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NEW MEXICO'S PUBLIC TRUST DOCTRINE IS INEFFECTIVE: HOWEVER, THERE IS HOPE AND THIS EXCITES YOU.

Cody Barnes*

ABSTRACT

Every state has a public trust doctrine that protects commonly owned natural resources. Under the doctrine, the state has a fiduciary duty to maintain the resources and ensure the public can use them. Generally, if the state breaches its fiduciary duty, the public can sue. Yet, New Mexico has trust issues. In Sanders-Reed v. Martinez, the New Mexico Court of Appeals expanded the resources within New Mexico's public trust but made it inept in the same breath. The court extended the trust to encompass air, water, and all other natural resources. However, it then severely limited the state's protection of those resources by removing the public's cause of action under the doctrine in many instances. Without a cause of action, there is neither a mechanism to enforce the state's public trust duties nor is there anything to incentivize the state to protect the entrusted resources. In short, without enforcement, the resources can easily be misused and abused. New Mexico's public trust now protects the entrusted resources in name only. This Comment outlines how the state's doctrine operates regarding one entrusted resource: water. It illustrates that there are very limited instances in which the public can sue the state for breaching a public trust duty and proposes two possible solutions. First, the legislature could address the issue directly; it could pass a law which gives the public a legal right to sue the state for breaching any public trust duty. Alternatively, the state could pass the so-called "Green Amendment," a proposed constitutional amendment that creates a fundamental right to "pure water" and "clean air," which would give the public a legal right under the New Mexico Civil Rights Act to sue the state.

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INTRODUCTION

The public trust doctrine is a common law doctrine that, in its most basic form, outlines the private and public rights and obligations for specific natural resources. The doctrine is the principle “that certain natural and cultural resources are preserved for public use,” and that the government owns and must protect and maintain these resources for the public’s use.¹ As common law, the public trust varies per state in what resources it protects and how it protects them.² Even with its variety, the doctrine in the United States has the same ancient Roman law and English common law roots.³ Still, the public trust was largely dormant in American legal culture until Professor Joseph Sax’s 1970 article⁴ popularized it as a focus of legal scholarship and litigation.⁵

Since Professor Sax’s article, environmental activists have used the doctrine as a legal tool to promote environmental conservation and resource preservation.⁶ Broadly speaking, such activists turn to the doctrine for two reasons: (1) the public trust protects commonly owned natural resources, such as water;⁷ and (2) it generally provides the state’s citizens the legal right necessary for standing.⁸

1. *Public Trust Doctrine*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/public_trust_doctrine [https://perma.cc/YV77-AT8U].

2. See Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 *ECOLOGY L. Q.* 53 (2010) (discussing the trends of the western United States’ public trust doctrines) [hereinafter *Western States’ Public Trust Doctrines*]; Robin Kunis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 *PENN. ST. ENV’T L. REV.* 1 (2007) (discussing the trends of the eastern United States’ public trust doctrines) [hereinafter *Eastern States’ Public Trust Doctrines*].

3. Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 *IOWA L. REV.* 631, 633–36 (1985). For more on this history, see Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *MICH. L. REV.* 471, 475–78 (1970); J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What was it, and Does it Support an Atmospheric Trust?*, 47 *ECOLOGY L. Q.* 117 (2020).

4. Sax, *supra* note 3.

5. Craig, *Western States’ Public Trust Doctrines*, *supra* note 2, at 55 (“In 1970, Professor Joseph Sax published his seminal article arguing for revitalization of the public trust doctrine, and, ever since, academics, politicians, voters, and judges have been exploring the potential value of the public trust doctrine for protecting public values in water, including recreational and ecological values.”).

6. See Lazarus, *supra* note 3, at 641–56 (discussing the uses of the public trust since Joseph Sax’s 1970 article, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*); Erin Ryan, Comment, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 *ENV’T L.* 477, 479 (2001) (outlining various cases and environmentalists who brought public trust claims).

7. See e.g., Barton H. Thompson Jr., *The Public Trust Doctrine: A Conservative Reconstruction and Defense*, 15 *SE. ENV’T L. J.* 47, 51 (2006) (discussing the public trust applying to “state governments own tidelands and the lands underlying tidal and navigable waterways”); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 *U. CHI. L. REV.* 711, 714 (1986) (stating the public trust provides the public rights of access “most notably [to] roadways and lands under navigable waters”). However, some states, such as California, Hawai’i, and New Mexico protect more resources. See *infra* Part I C, for the specifics of New Mexico’s public trust. See Craig, *Western States’ Public Trust Doctrines*, *supra* note 2, at 80–88 for details on California’s and Hawai’i’s public trust.

8. Lazarus, *supra* note 3, at 658 (“Promoting the public trust doctrine was in part based on its potential for providing citizens with the ‘legal interest’ or ‘legal right’ necessary to confer standing to

Pragmatically speaking, environmentalists turn to the doctrine because it forces the state to manage commonly owned natural resources, which are susceptible to overuse. All public trust resources are commonly owned resources—often termed public property⁹—such as rivers, oceans, lakes, and coastline. Public property is impacted by the tragedy of the commons. According to this theory, individuals with access to a shared good, like public property, tend to deplete it.¹⁰ They will act in their own interests and take all they can without preserving the property.¹¹ To combat this issue, “some management structure is required to make individual users take account of other users’ interests.”¹² The government is typically the source of such management.¹³ The public trust doctrine, in turn, is often its vehicle since the doctrine places vulnerable public property under the government’s protection.¹⁴

In addition to this management structure, the doctrine also (traditionally) includes an inbuilt enforcement mechanism. To ensure the government makes good on its duty to protect these resources, the doctrine provides a cause of action. If the state misuses or abuses a protected resource, that state’s citizens may sue the state

bring a lawsuit.”); see Daniel R. Coquillette, *Mosses From an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 814–16 (1979) (discussing cases in which citizens had sued under the public trust doctrine). A citizen does not satisfy standing requirements simply because the state breached its duties. For example, under the federal standing requirements, if the federal government breaches its trust duties, the breach does not necessarily satisfy redressability. Compare *Juliana v. United States*, 217 F. Supp. 3d 1224, 1259 (D. Or. 2016) (holding “Plaintiffs’ federal public trust claims [that the federal government breached its public trust duties] are cognizable in federal court”), with *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020) (holding plaintiffs’ claim was not redressable since plaintiffs “challenge only affirmative activities by the government, an order simply enjoining those activities will not, according to their own experts’ opinions, suffice to stop catastrophic climate change or even ameliorate their injuries”). Nor would the public trust satisfy all standing requirements in New Mexico state courts since the requirements mirror the federal ones. See *American Civil Liberties Union of New Mexico v. City of Albuquerque*, 2008-NMSC-045, ¶ 10, 144 N.M. 471, 188 P.3d 1222 (“While we recognize that standing in our state courts does not have the constitutional dimensions that are present in federal court, New Mexico’s standing jurisprudence indicates that our state courts have long been guided by the traditional federal standing analysis.”).

9. E.g., Rose, *supra* note 7, at 712–13 (describing commonly owned property, like the land between low and high tides, as “public property”).

10. *Id.* at 712 (“No one wishes to invest in something that may be taken from him tomorrow, and no one knows whom to approach to make exchanges. All resort to snatching up what is available for ‘capture’ today, leaving behind a wasteland.”).

11. *Id.*

12. *Id.* at 719. It is possible however, that, “our historic doctrines about ‘inherently public’ property in part vested property rights in the ‘unorganized public’ rather than in a governmentally-organized public.” *Id.* Still, “property in such an unorganized public would amount to an unlimited commons, which seems not to be property at all, but only a mass of passive ‘things’ awaiting reduction to private property through the rule of capture or, worse yet, their squandering in the usual ‘tragedy of the commons.’” *Id.* That is, public property without governmentally organized protection can fall to the tragedy of the commons.

13. *Id.* (“[A] governmental body might be the most useful manager where many persons desire access to or control over a given property, but they are too numerous and their individual stakes too small to express their preferences in market transactions; governmental ownership could broker those preferences.”).

14. *Id.* at 721 (“Moreover, the ‘trust’ language of public property doctrine [including the public trust doctrine], in an echo of natural law thinking, suggested that governments had some enforceable duties to preserve the property of the ‘unorganized’ public.”).

for a breach of its fiduciary duty. Suing the state for breach ensures the protected resources do not fall victim to overuse and abuse. Without this cause of action, there is arguably little to incentivize the state to meet its public trust obligations. With no threat of litigation, the state need not fear any repercussions and could use—or allow the public to use—the resources as it wishes. Then, as the tragedy of the commons suggests, the resources would eventually go to waste.

