial fishing through state legislatures and public referendums. The ability of someone to fish for a living is now seen at law as a privilege rather than a right. In other arenas of conflict over rights to scarce marine resources, it is increasingly seen as an unacceptable privilege.[68]

We have witnessed such changes in public attitudes in the Great Lakes, and have seen the resulting animosity between sport and commercial fishers, noticeably pitting U.S. sport-fishers against indigenous commercial fishers.[69] It is problematic that under the public trust doctrine, given the lack of a hierarchical ordering of protected public uses, a court could potentially limit the right to fish under the public trust doctrine if that court found that the other uses outweighed the interest in fishing. The California Supreme Court, among others, offers such a resolution, stating that "[w]e agree . . . that *Colberg* demonstrates the power of the state, as

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[67] *See, e.g.*, Arnold v. Mundy, 6 N.J.L. 1, 77–78 (1821).

[68] MCCAY, *supra* note 13, at 188.

[69] *See, e.g.*, ROBERT DOHERTY, DISPUTED WATERS: NATIVE AMERICANS & THE GREAT LAKES FISHERY 69–85 (1990).

administrator of the public trust, to prefer one trust use over another."[70] An increasing shift of the public trust doctrine towards a privilege view could lead to further animosity, the loss of commercial fishing as a way of life, and perhaps the end of fishing altogether if other public uses, such as boating, swimming and sunbathing, were deemed more important. Nonetheless, it should at least be argued that the historical precedence of navigation, fishing, and commerce as the primary protected public uses of navigable waterways under the public trust doctrine ought to prevent such an occurrence.

A primary aspect of the public trust doctrine involves the protection of the public's rights from actions by the state that relinquish those rights. *Illinois Central* involved the sale of submerged lands that would have had this effect. As discussed, in *Illinois Central* the Court held that the state cannot abdicate its trust responsibilities by granting away navigable waters or the underlying lands to private control, unless such action improves navigation or does not substantially impair the remaining trust.[71] However, the Court did not lay out a test for determining whether a state action meets one of those exceptions.

Some states have added to the *Illinois Central* holding by requiring explicit language in legislation expressing the intent to annul its trust responsibilities.[72] Although this does not set a standard for determining legitimate alienation of trust resources under the law, it at least holds elected officials accountable for actions perceived as illegitimate by the citizens. Other state courts have required a so-called "hard look" at the evidence when making a decision involving trust resources. In Wisconsin, for example, this means that the legislature must "weigh all the relevant policy factors" in making decisions that may abrogate trust responsibilities.[73] Again this rule does not explicate what constitutes an action offensive to the *Illinois Central* holding, but it

[70] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 722–23 n.21 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983); s*ee also* City of Madison v. State, 83 N.W.2d 674, 678 (Wis. 1957).

[71] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

[72] *See, e.g.*, Obrecht v. Nat'l Gypsum Co., 105 N.W.2d 143, 149 (Mich. 1960) (restating the *Illinois Central* holding, the Michigan Supreme Court adds the requirement that in cases where submerged lands have been alienated or taken away from public use that the state make such determinations "in due recorded form").

[73] State v. Bleck, 338 N.W.2d 492, 498 (Wis. 1983).

does provide some level of accountability.

Requirements of explicit intent or hard-look decision processes are procedural protections. However, the public trust doctrine includes substantive components, namely, the aforementioned public access rights and the *Illinois Central* protection against alienation by the state of large areas of the trust corpus. Public use of navigable waters, including the Great Lakes fisheries, also faces many environmental threats, from pollution to invasive species to shoreline development. We turn next to the question of whether substantive environmental protection guarantees exist under the public trust doctrine.

C. *Environmental Protection*

Fisheries around the world face considerable threats to their sustainability. Historically, overharvest, or removal of fish in excess of the number needed to restore the population, was a major early threat to Great Lakes fisheries.[74] Additional threats currently facing Great Lakes fisheries include invasive species, loss of native species, habitat destruction or degradation, water withdrawals, and pollution. Given these strains, much of fishery management today involves maintenance of a healthful environment for a fishery, in addition to the traditional regulation of harvest. Perhaps due to recognition of legislative pandering to corporate interests, natural resource managers and others who are concerned with those resources are searching for legal authority and rules that can be used to protect them.[75] Many believe the public trust doctrine may provide such authority and mandate beneficial actions by the state.[76]

In 1971, a California court enunciated what is still likely the

[74] *See* MARGARET BEATTIE BOGUE, FISHING THE GREAT LAKES: AN ENVIRONMENTAL HISTORY, 1783–1933, at 44-58 (2000).

[75] *See, e.g.*, Robert F. Kennedy, Jr., *Dick Cheney's Energy Crisis: The Secret Process that Plundered a Nation*, SIERRA, Sept./Oct. 2004, at 44. Perhaps it is not corporate favoritism, but some other reason or host of reasons that have led to the woeful state of our environment. Regardless, we have found through formal and informal interviews with many involved in fishery management in the U.S., that fishery managers often have generally negative attitudes about the competence and ability of the legislative and executive branches on the state and federal levels to deal effectively with environmental problems that they currently face.

[76] *See, e.g.*, Sax, *supra* note 4, at 474; Blumm, *supra* note 2, at 578; Rieser, *supra* note 5, at 411.

broadest statement of conservation principles under the public trust doctrine. In *Marks v. Whitney*, the court listed ecological protection as a protected public use, because of the services provided by a functioning ecosystem.[77] The court noted that:

> There 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, 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.[78]

These remarks are broad, and beg the question, which environmentally harmful actions in particular may be precluded under the public trust doctrine? In *Marks*, the court enjoined an owner of tidelands covered by the public trust who wanted to fill and develop those lands. Clearly, this filling would have eliminated some aquatic habitat. Such actions alone or in the aggregate have and will continue to cause harmful impacts on fisheries and the aquatic ecosystem.

Many current threats of habitat destruction come from development above the shoreline that leads to erosion and pollution of the aquatic ecosystem. However, as we mentioned, the scope of the public trust doctrine is generally limited to navigable waters up to their shoreline, limiting its application to habitat degradation. The geographic scope was extended beyond navigable waters in another California case. In *National Audubon Society v. Superior Court* (hereinafter *Mono Lake*), the California Supreme Court curtailed water withdrawals that abated water flows to Mono Lake and caused an extreme drop in the lake's water level.[79] From an ecosystems management perspective, the doctrine should likewise extend to some extent to the riparian or littoral areas because of their tremendous biological and physical

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[77] Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (extending the common law public trust doctrine to include the preservation of tideland in its natural state because of the ecological importance of such lands).

[78] *Id*.

[79] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 721 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983) (holding that "the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of nonnavigable tributaries").

impacts.[80] However, such an acknowledgment would likely meet opposition. For example, in *Mono Lake* the majority judges were recalled, leading to a chilling effect on California courts' use of the public trust doctrine.[81]

The *Mono Lake* case dealt with the water withdrawals by the City of Los Angeles that caused a considerable drop in water level of the lake and harmed the ecological integrity of the lake.[82] Likewise, water withdrawals and an attendant drop in water levels could greatly impact fisheries, navigation, and commerce on the Great Lakes. Given the growth of populations in water poor parts of the country the possibility of large scale withdrawal is of growing concern. Recognition of this aspect of the doctrine may be very important in the near future.

Pollution poses problems for fisheries, both because of its destructive effects on the ecosystem and its contamination of fish. A right to fish is seemingly worthless without the ability to eat that fish, and the public trust should prevent contamination even in the absence of any further acknowledgement of environmental protection provisions under the doctrine. Nonetheless, it seems that such measures under the auspices of the public trust doctrine rest on future decisions like *Mono Lake* in other jurisdictions.

Once we acknowledge a duty to protect the environment, we are still left to determine whether an action damaged the environment. One answer appears in *Payne v. Kassab*,[83] a case involving a constitutionally based public trust. The Pennsylvanian court created a three-part test that asks whether there was compliance with all applicable environmental law, whether attempts were made to minimize ecological impacts, and whether the harm outweighed the benefits.[84] This test potentially presents a problem for fisheries protection if no guidance is given to courts as

[80] *See, e.g.*, Peterjohn & Correll, *supra* note 49, at 1473 (demonstrating the importance of riparian areas for protecting waterways from excess nutrient loading).

[81] Dowie, *supra* note 6, at 23.

[82] *Nat'l Audubon Soc'y*, 658 P.2d at 711.

[83] Payne v. Kassab, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973).

[84] *Id*. This test involves the interpretation of public trust delineated in the State's Constitution and specifically acknowledges the importance of protecting the environment. *Id.* It is still subject to debate whether conservationists should expend effort toward incorporating conservation requirements into the common law doctrine or if time would be better spent trying to create statutory or constitutional trusts.

to how to account for benefits and harms. We would argue that the benefits balanced should only include those that are connected to trust protected uses of these resources. Furthermore, harm should be determined by giving consideration to cumulative impacts. In addition, some threshold may be needed to enjoin actions in situations where even though the actors are in compliance with all environmental laws, the activity still leads to serious degradation.

