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PATRICK REDMOND\*

## The Public Trust in Wildlife: Two Steps Forward, Two Steps Back\*\*

### ABSTRACT

*Many environmental advocates have recently lobbied for the application of the public trust doctrine to wildlife, among other natural resources, often pointing to the need for a new “ecosystemic” ethical framework for resource management and decision-making. In many states that have addressed this possibility, the road toward recognition of a “public trust in wildlife” has been a bumpy one, with halting encouragement provided by statutes or occasional court statements often preceding or even masking a more complex doctrinal development away from the public trust’s more expansive application. This article traces this “two steps forward, two steps back” trajectory in detail in six states—California, Idaho, Michigan, Wisconsin, Massachusetts, and Washington—whose courts have grappled with or suggested extending the scope and the protected uses of the public trust doctrine to support wildlife preservation efforts. It concludes that, despite the growing urgency of biodiversity loss and unacceptability of complacency, the public trust’s expansion has been limited by powerful opposition, by its susceptibility to distinct forms of judicial side-stepping, and by the erosion of judicial recognition of causes of action based on ecological preservation over the past two decades.*

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\*\* Since this article was submitted for publication, two significant California appellate decisions were released, which, appropriately for the theme of the article, point in opposite directions. A California Court of Appeal, in *Ctr. for Biological Diversity, Inc. v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008), reviewed over a century of the state’s case law and concluded, “it is clear that the public trust doctrine encompasses the protection of undomesticated birds and wildlife.” *Id.* at 599. Two months earlier, the California Supreme Court decided *Cal. Envtl. Prot. Info. Ctr. (EPIC) v. Cal. Dep’t of Forestry & Fire Prot.*, 187 P.3d 888 (2008), on statutory grounds and seemed to confine the common law public trust doctrine’s application to water resources; the court found an “overlap” where the protection of wildlife is “intertwined” with the protection of water resources, but “the duty of government agencies to protect wildlife is primarily statutory.” *Id.* at 926. The *FPL* court clearly disagreed, but tactfully (and with questionable accuracy) observed that for the purposes of that case, “it matters not whether the obligations imposed by the public trust are considered to be derived from the common law or from statutory law, or from both. Either way, public agencies must consider the protection and preservation of wildlife.” *FPL*, 83 Cal. Rptr. 3d at 599–600.

## I. INTRODUCTION

Over the past two decades, numerous legal scholars and environmental advocates have lobbied for the recognition of a “public trust in wildlife” following logically from the common law public trust doctrine.<sup>1</sup> The core of the public trust doctrine—generally traced back to Roman law—is that the state lacks the authority to alienate or abrogate its control of public trust resources on behalf of the public<sup>2</sup> and, in its strongest formulations, has an affirmative duty to exercise “continuing supervision” over their management<sup>3</sup> to preserve them as fully as possible.<sup>4</sup> In

1. See Susan Morath Horner, *Embryo, Not Fossil: Breathing Life into the Public Trust in Wildlife*, 35 LAND & WATER L. REV. 23 (2000); Mary Christina Wood, *Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act*, 34 ENVTL. L. 605 (2004); Deborah G. Musiker et al., *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87 (1995); Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989).

2. Meyers, *supra* note 1, at 728. One basic legal reference offers a very general core idea for the doctrine: “some kinds of property must be publicly-controlled to serve certain public purposes.” 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUB. NAT. RESOURCES L. § 8:27 (1st ed. 2007).

3. Nat’l Audubon Soc’y v. Superior Court of Alpine County, 658 P.2d 709, 728 (Cal. 1983). Also popularly referred to as the “Mono Lake Case.”

4. Other commentators, in myriad law review articles on the public trust doctrine, have offered an intriguing variety of more conceptual bases for the doctrine. In his seminal and highly influential 1970 article introducing the idea of using the public trust doctrine as a tool for judicial protection of natural resources, Professor Joseph Sax asserted that the “central substantive thought” in public trust litigation is:

When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* government conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.

Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 490 (1970) [hereinafter Sax, *The Public Trust Doctrine in Natural Resources Law*] (emphasis in original). Elsewhere:

[The] idea of public trusteeship rests upon three related principles. First, that certain interests—like the air and the sea—have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And, finally, that it is a principle purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit.

JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 165 (Knopf 1970). Other takes include: an “amorphous” concept which holds that the public is vested with certain rights in certain natural resources. Richard Lazarus, *Changing Conceptions of*

the view of these advocates, the application of the doctrine to wildlife and other natural resources is desirable to usher in an “ecosystemic” framework for resource management,<sup>5</sup> and more philosophically, a “new ethical framework” for environmental decision-making.<sup>6</sup>

The source of the modern American public trust doctrine was the U.S. Supreme Court’s recognition, in *Illinois Central Railroad v. Illinois*,<sup>7</sup> of a public trust held by states over navigable waterways, for the purposes of navigation, commerce, and fishing. Following *Illinois Central*, most states recognize this minimal public trust doctrine, and many states have expanded its recognition to the closely related resource of surface waters.<sup>8</sup> Many states further recognize a statutory or common law ownership of wildlife resources.<sup>9</sup> If a state holds wildlife on behalf of its

*Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 632 (1986); a “catalyst for social change” in the allocation of natural resources. Timothy Patrick Brady, “*But Most of It Belongs to Those Yet to Be Born:*” *The Public Trust Doctrine, NEPA, and the Stewardship Ethic*, 17 B.C. ENVTL. AFF. L. REV. 621, 623 (1989–90); as used in decisions by courts, specifically in the “Mono Lake Case,” a “clever catalyst for compromise,” after which “the ‘real’ public trust doctrine is defined by parties’ and decision makers’ non-litigation actions in light of judicially-determined general principles.” Craig Anthony Arnold & Leigh A. Jewell, *Litigation’s Bounded Effectiveness and the Real Public Trust Doctrine: The Aftermath of the Mono Lake Case*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 1, 4, 14, 22 (2001). See generally Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351 (1998); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 426 & n.3 (1989).

5. Meyers, *supra* note 1, at 724–25 (defining “ecosystemic” as “an approach that allows resource managers to consider both the short-term and long-term needs of wildlife, the health of the habitat upon which a specific species or variety of species depend for survival, and the needs and goals of those humans who interact with wildlife in the ecosystem.”).

6. *Id.* at 733 (describing this as “a movement away from the perception of humankind and nature as separate entities, with humans as manipulators and controllers of nature, and toward a philosophic base that recognizes humans as part of nature.”). See generally Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972); Laurence H. Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974). These two articles serve as the primary sources for Meyers’ “new ethical framework.”

7. 146 U.S. 387 (1892).

8. See DAVID M. GILLILAN & THOMAS C. BROWN, *INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE* 151–57 (1997) (discussing California’s application of the doctrine to its water allocation system in the “Mono Lake Case,” and similar extensions in Montana, Idaho, and Colorado). See also Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States*, 1 U. DENV. WATER L. REV. 177, 197 (1998). Cf. *California v. Super. Ct.*, 93 Cal. Rptr. 2d 276, 285–87 (Cal. Ct. App. 2000) (venturing legal and philosophical considerations of the nature of the state’s “ownership” of water).

9. See Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 709 n.241 (2005)

citizens, the argument runs, this should imply the same sort of trusteeship that limits the state's ability to alienate the resource and obligates the state to preserve it.<sup>10</sup>

From a purely logical legal perspective, this conclusion seems almost tautological. Indeed, the U.S. Supreme Court over a century ago asserted as a mere recognition the fact that the power and control over wildlife lodged in the state as a result of its ownership on behalf of the people is to be exercised "as a trust for the benefit of the people and not as a prerogative for the advantage of the government."<sup>11</sup> This trusteeship implies "the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state."<sup>12</sup> However, although the Court continued to invoke the state ownership rationale to uphold state regulations, it avoided endorsing state ownership as providing exclusive and unlimited state regulatory authority over wildlife, instead progressively weakening the rationale<sup>13</sup> until it was finally overturned in 1979.<sup>14</sup>

From a more inductive legal perspective, natural resource-protective statutory schemes, federal and state, often explicitly or implicitly incorporate trust principles, as opposed to treating their subject matter as discrete "regulatory objects."<sup>15</sup> The National Environmental Policy Act (NEPA) offers perhaps the best example. NEPA's preamble proclaims, as national policy, that it is the continuing responsibility of the federal government to use all practical means to ensure that the nation may "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."<sup>16</sup> At least one commentator<sup>17</sup> has argued that Congress's and the Council on Environmental Quality's original vision of the NEPA process—as "intended to help public offi-

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(listing 25 state ownership statutes along the lines of the Idaho Code's § 36-103(a): "All wildlife . . . within the state of Idaho, is hereby declared to be the property of the state . . .").

10. See *id.* at 713–19 (concluding that the public trust doctrine offers "fertile opportunities" for future growth, including imposing affirmative duties on states, equipping citizens with enforcement authority, collecting damages for injuries to wildlife, and insulating states from takings claims).

11. *Geer v. Connecticut*, 161 U.S. 519, 529 (1896).

12. *Id.* at 534.

13. See Blumm & Ritchie, *supra* note 9, at 701–06 (documenting the state ownership rationale's erosion from 1920 to 1979).

14. *Hughes v. Oklahoma*, 441 U.S. 322, 331–35 (1979) (holding that "challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources . . .").

15. Wood, *supra* note 1, at 616–17.

16. 42 U.S.C. § 4331(b)(1) (2000).

17. Brady, *supra* note 4, at 636, 641–45.

cials make decisions that are based on understanding of environmental consequences, and take actions that *protect, restore, and enhance the environment*”<sup>18</sup> has been undermined by the Supreme Court’s assertion that NEPA is “essentially procedural”<sup>19</sup> and that federal agencies are not bound to “elevate environmental concerns over other appropriate considerations.”<sup>20</sup> Likewise, the federal Endangered Species Act’s (ESA) core “jeopardy” provisions<sup>21</sup> delegate to federal agencies the trust-like responsibility to ensure the survival and recovery of endangered and threatened species.<sup>22</sup> On a state level, courts have recognized in provisions of the California Water Code, for example, a “legislative expression of the public trust,”<sup>23</sup> in that they create affirmative duties on the part of state agencies to provide for the preservation and even the restoration of wildlife populations, rather than merely proscribing actions that inflict harm on wildlife or wildlife habitat.

This distinction between proscriptive authority and affirmative duties has evoked numerous subtle philosophical and ethical discussions of the difference between a purely regulatory relationship between the state and its natural resources and a more trust-oriented relationship based on a stewardship ethic or “duty-based environmentalism.”<sup>24</sup> This is especially true as the “whole regulatory apparatus” implementing American pollution control laws has begun yielding its primacy among environmental lawyers and other advocates to what Professor Joseph

18. 40 C.F.R. § 1500.1(c) (2006) (emphasis added).

19. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978).

20. *Strycker’s Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980).

21. 16 U.S.C. § 1536(a) (2000).

22. *See Wood, supra* note 1. *Cf. Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1069–71 (9th Cir. 2004) (holding that species conservation, including recovery, is clearly a congressionally intended goal of the ESA’s critical habitat provisions, so that a FWS regulation defining “destruction or adverse modification” of critical habitat as changes to critical habitat that “appreciably diminish[ ] the value of critical habitat for both the survival *and* recovery of a listed species” [emphases added by court] is invalid as giving too little protection to species habitat).

23. *Cal. Trout v. State Water Res. Control Bd.*, 255 Cal. Rptr. 184, 209 (Cal. Ct. App. 1989) (citing the “Mono Lake Case” at 446 n.27).

24. *Brady, supra* note 4, at 642 (borrowing the phrase “duty-based environmentalism” from another commentary on NEPA: *Don J. Frost, Jr., Amoco Production Co. v. Village of Gambell and Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.: Authority Warranting Reconsideration of the Substantive Goals of the National Environmental Policy Act*, 5 ALASKA L. REV. 15, 44–47 (1988)). *See also* William F. Pedersen, “*Protecting the Environment—What Does That Mean?*,” 27 LOY. L.A. L. REV. 969, 970 (1994) (contending that the “compartmentalized approach” of our current regulatory structure reflects the absence of environmental goals, which in turn restricts our environmental protection efforts to “an extraordinarily narrow front.”).

Sax has called the “New Age of Environmental Restoration.”<sup>25</sup> In this “New Age,” environmentalists’ main focus has shifted noticeably from individual polluters and discharges to watersheds and ecosystems, and their agenda from localized pollution control to biodiversity protection and restoration.<sup>26</sup> The notion of preserving the attributes of a healthy environment as a “trust” for future generations evokes an appropriate sense of guardianship, responsibility, and community.<sup>27</sup>

A current prominent example should further highlight the distinction. In ongoing California litigation,<sup>28</sup> environmentalists challenged the entrance of California’s Departments of Forestry and Fish and Game into the “Headwaters Agreement” of 1996. Under this agreement, lumber companies would sell an old-growth forest—the habitat of the endangered marbled murrelet—and other land to the state and federal governments to create a permanent wildlife preserve.<sup>29</sup> In return, the lumber companies would be allowed to harvest their remaining timberlands subject to the approval of certain plans and permits by state and federal agencies under NEPA, the California Environmental Quality Act, and the state and federal endangered species acts, culminating in the issuance of an Incidental Take Permit.<sup>30</sup> Oversimplifying somewhat for the sake of clarity, the environmentalists’ challenge under the statutes was necessarily confined to whether the agencies followed proper administrative procedure. The California Court of Appeals specifically refused to

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25. Joseph L. Sax, *The New Age of Environmental Restoration*, 41 WASHBURN L.J. 1, 1 (2001).

26. *Id.*

27. Rose, *supra* note 4, at 351. See David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public’s Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 378–79 (1988) (analyzing the trajectory of this shift from “conservationism” to “preservationism” in terms of courts’ increasing recognition that the “all growth is good” rationale needs to be counterbalanced, and that the public’s interest in ecological values has been systematically undervalued). *But see* Alyson C. Flournoy, *In Search of an Environmental Ethic*, 28 COLUM. J. ENVTL. L. 63, 94 (characterizing the doctrine and its vision of a “rights-based ethic” as “a foundation for modern statutory law,” which “may have contributed to the lack of attention to ethics by legal scholars for some years,” since it seemed to provide an answer to ethical as well as legal questions). A similar revisionism appears in Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax’s Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209, 1214–17 (1991) (faulting the trust model for its inherent conservatism, paternalism, and peculiarly masculine lack of confidence in citizens’ individual and collective responsibility for nurturing our environment, all of which he blames for government’s failure to protect endangered environments and species).

28. *Envtl. Prot. Info. Ctr. (EPIC) v. Cal. Dep’t of Forestry & Fire Prot.*, 37 Cal. Rptr. 3d 31 (Cal. Ct. App. 2005).

29. *Id.* at 38–39.

30. *Id.*

address the “analytic gap” between evidence of impacts on the murrelet and the agency decision, concluding that, “Nothing more was required” than that the agency make specific findings on the prerequisites for the permit.<sup>31</sup> The environmentalists’ challenge under the public trust doctrine, by contrast, could and did include claims that the *very procedures* followed by the agencies constituted an invalid abrogation of their duty to protect wildlife. The Incidental Take Permit, for example, would prevent the Department of Fish and Game from requiring new or additional conservation measures, while the public trust doctrine requires it to “do everything necessary” to preserve wildlife, not simply to avoid “jeopardy” by “stopping short of species extinction.”<sup>32</sup>

In one state, Alaska, judicial recognition of a public trust in the state’s wildlife has been relatively unproblematic. The Alaska Constitution contains provisions reserving fish, wildlife, and waters “in their natural state” to the people “for common use,”<sup>33</sup> directing that natural resources be “utilized, developed, and maintained on the sustained yield principle,”<sup>34</sup> and mandating that the legislature shall “provide for the utilization, development, and conservation [of natural resources] for the maximum benefit of its people.”<sup>35</sup> The Alaska Supreme Court has interpreted these provisions as “constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters.”<sup>36</sup> Although the Alaska Constitution’s drafters and prior Alaska decisions had relied on the U.S. Supreme Court’s state ownership rationale, the Alaska court found that, “Nothing in the [1979] opinion [overturning this rationale] indicated any retreat

31. *Id.* at 64–65.

32. Brief of Petitioners-Respondents at 100–02, *Env’tl. Prot. Info. Ctr. & Sierra Club*, 2004 WL 2824571 (Nos. A104828, A105391). For the reader inclined to view the intricate interplay of ESA and public trust principles in a less complex but still highly detailed context, a superlative source is the transcript of a 2003 California State Water Resources Board (SWRCB) Hearing reviewing U.S. Bureau of Reclamation water rights permits: *SWRCB, Public Hearing, Phase 2: To Review the United States Bureau of Reclamation Water Rights Permits (Application 11331 and 11332) to Determine Whether Any Modifications in Permit Terms or Conditions Are Necessary to Protect Public Trust Values and Downstream Water Rights on the Santa Ynez River below Bradbury Dam (Cachuma Reservoir)*, available at <http://www.waterrights.ca.gov/hearings/CachumaPhase2Transcript11-12-03.pdf> [hereinafter *Cachuma Phase II*]. Of particular interest is a portion of the transcript where attorney Karen Kraus, for the steelhead advocacy group California Trout, contrasts proposed mitigation measures to satisfy the ESA with additional affirmative measures required by the SWRCB’s public trust responsibilities. *Id.* at 772–81.

33. ALASKA CONST. art. VIII, § 3.

34. *Id.* § 4.

35. *Id.* § 2.

36. *Owsichek v. State*, 763 P.2d 488, 493 (Alaska 1988). See also *Pullen v. Ulmer*, 923 P.2d 54, 60–61 (Alaska 1996).



from the state's public trust duty. . . . [T]he trust responsibility that accompanied state ownership remains."<sup>37</sup>

In other states, however, the road toward such recognition has been much less smooth. The occasionally encouraging court statement often masks a much more complex trajectory of doctrinal development *away* from the public trust's expansion. For example, a Virginia federal court's declaration that the public trust doctrine gives the state "the right and the duty to protect and preserve the public's interest in natural wild-life resources"<sup>38</sup> has been quoted in at least 17 law review articles and cited in about 50, but it has never been referred to in a reported Virginia decision. Meanwhile, Virginia courts have adhered to a 1932 decision rejecting the public trust doctrine as constituting, for most purposes, any kind of extra-constitutional limitation on legislative power over natural resources.<sup>39</sup> They have even rejected the substance of a 1971 state constitutional amendment declaring it to be the state's policy to "conserve, develop, and utilize its natural resources" and to "protect its atmosphere, lands, and waters from pollution, impairment, or destruction"<sup>40</sup> as a criterion for judicial review.<sup>41</sup> A Virginia commentator has criticized the courts' hesitation to promote the public's expressed interest in environmental protection and stewardship and their preference for deferring "almost unconditionally" to private property rights.<sup>42</sup> Even in less hostile state courts, judicial recognition of a public trust in wildlife often involves pulling together decades-old precedent with questionable statutory language to create new common law rights and duties.<sup>43</sup> No matter how straightforward the legal argument for extension of a recognized limited public trust doctrine to other resources may be, as its advocates would contend, courts have in general resisted the development. Per-

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37. *Owsichek*, 763 P.2d at 495 n.12. See also *Pullen*, 923 P.2d at 60 (noting that "[t]hese important themes have been consistently reaffirmed.").

38. *In re Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980).

39. *Commonwealth v. City of Newport News*, 164 S.E. 689 (Va. 1932).

40. VA. CONST. art. XI, § 1.

41. *Robb v. Shockoe Slip Found.*, 324 S.E.2d 674, 676-77 (Va. 1985).

42. Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 896-97 (1989-90).

43. This has unquestionably been the California experience. See generally *infra* notes 55-142 and accompanying text. The recently settled Friant Dam litigation, mandating restoration of a virtually extinct fishery, turned on a reinterpretation of Fish & Game Code § 5937 as expressing the public trust. See *Natural Res. Def. Council v. Patterson*, 333 F. Supp. 2d 906 (E.D. Cal. 2004). See also Nathan Matthews, *Rewatering the San Joaquin River: A Summary of the Friant Dam Litigation*, 34 *ECOLOGY L.Q.* 1109 (2007); Robert B. Firpo, *The Plain "Dam!" Language of Fish & Game Code Section 5937: How California's Clearest Statute Has Been Diverted from Its Legislative Mandate*, 14 *HASTINGS W.-NW. J. ENVTL. L. & POL'Y* 1349, 1371-72 (2008).

haps with an eye to averting the potentially multiplying challenges to state agency action or inaction, they have sometimes chosen to ignore or severely limit their own doctrines, or to eschew the logical and legal consequences of these doctrines once announced.

