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THE PUBLIC TRUST DOCTRINE AND COASTAL ZONE MANAGEMENT IN WASHINGTON STATE

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Abstract: The public trust doctrine is an ancient doctrine that has recently emerged as a powerful tool to protect the public interest in tidelands and shorelands. Created and developed by the judiciary, the doctrine's principles have found their way into several of Washington's regulatory statutes, such as the Shoreline Management Act and the Aquatic Lands Act. This Article traces the development of the doctrine in Washington, and explains the relation between the state's police power and the public trust doctrine. This Article also sets forth the current contours of the public trust doctrine in Washington, and charts potential future developments of this dynamic common law doctrine.

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I. INTRODUCTION

A. Introduction to the Public Trust Doctrine

The use and management of Washington State’s coastal resources is a subject of intense interest to many different groups: state and local government agencies responsible for shoreline management; courts adjudicating policy and administrative issues; and of course, the public that owns and utilizes the tidelands, shorelands, and waters of Washington’s rivers, lakes, and coast-line. Federal, state, and local governments have adopted statutes and regulations in an attempt to regulate and protect the coastal environment. One state statute in particular, the Shoreline Management Act of 1971,\(^1\) attempts a comprehensive approach to managing the coastal area, and implicates local, state, and federal actions in its implementation.

In recent years, an ancient legal concept has been rediscovered as a tool for coastal resource management. The public trust doctrine is rooted in Roman tradition, but courts throughout the United States have recently shown great interest in the doctrine as a flexible method for judicial protection of public interests in coastal lands and waters. Simply stated, the public trust doctrine provides protection of public ownership interests in certain uses of navigable waters and underlying lands, including navigation, commerce, fisheries, recreation, and environmental quality. While tidelands may be sold into private ownership through conveyance of the \textit{jus privatum}, the public trust doctrine reserves a public property interest, the \textit{jus publicum}, in these lands and the waters flowing over them. Indeed, the public trust interest in these lands and waters is so strong that government can defeat the public right only by express legislation, and then only to promote other public, rather than private, values. The doctrine also applies to state-owned lands, and imposes duties on state government and state agencies with respect to uses that can be made of these lands.

The public trust doctrine differs from regulatory schemes for coastal management in several respects. First, the doctrine is created, developed, and enforced by the judiciary. While the doctrine is fully binding law on state government, it stems from the courts rather than the

legislature. The doctrine also contains several features not generally found in statutes. Its scope is flexible, and courts may expand or limit it on a case-by-case basis. When properly invoked, the doctrine can limit private property rights while avoiding claims of unconstitutional takings. Unlike statutes, the doctrine has a quasi-constitutional nature. The legislature may extinguish the doctrine, but only in limited, explicitly-stated circumstances, and only for other public purposes.

The public trust doctrine arises out of the universally recognized need to protect public access to and use of such unique resources as navigable waters, beds, and adjacent lands. This public need is met through recognition of a property right, akin to an easement, that is owned by the state and subject to state control for the benefit of the public interest in navigation, commerce, environmental quality, and recreation. If the state wishes to control the use of this easement, including use by either the private owner or by the public, the state is merely controlling a right that it already owns. It is not regulating private property. The exercise of these state management or ownership rights do not therefore raise “takings” questions under the federal or state constitution because no regulation of private property is involved.

2. The law has long recognized public rights in waterways under several theories in addition to the public trust doctrine. For example, the federal and state navigation servitudes also further the public interest in navigation, often to the detriment of private property interests. See infra notes 172-76 and accompanying text. The Washington Supreme Court has also protected public rights on non-navigable waters. In Bach v. Sarich, 74 Wash. 2d 575, 445 P.2d 648 (1968), the court held that riparians have the right to prohibit non-riparian (i.e. non-water dependent) fills or constructions on lakes. State and local governments may also regulate development on such waters through their police power. Id. at 580, 445 P.2d at 652. In In re Martha Lake Water Co., 152 Wash. 53, 57, 277 P. 382, 383 (1929), the court held that appropriations from lakes that lower lake levels can unreasonably interfere with riparian rights.

3. A distinction should be made here. This Article considers three kinds of ownership: 1) where the state has title to the beds of navigable waters or other land subject to the public trust easement; 2) where title to the land has been conveyed into private ownership, but the land is still subject to the public trust easement; and 3) where the state does not own a public trust easement on privately owned land. With regard to (1) and (2) the state does not regulate the use of these property interests under the police power, rather it manages these interests as an owner on behalf of the public.

Some early cases and statutes assumed the states owned the fish and waters and could therefore regulate fishing and the allocation and use of waters. Current jurisprudence rejects the ownership concept for wild fish and waters in lakes and streams, saying that these resources are unowned. The current trend is to hold that the state power to regulate fisheries and water allocation is based on retained sovereign state police power. See Hughes v. Oklahoma, 441 U.S. 322 (1979). States need not own waterbeds, waters, or fish, in order to exercise regulatory authority.

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This Article considers several aspects of the public trust doctrine. First, the public trust is a state law doctrine, and its geographical scope and the interests it protects vary from state to state. Second, the doctrine is a product of judicial decisionmaking; it was initially recognized in the courts of the United States and England as an incident of sovereignty and is explained and implemented in these courts. The courts continue to determine its scope and usage. A member of the public has legal standing to bring suit to protect public trust resources. The suit can be brought against a private landowner who threatens to interfere with or destroy public trust resources, or against a state agency where it fails to protect public trust interests in the management of state-owned land.

Third, the public trust is a true common law doctrine—it is flexible, and courts enlarge and diminish it according to changing public needs on the one hand, and legitimate private expectations on the other. The doctrine defines both the public interest in private property and the uses that can be made of such property consistent with the doctrine. It also determines the policies that control management of publicly owned lands. In sum, the public trust doctrine defines the intersection of private ownership and public trust rights, as well as the intersection of public ownership and public trust duties.

Many of the interests protected by the public trust doctrine can also be protected by state exercise of its regulatory power. Why then do we need the public trust doctrine? Or, to put it another way, what are the significant differences between reliance on the doctrine and reliance on the regulatory power of the state?

The public trust doctrine is a judicial doctrine with ancient common law roots. History tells us that the interests protected by this doctrine are so important that their protection cannot be entrusted entirely to unfettered control by state legislatures. In using the public trust doctrine, courts review legislation almost as if they were measuring that

6. Marks v. Whitney, 491 P.2d 374, 381 (Cal. 1971); Wilbour, 77 Wash. 2d at 308-09, 462 P.2d at 234.
legislation against constitutional protections.\(^9\) In fact, the doctrine's character lies somewhere between an ordinary rule of law and a constitutional requirement. It is more powerful than the ordinary rule of law, but not as powerful as a constitutional clause that more readily justifies striking down inconsistent legislation. It might be labelled a quasi-constitutional doctrine.

Police power regulation is a product of the legislative process. This process can be slow, unwieldy, and costly, and in the meantime permanent damage may be done to public trust interests. Once navigable waters have been filled, or buildings constructed, they are seldom removed. The loss of open space, wetlands, navigable capacity, and fish and wildlife is often permanent. Also, if legislation is passed, it may provide only partial protection for the interests involved, contain loopholes, and become out-of-date. Enforcement may be spotty or inadequate. The public trust doctrine is premised on the belief that public trust interests are so profoundly important that they justify judicial review of legislation adversely impacting them, involving both the courts and the legislature in coastal management.

Another important feature of the doctrine is that it can significantly reduce takings claims by owners of tidelands and shorelands. The public trust doctrine initially applied to all state-owned beds of navigable rivers and tidelands when Washington State entered the Union in 1889. Subsequently, large portions of those lands were conveyed into private ownership. But the public trust, like a covenant or easement, continued to burden that property, even though the new owners received no express notice of the public trust burden. As a result, private land owners cannot claim a right to do anything that is inconsistent with the trust. Therefore, successful reliance on the public trust doctrine means that the takings issue is significantly diminished, if not avoided altogether.

**B. Scope of the Study**

Part II begins with a history of the development of the public trust doctrine. Roman jurists first elucidated the doctrine, and it entered America's legal system by way of English common law. Next, part II traces the chronological development of the public trust doctrine in Washington. The state constitution contains several articles that

\(^9\) For example, the Washington Supreme Court wrote in Caminiti v. Boyle, 107 Wash. 2d 662, 666, 732 P.2d 989, 992 (1987), cert. denied, 484 U.S. 1008 (1988): “The legislature has never had the authority, however, to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands.” Thus, the doctrine, like a constitutional principle, constrains the power of the legislature.
embody public trust principles. Washington's courts have also developed the doctrine. In early cases the Washington Supreme Court recognized certain public rights, such as the right of navigation, but did not explicitly label these decisions as public trust cases. Finally, in two 1987 cases the court explicitly identified the doctrine as part of Washington law.

Part II continues with an examination of several state statutes that express the values of the doctrine. The harbor area system, the Shoreline Conservation Act, the Shoreline Management Act, and the Water Resources Act each regulate either public or private lands and waters subject to the public trust. The Aquatic Lands Act has set forth proprietary goals and standards for management of state lands. Part II identifies congruities found between the regulatory goals of these statutes and the values expressed by the public trust doctrine. The interrelationship of the public trust doctrine with the regulatory power expressed in these statutes is a central issue in this part and the Article as a whole. This part also analyzes the obligations placed on state government for management of state-owned lands that are subject to the public trust doctrine.

Part III examines the practical elements of the doctrine, including its geographical scope and the variety of interests it protects. The doctrine is not extensively developed in Washington, but the state supreme court has indicated it has not decided the entire scope of the doctrine. This Article therefore examines decisions from other state courts around the country that address coastal management issues, and that may provide guidance to Washington courts and practitioners in predicting the future scope of the doctrine. Part III also sets forth the ways in which the public trust can be defeated, both by state and private action, and describes the various remedies available for conduct inconsistent with the public trust.

Part IV discusses the relation between the public trust doctrine and the takings clauses of the federal and state constitutions. Part V

10. WASH. CONST. art. XV; id. art. XVII, § 1.
11. See infra part II.B.2.
15. Id. § 90.58 (West Supp. 1991).
16. Id. § 90.54.
17. Id. §§ 79.90–96 (West 1991).
addresses other legal issues, including standing and federal supremacy, that can affect the application of the doctrine.

II. HISTORY OF THE PUBLIC TRUST DOCTRINE

A. Origins and Early History

The public trust doctrine originated from the widespread public practice, since ancient times, of using navigable waters as public highways for navigation, commerce, and fisheries. The earliest articulation of the doctrine is sometimes attributed to the Institutes of Justinian of 533 A.D., which provided that by the law of nature, things that are common to humankind are the air, running water, the sea, and the seashores.

In England the doctrine was well established by the time of the Magna Charta. Leading English court decisions recognized that the Crown held the beds of navigable waters in trust for the people for navigation, commerce, and fisheries. Even the Crown could not destroy this trust.

In the United States cases as early as Arnold v. Mundy, decided in 1821, recognized and upheld the doctrine. In Mundy the New Jersey court declared the trust as we know it today. The dispute concerned an oyster bed that was part of a pre-statehood conveyance from the King of England. Conveyances eventually led to Arnold’s ownership and use as a private oyster bed. This exclusive use was challenged by Mundy, who insisted the public had a right to take oysters in this area as it had done for many years. The court ruled in favor of Mundy, giving the first clear formulation of the doctrine. It said that under the
natural law, civil law, and common law, the navigable rivers in which
the tide ebbs and flows, and the beds and waters of the seacoast are
held by the sovereign in trust for the people.26

The court said that the states, being sovereign governments, had
succeeded to the English trust which was held by the Crown and that
a grant purporting to divest the citizens of these common rights was
void.27 The people, through their government, may regulate public
trust resources by building ports, basins, docks and wharves,
reclaiming land, building dams, locks and bridges, and improving fish-
ing places, but the sovereign power itself “cannot . . . make a direct
and absolute grant of the waters of the state, divesting all the citizens
of their common right.”28

Seventy years later, in Illinois Central Railroad v. Illinois,29 the U.S.
Supreme Court built upon the principles articulated in Mundy and
used the public trust doctrine to invalidate one of the more outrageous
land giveaways of the 19th century. In 1869 the Illinois legislature
deeded the bed of Lake Michigan along the entire Chicago waterfront
to the Illinois Central Railroad. In 1873 the legislature, suffering
pangs of conscience, repealed the grant. Ten years later the state sued
in state court to establish the invalidity of the railroad’s continued
assertion of ownership over the harbor bed.30 The Supreme Court
held the revocation valid, saying that a grant of all the lands under
navigable waters of a state was, “if not absolutely void on its face,
[then] subject to revocation”: the state cannot “abdicate its trust over
property in which the whole people are interested . . . [any more than
it can] . . . abdicate its police powers.”31

Mundy and Illinois Central establish the public trust doctrine as
part of the common law adopted by the various states. These cases
hold that legislatures will be held to a high standard, a trust-like stan-
dard, with regard to public trust resources. The above-quoted lan-
guage of the two opinions suggests that the doctrine may even limit
legislative power.32 At the least, the doctrine establishes a potent rule
of construction, requiring that legislatures conveying away or chang-
ing the status of public trust resources must do so explicitly.

26. Id. at 368.
27. Id. at 369.
28. Id. at 369–70.
29. 146 U.S. 387 (1892).
30. The company removed the case to federal court, raising the issue whether the repeal
offended the Contracts Clause and the Fourteenth Amendment Due Process Clause of the
Federal Constitution. Id. at 433.
31. Id. at 453–54.
32. See supra notes 27–31 and accompanying text.
In England the doctrine was applied primarily to the bed of the sea and to tidelands. The United States, in contrast, has large navigable rivers, such as the Mississippi and the Columbia, flowing inland for hundreds of miles. Not surprisingly, the U.S. courts extended the doctrine to cover navigable fresh waters. Thus, in this country, the doctrine covers all waters navigable in fact, whether fresh or salt.

Under the equal footing doctrine the title to the beds of all navigable waters, fresh or salt, automatically went to each state at statehood. As the original thirteen states held title to the beds of navigable waters, so must each new state hold such title if they are to be on an equal footing with the original thirteen. Accordingly, analysis of navigability-for-title determines what lands left the federal domain and passed to the states at statehood. Because state law cannot control the disposition of the federal domain, the test of navigability-for-title is necessarily a federal test, and is determined as of the date the state entered the union. The subsequent disposition of these lands is a matter solely of state law. Prior to statehood the federal government held title to these lands, which were chiefly valuable for "commerce, navigation, and fisheries... in trust for the future states."


35. The equal footing doctrine arises by implication from the United States Constitution, and provides that new states must be admitted on an equal footing with the original thirteen states. New states therefore have the same governing powers, including the power of governance over federal lands, as the original states. New states also acquire, as of the instant of statehood, the title to the beds of navigable rivers and lakes, because the original thirteen states held such titles. *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367 (1842).


37. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); *Utah*, 283 U.S. at 75. The Court described the test for navigability-for-title at the time of statehood in *Holt State Bank*:

The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce. 270 U.S. at 56 (citations omitted).

eral government could convey these beds away only in case of some “international duty or public exigency.”

At a minimum the public trust doctrine protects the public interest in the beds of navigable waters, up to mean high tide on the ocean, and mean high water mark on fresh waters. No use can be made of the beds of such waters without meeting conditions imposed by the doctrine. Beyond this, other states have interpreted the doctrine as applying to waters that are only navigable for recreational uses, even though the beds are privately owned. In other words, in some courts the public trust doctrine is not limited to those waters and beds which the state owns, or once owned, under the equal footing doctrine.

Federal courts have had little occasion to speak about the parameters of the doctrine, with the exception of Illinois Central Railroad v. Illinois and recently, Phillips Petroleum Co. v. Mississippi. The task of defining the scope of the doctrine has been left largely to state courts. California and Massachusetts have developed the doctrine more extensively than most states, with Wisconsin, Minnesota, New Jersey, Michigan, and a few other states not far behind. The doctrine has not been totally rejected in any state, although its application varies state by state and its application to particular facts has been denied.

Courts around the country have employed the public trust doctrine in literally hundreds of cases in recent years. Several trends are apparent. First, courts are applying the doctrine in new geographical contexts in order to reach and promote new interests. In particular, courts are finding and preserving public access to coast and shorelines. A second important trend is the use of the doctrine as a method of environmental protection.

39. Id. at 50. These duties include performance of international obligations, such as improvements to facilitate commerce with foreign nations or among the states. Id. at 48.
40. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988). Most states extend public trust rights from the seaward limit of the territorial sea to the mean high tide line. A handful of states, however, only recognize full public trust protection seaward of the low tide line. These states include Delaware, Maine, Massachusetts, Pennsylvania, and Virginia. See David C. Slade et al., Putting the Public Trust Doctrine to Work 59 n.22 (1990).
41. See infra notes 211–12 and accompanying text.
42. 146 U.S. 387 (1892).
44. See generally infra part III.
46. See, e.g., Slade et al., supra note 40, at 25.
48. See, e.g., infra part III.C.1.
Finally, coastal resource managers and state agencies are beginning to incorporate the public trust doctrine into the administrative decision-making process. State officials must identify both known and potential parameters of the doctrine, and determine the extent to which current regulatory decisions should be scrutinized for adherence to public trust values. Officials must also determine whether any past decisions are subject to public trust review as well.\footnote{See, e.g., National Audubon Soc'y v. Superior Court, 658 P.2d 709, 728 (Cal.), cert. denied, 464 U.S. 977 (1983).}

B. Chronological Development of the Public Trust Doctrine in Washington Law

Washington courts have only recently explicitly addressed the public trust doctrine in state cases. Nonetheless, the public trust has existed in Washington since statehood, and burdens all public trust resources, including tidelands, shorelands, and beds of navigable waters, as well as the waters themselves. Certain uses of these resources are specially protected by the doctrine, including navigation, commercial fisheries, and “incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes.”\footnote{Orion Corp. v. State, 109 Wash. 2d 621, 641, 747 P.2d 1062, 1073 (1987) (quoting Wilbour v. Gallagher, 77 Wash. 2d 306, 316, 462 P.2d 232, 239 (1969), cert. denied, 400 U.S. 878 (1970)), cert. denied, 486 U.S. 1022 (1988).} Because the public trust doctrine is dynamic and may change with contemporary needs, the scope of the doctrine will probably expand in the future.\footnote{See infra part III for a detailed analysis of the current scope of the public trust doctrine.} This part traces the development and current status of the doctrine in Washington law, constitutional, judicial, and statutory.