Even though it has been proven effective in some situations, the public trust doctrine should not be considered the final solution to all environmental problems. For example, additional problems will arise simply by virtue of trying to deal with scientific issues in courtrooms. One could argue that under *Mono Lake* the state must maintain a trust protected lake at a certain or at least minimum water level. A duty to maintain consistent water levels may create environmental problems where natural water level fluctuations play important biological roles. *Mono Lake*-type cases should be explicitly argued as requiring ecologically appropriate water levels, including natural fluctuations.[85]

And, as with any environmental law, we run the risk of perpetuating a culture of compliance instead of a culture of shared ownership.[86] Natural resource management scholar, Todd A. Bryan, explains:

> While the stated goal of the [environmental] movement is environmental protection and preservation, most movement members would agree that the preferred path to that goal is through shared ownership and responsibility among all citizens for our environmental and natural resource heritage and the problems we have created. What I mean by shared ownership in this context is the collective recognition that this natural heritage contains value, that a larger problem or crisis exists, and the acceptance of at least part of the responsibility not only for creating the problem but also for correcting it.[87]

By relying so heavily on additional regulation under the public

[85] However, this solution still leaves us with the problem of courts making decisions based on ecological science imbued with a great deal of uncertainty. *See, e.g.*, Melanie E. Kleiss, Note, *NEPA and Scientific Uncertainty: Using the Precautionary Principle to Bridge the Gap*, 87 MINN. L. REV. 1215, 1215–17 (2003).

[86] *See* Todd A. Bryan, *Tragedy Averted: The Promise of Collaboration*, 17 SOC'Y & NAT. RESOURCES 881, 883–84 (2004).

[87] *Id.* at 882.

trust doctrine or any other law, we hazard supporting blind conformity to the rules, instead of concern and desire to solve our environmental problems.[88] Professor Richard Delgado makes a similar critique of the public trust doctrine claiming that it has forestalled the development and adoption of more progressive environmental philosophies such as Aldo Leopold's "land ethic," Native American conceptualizations, and eco-feminism.[89]

In addition, a broadened conception of public use to include protection of ecological services provided by trust resources could conceivably conflict with traditional public uses. In *Marks*, the court stated that the state is not bound to protect traditional trust uses given the changing needs of the public.[90] This raises precisely the concern voiced by author Bonnie McCay, that fishing or even ecological protection becomes not so much a right as a competing use for public trust resources.[91]

Finally, a concern arises over Takings Clause issues under the public trust doctrine. Proponents of an environmental protection component to the doctrine find that its strength arises from the protection it provides to a state from takings claims.[92] Two rationales exist for this protection from the takings claims. One, compensation is not required because the public outrightly owns the submerged lands, shores, and waters. Or two, those lands are imbued with an easement, or something similar, gained before the acquisition of any private interest by riparian landowners and therefore takes precedence. In this connection we note that some commentators ardently oppose the current doctrine and any extension of it, due to their belief that private property rights are sacrosanct and the Takings Clause preeminent.[93]

Balancing public trust rights against other interests, like socio-cultural norms, religious beliefs and economic development,

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[88] *Id.* at 883.

[89] Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209, 1218–23 (1991)

[90] Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

[91] *See* MCCAY, *supra* note 68 and accompanying text.

[92] *See* Blumm, *supra* note 2, at 584–87.

[93] *See, e.g.*, James Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171, 210 (1987); Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings"*, 46 S.C. L. REV. 613, 640 (1995).

occurs frequently in the management of trust resources. This is a complicated matter, and is the subject of an intense decision making process by state legislatures and agencies that manage navigable waterways. The public has an interest in the fairness of these proceedings and in participating in them. We turn to the role of the public trust doctrine in providing equity and access to this process.

D. *Improved Decision Making Processes*

With or without recognition of a duty to protect the ecological integrity of aquatic ecosystems under the public trust doctrine, governance of the human activities that impact our navigable waterways invariably requires numerous and complex decision making processes. The doctrine may bear on three aspects of decision making, namely, process enhancement, public participation, and public recourse in cases of process failure.

Multiple methods exist for improving natural resource governance processes. An article in the esteemed scientific journal *Science* lists requirements for managing large resources, like the Great Lakes, including: provision of accurate and reliable information to decision makers and stakeholders, methods of dealing with conflict, means of inducing compliance with rules, adequate physical and technical infrastructure, and institutions that expect surprise and adapt to changed circumstances.[94] A deeper discussion of these concepts is beyond the compass of this article, but we feel an enhanced understanding of the issues such a discussion raises among those in the field of environmental law would be beneficial.[95] We previously mentioned process enhancement techniques provided by the public trust doctrine, including requirements of explicit language and "hard look" analysis by state legislatures and agencies when abdicating their trust responsibilities.[96] Similarly, legal scholar Susan Horner argues for inclusion of certain criteria for statutory public trust doctrines, which basically amounts to unbiased, transparent

[94] Thomas Dietz et al., *The Struggle to Govern the Commons*, 302 SCIENCE 1907, 1908–09 (2003) (describing problems that arise in attempts to sustainably govern commonly held resources, like most fisheries, and lists requirements and strategies to overcome those problems).

[95] *See generally* THE DRAMA OF THE COMMONS (Elinor Ostrom et al. eds., 2002).

[96] *See supra* text accompanying notes 73–74.

decision making processes with accountability for decision-makers.[97] Deliberations over actions with potential impacts on trust resources should consider acceptable trust uses, the extent of impacts, alternative actions, and any means of minimizing impacts. Furthermore, processes and final decisions should be explicit and made widely available. Such requirements should lead to more transparent management and make elected officials and agency employees more accountable to the public for their actions. In the end, these types of measures are simply rational steps for implementing *Illinois Central's* prohibition against actions detrimental to trust purposes.

Additionally, natural resource managers and scholars are increasingly interested in promoting the participation of local resource users in resource management as a more effective means of governance for natural resources.[98] Public involvement can provide information to managers and stakeholders. It may also serve as a method of dealing with conflict by avoiding conflict since the public will likely be more supportive or understanding of management decisions in which they took part and felt the process adequately considered their concerns. However, public participation may invite "excessive localism," a problem that concerned Sax, and which he thought the public trust doctrine could alleviate.[99] Although this is a valid concern and criticisms of

[97] Horner, *supra* note 6, at 43. "[T]hese translate into the following: 1) The designation of identifiable trustees; 2) The de-politicization of the process and assured independence of trustee action; 3) High-visibility decision-making; . . . 6) Ascertainable and, where possible, objective standards for decision-making; and 7) New ways of thinking about the funding of wildlife management agencies." *Id*.

[98] *See, e.g.*, Stephen M. Born & G. Simeon Stairs, *An Overview of Salmonid Fisheries Planning by State Agencies in the United States*, 28 FISHERIES 15 (2003) ("[A]ctive participation by the public and stakeholders in planning can be crucial in building support for and implementing management programs."); *see generally* Bryan, *supra* note 86.

[99] Sax, *supra* note 5, at 531–34. Typically, control over natural resources is delegated. For example, state legislatures delegate authority over fishery management in the Great Lakes to a state agency. *See, e.g.*, MICH. COMP. LAWS § 324.501 (West 1999). Additionally, controls over many activities that affect the fishery have been delegated to other agencies or even local governments. *See, e.g.*, WIS. STAT. § 62.11(5) (2005). Delegation to local governments may raise concerns of localism where control over public trust resources rests in local governing bodies. Complete local control over public trust resources is inherently problematic given that the public trust doctrine protects lands, waters, and use rights of citizens of the state as a whole. Often actions that appear beneficial for local residents may not be desirable on a state-wide basis. *See* Sax,

participatory management exist, that does not mean that all instances of such management practices fail or lead to excessive localism.[100] Problems like these may be avoided with properly structured and implemented public involvement processes.[101] Beyond the practical reasons for public participation, the unique public rights in trust resources seemingly mandate processes that are open to public involvement beyond the access provided by a representative government.

With or without the guarantees for adequate decision making processes outlined above, actions detrimental to the public's interest will certainly occur. Thus, allowing citizens to enforce their rights by bringing suit is one of the most important aspects of the doctrine. Legal commentator Richard Lazarus points out that fifteen years of experience demonstrate courts' willingness to allow private citizen standing for public trust litigation.[102] Common use rights or any other rights are meaningless if they are not enforceable. Citizen standing clearly leads to accountability and likely sustainable management of these resources.[103]

Water quality management in the Great Lakes has been likened to a Gordian knot, and the same can be said of fisheries management.[104] Many issues need to be addressed in order to create a sustainable fishery, and multiple mechanisms exist for achieving that result. The public trust doctrine may provide suitable means to reach this end, through provision of public access, ecological protection, or access and improvement of decision making processes. This ability is limited somewhat by the current application of the doctrine to navigable waters. Often times cases are brought based solely on their likelihood of success, and not on whether they serve the grander goals and objectives of society or even the litigant. We urge prudent use of the doctrine in order to consciously work to develop it in the courts. Furthermore,

supra note 5, at 531–34.

[100] *See* Bryan, *supra* note 86, at 881.

[101] *Id*.

[102] Lazarus, *supra* note 6, at 646.

[103] *See generally* Arun Agrawal, *Common Resources and Institutional Sustainability*, *in* THE DRAMA OF THE COMMONS, *supra* note 95, at 41, 62–63 (listing the "Critical Enabling Conditions for Sustainability of the Commons," specifically, that the rules or institutions should provide "accountability of monitors and other officials to users" of the common pool resource).

[104] Henry Regier, How Risk Assessment May Cripple a Precautionary Principle (May 24, 2004) (unpublished manuscript, on file with authors).

multiple jurisdictions divide the Great Lakes Basin and each applies its own amalgam of laws and regulations thus increasing the complexity. Because of the sovereign status of states and provinces within the Basin, multiple interpretations of the public trust doctrine exist leading to further complication. We continue with a look at these different constructions.

III. PUBLIC TRUST DOCTRINES OF THE GREAT LAKES STATES

As sovereigns, each of the eight Great Lakes States has their own versions of the public trust doctrine. In the following section we provide an overview of those doctrines. We assess these doctrines based on the issues discussed in the preceding section. We analyze each state's use of the public trust doctrine in terms of the scope of the doctrine, the level of public access guaranteed on public waterways within the scope of the doctrine, protection of their ecological integrity, and provision of procedural justice and public participation in decision making processes regarding the trust resources.