Repeating the logical legal arguments for an extension of the public trust doctrine, therefore, may be less indicative of a possible public trust in wildlife than offering a representative history of their recent progress within those states whose courts have given the possibility the richest and most serious attention. After a brief orientation to the key principles behind the doctrine's operation, a survey in six key states—California, Idaho, Michigan, Wisconsin, Massachusetts, and Washington—will show that for practically every case expressing sympathy with this extension, there has been an equal and opposite reaction against the extension. At present, the public trust in wildlife is an intriguing notion, often with far-reaching and fascinating implications. But it is far from a reality, even where the public trust doctrine's basic principles have been embraced.

## II. THE PUBLIC TRUST DOCTRINE

The public trust doctrine is generally described as having an ancient pedigree, with roots in the Justinian Institutes of Roman law and a more than century-old recognition by the U.S. Supreme Court in *Illinois Central Railroad v. Illinois*.<sup>44</sup> The doctrine has been invoked to supply constitutional or common law support for different, though sometimes overlapping, state (or private) powers or limitations. First, the doctrine has been invoked to confer standing on members of the general public to challenge public grants or private misuses of public trust resources. Second, the doctrine can support a state's authority to regulate public trust resources or activities on public trust lands. Sometimes, as in California, once that authority has been embodied in statutes or regulations, the full panoply of common law public trust theory inheres in these statutes or regulations and becomes a vital force in agency enforcement actions. Other times, as will be seen, the enforcing agencies and the courts choose to neglect the public trust underpinnings and confine their focus to statutory or regulatory interpretation. Third, the doctrine can be invoked as a limitation on a state's authority to alienate property in derogation of its public trust obligations. Fourth, the doctrine can be recognized as pro-

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44. 146 U.S. 387 (1892). *But see* James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine* 7–13, 18 *DUKE ENVTL. L. & POL'Y F.* 1 (2008) (reviewing Roman law and finding that this pedigree for the doctrine's restraint on alienability of lands and waters was “made impossible by the basic premise of Roman Law,” which was the Emperor's absolute power to make law).

viding an affirmative argument, or even an independent cause of action—sometimes called “breach of trust”—to prevent a state from wasting a natural resource. Fifth, and finally, the doctrine is often used by a state as a defense to a Fifth Amendment inverse condemnation action.

The central question for this article’s purposes in these five areas must be whether wildlife and the conservation of wildlife habitat qualify as constituents of the public trust obligation. This simple-sounding issue actually has three dimensions, because the public trust doctrine itself has three dimensions, which are usually discussed as (1) its geographic scope; (2) its protected uses; and (3) its duties or obligations.

The threshold inquiry before considering how the doctrine is to be applied is to determine the geographic zone, or scope, of public trust obligations. Traditionally, states have recognized public trust rights in state coastal waters reaching to the mean high-tide line, and in navigable inland bodies of water to the ordinary high-water mark.<sup>45</sup> The U.S. Supreme Court in *Phillips Petroleum Co. v. Mississippi*,<sup>46</sup> further acknowledged that the states are free to narrow or expand the zone of public trust protection.<sup>47</sup> Accordingly, some state courts, such as Idaho’s, have flirted with the idea of extending the trust to cover other resources besides waterways or the essential areas around waterways, such as wildlife.<sup>48</sup>

Once the geographic scope has been defined, the second dimension of the doctrine is determining what uses (or purposes) are permitted, restricted, or protected within it.<sup>49</sup> This sounds simple, but it is both conceptually and practically a complex matter, often involving several uses competing with one another. Judicial determinations of protected uses are generally made on an ad hoc basis and can vary greatly among the states.<sup>50</sup> Traditionally, the protected public trust uses included only commerce, navigation, and fishing.<sup>51</sup> As with the geographic scope of the doctrine, however, state courts are free to expand the protected uses in accordance with changing public needs and values. The California courts

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45. JACK H. ARCHER ET AL., *THE PUBLIC TRUST DOCTRINE & THE MANAGEMENT OF AMERICA’S COASTS* 15–16 (Univ. of Mass. 1994).

46. 484 U.S. 469 (1988).

47. *Phillips Petroleum*, 484 U.S. at 476.

48. See *Kootenai Env’tl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983).

49. ARCHER ET AL., *supra* note 45, at 22.

50. *Id.*

51. See *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892).

have been at the forefront of such expansion, recognizing ecological preservation as a protected use.<sup>52</sup>

The bare recognition of preservation as a protected use, taken by itself, would do little more than support the state in its authority to decline committing a trust resource to a use incompatible with preservation. The great leap forward made by the California Supreme Court in *National Audubon Society v. Superior Court of Alpine County* in 1983 was to find in this doctrinal development “an affirmation of the duty of the state to protect the people’s common heritage.”<sup>53</sup> The doctrinal shift from permitting certain uses on public trust lands to affirmatively protecting natural resources is “a significant change in the public trust doctrine’s traditional focus.”<sup>54</sup> The precise affirmative duties or obligations of the state as trustee—the third dimension of the doctrine’s development—have unfortunately been rarely discussed by the courts, but since future generations are among the trust’s intended beneficiaries, these obligations must include the duty to preserve. The following discussion will therefore address the progress in six key states in extending the scope and the protected uses of the public trust doctrine to support wildlife preservation efforts.

### A. Public Trust Doctrine in California

California is one of the few states whose courts have explicitly included wildlife within the scope of the public trust doctrine. In *San Diego County Archaeological Society, Inc. v. Compadres*, the court stated that “wild game . . . has always been deemed to be owned by the people of the state in their sovereign capacity. . . . It is from this common ownership that the public trust arises.”<sup>55</sup> The plaintiffs in *Compadres* were seeking to apply public trust protection to archaeological artifacts by analogizing them to wild animals. The source for the court’s dictum, refuting the analogy but affirming the public trust in wildlife, was *Ex parte Maier*,<sup>56</sup> which has provided support for several other states’ grants of

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52. *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971). See also *Kootenai*, 671 P.2d at 1088 (proclaiming the public trust “dynamic, rather than static” and “destined to expand with the development and recognition of new public uses.”).

53. *Nat’l Audubon Soc’y v. Super. Ct. of Alpine County*, 658 P.2d 709, 724 (Cal. 1983).

54. *ARCHER ET AL.*, *supra* note 45, at 26.

55. *San Diego County Archaeological Soc’y, Inc. v. Compadres*, 146 Cal Rptr. 786, 789 (Cal. Ct. App. 1978), *disagreed with on other grounds by* *L.A. v. Venice Peninsula Properties*, 644 P.2d 792, 798 n.11 (Cal. 1982) (disapproving dictum that “to the effect that the public trust doctrine applies only to property to which the state has at one time held title”).

56. 37 P. 402 (Cal. 1894).

protection to wildlife as a public resource.<sup>57</sup> *Maier* itself was a *habeas corpus* case, in which the petitioner challenged his detention for violating the statute prohibiting the sale of deer meat by contending that the prohibition was beyond the state's police power. The court responded that "wild game within a state belongs to the people in their collective, sovereign capacity; . . . they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good."<sup>58</sup>

The asserted inclusion of wildlife within the public trust also springs from section 1801 of the California Fish and Game Code, which declares the state's policy to be "to encourage the preservation, conservation, and maintenance of wildlife resources under the jurisdiction and influence of the state . . . for their intrinsic and ecological values," besides their economic, recreational, and aesthetic benefits.<sup>59</sup> In *Betchart v. California Department of Fish & Game*,<sup>60</sup> the court relied on section 1801 and *Maier* in affirming the state's power to reasonably regulate wildlife and patrol for violations. "The state has the duty to preserve and protect wildlife [as a] publicly-owned resource."<sup>61</sup> Another illegal possession case after *Compadres—People v. Harbor Hut Restaurant*<sup>62</sup>—placed wildlife protection provisions even more firmly within the tradition of environmental protection case law. The *Harbor Hut* court cited the seminal CEQA case *Friends of Mammoth*<sup>63</sup> for the proposition that the California "Supreme Court has recognized the importance attached to the goal of preserving and protecting this state's natural resources."<sup>64</sup> The court found it "beyond dispute" that the state holds title to its wildlife, just as it does its tidelands, "in public trust for the benefit of the people" and even quoted the recently decided *National Audubon Society v. Superior Court of Alpine County*'s recitation of the "dominant theme" of the state's obliga-

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57. See, e.g., *State v. Theriault*, 41 A. 1030, 1033 (Vt. 1898); *Sherwood v. Stephens*, 90 P. 345, 346 (Idaho 1907); *Harper v. Galloway*, 51 So. 226, 228 (Fla. 1910); *State v. Tice*, 125 P. 168, 169 (Wash. 1912); *State v. Morgan*, 63 So. 509, 510 (La. 1913); *People v. Zimberg*, 33 N.W.2d 104, 106 (Mich. 1948).

58. *Maier*, 37 P. at 404.

59. CAL. FISH & GAME CODE § 1801 (West 1998).

60. 205 Cal. Rptr. 135 (Cal. Ct. App. 1984).

61. *Id.* at 135–36.

62. 196 Cal. Rptr. 7 (Cal. Ct. App. 1983).

63. *Friends of Mammoth v. Bd. of Supervisors of Mono County*, 502 P.2d 1049, 1056 (Cal. 1972) (holding that the California Environmental Quality Act (CEQA) should be "interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.").

64. *Harbor Hut*, 196 Cal. Rptr. at 8.

tions being its “duty to exercise continued supervision” to prevent parties from using trust resources in a harmful manner.<sup>65</sup>

As with many other states, then, California courts have had little difficulty justifying the use of the state’s police power to regulate wildlife. What is always more problematic is the recognition of an affirmative public trust obligating the state to take measures for wildlife preservation and providing a “breach of trust” cause of action to the public when the state offers insufficient protection. The bundling in *Harbor Hut* of the public trust in wildlife with the traditional trust in tidelands, taken at face value, may mean that the former inherits all the protections due the latter, even though the courts have cautioned that “[t]he consequences of characterizing an interest of the state as a trust interest are not uniform.”<sup>66</sup> California’s formulation of this traditional public trust doctrine thus warrants some review.

The outlines of the involved history of the public trust doctrine in California can be traced through four landmark cases. First, in *People v. California Fish Co.*,<sup>67</sup> the California Supreme Court adopted what has been termed its recurrent “title-oriented approach” to analyzing public trust issues.<sup>68</sup> The state had granted thousands of acres of coastal tidelands to private individuals for development, under statutory provisions permitting the sale of swamp and tidelands that were designed to promote reclamation and agriculture and not “in pursuance of any design to promote, regulate, or control” the recognized public trust use of navigation.<sup>69</sup> California had already conveyed perhaps 80,000 acres of tidelands to private parties over roughly the previous half-century.<sup>70</sup> Since these grants were not made to promote trust purposes, the court could have applied *Illinois Central*’s remedy and invalidated them outright. Instead, the court held that the grants were valid and the grantees took an encumbered fee simple; because the legislature could not alienate the public trust easement over tidelands without a “clearly expressed or necessarily implied” intention to do so, the state retained the right to “enter upon and possess the same for the preservation and advancement of the public uses. . . .”<sup>71</sup> The various principles stated in *California Fish*

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65. *Id.* (quoting *Nat’l Audubon Soc’y v. Super. Ct. of Alpine County*, 658 P.2d 709, 721 (Cal. 1983)).

66. *Cal. Trout, Inc. v. State Water Res. Control Bd.*, 255 Cal. Rptr. 184, 212 (Cal. Ct. App. 1989).

67. 138 P. 79 (Cal. 1913).

68. Rose Young, *The Public Trust Doctrine in California, Florida and New Jersey: A Critique of Its Role in Modern Land Use Law*, 41 RUTGERS L. REV. 1349, 1355–56 (1989).

69. *Cal. Fish*, 138 P. at 83.

70. *Berkeley v. Super. Ct. of Alameda County*, 606 P.2d 362, 367 n.9 (Cal. 1980).

71. *Cal. Fish*, 138 P. at 88.

emerged for later courts as two rules: “(1) The state may make an absolute grant of tidelands to private parties when to do so is to promote navigation and commerce; and (2) Grants to private persons not for this purpose do not pass title free of the trust, but rather title is taken subject to the trust.”<sup>72</sup>

*California Fish* retained the traditional concept of the public trust’s scope as limited to navigable waterways and their protected uses for commerce, navigation, and fishing. Over a half-century after *California Fish*, during America’s “environmental decade” of the 1970s, the California courts embarked on expanding the latter rule. The second landmark case, *Marks v. Whitney*,<sup>73</sup> concerned a title dispute between private parties as to tidelands and so had no reason to disturb the traditional scope of the trust, but it radically expanded its protected uses. The court noted cases through the mid-twentieth century recognizing rights included in public trust “easements” to “fish, hunt, bathe, swim, to use for boating and general recreation purposes.”<sup>74</sup> But the court went on to note the “flexible” nature of public trust uses to “encompass changing public needs”:

In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.<sup>75</sup>

Further, the state’s authority to “control, regulate and utilize” public trust resources in furtherance of valid trust purposes, such as those suggested above, is “absolute.”<sup>76</sup> Conversely, however, not even the California courts have the power to restrain or bar a member of the public from “asserting or in any way exercising public trust uses,”<sup>77</sup> as

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72. *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1093 (Idaho 1983).

73. 491 P.2d 374 (Cal. 1971).

74. *Id.* at 380 (citation omitted).

75. *Id.*

76. *Id.*

77. *Id.* at 381.

the lower court in *Marks v. Whitney* had done by denying standing to a neighboring landowner claiming a public trust cause of action.<sup>78</sup>

The third landmark case, *Berkeley v. Superior Court of Alameda County*,<sup>79</sup> revisited the *California Fish* issue of whether and how the state can convey tidelands free of the public trust, and the court reiterated *California Fish*'s "[t]wo distinct rules."<sup>80</sup> The court again refused to invalidate grants of a public trust resource but instead concluded that the grantee will "hold it subject to the public trust."<sup>81</sup> The crucial question in *Berkeley* was how to deal with well-established investor and landowner expectations, since California had long ago conveyed most of its tidelands and other public trust property. Rather than apply a doctrinaire approach, the court chose to "balance the interests" between preexisting uses and the parties' expectations.<sup>82</sup> The principle emerging from *Berkeley* was that "the interests of the public are paramount in property that is still physically adaptable for trust uses, whereas the interests of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially valueless for those purposes."<sup>83</sup> Steering this pragmatic middle course actually strengthened the doctrine; it avoided pitting environmental values directly against the "value of investments," and also avoided consigning the doctrine to the status of an "academic exercise," which a purely prospective application would have done.<sup>84</sup> One commentator noted that the decision "managed to maintain the existing social, economic and environmental equilibrium."<sup>85</sup>

The final case in this quartet, a landmark not only for California but for the nation as a whole, addressed the authority of members of the public to challenge even legitimate state government allocations of public trust resources that seemed to conflict with the expanded purposes recognized in *Marks v. Whitney*. *National Audubon Society v. Superior Court of Alpine County*<sup>86</sup> concerned environmentalists' challenge of a 40-year-old water diversion permit granted by California's Water Resources agency to the City of Los Angeles, allowing it to appropriate almost the entire tributary flow into ecologically important and unique Mono Lake in the eastern Sierra Nevada mountains. The California Supreme Court candidly noted that it had been called on to reconcile "two systems of

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78. *See id.*

79. 606 P.2d 362 (Cal. 1980).

80. *Id.* at 366.

81. *Id.* at 372.

82. Young, *supra* note 68, at 1358–59.

83. *Berkeley*, 606 P.2d at 373.

84. *See id.*

85. Young, *supra* note 68, at 1359.

86. 658 P.2d 709 (Cal. 1983).



legal thought” that had been on a “collision course” since *Marks v. Whitney* recognized “that the public trust protects environmental and recreational values”; namely, between the public trust doctrine and California’s appropriative water rights system.<sup>87</sup> Perhaps more rigorously than in any other American decision, the *National Audubon* court examined the scope, the purposes, and the duties of the public trust. First, the court suggested that the scope of the trust extended geographically as far as any *activity* that can inflict damage on a protected public trust use. Second, in the controversy at hand, this only applied to nonnavigable tributaries of navigable waters, but because the court followed *Marks v. Whitney*’s conception of the protection of ecological values as a “clear” public trust purpose, the expansion could theoretically be vast. Third, and most importantly for future verbal formulations of the doctrine, the *National Audubon* court derived from *Illinois Central*, *California Fish*, and *Berkeley*’s inalienable and “continuing power” over trust lands a continuing and affirmative duty on the state to protect public trust resources, so that resource allocations could be revisited as circumstances and, impliedly, public values and priorities changed:

Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.<sup>88</sup>

The “core of the public trust doctrine is the state’s authority as sovereign to exercise a continuous supervision and control” over trust waters and lands.<sup>89</sup>

As in *Berkeley*, the court refused to apply to its full extent a doctrine which would “occupy the field” of water allocation and displace and disrupt the appropriative rights system and already existing appropriations “essential to the economic development of this state.”<sup>90</sup> Instead, the court affirmed the Water Resources agency’s power to make water allocations, even when these may unavoidably harm public trust values. However, the state also has an “affirmative duty” to consider public trust values, to protect them “whenever feasible,” to retain “continuing supervision” over allocation decisions, and to reconsider decisions “even

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87. *Id.* at 712.

88. *Id.* at 724.

89. *Id.* at 712.

90. *Id.* at 727.

though those decisions were made after due consideration of their effect on the public trust.”<sup>91</sup> In connection with these duties, some commentators have seen great importance in the court’s assumption that citizen activists would have standing to challenge agency decisions, acting as a sort of quasi-institutional watchdog over environmental values.<sup>92</sup>

Returning to California wildlife doctrine, after this remarkable expansion of California’s public trust, wildlife preservation advocates expected to be able to argue successfully that if the state has failed to adequately consider wildlife values in its allocation decisions, or if circumstances have changed so as to invoke the state’s “continuing supervision,” then its action or inaction is subject to judicial intervention. For instance, if the Department of Fish and Game has granted a lumber company an Incidental Take Permit improperly in view of the potential harm to wildlife, one would expect the public trust doctrine to provide a remedy.<sup>93</sup> *Environmental Protection Information Center’s* environmentalist challengers argued from *Maier* through *Betchart* that the public trust doctrine encompasses wildlife, then cited *National Audubon’s* recognition that state agencies retained—and the public trust imposed—the duty to exercise “the power to reexamine decisions in light of later circumstances.”<sup>94</sup> By assuring the lumber company it would forbear in enforcing endangered species protections, the Department of Fish and Game had ceded this power and violated the public trust.<sup>95</sup> The California Court of Appeals, however, placed a practical limit on the doctrine’s invocation. While recognizing the state’s “policy of wildlife preservation,” the court rejected Fish and Game’s “extra-statutory powers” purportedly deriving from its status as trustee.<sup>96</sup> The public trust doctrine does “empower[ ] and obligate *the State* to take charge of wildlife resources.”<sup>97</sup> But the state can discharge its responsibilities by establishing “regulatory schemes to protect the state’s wildlife,” which it has done with CEQA, the state’s

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91. *Id.* at 727–28.

92. See, e.g., Young, *supra* note 68, at 1361; Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to Environmentalists and Policy Makers*, 10 *FORDHAM ENVTL. L. REV.* 1, 48 n.140 (1998) (citing *Nat’l Audubon* as the prime example of the “small number of states” that “have permitted individuals to sue to enforce a public trust.”).

93. See *Cal. Env’tl. Prot. Info. Ctr. v. Cal. Dep’t of Forestry & Fire Prot.*, 37 *Cal. Rptr. 3d* 31 ( *Cal. Ct. App.* 2005); Brief of Petitioners-Respondents on Appeal at 97–99, *Cal. Env’tl. Prot. Info. Ctr.*, 37 *Cal. Rptr. 3d* 31 (Nos. A104828, A105391), 2004 WL 2824571. See also Answering Brief of Petitioners-Respondents at 13–16, *Cal. Env’tl. Prot. Info. Ctr.*, 37 *Cal. Rptr. 3d* 31 (No. S140547), 2006 WL 3908816.