I. Constitution

Prior to and at the time of statehood, tidelands and shorelands fronting harbor areas were areas of intensive economic development and interest. Following much lobbying and debate, the state constitutional convention approved three articles addressing ownership and management of the new state’s tidelands and shorelands.\footnote{Kenan R. Conte, The Disposition of Tidelands and Shorelands, Washington State Policy 1889-1982, at 10–20 (1982) (unpublished M.P.A. thesis, Evergreen State College).} Each of these articles has direct bearing on the scope of the state’s public trust powers and obligations.

First, the state constitution declares state ownership of the beds and shores of all navigable waters, except where a federal patent was per-
fected prior to statehood. Second, the constitution invalidated prior acts of the territorial legislature granting tidelands to railroad companies and establishing riparian rights. Finally, the constitution established harbor boundaries, and placed a restraint on disposition of beds underlying navigable waters outside of certain harbor lines. Article XV directed the legislature to provide for the appointment of a commission to draw harbor lines in the navigable waters that lie within or in front of the corporate limits of any city, or within one mile on either side. The state may not alienate any rights whatever in the waters beyond such harbor lines. Areas lying between harbor lines and the line of ordinary high water, within specified limits, are reserved for landings, wharves, streets, and other conveniences of navigation and commerce. The public policy expressed in these constitutional provisions is generally consistent with public trust principles: reserving complete state ownership in the beds and shores of navigable waters. The constitution did not, however, prohibit the sale of tidelands and shorelands. Instead, the state was permitted to dispose of first class tide and shorelands, which it did under statutory authorization.

53. WASH. CONST. art. XVII. See infra notes 253-59 and accompanying text for a discussion of pre-statehood grants.
54. WASH. CONST. art. XXVII, § 2.
55. Id. art. XV.
56. Id. art. XV, §§ 1, 2; see also Ralph W. Johnson & Eileen M. Coney, Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters, 54 WASH. L. REV. 275 (1978).
57. For further discussion of the interrelationship between the statutory harbor line system and the public trust doctrine, see infra part II.B.3.b.i.
58. The term "first class tidelands" means the shores of navigable tidal waters belonging to the state, lying within or in front of the corporate limits of any city, or within one mile thereof upon either side and between the line of ordinary high tide and the inner harbor line, and within two miles of the corporate limits on either side and between the line of ordinary high tide and the line of extreme low tide. WASH. REV. CODE ANN. § 79.90.030 (West 1991).
59. "First class shorelands" means the shores of a navigable lake or river belonging to the state, not subject to tidal flow, lying between the line of ordinary high water and the line of navigability, or the inner harbor line where established and within or in front of the corporate limits of any city or within two miles thereof upon either side. Id. § 79.90.040.
Public Trust Doctrine

until 1971.60 Second class tide61 and shorelands62 continue to be eligible for sale only to public entities.63

2. Cases

Early Washington cases, although not relying explicitly on the public trust doctrine, recognized legally protectable public interests in the state’s navigable waters and underlying beds.64 In Hill v. Newell,65 the court explicitly approved the reasoning of the leading California public trust case.66 In State v. Sturtevant,67 the court acknowledged that the state held the right of navigation “in trust for the whole people” of this state.68 The court did not expressly use the term “public trust” in Wilbour v. Gallagher,69 but it gave strong protection to the public right of navigation, one of the interests traditionally protected under the public trust doctrine. Explicit judicial recognition of the public trust doctrine in Washington occurred in 1987, in Caminiti v. Boyle.70

Principles and policies of the doctrine are evident in Washington state law, however, going back as far as 1891. One line of early cases examined the nature of the state’s ownership of tidelands and the beds of navigable waters. The Washington Supreme Court concluded in a series of decisions over several decades that the state owned these lands in fee, and that entry into statehood extinguished all riparian rights of adjacent landowners to navigable waters.71 This proprietary ownership, as contrasted with sovereign trusteeship, enabled the state

61. “Second class tidelands” means the shores of navigable tidal waters belonging to the state, lying outside of and more than two miles from the corporate limits of any city, and between the line of ordinary high tide and the line of extreme low tide. WASH. REV. CODE ANN. § 79.90.035 (West 1991).
62. “Second class shorelands” means the shores of a navigable lake or river belonging to the state, not subject to tidal flow, lying between the line of ordinary high water and the line of navigability, and more than two miles from the corporate limits of any city. Id. § 79.90.045.
63. Id. § 79.94.150(2). For an account of the controversy surrounding the enactment of this statute, see Conte, supra note 52, at 170–84.
64. Madson v. Spokane Valley Land & Water Co., 40 Wash. 414, 419, 82 P. 718, 719 (1905); Dawson v. McMillan, 34 Wash. 269, 275, 75 P. 807, 809 (1904).
65. 86 Wash. 227, 149 P. 951 (1915).
67. 76 Wash. 158, 135 P. 1035 (1913), aff’d on reh’g, 86 Wash. 1, 149 P. 33 (1915).
68. Id. at 165, 135 P. at 1037.
70. 107 Wash. 2d 662, 732 P.2d 989 (1987), cert. denied, 484 U.S. 1008 (1988). For further discussion of Caminiti, see infra part III.D.
71. Eisenbach v. Hatfield, 2 Wash. 236, 249, 26 P. 539, 542 (1891).
to dispose of tidelands, in fee, as provided by statute. But, the state conveyed only the bare legal title, leaving the public trust in place.

A parallel line of cases at this time examined both the nature of the state's disposition of tidelands and the remaining public interests in the lands and waters above them. In Eisenbach v. Hatfield, the court cited public interests in preservation of navigation and fishing as a limit on private ownership of submerged lands. New Whatcom v. Fairhaven Land Co. analogized the state's ownership of lands to that exercised by the king of England, and described the public's interest as "an easement in [all navigable waters] for the purposes of travel." Sequim Bay Canning Co. v. Bugge acknowledged a public right to navigable waters and fisheries, but denied a public right of claming on privately leased lands between the high and low water marks.

In State v. Sturtevant the Washington Supreme Court commented that the state was charged only with preserving the public interest in navigation following grant of shorelands into private ownership. On rehearing, the court left open the question whether a public right to fisheries was reserved out of tideland grants. Concurrently, the court decided two cases explicitly discussing the public interests remaining in tidelands and an abandoned navigable riverbed conveyed into private ownership. The court found all public interests to have been extinguished.

Two important points emerge from these cases. First, the Washington legislature early followed a strong public policy encouraging private ownership of tidelands and concomitant development and industrial expansion. The Washington Supreme Court implicitly approved this policy in its decisions. Second, although the court did not use the term "public trust doctrine" when analyzing these cases, it did invoke the leading public trust doctrine cases of the day, including

73. Eisenbach, 2 Wash. at 253, 26 P. at 544.
75. 49 Wash. 127, 94 P. 922 (1908).
76. For a discussion of the current state of this issue, see infra part III.C.2.a.
77. State v. Sturtevant, 76 Wash. 158, 165, 135 P. 1035, 1037 (1913), aff'd on reh'g, 86 Wash. 1, 149 P. 33 (1915).
81. See e.g., Harris v. Hylebos Indus., Inc., 81 Wash. 2d 770, 787, 505 P.2d 457, 467 (1973); Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 89, 102 P. 1041, 1044 (1909).
Public Trust Doctrine

*Illinois Central*\(^{82}\) and *People ex rel. Webb v. California Fish Co.*,\(^{83}\) as authority for its analysis. The court did not, however, apply the presumption against destruction of public trust interests that is the hallmark of contemporary public trust cases. Instead, particularly with *Palmer v. Peterson*\(^{84}\) and *Hill v. Newell*,\(^{85}\) the court engaged in perfunctory review of the statutes enabling the grants at issue, and their negative impact on public trust interests.\(^{86}\)

*Wilbour v. Gallagher*\(^{87}\) marks the modern genesis of public trust doctrine decisions in Washington. The court found that a shoreland owner's right to develop intermittently submerged property was circumscribed by the public interest in navigation at high water. The thirteenth footnote, where the court encouraged a more systematic method of permitting fill, is particularly significant.\(^{88}\) This footnote is generally thought to have inspired the Shoreline Management Act of 1971.\(^{89}\)

Nevertheless, doctrinal development of the public trust remained inconsistent even after *Wilbour*. The court in *Harris v. Hylebos Industries, Inc.*\(^{90}\) found that the "legislative intent regarding the use of tide-

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84. 56 Wash. 74, 105 P. 179 (1909).
85. 86 Wash. 227, 149 P. 951 (1915).
86. This problem continues. Recently, Division I of the Washington State Court of Appeals avoided its review obligations by concluding, without significant analysis, that public trust interests were extinguished in certain tidelands because the tidelands were granted into private hands prior to statehood. See *Reed v. State*, No. 25106-6-I (Wash. Ct. App. Div. One May 21, 1990), *petition for review denied*, 115 Wash. 2d 1028, 803 P.2d 324 (1990).
88. *Id.* at 316 n.13, 462 P.2d at 239 n.13. The note states:

> We are concerned at the absence of any representation in this action by the Town or County of Chelan, or of the State of Washington, all of whom would seem to have some interest and concern in what, if any, and where, if at all, fills and structures are to be permitted (and under what conditions) between the upper and lower levels of Lake Chelan. There undoubtedly are places on the shore of the lake where developments, such as those of the defendants, would be desirable and appropriate. This presents a problem for the interested public authorities and perhaps could be solved by the establishment of harbor lines in certain areas within which fills could be made, together with carefully planned zoning by appropriate authorities to preserve for the people of this state the lake's navigational and recreational possibilities. Otherwise there exists a new type of privately owned shorelands of little value except as a place to pitch a tent when the lands are not submerged.

*Id.*

90. 81 Wash. 2d 770, 505 P.2d 457 (1973).
lands in harbors of cities is manifestly that . . . such harbors . . . shall consist of commercial waterways, and that the filling and reclaiming of the tidelands . . . shall be encouraged." The court did note that the recently enacted Shoreline Act was not argued in the case as evidence of a legislative policy reversal.

More recently, the Washington Supreme Court has explicitly addressed the role of the public trust doctrine in Washington's coastal management in two cases. In *Caminiti v. Boyle*, the court found that the public trust doctrine had always existed in Washington law. The case involved interpretation of a statute that granted a revocable license to waterside owners to build private recreational docks on state-owned tidelands and shorelands. The court, while acknowledging the power and extent of the public trust doctrine, found the statute not inconsistent with public trust interests in navigable waters.

The court in *Orion Corp. v. State* made affirmative use of the public trust doctrine in curtailing development of privately owned land where the fills and housing would conflict with public interests in navigable waters. While the state clearly had the power to dispose of tidelands and shorelands, that disposition was not unqualified. Rather, it was subject to the paramount public right of navigation and fisheries. *Orion* is particularly noteworthy for its analysis of a constitutional takings claim. The tidelands owner argued that its property had been taken without just compensation as required by the state and federal constitutions. The court found that the owner had no right to make use of his property in a way that would impair public trust rights. "Since a 'property right must exist before it can be taken,'" the court concluded that no taking had occurred by preventing dredging or filling. The court, however, remanded the case to the trial court to

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91. *Id.* at 786, 505 P.2d at 466.
92. *Id.* at n.11.
95. WASH. REV. CODE ANN. § 79.90.105 (West 1991). Abutting residential owners may maintain docks without charge if such docks are used exclusively for private recreational purposes and the area is not subject to prior rights. Permission is subject to local regulation and may be revoked by the state upon a finding of public necessity. *Id.*
96. *Caminiti*, 107 Wash. 2d at 674, 732 P.2d at 997.
consider whether there were any profitable uses that would have been consistent with the public's rights.\textsuperscript{100}

In \textit{Draper Machine Works v. Department of Natural Resources},\textsuperscript{101} the court touched briefly on the public trust doctrine again. \textit{Draper} involved a rental dispute between the Department of Natural Resources and a marina owner. The owner argued that the Department had no authority to rent submerged lands because they are held by the state in its sovereign capacity, or in trust for the people.\textsuperscript{102} A private marina trying to avoid rental obligations was obviously not a sympathetic proponent of the public trust doctrine. The court only discussed this claim in a perfunctory manner. Rather than carefully scrutinizing the public trust issue, the court largely deferred to the legislature.\textsuperscript{103}

These cases indicate that the public trust doctrine has been adopted into Washington law, but has not yet been fully delineated. They do, however, suggest both the analytic foundations and the direction for future development of the doctrine.

3. \textit{Legislation}

To what extent do legislative enactments, addressing coastal resource management, embody and even supplant the public trust doctrine? The public trust doctrine represents two distinct concepts. First, the judicial function is expanded, from its usual rational basis review, to a more rigorous scrutiny of legislative and administrative acts. Second, when engaged in this review, the courts compare challenged laws or governmental actions with specific values, i.e., public interests in navigation, commerce, fisheries, and other uses of trust resources.

\begin{itemize}
  \item \textit{a. Judicial Review Function}
  \end{itemize}

Usually the judiciary will defer to legislative judgment when reviewing statutes. If a court can find a rational basis for a challenged statute, it will decline to substitute its own judgment for that of the

\begin{footnotesize}
\begin{enumerate}
  \item Id. at 662, 747 P.2d at 1084–85.
  \item Id.
  \item Id. at 318–19, 815 P.2d at 777–78. For example, the court wrote: “respondent’s argument relating to ‘reservation’ and sovereign and proprietary capacities only obscures the real point of the inquiry: Whether the Legislature intended in RCW 79.93.040 to allow DNR to collect rent for the use of certain portions of waterways.” Id. at 318, 815 P.2d at 777.
\end{enumerate}
\end{footnotesize}

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The courts make an exception to this deferential review, however, when certain constitutional issues are implicated. Courts will, for example, strictly scrutinize statutes that implicate certain fundamental rights or affect equal protection.

The public trust doctrine invites another form of heightened judicial scrutiny, not necessarily based on constitutional foundations but on historical common law traditions and the unique value and importance of navigable waters and coastlines. Thus, the courts have used the public trust doctrine to carefully examine statutes for consistency with public trust principles. Rather than deferring solely to legislative judgment about coastal management, the doctrine enables courts to compare that judgment with public trust values.

Presumably, a statute cannot even preclude the traditional heightened scrutiny that the public trust doctrine requires. Because the public trust doctrine is a judicially created law that may be invoked by judicial notice, the legislature cannot divest the courts of their responsibility to consider the public trust doctrine. Neither can the judiciary relinquish its public trust doctrine obligations. In other words, while the public trust doctrine may not direct the outcome of any given case, it does require courts to take a stronger than usual look at legislation that may negatively impact public trust interests.


105. Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) (invalidating statute limiting school desegregation as a violation of equal protection); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (invalidating housing ordinance that in effect prohibited some family members from living together in the same dwelling unit); Macias v. Department of Labor & Indus., 100 Wash. 2d 263, 668 P.2d 1278 (1983) (invalidating statute requiring seasonal workers to earn $150 from each employer to qualify for worker's compensation as a violation of equal protection, because statute penalized, in effect, the employee's fundamental right to travel).


107. See generally supra part II.A.

b. Statutes

i. Harbor Line System

The constitutionally mandated harbor line system gave rise to the first state statutes addressing public trust interests. The harbor line system provides for state ownership and management of all lands lying outside of established harbor lines. The proprietary interest reflected in the constitutional articles providing for the system, and the implementing statutes, clearly embody the public trust interest in these lands. The geographical scope of the public trust doctrine exceeds that of the harbor line system. As Johnson & Cooney noted:

The existence of the [public trust] doctrine in Washington is important because . . . harbor lines have been established in only a small percentage of the state's waters, and even where harbor lines do exist, they do not perfectly reflect contemporary public values in navigation and in the beds of navigable waters. The public trust doctrine may be available to protect these values in a proper case.

There is some correlation between the purposes of the harbor line system and the public trust doctrine. The harbor line system serves to limit the uses of harbor areas to "landings, wharves, streets, and other conveniences of navigation and commerce." These purposes mandate public use of the harbor area and in fact embody historic public trust uses.

Nothing in the Washington harbor line system . . . should be taken to negate the public trust doctrine in this state . . . [T]he harbor line system has reduced the need for reliance on the public trust doctrine and has, at least until recently, given adequate protection to many of the same public interests which otherwise would have received public trust doctrine protection.

While the harbor line system seeks to reserve and retain public control and access over important commercial waterfronts, it is not clear how other public trust interests, such as fisheries and recreation, would fare in conflict with the harbor line system. State policy during the first eight decades of statehood clearly favored disposition of tidelands and shorelands into private ownership, a policy contemplated

109. WASH. CONST. art. XV, § 1.
110. Id. art. XVII. See supra part II.B.1.
111. WASH. REV. CODE ANN. § 79.90 (West 1991).
112. Johnson & Cooney, supra note 56, at 287.
113. WASH. CONST. art XV, § 1.
115. See Conte, supra note 52, at x, 25–66.
and advanced by the harbor line system. Several statutes delineated the functions of the Harbor Line Commission and established programs for the sale of tidelands and leases of navigable water beds. In 1971, the state legislature halted further sales of tidelands and shorelands into private ownership. By that time, however, approximately sixty percent of all tidelands and thirty percent of all shorelands were, and remain, privately owned. Importantly, this private ownership does not extinguish public trust interests.

ii. Shoreline Management Act

In 1971, the state legislature enacted the Shoreline Management Act. The Shoreline Act establishes a management scheme and ethic for local comprehensive planning and land use control for all shorelines of the state. Its coverage extends from extreme low tide to two hundred feet inland from the high water mark. Wetlands are also covered. It excludes all streams and rivers with flows less than twenty cubic feet per second and all lakes less than twenty acres. Many of these waters and underlying lands are public trust resources. Whether the doctrine extends to cover all of the lands and waters subject to the jurisdiction of the Shoreline Act is a question yet unanswered by the Washington courts.