First, we focus on two legal issues concerning geographic scope: which waters fall under the doctrine and what is the demarcation between riparian land and public land. Second, we look at the types of activities covered under the public's right of access. Third, we analyze whether a state's doctrine provides for protection of the environment. We will also note whether the state provides takings protections given its likely importance for states that undertake conservation measures conditioned on their public trust authority or responsibility. Finally, we look at how the doctrine affects decision making processes provided by the state, for example, by increasing transparency, requiring public participation, granting standing to citizens bringing public trust suits, or through other means.

At the end of each state's summary we provide a quick overview and a rating of that state's public trust doctrine. Our three tier ratings of good, fair and poor, are based on whether we think future court decisions could lead to ecological protection and resource management that is transparent and just, based on current case law. By giving a state's doctrine a poor rating, whether due to undesirable precedent or lack of case law, we do not want to suggest the abandonment of the doctrine in those states. We believe the public trust doctrine could be an important legal tool throughout the Great Lakes Basin. Proponents of the doctrine

should carefully choose their opportunities for making public trust claims, especially in states with a deficient doctrine. We proceed with this analysis in the order of the states moving from West to East.

Minnesota Summary

Known as the Land of 10,000 Lakes and holding the headwaters of the Mississippi River, Minnesota also has roughly 270 miles of Lake Superior shoreline in an aesthetically stunning area known as the North Shore.[105] The importance of the public trust doctrine in this state is self-evident. As to the doctrine's scope, Minnesota owns in trust the land underlying those waters which were navigable at the time the State entered the Union.[106] U.S. federal law governs the determination of navigability, which basically amounts to all waterways ordinarily used or capable of use for trade and navigation.[107] The boundary of state owned lands underlying navigable waters extends to the low water mark.[108]

Minnesota has a broad set of public access rights, including "not only navigation by watercraft for commercial purposes, but the use also for the ordinary purposes of life, such as boating, fowling, skating, bathing, taking water for domestic or agricultural purposes, and cutting ice."[109] Minnesota also has an *Illinois Central*-type provision, pursuant to which it can only sell its submerged lands "provided that in so doing it (a) acted for the benefit of all the citizens, and (b) did not violate the primary purposes of its trust, namely, to maintain such waters for

[105] U.S. EPA, 2000 NATIONAL WATER QUALITY INVENTORY, APPENDIX F-1: TOTAL MILES OF GREAT LAKES SHORELINE IN THE NATION (2002), http://www.epa.gov/305b/2000report/

[106] State v. Bollenbach, 63 N.W.2d 278, 287–88 (Minn. 1954) (holding that title to riparian land was patented prior to statehood).

[107] *Id.* In an early case, the Minnesota Supreme Court extended the definition of navigability to include those waters which would support "any useful commerce." Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn. 1893). However, this holding was later limited, and in determining whether the lake was public or not, the court found that the federal test of navigability governs. *Bollenbach*, 63 N.W.2d at 287–88. The court left open the possibility "that the Lamprey test [may apply] where the state of Minnesota conveys to a private party riparian land which was granted to it by the United States after admission to the Union and which borders a body of water nonnavigable by the federal test of navigability." *Id.* at 288.

[108] State v. Slotness, 185 N.W.2d 530, 532 (Minn. 1971).

[109] Nelson v. DeLong, 7 N.W.2d 342, 346 (Minn. 1942).

navigation and other public uses."[110] It is unclear how, if at all, this might differ in practice from *Illinois Central*.

Minnesota's public trust law does not guarantee any general right to environmental protection. However, in *State v. Slotness*, the Minnesota Supreme Court held that they will not "in any way determine the state's power to establish restrictions upon a riparian owner's future improvement or reclamation of the submerged lake bed of navigable waters necessary to the environmental interests of the people in public waters."[111] Clearly this leaves open the possibility for conservation measures within the doctrine. In addition, Minnesota's doctrine protects the State from takings claims, including where regulations limiting riparian rights exist for the protection of the public trust.[112]

Minnesota public trust cases do not proscribe actions relevant to decision making processes regarding navigable waterways. Additionally, it is unclear to what extent the public has standing to bring actions against private land-owners or the government.[113] And regardless of concerns over excessive localism, the Minnesota Supreme Court has ruled that the State may delegate its trust powers to nearly any group, even down to the village level.[114]

We rank Minnesota's public trust doctrine as fair. On the positive side it protects fairly broad public access, including recreation, and it provides standard remedies, including limits similar to those in *Illinois Central* and takings protection. Also, the door is open for the acknowledgment of environmental protection, but the citizen standing provisions are lacking, and localism may be a problem given the seemingly unlimited ability to delegate control over trust resources.

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[110] State v. Longyear Holding Co., 29 N.W.2d 657, 670 (Minn. 1947).

[111] *Slotness*, 185 N.W.2d at 534.

[112] State v. H.L. Kuluvar, 123 N.W.2d 699, 706–07 (Minn. 1963).

[113] Like many other states, public trust issues in Minnesota seem to arise often in takings actions where the plaintiff has standing because of the claimed harm to their property interests. *But see* Minnesota Canal & Power Co. v. Koochiching Co., 107 N.W. 405 (Minn. 1906) (dissent claims that the plaintiff does not have standing to protect the interests of the general public, but the majority opinion does not deal with the issue); Viebahn v. Board of Crow Wing County Comm'rs, 104 N.W. 1089, 1094 (Minn. 1905) (seemingly requiring that the plaintiffs have a special injury beyond the general public to bring a suit against another private company that impeded navigability on a river).

[114] *Nelson*, 7 N.W.2d at 348.

Wisconsin Summary

With over 800 miles of Great Lakes shoreline, more than 15,000 inland lakes, and at least 13,500 miles of navigable rivers,[115] Wisconsin has not surprisingly entertained a substantial amount of public trust litigation. The Wisconsin Supreme Court has declared that the State holds the waters and submerged lands of navigable waterways in trust for the citizens of Wisconsin.[116] Navigable waters are defined as those capable of floating "any boat, skiff, or canoe, of the shallowest draft used for recreational purposes"[117] as long as "navigability is regularly recurring or of a sufficient duration to make it conducive to recreational uses."[118] State ownership of the lake beds generally extends to the ordinary high water mark and includes "areas covered with aquatic vegetation within the ordinary high water mark of the body of water in question."[119] The doctrine applies to rivers, but there the riparian owner owns to the thread of the stream.[120]

Wisconsin protects an expansive set of public interests, including navigation, fishing, and recreation.[121] The "public interest" is not necessarily synonymous with what one would consider a classic public trust purpose. For example, in *City of Madison v. State*, Madison wanted to fill in part of Lake Monona to construct a building that included an auditorium and art gallery.[122] The court held that this type of building was related to the use of the lake allowed under statute, and that it will allow people to partake of the scenic beauty of the lake.[123] As we mentioned the perceived importance by natural resource managers of providing public access to waterways is to promote a sense of stewardship over the resource. It is not obvious that seeing a concert at night in the auditorium will enlighten people to the

[115] Wisconsin's Water Library, Water Facts, http://www.aqua.wisc.edu/waterlibrary/facts.asp (last visited Jan. 25, 2006).

[116] Wisconsin's Envtl. Decade, Inc. v. Dep't of Natural Res., 271 N.W.2d 69, 72–73 (Wis. 1978).

[117] Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 519 (Wis. 1952).

[118] State v. Kelley, 629 N.W.2d 601, 607 (Wis. 2001).

[119] R.W. Docks & Slips v. State, 628 N.W.2d 781, 787 (Wis. 2001).

[120] Mayer v. Grueber, 138 N.W.2d 197, 202 (Wis. 1965).

[121] *Wisconsin's Envtl. Decade*, 271 N.W.2d at 72.

[122] City of Madison v. State, 83 N.W.2d 674, 678 (Wis. 1957).

[123] *Id.* Generally speaking, the public trust doctrine attempts to keep lakes in use as they are "normally" used. The connection in this case, however, seems tenuous.

importance of protecting the lake that used to cover the area on which that concertgoer is now seated. Additionally, in Wisconsin, similar to the *Illinois Central* rule, the public trust doctrine allows the state to make only "limited encroachments upon the beds of such waters where the public interest will be served."[124]

Wisconsin court holdings have found that environmental protection is a concern under the doctrine in Wisconsin. One court held that "[p]reventing pollution and protecting the quality of the waters of the state are . . . part of the state's affirmative duty under the 'public trust' doctrine."[125] Ironically, or perhaps wrongly, the court struck down a more protective environmental regulation by the City of Madison, because it conflicted with the authority delegated to the Wisconsin Department of Natural Resources as part of the affirmative duty of the State to protect the environment under the public trust doctrine.[126] Regardless, this is probably the most pro-environmental protection statement that one will find in the public trust doctrine decisions that apply to the Great Lakes. However, environmental protection is apparently afforded only to the extent that it promotes a separate public interest. It does not appear that there is a right to the environmental services provided by a healthy environment, even given the broad conception of public interest; moreover, it is unclear what actions are required under this affirmative duty. Also, Wisconsin's Supreme Court stated that the public trust doctrine protects the State against some takings claims, and that a "developer's riparian right of reasonable access to the lake [is] subordinate to the public trust doctrine."[127] This should provide Wisconsin with greater leeway to take conservation measures in the future.

The issue of decision making under Wisconsin's public trust doctrine involves somewhat mixed precedents. Actions that would alienate trust resources or abrogate trust duties require a "hard look" in decision making processes that involve an accounting of all of the public's interests.[128] The courts leave it up to the legislature to determine how all the different policy factors balance

[124] State v. Bleck, 338 N.W.2d 492, 498 (Wis. 1983).