94. Answering Brief of Petitioners-Respondents, *supra* note 93, at 15.

95. See *id.* at 15–16.

96. *Cal. Env’tl. Prot. Info. Ctr.*, 37 *Cal. Rptr. 3d* at 71.

97. *Id.* at 72 (emphasis in original).

Endangered Species Act, and its Forest Practices Act.<sup>98</sup> A public trust challenge would only succeed where it is alleged that wildlife is being harmed “by the absence of a regulatory scheme.”<sup>99</sup> The California Supreme Court reversed on statutory grounds, and it avoided resolving the public trust issue by finding that the factual record showed that the Department of Fish and Game retained its authority over lumber company decisions.<sup>100</sup>

A California district court has also narrowly cabined the doctrine’s application in a different context. In *Center for Biological Diversity, Inc. v. FPL Group, Inc.*,<sup>101</sup> environmentalists sought a declaratory judgment and the imposition of statutory fines under the public trust doctrine against the operators of wind power turbines at Altamont Pass; the turbines allegedly kill more than a thousand migratory raptors each year. The court dismissed the case for failure to state a cause of action.<sup>102</sup> While it noted *National Audubon*’s assertion that “any member of the general public has standing to raise a claim of harm to the public trust,” the court distinguished this case from the *National Audubon* line by noting its lack of connection to waterways and asserting (perhaps inaccurately) that appellate courts have consistently refused to expand the doctrine beyond the traditional interest in navigation, at least in private suits.<sup>103</sup> Even if wildlife is public trust property, the court continued, this only supports the state’s regulatory and enforcement actions, not private actions by members of the public.<sup>104</sup> According to the Center’s attorney, this ruling “conflicts with more than 100 years of California Supreme Court rulings” and “guts citizen enforcement of the public trust in wildlife.”<sup>105</sup> Where the State is the plaintiff in a similar action, its proprietary interest in the state’s wildlife is sufficiently concrete to support standing.<sup>106</sup> Indeed, California Attorney General Bill Lockyer asserted the

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98. *Id.*

99. *See id.*

100. *Env’tl. Prot. Info. Ctr. v. Cal. Dep’t of Forestry & Fire Prot.*, 187 P.3d 888 (Cal. 2008). The court did say that the government’s duty to protect wildlife was “primarily statutory” and suggested that the public trust doctrine was limited to “water resources,” but it was still “intertwined with the protection of wildlife.” *Id.* at 73–74.

101. *Ctr. for Biological Diversity, Inc. v. FPL Group, Inc.*, No. RG04-183113, 2006 WL 2987634 (Cal. Super. Ct. dismissed Oct. 12, 2006).

102. *Id.* at 17.

103. *Id.* at 15.

104. *Id.* at 16–17.

105. Press Release, *Ctr. for Biological Diversity*, Judge Dismisses Altamont Pass Bird Kill Lawsuit (Oct. 17, 2006), <http://www.biologicaldiversity.org/swcbd/PRESS/altamont-10-17-2006.html> (last visited June 10, 2009).

106. *People ex rel. Lockyer v. U.S. Forest Serv.*, No. C 04-02588 CRB, 2005 WL 1630020, at \*3 (N.D. Cal. 2005).

state's public trust interest in all of California's natural resources, including its waters, snow pack, coastline, and wildlife, when filing a claim for damages due to climate change against six major vehicle manufacturers.<sup>107</sup>

In California, as in other states with powerful environmental protection statutes, what can often mask the application of public trust *principles* in any given challenge of state or private action is that the public trust doctrine has been given legislative expression in these statutes; challengers will typically rely on the more definite application of statutory texts rather than the relatively indefinite application of a common law doctrine. Foremost among these statutes is the California Environmental Quality Act, adopted in 1970 following NEPA's enactment the previous year and modeled after the federal statute. CEQA requires agencies to "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state" and to "[e]nsure that the long-term protection of the environment . . . shall be the guiding criterion in public decisions."<sup>108</sup> One commentator has noted that NEPA's substantive policy goals reflected a strong public trust element, but that these were buried in a "narrow procedural requirement," so that the statute suffers from a "split personality."<sup>109</sup> Whereas NEPA's substantive public trust content has been consistently diluted by the U.S. Supreme Court,<sup>110</sup> the California Supreme Court has concluded that CEQA should be interpreted so as "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."<sup>111</sup>

In contrast to the California public trust doctrine's affirmative duty of "continuing supervision," CEQA's operation is primarily prospective. However, courts have made exceptions where a previously approved project is expanded or enlarged,<sup>112</sup> or even when CEQA's apparent legislative intent to require review of actions having a "significant effect on the environment" seems to mandate it.<sup>113</sup> Other statutes

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107. Complaint for Damages and Declaratory Judgment and Demand for Jury Trial, *Cal. ex rel. Lockyer v. General Motors Co.* (N.D. Cal. 2006), available at [http://ag.ca.gov/newsalerts/cms06/06-082\\_0a.pdf](http://ag.ca.gov/newsalerts/cms06/06-082_0a.pdf).

108. CAL. PUB. RES. CODE § 21,001 (West 2007).

109. Brady, *supra* note 4, at 636–37.

110. See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (declaring NEPA "essentially procedural").

111. *Friends of Mammoth v. Bd. of Supervisors of Mono County*, 502 P.2d 1049, 1056 (Cal. 1972).

112. See *Nacimiento Reg'l Water Mgmt. Advisory Comm. v. Monterey County Water Res. Agency*, 19 Cal. Rptr. 2d 1, 4 (Cal. Ct. App. 1993).

113. *County of Inyo v. Yorty*, 108 Cal. Rptr. 377, 384–85 (Cal. Ct. App. 1973). See generally Joel T. Perlstein, *Substantive Enforcement of the California Environmental Quality Act*, 69 CAL. L. REV. 112 (1981).

giving legislative expression to the public trust include, most notably, California Fish and Game Code section 5937, mandating that dam owners allow sufficient water to pass through to keep fish below the dam in “good condition”; this section’s offspring, section 5946, was recognized as a “specific legislative rule concerning the public trust.”<sup>114</sup> The former statute’s public trust character was in fact the basis of a more recent landmark decision mandating just the type of mammoth reversal of state appropriative action that has characterized the public trust from *Illinois Central* to *National Audubon*. In *Natural Resources Defense Council v. Patterson*,<sup>115</sup> a federal district court held that section 5937 required the “reestablishment [of a] dry stream’s historic fishery,” specifically requiring that the Central Valley Project, which had drained the San Joaquin River dry for half a century at Friant Dam, fulfill its duty to provide water to restore a long nonexistent salmon population in the river.<sup>116</sup>

Although, in the water arena at least, most of the progress toward wildlife protection has come from the judiciary rather than the legislative or executive branches, California agencies have placed public trust considerations at the forefront of their mandates, at least nominally. The influential “Racanelli decision” shortly after *National Audubon* confirmed that the State Water Resources Control Board (SWRCB) “unquestionably possessed legal authority under the public trust doctrine” to exercise continuing supervision over water appropriators “to protect fish and wildlife.”<sup>117</sup> The SWRCB includes as part of its 2005 Water Plan Update a broad historical and policy article on the public trust, which asserts that “wild creatures are protected” and cites *Maier* to support that the “control and regulation” are to be exercised as a trust for the people.<sup>118</sup> The State Lands Commission “administers public trust lands pursuant to statute and the Public Trust Doctrine.”<sup>119</sup> The Department of Fish and Game acknowledges in its Strategic Plan: “[I]t must conserve wildlife within a broad responsibility of governing. . . . The public trust doctrine is not just another legal article, it is *the* guiding principle that binds gov-

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114. *Cal. Trout, Inc. v. State Water Res. Control Bd.*, 255 Cal. Rptr. 184, 191, 209, 213 (Cal. Ct. App. 1989).

115. 333 F. Supp. 2d 906 (E.D. Cal. 2004).

116. *See id.* at 918.

117. *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 201 (Cal. Ct. App. 1986). *See also* Jan Stevens, *Instream Uses Twenty-Five Years Later: Incremental Progress or Revolving Door?*, 36 McGEORGE L. REV. 393, 400–01 (2005).

118. Jan S. Stevens, *Applying the Public Trust Doctrine to River Protection*, in 4 CALIFORNIA WATER PLAN UPDATE 2005 (California Dept. of Water Res. ed., 2005) (Paper presented at University of California at Davis, June 9, 2004) available at <http://www.waterplan.water.ca.gov/docs/cwpu2005/vol4/vol4-environment-applyingpublictrustdoctrine.pdf>.

119. CAL. STATE LANDS COMM’N, PUBLIC TRUST POLICY 1 (2001), available at [http://www.slcc.ca.gov/Policy\\_Statements/Public\\_Trust/Public\\_Trust\\_Policy.pdf](http://www.slcc.ca.gov/Policy_Statements/Public_Trust/Public_Trust_Policy.pdf).

ernment to the people it serves.”<sup>120</sup> Despite these professions, there have been allegations that the Department of Fish and Game’s “progressive politicization” had led to “neglect of its trustee responsibility” and “public distrust.”<sup>121</sup>

Whether or not the public trust in wildlife is a major agency motivator, it must be considered in these agencies’ decisions regarding other public trust resources. In most cases, this consideration has been mandated by statutes enacted in the wake of *Marks v. Whitney* and *National Audubon*. Section 1736 of the Water Code, for example, codifies the SWRCB’s duty to consider public trust uses such as fish, wildlife, and habitat preservation when approving a petition for a water rights transfer. The SWRCB relied on section 1736 to impose salinity restrictions for the Salton Sea on a transfer from Imperial Valley to San Diego.<sup>122</sup> Environmentalists challenging the transfer argued that the SWRCB should have considered the public trust doctrine in addition to the statutory criteria, but the SWRCB’s review concluded that they are practically coextensive.<sup>123</sup> In the absence of a statute, the *National Audubon* formulation still applies, and the “state must bear in mind its duty as trustee to consider the effect of the taking on the public trust, and to preserve, so far as consistent with the public interest, the uses protected by the trust.”<sup>124</sup>

One final issue, recently the subject of heated judicial controversy, is the possibility that state action taken to conserve wildlife can constitute a Fifth Amendment “taking” of private property interests. In *Tulare Lake Basin Water Storage District v. United States*,<sup>125</sup> the U.S. Court of Federal Claims held that in the important context of water rights, “a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right” and is tantamount to a physical occupation.<sup>126</sup> In *Tulare Lake*, the SWRCB had cited its public trust doctrine authority in waiving water quality standards and imposing water diversion restrictions in an effort to preserve Sacramento-San Joaquin Delta smelt and Chinook

120. Cal. Dep’t of Fish & Game, Fish and Game Strategic Plan, <http://www.dfg.ca.gov/about/strategy/docs/1995-Strategic-Plan.html> (last visited June 10, 2009) [hereinafter California Fish and Game Strategic Plan] (emphasis in original).

121. Jack C. Fraser, AZ. WILDLIFE NEWS, Spring 1997, at 5, quoted in Horner, *supra* note 1, at 45 n.104 (2000).

122. Order Denying Reconsideration of and Modifying Order, *In re* Imperial Irrigation District’s (IID) and San Diego Water Joint Petition, No. WRO 2002-0016, 2001 WL 34773897, at \*1–\*2 (Cal. State Water Res. Control Bd. Dec. 20, 2001).

123. *Id.* at 13.

124. State Water Res. Control Bd. Cases, 39 Cal. Rptr. 3d 189, 272 (Cal. Ct. App. 2006) (emphasis and internal quotations omitted).

125. 49 Fed. Cl. 313 (2001).

126. *Id.* at 318–19.

salmon under the federal ESA.<sup>127</sup> Although not a state case, *Tulare Lake*'s holding that such mandatory or discretionary agency actions require compensation, raised the specter of discouraging aggressive protective action. It also seemed troublesome in characterizing the agency action as a physical occupation rather than a "regulatory taking"; for the latter, the U.S. Supreme Court in *Lucas v. South Carolina Coastal Council* had created a "categorical" *per se* taking when a property owner has been ordered "to sacrifice all economically beneficial uses in the name of the common good."<sup>128</sup>

However, the *Lucas* Court had made exceptions to the *per se* rule where the regulation prevents a nuisance or is otherwise grounded in a state's "background principles" of property law.<sup>129</sup> A convincing argument has been made by many commentators that the public trust doctrine epitomizes such a "background principle," due to its longstanding and consistent application and other reasons.<sup>130</sup> Before *Tulare Lake*, the California courts followed this approach. In *Sierra Club v. Department of Forestry & Fire Protection*,<sup>131</sup> for example, the defendant state agency had approved timber harvest plans for the co-defendant lumber company in old-growth forests without the mitigation measures proposed by the Department of Fish and Game to protect the spotted owl, the northern goshawk, and other rare birds, mammals, and amphibians.<sup>132</sup> The court found the lumber company's claim that these measures amounted to takings "misplaced" and "inconsistent with precedents dealing with wildlife protection," which have consistently supported state and federal regulation.<sup>133</sup> Though the Court found *Lucas* troubling, its *per se* rule would not apply to the case at hand because "wildlife regulation of some sort has been historically a part of the preexisting law of property."<sup>134</sup>

Another Court of Federal Claims expressly rejected the *Tulare Lake* approach as "wrong," "incomplete," or "distinguishable" in *Klamath Irrigation District v. United States*,<sup>135</sup> in which irrigation districts cited *Tulare Lake* in claiming that reductions in irrigation diversions in Oregon and California, pursuant to U.S. Fish and Wildlife Service and National

127. *Id.* at 315–16.

128. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 1019 (1992) (emphasis in original).

129. *Id.* at 1029–31.

130. See, e.g., Zachary C. Kleinsasser, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421, 427–44 (2005).

131. 26 Cal. Rptr. 2d 338 (Cal. Ct. App. 1993).

132. *Id.* at 340.

133. *Id.* at 344–46.

134. *Id.* at 346–47.

135. 67 Fed. Cl. 504, 538 (2005).

Marine Fisheries Service biological opinions to protect Coho salmon and two freshwater fish, constituted compensable takings.<sup>136</sup> The court asserted that plaintiffs' economic interests in water rights can only be property rights if state law recognizes them as such, and that under both Oregon and California law, "water 'belongs to the public' and is held in trust by the states."<sup>137</sup> Even if plaintiffs' diversions were assured by contract, *Tulare Lake* erred in treating contract rights as absolute rather than limited by "some other state law principle." Without mentioning the public trust doctrine by name, the *Klamath* court noted that the *Tulare Lake* court had failed to consider whether water use could violate "accepted state doctrines" designed to "protect fish and wildlife."<sup>138</sup> In other words, since wildlife conservation is a protected public trust use, and the state's waters are securely within the public trust doctrine's scope, a land or water rights owner's economic and contract interests are assumed to remain subject to wildlife needs. A California court of appeal placed *Klamath's* reasoning within California law and similarly disclaimed *Tulare Lake* in *Allegretti & Co. v. County of Imperial*.<sup>139</sup> Though not a wildlife case, *Allegretti* noted that *Tulare Lake* had awarded compensation for interests that may not even exist, since purported property interests are limited by state doctrines protecting fish and wildlife.<sup>140</sup> The court rejected in turn the plaintiff's theories for a physical taking, a categorical regulatory taking, and under the ad hoc *Penn Central* factors<sup>141</sup> protecting "investment-backed expectations" from unreasonable interference.<sup>142</sup>

The recent lack of clarity in the California courts' application of the public trust doctrine to wildlife protection seems to reflect the doctrine's continued evolution and vibrancy rather than the retrenchment experienced in other states.<sup>143</sup> California remains one of the few states whose judiciary will countenance public and private suits challenging both public and private actions insufficiently protective of wildlife as both a public trust *purpose* and a public trust *resource* within the doctrine's scope.

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136. *Klamath*, 67 Fed. Cl. at 513–14.

137. *Id.* at 515.

138. *Id.* at 538.

139. 42 Cal. Rptr. 3d 122 (Cal. Ct. App. 2006).

140. *Id.* at 131–32.

141. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

142. Richard Frank, *The Dog That Didn't Bark, Imperial Water, I Love L.A., and Other Tales from the California Takings Litigation Front*, 34 *ECOLOGY L.Q.* 517, 520–24 (2007).

143. See *infra* notes 144–223 and accompanying text (discussing the doctrine's acceptance and eventual erosion in Idaho and Michigan). The noncommittal recent California Supreme Court decision in the *EPIC* case merely delayed resolution of this obscurity. See also *Env'tl. Prot. Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot.*, 187 P.3d 888 (Cal. 2008).



## B. Public Trust Doctrine in Idaho

Idaho is home to one of the most famous “wildlife trust” cases, *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club*,<sup>144</sup> which has been characterized as holding that the state “holds all waters in trust for benefit of the public, the trust doctrine takes precedence even over vested water rights,” that the state “does not have power to abdicate its role as trustee” and that “trust interests include . . . fish and wildlife habitat,” among others.<sup>145</sup> Idaho was also the scene of one of the most famous legislative reversals and limitations on the scope and uses protected by the public trust—its 1996 enactment of section 58-1203, which declared that Idaho’s public trust doctrine was “solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters.”<sup>146</sup> The new law also restricted the purposes protected by the public trust to those “provided in this chapter,” which did *not* include wildlife protection.<sup>147</sup> A large part of determining the current Idaho trend in public trust protection for wildlife, then, must consist of untangling *Kootenai* and its legislative response: What protections did the former extend to wildlife and how many of these did section 58-1203 manage to retract?

At the core of *Kootenai*’s discussion of the public trust doctrine was its consideration of the responsibilities of the Idaho Department of Lands in disposing of public lands. The court held that the Department of Land’s statutory authority and statutory responsibilities were not absolute, but were subject to the limitations imposed by the common law public trust.<sup>148</sup> The court recognized the public trust as a constitutional limitation on legislative and agency decisions over natural resources; the doctrine “at all times forms the outer boundaries of permissible government action with respect to public trust resources.”<sup>149</sup>

This raises the question of whether the scope and protected uses or purposes of the public trust are similarly fixed as constitutional limits, or whether they are determined by legislative or judicial fiat and are subject to revision. The assertion from *Kootenai* given above, that the trust is “dynamic, rather than static” and “destined to expand with the development and recognition of new public uses,” suggests an expansive conception of the doctrine, but it should be noted that the court merely

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144. 671 P.2d 1085 (Idaho 1983).

145. Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 COLO. L. REV. 283, 320 n.184 (2006).

146. IDAHO CODE ANN. § 58-1203 (2002) (emphasis added).

147. *Id.*

148. *Kootenai*, 671 P.2d at 1095.

149. *Id.*

included this as part of an excerpt from a law review article on the trust's history.<sup>150</sup> The court's methodology suggests a more conservative response to this question. After its broad constitutional statement of the public trust, the court looked at the statutory context for the agency's precise permitting responsibilities. Specifically, since the permit application at issue was for an encroachment on a lake's surface waters for the benefit of a yacht club, the court looked to the statute on commercial navigational encroachments.<sup>151</sup> This statute, and section 58-142,<sup>152</sup> also mentioned in the opinion, specify the protection of "fish and wildlife habitat" as among the several purposes for which the Idaho legislature has authorized regulation of the encroachment upon navigable lakes. Reading *Kootenai* at face value, then, the protection of fish and wildlife habitat could be only a permissible, rather than a necessary and absolute, public trust use, and appropriate for the legislature to designate statutorily in this context.

The recognition of wildlife preservation as a protected use was more firmly grounded in the common law public trust two years after *Kootenai*, in *Shokal v. Dunn*.<sup>153</sup> In *Shokal*, the court interpreted the "local public interest" requirement for water appropriations under Idaho statutes<sup>154</sup> for the first time. The court initially noted that this inquiry is related to the "larger doctrine of the public trust."<sup>155</sup> Citing the California Supreme Court—but, intriguingly, not mentioning the recent *National Audubon* decision—the court found in section 42-203A an "affirmative duty to assess and protect the public interest."<sup>156</sup> "Public interest" is typically left undefined in such water provisions, but the court drew guidance from two sources. First, the legislature enacted section 42-1501, which declared the preservation of minimum stream flows to be a "beneficial use," on the same day it enacted section 42-203A, which contained a list of public interest "uses" to be protected, with fish and wildlife habitat heading the list. Second, the Idaho court borrowed from Alaska's statute, which enumerated the elements of the public interest, including "the effect on fish and game resources."<sup>157</sup> The *Shokal* court was plainly determined, first, to incorporate environmental values into water appropriations decisions, following *National Audubon*, and second, to equate

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150. *Id.* at 1088 (quoting Roderick E. Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 SANTA CLARA L. REV. 63 (1982)).