The Shoreline Act reflects a legislative intent to protect public trust resources. The statute designs a land use program that governs both state-owned and private lands that fall under its jurisdiction. The Act emphasizes preservation of these waters for public access and water-related or water-dependent uses, and promotes environmental and aesthetic values.

118. Conte, supra note 52, at x.
120. The state retains power of approval over local master programs to insure consistency with the policies of the Act. WASH. REV. CODE ANN. § 90.58.090 (West Supp. 1991).
121. Id. § 90.58.030(2)(a)(f).
122. Id. § 90.58.030(2)(f).
123. Id. §§ 90.58.030(2)(d)(ii)–(iii).
124. See infra notes 217–21 and accompanying text.
125. This authority may be contrasted with that of other statutes that provide authority only over state-owned lands. See, e.g., WASH. REV. CODE ANN. § 79.90 (West 1991) (Aquatic Lands Act).
126. Id. § 90.58.020 (West Supp. 1991).
The Shoreline Act's goals and functions are far broader than those of the public trust doctrine. The Act establishes a process for comprehensive planning to guide the future of Washington shorelines, balancing development and preservation of public rights. Certain public trust values are reflected in the Act's legislative findings, use preferences, and guidelines for master program contents. The Orion court observed that the Shoreline Act reflects public trust principles in its underlying policy of "protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto." While the Shoreline Act represents an exercise of state regulatory power, the public trust doctrine supplements execution of the Act. When regulatory power is applied to trust resources, limiting them to specific trust uses, no takings issue arises. Private land is subject to the trust burden, which predates virtually all private ownership. A takings issue can arise, however, if regulations exceed public trust protections. For example, the Orion court found that the public trust easement on the tidelands at issue precluded their fill and residential development. The tidelands could, however, be used for aquacultural activities under the public trust burden, but not under the Shoreline Act. If aquaculture were a profitable use, the court concluded that Orion Corporation could claim a regulatory taking of its tidelands equal to their value as an aquaculture site, but not for other development. Thus, the public trust doctrine effectively shields the state's regulatory actions from takings claims, where those actions mirror the scope of the doctrine.

Although the Orion court clearly distinguished between the public trust doctrine and the Shoreline Act, earlier cases indicate the doctrine was nearly merged into the Act. The court in Caminiti noted that "the requirements of the 'public trust doctrine' are fully met by the legislatively drawn controls imposed by the Shoreline Management Act of 1971." Previously, the court observed that "any common-

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127. Id.
128. Id. §§ 90.58.020, .090.
130. Id. at 660–62, 747 P.2d at 1083–85. The court remanded for factfinding on this issue.
law public benefit doctrine this state may have had prior to 1971 has been superseded and the SMA [Shoreline Management Act] is the present declaration of that doctrine.”132 In Orion, however, the public trust doctrine made a strong reappearance as something distinct from the Shoreline Act. Thus, while the Shoreline Act may reflect elements and policies of the public trust doctrine, it does not supersede it.

iii. Waters Resources Act

The Water Resources Act of 1971133 (WRA) promulgates state policy governing the “utilization and management of the waters of the state,” providing guidelines and priorities for allocation and use of primarily freshwater bodies, especially rivers. This statute represents an intersection between the prior appropriation134 and public trust doctrines, and is explicitly binding on local governments and agencies.135 While the statute does not address navigation interests, it does cite environmental quality, particularly with respect to wildlife, as a priority in water allocation.136 The statute also implies a requirement of base flows to support navigation.137

The WRA covers all waters contained in lakes and streams in Washington, and groundwater resources, most of which are public trust resources.138 Waters in navigable lakes and streams are clearly protected by the public trust doctrine.139 Waters that are only recreationally navigable may also be subject to the doctrine.140 Underground waters are not protected by the doctrine, unless their use affects the quantity or quality of surface water resources.141

authoritative in Portage Bay is, arguably, in conflict with public access goals of the public trust doctrine, even though the Shoreline Act cites residential preference as facilitating public access. For a discussion of the court’s deference to the legislature in Draper Machine Works, Inc. v. Department of Natural Resources, 117 Wash. 2d 306, 318, 815 P.2d 770, 777 (1991), see supra notes 101–03 and accompanying text.

132. Portage Bay, 92 Wash. 2d at 4, 593 P.2d at 153 (citation omitted).
134. The prior appropriation system is a common law system of water allocation based on the principle of first in time, first in right. See Avery v. Johnson, 59 Wash. 332, 109 P. 1028 (1910).
135. WASH. REV. CODE ANN. § 90.54.090.
136. Id. § 90.54.020(3).
137. Id. § 90.54.020(3)(a).
138. Id. § 90.54.020 (providing management and guidelines for “the waters of the state”).
139. See infra part III.B.1.
140. See infra part III.B.2.e.
141. Appropriation of water from sources not traditionally within the scope of the public trust doctrine can violate the doctrine if the appropriation impairs trust resources. See, e.g., National Audubon Soc’y v. Superior Court, 658 P.2d 709, 721 (Cal.) (applying public trust doctrine to non-navigable tributaries where diversion had harmed public trust resources), cert. denied, 464 U.S. 977 (1983).
Public Trust Doctrine

The WRA's function is to provide policy guidance on the use of state waters, such that they are "protected and fully utilized for the greatest benefit to the people of the state."142 A number of the Act's administrative guidelines are clearly congruent with public trust values, although important exemptions exist. For example, the Act seeks to protect water quality and explicitly requires consideration of base flows in lakes and streams in order to protect environmental quality and fish and wildlife resources.143 It also, however, provides for a variety of other uses, private and public, and exempts existing water rights from the policies of the Act.144 Public trust values are in fact only a few of the many interests to be considered.

The Water Code of 1917145 is the basic water appropriation code in Washington, and created the process for establishing priorities among various diverters. The Water Code is potentially inconsistent with the public trust doctrine in that it purports to issue consumptive water use rights that sometimes damage and destroy public trust interests by not requiring minimum stream flow. The public trust doctrine, or the interests protected by that doctrine, were not discussed or considered when the code was adopted. Because no explicit intent to abolish the public trust doctrine is evident in the 1917 Code, or permits issued thereunder, the public trust doctrine should still be applicable to prior appropriation water rights.146

iv. State Environmental Policy Act

The State Environmental Policy Act of 1971 (SEPA)147 was the third in the trilogy of environmental statutes enacted in that year. SEPA is designed to achieve a balance between resource utilization and environmental protection through evaluation of state and local governmental activities. This evaluation provides a comprehensive analysis of development activities and their impacts in light of potential environmental impacts. The use of and impacts on public trust resources are only one element to be considered in environmental evaluations under SEPA. Nevertheless, the statute substantively guarantees aesthetic and environmental quality to the state's residents. These

143. Id. § 90.54.120(2).
144. Id. § 90.54.900.
146. For a discussion of the retroactive effect of the public trust doctrine on water diversion permits in California, see infra notes 186–88 and accompanying text.
rights are congruent with those protected by the public trust doctrine, and public trust jurisprudence may support claims to environmental quality of trust resources made through the SEPA process.

v. Aquatic Lands Act

In 1982, the legislature enacted the Aquatic Lands Act (ALA), consolidating a number of separate statutes relating to the lease and sale of state-owned tidelands and shorelands. The ALA covers a significant portion of public trust lands. Aquatic lands are defined as "all state-owned tidelands, shorelands, harbor areas, and the beds of navigable waters." The scope of the common law public trust doctrine differs in that it also embraces privately-owned aquatic lands, and may extend further inland than the line of high water and high tide.

The ALA is a prime example of legislation providing for management of state-owned public trust resources in a manner consistent with the doctrine. The ALA recites the great value of aquatic lands and requires that they be managed to benefit the public. The Act provides guidelines prioritizing use of aquatic lands: public use and access, water-dependent use, environmental protection, and renewable resource use are the most important public benefits to be promoted. State-wide interests are preferred over local interests. Non-water-dependent uses are permitted only under exceptional circumstances, where compatible with water-dependent uses. When evaluating tideland lease proposals, the managing agency, the state Department of Natural Resources, is instructed to consider the natural values of the land as wildlife habitat, natural area preserve, representative ecosystem, or spawning area, and it may withhold leasing where it finds the lands have significant natural values.

A specific provision of the ALA was at issue in Caminiti v. Boyle, the first case in which the Washington Supreme Court explicitly acknowledged the public trust doctrine as a part of Washington law. The petitioners challenged a state statute that allows owners of residential property abutting state-owned tidelands and shorelands to install and maintain private recreational docks on such lands without

149. WASH. REV. CODE ANN. § 79.90.010 (West 1991).
150. See infra part III.B.2.
151. WASH. REV. CODE ANN. § 79.90.450.
152. Id. § 79.90.455.
153. Id. § 79.90.460(3).
payment to the state. The court found a harmony between the challenged statute and the Shoreline Act, which it cited as a legislative manifestation of the public trust doctrine. The court upheld the ALA provision at issue, finding it was not in conflict with public trust values.

vi. **Seashore Conservation Act**

The most recent legislative protection for public trust resources was enacted in the 1988 amendments to the Seashore Conservation Act (SCA). Originally enacted in 1967, the SCA explicitly dedicates Washington state ocean beaches to public recreation. The function of the statute is to preserve this public trust resource for public use in perpetuity. The SCA declares that “[t]he ocean beaches within the Seashore Conservation Area are . . . declared a public highway and shall remain forever open to the use of the public.” The legislature based this policy on the increasing public pressure for recreational use of the ocean beaches, including swimming, surfing, hiking, hunting, fishing, clamming, and boating. General public recreational use is anticipated, but the statute also expresses some priorities. For example, most of the beaches shall be available only for pedestrians, not motor vehicles. Management of these lands is vested under the jurisdiction of the Washington State Parks and Recreation Commission. The Seashore Conservation Act expresses the policies of the public trust doctrine, and provides rules and a system of management for these important state lands for the public benefit.

C. **Summary**

The public trust doctrine has applied to all pertinent lands in Washington since statehood. Early cases referenced trust interests without explicitly calling them such. Recently, the Washington Supreme Court has explicitly recognized the doctrine. The state constitution also identifies and promotes the state’s interests in public trust

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156. In particular, the court noted that the priorities under the Shoreline Act include “‘single family residences . . . piers, and other improvements facilitating public access to shorelines of the state.’” Caminiti, 107 Wash. 2d at 671, 732 P.2d at 995 (emphasis by the court) (quoting WASH. REV. CODE ANN. § 90.58.020 (West Supp. 1991)).
160. Id. § 43.51.650.
161. Id. § 43.51.710.
resources, and provides a basis for legislative manifestations of the doctrine. Congruence between public trust values and several statutes governing use of the state's natural resources is common. These statutes have become increasingly important resource management tools, and the extent to which they embody or reflect public trust values has increased over time.

III. DESCRIPTION, ANALYSIS, AND POTENTIAL APPLICATION OF THE PUBLIC TRUST DOCTRINE

This part begins by noting that the public trust doctrine is primarily a state law doctrine with varying degrees of development from state to state. The following subparts describe the geographical scope of the doctrine, the interests protected by the doctrine, and actions by the state and by individuals that are inconsistent with the public trust doctrine. Each of these subparts begins with a discussion of what can clearly be discerned from Washington case law. The scope of the discussion in each subpart then expands to consider how Washington courts might develop the doctrine in light of cases from other jurisdictions, state legislative policies, and academic commentary. This approach is supported by the Washington Supreme Court’s reference to all of these sources in discussing the public trust doctrine.162

A. The Public Trust Doctrine—Primarily a State Law Doctrine

Although the U.S. Supreme Court has articulated many of the basic public trust principles in a few Supreme Court decisions, the public trust doctrine remains primarily a state law doctrine. The Court’s description in Shively v. Bowlby of the variation among state assertions of title to tidelands is equally applicable to the public trust doctrine: “there is no universal and uniform law upon the subject; . . . each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy . . . . Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.”163 Thus one could say that there is not one, but many, public trust doctrines in America, or at least many different forms of that doctrine.

Variations in the doctrine from state to state are the product of decisions made after statehood. The original states succeeded to the Eng-

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lish Crown's sovereign powers over navigable waters. Under the equal footing doctrine, the federal government held such lands in trust for future states, and granted to each state when it entered the Union the same ownership interest as the original states. Federal law controls whether waters are navigable-for-title, i.e. navigable so that the state acquired title at statehood under the equal footing doctrine. Subsequent developments in state law, however, control the scope of the doctrine in each state. Some states have conveyed much of these lands into private hands, and recognize fairly limited public trust interests in them. Other states, such as California and New Jersey, have been at the forefront in expanding the doctrine.

In addition, there is some support for a federal public trust doctrine which requires the federal government to act in accordance with trust principles. This may be important in states where the federal government owns large areas of coastal property. After tracing the growing preservationist attitude in public land law, one academic authority said that a federal public trust may exist that places several limits on federal power by 1) constraining congressional action, 2) constraining administrative action, 3) providing a rule of construction for federal legislation that protects trust interests, and 4) forcing the federal government to undertake actions to protect trust resources. Court decisions have reached varying conclusions about the existence of a federal public trust doctrine that would constrain management of federal resources. If there is a federal public trust doctrine, the federal

166. Under federal law, navigability-for-title is determined by considering the condition of the waters at the time the state was admitted to the Union. See Utah v. United States, 403 U.S. 9, 10 (1971); United States v. Oregon, 295 U.S. 1, 14 (1935).
168. Delaware, Pennsylvania, and Virginia recognize that an upland grant from the state extends seaward to the low water mark. Massachusetts and Maine give upland owners the right to tidelands out to the low water mark, or to 100 rods from the high water mark, whichever is less. SLADE et al., supra note 40, at 48 n.60 (1990). Consistent with their preference for private property, states like Massachusetts and Maine have construed public rights to lands between the high and low water marks narrowly. See, e.g., Bell v. Town of Wells, 557 A.2d 168, 169 (Me. 1989) (holding that state legislation giving the public a right to use privately owned intertidal lands for recreation was an unconstitutional taking under both the United States and Maine constitutions); Opinion of the Justices, 313 N.E.2d 561, 566 (Mass. 1974) (finding a public right to fish, fowl, and navigate, but no public right of passage on foot); see also infra part III.C.2.a.
170. See, e.g., City of Alameda v. Todd Shipyards Corp., 632 F. Supp. 333, 337 (N.D. Cal. 1986) (order denying cross motions for summary judgment) and 635 F. Supp. 1447, 1450 (N.D. Cal. 1986) (order denying motions to reconsider) (finding that clause in original conveyance from state to city barring transfer of the trust lands to private ownership also prohibited the federal
government may have an obligation to protect public trust interests in federal lands.\footnote{171}

A federal doctrine, the navigation servitude, closely parallels the public trust doctrine. The federal navigation servitude, though not denominated a federal public trust doctrine, shares common features with the state doctrine. The navigation servitude imposes a dominant easement on navigable waters and beds.\footnote{172} One of its primary functions is to justify nonpayment of compensation to private persons who claim their property interests have been damaged or destroyed by a government project on navigable waters in aid of navigation.\footnote{173} The navigation servitude protects the public interest in navigation and commerce. It derives from the fact that at statehood the federal government was delegated a servitude under the Constitution's Commerce Clause which applies to federal projects in aid of navigation on all navigable waters. Navigability, for purposes of the navigation servitude, is considerably broader than navigation for the equal footing doctrine.\footnote{174} States also have navigation servitudes, having delegated to the federal government only a portion of their reserved sovereign government from transferring the land to private ownership after it had exercised eminent domain); United States v. 1.58 Acres of Land, 523 F. Supp. 120, 123 (D. Mass. 1981) (finding dual sovereign nature of public trust when Coast Guard condemned land near Boston Harbor). \textit{But cf.} United States v. 11.037 Acres of Land, 685 F. Supp. 214, 216 (N.D. Cal. 1988) (holding that when the federal government exercises its power of eminent domain, the state public trust easement is extinguished).


\footnote{172. The navigation servitude, however, applies to waters that are navigable in fact. This is a broader definition, covering more waters than are covered in the navigable-for-title test.}


\footnote{174. As United States v. Appalachian Elec. Power Co., 311 U.S. 377, 408-09 (1940), made clear, the class of waters that are navigable for purposes of Congress' commerce power are much broader than the class of waters that are navigable-for-title. Congress' commerce power extends not only to those waters navigable at statehood, but also to those that are capable of being navigable. Therefore, the federal navigation servitude, based on Congress' commerce power, extends to more waters than does the equal footing doctrine.}

The U.S. Supreme Court has even held that the federal navigation servitude applies to non-navigable tributaries of navigable waters, where the purpose of a project was to aid navigation on the lower, navigable part of a river. United States v. Grand River Dam Auth., 363 U.S. 229, 233 (1960). In \textit{Grand River Dam} the United States Supreme Court held that the U.S. government owed no compensation for waterpower values in a dam site it had condemned as part of a flood control and navigation project. \textit{Id. But cf.} United States v. Kansas City Life Ins. Co., 339 U.S. 799, 809 (1950) (granting compensation to farmer whose farm was ruined when the United States raised the level of the Mississippi, thereby backing up water on the non-navigable tributary on which the farm lay).
power over navigation. Some state navigation servitudes, such as Alaska’s, require that the state project be in aid of navigation to trigger the servitude. Others, such as California, apply the servitude even though the state project damages or destroys navigation. The state navigation servitude is closely related to the public trust doctrine, and may, in fact, be considered a special branch of that doctrine.

All three of these doctrines, the federal navigation servitude, the state navigation servitude, and the public trust doctrine, reduce the government’s obligation to pay damages for taking or damaging private property. Federal management of navigable waters and their beds constitutes management of the federal government’s own servitude, and is not regulation of private property. In all three situations the relevant doctrine imposes a pre-existing burden on private property.

A federal public trust doctrine, if found to exist, would presumably apply only to federal lands. It would not override state public trust doctrines as applied to state or private lands, or the interpretation of the doctrine by state courts. Theoretically, Congress could enact explicit legislation preempting this field of law, but it has not done so, and is unlikely to do so in the future.