In short, this is the current dilemma of the public trust doctrine in New Mexico. The state's trust, since the New Mexico Court of Appeals' 2015 decision in *Sanders-Reed v. Martinez*,¹⁵ largely does not protect the natural resources within the trust from the tragedy of the commons. The *Sanders-Reed* Court effectively removed most causes of action available to citizens for abuses of New Mexico's natural resources. There, the Court of Appeals explicitly recognized that New Mexico's trust is *more* expansive than the traditional common law doctrine: it covers air, water, and all other natural resources,¹⁶ whereas the traditional common law doctrine only covers specific bodies of water.¹⁷ However, the court also severely limited the circumstances in which there is a cause of action under the trust. In basic terms, the *Sanders-Reed* Court held that principles of the common law trust, such as its cause of action, are superseded when there is an analogous statutory or constitutional scheme.¹⁸ The holding creates a patchwork effect for how the state manages its trust duties and whether the public can enforce them. As this Comment will show, some breaches are governed by regulations and government agencies, while others are governed by the common law.¹⁹ In practice, the *Sanders-Reed* Court gutted the trust's enforcement tool: its cause of action.

The impacts of *Sanders-Reed* are best illustrated by a hypothetical. Say you are a New Mexico resident living near the Rio Grande. On a walk along the river's banks with your dog, your dog drinks some of the river water. Later, sadly, your dog gets sick because the water was polluted. Conveniently for this hypothetical, you are well informed on New Mexico's public trust duties. You know there is a right to recreation around public water and the state must control water pollution. So, you want to sue the state for breaching its duties.

Before the *Sanders-Reed* decision this would be simple. You would have had a cognizable legal right to sue for both breaches in a single action in a state court as a New Mexico citizen. This means that you could directly enforce each violated public trust duty in a single action, which could influence the state's current and future decisions. That is, presumably, the state would want to avoid future litigation by taking appropriate measures to comply with its public trust duties. Thus, the cause of action pushes the state to prevent the degradation of the resource and keep the

15. 2015-NMCA-063, 350 P.3d 1221.

16. *Id.* ¶ 15, 350 P.3d at 1225 (“We agree that Article XX, Section 21 of our state constitution recognizes that a public trust duty exists for the protection of New Mexico’s natural resources, including the atmosphere, for the benefit of the people of this state.”)

17. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENV'T L. 425, 426 (1989) (“[T]he traditional public trust doctrine deals with our coastlines, harbors, and major rivers and lakes.”).

18. *Sanders-Reed*, 2015-NMCA-063, ¶ 16, 350 P.3d at 1225–26.

19. For a detailed discussion, see *infra* Part III.

waters open for recreation. The doctrine, then, actively prevents the resource from the social ills associated with the tragedy of the commons.

After *Sanders-Reed*, however, enforcement of all the public trust duties is siphoned to different agencies and branches of government making most if not all enforcement untenable. In our hypothetical, the dog walker (you) would have little luck enforcing the state's duties. Post-*Sanders-Reed*, you must first research whether the public trust duty to control water pollution and the right to recreate is regulated by statute or other law. Only after will you see where and whether you could bring your claims.

On one hand, you would not be able to enforce the state's duty to control water pollution. This duty has been delegated to the New Mexico Environment Department ("NMED"), which in turn has created a whole regulatory scheme to manage the duty.²⁰ Then, per *Sanders-Reed*, since this duty has been delegated to NMED, its breach is also controlled by the agency. That is, the only way to ensure the state complies with its duty to control water pollution is to follow NMED's enforcement procedures. To do so, you would notify the agency of the polluted section of the river. Then, NMED would have to test the site. If it could determine it was polluted and who polluted the water, the agency itself *could* cite that party. Then, after the citation, there *may* be a hearing in front of the Water Quality Control Commission ("WQCC"). You (the dog-walker) would not be a party in the case. You could participate, however, as a member of the public. You could make a comment that the state breached its fiduciary duty. However, the duty itself plays no legal role in the hearing. The offending party, since it is not the state, does not have a public trust duty. That is, in a technical sense, the state is not the one in violation. As such, the public trust is not influencing the state's actions. Therefore, unlike pre-*Sanders-Reed*, the public trust—on its own—is not directly incentivizing the state to do anything regarding this duty.

On the other hand, you could directly enforce your right to recreate. This right is enforced through the traditional common law public trust; thus, there is a cause of action.²¹ Under the New Mexico Constitution, all unappropriated water is public property.²² The New Mexico Supreme Court in *State ex rel. State Game Commission v. Red River Valley Co.* read into the public's ownership of water a right to recreate.²³ The court recently expanded this right to include acts that are reasonably necessary to enjoy the right, such as wading in the water and touching its banks and beds.²⁴ While the public's ownership of water is constitutionally granted, there is no law that supersedes the traditional public trust cause of action. In other words, for violations of the right to recreate you could bring suit in front of the judiciary.

As the dog-walking hypothetical illustrates, *Sanders-Reed* made an overly complex bar to understanding the public's rights under the public trust. Further, it made an inefficient system to protect the entrusted resources: there is no single

20. See *infra* Part III A.

21. See *infra* Part III B 2.

22. N.M. CONST. art. XVI, § 2.

23. 1945-NMSC-034, ¶ 13, 51 N.M. 207, 182 P.2d 421.

24. *Adobe Whitewater Club of New Mexico v. New Mexico State Game Commission*, 2022-NMSC-020, ¶ 42, 519 P.3d 46.

mechanism that protects a commonly owned resource like water in New Mexico. Rather, the state relies on a patchwork of agencies, regulations, rules, and common law—much of which does not directly incentivize the state to be proactive. This is an issue. Without the public trust doctrine (or with only an impotent version), the state largely fails to prevent the trust resources from overuse.

This Comment analyzes the impacts of *Reed-Sanders* on New Mexico's public trust doctrine and how the holding and reasoning have disincentivized state action to protect natural resources. This Comment focuses on a single resource: water. In essence, following *Sanders-Reed* there are two narrow instances in which the public may sue the state for breaching its public trust fiduciary duties relating to the resource. First, the public may sue the state if it does not ensure navigable-for-title waters are open for navigation, commerce, and fishing. Second, the public may sue the state if it infringes on the public's right to recreate on public waters. However, neither of these causes of action help *preserve* the entrusted resource. Put another way, without causes of action to ensure the state controls pollution and despoilment, the state is not accountable for letting resources go to waste. Without such accountability, the state could allow the entrusted bodies of water to fall to the tragedy of the commons. The Comment concludes that if water is any indication, the trust likely does not prevent the other protected resources from the same fate.

This Comment focuses on water for two reasons. First, the public trust doctrine traditionally just covers water.²⁵ Second, the New Mexico state constitutional provision that creates the state's public trust—Article XX, Section 21—explicitly names just two resources: air and water. The New Mexico Court of Appeals, in *Sanders-Reed*, held that there are no causes of action for air.²⁶ And as of the time of writing, no court or secondary source has discussed the boundaries of New Mexico's public trust for water.

This Comment will proceed in five parts. Part I will outline the common law principles that generally inform every public trust in the United States. Part I also will offer a critical discussion of how New Mexico's trust operates and how certain common law principles function in the context of New Mexico's unique approach. Part II will provide an analytical framework to determine *when* these common law principles will apply to New Mexico public trust analysis. Part III, then, will apply the framework to water to show that few common law causes of action are applicable given New Mexico's public trust approach post-*Sanders-Reed*. Ultimately, this discussion shows that the public's cause of action—such as it is—is largely eliminated for duties relating to water. As a result, Part IV will conclude that New Mexico's trust has lost its teeth since the state's citizens cannot enforce the state's duties in many instances. Finally, Part V suggests that the Legislature should take action that would allow the public to bring claims in front of the judiciary that the state breached a public trust duty.

25. Wilkinson, *supra* note 17, at 426–27.

26. *Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 19, 350 P.3d 1221.

I. THE PUBLIC TRUST DOCTRINE

The public trust doctrine is a common law doctrine.²⁷ Each state has its own specific public trust with broad discretion to establish its mechanics and name the resources it protects.²⁸ However, in some way or another, every state has the same common law principles at play, which were established by the United States Supreme Court in *Illinois Central Railroad Co. v. Illinois*.²⁹ For example, New Mexico's public trust is codified in its constitution,³⁰ yet it still uses these common law principles in certain instances.³¹

A. *Illinois Central Railroad Co. v. Illinois*

Before discussing the general common law principles at work in the public trust doctrine, it is necessary to briefly discuss *Illinois Central*—the foundational Supreme Court case on the subject. Chicago, in the early 1850s, gave the Illinois Central Railroad Company (“Illinois Central” or “the Company”) a substantial portion of land along Lake Michigan³² and within the city.³³ These grants were for the Company to construct rail lines throughout the harbor area and to connect those to existing lines that went to other parts of the country.³⁴ Included in the grant was the “right of way upon . . . land not exceeding 200 feet in width throughout its entire length.”³⁵

In 1869, the Illinois legislature granted, in fee simple absolute, all the land along Chicago's Harbor to which the Company previously had a right of way.³⁶ Within this legislative grant, the legislature conveyed over a mile of Lake Michigan's lakebed and banks to the Company.³⁷ The legislature gave “the railroad company

27. Craig, *Western States' Public Trust Doctrines*, *supra* note 2, at 58. In a very limited sense, this is true of New Mexico's trust. See *infra* Part I C. This Comment attempts to clarify, in Part III, when and how the common law principles discussed in this Part work under New Mexico's trust for water.