151. *Id.* at 1095 (citing IDAHO CODE ANN. § 58-147 (redesignated as § 58-1306 (2002))).

152. Redesignated as § 58-1301 (2002).

153. 707 P.2d 441 (Idaho 1985).

154. IDAHO CODE ANN. § 42-203A(5) (2002).

155. *Shokal*, 707 P.2d at 448 n.2.

156. *Id.* at 448 (emphasis in original).

157. ALASKA STAT. § 46.15.080.

the public interest with the public trust. Yet the Idaho court would not go quite so far as the California court in emphasizing the state's duty to protect natural resources. Despite paraphrasing *National Audubon*, the court would only go so far as to assert the Director of Water Resources's "considerable flexibility and authority" to consider and prioritize among public interest uses. Reflecting section 42-203's language, if an appropriation "will" conflict with the public trust, the director "may" reject the application, but presumably need not absolutely.

Despite these promising signals as to public trust uses and obligations, the scope of the doctrine in Idaho has always been narrow, and it has never been applied to lands above the "ordinary mean high water mark" of navigable waters.<sup>158</sup> Thus, while the protection of wildlife habitat can be a permissible use of public trust resources, wildlife and their habitat are not themselves recognized as public trust resources, strictly speaking. The Idaho Supreme Court has come close to extending the doctrine's scope to land; one commentator remarked that the court may not be ready to abandon the water, but it does have legs.<sup>159</sup> In *Selkirk-Priest Basin Ass'n, Inc. v. State*,<sup>160</sup> for example, the Idaho Supreme Court was apparently willing to accept for standing under the public trust doctrine an affidavit that a timber sale would damage trust resources by facilitating erosion into a navigable stream.<sup>161</sup>

Section 58-1203 may have been the legislature's attempt to stem this modest tide of expansion of the scope of the public trust beyond the traditional navigable waterways. Passed a year after *Selkirk-Priest*, the statute prohibits application of the doctrine to state trust lands, the administration of water rights, and the exercise of private property rights.<sup>162</sup> One commentator has asserted that this would "effectively gut" the public trust doctrine.<sup>163</sup> Given the public trust doctrine's apparent quasi-constitutional status as defining the "outer boundaries" of permissible government action, according to *Kootenai*, and conferring obligations which cannot be abdicated, under *Illinois Central*, it is doubtful

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158. *State ex rel. Haman v. Fox*, 594 P.2d 1093, 1102 (Idaho 1979). See also James M. Kearney, *Recent Statute Closing the Floodgates? Idaho's Statutory Limitation on the Public Trust Doctrine*, 34 IDAHO L. REV. 91, 100-02 (1997).

159. Scott W. Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 J. ENVTL. L. & LITIG. 107, 107 (1986).

160. 899 P.2d 949 (Idaho 1995).

161. *Id.* at 954. See also Lisa Lombardi, *The Public Trust Doctrine in Idaho*, 33 IDAHO L. REV. 231, 251 (1996).

162. IDAHO CODE ANN. § 58-1203 (2002).

163. Lombardi, *supra* note 161, at 251. See also Stephen D. Osborne et al., *Laws Governing Recreational Access to Waters of the Columbia Basin: A Survey and Analysis*, 33 ENVTL. L. 399, 428-29 (2003).

whether it can be statutorily emptied.<sup>164</sup> Thus far, however, section 58-1203 has eluded constitutional scrutiny.

Another potential pathway to a public trust in wildlife in Idaho is its “state ownership” statute, which declares that all wildlife is “the property of the state of Idaho” and “shall be preserved, protected, perpetuated, and managed.”<sup>165</sup> More than 30 states have such statutes, with varying language, but Idaho’s, enacted in 1976, has a peculiarly preservationist ring to it.<sup>166</sup> Although the strict state ownership of wildlife was invalidated by the U.S. Supreme Court,<sup>167</sup> these statutes remain on the books, and their parallel to trust language has led commentators to find them conducive to a “wildlife trust” theory.<sup>168</sup> These same commentators will admit, however, that the police power has become an alternative and arguably primary basis of government authority over wildlife.<sup>169</sup> And the police power alone provides only the authority to regulate, without the affirmative duty to preserve that the public trust theory supports and, under *National Audubon*, compels.<sup>170</sup> One Idaho appellate court did actually refer to the statutory recognition of wildlife as not only a “vital public interest” but also a “common trust.”<sup>171</sup> However, this was in the context of a search and seizure case, and the opinion on which it relied emphasized the state’s “pervasive control” over natural resource management and conservation, rather than its trustee relationship.<sup>172</sup>

Despite a promising zenith of judicial recognition in the 1980s, then, the public trust’s scope and protected uses have been in a defensive and retreating posture in Idaho since the mid-1990s. Its application to wildlife is currently doubtful without another reversal in the state’s case law.

### C. Public Trust Doctrine in Michigan

Michigan recognized the *Illinois Central* formulation of the public trust doctrine in *Collins v. Gerhardt*.<sup>173</sup> The Michigan Supreme Court has very recently affirmed that the doctrine is “alive and well in Michigan”<sup>174</sup>

164. Kearney, *supra* note 158, at 111–22.

165. IDAHO CODE ANN. § 58-1203 (2002).

166. See Blumm & Ritchie, *supra* note 9, at 709–10 n.241 (listing state statutes).

167. See *Hughes v. Oklahoma*, 441 U.S. 332 (1970).

168. See, e.g., Blumm & Ritchie, *supra* note 9.

169. *Id.* at 713.

170. *Id.*

171. *State v. Thurman*, 996 P.2d 309, 314, 316 (Idaho Ct. App. 1999).

172. *State v. Medley*, 898 P.2d 1093, 1097 (Idaho 1995).

173. 211 N.W. 115 (Mich. 1926).

174. *Glass v. Goeckel*, 703 N.W.2d 58, 66 (Mich. 2005).

and has clarified that it rests theoretically on the distinction between the *jus publicum*, public rights in navigable waters and submerged lands, and the *jus privatum*, private property rights that nevertheless remain subject to the public trust.<sup>175</sup>

Michigan includes wildlife within the scope of the common law public trust doctrine. The state's authority to regulate the taking and possession of wildlife, though long recognized, was firmly grounded in its public trust obligations in *People v. Zimberg*.<sup>176</sup> The court cited the 1894 California case *Ex parte Maier*:

The wild game within a state belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation, of the public good.<sup>177</sup>

The Michigan courts have expanded the scope of the doctrine to include the protection of "fish and game habitat."<sup>178</sup> A court of appeals cited *Grosse Ile Township* in tandem with Sax's seminal 1970 article for the proposition that private citizens should be able to maintain actions for violations of public trust obligations on public lands, but the same court found that the public trust doctrine should not form an independent basis for citizen standing in a public nuisance action.<sup>179</sup>

The complexion of Michigan environmental law changed dramatically with the passage and judicial interpretation of the Michigan Environmental Protection Act of 1970 (MEPA).<sup>180</sup> Article IV, section 52 of the Michigan Constitution of 1963 already provided that the "conservation and development of the natural resources of the state are hereby declared to be of paramount public concern" and the "legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction." It was not until 1974, however, in *Oakland County v. Vanderkloot*, that the Michigan Supreme Court determined that the second clause prescribed a mandatory duty

175. *Id.*

176. 33 N.W.2d 104, 106 (Mich. 1948).

177. 37 P. 402, 404 (Cal. 1894).

178. *Grosse Ile Twp. v. Dunbar & Sullivan Dredging Co.*, 167 N.W.2d 311, 316 (Mich. Ct. App. 1969).

179. *White Lake Improvement Ass'n v. City of Whitehall*, 177 N.W.2d 473, 476 (Mich. Ct. App. 1970). ("no case has been cited where a court has, even for a clearly publicly motivated group, made an exception to the 'different in kind' standing requirement which for so long has been a feature of the law of public nuisance.")

180. MICH. COMP. LAWS §§ 324.1701-06 (1999).

on the legislature as opposed to being “merely Declaratory.”<sup>181</sup> MEPA largely fulfilled this duty by proscribing “conduct . . . likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein . . . ” by any legal entity, public or private.<sup>182</sup> Sax, in introducing his draft of the law, explained that the “public trust” was purposely left undefined, “to open the way to elucidation and consideration of a wide range of problems . . . rather than to create confining definitions.”<sup>183</sup>

Sax set forth as another of MEPA’s essential purposes the recognition of a right to environmental quality as legally enforceable by private citizens.<sup>184</sup> MEPA conferred standing on “any citizen” to challenge pollution, impairment, or destruction by “any person.”<sup>185</sup> The expansion was not merely procedural, however. The *Vanderkloot* court held that MEPA provides a “source of supplementary substantive environmental law,” prescribing the “environmental rights, duties and functions of subject entities.”<sup>186</sup> These duties inform other administrative functions directed by separate statutes, such that agency failure to comply with MEPA’s substantive prescriptions “may be the basis for a finding of fraud or abuse of discretion.”<sup>187</sup> In the context of wildlife, then, anyone’s impairment of the public trust in wildlife and the protection of wildlife habitat could now *theoretically* be challenged by any concerned party.

The practical contours of the public’s right to challenge an alleged breach of this public trust duty remained to be defined. In *Superior Public Rights, Inc. v. State Department of Natural Resources*,<sup>188</sup> plaintiffs attempted to raise a due process challenge to the state’s grant of public trust lands for private commercial purposes without a public hearing. The court held that a due process analysis was not the appropriate vehicle for the protection of citizens’ rights; rather, citizens “must rely on their representative government to protect their interests.”<sup>189</sup>

MEPA’s apparently expansive enactment of standing has recently been further limited by the Michigan Supreme Court’s importation of the U.S. Constitution’s Article III “case or controversy” requirements into what had heretofore been largely prudential standing requirements. In

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181. Petition of Highway US-24, in Bloomfield Twp., Oakland County v. Vanderkloot, 220 N.W.2d 416, 425 (Mich. 1974).

182. MICH. COMP. LAWS §§ 324.1701 (1999).

183. SAX, *supra* note 4, at 248.

184. *Id.*

185. MICH. COMP. LAWS §§ 324.1701(1) (1999).

186. *Vanderkloot*, 220 N.W.2d at 427–28.

187. *Id.* at 430.

188. 263 N.W.2d 290 (Mich. Ct. App. 1977).

189. *Id.* at 295.

*Michigan Citizens for Water Conservation v. Nestle Waters North America, Inc.*,<sup>190</sup> the court struck down MEPA's section 1701(1) provision allowing "any person" to challenge another's "pollution, impairment or destruction." Disclaiming the apparent intent of MEPA to allow "private attorneys general" suits, the court asserted that environmental laws like MEPA are to be vindicated only by persons who have suffered a real "injury in fact" and thus "have a stake in the controversy."<sup>191</sup> "If the people are unhappy with how the executive branch fulfills its enforcement functions, the remedy is not a lawsuit, but a political one at the ballot box."<sup>192</sup> A dissenting justice complained that the court had "taken the power to protect the state's natural resources away from the people of Michigan."<sup>193</sup>

Even at their most expansive, however, Michigan courts have in practice limited the public trust doctrine to supporting the state's authority to regulate public trust resources or activities on public trust lands. One landmark case, *Michigan Oil Co. v. Natural Resources Commission*,<sup>194</sup> considered whether Michigan's natural resources agency retained authority to veto drilling permits based on endangerment to wildlife, when oil and gas leases had already been granted and the statutes subjected permit applications mainly to considerations of unnecessary waste. At issue, the court clarified, was "the scope of the authority of the [agency] to regulate the utilization and conservation of all the state's natural resources."<sup>195</sup> The court to some extent evaded recognition of an inherent and inalienable public trust obligation by construing the term "waste" broadly to include "the most serious permanent damage to or destruction of any and all natural resources of the state incidental to the production of oil."<sup>196</sup> The court did note, however, that the agency "retained its statutory authority to fulfill its duty to the people" by regulating state lands and resources "placed in its control and held by it as a public trust."<sup>197</sup> Nor could a permit denial constitute a "taking," since the agency's regulation of state lands was a proper exercise of the police power.<sup>198</sup>

Michigan further suggested the use of the public trust doctrine as a defense in inverse condemnation proceedings in *Blue Water Isles Co. v.*

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190. 737 N.W.2d 447 (Mich. 2007).

191. *Id.* at 462–63.

192. *Id.*

193. *Id.* at 469 (Weaver, J., dissenting).

194. 249 N.W.2d 135 (Mich. Ct. App. 1976).

195. *Id.* at 138.

196. *Id.* at 143.

197. *Id.* at 144–45.

198. *Id.*

*Department of Natural Resources*.<sup>199</sup> The court relied on the U.S. Supreme Court's statement that a land use restriction is a taking only if it is not "reasonably necessary to the effectuation of a substantial public purpose."<sup>200</sup> The protection of the public trust in inland lakes and streams and the preservation of the state's natural resources clearly qualified under this criterion.<sup>201</sup>

A number of cases from the mid- to late-1970s elaborated on the procedures courts must use in ruling on an alleged impairment of the public trust under MEPA, in wildlife and other resources. Courts also clarified the evidence of "impairment" of wildlife habitat necessary to establish the prima facie case. In *West Michigan Environmental Action Council v. Natural Resources Commission*, the Michigan Supreme Court pointed to the wildlife's limited numbers, its unique nature and location, and the "apparently serious and lasting, though unquantifiable," damage alleged to result from exploratory oil and gas drilling.<sup>202</sup> Lower courts tentatively interpreted these considerations as balancing the "rarity of the resources involved against the magnitude of the harm likely to result."<sup>203</sup> Courts eventually settled on the four "Portage factors" from *City of Portage v. Kalamazoo County Road Commission*: Courts should compare environmental conditions before and after a proposed action and consider (1) whether the natural resource involved is rare, unique, endangered, or has historical significance; (2) whether the resource is easily replaceable, (for example, by replanting trees or restocking fish); (3) whether the proposed action will have any significant consequential effect on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed); and (4) whether the direct or consequential impact on animals or vegetation will affect a critical number, considering the nature and location of the wildlife affected.<sup>204</sup> The court in *Kimberly Hills* further directed that MEPA's conservation mandate was not limited to resources that are "biologically unique" or "endangered"; rather, a "statewide perspective" of threats to wildlife in the context of "populations and ecological communities" was necessary.<sup>205</sup> The *Portage*

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199. 431 N.W.2d 53 (Mich. Ct. App. 1988).

200. *Id.* at 58 (citing *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 127 (1978)).

201. *Id.*

202. *W. Mich. Env'tl. Action Council v. Natural Res. Comm'n*, 275 N.W.2d 538, 545 (1979).

203. *Kimberly Hills Neighborhood Ass'n v. Dion*, 320 N.W.2d 668, 673 (Mich. Ct. App. 1982).

204. *See City of Portage v. Kalamazoo County Road Comm'n*, 355 N.W.2d 913, 915-16 (Mich. Ct. App. 1984).

205. *Kimberly Hills*, 320 N.W.2d at 673.



court did not agree that a statewide, as opposed to local, perspective is always necessary. The court imported into its "impairment" analysis a balance from an unreported case discussed by Sax of "the rarity of the resources involved against the magnitude of the harm likely to result."<sup>206</sup> There should be no similar balance of the "disadvantages against advantages of the defendant's proposed action."<sup>207</sup>

Ironically, what had seemed like an attempt to expand public trust protections for wildlife in *Kimberly Hills* evolved into a judicially more well-defined analysis of when wildlife is "impaired" as a "natural resource"; public trust analysis thereafter faded into the background, such that courts are "not empowered to enjoin any conduct which does not rise to the level of an environmental risk proscribed by the MEPA."<sup>208</sup> This followed and perhaps sprang from the Michigan Court of Appeals' clarification in *Stevens v. Creek* that, by the terms of MEPA, the pollution, impairment, or destruction can be of either a natural resource or of the public trust in that resource.<sup>209</sup> Michigan courts conceive of these in the "disjunctive."<sup>210</sup> Determination of whether a particular wildlife case fit within the scope of MEPA thereafter collapsed into two inquiries: (1) whether a natural resource is involved, and (2) whether the impact of the activity on the environment rises to the level of impairment to justify the trial court's intervention.<sup>211</sup> An adequate "level of impairment" is typically evaluated on *Kimberly Hills*' statewide basis rather than on a local basis.<sup>212</sup>

Perhaps coincidentally, within weeks of the *Stevens* pronouncement, the Michigan Supreme Court, in *Bott v. Commission of Natural Resources*, announced a restrictive application of the public trust doctrine to navigable waters only, not to "other waterways or to lakes with only one inlet or outlet."<sup>213</sup> In effect, then, the "public trust" has been both geographically limited and judicially and statutorily confined to ensure only the public's right to navigation, commerce, and fishing (the *Illinois Central* formulation) and to support the state's authority to protect its air,

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206. *Id.* (citing *Payant v. Dep't of Natural Res.* (unreported), as discussed in Joseph L. Sax & Roger L. Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003, 1031-35 (1972)).

207. *City of Portage*, 355 N.W.2d at 916.

208. *Id.* at 915.

209. *Stevens v. Creek*, 328 N.W.2d 672, 674 (Mich. Ct. App. 1982).

210. *Id.*

211. *See, e.g., Rush v. Sterner*, 373 N.W.2d 183, 186 (Mich. Ct. App. 1985).

212. *See id.* at 186-87 n.1.

213. *Bott v. Comm'n of Natural Res.*, 327 N.W.2d 838, 846 (Mich. 1982).

water, and other natural resources against pollution, impairment, or destruction (under MEPA).<sup>214</sup>

Thus circumscribed, much of the public trust doctrine's vitality could be expected to depend on state environmental agencies' commitment to pursuing an affirmative public trust conservation agenda. Michigan's Department of Natural Resources (DNR), assigned by MEPA to "protect and conserve the natural resources of this State,"<sup>215</sup> notes in its Wildlife Action Plan that it derives its conservation mandate from the public trust doctrine's recognition that it holds all wildlife for the people's benefit.<sup>216</sup> The DNR has recently announced notable successes in recovering endangered species and habitats.<sup>217</sup>

Further, the DNR, under Rule 281.811(1)(g) (known simply as "Rule 1"), insists on reviewing proposed actions for their impact on the public trust.<sup>218</sup> First, the DNR determines whether a proposed action falls within the *Bott* limitation as impacting a navigable waterway. If so, it next reviews a proposal under Rule 1's common law public trust standards of navigation and fishing. Next, it determines whether a proposal implicates Rule 1's environmental considerations of resource protection, which are generally best addressed under the criteria of MEPA's provision for "Habitat Protection [in] Inland Lakes and Streams."<sup>219</sup> These include "uses for recreation, *fish and wildlife*, aesthetics, local government, agriculture, commerce and industry."<sup>220</sup> Section 30106 further provides that no proposal should be approved if it "will unlawfully impair or destroy any of the waters or other natural resources of the state." The DNR seems to consider this formulation as expanding the public trust "beyond the common law" and requiring a quantification of a project's impacts on natural resources.<sup>221</sup>

214. See also MICH. ADMIN. CODE r. 281.811(1)(g) (2000) (defining the "public trust" for the Michigan Department of Environmental Quality to mean the right to navigate and fish in navigable waterways, the state's duty to preserve this right, and the public's concern and state's duty to achieve natural resource protection).

215. MICH. COMP. LAWS § 324.501 (1999).

216. Mich. Dep't of Natural Res., *Wildlife Action Plan* (June 2005), available at [http://www.michigan.gov/dnr/0,1607,7-153-10370\\_30909--,00.html](http://www.michigan.gov/dnr/0,1607,7-153-10370_30909--,00.html).

217. See, e.g., "Michigan's Kirtland's Warbler Population Continues to Grow," [http://www.michigan.gov/dnr/0,1607,7-153-10371\\_10402-175411--,00.html](http://www.michigan.gov/dnr/0,1607,7-153-10371_10402-175411--,00.html) (last visited May 5, 2009).

218. See generally *Petition of Donna C. Marentay on the Permit Issued to Sanctuary of Brills Lake*, 2005 WL 1658505 (July 1, 2005).