The federal consistency requirement of the Coastal Zone Management Act may diminish the significance of a federal public trust doctrine. The consistency requirement shows Congress’ explicit intent to leave coastal management under state control. It obligates federal agencies and federal permittees to comply with state coastal management programs. State coastal management programs include relevant state judicial and administrative decisions that define and apply state property law. This presumably would include the public trust doctrine. The federal government must act consistently with this aspect of the state coastal management program, as with other aspects of the state’s program. Therefore, the discussion which follows focuses on the definition and application of Washington’s public trust doctrine.

177. See infra part V.B.1.
B. The Geographical Scope of the Doctrine

I. The Established Geographical Scope in Washington

As mentioned earlier, under the equal footing doctrine each state obtained title to the beds of its navigable waters and waters subject to the ebb and flow of the tides. At statehood Washington asserted in its state constitution all possible rights under the equal footing doctrine:

The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes.

The state constitution, however, was silent on the issue of the use and sale of state-owned shorelands and tidelands, leaving that issue to the politics of future legislatures and to the interpretation to be given article 17 by the Washington Supreme Court. Washington State was eager to encourage growth and development, so it transferred approximately sixty-one percent of its tidelands and thirty percent of

180. WASH. CONST. art. XVII, § 1. In Hughes v. State, the Washington Supreme Court defined the line of ordinary high tide:

[W]e deem the word 'ordinary' to be used in its everyday context. The 'line of ordinary high tide' is not to be fixed by singular, uncommon, or exceptionally high tides, but by the regular, normal, customary, average, and usual high tides. Thus the line of 'ordinary high tide' is the average of all high tides during the tidal cycle.

Hughes v. State, 67 Wash. 2d 799, 810, 410 P.2d 20, 26 (1966) rev'd or other grounds, 389 U.S. 290 (1967). The language of the opinion and the diagram the Washington Supreme Court provided in the opinion further suggest that the line of ordinary high tide is synonymous with the line of vegetation. Id. at 803, 410 P.2d at 22. As Professor Corker noted, the court's decision to fix the boundary between tidelands and uplands at the vegetation line lacked both significant legal precedent and practical justification. Charles E. Corker, Where Does the Beach Begin, and to What Extent Is This a Federal Question, 42 WASH. L. REV. 33, 43–54 (1966). The Washington court's fixing the boundary between uplands and tidelands at the vegetation line differs from the federal test announced in Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10 (1935). Borax adopted a boundary of the mean high tide established by the average elevation of all tides as observed at a location through a tidal cycle of 18.6 years. Id. at 27. Professor Corker's assertion that in case of divergence between these two lines, the vegetation line will always be inland, appears sound. Corker, supra, at 41 n.29. Thus, the Washington Supreme Court's interpretation of the term "ordinary high tide" means that through its constitution the State of Washington asserted ownership up to the level of vegetation, creating a broad area of publicly owned intertidal lands. As the discussion below indicates, however, natural and man-made changes may affect the state's ownership rights. See infra part III.B.3.a.

Significantly, the U.S. Supreme Court recently confirmed a state's right to claim any lands subject to the ebb and flow of the tides, rejecting the argument that public trust lands are only those beneath navigable waters. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 479–80 (1988).

181. Hughes, 67 Wash. 2d at 805, 410 P.2d at 23.
its shorelands into private hands between 1889 and 1979. Those transfers, however, did not in themselves extinguish the *jus publicum*, or public interest, in tidelands and shorelands. Public and private interests co-exist in those parcels conveyed into private hands, so long as these lands are still usable for public trust purposes.

The Washington Supreme Court has not expressly addressed the geographical scope of the public trust doctrine. The court’s opinions in *Orion* and *Caminiti* suggest, however, that the geographical scope of the public trust doctrine extends at a minimum to the tidelands and shorelands that the state held title to at the time of statehood. In *Caminiti*, the court may have applied the doctrine to upland owners’ lands for limited purposes when it said that the public must be able to get around docks built on state-owned tidelands and shorelands. These cases should not, however, be read as strictly limiting the geographical scope of the doctrine in Washington. No cases have tested how far the Washington Supreme Court will extend the scope of the doctrine. In deciding the scope of the doctrine, the courts of our state would likely consider precedents from other jurisdictions, state legislative policies, and academic commentary.

2. Does the Doctrine Apply to Lands Other than Those Under Navigable-for-Title Waters or Beneath Tidal Waters?

a. Non-Navigable-for-Title Tributaries

The California Supreme Court applied the public trust doctrine to cover non-navigable tributaries in *National Audubon Society v. Superior Court* (the *Mono Lake* case). Mono Lake is a large, navigable, scenic lake that sits at the base of the Sierra Nevadas in California. While this saline lake contains no fish, it does contain brine shrimp, which are a source of food for large numbers of migratory and nesting birds. Small islands in the middle of the lake serve as nesting grounds.
for many of these birds. In 1940, the California Division of Water Resources granted Los Angeles a permit to divert water from the non-navigable tributaries of Mono Lake. Since that time, Los Angeles had been diverting virtually the entire flow of four of the five non-navigable tributaries that originally fed the lake. In this hot, arid, region those diversions had a devastating impact on the lake. By the time the California court heard the case, the surface area of the lake had shrunk by a third and many of the islands in the lake had become linked to the mainland, exposing the birds to predators.\(^{187}\)

The plaintiffs in *Mono Lake* filed suit to enjoin the diversions on the theory that the public trust protects the shores, bed, and waters of Mono Lake. Thus, the California Supreme Court squarely faced the issue of whether public trust principles covered activities on non-navigable tributaries that affected navigable waters. The court concluded that the public trust doctrine "protects navigable waters from harm caused by diversion of nonnavigable tributaries."\(^{188}\) It follows from the logic of *Mono Lake* that California might regulate other types of upland activities that cause harmful spillover effects on public trust resources.\(^{189}\) Under this interpretation, upstream pollution and appropriations of water that reduce the volume, and therefore the assimilative capacity of public trust resources, would be subject to state control under the public trust doctrine. The Washington Supreme Court has not had occasion to address this issue. Other states have cited the *Mono Lake* decision favorably,\(^{190}\) and academics have generally praised the decision\(^{191}\) but no public trust decisions have actually applied (or rejected) the *Mono Lake* principle to prior appropriation rights.\(^{192}\)

\(^{187}\) Id. at 711.

\(^{188}\) Id. at 721.

\(^{189}\) Admittedly, one could just as easily denominate the result of *Mono Lake* an extension of the public trust doctrine to upland uses rather than an extension of the geographical scope of the doctrine.


\(^{192}\) Subsequent California appellate decisions have touched on the relation between the public trust doctrine and the prior appropriation system. Golden Feather Community Ass'n v. Thermalito Irrigation Dist., 244 Cal. Rptr. 830 (Ct. App. 1988) (declining to apply public trust doctrine to prevent appropriators of a non-navigable tributary of an artificial lake from lowering the level of the lake), *reh'g granted*, 257 Cal. Rptr. 836 (Ct. App. 1989); United States v. State
b. Related Wetlands and Uplands

Recognizing the interconnectedness of water systems and the importance of wetlands to water quality and wildlife preservation, courts in some states have extended the public trust doctrine to cover wetlands and even uplands related to navigable water bodies. For example, the high court of Massachusetts extended the doctrine to cover state parks and swamps. The Wisconsin Supreme Court in *Just v. Marinette County* considered a case in which landowners had filled wetlands without obtaining the necessary permit. The court recognized that Wisconsin had an active duty under the doctrine to preserve water quality, and it noted that wetlands serve a vital role in purifying the waters in the state’s lakes and streams. The Wisconsin Supreme Court therefore concluded that filling of wetlands implicated the state’s duties under the public trust doctrine. The Washington Supreme Court has not addressed this issue directly. If the Washington court follows Wisconsin it might rule that the doctrine covers wetlands and related uplands that affect public trust interests.

c. The Dry Sand Area

Courts have employed numerous legal doctrines, including the public trust doctrine, and custom to recognize public rights in the dry sand area of ocean beaches (i.e. those areas above ordinary high tide). For example, in *Matthews v. Bay Head Improvement Association* the New Jersey Supreme Court recognized that in order for the public to fully exercise its right to swim and bathe below the mean high water mark, the public must also have both a right of access and a right to use the dry sand area of beaches. In other words, in New Jersey the public is not only entitled to cross private dry sand areas, it also has the right to sunbathe and generally enjoy recreational activi-
ties in those areas. The court, however, stopped short of saying that all dry sand areas will be subject to public rights, by saying that the extent of the public’s rights under the doctrine will depend on the circumstances. The Oregon Supreme Court recognized public rights in the dry sand area of all state beaches through the ancient doctrine of custom in *State ex rel. Thornton v. Hay*. The Oregon court listed a seven-part test to determine whether the public had acquired a customary right to Oregon’s ocean beaches. First, the public’s use must be ancient and used “so long ‘that the memory of man runneth not to the contrary.’ ” Second, the customary right must be exercised without interruption. Third, the customary use must be peaceable and free from dispute. The fourth requirement is that the customary right be reasonable. The fifth requirement, certainty, was satisfied by the visible boundaries of the dry sand area and the character of the land. Sixth, the custom must be obligatory, “that is . . . not left to the option of each landowner whether or not he will recognize the public’s right to go upon the dry-sand area for recreational purposes.” Finally, custom must not be repugnant, or inconsistent, with other customs or with other laws. The Oregon Supreme Court found that all seven requirements of the doctrine of custom had been satisfied and declared the public’s customary right to the dry sand area of beaches. Courts in other states have also recognized the doctrine of custom as a way to protect public rights.

Other states have recognized the public’s rights in the dry sand area through statutes and state constitutional provisions. For example, under a Texas statute, all parts of the Gulf of Mexico beach between the vegetation line and the mean low tide line are subject to the public’s right of ingress and egress regardless of private ownership where the public has acquired a right through prescription, dedication, or

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201. *Id.* at 365.
203. *Id.* at 677 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 76).
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
continuous right.\textsuperscript{211} California’s constitution recognizes the public’s right of access to tidelands and shorelands.\textsuperscript{212}

Once again, the Washington Supreme Court has never had the opportunity to directly address the issue of whether public trust rights exist in the dry sand areas of beaches in this state.\textsuperscript{213} The Shoreline Management Act of 1971 clearly favors uses which promote public access to and recreation along tidelands and shorelands.\textsuperscript{214} A Washington State Attorney General’s opinion concludes that the public has the right to use and enjoy the dry sand area of ocean beaches through the doctrine of custom recognized by the Oregon Supreme Court in \textit{Thornton}.\textsuperscript{215} If the Washington Supreme Court recognized a public right in the dry sand area of beaches, an additional issue would be the extent of that right.

Whether the Washington court would go beyond recognizing the public’s right of ingress and egress and recognize public rights in sunbathing and recreating in the dry sand area, as the court did in New Jersey, is unclear. Alternatively, the Washington Supreme Court might follow those courts reluctant to expand public access at the expense of private property.\textsuperscript{216}

d. State Legislation Also Supports a Broad Geographical Scope for the Public Trust Doctrine

In defining the geographical scope of the public trust doctrine, Washington courts might also look to the Shoreline Management Act for legislative policy support. The coverage of the Shoreline Act is extremely broad, covering all navigable salt water, all navigable-for-title fresh water, and most waters that are navigable only for pleasure craft. The Act’s coverage extends to all uplands lying within two hundred feet of the high water mark of all navigable waters and most non-

\textsuperscript{212} Cal. Const. art. X, § 4. California courts have recognized this section of the California Constitution as a codification of the public trust doctrine. Carstens v. California Coastal Comm’n, 227 Cal. Rptr. 135, 143 (Ct. App. 1986); see also Golden Feather Community Ass’n v. Thermalito Irrigation Dist., 257 Cal. Rptr. 836, 842 (Ct. App. 1989) (looking to art X, § 4 of the California Constitution to define the scope of the public trust doctrine).
\textsuperscript{213} For a discussion of the public’s right to walk over privately held tidelands, see infra part III.C.2.a.
\textsuperscript{216} Maine and Massachusetts probably would not recognize public rights in the dry sand area. Those states even refuse to recognize a public right to recreate or walk over privately owned intertidal lands. Bell v. Town of Wells, 557 A.2d 168 (Me. 1989); Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974).
navigable-for-title waters, both rivers and lakes.\textsuperscript{217} It also covers flood plains, flood ways, bogs, swamps, and river deltas.\textsuperscript{218} Because of an expansive definition of shorelines, the Act covers shorelines on lakes and streams that could not meet the test for navigability-for-title,\textsuperscript{219} and thus covers lands that were never owned by the state under the equal footing doctrine. The Shoreline Act and the public trust doctrine are distinct, though symbiotically related.\textsuperscript{220} Recently the court found it worth noting that public trust principles are reflected in the Shoreline Act's underlying policies.\textsuperscript{221} This suggests that the legislature is both aware of the public trust doctrine and willing to enact legislation in furtherance of the goals of the doctrine.

This legislative expression of policy could encourage the Washington court to rule that the public trust doctrine applies to waters navigable only for recreational purposes, where title to the beds are privately owned and never passed through state ownership.\textsuperscript{222} Extension of the public trust doctrine to the areas covered by the Shoreline Act could conceivably help control harmful spillover effects from many non-navigable tributaries and uplands and assure public access—values that other state courts have considered important when extending the geographical scope of the public trust doctrine.

All state-owned lands within the coverage of the public trust doctrine are also subject to state management regulations. The Seashore Conservation Act\textsuperscript{223} is an example. Under this Act all state-owned ocean beaches between ordinary high tide and extreme low tide are declared public highways, forever open to the use of the public. These

\textsuperscript{217} WASH. REV. CODE ANN. § 90.58.030(2)(f) (West Supp. 1991). The "[o]rdinary high water mark" itself extends all the way up to the vegetation line. Id. § 90.58.030(2)(b).

\textsuperscript{218} Id. §§ 90.58.030(2)(f)-(g); WASH. ADMIN. CODE § 173-22 (1990).

\textsuperscript{219} WASH. REV. CODE ANN. § 90.58.030(2)(d) provides that shorelines: means all of the water areas of the state, including reservoirs, and their associated wetlands, together with the lands underlying them; except (i) shorelines of state-wide significance; (ii) shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments; and (iii) shorelines on lakes less than twenty acres in size and wetlands associated with such small lakes.

\textsuperscript{220} See infra part III.B.2.e.

\textsuperscript{221} For example, in Orion the court noted: "[W]e have also observed that trust principles are reflected in the SMA's underlying policy." Orion Corp. v. State, 109 Wash. 2d 621, 641 n.11, 747 P.2d 1062, 1073 n.11 (1987) (citing Portage Bay-Roanoke Park Community Council v. Shorelines Hearings Bd., 92 Wash. 2d 1, 4, 593 P.2d 151, 153 (1979)), cert. denied, 486 U.S. 1022 (1988).

\textsuperscript{222} See supra part II.B.3.b.vi.

\textsuperscript{223} WASH. REV. CODE ANN. §§ 43.51.650-.765 (West 1983 & Supp. 1991); see supra part II.B.3.b.vi.
lands are managed by the Washington Parks and Recreation Commission for public recreational purposes. A second example is the extensive Aquatic Lands Act, covering all state-owned tidelands, shorelands, harbor areas, and the beds of navigable waters. This Act contains detailed instructions for management of these lands by the state, primarily through the Department of Natural Resources. Presumably the geographical scope of the public trust doctrine could be extended to protect lands subject to these regulations from harmful upland uses.

e. Rights of Riparians and the Public to Use the Surfaces of Non-Navigable-for-Title Waters

Although public and riparian rights to use the surface of non-navigable-for-title waters are not always denominated as public trust interests, recognition of these rights illustrates an important application of the concept of public rights, nearly identical in function if not in name, to public trust rights. As the state’s population and the public interest in recreation continue to grow, rights to use the surface of non-navigable streams and lakes will continue to increase in importance.

Washington cases on riparian and public rights to non-navigable streams are neither recent nor logically consistent. In Griffith v. Holman, decided in 1900, the court took a dim view of public rights to boat and fish on non-navigable streams. Plaintiff had placed a wire fence across the little Spokane River. Defendant cut the fence and caught fish while floating across plaintiff’s property. Accepting plaintiff’s trespass theory, the state supreme court upheld the trial court’s award of $250 for damaging the fence, and $250 for the fish—no small award in those days. Paradoxically, a year later the court recognized the right of loggers to float their logs down non-navigable streams in Watkins v. Dorris. More recently, in Snively v. Jaber, the court held that riparians and their licensees have the right to use the entire surface of non-navigable-for-title lakes. Although this

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224. WASH. REV. CODE ANN. § 79.90 (West 1991); see supra part II.B.3.b.v.
225. WASH. REV. CODE ANN. § 79.90.010.
226. 23 Wash. 347, 63 P. 239 (1900).
227. Later, in Snively v. Jaber, 48 Wash. 2d 815, 296 P.2d 1015 (1956), the court said that the Griffith decision was based on a fencing statute.
228. 24 Wash. 636, 64 P. 840 (1901).
229. 48 Wash. 2d 815, 296 P.2d 1015 (1956).
230. For a long while the state’s Department of Wildlife followed a policy of obtaining waterfront lots along non-navigable lakes, thereby becoming riparians and opening up lakes to public use. But there are limits to this practice, as the court indicated in Botton v. State, 69 Wash. 2d 751, 420 P.2d 352 (1966). There, the court held that although the state may admit the
appears different from saying that the public has a right to use the surface of these waters, any difference is more apparent than real. According to Snively, riparians, and their licensees, can use these lake surfaces. Licensees include anyone who has the riparian’s permission, whether that permission is obtained by fee, or for free. The state is a riparian if it acquires an access road to a lake. The state can allow the public as licensees to use this access. Those public users are thus licensees of a riparian. If the law said the public has a right to use these waters, this public right would only be available to those who could get onto the lake without trespassing on private property. Once again, public access depends on riparian license.