28. Wilkinson, *supra* note 17, at 453–55 (stating states are given “broad discretion in administering the trust.”); see Craig, *Western States' Public Trust Doctrines*, *supra* note 2, at 56–57 (discussing the general differences between eastern states' public trust doctrine and western states' public trust doctrines).

29. 146 U.S. 387 (1892).

30. N.M. CONST. art. XX, § 21. Other states, such as Pennsylvania, have codified their public trust in their constitution. PA. CONST. art. 1, § 21; Craig, *Eastern Public Trust Doctrines*, *supra* note 2, at 20–21 (outlining the Pennsylvania public trust doctrine as codified in its constitution).

31. For more on the common law principles at play in New Mexico's public trust, see *infra* Part III.

32. Chicago borders Lake Michigan to the east.

33. *Illinois Central Railroad Co.*, 146 U.S. at 440–43 (discussing the procedural history of the city ordinance which granted tracts of land to the Railroad).

34. *Id.* at 439 (requiring, originally, that the Illinois Central Railroad Company build “a railroad from the southern terminus of the Illinois & Michigan Canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch to Chicago, and another, via the town of Galena, to a point opposite Dubuque, in the state of Iowa”).

35. *Id.* at 440.

36. *Id.* at 448.

37. *Id.* (granting, in fee simple absolute, to Illinois Central Railroad Company “all the right and title of the state of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for a distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south

nearly the whole of the submerged lands of the harbor, subject only to the limitations that it should not authorize obstructions to the harbor, or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged.”³⁸ The grant gave Illinois Central the power “to construct as many docks, piers, and wharves and other works as it might choose, and at such positions in the harbor as might suit its purposes, and permit any kind of business to be conducted thereon, and to lease them out on its own terms for indefinite periods.”³⁹

Illinois, a few years after its grant to Illinois Central, changed its mind and sued the Company.⁴⁰ It sought the court to declare that Illinois has the “exclusive right to develop and improve the harbor of Chicago by the construction of docks, wharves, [and] piers.”⁴¹ The Company, on the other hand, considered it had “an absolute title to such submerged lands by the act of 1869.” On appeal, the United States Supreme Court held the submerged land at issue was “held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.”⁴² Said another way, despite the apparent contractual legitimacy between the Company and the state, the legislature’s grant in 1869 violated the public trust doctrine.

B. The Illinois Central Minimum

Illinois Central establishes many of the common law principles that are generally applicable to every public trust.⁴³ For ease of reference, this Comment collectively terms these principles the “*Illinois Central* Minimum.”⁴⁴

Generally, the *Illinois Central* Minimum refers to six foundational public trust doctrine concepts. First, the state is the trustee.⁴⁵ Second, the state’s public trust

line of lot twenty-one, south of and near to the roundhouse and machine shops of said company, in the south division of the said city of Chicago”).

38. *Id.* at 451.

39. *Id.*

40. *Id.* at 439.

41. *Id.*

42. *Id.* at 452.

43. Professor Robin Kundis Craig articulates this point clearly: “In the western states, the Illinois Central Railroad Court’s [sic] pronouncements regarding the public trust doctrine have generally been interpreted as defining the doctrine’s minimal applicability in terms of waters covered, uses protected, and restraints on state authority to eliminate the public trust.” *Western States’ Public Trust Doctrines*, *supra* note 2, at 71. New Mexico is by no means exempt from Craig’s observation: the basic principles of *Illinois Central* form the foundation of the state’s public trust approach. See *Adobe Whitewater Club of New Mexico v. New Mexico State Game Commission*, 2022-NMSC-020, ¶ 18, 519 P.3d 46 (“[T]he public trust doctrine is a matter of state law subject only to governmental regulation by the United States under the Commerce Clause and admiralty power.”). For more discussion on this see *infra* Part III.

44. This term is used since many of these principles come from *Illinois Central*. Yet, some of these common law principles, such as the state’s fiduciary duty, were elaborated on and expanded in other cases.

45. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1254 (D. Or. 2016).

will protect water,⁴⁶ specifically navigable-for-title watercourses.⁴⁷ Third, as a trustee, the state has a fiduciary duty to ensure the resources under the trust are used and protected in certain ways.⁴⁸ At a minimum, every trust must ensure that the public can use navigable-for-title watercourses for navigation, commerce, and fishing,⁴⁹ as established in *Illinois Central Railroad Co.*⁵⁰ Fourth, a state may not relinquish control of the entrusted resources.⁵¹ In limited circumstances, however, the state can extend its trust duties to a private party.⁵² To do so, the state must convey ownership of a trust resource to be used in a manner consistent with the public trust.⁵³ Fifth, the public is the beneficiary of the trust.⁵⁴ Sixth, if the state breaches its fiduciary duty, any beneficiary may sue the state.⁵⁵

The first and second *Illinois Central* Minimum concepts are that the state is the trustee of the public trust which protects navigable-for-title watercourses. The purpose of these two principles is to protect the federal government's ability to control and regulate interstate commerce⁵⁶ along navigable-for-title watercourses.⁵⁷ The federal government does so by limiting how the state may use navigable-for-title waters. The Court, in *Illinois Central*, determined Lake Michigan was a navigable-for-title watercourse.⁵⁸ The federal government granted parts of Lake Michigan, including its lakebed, to Illinois when the state entered the Union in

46. Wilkinson, *supra* note 17, at 426–27.

47. In this Comment, “navigable-for-title” is meant to refer to the test a federal court uses to determine whether a body of water is navigable at the time of statehood to clarify a link in the chain of title for the body of water's submerged land. The classic test is if the water is “used, or [is] susceptible of being used, in [its] ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water” at the time of statehood. The *Daniel Ball*, 10 Wall. 557, 563, 19 L. Ed. 999 (1871); *PPL Montana, LLC v. Montana*, 565 U.S. 576, 592 (2012).

48. John C. Dernbach, *The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources*, 54 U. MICH. L. J. REFORM 77, 93 (2020) (“Courts have used general trust law to determine the duty or standard of care that a trustee must employ for these resources. These duties include the duty to monitor trust property, the duty to manage trust property with prudence, and the duty of undivided loyalty to beneficiaries. Courts have also used trust principles to decide that revenues from the use or sale of natural resources can be expended only in ways that are consistent with the terms of the trust.”); Craig, *Western States' Public Trust Doctrines*, *supra* note 2 (discussing the various protected uses in each western state's trust); Wilkinson, *supra* note 17, at 426 & n.6 (“A wide range of trust purposes have been recognized, from the traditional navigation, commerce, and fishing uses established in *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892), to the more expansive purposes recognized in the modern cases.”).

49. See Craig, *Western States' Public Trust Doctrines*, *supra* note 2.

50. *Illinois Central Railroad Co.*, 146 U.S. 387 (1892).

51. *Id.* at 453–54.

52. *Id.*

53. *Id.*

54. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1254 (D. Or. 2016).

55. *Id.* at 1259 (“Plaintiffs’ federal public trust claims are cognizable in federal court.”); Dernbach, *supra* note 48, at 88 (“Just as traditional trustees are judicially accountable for their management of the trust corpus, courts say, so also are government trustees for their management of the public trust corpus.”); Lazarus, *supra* note 3, at 658 (“The public trust doctrine, by providing a formal legal right to environmental quality, addressed the standing concern.”).

56. U.S. CONST. art. I, § 8, cl. 2.

57. Ryan, *supra* note 6, at 479 (“[T]he traditional doctrine evolved to protect common rights to access for commerce purposes (hence the criteria of navigability).”).

58. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 435.

1818.⁵⁹ The federal government did not convey the lake and its lakebed in fee simple to the state.⁶⁰ Rather, it conveyed the title with an implicit condition that the submerged land and waters be “held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.”⁶¹

Third, the state has a fiduciary duty⁶² to ensure the trust’s beneficiaries may enjoy the benefits of the public trust.⁶³ This principle requires that navigable-for-title watercourses are open for navigation, commerce, and fishing. It is a benefit of the public trust to keep such waters open for those uses. In other words, under the *Illinois Central* Minimum, the state has a fiduciary duty to ensure navigable-for-title watercourses remain open for navigation, commerce, and fishing.

For this third principle, the state’s hand was forced, in a way. The state’s right to alienate public trust property is restricted. The state is limited to conveyances for uses that promote the public interest.⁶⁴ This effectively ensures such property is ultimately protected by the trust. For example, in *Illinois Central*, the Illinois legislature conveyed the banks and submerged lands of the Chicago harbor to Illinois Central Railroad Company.⁶⁵ Illinois’s legislature limited the conveyance.⁶⁶ It stated that Illinois Central “should not authorize obstructions to the harbor, or impair the public right of navigation.”⁶⁷ However, it did not restrict the use or development of

59. *Id.* at 435–37. Illinois received “all that portion of Lake Michigan lying east of the mainland of the state and the middle of the lake, south of latitude 42 degrees and 30 minutes.” *Id.* at 435. Illinois received title to those portions of the lake and its lakebed due to the Equal Footing Doctrine. *Id.* For more on this Doctrine see *infra* Part III B.

60. *Id.* at 452.