219. MICH. COMP. LAWS § 324.30106 (1999).

220. *Id.* (emphasis added).

221. See, e.g., *Petition of MARD Enterprises, Inc.*, 2006 WL 3038736 (Oct. 13, 2006).

As for remedies authorized under MEPA, the *Stevens* court noted that restoration of natural habitat can be a proper remedy.<sup>222</sup> The “new legal fiction” of the state’s “important interest in regulation and conservation of wildlife and natural resources” as a public trust also supports a common law civil action for damages by the state against one who unlawfully takes or possesses wildlife.<sup>223</sup>

#### D. Public Trust Doctrine in Wisconsin

Wisconsin’s seminal public trust doctrine case was 1952’s *Muench v. Public Service Commission*,<sup>224</sup> which recognized the doctrine, supported the public’s right to enforce the trust, and generally asserted a favorable attitude toward its expansion. As early as 1915, Wisconsin’s Water Power Law contained a provision requiring the predecessor to Wisconsin’s Public Service Commission, when granting a permit to construct a dam upon a navigable stream, to find that the dam would not obstruct navigation “or violate other public rights.”<sup>225</sup> A 1929 amendment provided that “the enjoyment of scenic beauty” is one such public right.<sup>226</sup> The *Muench* court found this statute “highly illustrative” of the “trend to extend and protect the rights of the public to the recreational enjoyment” of navigable waters. Even earlier, the Wisconsin court had “put itself on record” as favoring the public trust doctrine for navigable waterways.<sup>227</sup> The *Muench* case itself concerned the right of a private citizen to challenge the Commission’s decision that a county board resolution approving construction of a dam on the Namekagon River obviated the need for it to make independent findings of the proposed dam’s effects on the public rights to hunting, fishing, and scenic beauty. A nineteenth-century case, *Priewe v. State Land & Improvement Co.*,<sup>228</sup> had already asserted the judiciary’s role, as against the legislature, as the final arbiter of legitimate public purposes. On the issue of standing, the *Muench* court found that, even in the absence of a direct economic interest, a private citizen can sue to enforce the public’s right “to enjoy our navigable streams for recreational purposes, including the enjoyment of scenic beauty.”<sup>229</sup> The 1929 statute had either created or recognized a legal right to recreational en-

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222. *Stevens v. Creek*, 328 N.W.2d 672, 675 (Mich. Ct. App. 1982) (citing *Eyde v. Mich.*, 267 N.W.2d 442 (Mich. Ct. App. 1978)).

223. *Attorney General v. Hermes*, 339 N.W.2d 545, 550 (Mich. Ct. App. 1983).

224. 53 N.W.2d 514 (Wis. 1952).

225. WIS. STAT. ANN. § 31.06(3) (West 2006).

226. 1929 Wis. Sess. Laws 1024.

227. *Muench*, 53 N.W.2d at 517 (citing *McLenna v. Prentice*, 55 N.W. 764 (Wis. 1893)).

228. 67 N.W. 918 (Wis. 1896).

229. *Muench*, 53 N.W.2d at 522.

joyment “that is entitled to all the protection which is given financial rights” and the court thus anticipated *Phillips Petroleum* in approving the trend in Wisconsin in “extend[ing] the rights of the general public” as to the protected uses, if not the scope, of the public trust doctrine.<sup>230</sup>

*Muench* provided a framework for further development of public rights and state duties over trust resources.<sup>231</sup> The common law Wisconsin doctrine “requires the state to intervene to protect public rights in the commercial or recreational use of navigable waters.”<sup>232</sup> *State v. Public Service Commission*<sup>233</sup> established several criteria by which courts could determine if the public trust obligations were being violated. These include (1) commitment of a trust resource to non-public control; (2) access and use; (3) destruction or significant impairment of protected uses; and (4) a high ratio of “disappointment” of burdened parties to “convenience” for those benefited.<sup>234</sup> The Idaho Supreme Court in *Kootenai* gleaned from this list a concern with project impacts, individual and cumulative, on the public trust resource, in light of the resource’s “primary purpose,” and concern with broad public uses being sacrificed to limited or private ones.<sup>235</sup>

As for the scope of the public trust extending to wildlife, a Wisconsin statute provides that the state holds title to, and the custody and protection of, all wild animals in the state, to regulate their enjoyment, use, and *conservation*.<sup>236</sup> Further, Wisconsin courts have considered it “well established” that the state holds title to wild animals “for the benefit of the people.”<sup>237</sup> They have never held, however, that wildlife is included within the formal scope of the public trust doctrine, which has been limited to navigable waterways.<sup>238</sup> Given this quasi-trust status, *Muench* raises the question whether its expansion of protected uses depended on legislative enactment or might occur gradually with changing values. The California courts, by comparison, had effected their public trust revolution of sorts by asserting that in administering the public trust, the state is not burdened with an “outmoded classification” favor-

230. *Id.* at 523.

231. See John Quick, *The Public Trust Doctrine in Wisconsin*, 1 WIS. ENVTL. L.J. 105, 109–11 (1994).

232. *Id.* at 110.

233. 81 N.W.2d 71, 73–74 (Wis. 1957).

234. *Id.*

235. *Kootenai Env'tl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1985, 1092–93 (Idaho 1983).

236. WIS. STAT. ANN. § 29.011(1) (West 2004) (emphasis added).

237. *State v. Lipinske*, 249 N.W. 289, 291 (Wis. 1933).

238. *Muench v. Pub. Serv. Comm'n*, 53 N.W.2d 514, 517 (Wis. 1952) (cited in *Hilton ex rel. Pages Homeowners' Ass'n v. Dep't of Natural Res.*, 717 N.W.2d 166, 173 (Wis. 2006)).

ing traditional uses, but must yield to the “growing recognition” that one of the most important public uses of trust resources is “preservation . . . in their natural state.”<sup>239</sup> Wisconsin courts have used more pragmatic language, labeling Wisconsin’s Department of Natural Resources (DNR) the “custodian of Wisconsin’s wildlife,” whose mandate is “to maintain a balance between protection of wildlife and exploitation of the state’s resources, and to conserve the wild plant and animal species” of the state.<sup>240</sup>

This question of how the scope of the public trust might expand assumes even greater importance in view of the statutory accretions made to “public rights” in the context of dam permitting.<sup>241</sup> In 1971, “ecological values” were added to “public interest” considerations, and the enjoyment of environmental quality was declared to be a public right.<sup>242</sup> Judicially, *Just v. Marinette County*<sup>243</sup> proffered the oft-quoted dicta that there is “no absolute and unlimited right to change the essential natural character” of the land and “use it for a purpose for which it was unsuited in its natural state.”<sup>244</sup> The same court declared that the public trust doctrine obligates the state to “eradicate the present pollution and to prevent further pollution” in its navigable waters.<sup>245</sup>

If the custodial relationship of the state to its wildlife can be analogized to its trust relationship to waterways, perhaps these expansions of recognized uses, values, and duties will carry over as well. One court did suggest a general affirmative public right to “preserve natural resources.”<sup>246</sup> Moreover, only six months after *Just*, the Wisconsin Supreme Court found that the public right to scenic beauty exists regardless of whether this is codified in statute.<sup>247</sup> The statute applicable to “structures” in navigable waters, rather than to dams, allowed permitting when the structure is not “detrimental to the public interest.”<sup>248</sup> The court, ironically while remanding a DNR boathouse permit denial because the agency had applied its own recent administrative provision rather than the statute in force, also urged it to consider a non-statutory “natural beauty” criterion as part of its public interest determination.

239. *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971).

240. *Barnes v. Dep’t of Natural Res.*, 516 N.W.2d 730, 737 (Wis. 1994).

241. WIS. STAT. ANN. § 31.06 (West 2006).

242. 1971 Wis. Sess. Laws 1042.

243. 201 N.W.2d 761 (Wis. 1972).

244. *Id.* at 768.

245. *Id.*

246. *State v. Trudeau*, 408 N.W.2d 337, 343 (Wis. 1987) (citing *Just*, 201 N.W.2d 761 (Wis. 1972)).

247. *Clafin v. Dep’t. of Natural Res.*, 206 N.W.2d 392 (Wis. 1973).

248. WIS. STAT. ANN. § 30.12(2)(a) (West 2002) (repealed 2003).

“The natural beauty of our northern lakes is one of the most precious heritages Wisconsin citizens enjoy. It is entirely proper that that natural beauty should be protected as against specific structures that may be found to mar that beauty.”<sup>249</sup>

Wisconsin courts have not been so eager to extend affirmative protections to the state’s wildlife. In *Barnes v. Department of Natural Resources*,<sup>250</sup> petitioners sought to require the DNR to commence a rulemaking procedure to add the bobcat to the state list of threatened species. The court declined to hold, as a matter of law, that when presented with inconclusive evidence of a species’ population stability, the DNR should exercise the precaution of listing the species or at least engaging in rulemaking.<sup>251</sup> As already quoted, the DNR’s mandate is to “maintain a balance,” and the statutory requirement for DNR to rely on scientific evidence to add to the endangered and threatened species list shows that the legislature envisioned a husbanding of agency resources to commit to species “proven to be in need of protection,” not merely in “unproven decline.”<sup>252</sup>

As this suggests, the DNR has “wide regulatory authority over the natural resources, fish and game of Wisconsin.”<sup>253</sup> “The legislature has delegated to the DNR broad authority to regulate under the public trust doctrine and to administer [chapter] 30.”<sup>254</sup> Indeed, most of the public trust doctrine’s development since *Muench* has concerned statutes that delegate the state’s public trust authority and obligations, partly to the DNR, partly to local governments.<sup>255</sup> *Muench* itself had stated that only matters of local concern could be delegated to local governments, while decisions threatening possible “interference with public rights,” such as scenic beauty, must be made at the state level.<sup>256</sup> Statutes delegating such decisions to local institutions are unconstitutional.<sup>257</sup> The DNR, by contrast, is authorized to make findings as to whether the interference with public rights is outweighed by the public benefits of proceeding with a

249. *Clafin*, 206 N.W.2d at 398. See also Melissa Kwaterski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 *ECOLOGY L.Q.* 135, 159–60 (2000).

250. 516 N.W.2d 730, 737 (Wis. Ct. App. 1994).

251. *Id.* at 739.

252. *Id.* (citing WIS. STAT. ANN. § 29.415(3) (West 1996) (current version at WIS. STAT. ANN. § 29.604(3) (West 1997)).

253. *LeClair v. Natural Res. Bd.*, 483 N.W.2d 278, 284 n.9 (Wis. Ct. App. 1992).

254. *ABKA Ltd. P’ship v. Wis. Dep’t of Natural Res.*, 648 N.W.2d 854, 858–59 (Wis. 2002) (citing *Wisconsin v. Town of Linn*, 556 N.W.2d 394, 402 (Wis. Ct. App. 1996)).

255. *Quick*, *supra* note 231, at 110–11.

256. *Muench v. Pub. Serv. Comm’n*, 53 N.W.2d 514, 524 (Wis. 1952).

257. *Id.* at 525.

project.<sup>258</sup> The Wisconsin Court of Appeals elaborated on these points in *Village of Menomonee Falls v. Department of Natural Resources*.<sup>259</sup> Delegations to local governments in furtherance of public trust interests are valid so long as they are not construed as a “blanket delegation of the state’s public trust authority” allowing localities to impair “paramount” public trust interests.<sup>260</sup> The state government, through the DNR, “retains ultimate control over all issues essential to the protection of the public trust.”<sup>261</sup> The agency must balance three policy factors in enforcing its public trust duties: preserving natural beauty, maximizing public use of navigable waters, and providing for the convenience of riparian owners.<sup>262</sup> Further, the public trust doctrine requires the DNR to determine a resource’s “reasonable use” in light of each situation’s particular facts.<sup>263</sup>

The DNR’s project review process illustrates how firmly Wisconsin has remained within *Muench*’s framework of a public trust traditionally limited in scope, with a more expansive recognition of “public rights” and solicitude for the “public interest.” To take one example, the DNR denied an application for a permit to dredge part of a lake bed to improve boat access.<sup>264</sup> As this would occur below the ordinary high-water mark, the lake bed was subject to the public trust, and the DNR conducted a thorough examination of numerous “public interest” factors, including impacts on water quality, fishery values, the functional values of wetlands, natural scenic beauty, and plant and wildlife diversity. The administrative law judge concluded that, based on the overwhelming amount of testimony as to detrimental impacts, the proposed project would not be “consistent with the public interest” within the meaning of section 30.20 of the Wisconsin Statute. The public trust duty “requires the state not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation and scenic beauty.”<sup>265</sup> Upon judicial review, DNR factual findings are evaluated under the “substantial evidence” test, and its legal conclusions are granted “great weight” deference.<sup>266</sup>

The basis for standing for private citizens and the state to challenge proposed or ongoing impairments of public trust resources has

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258. *Id.*

259. 412 N.W.2d 505 (Wis. Ct. App. 1987).

260. *Id.* at 514–15.

261. Quick, *supra* note 231, at 111.

262. *Hilton v. Dep’t of Natural Res.*, 717 N.W.2d 166, 173 (Wis. 2006).

263. *Id.* at 174.

264. Harry K. Carr, Jr. Permit Application, 1998 WL 998156 (Oct. 16, 1998).

265. *Wisconsin’s Env’tl. Decade, Inc. v. Dep’t of Natural Res.*, 271 N.W.2d 69, 72 (Wis. 1975).

266. *Hilton*, 717 N.W.2d at 172.

been heavily litigated in Wisconsin. As already noted, *Muench* had held that the public trust doctrine entitles the public to enforce its rights to navigation, fishing, recreation, and the enjoyment of scenic beauty, even in the absence of a direct economic interest, to the full extent a party could enforce financial rights in Wisconsin courts.<sup>267</sup> The state supreme court limited this generalized standing somewhat in *State v. Deetz*.<sup>268</sup> In *Deetz*, the state argued that a cause of action against a land developer causing runoff damaging a lakeshore arose simply out of interference with the public's right to use and enjoy navigable waters.<sup>269</sup> The court disagreed, concluding that the public trust doctrine does not create substantive legal rights, but merely "gives the state standing as trustee to vindicate any rights that are infringed upon by existing law."<sup>270</sup> The court proceeded to quote Sax himself: "The 'public trust' has no life of its own and no intrinsic content. It is no more—and no less—than a name courts give to their concerns about the insufficiencies of the democratic process."<sup>271</sup> The court further restricted standing based essentially on injury-in-fact requirements in *Wisconsin's Environmental Decade v. Public Service Commission*.<sup>272</sup> Wisconsin's statutes entitling aggrieved parties to judicial review of administrative decisions essentially required a petitioner to "show a direct effect on his legally protected interests."<sup>273</sup> This was interpreted to require a "two-step analysis," first ascertaining whether an agency decision "directly causes injury to the interest of the petitioner," then determining "whether the interest asserted is recognized by law."<sup>274</sup>

It may be especially instructive to observe how the Wisconsin Supreme Court dealt with the petitioners' suggestion that the Wisconsin Environmental Protection Act (WEPA),<sup>275</sup> in effect established a "new public trust in the entire environment."<sup>276</sup> The court had already found persuasive the federal courts' expansive recognition of standing in environmental cases, particularly those arising out of NEPA.<sup>277</sup> The court entertained the idea that WEPA's preamble, modeled on NEPA's, "rises to the level of establishing a public trust comparable to the public trust in

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267. *Muench v. Pub. Serv. Comm'n*, 53 N.W.2d 514, 522 (Wis. 1952).

268. 224 N.W.2d 407 (Wis. 1974).

269. *Id.* at 411.

270. *Id.*

271. *Id.* at 413 (quoting Sax, *The Public Trust Doctrine in Natural Resources Law*, *supra* note 4, at 521).

272. 230 N.W.2d 243 (Wis. 1975).

273. *Id.* at 248. (citing WIS. STAT. ANN. §§ 227.15, 227.16(1) (West 2001).

274. *Id.*

275. WIS. STAT. ANN. § 1.11 (West 2004).

276. *Wisconsin's Envtl. Decade*, 230 N.W.2d at 251.

277. *Id.* at 248, 252.



navigable waters such that any harm to the environment is presumed to harm the interests of any citizen of the state,” but ultimately found this “doubtful.”<sup>278</sup> However, it did hold that WEPA, like NEPA, had expanded substantive environmental law’s “zone of interests” such that the second part of the standing analysis would be satisfied where “it is alleged that the agency’s action will harm the environment in the area where the person resides.”<sup>279</sup> If the court wavered here, it could be because the various state-implemented “mini-NEPAs,” like NEPA itself, often embody a “statutory split personality” between a “new public trust in the entire environment” and narrow strictly procedural requirements.<sup>280</sup> This potential for courts to find or decline to find a new public trust in state environmental policy acts has been commented on in California<sup>281</sup> and in Michigan.<sup>282</sup> At any rate, it is not the formal, still water-based public trust doctrine from *Muench* that supports *Wisconsin’s Environmental Decade’s* expansion of environmental standing; a recent unpublished opinion rejected the extension of the doctrine to “all citizen interests in the public natural resources,” including forests and wildlife.<sup>283</sup>

The Wisconsin public trust doctrine, then, has remained vital but also fairly static in the half-century since *Muench*. Its scope has remained in navigable waters, and its obligations have remained roughly within the banks of *Muench’s* principles of delegation to the DNR and local governments. Wisconsin courts have declined to find within evolving societal values or the state’s Environmental Protection Act a reason to expand the trust’s scope to include wildlife or natural resources in general. On the other hand, protected trust purposes have expanded gradually since *Muench* made the big step forward, such that the DNR in its permit processes now considers wildlife diversity and habitat as constituents of the “public interest.”

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278. *Id.* at 252.

279. *Id.*

280. Brady, *supra* note 4, at 636–37.

281. Antonio Rossmann, Comment, *The 25-Year Legacy of Friends of Mammoth*, 21 ENVIRONMENTAL L. & POL’Y J. 63, 66 (1998) (mandating a “new model of . . . decisionmaking when the environment is at risk,” the California courts have “collaborated with the lawmakers to effect their inchoate will”).

282. *Mich. Citizens for Water Conservation v. Nestle Waters N. Am.*, 737 N.W.2d 447, 469 (Mich. 2007) (Weaver, J., dissenting). By holding that the Michigan EPA does not even confer standing on the public, the Michigan Supreme Court has “taken the power to protect the state’s natural resources away from the people.” *Id.*

283. *Friends of Richland County v. Richland County*, 727 N.W.2d 374, 2006 WL 3782971, \*4 (Wis. Ct. App. 2006) (internal quotations omitted).

### E. Public Trust Doctrine in Massachusetts

As with Michigan, Massachusetts' public trust doctrine has essentially remained cabined by statute and judicial interpretation, but within its traditionally narrow confines in both scope and protected uses.

The Massachusetts Supreme Court has stated concisely that under the public trust doctrine, "the Commonwealth holds tidelands in trust for the use of the public for, traditionally, fishing, fowling, and navigation."<sup>284</sup> In *Boston Waterfront Development Corp. v. Commonwealth*, the court based its recognition of the trust on Crown grants divided since the Magna Carta into two legal categories: a proprietary *jus privatum*, or ownership interest, and a governmental *jus publicum*, or sovereign trust interest.<sup>285</sup> The *jus privatum* could be parceled out to individuals or corporations as private property, but the *jus publicum* had to remain in trust for the state's residents.<sup>286</sup> Since the geographic scope of the public trust was originally recognized to encompass only tidal shorelands, the court noted that as far back as the mid-nineteenth century, real estate on the seashore to which the public have "a common and acknowledged right" should be subject to more restrictive regulations than interior real estate.<sup>287</sup> Into the later twentieth century, this additional restriction was still characterized as an "easement of the public for the public uses of navigation and commerce," combined with a "right of the state . . . to enter upon and possess the same for the preservation and advancement of the public uses."<sup>288</sup> The *Boston Waterfront* court, noting that the public trust concept is difficult to describe in the language of property law, ultimately settled on holding that the Boston Waterfront Development Corporation had title in fee simple, but following *Illinois Central*, the legislature could only make a grant for a "public purpose," so that the corporation's fee is "subject to the condition subsequent" that it be used for the public purpose for which it was granted.<sup>289</sup>

The only major modification made to the *Boston Waterfront* formulation has been by the 1983 and 1990 amendments to the 1866 Public Waterfront Act (PWA),<sup>290</sup> which are said to have "codified" Massachusetts' public trust doctrine, delegating authority to the Massachusetts De-

284. *Moot v. Dep't of Env'tl. Prot.*, 861 N.E.2d 410, 412 (Mass. 2007).