These inconsistencies in Washington lake and stream law can best be explained in terms of the social and economic needs of the time. Supporting logging operations has been important since the earliest days in Washington’s history. Recreation on non-navigable lakes was also deemed important, whereas irrigation appropriations from lakes are relatively less significant. With the growing social and economic importance of recreational uses of small streams, it is likely that the Washington Supreme Court would either distinguish or overrule Grif

th today. As the population of the state grows, the public demand for recreational uses of small streams will continue to increase. Several other western states have recognized public rights of navigation on streams that are not commercially navigable but are navigable for pleasure craft only. Washington may follow the example set by

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232. See SLADE et al., supra note 40, at 162 (“The nearly universal rule is that the public trust doctrine does not grant the public any right or privilege of perpendicular access by crossing over private land.”). Presumably, a float plane could land on a non-navigable-for-title lake without trespassing over private property. But the number of such incidents is so small as to be virtually irrelevant.
those other states for streams. As noted above, it has already in effect done so for lakes.

3. Other Issues Affecting the Geographical Scope

a. Additions and Losses of Public Trust Lands and Waters Due to Natural and Artificial Changes

i. Accretion/Reliction

The natural world, always dynamic, pays little heed to the boundaries set by humans. Coasts and shores change. The Long Beach Peninsula, located in Pacific County in southwestern Washington State, is a good example. Historically, large accretions have extended the peninsula’s ocean beaches hundreds of feet to the west.235 Thus, the question of ownership of accretions in Washington State is not just an academic one; it implicates very real, and valuable, public and private interests.

The general rule in most states is that gradual changes by accretion or reliction change the boundaries of privately owned uplands and public trust lands. Washington follows this rule for shorelines along fresh water rivers and lakes.236

As to accretions to ocean beaches that occurred after 1889 statehood, however, the state asserts ownership. In Hughes v. State,237 the Washington Supreme Court held that accretions to ocean beaches that occurred after statehood in 1889 belonged to the State of Washington, not the upland owner. Mrs. Hughes appealed the case to the U.S. Supreme Court. The Supreme Court held that because Mrs. Hughes’ predecessor in title had received the property from the United States prior to Washington statehood, her right to accretions to her land was governed by federal, not state law.238 According to the Court, under federal common law, Mrs. Hughes was entitled to the accretions to her property.239 After a brief flirtation with expanding the role of fed-

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239. Id. The Court in Hughes did not address the question of whether the federal rule applied to accretions to property where the title was acquired from the federal government after
eral common law in determining the rights of federal patentees, the Court limited the application of federal law to cases like *Hughes* where ocean front property was involved on the ground that international relations were implicated.240

The Seashore Conservation Act241 provides that all accretions along the ocean shores owned by the state are declared public highways the same as ocean tidelands. The Washington State Parks and Recreation Commission has established a negotiation system in an attempt to manage these accreted lands.242

**ii. Avulsion**

Under Washington law, the addition or loss of land due to avulsion or sudden catastrophe does not affect the seaward boundary.243 Most other states adhere to this fixed boundary rule for avulsive changes.244 Thus, if a navigable river changed its course suddenly by avulsion, title to the original bed would remain in the state, and would still be subject to the public trust doctrine. The new location of the river would also be subject to the public trust doctrine, although the bed would be privately owned.

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240. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 377 n.6 (1977). In a more recent decision, *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 279–82 (1982), the U.S. Supreme Court reaffirmed the application of federal law to accretions along the ocean when it held that federal law dictates that accretions to federal lands belong to the federal government.


242. A commentator discussing the evolution of accreted land claims states that:

In April, 1968, negotiations between private landowners and WSPRC [Washington State Parks and Recreation Commission] led to the establishment of a Seashore Conservation Line (SCL), and a program to secure dedications west of this line from persons who had clear title up to the Pacific Ocean. As a result, the boundary of the SCA [Seashore Conservation Area] changed—where applicable—to this new coordinate line, established by WSPRC, approximately 150 feet east of the line of vegetation on the peninsula. . . . The agreement also required the SCA to be reestablished in 1980 and every ten years thereafter to insure it remains the same distance from the line of mean high tide.


244. *See, e.g.*, Cinque Bambini Partnership v. State, 491 So. 2d 506, 520 (Miss. 1986) ("By way of contrast to our law regarding accretion and reliction, boundaries and titles are not affected by avulsion."); *aff'd*, 484 U.S. 469 (1988).
iii. Artificial Changes

States generally treat artificial changes in the shoreline the same as avulsive changes—i.e., boundaries remain fixed. This is particularly true if the owner of the upland property brings about the change to add to the property. Where the owner of property is not involved in, or is a stranger to, the cause of the change, several courts have held that title will vest in the upland owner. Such changes in the shoreline often occur where a neighboring owner or the state has erected a seawall, pier, or breakwater. Artificially created water bodies generally are privately owned.

Artificial changes along coastlines and shorelines may also raise other issues besides title. For example, if a waterside owner fills or alters tidelands, will they still be subject to the public trust? The California Supreme Court, in Berkeley v. Superior Court, balanced the interests of the public and of landowners when it stated that the trust still applies to tidelands “still physically adaptable for trust uses” but not to lands “rendered substantially valueless for those purposes.”

The Washington Supreme Court quoted Berkeley extensively on this point in Orion, and thus might follow a similar rule. Yet another issue is whether the public trust doctrine applies to artificially created tidelands, shorelands, bottomlands or submerged lands. Some state courts have held that the trust does not apply to such lands, but another court held that it does.

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248. Berkeley v. Superior Court, 606 P.2d 362 (Cal.), cert. denied, 449 U.S. 840 (1980). In applying this test, the court said that tidelands that have been filled, whether or not they have been substantially improved, are free from the trust to the extent that they are no longer subject to tidal action. The court noted that parcels that no longer have Bay frontage were obvious examples of where the trust had been extinguished. Id. at 374; see also State v. Central Vt. Ry., 571 A.2d 1128 (Vt. 1989) (land filled along lakeshore still subject to the public trust).
250. The Washington Supreme Court’s decision in Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969), cert. denied, 400 U.S. 878 (1970), suggests that the Washington court will have little tolerance for those who fill public trust lands. In Wilbour, the court required that fill be removed from Lake Chelan. Id. at 316, 462 P.2d at 239.
252. Mentor Harbor Yacht Club v. Mentor Lagoons, Inc., 163 N.E.2d 373, 377 (Ohio 1959) (holding that if waters were naturally navigable, then an artificial extension of a channel brought the extended waters under the public trust doctrine).
b. Lands Exempt from the Public Trust Doctrine

Several categories of land may be exempt from the public trust doctrine. These include: 1) lands conveyed prior to statehood; 2) federal acquisitions of state public trust lands; and 3) lands covered by Indian treaties.

First, tidelands and shorelands conveyed to private parties prior to statehood may not be subject to the public trust. Extinction of the trust requires express and unequivocal statement in the words of the original grant.253 Given the federal government’s responsibility to hold lands in trust for future states, few federal grants are likely to extinguish the public trust interest.

The history of federal grants in Washington, however, indicates that in this state the public trust continues to apply to pre-statehood grants. Many pre-statehood grants to private parties suggest that the land boundary extends to the meander line. The government meander line, when compared to the line of mean high tide, is often far out in the water.254 The federal government, however, generally had no right to convey lands below the high water mark, but held those lands in trust for future states under the equal footing doctrine.255

Nevertheless, the Washington State Constitution affirmed federal patents to tidelands and shorelands by providing that “this section [declaring public ownership of tidelands and shorelands] shall not be construed so as to debar any person from asserting his claim to vested rights.”256

On its face, this phrase appears to only disclaim state ownership of lands that the federal government validly conveyed into private hands. Nonetheless, the Washington Supreme Court early in its history held that this constitutional provision was a present grant of the state’s interest in previously patented lands.257 As the court wrote in Scurry v. Jones:

253. City of East Haven v. Hemingway, 7 Conn. 186, 199 (1828) (a pre-statehood grant could convey public rights into private hands, but only with “words so unequivocal, as to leave no reasonable doubt concerning the meaning”).
254. Phillip W. Lear, Accretion, Erosion and Avulsion: A Survey of Riparian and Littoral Title Problems, 11 J. ENERGY NAT. RESOURCES & ENVTL. L. 265, 274 (1991); see, e.g., Hardin v. Jordan, 140 U.S. 371, 374 (1891) (finding gross surveyor error because a large spit emanating from the shore of a lake and virtually dividing it in two was not meandered).
255. See supra note 165 and accompanying text.
256. WASH. CONST. art. XVII, § 1.
257. See, e.g., Cogswell v. Forrest, 14 Wash. 1, 43 P. 1098 (1896); Scurry v. Jones, 4 Wash. 468, 30 P. 726 (1892). Subsequent cases following Scurry include Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., 78 Wash. 2d 975, 978–79, 482 P.2d 769, 722, cert. denied, 404
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And as the state, in the section immediately preceding this, had asserted its title to all such lands, whether occupied or unoccupied, which had not been thus patented, it seems clear to us that the evident intent of the disclaimer was to ratify the action of the United States in the issuance of such patents. In our opinion, the interest of the state passed as fully to the grantees in such patents, or to those holding under them, as it would have done had there been express words of grant used in the constitution. Any other interpretation of the language used would deprive it of any beneficial force whatever.\(^{258}\)

Thus it was the state, not the federal government, that actually gave these lands to private parties. The state is bound by the public trust doctrine, and any conveyances of tidelands that the disclaimer clause did make to private parties would not have destroyed the public trust interest in those lands.\(^{259}\)

Congress may also convey public trust lands prior to statehood in accordance with international obligations. In *Shively v. Bowlby* the Supreme Court stated that “Congress has the power to make grants of lands below high-water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations.”\(^{260}\)

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\(^{259}\) Recently, there was a dispute over the waterward boundary between uplands owned by a private landowner and tidelands owned by the State of Washington. See State’s Memorandum in Support of Motion for Summary Judgment and in Opposition to Defendant’s Request for a Preliminary Injunction, State v. Lund (Super. Ct. Pierce County, filed Aug. 4, 1989) (No. 249864) (on file with the Washington Law Review). Although the case ultimately settled, the state’s memorandum raises several interesting issues, such as whether post-statehood patentees also had a waterward boundary of the meander line, and whether such a boundary is a moving boundary so that as erosion occurred along the Lunds’ property, their property line moved landward. *Id.* at 5–17.

\(^{260}\) Shively v. Bowlby, 152 U.S. 1, 48 (1894). The U.S. Supreme Court’s decision in *Summa Corp. v. California ex rel. State Lands Comm’n*, 466 U.S. 198 (1984), comes closest to an example of an extinguishment of the public trust doctrine in accordance with the federal government’s international obligations. The *Summa* case involved the question of whether a lagoon near Los Angeles was subject to the public trust doctrine. Summa Corporation’s title dated back to an 1839 Mexican title. Pursuant to the 1848 Treaty of Guadalupe Hidalgo, Congress set up a Board of Land Commissioners in 1851 to decide the rights of those claiming title to lands under the Spanish or Mexican governments. *Id.* at 203. Summa Corporation’s predecessors in title finally had their rights in the land at issue confirmed in 1873. While the Court acknowledged that ordinary federal patents purporting to convey tidelands located within a state are invalid because the federal government holds such tidelands in trust for states, the situation was different with patents confirmed under the 1851 Act because the United States was discharging its international obligations. The Court held that California’s failure to assert its public trust interest during the confirmation process precluded it from claiming that a public trust easement applied at the present time.
Second, when the federal government exercises its power of eminent domain to acquire trust burdened lands, those lands may become exempt from the trust. The few case precedents on this issue, however, are conflicting.\textsuperscript{261}

Third, lands may be exempt from the public trust doctrine because of an Indian treaty or agreement\textsuperscript{262} entered into prior to statehood. Presumably the trust would not apply to Indian country because state law does not apply to Indian reservations unless Congress clearly mandates otherwise.\textsuperscript{263}

Whether a treaty gives a tribe title to the beds underlying navigable waters involves conflicting presumptions. On the one hand, a fundamental principle in interpreting Indian treaties is that they are to be interpreted as the Indians would have understood them.\textsuperscript{264} Most Indians presumably believed they were receiving the water bodies and beds within or alongside their reservations. On the other hand, under the equal footing doctrine, the federal government held the lands underlying navigable waters in trust for each future state until they entered the Union. These two legal principles collided directly in \textit{Montana v. United States}.\textsuperscript{265} The Court found that the Crow treaty language did not overcome the presumption that the beds of navigable waters remain in trust for future states and pass to the new states when they assume sovereignty. The Court also noted that the Crow Tribe had historically depended on buffalo and other upland game rather than on fishing. Ultimately, the Court concluded that the state, not the tribe, held title to the bed of the Big Horn River. Whether an Indian tribe or the state holds title to the bed of navigable waters, therefore, is likely to turn on both the language of the treaty or agreement and on whether the tribe has historically depended on resources located in the

\begin{footnotesize}
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\item[261.] See, e.g., \textit{United States v. 1.58 Acres of Land}, 523 F. Supp. 120, 124 (D. Mass. 1981) (noting that the federal government is as restricted as states are in its ability to abdicate its sovereign \textit{jus publicum} to private individuals). \textit{But cf.} \textit{United States v. 11.037 Acres of Land}, 685 F. Supp. 214 (N.D. Cal. 1988) (holding that where the federal government exercises its powers of eminent domain, the state public trust doctrine is extinguished). For a discussion of the existence of a federal public trust doctrine, see also \textit{supra} part III.A.
\item[262.] No treaties were signed with Indian tribes after 1871. However, reservations were created thereafter, usually by agreement between the tribe and the Executive, and approved by Congress. Additional reservations were created by Executive Order and by congressional legislation. \textsc{Felix S. Cohen, Handbook of Federal Indian Law} 127–28 (Rennard Strickland et al. eds., 1982 ed.).
\item[263.] For a general discussion of federal preemption of state law, see \textit{id.} at 270–79.
\item[265.] 450 U.S. 544 (1981).
\end{itemize}
\end{footnotesize}
water or on submerged land.\textsuperscript{266} As noted previously, if the tribe has title, the public trust interest under state law is probably extinguished because state law does not generally apply on an Indian reservation unless Congress clearly expresses such an intent.\textsuperscript{267}

C. Interests Protected by the Public Trust Doctrine

I. Interests Protected Under Washington Law

The classic list of interests protected by the public trust includes commerce, navigation, and fisheries.\textsuperscript{268} The Washington Supreme Court has followed the general trend by expanding the range of public interests. The court noted in \textit{Orion} that it had extended “the doctrine beyond navigational and commercial fishing rights to include ‘incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes.’”\textsuperscript{269}

Under Washington law, environmental quality and water quality are probably also protected interests. The public’s interest in fishing can only be realized if water quality and quantity are adequate to support fish.\textsuperscript{270} Moreover, the Washington Supreme Court indicated in \textit{Orion} that it would look favorably on a claim that protecting the environment is a public trust interest. The \textit{Orion} court found trust principles embodied in the Shoreline Management Act’s underlying policy, “which contemplates ‘protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life.’”\textsuperscript{271} The court also cited \textit{Marks v. Whitney}, a California case recognizing the public interest in both eco-

\begin{footnotes}
\item[266.] For a recent case where the court found that a tribe had title to the water beneath a navigable waterway, see Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983), \textit{cert. denied}, 465 U.S. 1049 (1984). \textit{See also} Andrea G. Oakley, \textit{Note, Not on Clams Alone: Determining Indian Title to Intertidal Lands—United States v. Aam}, 65 \textit{Wash. L. Rev.} 713 (1990).

\item[267.] \textit{Cohen, supra} note 262, at 270–79.

\item[268.] Ralph W. Johnson, \textit{Water Pollution and the Public Trust Doctrine}, 19 \textit{Envtl. L.} 485, 495 (1989). Even early cases like Arnold v. Mundy, 10 Am. Dec. 356, 368 (N.J. 1821), recognized a broad spectrum of public interests that included “fishing, fowling, sustenance, and all other uses of the water and its products.”


\item[270.] \textit{United States v. State Water Resources Control Bd.}, 227 Cal. Rptr. 161, 201 (Ct. App. 1986) (holding that Water Board had authority to supervise appropriators under the public trust doctrine to protect fish and wildlife); Johnson, \textit{supra} note 268, at 488.

\item[271.] \textit{Orion}, 109 Wash. 2d at 641 n.11, 747 P.2d at 1073 n.11 (quoting Portage Bay-Roanoke Park Community Council v. Shorelines Hearings Bd., 92 Wash. 2d 1, 4, 593 P.2d 151, 153 (1979)).
\end{footnotes}
logical values and preserving tidelands in their natural state. Therefore, given the proper case, the Washington Supreme Court may follow several other states that recognize water quality and environmental preservation as public trust interests.

If water quality is a protected interest, the public trust doctrine might limit activities that degrade water quality, including discharges of wastes into public waters, activities that cause erosion and thus siltling of waterbodies, and prior appropriations that reduce the assimilative capacity of waterbodies and thus result in degradation of water quality. Of course, any application of the public trust doctrine in these areas would have to take account of existing federal and state laws on water pollution, the prior appropriation code, and the legitimate economic expectations of those affected.

Using the public trust doctrine to protect environmental quality is a logical extension of the doctrine in Washington. Early courts did not often expressly address environmental quality as a protected public trust right. It was widely thought that nature's bounty was limitless. Pollution, however, can limit or destroy public enjoyment of trust resources just as much as filling or committing tidelands and shorelands to exclusively private uses. In the past, the public trust doctrine did not allow such monopolization; now that the threat to public rights is in the form of pollution and environmental degradation, the courts are expanding their interpretation of the public trust doctrine to protect the public rights from that threat.