[125] *Wisconsin's Envtl. Decade*, 271 N.W.2d at 76 (striking down a city regulation banning use of herbicides and chemical treatments in the city's lakes).

[126] *Id.* at 77.

[127] R.W. Docks & Slips v. State, 628 N.W.2d 781, 784 (Wis. 2001).

[128] Hixon v. Pub. Serv. Comm'n, 146 N.W.2d 577, 583 (Wis. 1966).

out,[129] however, there is no guarantee of public participation in this balancing. Still, where the hard look fails, the doctrine at least provides standing for citizen suits to protect their public rights in navigable waters.[130]

Wisconsin probably has the strongest public trust doctrine in the basin, and deserves a ranking of good.[131] For scope of the doctrine, navigability is broadly construed, and the doctrine protects up to the ordinary high water mark. There are a broad set of protected public uses (possibly too broad) and an *Illinois Central* type of protections against diminishment of trust responsibilities. Most importantly, the State has an affirmative duty to not only protect public uses, but also the environmental integrity of its navigable waters for its public trust protected public uses. And there is protection for the State from takings claims. Implications for decision making regarding trust properties include the requirement of a "hard look" in these processes, and the provision of public standing.

Illinois Summary

With a Lake Michigan shoreline of only slightly more than 60 miles, one of the smallest portions of the Great Lakes Basin,[132] it seems almost ironic that the most famous public trust doctrine case involved Illinois' actions in their fraction of the Great Lakes. In Illinois, the public trust doctrine applies to navigable waterways, defined as those that are, were, or could reasonably be made

[129] *Id*.

[130] In *State v. Deetz* the court held:

> The district court concluded that it would not interpret the Wisconsin public trust doctrine to provide per se an affirmative cause of action in addition to the traditional causes of action recognized by the state of Wisconsin. We believe that the District Court properly stated the law of Wisconsin. The public trust doctrine merely establishes standing for the state, or 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.

224 N.W.2d 407, 413 (Wis. 1974). While the provision of public standing is positive, the denial of a cause of action is problematic and odd given that supposedly the State has "affirmative obligations as trustee of navigable waters." *Wisconsin's Envtl. Decade,* 271 N.W.2d at 73.

[131] Sax used the state as one of his primary examples for positive characteristics of public trust doctrines. Sax, *supra* note 5, at 509–23.

[132] U.S. EPA, *supra* note 105.

susceptible to commercial navigation.[133] In Lake Michigan the State owns the submerged lands up to the water line when free from disturbing causes.[134] On most rivers, the riparian owner owns to the thread of the stream.[135]

The public has the right to navigate in all navigable waters, but this right is limited to the navigable channel in streams.[136] Recreational use of Lake Michigan is allowed, and probably limited to within the navigable channels of navigable rivers.[137] Interestingly, the Illinois Supreme Court held that there "is no natural or necessary connection between the easement of navigation, which is of the same character as a public highway. . . and the right to hunt and fish where such easement exists."[138] Thus, Illinois citizens' fishing rights are limited to waterways where the State owns the submerged lands. Nonetheless, the State of Illinois may still regulate fishing in these private streams.[139] In addition, *Illinois Central* protections, which limit the state's ability to abrogate its trust responsibilities to instances where such action would promote the purposes of the trust or at least not diminish the public's rights, also apply in Illinois.[140]

It appears that Illinois courts recognize the conservation aspects of the public trust doctrine. In *People ex rel. Scott v. Chicago Park District*, the Illinois Supreme Court noted that the doctrine has evolved from its original purview, and that "there has developed a strong, though belated, interest in conserving natural resources and in protecting and improving our physical environment."[141] In addition, in 1970, Illinois amended its Constitution to include provisions that it is the "public policy of the State and the duty of each person . . . to provide and maintain

[133] *See* DuPont v. Miller, 141 N.E. 423, 425 (Ill. 1923); People *ex rel.* Deneen v. Econ. Light & Power Co., 89 N.E. 760, 769 (Ill. 1909).

[134] Brundage v. Knox, 117 N.E. 123, 131 (Ill. 1917).

[135] People *ex rel.* Att'y Gen. v. Kirk, 45 N.E. 830, 833 (Ill. 1896).

[136] Schulte v. Warren, 75 N.E. 783, 785 (Ill. 1905).

[137] *Id.*

[138] *Id.*

[139] Parker v. People, 111 Ill. 581, 595 (1884) ("The cases here referred to fully establish the doctrine that whatever the private right of taking fish in streams flowing over a man's land, it is under the limitation that its exercise may be regulated and controlled, as public necessity may require; and they clearly announce the rule that their free passage may be secured by enactment, or it is secured by the common law.").

[140] People *ex rel.* Scott v. Chi. Park Dist., 360 N.E.2d 773, 779–80 (Ill. 1977).

[141] *Id.* at 780.

a healthful environment for the benefit of this and future generations"[142] and that "[e]ach person has the right to a healthful environment."[143] It is unclear exactly how this article alters or informs the public trust doctrine or vice versa.[144] Additionally, Illinois cases have not clearly addressed protection from takings claims under the public trust doctrine, but we think the courts may provide some relief when the state acts in order to improve navigation.[145]

In addition, members of the public in Illinois have the right to bring suit under the public trust doctrine:

> If the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time.[146]

Beyond this, public access to or implementation of decision making processes involving trust resources is not discussed in the case law.

Even given the significance of *Illinois Central*, we feel the Illinois doctrine only deserves a rating of fair. The doctrine in Illinois is somewhat undeveloped. Its geographic scope is modest and the public's rights of use are limited. On the positive side it includes *Illinois Central* protections. The doctrine hints at the importance of conserving trust waters, and there is a constitutional guarantee of a "healthful environment" to support this trend in the future. However, the extent of takings protections is unclear with respect to actions that improve navigation much less the environment. Finally, the doctrine provides standing, but no public participation protections of relevance to decision making processes.

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[142] ILL. CONST. art. XI § 1.

[143] *Id*. § 2.

[144] It appears that courts may tend to construe "healthful environment" narrowly. For example, these provisions were not helpful in protecting two endangered or threatened species slated to lose habitat due to the damming of a navigable river. *See* Glisson v. City of Marion, 720 N.E.2d 1034 (Ill. 1999).

[145] People *ex rel.* Deneen v. Econ. Light & Power Co., 89 N.E. 760, 769 (Ill. 1909); Schulte v. Warren, 75 N.E. 783, 785 (Ill. 1905).

[146] Paepcke v. Pub. Bldg. Comm'n, 263 N.E.2d 11, 18 (Ill. 1970).

Indiana Summary

Only forty-three miles of Lake Michigan coast line border the State of Indiana, the smallest amount of any state.[147] The State of Indiana owns the land underlying navigable waters, which are defined as those waters "[available and susceptible] for navigation according to the general rules of river transportation at the time Indiana was admitted to the Union" in 1816.[148] By statute, Indiana owns to the ordinary high water mark on the navigable waterways of the State.[149]

Two early cases mention a public right to navigate and fish in the navigable waters of Indiana.[150] Beyond this it is unclear exactly what the common law doctrine protects. Many cases reference statutes that apply the public trust doctrine to lakes and recreational streams.[151] While explicit adoption or even mention of the *Illinois Central* rule is absent from Indiana case law, one court did state that "[t]he state in its sovereign capacity is without power to convey or curtail the right of its people in the bed of Lake Michigan."[152] It is unclear if there are exceptions to this ban similar to those in *Illinois Central* for conveyances or curtailments that improve or do not harm the rights of the public.

Legislation provides the public a right to preservation of freshwater lakes.[153] At least one court felt that this legislation impacted the common law, stating that "[p]ublic trust legislation has modified common law riparian rights by recognizing the

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[147] U.S. EPA, *supra* note 105.

[148] State *ex rel.* Ind. Dep't of Conservation v. Kivett, 95 N.E.2d 145, 148 (Ind. 1950). The court adopted this test from federal case law, because it felt that "[w]hether or not the waters of a state are navigable presents a question which must be decided under federal law and, under federal law, the rule is that a river is navigable in law which is navigable in fact." *Id*.

[149] 312 IND. ADMIN. CODE 1-1-26, 6-1-1 (1996). *See generally*, State of Indiana, Access Indiana: Lake Michigan and Navigable Tributaries, http://www.state.in.us/nrc_dnr/lakemichigan/navtrib/navtribb.html (last visited Jan. 22, 2006).

[150] Lake Sand Co. v. State *ex rel.* Att'y Gen., 120 N.E. 714, 716 (Ind. App. 1918); Bainbridge v. Sherlock, 29 Ind. 364, 367–68 (1868).

[151] The Indiana public has a right to navigate, fish, and recreate in general in all lakes, not just the navigable ones, in Indiana through legislation. *See* IND. CODE ANN. § 14-26-2-5 (West 1998). With respect to rivers, and again by statute, the public has similar recreational rights in so-called "recreational streams." IND. CODE ANN. § 14-29-8-2 (West 1998).

[152] *Lake Sand Co.*, 120 N.E. at 716.

[153] IND. CODE ANN. § 14-26-2-5(c)(2)(a) (West 1998).

public's right to preserve the natural scenic beauty of our lakes and to recreational values upon the lakes."[154] The effect of this pronouncement is less than clear. It appears that the doctrine in Indiana does not grant standing to the public, but instead requires a showing of specific harm.[155]

In the end it is very difficult to delineate, much less rate, the common law public trust doctrine in Indiana. This is due mainly to the lack of public trust litigation. Geographic scope of the doctrine, public use, environmental protection, and decision making processes seem to be governed in general by statute. One of the few aspects that are actually clear in Indiana is troubling; the doctrine in Indiana does not grant citizen standing. Due to the near non-existence of the doctrine in Indiana, we rate it poor.