285. *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 358 (Mass. 1979).

286. *Id.* at 359.

287. *Id.* at 365 (citing *Commonwealth v. Alger*, 7 Cush. 53, 95 (1851)).

288. *Id.* (citing *Michaelson v. Silver Beach Improvement Ass'n.*, 173 N.E.2d 273 (Mass. 1961), and quoting *People v. Cal. Fish Co.*, 138 P. 79 (Cal. 1913), and, interestingly, *Marks v. Whitney*, 491 P.2d 374, 381 (Cal. 1971)).

289. *Id.*

290. 1983 Mass. Acts ch. 589, § 22; 1990 Mass. Acts ch. 177, § 151.

partment of Environmental Protection (DEP) to manage the tidelands so as “to preserve and protect the rights” of the public by ensuring that they “are utilized only for water-dependent uses or otherwise serve a proper public purpose.”<sup>291</sup> One category of “water-dependent uses” specified by regulation is for “wildlife refuges, bird sanctuaries, nesting areas, or other wildlife habitats.”<sup>292</sup> To this extent at least, the public trust doctrine’s codification in the PWA incorporates wildlife habitat designation as a protected, but not a mandated, use of tidelands. Alternatively, in *Moot v. Department of Environmental Protection*, the court noted without further explanation that the “proper public purpose” was not identical with public trust obligations.<sup>293</sup> The test for a “public purpose” is (1) whether there is “a direct public benefit” that reaches “a significant part of the public,” and (2) whether private advantages are “reasonably incidental” to carrying out this public benefit.<sup>294</sup> In fact, the legislature retains the authority to alienate public trust lands and even to extinguish public rights by allowing private parties to render tidelands unfit for “fishing, fowling, and navigation,” so long as it does not grossly disregard the public interest in doing so.<sup>295</sup> Further, when the state authorizes a “non-water dependent” use, it must make a specific finding that the use provides a greater benefit than detriment to public rights and include in its license the exact parameters and conditions upon which the license is granted; noncompliance with these can result in revocation of the license.<sup>296</sup>

Interestingly, DEP’s brochure on the PWA includes a much broader (though obviously non-binding) statement of the public trust doctrine, in which “the public interest in all tidelands is rooted.”<sup>297</sup> There, the two major principles underlying the doctrine are that (1) “the public has fundamental rights and interest in natural resources such as the air, the sea and the shore, [and (2)] “the state, as trustee of the public interest, has a duty to preserve and enhance both these natural resources and the public’s right to use them.”<sup>298</sup> The DEP may aspire to this *National Audubon*-like vision of its trusteeship, but most of its actual decision-making

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291. MASS. GEN. LAWS ANN. ch. 91, § 2 (West 2001). See Karl P. Baker & Dwight H. Merriam, *Indelible Public Interests in Property: The Public Trust and the Public Forum*, 32 B.C. ENVTL. AFF. L. REV. 275, 283–85 (2005).

292. 310 MASS. CODE REGS. 9.12(2)(a)(15) (2007).

293. *Moot v. Dep’t of Env’tl. Prot.*, 861 N.E.2d 410, 412 n.5 (Mass. 2007).

294. Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1100–01 (Mass. 1981).

295. *Id.* at 1099.

296. MASS. GEN. LAWS ANN. ch. 91, § 18 (West 2001). *Moot*, 861 N.E.2d at 414 nn.8–9.

297. MASS. DEP’T OF ENVTL. PROT., CHAPTER 91: THE MASSACHUSETTS PUBLIC WATERFRONT ACT (2003), available at <http://www.mass.gov/dep/water/resources/c91comp.pdf>.

298. *Id.* at 4.

adheres to a more prosaic statutory and regulatory framework. In fact, the DEP has evolved its own restrictive threshold standing rules for challengers to “M.G.L. ch. 91” licenses,<sup>299</sup> requiring that they demonstrate “more than a vague or transient interest in the matter” and that their concrete interest “assures that they will represent responsibly the interests of public trust beneficiaries and advocate diligently the public rights and interests they assert.”<sup>300</sup>

As this suggests, the PWA’s regulations do not extend standing to challenge the granting of a license or permit to the general public or even to the neighbor of a proposed project, unless the challenger satisfies the nuisance-like definition of “aggrieved person” as one who as a result of the license or permit “may suffer an injury in fact, which is different either in kind or magnitude, from that suffered by the general public,” and which is within the scope of interests protected by the statute.<sup>301</sup> In *Higgins v. Department of Environmental Protection*,<sup>302</sup> for example, landowners abutting filled tidelands on which a hotel would be constructed under a DEP license sought to challenge the project approval, claiming impacts on their views and traffic. The Massachusetts Appeals Court concluded that a lower court’s dismissal on standing grounds was appropriate, since the plaintiffs’ uses and potentially violated interests were not sufficiently water-dependent, and therefore outside of the scope protected by the PWA.

This formulation and implementation of the public trust doctrine—traditional in both its scope and uses—seems to offer little potential for extraordinary protection to wildlife. In a more expansive vein, Sax discussed a line of Massachusetts cases developing a judicial doctrine protective of public trust *lands* in his seminal 1970 article.<sup>303</sup> The “first major step” in this direction was *Gould v. Greylock Reservation Commission*.<sup>304</sup> In *Gould*, the legislature authorized a commission administering a public park to construct and operate an aerial tramway and other facilities; the commission expanded this proposal into an elaborate ski resort. When local residents challenged the new project, the Massachusetts Supreme Court invalidated the underlying lease, holding that public park land “is not to ‘be diverted to another inconsistent public use

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299. Licenses issued pursuant to Massachusetts’s laws pertaining to waterways found at MASS. GEN. LAWS ANN. ch. 91.

300. *In re Pamet Harbor Yacht Club, Inc.*, File No. W97-8800, 1999 WL 74240 (Mass. Dep’t of Env’tl. Prot. Jan. 29, 1999).

301. 310 MASS. CODE REGS. 9.02 (2007).

302. 835 N.E.2d 610 (Mass. App. Ct. 2005).

303. See Sax, *The Public Trust Doctrine in Natural Resources Law*, *supra* note 4, at 491–502.

304. 215 N.E.2d 114 (Mass. 1966).

without plain and explicit legislation to that end.’”<sup>305</sup> In Sax’s interpretation, the court devised a legal rule imposing a presumption that “the state does not ordinarily intend to divert trust properties in such a manner as to lessen public uses.”<sup>306</sup> With a “simple but ingenious flick of the judicial wrist,” the court shifted the burden to state agencies to obtain “specific, overt approval of efforts to invade the public trust” and thus “struck directly at low-visibility decision-making.”<sup>307</sup> In fact, another commentator has pointed out, such a “stringently applied” requirement for “explicit legislation” to encroach on public parks—sometimes called the “prior public use” doctrine—can be traced back almost a century and is most probably entirely separate and distinct from the public trust doctrine.<sup>308</sup> Later cases, such as *Sacco v. Department of Public Works*, continued this “hard look” into agency authorization and decision-making, most notably invalidating a public works department’s decision to fill a pond in part because an authorization for making “improvements” could not be intended to derogate “the protection of water resources, fish and wildlife and recreational values” mandated by a recent highway construction planning statute.<sup>309</sup> The Idaho Supreme Court in *Kootenai*, following Sax, used *Gould* as its reference point for the “Massachusetts Approach” to the public trust doctrine, the essential element of which was that public trust resources may only be alienated by *express legislative* mandates.<sup>310</sup>

This contrast of the PWA with the *Gould* line displays a curious dichotomy between the formal and limited public trust doctrine on the one hand, and a probing review of agency natural resource decisions on the other, which was never formally labeled the “public trust doctrine” (neither *Gould* nor *Sacco* even mentions the doctrine), but functionally performs its role. Much of the latter function was supplanted by Massachusetts’ enactment of its own Environmental Protection Act (MEPA) in 1972, which requires all state agencies to review their activities’ “impact on the natural environment” and use “all practicable means and measures to minimize damage.”<sup>311</sup> The extensive definition of “damage” is geographically oriented and does not specifically mention wildlife or

305. *Id.* at 121.

306. Sax, *The Public Trust Doctrine in Natural Resources Law*, *supra* note 4, at 494.

307. *Id.*

308. Baker & Merriam, *supra* note 291, at 285, 289–91 (citing *Higginson v. Slattery*, 99 N.E. 523 (Mass. 1912); Heather J. Wilson, *The Public Trust Doctrine in Massachusetts Land Law*, 11 B.C. ENVTL. AFF. L. REV. 839, 865–66 (1984)).

309. *Sacco v. Dep’t of Pub. Works*, 227 N.E.2d 478, 480 (Mass. 1967).

310. *Kootenai Env’tl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1091 (Idaho 1983).

311. MASS. GEN. LAWS ANN. ch. 30, §§ 61–62 (West 2001).

wildlife habitat, but it is clear that the courts consider an assessment of wildlife effects part of a sufficient “environmental impact report” for particular projects. In *Sierra Club v. Department of Environmental Management*,<sup>312</sup> an important recent case on MEPA, the court pointed to assessment of a project’s impacts on an area’s “ecology,” “vegetation,” and “wildlife habitats” as determinative of whether “[e]nvironmental impacts were adequately considered.”<sup>313</sup>

Also in 1972, Massachusetts amended article XLIX to its constitution, granting the people the right to “the natural, scenic, historic, and esthetic qualities of their environment” and declaring “the protection of the people in their right to the conservation, development and utilization of . . . natural resources” to be a “public purpose,” apparently seeking to guarantee the state its eminent domain power for these activities. These natural resources include “wild birds . . . wild mammals and game.”<sup>314</sup> However, this article does not operate as an independent grant of standing to vindicate the “constitutional right to clean air and clean water”; the state supreme court in *Enos v. Secretary of Environmental Affairs* summarily dismissed this possibility in “one sentence, and without any discussion.”<sup>315</sup> Barring a change in the court since *Enos*, it is difficult to see how this article could support standing for a challenge to state failure to protect wildlife. Massachusetts does offer statutory protections to endangered and threatened species and species “of special concern” through its own Endangered Species Act, which prohibits taking protected species as well as altering their “significant habitat.”<sup>316</sup>

With MEPA operating prospectively to cover new projects and the PWA having codified the traditional public trust, the more conceptual public trust (or prior public use) doctrine Sax found in *Gould* and its progeny now occupies a much more limited sphere, being used in attempts to reverse such public decisions as to use Boston Common for private commercial music concerts, for example.<sup>317</sup> The Massachusetts courts have further limited this potential by enforcing strict standing requirements. In *Pratt v. City of Boston*, the court equated a suit to restrain cities and towns from carrying out “wrongful acts” with an attempt at

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312. 791 N.E.2d 325, 336 (Mass. 2003).

313. *Id.* at 336.

314. MASS. CONST. art. XCVII. See also [Protectmassenvironment.org](http://protectmassenvironment.org), Article 97 Lands, [http://protectmassenvironment.org/article\\_97\\_lands.htm](http://protectmassenvironment.org/article_97_lands.htm) (last visited June 10, 2009) (discussing 1973 Massachusetts Attorney General opinion).

315. 731 N.E.2d 525, 532 n.7 (Mass. 2000); Anil S. Karia, *A Right to a Clean and Healthy Environment: A Proposed Amendment to Oregon’s Constitution*, 14 U. BALT. J. ENVTL. L. 37, 69–70 (2006).

316. MASS. GEN. LAWS ANN. ch. 131A, §§ 1–6 (West 2002).

317. *Pratt v. City of Boston*, 483 N.E.2d 812, 812 (Mass. 1985).

“taxpayer standing,” and it said that there must be a statutory basis instead.<sup>318</sup> A statute aimed at enforcing public trust uses provided only for commencement of a suit by the attorney general or a group of 10 taxpayers.<sup>319</sup> Even a statute authorizing a challenge to the erection of a building on a public park conferred a “highly restricted scope” of standing, namely only as to the issue whether a concert stage is a building at all.<sup>320</sup>

Statutory standing does exist, however, for any 10 Massachusetts plaintiffs challenging any “damage to the environment” that “is occurring or is about to occur,” subject to a *de minimis* exception and with the remedy consisting of the issuance of a temporary restraining order.<sup>321</sup> Although section 7A, after its 1973 reorganization, no longer requires that the complained-of action be in violation of a statute,<sup>322</sup> it is still a defense to a suit that the defendant is in compliance with “a judicially enforceable administrative pollution abatement schedule or implementation plan the purpose of which is alleviation of damage to the environment.”<sup>323</sup> Lack of compliance can be failure to follow MEPA’s review provisions.<sup>324</sup>

Overall, in contrast to states such as California and Michigan in which public trust resources, however defined, comprise a separate and substantial area of judicial and administrative focus, the doctrine in Massachusetts seems confined and stunted, with its scope and uses narrowed by statute to mainly water-dependent and commercial uses. Even the Massachusetts Division of Fisheries and Wildlife’s (MDFW) 2005 Comprehensive Wildlife Conservation Strategy<sup>325</sup> fails to mention the public trust doctrine in even an aspirational sense as a driver of its policies and operations. Instead, the MDFW points only to the constitution and general laws as establishing and articulating its responsibilities,<sup>326</sup> and a search on its home page produces no relevant results on how the public trust doctrine influences wildlife policy.<sup>327</sup> Similarly, the public trust element in takings analyses sometimes appears as an afterthought,

318. *Id.* at 817.

319. *Id.* at 818 (citing MASS. GEN. LAWS ANN. ch. 214, § 3(10) (West 2005)).

320. *Id.* at 819 (citing MASS. GEN. LAWS ANN. ch. 45, § 7 (West 1994)).

321. MASS. GEN. LAWS ANN. ch. 214, § 7A (West 2005).

322. See *Boston v. Mass. Port Auth.*, 308 N.E.2d 488, 493–94 (Mass. 1974).

323. MASS. GEN. LAWS ANN. ch. 214, § 7A (West 2005).

324. *Sierra Club v. Dep’t of Env’tl. Mgmt.*, 791 N.E.2d 325, 327–28 & n.3 (2003).

325. See generally MASSACHUSETTS DIVISION OF FISHERIES AND WILDLIFE, COMPREHENSIVE WILDLIFE CONSERVATION STRATEGY (2005).

326. *Id.* at 35.

327. See Massachusetts Division of Fisheries & Wildlife, [http://www.mass.gov/dfwele/dfw/habitat/habitat\\_home.htm](http://www.mass.gov/dfwele/dfw/habitat/habitat_home.htm) (last visited Apr. 20, 2009). In contrast, the California Department of Fish and Game’s declaration states that the doctrine is “not just another legal article” but “the guiding principle that binds government to the people it serves.” California Fish and Game Strategic Plan, *supra* note 120.

as in *Wilson v. Commonwealth*,<sup>328</sup> in which a landowner sued after the DEP's predecessor agency denied a permit for a sea wall, and the owner's house was subsequently undermined by a major storm. After deciding the case primarily on administrative grounds, the court inserted a single paragraph noting that this coastal area "might" have been impressed with the public trust, so that the owners would have had "only qualified rights to their shoreland" and "no reasonable investment-backed expectations under which to mount a taking challenge."<sup>329</sup> Even a major wind turbine project in Horseshoe Shoal, off the Massachusetts coast in Nantucket Sound, the construction of which threatens unknown disturbances to birds and marine life, has been analyzed almost entirely under federal statutes, with environmental lawyer Robert Kennedy, Jr., among the few complaining that the project would "privatize a . . . public trust resource" for commercial and industrial purposes, even if environmentally friendly ones.<sup>330</sup>

Given this cramped development of the public trust doctrine in Massachusetts—even within the context of the nationwide trend toward judicial expansion of environmental protections in the 1970s and 1980s—as well as the longstanding assumption that the PWA has comprehensively codified the doctrine, it seems unlikely that Massachusetts courts would extend its scope or protected uses to wildlife conservation in any way comparable to some other states.

#### F. Public Trust Doctrine in Washington

The Washington Supreme Court first recognized the public trust doctrine in 1901 as the basis of the public's right to use navigable waterways and the state's right to regulate them.<sup>331</sup> It founded this recognition in article 17, section 1, of the Washington Constitution, which vested in the state "ownership to the beds and shores of all navigable waters."<sup>332</sup> Initially, the geographic scope of the public trust was limited to naturally navigable waterways and the protected uses were limited to navigation and fishing. Nearly 70 years later, *Wilbour v. Gallagher*<sup>333</sup> recognized that

328. 583 N.E.2d 894 (Mass. App. Ct. 1992).

329. *Id.* at 901.

330. Amanda Griscom, *Tilting at Windmills: Activists Are Split on a Proposed Wind Project Off Cape Cod*, GRIST, Dec. 19, 2002, <http://www.3grist.org/news/powers/2002/12/19/griscom-windmill/index.html>. See also Jay Wickersham, *Sacred Landscapes and Profane Structures: How Offshore Wind Power Challenges the Environmental Impact Review Process*, 31 B.C. ENVTL. AFF. L. REV. 325, 328 n.20 (2004) (listing the myriad of review processes to which the project is subject).

331. *New Whatcom v. Fairhaven Land Co.*, 64 P. 735 (Wash. 1901).

332. WASH. CONST. art. XVII, § 1.

333. 462 P.2d 232 (Wash. 1969).



the “logical extension” of the scope of the doctrine includes occasionally artificially submerged lands, and an expansion of protected uses that would include “corollary” recreational uses such as boating and swimming.<sup>334</sup> Prompted partially by the *Wilbour* court’s expressions of concern at the absence of state or local involvement in designating what developments would be appropriate and in what locations, at the outset of the “environmental decade” of the 1970s the Washington Legislature enacted the Shoreline Management Act (SMA),<sup>335</sup> which established a “regulatory scheme and public involvement process for tideland and shoreline development.”<sup>336</sup>

The classic exposition of Washington’s current public trust doctrine was given in *Caminiti v. Boyle*.<sup>337</sup> It is founded on the distinction between the *jus privatum*, or “private property interest,” which the state holds in tidelands and shorelands, and the *jus publicum*, or “public authority interest,” which covers navigable waterways and lands under them.<sup>338</sup> While the state is free to convey the *jus privatum* “as absolutely as if the transaction were between private individuals,” the sovereignty and dominion over this state’s tidelands and shorelands, as distinguished from *title*, always remains in the state, and the state holds such dominion in trust for the public.<sup>339</sup> This “public authority interest” in these lands remains as inalienable as the state’s police power.<sup>340</sup> Drawing on *Illinois Central*’s assertion that “[t]he control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining,” the *Caminiti* court devised a test for whether an exercise of legislative power over trust resources violates the public trust doctrine. First, courts

must inquire as to: (1) whether the state, by the questioned legislation, has given up its right of control over the *jus publicum* and (2) if so, whether by so doing the state (a) has promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it.<sup>341</sup>

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334. *Id.* at 237, 239.

335. WASH. REV. CODE ANN. §§ 90.58.010–.930 (West 2009 & Supp. 1988).

336. F. Lorraine Bodi, *The Public Trust Doctrine in the State of Washington: Does It Make Any Difference to the Public?*, 19 ENVTL. L. 645, 647 (1989).

337. 732 P.2d 989 (Wash. 1987).

338. *Id.* at 993–94.

339. *Id.*

340. *Id.*

341. *Id.* at 994–95.

Before applying this test to the legislation at issue in *Caminiti*, the court noted that all of these requirements are “fully met” by the SMA’s “legislatively drawn controls” on new development projects that are designed to prevent adverse environmental effects.<sup>342</sup> Indeed, Washington courts consider the SMA to constitute the “codification” of the doctrine, at least for tidal shorelands.<sup>343</sup>

The scope of Washington’s public trust doctrine has remained limited to *Caminiti*’s tidelands and shorelands, with some judicial pressure for expansion, as will be noted, though the protected uses have been expanded as far in California’s *Marks v. Whitney* and through U.S. Supreme Court decisions. In *Rettkowski v. Department of Ecology*,<sup>344</sup> the Washington Supreme Court refused to recognize any state public trust obligations even over non-navigable waters or groundwater, and disclaimed any intention of revisiting the doctrine’s scope.<sup>345</sup> One justice dissented, maintaining that the history and the theory of the public trust doctrine argued strongly for abandoning the navigability requirement as “ultimately artificial and absurd.”<sup>346</sup> Since the U.S. Supreme Court and other state courts, such as California’s, have extended the protected uses well beyond navigation, it is “odd” to suggest that the “sole measure of the expanse of [trust] lands is the navigability of the waters over them.”<sup>347</sup> At its most basic level, “the scope of the public trust doctrine is defined by the public’s needs in those natural resources necessary for social stability, [thus requiring their] protection and perpetuation.”<sup>348</sup>

There have been other hints of expansion, but these have mainly been limited to the recognition of new protected uses, often including wildlife preservation measures. Shortly after *Caminiti*, in *Orion Corp. v. State*,<sup>349</sup> for example, the Washington Supreme Court suggestively described public trust doctrine as resembling “a covenant running with the land (or lake or marsh or shore) for the benefit of the public *and the land’s dependent wildlife*.”<sup>350</sup> As in *Rettkowski*, the court quickly disclaimed any

342. *Id.* at 995.