272. Id. at 641 n.10, 747 P.2d at 1073 n.10.


274. Johnson, supra note 268, at 505.

275. Now some legal scholars and environmentalists are claiming that the public trust doctrine should prohibit development that interferes with the delicate process of replenishing sand on our nation's beaches. Cory Dean, A New Theory: A Beach Has a Right to Its Sand, N.Y. TiMEs, Nov. 29, 1991, at B9.
2. Interests Potentially Protected in Washington

a. Right of Public to Walk on and/or Harvest Shellfish on Privately Owned Tidelands

The Washington Supreme Court has yet to consider whether the public has a right to walk across privately owned tidelands, or whether the public may dig clams on those tidelands. One commentator notes that nearly all states recognize that the public trust doctrine provides the public a right to pass and repass over public trust tidelands.\(^{276}\) Although other states’ courts have issued opinions which generally lend support to the public’s right of access, few have directly addressed whether the public has a right to walk across privately owned tidelands.

For example, the Rhode Island Supreme Court in Jackvony v. Powel,\(^{277}\) looked to Rhode Island’s constitution that guarantees to the people “the privileges of the shore,” and concluded that one of those privileges included the right to pass along the shore.\(^{278}\) The case did not, however, involve the public’s rights to pass along a privately held beach. Rather, it involved an attempt by a beach commission to fence off a beach owned by the city of Newport.\(^{279}\) Similarly, in Tucci v. Salzhauer,\(^{280}\) a New York court held that the public had a right to pass and repass over lands owned by the Town of Hempstead. Thus, Tucci, like Jackvony, recognized a public right of passage, but did not specifically address the question of whether the public would have a right to pass over privately held tidelands.

New Jersey Supreme Court decisions suggest that the public would have a right to walk over privately held tidelands. The public’s right to use tidal lands and water “encompasses navigation, fishing and recreational uses, including bathing, swimming and other shore activities.”\(^{281}\) Presumably, “other shore activities” would include the right to walk along tidelands. Also significant is the fact that New Jersey has recognized the public’s right to use the dry sand area of privately

\(^{276}\) SLADE et al., supra note 40, at 162.
\(^{277}\) 21 A.2d 554 (R.I. 1941).
\(^{278}\) Id. at 556, 558; see also Dennis W. Nixon, Evolution of Public and Private Rights to Rhode Island’s Shore, 24 SUFFOLK U. L. REV. 313, 325-26 (1990) (discussing a recent amendment to the Rhode Island Constitution that listed a right to pass along the shore as a public right).
\(^{279}\) Jackvony, 21 A.2d at 558.
\(^{280}\) 336 N.Y.S.2d 721 (N.Y. App. Div. 1972). The court noted that the public’s right of passage even included the right to push a baby carriage along the shore. Id. at 724.
owned beaches under the public trust doctrine. Because the New Jersey Supreme Court recognized the public's right to use privately owned dry sand areas of beaches, it probably would recognize the public's right to walk over privately held tidelands.

California would also probably recognize the public's right to walk along privately held tidelands. In *Marks v. Whitney*, the California Supreme Court noted that the public trust easement on privately held lands includes the public's "right to fish, hunt, bathe, swim, [and] to use for boating and general recreation purposes the navigable waters of the state. . . . The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs." This language suggests that California would recognize a public right to walk over privately held tidelands.

In Massachusetts and Maine, however, the public's rights do not include the right to pass over privately held tidelands. In *Opinion of the Justices*, the Massachusetts Supreme Court considered the constitutionality of a proposed statute that would have given the public a right of passage over privately held tidelands. In determining the scope of public rights remaining in privately held tidelands, the court considered the colonial ordinance of 1641-47. In that ordinance the Massachusetts colony extended the titles of upland owners to encompass land as far as the mean low water line or 100 rods from the mean high water line, whichever was less. The court found that the original ordinance had only reserved the public's rights in fishing, fowling, and navigation, and it refused to take a more expansive view of public rights which would include the right to pass along, or enjoy recreation on, privately held tidelands. Therefore, it found the proposed ordinance to be an unconstitutional taking of private property without compensation.

The Supreme Court of Maine recently followed Massachusetts' course in a close four-to-three opinion, *Bell v. Town of Wells*. Maine, which was originally a district of Massachusetts, shares a common legal history with that state. The majority in *Bell* found that Maine's constitution had confirmed the seventeenth century Massa-

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282. Id.
283. 491 P.2d 374 (Cal. 1971).
284. Id. at 380.
286. Id. at 567.
287. For a discussion of the relation between takings and the public trust doctrine, see infra part IV.
288. 557 A.2d 168 (Me. 1989).
The court traced the description of public rights in cases from both Massachusetts and Maine. Its conclusion mirrored that of the Massachusetts court: the public’s rights are limited to those of navigation, fishing, and fowling. The court specifically mentioned “recreational walking” as a right that it refused to recognize.

The results of the Massachusetts and Maine decisions are somewhat anomalous. As one commentator noted, Massachusetts’ approach does not in fact preclude the public from walking on the foreshore. Instead, it simply requires that a person desiring to stroll along the shore carry a fishing line or net.

Washington has no ordinances similar to Massachusetts’ 1641-47 ordinance that gave upland owners title to tidelands. The Washington court has also recently recognized a broad range of recreational rights under the public trust doctrine. These facts suggest that the Washington Supreme Court might support the public’s right to walk over privately held tidelands, but the eventual outcome on this issue remains uncertain.

Similarly, the public’s right to gather shellfish on privately held lands also remains uncertain in Washington. An early Washington case, *Sequim Bay Canning Co. v. Bugge*, favored private rights to shellfish over public rights. The plaintiff canning company leased tidelands from the state, using them to raise local and eastern clams. Defendant was a competing cannery that sent its employees, who happened to be Indians, to collect shellfish on plaintiff’s tidelands. The court held that plaintiff was entitled to injunctive relief prohibiting the defendant and its employees from trespassing and digging clams. The court reasoned that because clams live in the soil under the waters, they belong to private owners or lessees of the tidelands.

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289. *Id.* at 175–76.
290. *Id.* at 175.
293. 49 Wash. 127, 94 P. 922 (1908).
294. *Id.* at 131, 94 P. at 923. Similarly, in Palmer v. Peterson, 56 Wash. 74, 105 P. 179 (1909), the Washington Supreme Court held that when the state deeded oyster lands to a private
Sequim Bay Canning, however, is not solid authority against a public trust right to harvest all shellfish. First, the plaintiff in Sequim Bay Canning leased lands specifically to raise clams. Without a secure right to raise clams on those lands, the company's lease would have been worthless. Where a party owns or leases tidelands for a purpose other than raising shellfish, it is unclear that the court would find such a compelling private property interest in shellfish located on that land. Indeed, Sequim Bay Canning departed significantly from earlier common law precedents on the ownership of shellfish. Second, Sequim Bay Canning did not involve the general public's right to gather naturally growing shellfish. It involved hostile efforts by one cannery to destroy another. Therefore, Sequim Bay Canning may not control whether the public has a right to gather shellfish on all privately owned tidelands. Significantly, even states like Maine and Massachusetts, that have been very conservative about expanding public rights to privately owned tidelands, have recognized the public's right to gather shellfish on privately held tidelands.
b. Rights of Riparians and the Public to Boat and Fish on the Surfaces of Non-Navigable-for-Title Waters

This subject was previously discussed as an extension of the geographical scope of the public trust doctrine. Alternatively, one may view it as a public interest.

c. Aesthetic Beauty

Preservation of aesthetic beauty is a logical addition to the list of protected public trust interests. Indeed, for the sightseer, the enjoyment of natural beauty is a form of recreation. The Washington court has already recognized recreation as a protected interest. Several other states have recognized aesthetic beauty as a legitimate public trust interest. The Washington Shoreline Management Act also mentions the value of aesthetic beauty.

d. The Future for Recognizing New Interests Protected by the Doctrine

As a dynamic common law principle, courts will likely continue to shape the public trust doctrine to fit the ever-evolving public interest. The Washington Supreme Court has explicitly stated that it has not defined the total scope of the doctrine, implying that it might extend the doctrine further to meet future public needs, especially if those needs were not taken into account when private rights were acquired.

299. See supra part III.B.2.e.
302. WASH. REV. CODE ANN. § 90.58.020 (West Supp. 1991) (in implementing the policies of the Shoreline Management Act, “the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines” shall be preserved).
303. Orion, 109 Wash. 2d at 640–41, 747 P.2d at 1073 (“Recognizing modern science's ability to identify the public need, state courts have extended the doctrine beyond its navigational aspects.”); Marks, 491 P.2d at 380 (“The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs.”). But cf. Lazarus, supra note 19, at 656 (describing the public trust doctrine as a convenient legal fiction used by courts “to avoid judicially perceived limitations or consequences of existing rules of law”).
304. Orion, 109 Wash. 2d at 641, 747 P.2d at 1073.
As the list of protected public trust interests grows, new questions arise. Conflicts will arise between two or more public trust interests. For example, what should happen when the interests of commerce or recreation conflict with the interest in preserving the environmental integrity of trust resources? It is unlikely that courts will or even should set up a rigid hierarchy of public trust uses. A better answer is balancing competing uses. As an example, the Shoreline Management Act balances competing uses. The Act gives priority to values and uses such as water-dependent uses furthering public access and enjoyment of the states' waters, and preservation.

D. Public Trust Restrictions on State Power

When Washington became a state, it asserted ownership over tidelands and shorelands. Seeking to foster economic development, however, the state conveyed a large amount of its tidelands and shorelands. Early Washington cases recognized an almost unfettered power of the legislature to dispose of those lands.

More recently, in Caminiti, the Washington Supreme Court dealt with the application of the public trust doctrine to public lands. Preliminarily, the court discussed the origin and background of the doctrine, as well as its application to private property, saying that while the state could convey private interests in tidelands and shorelands, it could never “sell or otherwise abdicate state sovereignty” over them. According to the court, “[t]he state can no more convey or give away this jus publicum interest than it can ‘abdicate its police powers in the administration of government and the preservation of the peace.’” In adopting this position the court adopted a role as reviewer of state conveyances to assure that they are consistent with public trust obligations.

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305. See, e.g., Carstens v. California Coastal Comm'n, 227 Cal. Rptr. 135 (Ct. App. 1986).
307. Eisenbach v. Hatfield, 2 Wash. 236, 244–45, 26 P. 539, 541 (1891) (stating that tidelands “belong to the state in actual proprietary, and that the state has full power to dispose of the same, subject to no restrictions, save those imposed upon the legislature by the constitution of the state and the constitution of the United States”).
309. Id. at 666, 732 P.2d at 992.
310. Id. at 669, 732 P.2d at 994 (quoting Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892)).
311. For the crucial role of the judiciary in enforcing the public trust, see generally Sax, supra note 20.
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In *Caminiti*, the Washington Supreme Court adopted a test for determining when state legislation modifies the public trust doctrine as applied to state lands. The court relied heavily on the U.S. Supreme Court's seminal opinion in *Illinois Central Railroad v. Illinois.* First, the court must inquire whether the state, by reason of the legislation, has given up its right to control the *jus publicum.* If the court finds that it has, then the court must determine "whether by doing so the State has (a) promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired" the *jus publicum.*

Applying the new test, the court nonetheless held that the statute at issue in *Caminiti* did not violate the public trust doctrine. The plaintiffs had challenged the validity of a statute that granted private landowners the right to extend recreational docks onto abutting public shorelands and tidelands without paying money to the state. Initially, the court discussed the interrelationship of the public trust doctrine and the Shoreline Management Act. The court concluded that the Act contains legislative controls that meet the requirements of the public trust. The Shoreline Act lists among its preferred uses single family residences and piers. The court then concluded that the statute at issue in *Caminiti* was consistent with the Shoreline Act, and, by implication, with the public trust doctrine.

The *Caminiti* court also found that the state did not give up its right of control over the *jus publicum* by allowing private landowners to build docks on public shorelands and tidelands. The court supported its position with several arguments: 1) the statute does not allow for private docks in harbor areas; 2) private docks are to be used only for recreational purposes; 3) the Department of Natural Resources has the authority to revoke a property owner's right to maintain such a dock; and 4) these residential private docks are "subject to local regulation governing construction, size and length." These factors led the court to conclude that the government's control over the docks was adequate to satisfy the requirements of the public trust doctrine.

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312. 146 U.S. 387 (1892).
314. *Id.* at 670, 732 P.2d at 994–95 (emphasis added).
318. *Id.* at 672, 732 P.2d at 995–96.
The court continued its analysis and found that the construction of private docks on public tidelands and shorelands actually promoted, to some extent, the public's interest in the *jus publicum* as defined in the Shoreline Act.³¹⁹ Finally, the court concluded that such docks do not impair the public interest.³²⁰

Although the *Caminiti* court set forth a test indicating that it would seriously scrutinize legislative actions affecting trust property, in actual practice it barely scrutinized the legislation at issue. As a result, the outcome of future cases is unclear. Will the court give real substance to the test it enunciated, or will it continue to defer to the legislature? A recent case, *Draper Machine Works, Inc. v. Department of Natural Resources*, suggests that deference to the legislature will continue.³²¹

1. State Projects

The Shoreline Management Act applies to all shorelines owned and administered by the state and local governments.³²² Therefore, under *Caminiti*, state projects that fall within the Shoreline Act list of preferred uses would likely be consistent with the public trust doctrine.³²³

2. Application of the Public Trust Doctrine in State and Local Land Use Planning

Washington State policy strongly encourages comprehensive planning.³²⁴ In general, comprehensive planning helps to coordinate administrative decisions involving the physical development and use of land, air, and water resources. Public trust values should be considered when planners balance alternatives and develop recommendations. Significantly, the Washington Supreme Court’s *Orion* decision involved the legitimacy of two comprehensive plans, and the court

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³¹⁹. Id. at 673–74, 732 P.2d at 996.
³²⁰. Id.
³²³. Of course, the state project would also have to pass under other state environmental regulations, such as the State Environmental Policy Act. Id. § 43.21C (West 1983 & Supp. 1991).
³²⁴. With the passage of the Growth Management Act in 1990, the emphasis on comprehensive planning in Washington is stronger than ever before. For example, the 1990 Growth Management Act requires counties experiencing growth, especially those that are more populous (this includes all twelve Puget Sound counties and the cities therein), to adopt comprehensive plans by July 1, 1993. Id. § 36.70A.040 (West 1991). Zoning consistent with those plans must be adopted within a year thereafter. Id. § 36.70A.120.
implicitly approved comprehensive planning as a method of protecting
public trust resources and uses.\footnote{325}{325. Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022 (1988). The two comprehensive plans in Orion were the Skagit County Shoreline Master Program and the Padilla Bay National Estuarine Research Reserve Management Plan.}

Authority for regional planning is delegated principally to counties, but extends to all levels of government through the Planning Enabling Act.\footnote{326}{326. WASH. REV. CODE ANN. § 36.70 (West 1991); see also id. § 35A.63 (providing for planning and zoning in code cities). The scope and scale of planning varies, depending on the resource, purpose, jurisdictional authority, and need for coordination. Planning efforts may be state-wide and quite complex. However, the fundamentals of the planning process—assessing needs, determining relative costs and benefits, and presenting alternatives—remain basically the same. Accordingly, comprehensive planning is done at both the state and local levels. The state generally assumes responsibility for ensuring coordination, technical assistance, policy compliance, and consistency.}

The Act describes planning as an essential process to insure multiple uses of environmental resources.\footnote{327}{327. According to the Act, the purpose of planning is “assuring the highest standards of environment for living, and the operation of commerce, industry, agriculture and recreation, and assuring maximum economies and conserving the highest degree of public health, safety, morals and welfare.” Id. § 36.70.010. The language of the Act clearly aligns planning with the regulatory police powers of government.}

On both the state and local levels, comprehensive plans serve a wide variety of functions, including state agency operating plans, port and harbor improvement districts, aquatic lands leasing, and utility operations. Each comprehensive plan must promote the public interest, where appropriate, and include both mandatory and optional elements.\footnote{328}{328. See id. § 36.70.470 regarding promotion of the public interest. Under § 36.70.330, the required elements include land use, circulation, and supporting materials such as maps, diagrams, and charts. Optional elements include conservation, recreation, rights of way, ports, harbors, and public use. Id. § 36.70.350. An analysis of these elements would entail consideration of public trust lands, waters, and uses if they are present in the geographical area under review.}

Traditionally, a comprehensive plan has been a kind of blueprint that influences regulatory regimes such as local zoning codes and environmental designations. They have also guided political decision-making. The 1990 Growth Management Act, however, further enhances the importance of comprehensive plans in those counties and cities covered by the Act by requiring that development regulations be consistent with these counties’ and cities’ plans.\footnote{330}{330. Id. § 36.70A.120 (West 1991). The Growth Management Act requires counties that adopt plans under the Act to designate wetlands, steep slopes, and flood plains, and to adopt...}
Some forms of comprehensive planning bear directly on preserving elements of the public trust. The Shoreline Management Act requirement of a combination of state and local planning is an example. The Shoreline Act clearly states the need for comprehensive planning to allow multiple uses of the state's shorelines while protecting the public interest.\textsuperscript{331} Such planning is essential to the creation of local shoreline master programs (SMPs)\textsuperscript{332} that implement the plans. In general, SMPs regulate use in, on, and over shorelines. Zoning classifications create natural, conservation, rural, and urban areas specifying appropriate, conditional, and prohibited uses for each environment. SMPs may also incorporate any other element deemed appropriate or necessary to effectuate the policy of the Shoreline Act.\textsuperscript{333} This clause is an open invitation for local SMPs to expressly incorporate public trust doctrine principles. Finally, SMPs, unlike other comprehensive plans, are adopted into the Washington Administrative Code (WAC) and become part of the state's Shoreline Master Program. As a result, all local SMP rules, regulations, designations and guidelines become state law and are enforceable.\textsuperscript{334} In this manner, protection of public trust resources and uses becomes binding.

Comprehensive planning also facilitates environmental review. The State Environmental Policy Act of 1971 (SEPA) established a statewide review process for evaluation and decision-making on land use proposals.\textsuperscript{335} The intent of SEPA is to ascertain the proper balance between development and environmental protection. Therefore, SEPA review is made effective only through comprehensive planning. As part of its review criteria, SEPA establishes a "trustee" responsibil-

\textsuperscript{331} Id. § 36.70A.170. Counties and cities that are not required or do not choose to regulate under the provisions of the Growth Management Act must also develop regulations to protect critical areas by March 1, 1992. Id. § 36.70A.060, as amended by Act of July 16, 1991, ch. 32, § 21, 1991 Wash. Laws 1st Spec. Sess. 2903. This may provide additional opportunities to consider public trust values.