Michigan Summary

Michigan has an astonishing 3,200 miles of shoreline on four of the five Great Lakes, and is second only to Alaska for total amount of shoreline.[156] Additionally, the state has roughly 11,000 inland lakes and rivers. There is one major difference between the geographic scope of public trust waters in Michigan and the other states looked at thus far; only in the Great Lakes does Michigan have title to submerged lands.[157] In the Great Lakes, the boundary between submerged land and riparian land lies at the ordinary high water mark.[158] In navigable waters other than the Great Lakes, the riparian owner holds title to the center of the stream.[159] Still, the trust applies in these other navigable waters due to the commonly held divisibleness of ownership of the land and public navigation rights.[160] Navigability is determined by whether that body is susceptible to use for commercial navigation or floating logs.[161]

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[154] Lake of the Woods v. Ralston, 748 N.E.2d 396, 401 (Ind. Ct. App. 2001).

[155] Bissell Chilled Plow Works v. S. Bend Mfg. Co., 111 N.E. 932, 939 (Ind. App. 1916).

[156] Rep. Rahm Emanuel, Great Lakes Fact Sheet, http://www.house.gov/emanuel/glfactsheet.htm (last visited Jan. 25, 2006).

[157] Nedtweg v. Wallace, 208 N.W. 51, 53 (Mich. 1926); Hilt v. Weber, 233 N.W. 159, 161 (Mich. 1930).

[158] Glass v. Goeckel, 703 N.W.2d 58, 68–69, 72 (Mich. 2005).

[159] Bott v. Comm'n of Natural Res., 327 N.W.2d 838, 841 (Mich. 1982).

[160] Obrecht v. Nat'l Gypsum Co., 105 N.W.2d 143, 149 (Mich. 1960); *Bott*, 327 N.W.2d at 841.

[161] *Bott*, 327 N.W.2d at 841. In acknowledging a previous extension of navigability from waters which could support ships to those that could float logs,

Michigan citizens generally have broad access rights to those waters deemed navigable. In *Thies v. Howland*, the court held that "[n]onriparian owners and members of the public who gain access to a navigable waterbody have a right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming."[162] Furthermore, Michigan has adopted *Illinois Central* protections that limit the state's ability to abrogate their trust responsibilities to instances where such action would promote the purposes of the trust or at least not diminish the public's rights.[163]

No court cases have identified any environmental protection aspects to Michigan's doctrine.[164] This may be in part due to the addition of a conservation imperative in the Michigan Constitution, as revised in 1963,[165] and the passage of the Michigan Environmental Protection Act ("MEPA") in 1970.[166] Michigan's Constitution proclaims that conservation is a

the court found that extension justifiable because it involved commerce. *Id.* at 844. Although the court apparently wanted to foreclose the idea of expanding the test for navigability to waters suitable for recreation, this involves-commerce test seemingly leaves open an argument for expansion where a litigant can demonstrate the substantial commerce involved in recreational pursuits today.

[162] Thies v. Howland 380 N.W.2d 463, 466 (Mich. 1985); *see also* McCardel v. Smolen, 273 N.W.2d 3, 6 (Mich. 1978). Additionally, it appears that hunting may be protected on the Great Lakes. *Hilt*, 233 N.W. at 167; *Nedtweg*, 208 N.W. at 54; Sterling v. Jackson, 37 N.W. 845, 853 (Mich.1888).

[163] *Obrecht*, 105 N.W.2d at 149. In *Obrecht* the court held that

> no part of the beds of the Great Lakes, belonging to Michigan and not coming within the purview of previous legislation such as the swamp land acts and the St. Clair Flats leasing acts . . . can be alienated or otherwise devoted to private use in the absence of due finding of one of two exceptional reasons for such alienation or devotion to non-public use. One exception exists where the State has, in due recorded form, determined that a given parcel of such submerged land may and should be conveyed "in the improvement of the interest thus held" (referring to the public trust). The other is present where the State has, in similar form, determined that such disposition may be made "without detriment to the public interest in the lands and waters remaining."

Id.

[164] Although in *Bott v. Commission of Natural Resources*, a case more famous for limiting which waters the doctrine applies to, the court did state as dicta that part of the reason for not including more waterways under the public trust doctrine is that it would lead to environmental degradation. *Bott*, 327 N.W.2d at 847, 853.

[165] MICH. CONST. art. IV, § 52.

[166] Michigan Environmental Protection Act, MICH. COMP. LAWS § 324.1701(1) (1999).

"paramount public concern."[167] It seems logical that the most rigorous application of this clause would apply to waters and submerged lands held in common by the people of Michigan, but that has yet to be seen. MEPA provides citizens standing to bring suit to protect the state's "natural resources and the public trust in these resources from pollution, impairment, or destruction."[168] How the Michigan Constitution and MEPA affect or are affected by the public trust doctrine is unclear, and may be due in part to an implicit rule in legal interpretation that laws are supposed to be dealt with separately (unless they directly conflict) even though their impacts or domains are obviously overlapping. As to the issue of takings, the Michigan Supreme Court stated that "damage to riparian properties arising from navigational improvements are often not compensable takings . . . because the title of such property is held subordinate to the public's right to navigate and the state's authority to improve navigation."[169] The same rule may apply to environmental improvements by the state if and when the courts recognize such an environmental protection mandate.

Concerning decision making processes for trust resources in Michigan, in *Obrecht v. National Gypsum Co.,* the court required that the State make the determinations in "due recorded form" for the sale or privatization of submerged lands.[170] Such demand for explicit statements in situations where the state intends on abrogating its trust responsibilities both prevents unintentional derogation of the trust and improves the transparency of decision making processes allowing for accountability of elected officials. Furthermore, the public trust doctrine provides standing to the public. In *Obrecht*, the court allowed members of the public to bring two claims. One of the claims was to abate a nuisance.[171] In support of the other claim, the litigants argued that a grant of submerged lands in Lake Huron was invalid under the public trust doctrine.[172] Although the court did not deal specifically with the issue of standing, it implicitly supported the idea by allowing

[167] MICH. CONST. art. IV, § 52.

[168] Michigan Environmental Protection Act, MICH. COMP. LAWS § 324.1701(1) (1999). *See* James M. Olson & Christopher M. Bzdok, *The MEPA Lives—in Northern Michigan and Beyond*, 78 MICH. BAR J. 418 (1999).

[169] Peterman v. Dep't of Natural Res., 521 N.W.2d 499, 508 (Mich. 1994).

[170] Obrecht v. Nat'l Gypsum Co., 105 N.W.2d 143, 149 (Mich. 1960).

[171] *Id.* at 146–47.

[172] *Id.* at 148.

the cases. A more definitive pronouncement on standing may not have occurred due to the broad standing historically provided through MEPA.[173]

We assign a fair rating to the Michigan doctrine. On the positive side it applies to the ordinary high water mark in the Great Lakes, it allows broad use of trust covered waterways, and includes *Illinois Central* protections. Cases have not specifically acknowledged the right to environmental protection under the doctrine, but there are conservation measures in the Michigan Constitution that could bolster the argument for such protections.[174] Finally, not many guarantees of access to or fairness in decision making processes exist. The State requires explicit notice of intent to abrogate trust responsibilities, a small step toward transparency and accountability. And although we hope to promote informed use of the public trust throughout the Great Lakes basin, given the anti-environmental stance of the current Michigan Supreme Court, it is difficult to hold very high hopes for future public trust litigation in the state.

Ohio Summary

Ohio has over 260 miles of shoreline on the southwest corner of Lake Erie, with nearly 3 million citizens in that general region.[175] As to the scope of resources protected under the public trust doctrine in Ohio, the courts have held that the State owns the water and submerged beds of Lake Erie and inland lakes to the water's edge[176] or natural shoreline.[177] For navigable rivers, the State has rights to the water while the riparian landowners own the riverbeds.[178] In defining navigability, one appellate court held "that the modern utilization of our waters by our citizens requires that our courts, in their judicial interpretation of the navigability of such waters, consider their recreational use as well as the more

[173] *See* Olson & Bzdok, *supra* note 168, at 421. *But see* Nat'l Wildlife Fed'n v. Cleveland Cliffs Iron Co., 684 N.W.2d 800, 819 (Mich. 2004) (gutting, in dicta, the broad provision of public standing under MEPA).

[174] MICH. CONST. art. IV, § 52.

[175] Ohio Office of Coastal Mgmt., Fast Facts about Ohio's Portion of Lake Erie, http://www.ohiodnr.com/coastal/quicklink.htm (last visited Nov. 17, 2005).

[176] Sloan v. Biemiller, 34 Ohio St. 492, 512–13 (Ohio 1878).

[177] State *ex rel.* Squire v. Cleveland, 82 N.E.2d 709, 725 (Ohio 1948).

[178] State *ex rel.* Brown v. Newport Concrete Co., 336 N.E.2d 453, 455 (Ohio Ct. App. 1975).

traditional criteria of commercial use."[179] Thus, navigability is determined by an ability to recreate in the water, although an exact standard is not provided.