61. *Id.*

62. Generally, a fiduciary duty for trusts refers to the obligation one has to act in the best interest of another. In trust law, there are six separate fiduciary duties: (1) the duty to administer the trust as a prudent person would; (2) the duty of obedience (or, the duty to administer the trust in accordance with its terms and applicable law); (3) the duty of care; (4) the duty of loyalty; (5) the duty to inform (or, duty to provide notice and account); and (6) the duty of impartiality. See Susan Gary, George Gleason Bogert, George Taylor Bogert & Amy Morris Hess, *Bogert’s The Law of Trusts and Trustee* § 541 (2021); RESTATEMENT (THIRD) OF TRUSTS §§ 76–84 (AM. L. INST. 2021). This Note will refer to all of these duties generally as a “fiduciary duty.”

63. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1254 (D. Or. 2016). The court noted the trust: operates according to basic trust principles, which impose upon the trustee a fiduciary duty to “protect the trust property against damage or destruction.” The trustee owes this duty equally to both current and future beneficiaries of the trust. In natural resources cases, the trust property consists of a set of resources important enough to the people to warrant public trust protection. The government, as trustee, has a fiduciary duty to protect the trust assets from damage so that current and future trust beneficiaries will be able to enjoy the benefits of the trust.

Id. (citations omitted).

64. Sax, *supra* note 3, at 488–89 (“[N]o grant [by a state of land under the public trust] may be made to a private party if that grant is of such amplitude that the state will effectively have given up its authority to govern, but a grant is not illegal solely because it diminishes in some degree the quantum of traditional public uses.”); Craig, *Western States’ Public Trust Doctrines*, *supra* note 2, at 69–70 (“[T]he doctrine acts as a restraint on the state’s ability to alienate the beds and banks of navigable waters or to abdicate regulatory control over those waters.”).

65. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 438 (1892).

66. *Id.* at 448–49.

67. *Id.* at 451.

the submerged land under the harbor.⁶⁸ The railroad could “construct as many docks, piers, and wharves and other works as it might choose, and at such positions in the harbor as might suit its purposes, and permit any kind of business to be conducted thereon.”⁶⁹ The Court held the state could convey submerged lands—lands under the public trust—to a private company.⁷⁰ However, it limited the state’s right to alienate the land to transfers which “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.”⁷¹ The Court noted if the state conveyed title to the submerged land for “the erection of wharves, docks, and piers” alone, the conveyance would be valid.⁷² These uses would be ones that promote the public interest in the Chicago harbor.⁷³ However, the Company was not limited to building wharves, docks, and piers. For example, it could develop “other works as it might choose” and it could “permit any kind of business to be conducted thereon.” Therefore, Illinois did not convey the land exclusively to promote a public interest and the conveyance was invalid.⁷⁴

Fourth, the public trust prohibits the state from fully relinquishing control of the entrusted resource. In *Illinois Central* the court stated:

In the administration of government the use of [its police] powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. *So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the state.*⁷⁵

Even though the state can convey trust assets in certain instances, the state ultimately controls the resources in the trust.⁷⁶ Said another way, if the state validly conveys public trust assets, the state’s grant is not absolute: it holds the right to retake control of what it conveyed.⁷⁷

Fifth, every state owes its fiduciary duties to the trust’s beneficiaries, the current and future people in the state. The *Illinois Central* court noted the “trust [was] for the people of the state.”⁷⁸ Recently, in the much-publicized case *Juliana v. United States*, the United States District Court for the District of Oregon took this notion a step further. The *Juliana* court noted: “The government, as trustee, has a fiduciary

68. *Id.*

69. *Id.*

70. *Id.* at 453.

71. *Id.*

72. *Id.* at 452.

73. *Id.*

74. *See id.* at 454–55.

75. *Id.* at 453–54 (emphasis added).

76. Joseph Sax provides a more extensive analysis on the limits of a state’s ability to alienate and release control of resources under its trust. Sax, *supra* note 3, at 485–89.

77. *Illinois Central Railroad Co.*, 146 U.S. at 453–54.

78. *Id.* at 452.

duty to protect the trust assets from damage so that current *and future* trust beneficiaries will be able to enjoy the benefits of the trust.”⁷⁹ Applying this concept to the *Illinois Central* Minimum, the state owes its duty to current and future people of its state and must take actions that ensure navigable-for-title waters remain open for navigation, commerce, and fishing.

Finally, sixth, the public trust provides a common law cause of action. The beneficiaries can sue if the state breaches a fiduciary duty.⁸⁰ Generally, under standard trust law,⁸¹ a trustee breaches its fiduciary duty if it “fail[s] to conform to the prudent person standard of care and skill.”⁸² Any beneficiary, upon breach, can bring a claim to the judiciary that the state breached its fiduciary duty.⁸³ The court will determine if the trustee was negligent in its duties.⁸⁴ If it was, the trustee could be liable for damages to the beneficiary.⁸⁵

Courts often allow a public trust’s beneficiaries to bring this cause of action.⁸⁶ Many scholars have outlined and discussed cases brought under the public trust.⁸⁷ Notably, *Juliana v. United States* is a recent example of a court allowing any beneficiary to sue the government for breach of its public trust duties. There, a group of young activists sued the federal government for breaching its public trust fiduciary

79. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1254 (D. Or. 2016) (emphasis added).

80. Effectively, every state must have a cause of action for breaches of the fiduciary duty to ensure navigable-for-title watercourses remain open for navigation, commerce, and fishing. However, if a state expands its trust to additional resources, that state is not obligated to keep the cause of action for those additional assets. *Infra* Part III will discuss the applicability of this cause of action for water under New Mexico’s public trust.

81. There is a distinction between private trusts, which are encompassed by trust law, and public trusts, which are not covered by trust law:

Traditional trust law, or simply trust law, is the large body of common law and statutory trust law that is ordinarily labeled as such in texts, treatises, and restatements on the subject. It includes principles that apply to all trusts, such as the overall structure of trusts, principles requiring the trustee to adhere to the terms of the trust, and principles defining the responsibility of trustees toward beneficiaries. *Public trusts for natural resources are not ordinarily described as part of trust law. Trust law, thus understood, could be described as private trust law, because it is not public trust law.* That is how judges and lawyers writing on public trusts for natural resources have often appeared to understand what private trust law means.

Dernbach, *supra* note 48, at 80–81 (emphasis added).

Although a public trust is “not ordinarily described as part of trust law,” courts often turn to general trust principles for guidance. *Id.* at 80. This is likely the case because public trust law is largely underdeveloped while private trust law is not. *Id.* at 82–83. Therefore, private trust law helps when “addressing issues that may be new in the public trust.” *Id.* at 83.

82. Gary, *supra* note 62, § 541.

83. Lazarus, *supra* note 3, at 658 (“Promoting the public trust doctrine was in part based on its potential for providing citizens with the ‘legal interest’ or ‘legal right’ necessary to confer standing to bring a lawsuit”); see Coquillette, *supra* note 8, at 814–16 (discussing cases in which citizens had sued under the public trust doctrine).

84. Gary, *supra* note 62, § 541.

85. *Id.*

86. See Coquillette, *supra* note 8, at 814–16.

87. *E.g.*, Sax, *supra* note 3, at 491–553 (outlining cases in many states across the United States brought under the public trust); Lazarus, *supra* note 3, at 641–56 (discussing the uses of the public trust since Joseph Sax’s 1970 article, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*); Ryan, *supra* note 6, at 479 (outlining various cases and environmentalists who brought public trust claims).

duty by “failing to protect the . . . water, seas, [and] seashores” among other resources.⁸⁸ Plaintiffs alleged many of their injuries related to “the effects of ocean acidification and rising ocean temperatures.”⁸⁹ They sued the federal government since the resource—the ocean—was under federal jurisdiction.⁹⁰ The court held there is a cognizable claim in federal court against the federal government for violations of the public trust for resources protected by the federal government.⁹¹ However, on appeal, their case failed for a lack of redressability.⁹² Although *Juliana* was a case in federal court against the federal government, it illustrates that the beneficiaries may bring a breach of fiduciary duty claim against the trustee. The same principles apply in state court.

In sum, the *Illinois Central* Minimum has six general contours. First, the state is the trustee. Second, the public trust protects navigable-for-title waters. Third, the state, as trustee, has a fiduciary duty to ensure such waters remain open for navigation, commerce, and fishing. The doctrine forces the state’s hands for this duty since it restricts a state’s ability to alienate the submerged land under the trust. Fourth, the state may relinquish or retake control of an entrusted asset. Fifth, the present and future citizens of the state are the beneficiaries of the trust. Sixth, a beneficiary has a cause of action if the state fails to perform its fiduciary duty.

For the purposes of this Comment, there is one final wrinkle that merits mention. Every state must comply with the *Illinois Central* Minimum in the Minimum’s narrowest application. So, a state must ensure navigable-for-title watercourses remain open for navigation, commerce, and fishing.⁹³ Yet, a state has the discretion to expand its public trust.⁹⁴ Included in this discretion is whether the state would like to apply the *Illinois Central* Minimum principles to other resources.