343. See *Ass’n of Wash. Bus. v. Wash. Dep’t of Ecology*, SHB No. 00-037, 2001 WL 1022097, \*2 (Wash. Shorelines Hearings Bd. 2001). See also *Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearings Bd.*, 593 P.2d 151, 153 (Wash. 1979) (“any common-law public benefit doctrine this state may have had prior to 1971, has been superseded and the SMA is the present declaration of that doctrine.”).

344. 858 P.2d 232 (Wash. 1993).

345. *Id.* at 239 & n.5.

346. *Id.* at 244 (Guy, J., dissenting).

347. *Id.* (quoting *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988)).

348. *Id.* (citing Joseph Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 189 (1980)).

349. 747 P.2d 1062 (Wash. 1987).

350. *Id.* at 1072–73 (emphasis added) (quoting Reed, *supra* note 159, at 118).

intention of deciding the doctrine's "total scope," but *Orion* did note the gradual expansion of protected uses to encompass "incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes," and it cited with approval Virginia, Wisconsin, and California decisions expanding the doctrine to wildlife, non-tidal lands, and ecological values generally.<sup>351</sup> The Washington Supreme Court gave formal recognition to the first and last of these uses in *Weden v. San Juan County*.<sup>352</sup> In *Weden*, the court addressed a challenge to a county ordinance banning the operation of motorized personal watercraft, specifically to protect threatened or endangered marine mammals and birds and their habitat from harassment. One ground for the challenge was that the ordinance violated the public trust doctrine's guarantee of public access to waterways. Although the strict basis of the court's rejection of this challenge was its finding that the county had not given up control of its waters and therefore complied with the *Caminiti* test, the court proceeded to scoff at the suggestion that the public trust doctrine should be used "to sanction an activity that actually harms and damages the waters and wildlife of this state."<sup>353</sup> The court cited a law review article, rather than precedent, for the assertion that the doctrine's protected purposes include "public ownership interests in . . . environmental quality."<sup>354</sup>

In *Weden* and other cases, Washington courts have seemingly taken for granted that protection for wildlife is a permissible, if not mandated, public trust purpose. This assumption likely derives from the legislature's dual directives in the SMA to "protect[ ] against adverse effects to the public health, the land and its vegetation and wildlife . . . while protecting generally public rights of navigation and corollary rights incidental thereto."<sup>355</sup> As early as 1979's *Portage Bay* decision, the SMA's "underlying policy" favoring careful planning, management, and coordination of shoreline development was recognized as reflecting "trust principles,"<sup>356</sup> and even earlier, its policy protecting "aesthetic" and "spiritual" environmental values constituted a potentially justified exercise of the police power, after satisfying a balancing test of "property

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351. *Id.* at 1073 & n.10 (citing *In re Steuart Transp. Co.*, 495 F. Supp. 38 (E.D. Va.1980); *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972); *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971)).

352. 958 P.2d 273, 283–84 (Wash. 1998).

353. *Id.* at 284.

354. *Id.* at 283 (citing Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 524 (1992), available at <http://www.ecy.wa.gov/pubs/93054.pdf>).

355. WASH. REV. CODE ANN. § 90.58.020 (West 2004).

356. *Orion Corp. v. State*, 747 P.2d 1062, 1073 n.11 (Wash. 1987) (citing *Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearings Bd.*, 593 P.2d 151 (Wash. 1979)).

rights” and “social needs,” so as not to require compensation for a taking.<sup>357</sup> The Shoreline Hearings Board (SHB), invested by the SMA with authority over permitting reviews under section 90.58.180, has viewed the SMA’s primary mandate as maintaining “public use and enjoyment of the shorelines,” which covers the right to navigation but includes other forms of public access and even visual impacts.<sup>358</sup> The SHB notes that, after *Weden*, the public interest in access to and enjoyment of the shoreline “necessarily includes a component of environmental and habitat protection.”<sup>359</sup> The statute requires local governments to develop “master programs” for regulation of the uses of the shoreline consistent with Washington Department of Ecology guidelines and including economic development, public access, recreation, transportation, and conservation elements.<sup>360</sup>

In the late 1990s, the Department of Ecology undertook a major revision of its guidelines in an attempt to reverse declines in the quality of the state’s shorelines due to rapid or ill-considered development.<sup>361</sup> Two notable inclusions were provisions developed in cooperation with federal agencies to avoid state liability for “take” under the federal ESA and assure ESA compliance, specifically by initiating consultations with the federal ESA agencies on individual master programs, and by establishing a new emphasis on “restoring ecological functions.”<sup>362</sup> In other words, in spirit if not expressly, the Department of Ecology was attempting to implement SMA directives as an affirmative, public trust-like obligation to preserve and restore the state’s fish and wildlife—a move which would test the expansiveness of the state courts’ interpretation of the SMA’s public trust basis. Unfortunately, the guidelines never made it to court but were reviewed by the SHB itself, in *Ass’n of Washington Businesses v. Washington Department of Ecology*, which in a divided decision struck down the state ESA provisions but left the restoration emphasis intact.<sup>363</sup> While the majority interpreted the Department of Ecology’s authority to require the SMA to effectuate the Department’s imposition of

357. *Dep’t of Ecology v. Pacesetter Construction Co.*, 571 P.2d 196, 198–201 (Wash. 1977).

358. *Ass’n of Wash. Bus. v. Wash. Dep’t of Ecology*, SHB No. 00-037, 2001 WL 1022097, \*9 (Wash. Shorelines Hearings Bd. 2001).

359. *Id.* (citing *Weden v. San Juan County*, 958 P.2d 273, 698).

360. WASH. REV. CODE ANN. § 90.58.080(1), .100(2)(a)-(i) (West 2004).

361. See News Release, Ecology Department Adopts New Shoreline Guidelines, Nov. 29, 2000, <http://www.ecy.wa.gov/news/2000news/2000-230.html> (last visited June 10, 2009).

362. *Ass’n of Wash. Bus. v. Wash. Dep’t of Ecology*, SHB No. 00-037, 2001 WL 1022097, \*4–9 (Wash. Shorelines Hearings Bd. 2001) (citing WASH. ADMIN. CODE § 173-26-200, -210 (2000)).

363. See generally *id.*

master program elements (which are meant to protect *and restore* ecological functions),<sup>364</sup> the partial dissenters argued that the new guidelines “fail to account for the balancing of interests that is contained in the language and the history of the act and impermissibly shift the focus to habitat restoration.”<sup>365</sup> On the endangered species issue, the majority found that the Department of Ecology had no statutory mandate to “implement the ESA,” while a lone dissenter argued that the Department was in fact implementing the SMA “in a *manner consistent with the ESA*” and “should be commended.”<sup>366</sup> Given this extreme divergence within the SHB itself, it is tempting to view *Ass’n of Washington Businesses*—which included a score of interested parties on each side, roughly classifiable as developers and local governments against environmentalists—as a lost opportunity for the courts, especially the state supreme court, to rule on the scope and extent of the state’s public trust obligations toward wildlife preservation and restoration.

After the Department of Ecology’s unsuccessful attempt to insinuate ESA principles into the SMA, a Washington Court of Appeals returned to the scope of the common law public trust doctrine as applied to both shoreline and upland wildlife, in a pair of 2004 decisions. A 2000 decision, *State v. Longshore*,<sup>367</sup> had held that the public trust doctrine confers no right of access to the general public to take naturally occurring or cultivated clams from property that the state had sold into private ownership.<sup>368</sup> In *Washington State Geoduck Harvest Ass’n v. Washington State Department of Natural Resources*,<sup>369</sup> a commercial clam harvesting group argued that *Longshore*’s public-private distinction should mean that the state has no authority to regulate access to wildlife on public shorelands, an interpretation that would render the Washington Department of Natural Resources’ (DNR) auctioning of harvesting rights invalid. Since the shellfish at issue were “embedded” in the public shorelands, the court did not need to expand the doctrine’s traditional scope, though it—perhaps inadvertently—used affirmative language in describing the public trust as “obligat[ing] the state to balance the protection of the public’s right to use resources on public land with the protection of the resources that enable these activities.”<sup>370</sup> The court retreated from this dicta in its holding, which merely found DNR’s state regulation of shellfish harvesting “consistent with our state’s protection of commerce, navigation, com-

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364. *Id.* at 9 (emphasis added).

365. *Id.* at 21.

366. *Id.* at 5, 26–27 (emphasis in original).

367. 5 P.3d 1256 (Wash. 2000).

368. *Id.* at 1260.

369. 101 P.3d 891 (Wash. Ct. App. 2004).

370. *Id.* at 895–96.

mercial fishing, and incidental recreational activities” and agreed with *Caminiti*’s test for permissible state action under the public trust doctrine.<sup>371</sup>

At issue in *Citizens for Responsible Wildlife Management v. State*<sup>372</sup> were two state initiatives that imposed restrictions on game hunting methods as well as questions regarding the public trust doctrine’s scope and the extent and character of the state’s obligations. A hunting group argued that the initiatives violated the state’s public trust duty to control and manage wildlife for the public’s benefit. The court noted initially that the state does hold title to wild animals “in trust for the peoples’ use and benefit.”<sup>373</sup> It cited an old case asserting that the “killing, taking and use of game was subject to absolute governmental control for the common good.”<sup>374</sup> However, citing *Caminiti*, *Rettkowski*, and *Weden*, the court asserted that “[n]o Washington court ha[d] ever applied the public trust doctrine to *terrestrial* wildlife or [even *terrestrial*] resources.”<sup>375</sup> The court proceeded to assume, without deciding, that the public trust doctrine would apply to the initiatives, and it applied the test from *Caminiti*, “ask[ing] (1) whether the state has given up its right of control over the *jus publicum*; (2) if so, whether the state (a) has promoted the public’s interest in the *jus publicum*, or (b) has not substantially impaired it.”<sup>376</sup> The court answered the threshold question negatively; the state did not cede control over natural resources through the initiatives, but rather seemed to assume greater control.<sup>377</sup> Interestingly, a concurring judge wrote separately to expressly assert that the public trust doctrine should apply to all the state’s resources and that because the “primary beneficiaries” of the trust are “those who have not yet been born,” the more important inquiry is not whether the “state”—the voters or the government at any given time—have retained control over the resources in question, but whether they are fulfilling their obligation “to manage natural resources well for the benefit of *future* generations.”<sup>378</sup> Within this one appellate court at least, there has been a significant divergence between a formalistic and procedural conception of the public trust and a more substantive and result-oriented one that would obviously afford stronger protection to wildlife along with other state resources.

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371. *Id.* at 896–97.

372. 103 P.3d 203 (Wash. Ct. App. 2004).

373. *Id.* at 205.

374. *Id.* (citing *Cawsey v. Brickey*, 144 P. 938, 939 (Wash. 1914)).

375. *Id.* (emphasis added).

376. *Id.* at 206.

377. *Id.* at 207–08.

378. *Citizens for Responsible Wildlife Mgmt. v. State*, 103 P.3d 203, 208–09 (Wash. Ct. App. 2004) (Quinn-Brintnall, J., concurring) (emphasis in original).

Another basis of state authority for affirmative oversight of natural resources is the Washington State Environmental Policy Act of 1971 (SEPA).<sup>379</sup> Modeled on NEPA, SEPA directs that state and municipal entities prepare environmental impact statements (EIS) for proposed “major actions significantly affecting the quality of the environment” to insure that “presently unquantified environmental amenities and values will be given appropriate consideration in decision-making.”<sup>380</sup> As with NEPA, SEPA’s legislative declarations include strong public trust language, asserting that it is the “continuing responsibility” of the state to use “all practicable means” to work toward fulfilling “the responsibilities of each generation as trustee of the environment for succeeding generations.”<sup>381</sup> In the decades since SEPA’s adoption, the primary development seen to negatively impact environmental conditions has been the rapid and often uncontrolled growth of Washington’s urban and suburban areas.

As with NEPA, SEPA’s requirements have been given a largely procedural as opposed to a substantive spin by the Washington courts. Nevertheless, in *Adams v. Thurston County*,<sup>382</sup> for example, a court of appeals affirmed that “SEPA overlays and supplements all other state laws.”<sup>383</sup> While a locality cannot seek to grab unfettered control over local growth by interposing EIS requirements into the plat application process for subdivisions, (so as to delay vesting of property rights in conflict with the state vesting statute),<sup>384</sup> neither can a locality treat SEPA as a mere formality but must “gather complete environmental information” before development can proceed.<sup>385</sup> Even if a proposed development is allowed under zoning and building ordinances frozen at the time of vesting, a locality retains the discretionary ability to condition or deny any development based on environmental impacts identified in its EIS.<sup>386</sup>

Thus, besides the interagency conflicts suggested in the *Ass’n of Washington Businesses* hearing discussed above, SEPA, SMA, and their public trust implications have engendered numerous battles between state and local governments that are determined to impose stricter environmental conditions on new development. In a recent case, *Biggers v. City of Bainbridge Island*,<sup>387</sup> an island city in Puget Sound imposed a mora-

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379. WASH. REV. CODE ANN. § 43.21C.010-.914 (West 1998).

380. *Id.* § 43.21C.030.

381. WASH. REV. CODE ANN. § 43.21C.020 (West 1998).

382. 855 P.2d 284 (Wash. Ct. App. 1993).

383. *Id.* at 287.

384. *Id.* at 290.

385. *Id.* at 291.

386. *Id.*

387. 169 P.3d 14 (Wash. 2007).

torium on shoreline development so it could address the possible impacts on threatened salmon habitat. When developers challenged the moratorium as *ultra vires*, the city attempted to assert a novel theory of local police power over “development of private property on shorelines of statewide significance.”<sup>388</sup> Ironically, perhaps, the Washington Supreme Court relied on the public trust doctrine in rejecting the city’s attempt to offer greater protections to wildlife habitat. Because the State of Washington cannot convey or give away its *jus publicum* interest in shorelines to private parties, it “[c]learly” cannot “impliedly abdicate[ ]” the interests of all Washington residents to local governments.<sup>389</sup> The state has validly and expressly delegated “some state power” over shorelines under the SMA; since the SMA “embodies a legislatively-determined and voter-approved balance between protection of state shorelines and development,” local governments are not authorized to conflict with it.<sup>390</sup> A lone dissent suggested that the majority had misapplied Washington’s public trust doctrine precedent: *Rettkowski* and *Caminiti* held that the state *could* delegate its public trust duty, and the majority here even noted that it had done so under the SMA.<sup>391</sup> Since the SMA “explicitly grants local government *exclusive* authority to administer the permit program,”<sup>392</sup> the city had the authority to defer acceptance of permit applications.<sup>393</sup>

The larger battle, strikingly reflected in Washington’s divided decisions and elsewhere, has been how the public trust doctrine’s affirmative duties, perceived as potentially unmanageable administratively and judicially, could be kept carefully confined within express legislative enactments or an unexpressed legislative “power.” Indeed, the formalism of recent decisions that expand on *Rettkowski*’s majority opinion seems to have moved even farther away from Justice Guy’s dissenting view that “the scope of the public trust doctrine is defined by the public’s needs in those natural resources necessary for social stability.”<sup>394</sup> Just as the SHB in *Ass’n of Washington Businesses* disallowed the Department of Ecology’s initiatives to protect endangered species, the state supreme court in *R.D. Merrill Co. v. State Pollution Control Hearings Board*,<sup>395</sup> concluded that “the public trust doctrine does not serve as an independent source of author-

388. *Id.* at 21.

389. *Id.* at 21–22 (citing *Rettkowski v. Dep’t of Ecology*, 858 P.2d 232 (Wash. 1993); *Caminiti v. Boyle*, 732 P.2d 989 (Wash. 1987)).

390. *Id.* at 22.

391. *Id.* at 30–31 (Fairhurst, J., dissenting).

392. *Id.* at 31 (emphasis in original).

393. *Biggers v. City of Bainbridge Island*, 169 P.3d 14, 31 (Wash. 2007).

394. *Rettkowski*, 858 P.2d at 242.

395. 969 P.2d 458 (Wash. 1999).



ity for the Department to use in its decision-making apart from the provisions in the water codes,” or even as an independent canon of construction in interpreting the code provisions.<sup>396</sup> This conclusion flowed from *Rettkowski*’s important observation that “the duty imposed by the public trust doctrine devolves upon the State, not any particular agency thereof.”<sup>397</sup> The Department of Ecology had no statutory authority to assume this duty to regulate to preserve the state’s “precious and limited” resources.<sup>398</sup> Even assuming it had such an affirmative duty, the public trust doctrine “could provide no guidance as to *how* [the Department of] Ecology” would exercise it, since state agencies can look only to statutory mandates for guidance.<sup>399</sup> The recent decision in *Citizens for Responsible Wildlife Management* rejecting the public trust doctrine’s application to wildlife brought this reasoning full-circle, relying on *R.D. Merrill*, along with *Rettkowski*, *Weden*, and *Caminiti*, to prevent the kind of functional expansion in the doctrine’s scope that Justice Guy seemed to think was compelled by its underlying values.

While Washington’s courts have clearly accepted the legislature’s application of the state’s public trust authority to the purpose of wildlife protection, recent decades have been characterized by recurring battles among Washington agencies and the judiciary itself as to how independent, how broadly spread, and how affirmative that authority should be. Stated in terms of this article’s prefatory comments, Washington seems to have accepted *Marks v. Whitney*’s recognition of the public trust doctrine’s dynamic and flexible uses but has stopped short of endorsing *National Audubon*’s affirmative obligations, despite notable pressure from the Department of Ecology and some members of the bench to step across this all-important line.

### III. CONCLUSION

Obviously, the path to judicial recognition of the public trust in wildlife has not been smooth. Indeed, this path has been so crisscrossed and rutted with competing doctrines of constitutional limitations, property rights, and statutory and agency mandates that drawing generalizations across state lines invites oversimplification. Yet there are a few observations about the various states’ responses to attempts to expand the scope and protected uses of the public trust that can be meaningfully hazarded.

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396. *Id.* at 467.

397. *Rettkowski v. Dep’t of Ecology*, 858 P.2d 232, 239 (Wash. 1993).

398. *Id.*

399. *Id.* at 239–40 (emphasis in original).

First, the public trust doctrine courts powerful enemies. Because it is both a recognition of a sort of latent public property interest in natural resources and a form of constitutional limitation on state authority, in its more affirmative formulations it has been aggressively opposed both by proponents of strong private property rights and by proponents of broad state agency discretion. The California Headwaters case discussed in Part I<sup>400</sup> illustrates perfectly how public trust advocates often have to battle both opponents at the same time. Time and again in the above discussions, environmentalists appear as unwelcome guests at the table. In California's *FPL* case,<sup>401</sup> Michigan's *Nestle Waters*,<sup>402</sup> Wisconsin's *Barnes*<sup>403</sup> and *Deetz*,<sup>404</sup> and Washington's *Citizens for Responsible Wildlife Management*,<sup>405</sup> the recurring response from the courts has been, "Please go away, you are interrupting something important." The great exception to this cold reception was the groundbreaking *National Audubon* case, which was also exceptional in that it featured a perfect villain—that great water thief, the City of Los Angeles—an "imperiled" heroine, and a "scenic and ecological treasure of national significance,"<sup>406</sup> all of which was turned into a *cause celebre* by a well-coordinated media campaign and California's most ubiquitous bumper-sticker.<sup>407</sup>

Second, compounding this first problem, the public trust doctrine is susceptible to judicial sidestepping in two forms. One form, what might be called the "deaf ear" approach, arises because in its post-*Marks v. Whitney* formulation the public trust doctrine strikes a discordant note

400. Cal. Envtl. Prot. Info. Ctr. (EPIC) v. Cal. Dep't of Forestry & Fire Prot., 37 Cal. Rptr. 3d 31 (Cal. Ct. App. 2005). See *supra* notes 28–32, 93–100, and accompanying text.