The public has broad rights of access to the navigable waters of Ohio, including "all legitimate uses, be they commercial, transportational, or recreational."[180] Furthermore, the Ohio Supreme Court adopted verbatim, the *Illinois Central* requirement that the trust cannot be alienated, except where it improves the public trust or is not detrimental to the trust.[181]

Ohio's broad interpretation of both geographic scope and public use rights, does not extend to environmental protection. Ohio does, however, have a constitutional provision that allows for conservation of its natural resources, but again it is unclear how it affects the public trust doctrine.[182] Should a court recognize a right to environmental protection under the public trust doctrine in Ohio, the doctrine provides takings clause immunity for state actions in furtherance of the public trust.[183]

The doctrine provides a minimal level of transparency to decision making processes by only allowing the state to derogate its trust responsibilities through "express words, or by necessary implication."[184] Furthermore, it appears that a private person must have suffered some injury beyond that of an average member of the public in order to protect the public interest in trust resources.[185] In other words, no standing is provided.

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[179] *Id*. at 457.

[180] *Id.* at 458.

[181] State v. Cleveland & Pittsburgh R.R. Co., 113 N.E. 677, 683–83 (Ohio 1916).

[182] OHIO CONST. art. 2, § 36.

[183] State *ex rel.* Squire v. Cleveland, 82 N.E.2d 709, 728 (Ohio 1948). The Ohio Supreme Court held that

> the city [by grant of the state] had the right to construct it without compensating the upland owners, no matter how much their littoral rights were impaired or even destroyed, for we again repeat that the littoral rights of the upland owners are not titles to land, and though they are property rights they are restricted and limited and entirely subservient to the power and authority of the state and federal governments in whatever either of them do in aid of navigation, water commerce or fishery.

Id.

[184] Hickok v. Hine, 23 Ohio St. 523, 531 (Ohio 1872).

[185] State *ex rel.* Anderson v. Preston, 207 N.E.2d 664, 669 (Ohio Ct. App. 1963).

Ohio's doctrine is decent, but incomplete, and we rank it fair. Positive aspects include the broad definition of navigability (capable of recreation), broad public access, takings relief, *Illinois Central* protections, and a sketchy requirement for explicit expression of legislative intent to abrogate the trust. But the lack of a right to ecological protection, no guarantees of public participation or transparency in decision making processes regarding navigable waterways, and a lack of standing for the public to enforce their rights are severe problems.

Pennsylvania Summary

Pennsylvania rests against Lake Erie with more than sixty miles of shoreline on the northwest corner of the state.[186] Determining the extent and nature of the public trust doctrine in Pennsylvania is difficult since many decisions rely on the public trust language found in the State's Constitution. Under the Pennsylvania Constitution, all of the public natural resources are owned in common, held in trust by the state.[187] Still, the determination of what constitutes a public waterway hinges on the common law definition of navigability. Navigability is determined by "whether water is used or usable as a broad highroad for commerce and the transport in quantity of goods and people . . . . The basic difference is that between a trade-route and a point of interest. The first is a public use and the second private."[188] As to the property boundaries in navigable lakes, the State of Pennsylvania owns the submerged lands with the riparian land owner holding title to the water's edge.[189] For navigable rivers, the Pennsylvania Supreme Court held: "Below its ordinary low water the ownership of the soil under the river is in the commonwealth, the title of the abutting riparian owner extending only to ordinary low-water mark, subject to the rights of navigation, fishery, and improvement of the stream between high and low water marks."[190]

In the early and influential case of *Shrunk v. Schuylkill Navigation Co.*, the court unambiguously stated that there are public use rights of navigation and fishing.[191] It is unclear whether

[186] U.S. EPA, *supra* note 105.
[187] PA. CONST. art. I, § 27.
[188] Lakeside Park Co. v. Forsmark, 153 A.2d 486, 489 (Pa. 1959).
[189] Conneaut Lake Ice Co. v. Quigley, 74 A. 648, 650 (Pa. 1909).
[190] Black v. Am. Int'l Corp., 107 A. 737, 738 (Pa. 1919).
[191] Shrunk v. Schuylkill Navigation Co., 14 Serg. & Rawle 71, 80 (Pa. 1826).

a concomitant right to recreate in public waters exists under the public trust doctrine. Furthermore, we are hard-pressed to find evidence that Pennsylvania has adopted the *Illinois Central* rule or similar restraints to protect public access. The closest the State comes to its adoption is found in a decision by the then Secretary of Forest and Waters for Pennsylvania: "The legislature of the State represents its sovereignty, and through enactments by that body may grant rights not inimical to that of navigation upon the bosom of its navigable waters within or bordering upon the State."[192]

Article I, Section 27 of the Pennsylvania Constitution grants to the public a right to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment," and requires that the State act to preserve those rights.[193] However, this article was deemed not self-executing, requiring Pennsylvania to pass additional laws to protect the environment.[194] It is unclear whether the public trust doctrine serves as an enforceable law under this article of Pennsylvania's Constitution. Regardless, it appears that the doctrine protects the State against takings claims when improving navigation.[195] Whether courts will apply this equally to actions that protect the environment has not been determined.

No standards are set under the doctrine to provide fair and open decision making processes. Furthermore, there is apparently no provision of standing under the common law public trust doctrine.

To summarize, the common law public trust doctrine in Pennsylvania appears deficient, and accordingly we would rank it

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[192] Waters of Presque Isle Bay, 12 Pa. D. & C. 88, 90 (1928).

[193] PA. CONST. art. I, § 27.

[194] Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 591–92 (Pa. 1973).

[195] Zimmerman v. The Union Canal Co., 1 Watts & Serg. 346, 352–53 (Pa. 1841).

> It seems, however, to be but in accordance with the decisions made upon the subject, that it is one of the incidents to holding property on one or both sides of a navigable stream that the party is subject to, any inconvenience that may arise from deepening the channel, or otherwise improving the navigation of such stream, is to be submitted to, without any right to damages therefor, except as such improvement may flood or drown their lands.

Id.

as poor. This ranking does not account for the very broad and protective clause in the State's Constitution that clearly provides for the conservation of the state's natural resources, but only the common law public trust doctrine. Under it, the scope of waterways and underlying lands protected under the doctrine is average. The courts have not explicitly delineated the extent of acceptable or protected uses for these waterways, and it is not clear whether *Illinois Central* protections have been adopted. And issues regarding access to decision making processes do not arise in Pennsylvania's public trust case law. On the positive side, the doctrine does provide takings claims protection to the state.

New York Summary

Third behind Michigan and Wisconsin in amount of Great Lakes coastline, New York has around 570 miles of shoreline combined on Lakes Erie and Ontario.[196] Waters that form a territorial border are called navigable-in-law and the submerged lands beneath these waters are owned by the State of New York up to the ordinary high watermark.[197]

In New York the public has a right to navigate and fish in navigable-in-law waters, which includes tidal waters, boundary waters and the Great Lakes.[198] In waters that are navigable-in-fact, the public merely has a right to navigate in the waters.[199] Navigation-in-fact is determined by whether a water body is capable of recreational navigation.[200] We thus assume that recreational boating is allowed in all navigable-in-fact waters, but the public's rights to use waters for other purposes remains unclear. To protect the rights that exist, New York has adopted in substance if not by name the *Illinois Central* holding.[201]

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[196] U.S EPA, *supra* note 105.

[197] *In re* Buffalo, 99 N.E. 850, 852 (N.Y. 1912).

[198] Strawberry Island Co. v. Cowles, 140 N.Y.S. 333, 337–38 (Sup. Ct. 1913); Douglaston Manor v. Bahrakis, 89 N.Y.2d 472, 480 (1997).

[199] Adirondack League Club, Inc. v. Sierra Club, 706 N.E.2d 1192, 1195 (N.Y. 1998).

[200] *Id*.

[201] The U.S. Supreme Court held in *Appleby v. City of New York* in reviewing the public trust doctrine in New York that "the title which the state holds and the power of disposition is an incident and part of its sovereignty that can not be surrendered, alienated, or delegated, except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit." Appleby v. City of New York, 271 U.S. 364, 395 (1926) (citing Coxe v. State, 39 N.E. 400

At least two lower court decisions refer to an environmental protection component of the public trust doctrine. In one, the district court stated that "[t]he entire ecological system supporting the waterways is an integral part of them (the waterways) and must necessarily be included within the purview of the trust."[202] And in a second case, the court found that the "city has an obligation to its citizenry to protect and preserve the waters within its boundaries against any potential hazard of pollution and ecological destruction."[203] Perhaps this principle will develop further in the future. Additionally, the State is immune from takings claims in waters that are navigable in-fact when actions are taken in order to improve navigation.[204] This is a very limited right and is narrowly applied to only improvements for the purposes of navigation and transportation.[205] Thus, even if environmental protections were included in the public trust, takings protection may not apply to actions for that purpose. Finally, New York's Constitution states that the "policy of the state shall be to conserve and protect its natural resources and scenic beauty [and] shall include adequate provision for the abatement of air and water pollution."[206] As in other states with similar constitutional clauses, it is unclear how this will influence future public trust law development.

Two issues have arisen with respect to decision making processes. First, in order to abrogate its trust duties the state must provide "clear evidence of its intention . . . ."[207] Such a requirement increases the transparency of governmental decisions of this nature, and keeps elected officials accountable for such actions. Second, where decisions are made that breach the trust, citizens have standing to bring suit to enforce public rights under

(N.Y. 1895)).

[202] People v. Poveromo, 336 N.Y.S.2d 764, 775 (Dist. Ct. 1972), *rev'd on other grounds*, 359 N.Y.S.2d 848 (App. Div. 1973).

[203] Colonial Pipeline Co. v. State Bd. of Equalization & Assessment, 366 N.Y.S.2d 949, 953 (Sup. Ct. 1975).

[204] Fulton Light, Heat & Power Co. v. State, 94 N.E. 199, 204 (N.Y. 1911) ("The right of the state to make improvements in the river for the benefit of the public, in facilitating navigation and transportation thereon, must be fully conceded. It may do so without regard to the private ownership of the bed of the river. The proprietary interest of the riparian owner is subordinate to the public easement of passage and the state may be regarded as the trustee of a special public servitude.").