\textsuperscript{332} WASH. ADMIN. CODE title 173 (1990). SMPs are defined as comprehensive plans in WASH. REV. CODE ANN. § 90.58.03(3)(a) (West Supp. 1991). These plans are developed locally and must be consistent with the policies of § 90.58 before approval by the Department of Ecology. For the most part, the state functions in an advisory capacity but has the authority to revise, amend, or reject SMPs until they comply.

\textsuperscript{333} WASH. REV. CODE ANN. § 90.58.100(2)(h) (West Supp. 1991).

\textsuperscript{334} Id. § 98.58.100(1).

\textsuperscript{335} Id. § 43.21C (West 1983 & Supp. 1991); WASH. ADMIN. CODE title 197 (1990).
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ity, seeks the widest range of beneficial uses, and tries to preserve important historic, cultural, and natural aspects of our national heritage. This invites consideration of the public trust doctrine. In practice, however, SEPA reviews are handled in a generic fashion, rarely (if ever) explicitly referring to the public trust doctrine. It is important to note, however, that opportunities to apply public trust principles exist because many proposals that fall under SEPA review also may be subject to more stringent reviews such as that for shoreline substantial development permits.

From a land management perspective, area management programs should reflect both public trust principles and comprehensive planning. Balancing appropriate uses to provide the greatest public benefit or interest is a commonly stated goal of both management and the public trust. Area management programs diverge primarily in matters of detail. When viewed cumulatively, however, they embody most of the principles found under the public trust doctrine.

In summary, comprehensive planning implemented on both state and local levels allows consideration of public trust principles, resources, and uses. Zoning in the local SMPs implements these principles. Other planning projects contain the elements necessary for similar public trust protection.

3. Licensees and Lessees of the State

By licensing and leasing public trust resources, states can control use of the resources and receive revenue. This part discusses state management of state-owned land, the central issue in Caminiti. The issue, in a nutshell, is: what duties are imposed on the state by the

337. Id. § 43.21C.020(2)(d).
338. There are numerous examples of area management programs that protect and preserve public trust rights and lands including: DNR multiple use management (Id. § 79.68.90 (West 1991)); natural area preserves (§ 79.70); natural resource conservation area (§ 79.71); scenic rivers system (§ 79.72); aquatic lands leasing (§ 79.90; WASH. ADMIN. CODE § 332-30 (1990)); shellfish harvesting areas (WASH. REV. CODE ANN. § 75.08.080 (West Supp. 1991)); habitat preserves (§ 77.12.650); integrated transportation systems (§ 47.01.071 (West 1986)); seashore conservation area (§ 43.51.660 (West 1983)); and state park system (§ 43.51 (West 1983 & Supp. 1991); WASH. ADMIN. CODE Title 352 (1990)).
339. One observer has even argued that the Department of Natural Resources' Aquatic Land Enhancement Account (ALEA) is a direct application of the public trust doctrine in management. Susan Snow, The Aquatic Land Enhancement Account: Operationalizing the Public Trust in Washington Submerged Land Management (1989) (unpublished M.M.A. thesis, University of Washington (Seattle)).
public trust doctrine in the management of state-owned lands that are
covered by the Seashore Conservation Act and Aquatic Lands Act?

The first inquiry is whether the legislature has relinquished control
of the trust resource. *Caminiti* suggests that if the state imposes condi-
tions in its licenses, and the rights of the licensee are subject to revoca-
tion, then a court may find that the state has not relinquished control
of the resource. 341 As a practical matter, however, if a state tries to
maintain too much control over shorelands and tidelands, it may dis-
courage all development. For example, if a state agency attempted to
lease tidelands subject to too many conditions, for a short term with
no right of renewal, private investors would not likely undertake
development. Prospects for a return on investment would be too
uncertain, and financing would be difficult. In Washington, Depart-
ment of Natural Resources (DNR) leases generally may not exceed
fifty-five years for tidelands and shorelands, 342 thirty years for the beds
of navigable waters, 343 and ten years for leases for mariculture. 344
DNR has other means to maintain state control, such as refusing lease
renewals and cancelling leases for non-compliance.

State relinquishment of control over a trust resource will be upheld
only if it promotes, or does not substantially impair, that interest. The
Washington Supreme Court decision in *Caminiti* indicates that it may
look to the Shoreline Management Act for guidance on whether a
given use promotes the public interest. 345 Even though the Shoreline
Act has dubious preferences such as the one for single family resi-
dences, it nonetheless provides some protection for the public interest.
For example, one of the stated preferences in the Shoreline Act is for
water uses that are "unique to or dependent upon use of the state's
shoreline." 346

In defining the scope of the public interest, the court may also look
to the list of public trust interests in *Orion* and interests recognized by
other courts. 347 "Promoting the public interest" also raises issues.
For example, would it be inconsistent with the public trust doctrine to
allow leasing or licensing of uses which, although neither within the
Shoreline Act's list of preferred uses nor within the judicially recog-

341. *Id.* at 671-73, 732 P.2d at 995-96.
343. *Id.* § 79.95.020.
344. *Id.* § 79.96.010.
347. For a discussion of the public trust interests that the court has recognized or might
recognize in Washington, see *supra* parts III.C.1-2.
nized list of public interests, are accessory or incidental to permitted uses? Could the state lease or license land for a use that would not further the public trust if the developer agreed to take measures, such as public accessways, that promote the public interest?\footnote{348}

4. **State Obligation to Abide by Public Trust Principles on State-Owned Land**

*Caminiti* is the only major Washington case in which state action has been challenged as inconsistent with the public trust doctrine. As a result, state law is not well developed. The Washington Supreme Court could, however, derive valuable principles and lessons from other states’ case law.

For example, the California Supreme Court’s decision in *National Audubon Society v. Superior Court*\footnote{349} (the Mono Lake case) indicated that the state had an ongoing duty to uphold public trust values. The court found that the Water Board had not taken public trust interests into account when it approved Los Angeles’ appropriation permit that diverted waters from Mono Basin. The court remanded the case to the Water Board to reconsider allocation of water in light of public trust values. Similarly, the Washington Supreme Court could require the state to re-evaluate permits, licenses, and leases made in the past in light of evolving public trust doctrine principles.

Although some courts have allowed legislatures to convey trust lands for purposes that have nothing to do with public trust uses, Washington is unlikely to follow suit. Those courts require only an advancement of the general public interest, as opposed to a public trust interest, in exchange for the conveyance. For example, courts have validated conveyances of land for offshore oil production,\footnote{350} marketability of title for structures,\footnote{351} construction of a YMCA,\footnote{352} a restaurant, a bar and a shopping complex,\footnote{353} because the uses were in the public interest.

It is unlikely that the Washington Supreme Court would take such an approach if it continues to look to the Shoreline Management Act

\footnote{348. See Donald L. Connors & Jack H. Archer, The Public Trust Doctrine: Its Role in Managing America’s Coasts 48 n.100 (Aug. 2, 1990 Draft) (suggesting that a state agency might be able to lease or license land under both of these circumstances); see also infra notes 350–55 and accompanying text.}


\footnote{350. Boone v. Kingsbury, 273 P. 797, 815–16 (Cal. 1928), cert. denied, 280 U.S. 517 (1929).}

\footnote{351. Opinion of the Justices, 424 N.E.2d 1111, 1115 (Mass. 1981).}

\footnote{352. People v. City of Long Beach, 338 P.2d 177, 178–79 (Cal. 1959).}

\footnote{353. Martin v. Smith, 7 Cal. Rptr. 725, 728 (Ct. App. 1960).}
for policy guidance. Because the Shoreline Act has a general preference for water-related uses, the court may limit the scope of the public interest to preclude unprincipled land-related uses of public trust resources. In addition, the language of the seminal U.S. Supreme Court decision on the public trust doctrine, *Illinois Central Railroad v. Illinois*, suggests limits to what may be deemed a public interest. In that case the Court held that a state can convey trust land only if it "can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." The crucial language here is "in the lands and waters remaining." That language modifies and restricts the term "public interest." In other words, such lands can be conveyed into private ownership only for purposes that are consistent with the public's interest in the public trust resources, not for purposes that generally further the public interest.

E. Private Actions that Are Inconsistent with the Public Trust Doctrine

Even where the state has conveyed tidelands and shorelands to private individuals, those lands generally continue to be burdened by the public trust doctrine. One way the Washington Supreme Court has conceptualized this is by saying that the ownership of tidelands and shorelands has two different aspects, the *jus privatum*, or proprietary interest, that may be conveyed by the state, and the *jus publicum*, or public authority interest, that may not be conveyed. Thus, when the state conveys tidelands and shorelands to a private individual, it conveys only the *jus privatum*, and retains the *jus publicum* for itself. The court has also likened the trust to "'a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land's dependent wildlife.'" Private citizens or the Attorney General may bring suits to enjoin private landowners from damaging public trust interests.

Tidelands and shorelands in private hands are not, however, invariably burdened by the public trust. If land is no longer adaptable to

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354. 146 U.S. 387 (1892).
357. *Id.* at 639, 747 P.2d at 1072.
358. *Id.* at 640, 747 P.2d at 1072-73 (quoting Scott W. Reed, *The Public Trust Doctrine: Is it Amphibious?*, 1 J. Env'tl. L. & Litig. 107, 118 (1986)).
359. For a discussion of who can bring an action to enforce the public trust doctrine, see infra part V.A.1.
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trust uses, it is no longer burdened by the trust.\textsuperscript{360} It should not follow, however, that the public trust burden should be applied less stringently to tidelands that are still usable for trust purposes but are surrounded by built-up tidelands.\textsuperscript{361}

Although the Washington Supreme Court has not had the opportunity to address the issue, it could find that prior appropriators, who significantly reduce the flow of rivers or dry up waterbodies, are acting in a manner inconsistent with the public trust.\textsuperscript{362} Although the court has not had occasion to hold that appropriative rights are subject to the public trust doctrine, it has held that appropriations of water that lower lake levels can unreasonably interfere with riparian rights. In \textit{In re Martha Lake Water Co.},\textsuperscript{363} the Washington Supreme Court held that appropriators could not damage riparian rights by lowering the level of the lake by twelve inches, thus exposing eight to fifty feet of muddy lake bottom in front of the riparian lands. The court might also limit appropriations which adversely affect public trust rights.\textsuperscript{364} The state's strong policy of preserving minimum in-stream flows further supports protecting public trust resources from damage by prior appropriators.\textsuperscript{365}

IV. INTERFACE OF THE PUBLIC TRUST DOCTRINE WITH THE TAKINGS CLAUSE OF THE WASHINGTON AND FEDERAL CONSTITUTIONS

A. Application of the Public Trust Doctrine to Avoid Takings Claims

Even where the state has conveyed tidelands and shorelands to private individuals, those lands are still burdened by the public trust. The trust resembles a "covenant running with the land" for the benefit

\textsuperscript{360} \textit{Orion}, 109 Wash. 2d at 640 n.9, 747 P.2d at 1072 n.9 (citing Berkeley v. Superior Court, 606 P.2d 362 (Cal.), \textit{cert. denied}, 449 U.S. 840 (1980)).

\textsuperscript{361} In State Department of Ecology v. Ballard Elks Lodge No. 827, 84 Wash. 2d 551, 527 P.2d 1121 (1974), the court suggested that part of the reason the Elks Club could build its non-water-dependent lodge over tidelands was because the site was located in a densely developed portion of Shilshole Bay, where other non-water-dependent structures extended out over tidelands. Now that the court has more firmly committed itself to the public trust doctrine, it seems less likely that the court would allow a non-water-dependent use such as this, considering the overall cumulative impact.

\textsuperscript{362} See Johnson, \textit{supra} note 173, at 257–58; see also \textit{supra} note 349 and accompanying text for a discussion of the Mono Lake case.

\textsuperscript{363} 152 Wash. 53, 377 P. 382 (1929).

\textsuperscript{364} See Johnson, \textit{supra} note 173, at 244–45.

\textsuperscript{365} \textit{See WASH. REV. CODE ANN.} §§ 90.22, .54 (West Supp. 1991).
of the public. As a result, private property owners do not have the right to do anything inconsistent with the public trust.

Private landowners cannot claim a taking has occurred when regulations prevent them from doing things that would adversely affect public trust interests. Whether or not the landowner had notice of the burden the public trust doctrine imposed on the land is irrelevant; no restrictions need be in the original conveyance. Instead, courts impose the public trust doctrine as a matter of law.

The U.S. Supreme Court's recent opinion in Phillips Petroleum Co. v. Mississippi illustrates the fact that explicit notice about the public trust to private landowners is unnecessary. In Phillips Petroleum the Court held that lands beneath non-navigable streams that were influenced by the ebb and flow of tides from the Gulf of Mexico were public trust lands and passed to Mississippi upon statehood under the equal footing doctrine. The Court rejected the landowners' equitable arguments that they were entitled to the land because they held the lands under a pre-statehood grant and had paid taxes on the lands. The Court insisted that earlier Mississippi cases had made the state's claim to private tidelands clear. If the Court considers such notice adequate to allow states to take possession of tidelands, a fortiori such notice should be adequate to apprise private landowners of the public trust easement covering their property.

In Orion the Washington Supreme Court explored the relationship between takings claims and the public trust doctrine. Orion Corporation owned a large part of the tidelands in Padilla Bay, an ecologically important estuary that is navigable at high tide. Orion planned to dredge and fill the bay in order to create a residential, Venetian-style community. In 1971 the Shoreline Management Act identified the bay as a shoreline of statewide significance, and declared that state policy required preservation and protection of the area. The

367. Id. at 641, 747 P.2d at 1073.
368. See, e.g., id. at 640, 747 P.2d at 1072 (noting that Orion purchased its land "subject to the terms of the trust"). By contrast, Washington State requires all other encumbrances and liens to be registered so as to protect purchasers. WASH. REV. CODE ANN. § 58.19.010 (West 1990). At least one commentator has suggested that areawide plans should be developed for public access. James W. Scott, Washington State Department of Ecology, Shorelands Division, An Evaluation of Access to Washington's Shorelines Since Passage of the Shoreline Management Act of 1971, 27 (Sept. 1983). In addition to enhancing public access, areawide plans might be one way of giving property owners (and potential buyers) notice of public rights.
370. Id. at 482. But cf. Justice O'Connor's spirited dissent. Id. at 485.
371. Orion, 109 Wash. 2d at 641, 747 P.2d at 1073.
state later approved the Skagit County Shoreline Management Master Program (SCSMMP), that designated Orion's lands as "aquatic," thus prohibiting dredging and filling. These regulations combined to limit commercially valuable uses to nonintensive recreation and aquaculture, the latter requiring a conditional use permit.372

In Orion the court decided that the tidelands of Padilla Bay were burdened by the public trust doctrine. The court concluded that "Orion never had the right to dredge and fill its tidelands, either for a residential community or farmlands [s]ince a 'property right must exist before it can be taken,' neither the SMA [Shoreline Act] nor the SCSMMP effected a taking by prohibiting Orion's dredge and fill pro-

ject.373 Thus, the public trust doctrine can largely preclude a successful takings claim because private property owners have no right to act in a manner inconsistent with public trust interests.

The court in Orion indicated that a takings issue might still exist if the regulation of Orion's land unduly burdened uses that would be consistent with the public trust doctrine. Under the SCSMMP, Orion was strictly limited to using the bay for non-intensive aquaculture and recreation. Orion claimed that its property might be usable for other purposes that were consistent with the public trust. Because the trial court record did not disclose whether Orion's property was adaptable to any of these other uses, the court remanded the case for further proceedings at the trial court level.374

Thus, the public trust doctrine does not bar all takings challenges. If state and local regulation significantly burden uses that would be consistent with the public trust, then private landowners may have a takings action. The Washington Supreme Court has indicated that although its analytical approach may differ from the federal test, the breadth of constitutional protection against takings without compensation is virtually the same under both the state and federal constitutions.375

B. Takings Claims That May Be Raised by the Extension of the Trust Doctrine

Although application of the public trust doctrine to lands tradition-ally within the trust will successfully prevent most takings challenges, extension of the public trust doctrine to tributaries, uplands, and

372. Id. at 626-29, 747 P.2d at 1065-67.
373. Id. at 641-42, 747 P.2d at 1073 (citation omitted).
374. Id. at 662, 747 P.2d at 1084.
375. Id. at 657, 747 P.2d at 1082; see infra part IV.D.
related lands may raise more serious takings issues. The U.S. Supreme Court in *Phillips Petroleum*\(^{376}\) indicated that there are no constitutional limits preventing states from recognizing preexisting public trust rights. Thus, public trust burdens on lands subject to the ebb and flow of the tide and lands under navigable-for-title waterways are likely immune from takings challenges. As indicated above, however, some courts have expanded the geographical scope of the public trust doctrine. As a result, states may regulate appropriations on non-navigable tributaries and related wetlands; guarantee public access to the dry sand areas of beaches; and extend the public’s right to use non-navigable lakes and streams.\(^{377}\)

Geographical extensions of the public trust doctrine could raise takings issues. One commentator has suggested that the Wisconsin court’s extension of the doctrine to wetlands may be constitutionally suspect.\(^{378}\) Another commentator, Professor Lazarus, insists that if the state tries to extend the doctrine beyond lands acquired at statehood, landowners have valid takings claims.\(^{379}\) Several courts, however, have examined the practical and environmental realities of preserving public rights in extending the scope of the doctrine. For example, the New Jersey Supreme Court recognized the practical problem that inadequate access poses to the full exercise of public rights, and extended the doctrine to the privately owned dry sand area of beaches. Other courts, such as the Wisconsin Supreme Court, have recognized the interconnectedness of water resources and extended the scope of the doctrine to prevent indiscriminate filling of wetlands. By extending the doctrine to cover these areas, courts have preserved and effectuated public rights rather than adhering to inflexible legal doctrine.