C. New Mexico’s Public Trust for Water

New Mexico exercised its discretion and expanded its trust. In its expansion, the state broadened its public trust to protect more resources and added additional duties for the state than the *Illinois Central* Minimum requires. However, in its expansion, the state did not explain how and whether the *Illinois Central* Minimum applies to the public trust’s new boundaries. This subsection attempts to clarify the explicit boundaries of the New Mexico public trust for water. Section II will explain the *Sanders-Reed* analysis which can be used to clarify the remaining gray areas.

88. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1255 (D. Or. 2016).

89. *Id.* at 1256 & n.11 (providing examples of the alleged harm as the loss of fish due to acidic waters which impacts plaintiffs’ diets or water levels rising that limited their recreational opportunities).

90. *Id.* at 1255.

91. *Id.* at 1259 (“Plaintiffs’ federal public trust claims are cognizable in federal court.”).

92. *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020) (holding plaintiffs’ claim was not redressable since plaintiffs “challenge only affirmative activities by the government, an order simply enjoining those activities will not, according to their own experts’ opinions, suffice to stop catastrophic climate change or even ameliorate their injuries”).

93. See *infra* Part III B 1.

94. See Craig, *Western States’ Public Trust Doctrines*, *supra* note 2, at 58 (“[A]s with other forms of common law, states have evolved their public trust doctrines in light of the particular histories and perceived needs and problems of each state.”).

First, New Mexico's public trust protects all natural resources and requires the Legislature to control those resources' pollution and despoilment.⁹⁵ New Mexico's public trust is codified in Article XX, Section 21 of the state constitution, which reads: "the legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people."⁹⁶ In *Sanders-Reed*, the New Mexico Court of Appeals held this constitutional section "recognizes that a public trust duty exists for the protection of New Mexico's natural resources."⁹⁷ The court explicitly stated this section delegated to the legislature the public trust duty to control pollution and despoilment.⁹⁸

In terms of scope, New Mexico's trust covers *more* waters (and other resources) than the *Illinois Central* Minimum. New Mexico's trust protects all publicly owned water, whereas the *Illinois Central* Minimum only applies to navigable-for-title waters. The New Mexico Supreme Court stated, "the public waters of this state are owned by the state as trustee for the people."⁹⁹ In New Mexico, the public fully owns all water in the state that has not been "appropriate[ed] for beneficial use," regardless of the water's navigability.¹⁰⁰ Still, even if water is both appropriated and put to a beneficial use, the public simply loses a proverbial stick in the bundle. As a prior appropriation state,¹⁰¹ when a party appropriates water and puts it to a beneficial use, all the party receives—in terms of a property right—is a usufructuary right. In English, the water appropriator does not own the water they appropriate, they hold a right to use the water.¹⁰² Therefore, the public owns a vast amount of the resource in the state. As such, New Mexico's public trust for water is more expansive than the *Illinois Central* Minimum.

Further, the duties under New Mexico's public trust for water go beyond the *Illinois Central* Minimum. The Minimum protects navigation, commerce, and fishing in navigable-for-title watercourses. As established earlier in this Part,¹⁰³ the state's constitution adds two distinct duties: the duty to control water pollution and the duty to control water despoilment.¹⁰⁴ Further, in 1945, the New Mexico Supreme

95. *Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 15, 350 P.3d 1221.

96. N.M. CONST. art. XX, § 21.

97. *Sanders-Reed*, 2015-NMCA-063, ¶ 15, 350 P.3d at 1225.

98. *Id.* ¶ 16, 350 P.3d at 1225–26 ("Article XX, Section 21 of our constitution recognizes the duty to protect the atmosphere and other natural resources, and it delegates the implementation of that specific duty to the Legislature.")

99. State ex rel. Bliss v. Dority, 1950-NMSC-066, ¶ 11, 55 N.M. 12, 255 P.2d 1007.

100. N.M. CONST. art. XVI, § 2; N.M. STAT. ANN. § 72-1-1.

101. N.M. STAT. ANN. § 72-1-2. Generally speaking, in the US there are two systems of water regulation: riparian rights and prior appropriation. The eastern US applies the former, while the western US applies the latter. For more on each system see REED D. BENSON, BURKE W. GRIGGS & A. DAN TARLOCK, WATER RESOURCE MANAGEMENT chs. 2-3 (8th ed. 2021) (outlining the basic principles of each system).

102. *Snow v. Abalos*, 1914-NMSC-022, ¶ 11, 18 N.M. 681, 140 P. 1044 ("The appropriator does not acquire a right to specific water flowing in the stream, but only the right to take therefrom a given quantity of water, for a specified purpose.")

103. *Supra* Part I C.

104. N.M. CONST. art. XX, § 21 ("The legislature shall provide for control of pollution and control of despoilment of the . . . water.")

Court added a right to recreate in public water,¹⁰⁵ and the same court in 2022 explicitly placed the right within the public trust doctrine.¹⁰⁶ In *State ex rel. State Game Commission v. Red River Valley Co.*, the court decided the public may fish and recreate in the Conchas Reservoir,¹⁰⁷ an artificial lake created by the Conchas dam.¹⁰⁸ Appellees owned the land underneath the Reservoir,¹⁰⁹ while the United States, which owned the land on the banks of the reservoir, granted an easement to New Mexico “for [the] use and occupation of such lands.”¹¹⁰ Appellees claimed that by owning the submerged land, they had the exclusive right to fish and recreate in the Reservoir.¹¹¹ The court disagreed. It held that because the state owned the water, the public had the right to “outside recreation, sports and fishing” in public waters, such as the Conchas Reservoir.¹¹² Recently, the New Mexico Supreme Court included in this right “the privilege to do such acts as are reasonably necessary to effect the enjoyment of” the right.¹¹³ Therefore, included in the ownership of water, the public has the right to recreate in those waters and the state must also control water pollution and despoilment.

Although New Mexico’s trust is clearly more expansive than the *Illinois Central* Minimum—as discussed above—it is not initially clear how the other principles within the Minimum operate within the state. That is, crucially for this Comment, New Mexico’s trust continues to veil when there is a common law cause of action if the state breaches a duty relating to water. At the time of writing, there has only been one appellate decision that explicitly discusses the boundaries of New Mexico’s public trust: the New Mexico Court of Appeals decision in *Sanders-Reed v. Martinez*.¹¹⁴ The *Sanders-Reed* court’s analysis provides an approach one can use to clarify the trust’s remaining boundaries.

II. THE SANDERS-REED ANALYTICAL FRAMEWORK CAN HELP PREDICT IF AN ILLINOIS CENTRAL MINIMUM PRINCIPLE APPLIES TO A RESOURCE PROTECTED BY NEW MEXICO’S TRUST

In *Sanders-Reed*, the New Mexico Court of Appeals held that the common law cause of action as applied to air was superseded by existing law. Ultimately, the court reasoned an *Illinois Central* Minimum principle would survive for a specific resource only if an existing statute, constitutional law, or other rule does not supersede the principle. Before applying the *Sanders-Reed* analysis to water, it is

105. *State ex rel. State Game Commission v. Red River Valley Co.*, 1945-NMSC-034, ¶ 13, 51 N.M. 207, 182 P.2d 421.

106. *Adobe Whitewater Club of New Mexico v. New Mexico State Game Commission*, 2022-NMSC-020, ¶ 19, 519 P.3d 46 (“[T]he scope of public trust to waters in New Mexico includes fishing and recreation.”).

107. 1945-NMSC-034, ¶ 13, 182 P.2d at 426.

108. *Id.* ¶ 5, 182 P.2d at 424.

109. *Id.* ¶ 6, 182 P.2d at 424–25.

110. *Id.* ¶¶ 10–11, 182 P.2d at 425.

111. *Id.* ¶ 13, 182 P.2d at 426.

112. *Id.* ¶¶ 48, 59, 182 P.2d at 432–33, 434.

113. *Adobe Whitewater Club of New Mexico v. New Mexico State Game Commission*, 2022-NMSC-020, ¶ 42, 519 P.3d 46.

114. *Sanders-Reed v. Martinez*, 2015-NMCA-063, 350 P.3d 1221.

necessary to first outline the facts and reasoning of the case. Part III will return to the main analysis of the state's public trust for water.

A. *Sanders-Reed v. Martinez*

In 2011, the Environmental Improvement Board (“EIB”), charged with “protecting New Mexico’s air and other natural resources,” repealed the state’s greenhouse gas regulations.¹¹⁵ The governing regulations require that persons adversely affected by EIB changes either “appeal the EIB’s decision to repeal the regulations,” or propose their own “regulations using the process provided under NMSA 1978, [Section] 74-2-6(A) (1992) of the Air Quality Control Act.”¹¹⁶ Rather than pursuing those options, plaintiffs—WildEarth Guardians, an environmental nonprofit, and two parents on behalf of their daughter—elected to sue the state for breaching its public trust duties to control the pollution and despoilment of the state’s air.¹¹⁷

The New Mexico Court of Appeals held that the state had public trust duties; namely, the duty to control pollution and the duty to control despoilment of a natural resource.¹¹⁸ Yet, the court held in addition (and importantly to the public trust’s operation) that there was not a separate cause of action regarding these duties as applied to air.¹¹⁹ It reasoned that the *Illinois Central* Minimum’s cause of action, as common law, was superseded by the Air Quality Control Act.¹²⁰ It considered that the Act delegated the trust duties to the Environmental Improvement Board¹²¹ and provided ample opportunity for the public to involve itself in the process.¹²² To the court, this was an adequate framework to manage the legislature’s duty to control air pollution and despoilment.¹²³ Then, since the Act allowed the public to involve itself, the statute conflicted with the public trust’s common law cause of action.¹²⁴ With an adequate framework and conflict, the common law was superseded.¹²⁵

B. The *Sanders-Reed* Analytical Framework

Sanders-Reed provides a framework to determine when the public trust common law cause of action is abrogated by legislative action. In basic terms, the framework is: when the legislature (1) delegates its public trust duty to another governmental body in a way (2) that allows the public to participate in the regulatory process and (3) grants judicial review for adversely affected parties, the delegation

115. *Id.* ¶¶ 4–6, 350 P.3d at 1223.