[205] *Id.* at 205.

[206] N.Y. CONST. art. 14, § 4.

[207] Appleby v. City of New York, 271 U.S. 364, 384 (1926).

the doctrine.[208]

New York has an interesting public trust doctrine, which we rank as fair. Defining navigable waters as those waters which are capable of recreational navigation opens many waterways to New Yorkers. However, fishing access is guaranteed only in border waters (which includes the Great Lakes) and those influenced by the tide. The doctrine provides remedies, including *Illinois Central* protections. The doctrine also provides citizen standing, but not guidance for public participation in or fairness of decision making processes. Finally, case law from lower courts acknowledges the need to protect the environment, but this has not been developed and such actions may not be provided immunity from takings claims.

IV. A CANADIAN PUBLIC TRUST

We turn to the public trust doctrine in Canada. The U.S. and Canada share the longest border in the world, and it runs down the center of four of the Great Lakes.[209] Canada has the most shoreline and the most lake area of any country.[210] The issues addressed by the public trust doctrine would seemingly be at least as important in Canada as the U.S. And while the public trust doctrine arose in the same body of common law adopted by both countries, it has received considerably less attention in Canada. In fact, use of the common law public trust doctrine in Canada is nearly non-existent. There are very few cases or even scholarly articles on the subject.[211] The rudimentary form of the doctrine

[208] In *Barnes v. Midland R.R. Terminal Co*., a riparian owner sued to enforce the public right to walk across a beach below the high-water mark in front of the neighboring property owner's land. The court enjoined the defendant from blocking public access to the beach below the high-water mark. Although the plaintiff was a riparian owner, he was not really suing to enforce his own riparian rights, but rather to enforce public rights without showing that he had a special injury. Barnes v. Midland R.R. Terminal Co., 85 N.E. 1093 (N.Y. 1908).

[209] GOV'T OF CANADA, CANADA-UNITED STATES ACCORD ON OUR SHARED BORDER: UPDATE 2000 2, *available at* http://www.cic.gc.ca/English/pdf/pub/border.pdf.

[210] Natural Resources Canada, *Coastline and Shoreline*, *in* THE ATLAS OF CANADA, http://atlas.gc.ca/site/english/learningresources/facts/coastline.html (last visited Jan. 26, 2005); Env't Canada, How Much Do We Have? http://www.ec.gc.ca/water/en/info/facts/e_quantity.htm (last visited Jan. 26, 2005).

[211] *See* Constance D. Hunt, *The Public Trust Doctrine in Canada*, *in* ENVIRONMENTAL RIGHTS IN CANADA 151, 151 (J. Swaigen ed., 1981); CHRISTINE

appeared 150 years ago, but then further development ceased.[212] This absence is peculiar given the country's proximity to the U.S., both geographically and culturally. The few scholars who have commented on Canada's doctrine have suggested the non-litigious nature of Canadians, lack of standing for citizens to enforce public rights, poor precedent, and the conservative role played by Canadian courts as reasons for the lack of development and use of the doctrine.[213] We proceed with a review of the portions of the doctrine that do exist in Canada.

The Supreme Court of Ontario defined navigable waters as those that have "real or potential practical value to the public as a means of travel or transport from one point of public access to another point of public access."[214] The court outlined more specific criteria, which in effect are fairly lenient, and include the determination that a waterway is navigable if it is susceptible to recreational navigation.[215] Along the Great Lakes, riparian owners

ELWELL & TYSON DYCK, CANADIAN INST. FOR ENVTL. LAW & POL'Y, WATER GRAB #2 PROVINCE OF ONTARIO'S PLANS TO TRANSFER LOCAL WATER SYSTEMS AND SERVICES TO THE PRIVATE SECTOR: A BREACH OF THE PUBLIC TRUST? 22–33 (2002); Kate Smallwood, Coming Out of Hibernation: The Canadian Public Trust Doctrine (1993) (unpublished Master of Laws thesis, Univ. of British Columbia) (on file with Univ. of British Columbia Library).

[212] *See* The Queen v. Meyers, [1853] U.C.C.P. 305, 317–23; The Queen v. Lord, [1864] P.E.I. 245, 257; The Queen v. Robertson, [1882] S.C.R. 52, 118.

[213] *See, e.g.*, Hunt, *supra* note 211, at 173–88.

[214] Canoe Ontario v. Reed, [1989] 69 O.R.2d. 494, 502.

[215] *Id*. The Supreme Court of Ontario accepted the following conclusions about navigability:

> (i) Navigability in law requires that the waterway be navigable in fact. It must be capable in its natural state of being traversed by large or small craft of some sort.
> (ii) Navigable also means floatable in the sense that the river or stream is used or is capable of use for floating logs or log rafts or booms.
> (iii) A river may be navigable over part of its course and not navigable over other parts.
> (iv) To be navigable, a river need not in fact be used for navigation so long as it is realistically capable of being so used.
> (v) A river is not navigable if it is used only for private purposes or if it is used for purposes which do not require transportation along the river (e.g., fishing).
> (vi) Navigation need not be continuous but may fluctuate with the seasons.
> (vii) Where a proprietary interest asserted depends on a Crown grant, navigability is initially to be determined as at the date of the Crown grants.

Id. (citing Re Coleman, [1983] 143 D.L.R. 608, 613–15 (Ont. High Ct. J. Can.)).

own down to the low water mark.[216]

The public clearly has a right to navigate[217] and fish.[218] Furthermore, it appears that while the Crown and the Provinces may not limit the public's access rights, the Canadian legislature has unlimited power to modify these rights. In *Friends of the Oldman River Society v. Canada*, the Canadian Supreme Court noted the "paramountcy of the public right of navigation [and] that it can only be modified or extinguished by an authorizing statute."[219] Thus, there are no *Illinois Central* types of restrictions.

In addition, there are apparently no requirements for public participation or transparency in processes that could affect navigable waterways. Indeed, Canadian courts seem hostile to the idea of providing standing to enforce public rights.[220]

Besides Canada's lack of process requirements under the public trust doctrine, there are also no cases that make note of duties to protect the environment under the public trust doctrine. To be clear, Canada and its provinces do have a body of laws aimed at protecting the environment, in particular the Great Lakes fisheries, but neither Ontario nor the Canadian federal government has any such protections under their respective public trust doctrine.

Clearly, the Canadian doctrine lacks many of the characteristics of those found in the U.S. and those that we have identified as important for the purposes of creating sustainable Great Lakes fisheries. To the extent that the Canadian doctrine could be recast, many hurdles exist. Commentators on the public trust in Canada have focused on the case *Green v. Ontario*, and the problems it presents.[221] In *Green*, the plaintiff, a Canadian citizen, sued the government to force it to enjoin a cement company from excavating sand adjacent to a provincial park.[222] The court found that either of two claims were raised by the plaintiff, first, that the

[216] Ontario v. Walker, [1974] 42 D.L.R. 629 (Can.).

[217] Friends of the Oldman River Soc'y v. Canada (Minister of Transp.), [1992] S.C.R. 3, 54 (Can.).

[218] *Friends*, S.C.R. 3; The Queen v. Nikal, [1996] 1 S.C.R. 1013, 1047 (Can.).

[219] *Friends*, S.C.R. at 55.

[220] *See, e.g.*, Re Greenpeace Found. of British Columbia et al. and Minister of the Environment [1981] 122 D.L.R. 3d 179 at 184.

[221] *See* Hunt, *supra* note 211, at 174–81; ELWELL & DYCK, *supra* note 211, at 23–26; Smallwood, *supra* note 211.

[222] Green v. The Queen, 34 D.L.R. 3d 20 (1972).

excavation is a public nuisance, or, second, that the government's allowance of the excavation constitutes a breach of a statutory trust.[223] The *Green* court held, however, that Green did not have standing under either claim.[224]

Although *Green* is apparently one of the few, if not the only, reported Canadian cases where the public trust doctrine is raised, it is important to recognize that this case involved a statutory trust and not the common law doctrine. Also, *Green* involved a provincial park, not navigable waterways or anything remotely related to the foci of the common law public trust doctrine. The court based its holding on an implied public nuisance claim and alternatively a breach of statutory trust. In dicta the court set out a great deal of reasoning as to why a trust was not created, by applying classical trust law.[225] The case may present problems for future attempts to create statutory trusts, but should not affect the development of the common law public trust doctrine.

Still, *Green* does raise two concerns. First, it is another example of the battle faced in allowing citizens to enforce their rights. Second, the court threw out the case claiming it was frivolous, seemingly an overreaction, and possibly evidence of hostility towards environmental claims.[226] If the court's holding is representative of its view of environmental protection claims, this may present problems for future Canadian litigants under any cause of action.

A rudimentary public trust doctrine exists in Canada, but it is an austere announcement of the public right to navigate and fish in navigable waters. It is a dormant doctrine to say the least. There are very few cases that deal with public trust issues and almost none of which actually articulate a public trust doctrine.

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[223] *Id*. at 24–25.

[224] *Id*. at 27.

[225] For further discussion of this holding, see Hunt, *supra* note 211, at 174–80.

[226] Elwell and Dyck also found the court's holding to be anti-environment in nature, but contend that "judicial opinions on environmental issues have changed since 1973" and thus have hope for similar cases in the future. *See* ELWELL & DYCK, *supra* note 211, at 24.