401. Ctr. for Biological Diversity, Inc. v. FPL Group, Inc., No. RG04-183113, 2006 WL 2987634 (Cal. Super. Ct. dismissed Oct. 12, 2006).

402. See generally Michigan Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 737 N.W.2d 447 (Mich. 2007).

403. See *Barnes v. Dep't of Natural Res.*, 516 N.W.2d 730 (Wis. Ct. App. 1994). *ABKA Ltd. P'ship v. Wis. Dep't of Natural Res.*, 648 N.W.2d 854, 858–59 (Wis. 2002); Quick, *supra* note 231, at 110–11.

404. See *State v. Deetz*, 224 N.W.2d 407 (Wis. 1974); *Wisconsin's Envtl. Decade v. Pub. Serv. Comm'n*, 230 N.W.2d 243 (Wis. 1975).

405. See *Citizens for Responsible Wildlife Mgmt. v. State*, 103 P.3d 203 (Wash. Ct. App. 2004); WASH. REV. CODE ANN. § 43.21C.010-914 (West 1998).

406. *Nat'l Audubon Soc'y v. Super. Ct. of Alpine County*, 658 P.2d. 709, 712 (Cal. 1983).

407. CRAIG ANTHONY ARNOLD, *BEYOND LITIGATION: CASE STUDIES IN WATER RIGHTS DISPUTES* 177, 189 (2002) (noting that the "Save Mono Lake" campaign generated thousands of bumper stickers and had a substantial impact on Southern Californians' attitudes about their water, that the Mono Lake Committee gained more than 20,000 members, and that public education and advocacy were crucial to the application of public trust principles to this case). See also KAREN PIPER, *LEFT IN THE DUST: HOW RACE AND POLITICS CREATED A HUMAN AND ENVIRONMENTAL TRAGEDY IN L.A.* 149 (2006) (describing the high-profile campaign).

of insurgency within courts inclined to enforce only the mostly procedural rights and duties well-defined by the “modern” statutory environmental law framework. Amidst this framework of state and federal environmental policy acts and endangered species acts, advocates for the doctrine’s expansion are essentially seeking to revive ancient common law rights on behalf of specific ecological entities. While courts assuredly continue to follow the interpretive principle that “statutes should not be construed to abolish common law rights unless absolutely necessary,”<sup>408</sup> they generally resort to glances at the common law to “fill gaps” in regulatory concepts or definitions,<sup>409</sup> to address special harms suffered by particular individuals or communities,<sup>410</sup> or to allow recovery of damages.<sup>411</sup> Courts consistently resist what amounts to granting standing to rivers and ecosystems.<sup>412</sup> California’s *FPL* case,<sup>413</sup> in which the court essentially “nonsuited” wildlife advocates for undisputed massive raptor deaths, offers the most straightforward example, but in Michigan’s *Nestle*

408. *Courtney Enterprises, Inc. v. Publix Super Markets, Inc.*, 788 So. 2d 1045, 1049 (Fla. Dist. Ct. App. 2001), cited in KENNETH A. MANASTER & DANIEL P. SELMI, *STATE ENVIRONMENTAL LAW* § 2:2 (2007). Cf. *Cal. Ass’n of Health Facilities v. Dep’t of Health Services*, 940 P.2d 323, 331 (Cal. 1997) (“unless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules.”).

409. MANASTER & SELMI, *supra* note 408, at § 2:2 (citing *City of Modesto Redevelopment Agency v. Super. Ct.*, 13 Cal. Rptr. 3d 865, 872 (Cal. Ct. App. 2004); *Leslie Salt Co. v. San Francisco Bay Conservation & Dev. Comm’n*, 200 Cal. Rptr. 575 (Cal. Ct. App. 1984)).

410. *Id.* (citing *Greater Westchester Homeowners Ass’n v. L.A.*, 603 P.2d 1329 (Cal. 1979) (nuisance action for airport noise)).

411. *Id.* (citing *Wagner v. Anzon*, 684 A.2d 570 (Pa. Super. Ct. 1996)).

412. The great counter-example, of course, is Justice Douglas’s dissent in *Sierra Club v. Morton*, 405 U.S. 727, 741–52 (1972). Far from one of unleashing courts’ jurisdictional reach, the problem of expanding standing is:

to make certain that the inanimate objects, which are the very core of America’s beauty, have spokesmen before they are destroyed. It is, of course, true that most of them are under the control of a federal or state agency. The standards given those agencies are usually expressed in terms of the “public interest.” Yet “public interest” has so many differing shades of meaning as to be quite meaningless on the environmental front.

*Id.* at 745. In a separate dissent, Justice Blackmun questioned whether the law must “be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues.” *Id.* at 755–56. Both Justices felt so strongly about their dissents that they read them from the bench. ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 982 (5th ed. 2006). The California Supreme Court cited Justice Blackmun’s dissent in the landmark CEQA case *Friends of Mammoth v. Bd. of Supervisors of Mono County*, 502 P.2d 1049, 1053 (Cal. 1972), but otherwise this attitude of special solicitude for the environment despite procedural and administrative law strictures has not been widely adopted.

413. *Ctr. for Biological Diversity, Inc. v. FPL Group, Inc.*, No. RG04-183113, 2006 WL 2987634 (Cal. Super. Ct. dismissed Oct. 12, 2006).

*Waters*,<sup>414</sup> *Wisconsin's Environmental Decade*,<sup>415</sup> and Washington's *Citizens for Responsible Wildlife Management*,<sup>416</sup> courts have treated plaintiffs' claims as "generalized grievances" better suited for solutions through the political branches.

A cagier form of evasion, the "bait and switch" approach, occurs when courts nominally recognize public trust rights and duties but choose to define them conceptually<sup>417</sup> rather than with geographic or, for want of a better word, "ethical" precision, with *Marks v. Whitney's* "preservation of lands in their natural state" epitomizing the latter. By doing so, these courts have knowingly reserved to themselves the ability to defer these conceptual rights and duties to administrative analogs that are grounded in more predictable and containable statutory mandates. The Michigan, Massachusetts, and Washington courts, as has been seen, have repeatedly found in each respective state's EPA, PWA, and SMA, sufficient implementation of a common law duty to prevent the impairment of certain natural resources so as to allow the former to essentially preempt the latter.<sup>418</sup> Again, California serves as the exception that proves the rule. The *National Audubon* court was urged to find in the state's water rights allocation system a sufficient accommodation of ecological values to absorb these, but it pointedly refused to avert the "collision course" on which they were bound, instead attempting to "integrate"

414. See generally *Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc.*, 737 N.W.2d 447 (Mich. 2007).

415. See *Wisconsin's Env'tl. Decade v. Pub. Serv. Comm'n*, 230 N.W.2d 243 (Wis. 1975); WIS. STAT. ANN. § 1.11 (West 2004).

416. See *Citizens for Responsible Wildlife Mgmt. v. State*, 103 P.3d 203 (Wash. Ct. App. 2004); WASH. REV. CODE ANN. § 43.21C.010-.914 (West 1998).

417. See, e.g., *Commonwealth v. City of Newport News*, 164 S.E. 689, 696 (Va. 1932). As a commentator has noted, the Court was less than clear on how to distinguish the *jus publicum*—to which the public trust applies—from the *jus privatum*, but it apparently defined the scope and uses of the public trust conceptually rather than geographically, requiring a *jus publicum* right to be a commonly-enjoyed, public use that does not reduce a resource to private property and that is substantially related to the preservation of some constitutional right. See Sharon M. Kelly, *The Public Trust and the Constitution: Routes to Judicial Overview of Resource Management Decisions in Virginia*, 75 VA. L. REV. 895, 908–12 (1989). This commentator has suggested that non-consumptive outdoor recreation, including the observation of wildlife, should qualify in theory as a protected use. It is non-possessory, and it bears a substantial relationship to the Virginia Constitution's rights of "pursuing and obtaining happiness and safety." VA. CONST. art. I, § 1. As already noted, however, Virginia courts have used this strategic vagueness to defer "almost unconditionally" to private property rights. See *In re Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980); *Commonwealth v. City of Newport News*, 164 S.E. 689 (Va. 1932); VA. CONST. art. XI, § 1; *Robb v. Shockoe Slip Found.*, 324 S.E.2d 674, 676–77 (Va. 1985); *Butler*, *supra* note 42.

418. See, e.g., *City of Portage v. Kalamazoo County Road Comm'n*, 355 N.W.2d 913, 915 (Mich. Ct. App. 1984) (courts are "not empowered to enjoin any conduct which does not rise to the level of an environmental risk proscribed by the MEPA.").

their “teachings and values.”<sup>419</sup> This refusal to collapse two factually related but ethically distinct inquiries into a discrete statutory procedure has characterized and troubled California courts ever since.<sup>420</sup> Courts are naturally resistant to adopting formless criteria of review, and most state courts, based on this sample, have opted for statutory certainty and uniformity when faced with a similar dilemma.

Third, in a more historical vein, it may have struck the reader that in nearly all cases the recognition of ecological preservation as the basis for a cause of action, via court decision or statutory enactment or both, occurred roughly between 1970 and 1989, while in most of the above cases, the erosion of this recognition began toward the tail end of this two-decade span and has progressed methodically ever since. Idaho provides the most clear-cut example: despite the Idaho Supreme Court seeming to find a constitutional public trust limitation on state authority in *Kootenai* in 1983, the legislature felt free to cabin this limitation statutorily in 1996.<sup>421</sup> Even in California, given that state’s tremendous population and resource pressures, *Marks v. Whitney* and *National Audubon* have less spawned a revolution toward environmental restoration than erected a much-needed obstacle to the retreat witnessed in other states.<sup>422</sup> It

419. *Nat’l Audubon Soc’y v. Super. Ct. of Alpine County*, 658 P.2d 709, 712 (Cal. 1983).

420. *See, e.g., El Dorado Irrigation Dist. v. State Water Res. Control Bd.*, 48 Cal. Rptr. 3d 468, 490–92 (Cal. Ct. App. 2006) (“Another important principle that may compete with the rule of priority is the public trust doctrine. . . . [W]hen the public trust doctrine clashes with the rule of priority, the rule of priority must yield. Again, however, every effort must be made to preserve water right priorities to the extent those priorities do not lead to violation of the public trust doctrine.”). Early CEQA cases actually primed the California courts for this sort of dramatic tension between values. A wonderful short article, Rossmann, *supra* note 281, beautifully describes the momentousness of the *Friends of Mammoth* and especially the Owens River decisions of the 1970s, which “read less like legal doctrine and more like passages of great scripture,” succeeding, in cases that “could have gone the other way . . . within the limits of human inadequacy to capture in words mandate and aspirations that transcend the moment.” *Id.* at 69.

421. *See Kootenai Env’tl. Alliance v. Panhandle Yacht Club*, 671 P.2d 1085 (Idaho 1983); IDAHO CODE ANN. § 58-1203 (2002); *supra* notes 145–72 and accompanying text.

422. *See David R.E. Aladjem, Innovation Within a Regulatory Framework: The Protection of Instream Beneficial Uses of Water in California, 1978 to 2004*, 36 McGEORGE L. REV. 305, 326 (2005) (observing that two SWRCB proceedings in 1994 and 2001 may “have marked the high-water mark of the public trust doctrine”). *See also* Gregory A. Thomas, *Conserving Aquatic Biodiversity: A Critical Comparison of Legal Tools for Augmenting Streamflows in California*, 15 STAN. ENVTL. L.J. 3, 40 (1996): “[California’s public trust doctrine] fails to prescribe the circumstances under which water must be allocated for environmental protection.” Also, “barring further legal developments, the utility of the public trust doctrine for restoring impaired aquatic ecosystems can be undermined by the discretion inherent in its application.” *See, e.g., State Water Res. Control Bd. Cases*, 39 Cal. Rptr. 3d 189, 272–73 (Cal. Ct. App. 2006) (“While the Board had a duty to adopt objectives to protect fish and wildlife uses and a program of implementation for achieving those objectives, in doing so the Board

seems no coincidence that the 1990s also saw aggressive efforts to repeal major components of the federal environmental statutes, with a Congress and judiciary “decidedly more skeptical” about the entire regulatory framework.<sup>423</sup> California, to a degree unmatched by other states, continued to grapple with exponential growth and the resulting water shortages and loss of habitat and open space.<sup>424</sup> Probably because these problems maintained high public visibility and spawned widespread

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also had a duty to consider and protect all of the other beneficial uses to be made of water in the Bay-Delta, including municipal, industrial, and agricultural uses. It was for the Board in its discretion and judgment to balance all of these competing interests in adopting water quality objectives and formulating a program of implementation to achieve those objectives. . . . The public trust doctrine entitles [plaintiffs] to nothing more.”). See also *Cachuma Phase II*, *supra* note 32, at 773–74 where attorney Karen Kraus for California Trout asserts that, “The Supreme Court of California has made it clear that this perspective [giving consumptive uses of water a higher priority than public trust uses] no longer has a place here,” and recites the “Mono Lake Case” criteria as the “legal framework” for the contention that the state’s river management actions are not adequate to achieve the *restoration* of steelhead habitat.

Current proceedings in the massive Bay-Delta controversy are likely to define to some extent the future restoration mandate of the public trust doctrine in California. See Gary A. Patton, *As Delta Crumbles, California Water Board May Review Whether Exports Are Consistent with Public Trust*, CAL. PROGRESS REPORT, Dec. 1, 2007, [http://www.californiaprogressreport.com/2007/12/as\\_delta\\_crumb.html](http://www.californiaprogressreport.com/2007/12/as_delta_crumb.html) (last visited June 10, 2009). See also SWRCB’s Dec. 4, 2007 proceedings index (including the Public Trust Alliance’s comments), [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/120407\\_board\\_meeting/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/120407_board_meeting/) (last visited June 10, 2009).

423. PERCIVAL ET AL., *supra* note 412, at 88, 96–97 (calling this a period of “Regulatory Recoil and Reinvention”).

424. See BANK OF AM. ET AL., *BEYOND SPRAWL: NEW PATTERNS OF GROWTH TO FIT THE NEW CALIFORNIA* 3, 8 (1996), available at [http://gif.stat.ucla.edu/background/SmartGrowth/Sprawl/36\\_beyond\\_sprawl.pdf](http://gif.stat.ucla.edu/background/SmartGrowth/Sprawl/36_beyond_sprawl.pdf) (correlating California’s population doubling to 32 million since the mid-1960s—effectively adding “another Oakland or Fresno every year”—with massive encroachment on natural ecosystems, including the destruction of 95 percent of the state’s wetlands, and a projected water deficit of 2 to 8 million acre-feet by 2020). See also DAVID CARLE, *INTRODUCTION TO WATER IN CALIFORNIA* 135 (2004) (holding water development and “changes in the waterscape” responsible for California’s “distinction as one of the globe’s extinction epicenters of the twentieth century”); DAVID CARLE, *WATER AND THE CALIFORNIA DREAM: CHOICES FOR THE NEW MILLENNIUM* 144, 147 (2000) (documenting California’s loss of 99 percent of native grasslands, 89 percent of riparian woodlands, 95 percent of wetlands, 280 listed endangered or threatened plant and animal species, the disappearance of 57 million out of 60 million former migratory birds, and 94 percent of the 1950s coho salmon run or 99.4 percent of the estimated 1850s run); Jane Kay, *Chinook Salmon Run Shrinks—Fishing Industry Alarmed*, S.F. CHRONICLE, Jan. 30, 2008 (Central Valley fall Chinook salmon run—the “workhorse” for the California and Oregon fishing industry—“apparently has collapsed”). See generally MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* (1993); NORRIS HUNDLEY, JR., *THE GREAT THIRST: CALIFORNIANS AND WATER: A HISTORY* (2001) (providing essential background on California and the West’s allocation and misallocation of water resources).

support for anti-development measures,<sup>425</sup> the courts there remained sensitive to enforcing environmental restraints.<sup>426</sup> In Washington, confronting the same situation on a smaller scale, it is notable that state supreme court decisions there that have tended toward retrenchment generated adamant dissents,<sup>427</sup> and that much of the litigation has been between state government waiving potential public trust responsibilities and local governments seeking to enforce them on their own.<sup>428</sup>

As one front in the effort toward a “new ethical framework” for environmental decision-making, then, an expanded public trust in wild-life has recently suffered as many defeats as it has enjoyed victories. Nearly four decades ago, Joseph Sax introduced the idea that environmental advocates could use the public trust doctrine in cases where the “whole of the public interest has not been adequately considered” by legislatures and agencies, and court intervention would produce the “openness and visibility” to protect the public against special interest “overreaching” and provide the best “climate for democratic policy making.”<sup>429</sup> After a decade or so of encouraging advance, through the enactment of trust-like statutes and judicial solicitude for ecological values, Sax’s vision has been increasingly stymied by excessive deference to agency capitulation to resource pressures, private property rights activism, and in some cases, outright judicial hostility, contortions, and distortions. It simply cannot be right, for example, that a Michigan law intended by Sax to provide every resident a legally enforceable right to environmental quality, and endorsed by that the state’s courts as such, suddenly constitutes an impermissible judicial power-grab.<sup>430</sup> Similarly, it cannot be right that courts recognizing a public “ownership interest” in environmental quality should continue to define its scope by an archaic “navigability” principle rather than by “the public’s needs in those natural resources necessary for social stability,”<sup>431</sup> or deny local governments

425. See, e.g., Shawn Doherty, *Anti-Growth Forces Heed Battle Cry Development*, L.A.TIMES, May 23, 1991, at J1 (describing “droves” of activists warning of “impending development doom”). Kevin Roderick, *The Times Poll: Rationing, Slow Growth Favored to Offset Drought*, L.A.TIMES, Jan. 31, 1991, at A1.

426. See, e.g., *Fed’n of Hillside and Canyon Ass’n v. L.A.*, 100 Cal. Rptr. 2d 301 (Cal. Ct. App. 2000) (striking down part of City’s General Plan Framework for insufficient factual support for its growth mitigation measures).

427. See, e.g., *Rettkowski v. Dep’t of Ecology*, 858 P.2d 232, 244 (Wash. 1993) (Guy, J., dissenting).

428. *Biggers v. City of Bainbridge Island*, 169 P.3d 14 (Wash. 2007).

429. Sax, *supra* note 4, at 495–96.

430. See *Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc.*, 737 N.W.2d 447 (Mich. 2007).

431. *Rettkowski*, 858 P.2d at 239 & n.5.

the authority to protect local resources.<sup>432</sup> One circumstance potentially presaging a reversal of this recent trend toward retrenchment is the growing sense of urgency attending the accelerating loss of biodiversity<sup>433</sup> and the growing recognition that complacency and intransigence in the face of humanity's virtual destruction of our environment are no longer acceptable responses.<sup>434</sup> Perhaps, in Sax's "New Age of Environmental Restoration," a revitalized concern with undoing our calamitous impacts on wildlife, wildlife habitat, and biodiversity will be enough to reverse the trend traced here.

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432. *Biggers*, 169 P.3d at 14.

433. The recognition of climate change as the "defining challenge of our age" has brought the issue of attendant biodiversity loss front and center. *E.g.*, Jeffrey Kluger, *Global Warming Heats Up*, *TIME*, Apr. 3, 2006 (the famous "stranded polar bear" cover story, noting "crashing" habitats across North America and upwards of 85 percent of poll respondents favoring government action). *See generally* THOMAS E. LOVEJOY & LEE HANNAH, *CLIMATE CHANGE AND BIODIVERSITY* (2004).

434. *See, e.g.*, BILL MCKIBBEN, *THE END OF NATURE* 171–78 (1990). (For the heretofore "spectacularly foreign" idea that "the rest of creation might count for as much as we do . . . has very slowly begun to spread in recent years, both in America and abroad, as the effects of man's domination have become clearer"); REISNER, *supra* note 424, at 512–14 (describing an "epochal shift in values" that has worked as the engine of change—with law, such as the public trust doctrine, serving as the "ignition"—toward something that is now "beginning to seem plausible": "undoing the wrongs caused by earlier generations" and committing to put an essential resource such as water back where "it really belongs").