116. *Id.* ¶ 7, 350 P.3d at 1223.

117. *Id.* ¶ 11, 350 P.3d at 1224.

118. *Id.* ¶ 15, 350 P.3d at 1225.

119. *Id.* ¶ 19, 350 P.3d at 1227.

120. *Id.*

121. *Id.* (“The Air Quality Control Act has established adequate procedures to address and implement any regulation of greenhouse gases in the atmosphere.”).

122. N.M. STAT. ANN. §§ 74-2-6 (A)–(F) (1992); *Sanders-Reed*, 2015-NMCA-063, ¶ 17, 350 P.3d at 1226.

123. *Sanders-Reed*, 2015-NMCA-063, ¶¶ 16, 19, 350 P.3d at 1225–26, 1227.

124. *Id.* ¶ 19, 350 P.3d at 1227.

125. *Id.*

likely supersedes the trust's common law cause of action.¹²⁶ While all three factors were present in *Sanders-Reed*,¹²⁷ it is unclear (due to the lack of additional case law) whether all three factors are necessary to supersede the *Illinois Central* principle. While this Comment focuses exclusively on the effects *Sanders-Reed* has on the common law cause of action, one could apply this framework to each *Illinois Central* Minimum principle and each protected natural resource.

First, as was mentioned above,¹²⁸ the *Sanders-Reed* court held that the legislature delegated to the EIB its duty to control air pollution and despoilment through the Air Quality Control Act.¹²⁹ The Act grants the EIB the authority to “adopt, promulgate, publish, amend and repeal rules and standards consistent with the Air Quality Control Act to attain and maintain national ambient air quality standards and prevent or abate air pollution.”¹³⁰ In the opinion, the court quickly moved passed this factor¹³¹ and held that the legislature delegated the duties to control air pollution and despoilment to the EIB.¹³²

For the purposes of this Comment, discussing the Act in more depth will provide more context. The Act grants authority to the EIB to regulate many types of air pollution. For example, it explicitly grants the EIB power to promulgate “rules to protect visibility,”¹³³ to prescribe performance standards “for hazardous air pollutants,”¹³⁴ and to establish “rules requiring the installation of control technology for mercury emissions.”¹³⁵ The Act clearly manages and regulates air quality, while it also delegates such management and regulation to the EIB.

Second, the Act allows the public to participate in the regulatory process.¹³⁶ This was not at issue in *Sanders-Reed*; plaintiffs did not contest the availability of other processes or that the EIB's current process violated trust duties.¹³⁷ However, the court focused on this factor nonetheless.¹³⁸ The Act states: “Any person may recommend or propose regulations to the environmental improvement board or the local board for adoption.”¹³⁹ The EIB reiterated the Air Quality Control Act's

126. *See id.* ¶¶ 17, 19, 350 P.3d at 1226, 1227.

127. *See id.* ¶ 17, 350 P.3d at 1226.

128. *Supra* Part II A.

129. *Sanders-Reed*, 2015-NMCA-063, ¶ 19, 350 P.3d at 1227 (“The Air Quality Control Act has established adequate procedures to address and implement any regulation of greenhouse gases in the atmosphere.”).

130. N.M. STAT. ANN. § 74-2-5(B)(1) (2019). The court did not cite the specific section of the Act; however, the language is useful to understand the duties that the legislature delegated to the EIB. *See Sanders-Reed*, 2015-NMCA-063, ¶ 16, 350 P.3d at 1225–26.

131. *See Sanders-Reed*, 2015-NMCA-063, ¶ 16, 350 P.3d at 1225–26.

132. *See id.* ¶ 17, 350 P.3d at 1226 (citing N.M. STAT. ANN. § 74-2-5(A) (2019) (“The environmental improvement board or the local board shall prevent or abate air pollution.”)).

133. N.M. STAT. ANN. § 74-2-5(D)(1) (2019).

134. *Id.* § 74-2-5(D)(2).

135. *Id.* § 74-2-5(D)(4).

136. *Sanders-Reed*, 2015-NMCA-063, ¶ 17, 350 P.3d at 1226.

137. *Id.* (“Plaintiffs neither contend that this process has been unavailable to them, nor do they argue that this process is inconsistent with public trust principles for implementing the protections set forth in Article XX, Section 21 of the Constitution.”).

138. *See id.*

139. N.M. STAT. ANN. § 74-2-6(A) (1992).

statement in its rulemaking procedure: any person may propose rules to the EIB.¹⁴⁰ Additionally, any member of the public may participate in most adjudicatory hearings.¹⁴¹ Therefore, the EIB's procedures and the Air Quality Control Act provide a clear route for public involvement.

Third, the Act allows any adversely affected party of an EIB decision to seek judicial review.¹⁴² On appeal, the court "must consider whether the EIB's action was 'arbitrary, capricious[,] or an abuse of discretion; 'not supported by substantial evidence in the record' made during the EIB proceedings; or 'otherwise not in accordance with law.'"¹⁴³

With these three factors, the legislature created an adequate statutory framework that conflicted with the *Illinois Central* Minimum's cause of action.¹⁴⁴ Before reaching its holding, the court emphasized everything plaintiffs—and the public—could do to influence the state's air quality regulations.¹⁴⁵ Plaintiffs and the public can propose their own regulations.¹⁴⁶ They have the opportunity to appeal any EIB decision.¹⁴⁷ "[T]hey have the opportunity to participate in the legislative process . . . and voters have the opportunity to exercise their desire for political change regarding complex environmental issues at the ballot box during each election cycle."¹⁴⁸ In short, the court considered that plaintiffs and the public had ample opportunity (that the other branches of government allowed) to influence the EIB's and the legislature's air quality regulation. The court reasoned a separate cause of action would "circumvent and render a nullity" the process established by the legislature.¹⁴⁹ In other words, the *Illinois Central* Minimum's cause of action conflicted with the established framework. Then, because of the conflict, the statutory scheme superseded the cause of action.¹⁵⁰

Even though the statutory framework superseded the *Illinois Central* Minimum's cause of action, the public may raise violations of the state's public trust duties in other contexts.¹⁵¹ Their arguments, however, must come within the appropriate processes established by the legislature.¹⁵² In other words, the public

140. N.M. ADMIN. CODE § 20.1.1.300(A) (2018).

141. *E.g.*, ADMIN. § 20.1.2.207(B)(1) (2006) ("Any member of the general public may testify at the hearing. No prior notification is required to present general non-technical statements in support of or in opposition to the petition.").

142. N.M. STAT. ANN. § 74-2-9(A) (1992).

143. *Sanders-Reed*, 2015-NMCA-063, ¶ 17, 350 P.3d at 1226 (citing N.M. STAT. ANN. § 74-2-9(A)-(C) (1992)).

144. *Id.* ¶ 19, 350 P.3d at 1227 ("The Air Quality Control Act has established adequate procedure[s] to address and implement any regulation of greenhouse gases in the atmosphere.").

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* ¶ 15, 350 P.3d at 1225.

150. *Id.* ¶ 16, 350 P.3d at 1225 ("[T]he common law does not apply to the extent the subject matter of the duty or right asserted is covered by constitution, statute, or rule").

151. *Id.* ¶ 15, 350 P.3d at 1225 (one "may raise arguments concerning the duty to protect the atmosphere").

152. *Id.*

cannot bring a claim under the public trust, but they may argue the state violated its duties in other contexts.

The next Part will apply the *Sanders-Reed* framework to water to determine in what instances there is a common law cause of action. It will illustrate the trust's cause of action is nearly as limited for water as it is for air.

III. THE BENEFICIARIES OF NEW MEXICO'S PUBLIC TRUST FOR WATER HAVE TWO LIMITED CAUSES OF ACTION

As discussed above,¹⁵³ New Mexico's trust as it relates to water is more expansive than the *Illinois Central* Minimum. For one, it covers *all* public waters. The state must control pollution and despoilment in all waters. Further, it must ensure the public's right to recreate in the water is not infringed. Finally, for navigable-for-title watercourses, it must ensure the body of water remains open for navigation, commerce, and fishing.