V. INDIGENOUS PEOPLES OF THE GREAT LAKE BASIN

Native American tribes and First Nations have fished in the Great Lakes for thousands of years. Fishing continues today, and tribal fisheries in the upper lakes, Lakes Michigan, Huron, and Superior, still play an important role in those communities, and present a significant public issue. Indeed, tribal fishing in the Great Lakes Region has been and remains a very contentious issue.[227] As sovereigns with rights reserved through specific treaties, tribes and First Nations possess varying levels of management authority over tribal fishing and to some extent over reservation waterways.[228] In this section we will discuss two issues. First, although there is no formal indigenous public trust doctrine, similar protections do appear in some of the indigenous laws that we have studied. Second, there is concern that the public trust doctrine of the U.S. and perhaps Canada could be used to infringe on Native American or First Nation sovereignty.

The Native American tribes and First Nations that reside in the Great Lakes region have their own distinct historical and current legal practices far removed from locations and events that led to the adoption of the public trust doctrine in the U.S. Even though no tribe or First Nation has adopted the public trust doctrine as it has been described in this article, Native Americans do have some analogous concepts embedded in their culture and legal traditions. An analysis of the laws of all the different nations and groups of indigenous peoples in the Great Lakes is beyond the scope of this article, but looking at the four components of the public trust doctrine that might impact fisheries one can easily find similar protections arising in tribal law.[229] While the laws of tribes

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[227] *See* MICHAEL J. CHIARAPPA & KRISTIN M. SZYLVIAN, FISH FOR ALL: AN ORAL HISTORY OF MULTIPLE CLAIMS AND DIVIDED SENTIMENT ON LAKE MICHIGAN 380 (2003); *see also* LARRY NESPER, THE WALLEYE WAR: THE STRUGGLE FOR OJIBWE SPEARFISHING AND TREATY RIGHTS (2002); Anna Pugh, Comment, *Meeting the Spirit of Sparrow: The Regional Fisheries Committee as a Management Model in Canada*, 12 DALHOUSIE J. LEGAL STUD. 267 (2003).

[228] Montana v. U.S., 450 U.S. 544, 550–54 (1981) (discussing various treaties and rights granted therein that give tribes the authority to exclude nonmembers from waterways).

[229] Once again, those four components, which we outlined previously, include the geographic scope of waters to which the public (or tribal members) can access, the uses accepted or protected in those waters, the provision of environmental protection guarantees, and public access to and fairness in decision making processes regarding these resources. The scope of navigable waterways that fall under the jurisdiction of tribes in the U.S. is a complex issue

and First Nations vary considerably, Great Lakes tribes themselves have pointed to a common perception on the connection between tribal members and their environment.[230] In a document prepared as part of their participation in the Great Lakes Regional Collaboration, Tribal Nations of the Great Lakes Basin stated that "[a]lthough unique and distinct in their own right, Great Lakes Tribal Nations share much in terms of the historic, cultural social underpinnings of their respective communities, particularly regarding their interdependence with and reliance upon natural resources to meet subsistence, economic, cultural, spiritual, and medicinal needs."[231] Scholars have noted an environmental ethic in indigenous peoples, including the Ojibwa of the Great Lakes region.[232] Future research could address whether the underlying values embodied in the public trust doctrine are reflected in the

governed by an amalgam of treaties, federal and state laws, and court decisions. Looking at the Little River Band of Ottawa Indians, whose reservation is located in lower Michigan, as one example, we see that they provide broad rights of access for its tribal members to the waters over which it has authority to regulate. *See, e.g.*, Little River Band of Ottawa Indians Tribal Code, ch. 500, § 1-3(d) (2004), *available at* http://www.lrboi.com/council/Regulations%20-%20New/Chapter%20R500.pdf (stating "members shall be afforded the greatest possible freedom to use and enjoy these resources consistent with the preservation and improvement of those resources for future generations and their fair distribution."). This guarantee is possibly due in part to the Band's recognition that "continued training of Tribal hunters, fishers, and gatherers allows the transfer of Aníšhinaábek 'traditional' values from generation to generation." Little River Band of Ottawa Indians Tribal Code, ch. 500, § 1-2(h) (2004). The Little River Band has recognized the importance of protecting their environment and has provided protection for it. Little River Band of Ottawa Indians Tribal Code, ch. 500, § 1-2(e) (2004) (recognizing that "the Aníšhinaábek have been dependent upon animals for their food, clothing, and tools; and for their very knowledge of the world, life, and themselves"); Little River Band of Ottawa Indians Tribal Code ch. 500, § 1-3(q) (2004) (requiring "adequate remedies for the protection of species' environmental life support systems from degradation, and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources"). Public access to and fairness in decision making procedures is difficult to assess, but we note that the Little River Band provides at least some access and transparency. Little River Band of Ottawa Indians Tribal Code, ch. 500, tit. 01 art. 5 (2004).

[230] *See, e.g.*, GREAT LAKES REG'L COLLABORATION, TRIBAL NATIONS ISSUES AND PERSPECTIVES (2005), *available at* http://www.glrc.us/documents/GLRC-Tribal-Briefing-Paper.pdf.

[231] *Id*. at 2.

[232] *See, e.g.*, J. BAIRD CALLICOTT & MICHAEL P. NELSON, AMERICAN INDIAN ENVIRONMENTAL ETHICS: AN OJIBWA CASE STUDY 117-34 (2004); *see also generally* LLOYD BURTON, WORSHIP AND WILDERNESS: CULTURE, RELIGION, AND LAW IN THE MANAGEMENT OF PUBLIC LANDS AND RESOURCES (2002).

legal mechanisms of the indigenous peoples of the Great Lakes basin.

A concern arises over the possibility of questionable use of the public trust doctrine to infringe on the sovereignty of indigenous peoples of the Great Lakes Basin. We see an example of this in *Montana v. United States*, where the Supreme Court held that even the portion of a navigable waterway running through the middle of a tribal reservation belonged to the State of Montana.[233] This case was decided under the equal footing doctrine, but at heart the equal footing and public trust doctrines are closely related.[234] In *Montana*, the court claims that "ownership of land under navigable waters is an incident of sovereignty"[235] and then seemingly forgets that tribes are sovereigns and "owned" the Americas long before English common law landed on their shores. Furthermore, it seems to treat treaties as grants from the U.S. federal government to the tribes,[236] when these treaties should be seen as a grant of rights over lands owned by tribes to the U.S.[237]

It is yet to be seen whether Native American tribes or First Nations will need or want a public trust doctrine of their own. Clearly though, using the public trust doctrines that exist in the U.S. and Canada to infringe upon the sovereignty of the indigenous peoples of the Great Lakes region would seem to go against the purpose and spirit of the doctrine since the tribes and First Nations peoples were publics that preceded the Europeans by many centuries.

CONCLUSION

Fisheries in the Great Lakes provide an enormous amount of enjoyment and economic benefits to the people in the region and beyond. Those fisheries face a variety of threats from overfishing,

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[233] *Montana*, 450 U.S. at 553–54.

[234] *See* Rasband, *supra* note 18, at 5 (describing the equal footing and public trust doctrines as both originating from the same common law source).

[235] *Montana*, 450 U.S. at 551.

[236] *Id.* at 552–53.

[237] Winans v. United States, 198 U.S. 371, 381 (1905) (holding that "[t]he right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. . . . In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted").

pollution, and the introduction of exotic species, among others. The importance of creating and implementing policy to conserve fishery resources and to protect the ecosystem in which the fish reside is gaining momentum in the Great Lakes Basin. The public trust doctrine is among the many tools being analyzed for this task. This paper reviewed many of the ways in which future use of the public trust doctrine could impact fisheries in the Great Lakes. We then reviewed the current status of the doctrine in the U.S., Canada, and Native Americans tribes and First Nations that lie within the Great Lakes Basin. To conclude we wish to recap some of the main issues that have arisen.

On the positive side, the public trust doctrine protects public access to these resources that citizens have had for centuries. Hopefully, such exposure will also translate into a desire to protect those resources from harm and for future generations. However, we need to be careful that this guaranteed access is not used as a rationale for the overuse of our resources, or to override the creation of aquatic reserves that are necessary to the survival of our fisheries. The scope of such protected waters is limited to navigable waterways, the definition of which varies from jurisdiction to jurisdiction. In these times when the voices of privatization are so strong, we need to continue our diligence of protecting the public's access to the widest array of waterways. However, there is a need to recognize the sovereign rights of the indigenous people who live around the Great Lakes and whose ancestors have lived here for thousands of years.

The public must participate in decisions regarding the future of our fisheries, navigable waterways, and all natural resources. The public trust doctrine has provided some level of participation in and accountability for decisions regarding navigable waterways, primarily through standing for members of the public. Perhaps the doctrine should not be so limited as litigation is probably not the most efficient means to gain that result. Finally, we need a legal mechanism to help protect the ecological integrity of the Great Lakes. The question we keep finding ourselves asking is what good is the right to fish if there are no fish left or they are too polluted to eat? This is especially true for the indigenous peoples of the region who rely on local fisheries for a larger percentage of their diet than other inhabitants of the region. The public trust doctrine has been and could further be used for such protection. Its existence and its undergirding philosophy should also serve to

inspire policymaking in legislative and administrative bodies to fulfill the doctrines' promise. We see such an influence in the Joint Strategic Plan for Management of Great Lakes Fisheries, which has been signed by all of the Great Lakes fisheries authorities and states that the "fishery resources of the Great Lakes are held in trust for society by government."[238] Arguably, one of the largest questions still remaining is the question of how to balance the different types of uses of the navigable waterways. Historically, the public trust doctrine protected navigation, fishing and commerce. Today, our waterways are used for an increasing number of additional uses. One of the greatest strengths of the public trust doctrine is its adaptability; we shall see how it adapts to answer new questions.

[238] GREAT LAKES FISHERY COMM'N, *supra* note 58.