C. Banishing the Specter of the Nollan Decision

Armed with the Supreme Court’s decision in *Nollan v. California Coastal Commission*,\(^ {380}\) many owners of land along beaches and shores claim a taking has occurred whenever the state seeks to provide public access to and along beaches. In *Nollan*, the California Coastal Com-

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\(^{376}\) 484 U.S. 469 (1988).

\(^{377}\) See *supra* part III.B.


\(^{379}\) Lazarus, *supra* note 19, at 648–49.

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mission tried to condition its grant of permission to rebuild a house on the transfer of an easement across private beachfront property. The easement would have secured lateral public passage across Nollan's property along a strip of dry sand between the mean high tide line and a seawall. The U.S. Supreme Court found that a taking had occurred because there was no nexus between the governmental purpose of the permit condition and the development ban. 381

The Nollan decision, however, does not limit the application of the public trust doctrine. First, the parties did not raise the public trust doctrine as an issue. 382 If, as some courts have held, the public trust doctrine covers the dry sand area, 383 a state would not need to obtain such an easement. Similarly, if the doctrine of custom provides the public a right to the dry sand area of beaches, then public access does not constitute a taking of private property. Second, even if a state applies the Nollan reasoning, it may be able to meet the nexus requirement by adequately showing that a permit condition, such as a lateral access easement, is related to legitimate state interests affected by the development. If a state properly invoked the public trust doctrine and the myriad public interests protected by it, courts may recognize that beachfront and shorefront development affects substantial, legally recognized, public interests.

D. Takings and Public Trust Resources: Lucas v. South Carolina Coastal Council

The South Carolina Supreme Court in Lucas v. South Carolina Coastal Council 384 has set the stage for another case implicating public trust resources and takings jurisprudence. Mr. Lucas owns a pair of oceanfront lots in South Carolina. South Carolina, through its Beachfront Management Act, 385 limited development on lots like Lucas' that are located on the beach dune system. The Act prohibited, through set-back lines, the construction of any permanent structures on such property, except a small deck or walkway. 386 The Act contained extensive findings and policy that suggested that these measures

381. Id. at 838–42.
382. In dissent, Justice Blackmun specifically stated that Nollan did not implicate in any way the public trust doctrine. Id. at 865.
384. 404 S.E.2d 895 (S.C. 1991), cert. granted, 112 S. Ct. 436 (Nov. 18, 1991, argued Mar. 2, 1992) (No. 91-453). Significantly, the court only addressed the takings issue. It declined to consider other legal theories, such as the public trust doctrine. Id. at 896 n.1.
386. Lucas, 404 S.E.2d at 895–96.
were necessary to prevent a serious public harm.\textsuperscript{387} In particular, the legislative findings noted the delicate nature of the beach/dune system, and stated that further development could cause significant erosion problems.\textsuperscript{388} Following \textit{Keystone Bituminous Coal Ass'n v. De Benedictis},\textsuperscript{389} and \textit{Mugler v. Kansas},\textsuperscript{390} the South Carolina court in \textit{Lucas} held that no taking had occurred because the Act was an exercise of the police power that prevented a serious public harm.\textsuperscript{391}

Under Washington's current takings jurisprudence, the State of Washington could potentially make a similar argument to defeat a regulatory takings claim in the coastal zone. Recently, the Washington Supreme Court in \textit{Presbytery of Seattle v. King County}\textsuperscript{392} attempted to clarify the law of takings. The court created a threshold inquiry to determine whether governmental action constitutes a taking. It will only apply a takings analysis if the regulation provides a public benefit (as opposed to a public harm) or it destroys one or more of the fundamental attributes of ownership—the right to possess, to exclude others, and to dispose of the property.\textsuperscript{393} Therefore, an attempt to regulate in the coastal zone could be immune from a takings claim if its purpose was to prevent a public harm, and it did not destroy any fundamental attributes of ownership.

\textsuperscript{387} \textit{Id.} at 896–98.
\textsuperscript{388} \textit{Id.} at 897.
\textsuperscript{389} 480 U.S. 470 (1987).
\textsuperscript{390} 123 U.S. 623 (1887).
\textsuperscript{391} \textit{Lucas}, 404 S.E.2d at 899–902.
\textsuperscript{392} 114 Wash. 2d 320, 787 P.2d 907 (1990).
\textsuperscript{393} \textit{Id.} at 329–30, 787 P.2d at 912. But note that this does not mean the state regulation is necessarily valid. It may still violate due process. \textit{Id.} at 330, 787 P.2d at 912–13. If the statute is invalidated as violative of due process, however, it is much less likely that the state will face liability for a temporary taking. \textit{Id.} at 332 n.20, 787 P.2d at 913 n.20 (quoting Orion Corp. v. State, 109 Wash. 2d 621, 648–49, 747 P.2d 1062, 1077 (1987), \textit{cert. denied}, 486 U.S. 1022 (1988)). The court's mode of analysis in \textit{Presbytery} has been questioned. See Jill M. Teutsch, Comment, \textit{Taking Issue with Takings: Has the Washington Supreme Court Gone Too Far?}, 66 \textit{WASH. L. REV.} 545 (1991).
V. FACTORS THAT IMPACT ENFORCEMENT OF THE PUBLIC TRUST DOCTRINE: JUDICIAL REMEDIES AND FEDERAL PREEMPTION

A. Judicial Remedies for Conduct Inconsistent with the Public Trust Doctrine

I. Enforcement by Private Citizens, Private Groups, and the Attorney General

The issue of standing should not pose a serious obstacle to suits by private citizens and private groups. In Caminiti, the plaintiffs were an individual, Ms. Caminiti, and the members of the Committee for Public Shorelines Rights. They challenged a state statute that allowed private upland owners to build docks on public tidelands and shorelands without paying any rent to the state. The plaintiffs contended that they had an interest in the amount of revenue collected by the state, and they contended that the presence of private recreational docks affected their access to and use of public lands. These uses included, but were not limited to, their ability to fish, swim, navigate, water-ski, beachcomb, procure shellfish, sunbathe, observe natural and undisturbed wildlife, play on open beaches, and enjoy seclusion.

There appears to have been no serious issue over standing, because the court in Caminiti never addressed the matter. Therefore, if private citizens or citizens’ groups allege that their interests in public trust resources are affected by state or private action, and if they specifically list their personal interests, then standing should not be a barrier to a suit. In doctrinal terms, such a showing of interests would be adequate to establish that there was an injury in fact and that the plaintiffs are among the injured parties. This liberal standing test is in accord with the national trend toward loosening standing requirements in environmental suits.

395. Id. at 665, 732 P.2d at 992.
396. Id.
The Attorney General has the power to protect state and public interests by bringing suit to enforce the public trust doctrine. The Attorney General also has authority to enforce the Shoreline Management Act.

2. Other Ways for Public Trust Issues To Come Before the Court

Courts will also have to address public trust issues when a private property owner claims that state regulation has caused the inverse condemnation of his or her property. As was discussed in Part IV of this Article, the public trust doctrine must be considered in determining whether a taking by excessive regulation has occurred.

B. Federal/State Powers and the Public Trust Doctrine

1. Limitations on State Power: Supremacy, Preemption, and Federal Sovereign Immunity

State attempts to use the public trust doctrine may conflict with federal power. Under the Supremacy Clause of the U.S. Constitution, the "Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, . . . shall be the supreme law of the land." Accordingly, the courts have developed the doctrine of federal preemption to determine when federal legislation prevents states from enacting laws. The U.S. Supreme Court has succinctly described its preemption analysis:

[S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Congress may preempt state law by expressly stating its intention to do so in a federal statute. Generally, however, Congress does not expressly address the preemption issue, so courts must look to legislative history to determine Congress' intent.

398. WASH. REV. CODE ANN. § 43.10.030 (West 1983).
400. U.S. CONST. art. VI, cl. 2.
In general, state attempts to protect public trust resources are not likely to encounter many preemption problems. The U.S. Supreme Court maintains a presumption against federal preemption when federal legislation enters an area of traditional state power. The public trust doctrine, which protects local public interests and the environment, is a doctrine grounded in property law which is an area traditionally governed by the states. Furthermore, the federal government's efforts to protect the environment have generally stressed the importance of a collaborative effort between the states and the federal government. The U.S. Supreme Court has found that some state laws, however, such as bans on supertankers over a certain size, and standards for vessel design, construction, and navigational equipment, were preempted by the federal Ports and Waterways Safety Act. The Court found that the federal legislation demonstrated congressional intent that there be national uniformity in tanker design standards. Nevertheless, a more recent case involving the issue of preemption of a state environmental law, California Coastal Commission v. Granite Rock Co., indicates the Court's continued reluctance to find preemption of state laws that protect the environment.

State public trust activities may also be precluded as an encroachment upon Congress' commerce power. Congress' power over navigation under the Commerce Clause extends primarily to waterbodies that are navigable in fact.

402. For a discussion of federal preemption and state efforts to control oil pollution, see Ralph W. Johnson, Oil and the Public Trust Doctrine in Washington, 14 U. Puget Sound L. Rev. 671 (1991).
404. See infra part III.A.
408. 480 U.S. 572 (1987) (upholding California's right to review and require a permit for a private mining project on United States Forest Service lands, despite federal legislation such as the Federal Land Policy and Management Act, the National Forest Management Act, and the Coastal Zone Management Act).
409. U.S. CONST. art. I, § 8, cl. 3.
410. Waterbodies are navigable in fact if "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870). Waterbodies need not be navigable in their original state, but only need
power over state law in the area of interstate navigation, state regulation of navigation is given substantial leeway where there is no applicable congressional act, no need for national uniformity, and no evidence that state action impedes interstate commerce.\footnote{411}

The federal government's sovereign immunity may also prohibit states from enforcing the public trust doctrine against federal projects. Federal projects "are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous."\footnote{412} In practice, however, state regulation of federal projects has often been allowed because of the policies Congress has set forth that suggest that federal and state governments share responsibility in environmental protection and natural resource management.\footnote{413}

In \textit{Friends of the Earth v. United States Navy},\footnote{414} the Ninth Circuit rejected the Navy's claim that, because of sovereign immunity, Washington, through the Shoreline Management Act, could not regulate the Navy's project. In reaching its decision, the court first looked to the federal Clean Water Act.\footnote{415} The Clean Water Act waives federal sovereign immunity with respect to state programs that either control the discharge of dredged or fill material or operate to control and abate water pollution.\footnote{416} The court reasoned that Washington's Shoreline Act was such a program, and therefore the Navy could not assert sovereign immunity to avoid the Shoreline Act's requirements.\footnote{417} The \textit{Friends of the Earth} decision indicates that courts are likely to have little tolerance for the antiquated doctrine of sovereign immunity in light of states' legitimate interests in preserving their coastal environments.

\section*{2. A Self-Imposed Limitation on Federal Power: The Consistency Requirement of the Coastal Zone Management Act}

Under their coastal zone management programs, states can limit, modify, or prohibit activities of federal agencies and private actions requiring federal permits under the consistency provisions of the fed-
eral Coastal Zone Management Act.\footnote{418} By including public trust principles in their coastal zone management programs, states can effectively influence federal activities and avoid federal preemption questions.

Under the consistency requirement, federal agency activities directly affecting the coastal zone must be consistent “to the maximum extent practicable” with the enforceable policies of approved state management programs.\footnote{419} “Enforceable policies” include not only state policies contained in constitutional provisions, laws, regulations, land use plans, and ordinances, but also judicial or administrative decisions.\footnote{420} Therefore, federal agency activity must be consistent not only with legislative and regulatory expressions of the public trust doctrine; federal agency activity must also be consistent with the public trust doctrine as expressed by state courts. The National Oceanic and Atmospheric Administration’s regulations have interpreted the phrase “to the maximum extent practicable” to require “full consistency” unless federal law prevents the federal agency from meeting this requirement.\footnote{421}

If private activity affects the land or water of the coastal zone, an applicant for a federal permit must certify to the relevant federal agency that the activity or project is consistent with the state’s enforceable policies.\footnote{422} Once again, “enforceable policies” means not only state laws and regulations, but also judicial opinions. Thus, decisions such as Orion\footnote{423} and Caminiti\footnote{424} that recognize the public trust doctrine in Washington constitute enforceable policy. If the state objects to the proposed project, the only way for the project to get approved is for the Secretary of Commerce to override the state’s objection. The Secretary of Commerce, however, can only override a state objection if the project is consistent with the national objectives

\footnotesize
\begin{itemize}
\item \footnote{419} Id. § 1456(c)(1). The term “federal activity” means “any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities.” 15 C.F.R. § 930.31 (1992).
\item \footnote{421} 15 C.F.R. § 930.32 (1992). Although the regulations provide for mediation of disputes between the states and federal agencies, in practice the states have generally gone to federal court to get injunctions against federal agencies. CONNORS & ARCHER, supra note 348, at 296.
\item \footnote{422} 16 U.S.C.A. §§ 1456(c)(3)(A), (B) (West Supp. 1991).
\end{itemize}
of the federal Coastal Zone Management Act or the activity is necessary for national security.425

The State of Washington has clearly indicated in the Shoreline Management Act that it will enforce the federal consistency requirement: "Where federal or interstate agency plans, activities or procedures conflict with state policies, all reasonable steps available shall be taken by the state to preserve the integrity of its policies."426 In addition to following the Shoreline Act, federal agencies and federal permittees must also follow several other state legislative programs.427 The Department of Ecology, which manages the state coastal management program, conducts the federal consistency reviews for the state of Washington. The geographical scope of the coastal zone is very large in Washington State, covering all fifteen Pacific Ocean and Puget Sound coastal counties. The Department of Ecology also reviews federal activities outside of the coastal zone, but west of the crest of the Cascade Range, to avert potential spillover effects that directly affect the coastal zone.428

Therefore, the consistency requirement of the federal Coastal Zone Management Act provides an important mechanism for protecting public trust resources from federal agency activity or federally permitted activity. Those activities must not only be consistent with state laws, regulations, and plans that protect public trust resources; they must also be consistent with judicial pronouncements of the doctrine.

VI. CONCLUSIONS AND RECOMMENDATIONS

The public trust doctrine is now firmly established in Washington law. This Article has described the relation of the doctrine to the state's police power, possible future development of the doctrine, and related issues such as takings, standing, and preemption. In the future the public trust doctrine will likely continue to be a powerful tool to protect the public interest in tidelands and shorelands.

This Article has discussed the difference between the property-based public trust doctrine and regulatory statutes that are based on the state's police powers. The public trust doctrine requires the judiciary to review all governmental activity involving public trust resources against substantive criteria. This is a unique feature of the doctrine.

Nonetheless, regulatory statutes and the doctrine have influenced each other. They have an almost symbiotic relationship. Public trust principles are often incorporated in statutes. The Washington Supreme Court has also often looked to regulatory statutes, such as the Shoreline Management Act, to define the parameters of the doctrine.

The Article also discussed the current and potential scope of the doctrine. In Orion, the Washington Supreme Court declined to decide the entire scope of the doctrine. Thus, future development of the doctrine seems likely. The decisions of other states may provide guidance for Washington's courts in developing the public trust doctrine. Other courts have applied the doctrine to cover the dry sand area of beaches, non-navigable-for-title tributaries, related wetlands, and the surfaces of recreationally navigable waters. Other state courts have also recognized new public trust values, such as aesthetic beauty and the right of the public to walk over and harvest shellfish on privately owned lands. State courts will likely continue to recognize new public trust interests as public needs and priorities evolve.

Administrators and planners should also keep abreast of developments of the doctrine. They should consider the doctrine and its values when making decisions affecting public trust resources. Such consideration would not be onerous because state and local officials already consider similar issues under the Shoreline Management Act, the Aquatic Lands Act and the State Environmental Policy Act.

The Article has also faced that veritable legal ogre, the takings issue, and shown how application of the doctrine can avoid some claims of unconstitutional taking. The public trust doctrine diminishes the impact of the U.S. Supreme Court's decision in Nollan v. California Coastal Commission, that found that requiring an easement across the dry sand area of a beach as a condition for a building permit constituted a taking without just compensation. Neither party raised the public trust doctrine issue in that case. Had the Commission successfully argued that the doctrine be applied to the dry sand area rather

than merely seeking an easement from the owner, the outcome of the case might very well have been different.

The public trust doctrine provides important protection for coastal resources from harmful private development. In economic terms, it requires owners of property affected by the trust to internalize the true costs and benefits of development. Because society has historically treated water resources as free and inexhaustible, the costs of this resource's degradation have rarely been internalized in the cost of development or production. This is "a classic case of market failure."431 The public trust doctrine helps to internalize such costs by limiting development that damages resources in which we all have an important interest.

Finally, this Article discussed two issues that may affect enforcement of the doctrine; standing and federal supremacy. At least from the Washington Supreme Court's opinion in Caminiti,432 it appears that private individuals and groups can easily meet the standing requirement to bring a suit to protect public trust interests. Federal supremacy also does not appear to thwart the doctrine. Congress has passed no laws that limit the doctrine. In fact, through the consistency requirement of the federal Coastal Zone Management Act, federal agency activity and permits are actually subject to the doctrine.

Well over thirteen hundred years ago, the compilers of Justinian's Institutes articulated the core of what we know today as the public trust doctrine: "[t]hings common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea."433 The vitality of the public trust doctrine today shows just how important the public interest is in these resources. That vitality is not surprising. The public access to and use of water resources fulfills very real needs such as fishing, navigation, commerce, and recreation. But there is also a human desire to be near water and use it that goes beyond pragmatic concerns. As Herman Melville wrote in Moby Dick:

But look! here come more crowds, pacing straight for the water, and seemingly bound for a dive. Strange! Nothing will content them but the extremist limit of the land; loitering under the shady lee of yonder warehouses will not suffice. No. They must get just as nigh the water as they

possibly can without falling in. And there they stand—miles of them—
leagues. Inlanders all, they come from lanes and alleys, streets and ave-
 nues—north, east, south, and west. Yet here they all unite. Tell me,
does the magnetic virtue in the needles of the compasses of all these
ships attract them thither? 434

434. HERMAN MELVILLE, MOBY DICK 94 (Penguin ed. 1986). The authors cannot claim
credit for finding this wonderful quote. See SLADE et al., supra note 40, at xxxv.