This Part will first look to the duties to control pollution and despoilment. It will then move to the duty to ensure navigation, commerce, fishing, and the duty to protect the public's right to recreate. Ultimately, applying the *Sanders-Reed* analysis, there are only two circumstances in which a beneficiary may sue under a water-related public trust theory. A beneficiary may sue if their right to recreate in the water is infringed or if the state does not ensure a navigable-for-title watercourse remains open for navigation, commerce, and fishing. A beneficiary has no legal right to sue the state if the state breaches its duty to control water pollution and despoilment. Without the ability to sue, the resources protected in New Mexico's trust are just as susceptible to the tragedy of the commons as they would be absent a public trust.

A. There is Not a Common Law Cause of Action if the State Breaches its Duty to Control Water Pollution and Despoilment

As explained above, the *Sanders-Reed* court looked to three factors to determine if there is a separate common law cause of action: (1) whether the legislature delegated its duty to another agency; (2) if it did, whether the statute created an explicit route for public participation; and (3) if the statute's appeals process goes directly to the judiciary.

As it relates to water pollution and despoilment, under the first factor, the Legislature has statutorily delegated the duty to control pollution and despoilment of waters in New Mexico to the Water Quality Control Commission ("WQCC"). Under the Water Quality Act,¹⁵⁴ the Legislature created the WQCC.¹⁵⁵ The Water Quality Act allows the WQCC to manage a broad range of waters. The WQCC has the authority to regulate pollution for waters "in the state or in any specific geographic area, aquifer or watershed of the state or in any part thereof, or for any class of waters, and to govern the disposal of septage and sludge and the use of sludge for various

153. *Supra* Part I C.

154. N.M. STAT. ANN. §§ 74-6-1 to -17 (1993).

155. *Id.* § 74-6-3 (2007).

beneficial purposes.”¹⁵⁶ It requires the WQCC to “adopt, promulgate and publish regulations to prevent or abate water pollution in the state.”¹⁵⁷ It also requires the WQCC to regulate surface and groundwater standards.¹⁵⁸ The Act explains that “[t]he standards shall at a minimum protect the public health or welfare, [and] enhance the quality of water.”¹⁵⁹ The WQCC “may adopt regulations establishing pretreatment standards.”¹⁶⁰ The Water Quality Act, then, explicitly delegates the state’s trust duty to control water pollution and despoilment to the WQCC.

The Act creates a clear framework on how to regulate water standards. For example, it explains that the WQCC, “[i]n making standards, . . . shall give weight it deems appropriate to all facts and circumstances, including the use and value of the water for water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes.”¹⁶¹ The WQCC should also give weight to other factors such as the public interest,¹⁶² the technical and economic feasibility of the regulation,¹⁶³ and “federal water quality requirements.”¹⁶⁴ Finally, the WQCC cannot adopt any regulation without a public hearing.¹⁶⁵ Then, hearings on regulations of “statewide application” must be held in Santa Fe or in the area for which it applies.¹⁶⁶ Thus, the Act creates a clear framework to manage the duty to control water pollution and despoilment.

Under the second factor, the Water Quality Act and the WQCC’s own procedures allow the public to participate both in rulemaking and adjudicatory actions.¹⁶⁷ The Act states: “Any person may petition in writing to have the commission adopt, amend or repeal a regulation or water quality standard.”¹⁶⁸ Additionally, any interested party may participate in a public hearing.¹⁶⁹ The WQCC’s own procedures explicitly allow public involvement. For example, the public may propose its own regulation¹⁷⁰ and participate in many types of hearings.¹⁷¹ Therefore, the Legislature has created an avenue for the public to propose regulations, participate in hearings, and voice its opinions to the WQCC.

156. *Id.* § 74-6-4(E) (2019).

157. *Id.*

158. *Id.* § 74-6-4(D).

159. *Id.*

160. *Id.* § 74-6-4(L).

161. *Id.* § 74-6-4(D).

162. *Id.* § 74-6-4(E)(2).

163. *Id.* § 74-6-4(E)(3).

164. *Id.* § 74-6-4(E)(7).

165. *Id.* § 74-6-6(A) (1993).

166. *Id.* § 74-6-6(C).

167. For the WQCC’s rulemaking procedure see N.M. ADMIN. CODE § 20.1.6 (2018), for its adjudicatory procedures see ADMIN. § 20.1.3 (2010).

168. N.M. STAT. ANN. § 74-6-6(B) (1993).

169. *Id.* § 74-6-6(D).

170. ADMIN. § 20.1.6.200(A) (“Any person may file a petition with the commission to adopt, amend, or repeal any regulation within the jurisdiction of the commission.”).

171. *E.g.*, ADMIN. § 20.1.3.17(F) (allowing any member of the public to participate in abatement hearings); ADMIN. § 20.1.3.18(D) (2010) (permitting any member of the public to participate in variance hearings).

Finally, the Act allows the public to directly appeal a WQCC decision to the court of appeals. A person “adversely affected by a regulation,” compliance order, or permitting action by the WQCC “may appeal to the court of appeals for further relief.”¹⁷² On appeal, the court considers whether the Commission’s action was “arbitrary, capricious or an abuse of discretion; not supported by substantial evidence in the record; or otherwise not in accordance with law.”¹⁷³

As the preceding paragraphs make clear, the New Mexico legislature created an analogous statutory framework for its duty to control water pollution and despoilment to the framework it created for air. The legislature delegated its duty to control air pollution and despoilment through the Air Quality Control Act to the EIB. It similarly delegates its duties for water through the Water Quality Act to the WQCC. For air, the EIB and Air Quality Control Act established procedures to regulate air pollution and despoilment. Similarly, the Water Quality Act and the WQCC establish procedures to regulate water pollution and despoilment. Further, both the Air Quality Control Act and the Water Quality Act explicitly give the public avenues to participate in the regulatory process. Finally, regarding both resources, the public may appeal an EIB or WQCC decision directly to the court of appeals. Thus, just as with the Air Quality Control Act and the EIB, the legislature created an adequate framework with its own process for water pollution and despoilment.

Accordingly, there likely will not be an *Illinois Central* Minimum cause of action for breaches of the public trust’s duties to control water pollution and despoilment since the legislature has created a framework analogous to the state’s duties for air. For air, the *Sanders-Reed* court reasoned if it allowed a separate cause of action, it would “circumvent and render a nullity” the process established by the legislature and the EIB. It is very likely the same case for the WQCC. The *Sanders-Reed* court did not extend the *Illinois Central* Minimum cause of action to the legislature’s duty to control air pollution and despoilment because the cause of action conflicted with the Air Quality Control Act and the EIB’s process. A separate cause of action is very likely to conflict with the Water Quality Act’s and the WQCC’s process. Therefore, it is doubtful a court would extend the *Illinois Central* Minimum cause of action to this analogous situation.

However, unlike air, water has additional trust duties. This Comment will show in the following subpart that the *Illinois Central* Minimum’s cause of action is likely available for the remaining duties.

B. The *Illinois Central* Minimum’s Cause of Action Applies to Two Duties of New Mexico’s Public Trust

The *Sanders-Reed* analysis will be different for navigable-for-title waters and other waters since the applicable duties are different for each. Each *Illinois Central* Minimum principle will apply to navigable-for-title waters. However, for other waters, New Mexico’s trust only ensures that the public may recreate on the waters and the state’s duty to control water pollution and despoilment as discussed in the previous subpart.

172. N.M. STAT. ANN. § 74-6-7(A) (1993).

173. *Id.* § 74-6-7(B)(1)-(3).

For practical reasons, the duty will not apply to other water bodies since the state does not own the submerged land in those bodies of water. The protection of navigation and commerce is predicated upon state ownership of the submerged land. As was discussed in Part I B, these uses are ensured by restricting the state's ability to alienate submerged lands. As a threshold, to restrict the right to alienate, the state must own the submerged land.

The state holds title to submerged land under navigable-for-title waters based on the Equal Footing Doctrine. Under the doctrine, the federal government ensures "that new states enter the Union on a basis of full political equality with all other states."¹⁷⁴ The original thirteen states received title to submerged land under navigable-in-fact waters after the American Revolution.¹⁷⁵ Thus, to remain equal, when a state enters the Union, it often receives title to analogous submerged lands.¹⁷⁶ New Mexico was no exception.

The state does not necessarily hold the title to land under other waters. The federal government, through the Desert Lands Act of 1877, separated the title of non-navigable water in western states, including New Mexico, from the title of the land underneath those waters.¹⁷⁷ The federal government, then, conveyed the title of the water to the states but retained the title of the submerged land for itself.¹⁷⁸ Therefore, New Mexico does not necessarily hold title to the land under other waters.

174. Wilkinson, *supra* note 17, at 444.

175. Craig, *Western States' Public Trust Doctrines*, *supra* note 2, at 63–64.

176. For a state to receive title under the Equal Footing Doctrine, the watercourses must be "used, or are susceptible of being used, . . . as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 592 (2012) (quoting *The Daniel Ball*, 77 U.S. 557, 563 (1870)). Additionally, the "waters must be navigable-in-fact as of the date of the state's admission into the union." Craig, *Western States' Public Trust Doctrines*, *supra* note 2, at 63.

177. Craig, *Western States' Public Trust Doctrines*, *supra* note 2, at 70–71. Under the act, "Congress recognized that reclamation, large-scale development, and movement of fresh water would be necessary in order to settle the arid western lands." *Id.* at 70. So, to ease the settlement of many western states, the federal government conveyed title of the non-navigable water to the states. *Id.* at 70–71.

178. *PPL Montana, LLC*, 565 U.S. at 591. This separation between owning water and its submerged land is further emphasized through New Mexico's prior appropriation doctrine. Under prior appropriation, "[w]ater rights are . . . not tied to a particular location or even a particular source." *Walker v. United States*, 2007-NMSC-038, ¶ 27, 142 N.M. 45, 162 P.3d 882. There is one exception to this separation: water used for irrigation. "Irrigation water rights are appurtenant to the land, meaning that any conveyance of the land will carry the water right with it unless the water right is expressly reserved by the grantor." *Id.* ¶ 23, 162 P.3d at 889. In New Mexico, this separation stems from its arid environment, as was true with the Desert Lands Act:

Early Western settlers, such as those in the gold mining camps of California and the early irrigation settlements in Colorado, found the riparian doctrine unworkable in the arid West because they often had to divert water from its source in order to use it beneficially because the land associated with the use of the water did not itself contain a water source.

Id. ¶ 25, 162 P.3d at 889. The Court further explained under riparianism, upstream users "would have had to show that their reasonable use did not interfere with those downstream," which would be burdensome since "most uses" in the arid West "somehow affected downstream users." *Id.* This severing of ownership of the water and riverbed is contrasted by riparianism. Generally, under a riparianism system, if the property owner owns both banks of the non-navigable watercourse, they also own the submerged land underneath the river and the water itself. *State ex rel. State Game Commission v. Red River Valley Co.*, 1945-NMSC-034, ¶ 14, 51 N.M. 207, 182 P.2d 421 ("So far as non-navigable streams are concerned, the

For practical reasons, the *Illinois Central* Minimum duty to ensure navigation and commerce likely only applies to navigable-for-title waters. Due to these distinctions, the *Sanders-Reed* analysis will be different. Therefore, this subpart is divided into two further subparts: navigable-for-title waters and all other watercourses.

i. The Illinois Central Minimum cause of action is available for the duty to keep navigable-for-title waters open for navigation, commerce, or fishing

A beneficiary likely has a legal right to sue under the New Mexico public trust if the state does not ensure navigable-for-title waters remain open for navigation, commerce, and fishing. This is so for two reasons: first, there is not a New Mexico statute, constitution, or rule that supersedes the protected use; and second, even if there is a New Mexico law that would otherwise supersede the principle, the *Illinois Central* Minimum would preempt the state law. However, the cause of action in New Mexico will be very limited because there are few navigable-for-title waters in the state.

The *Illinois Central* Minimum's cause of action survives the *Sanders-Reed* analysis. The state fails the first factor: it has not delegated its duty. For example, the Water Quality Act and subsequently any WQCC rule or procedure will not apply since both manage water pollution and despoilment.¹⁷⁹ The Interstate Stream Commission in the Office of the State Engineer would not promulgate rules limiting these rights either.¹⁸⁰ The Commission largely manages water compacts between states rather than navigation, commerce, or fishing.¹⁸¹ Without a statute, constitutional law, or rule through which the legislature delegated the public trust duty, there is no need to go through the other steps of the *Sanders-Reed* analysis. The state has not established a framework for the duty. Without an existing framework, the duty and the *Illinois Central* Minimum cause of action do not conflict with anything. Without a conflict, the principles survive.

Second, even if there were a state law that restricted this cause of action, it likely would be preempted by the *Illinois Central* Minimum. The New Mexico Supreme Court recently recognized the state's public trust doctrine is state law "subject only to governmental regulation by the United States under the Commerce

common law rule, seemingly without exception, is that the one owning both banks of a stream likewise owns the entire bed thereof, the waters are private waters, and the owner has the exclusive right to fish therein."). Therefore, New Mexico, under prior appropriation, followed the United States Congress' lead and separated title of non-navigable water and the banks as a response to its arid environment.

179. See N.M. STAT. ANN. § 74-6-1 to -17 (1993) (creating the Water Quality Control Commission and requiring the Commission to create standards on water quality).

180. The commission, as its name suggests, covers waters that go between states. N.M. STAT. ANN. § 72-14-3 (1953) (limiting the commission's duties "to negotiate compacts with other states to settle interstate controversies or looking toward an equitable distribution and division of waters in interstate stream systems," to match federal appropriations, to "investigate water supply, to develop, to conserve, to protect and to do any and all other things necessary to protect, conserve and develop the waters and stream systems of this state").

181. N.M. STAT. ANN. § 72-14-3 (1953).

Clause and admiralty power.”¹⁸² In this instance, the trust is limited by the Commerce Clause. First, the Minimum is federal law. Federal law may preempt state law under the Supremacy Clause of the United States Constitution.¹⁸³ There are multiple ways a federal law preempts a state or local law.¹⁸⁴ One is if the state law impedes a federal objective.¹⁸⁵ Here, the federal objective is to ensure navigable-for-title watercourses are open for navigation, commerce, and fishing. In other words, to promote commerce. If a state impeded this goal with alternative laws, the federal law would preempt the state law.

This cause of action in New Mexico will be very limited. There are very few waters in New Mexico, if any, that are navigable-for-title. Federal courts determine whether a body of water is navigable-for-title.¹⁸⁶ Generally, a court will analyze each segment of water to “determine[] whether trade and travel could have been conducted in the customary modes of trade and travel on water, over the relevant river segment in its natural and ordinary condition” at the time of statehood.¹⁸⁷ Of the waters in New Mexico, federal courts have only determined if the Rio Grande is navigable-for-title.¹⁸⁸ It is not.¹⁸⁹ If the Rio Grande—one of the largest rivers in the state—is not navigable-for-title, it seems likely most bodies of water in the state are also not navigable-for-title. Yet, without explicit court determinations, theoretically, the state still has a duty to ensure navigable-for-title waters in the state remain open for navigation, commerce, and fishing. Thus, any beneficiary could sue the state for a breach of this duty. However, it seems unlikely that there are many waters to which this duty applies.

ii. The Illinois Central cause of action is available if the state infringes on the public’s right to recreate in public waters

This cause of action is not superseded by constitution, law, or rule for this right. The New Mexico Supreme Court recently struck down certain New Mexico Department of Game and Fish (“DGF”) rules that unconstitutionally restricted the

182. *Adobe Whitewater Club of New Mexico v. New Mexico State Game and Fish*, 2022-NMSC-020, ¶ 18, 519 P.3d 46.

183. U.S. CONST. art. VI, § 2. The Clause in full reads: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United State, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” *Id.*

184. For example, through express preemption, *see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); conflicts preemption, *see Florida Lime & Avocado Growers, Inc. v. Paul, Director, Dept. of Agriculture of California*, 373 U.S. 132 (1963); or field preemption, *see Arizona v. United States*, 567 U.S. 387 (2012).

185. *See Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190 (1983).

186. *See Anthony Dan Tarlock & Jason Anthony Robison, Law of Water Rights and Resources* § 8:12 (2021) (stating “three Supreme Court cases between 1926 and 1935 established that the [navigable-for-title] test is a federal one”); Wilkinson, *supra* note 17, at 427 n.8 (“Navigability-for-title is both a rule of real property and a question of federal law.”).

187. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 601 (2012). For more on the test, see Tarlock & Robison, *supra* note 186.

188. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

189. *Id.* at 695.

public's right to recreate in *Adobe Whitewater Club of New Mexico v. New Mexico State Game and Fish Commission*.¹⁹⁰ The violating rules were likely the only ones to have managed the right to recreate on public water.¹⁹¹

In 2018, the DGF promulgated rules that established a process for private landowners to close access to the non-navigable public waters on their property.¹⁹² The petitioners in *Adobe Whitewater* alleged the DGF's rules were unconstitutional.¹⁹³ They argued the public's right to recreate in public waters could not be infringed simply because the land underneath the water was privately owned.¹⁹⁴ Private landowners argued the DGF rules did not alter the petitioners' right to recreate because the water remains open; the public simply did not have the right to touch the banks and beds of the waterbody.¹⁹⁵

The *Adobe Whitewater* court sided with the petitioners and held the rules were "an unconstitutional infringement on the public's right to use public water."¹⁹⁶ It further held that the right contains "acts as are reasonably necessary" to enjoy it, which includes the right to touch the streambed of public waters on private property.¹⁹⁷ The court reasoned that reasonable acts must be included in the right; any other holding would go against precedent set by the *Red River* court (the court that established the right to recreate).¹⁹⁸ The *Adobe Whitewater* court did explain, however, that the acts must be to "utilize[e] . . . the water itself and any use of the beds and banks must be of minimal impact."¹⁹⁹

Since the rules are unconstitutional, the *Illinois Central* Minimum's cause of action is simply not infringed. First, the state has not delegated its duty to manage the right to recreate in any capacity. The court unequivocally held the right applies to all public waters, no matter the ownership of the submerged land. Further, without a rule or amendment that delegates the duty, the analysis fails the other two *Sanders-Reed* factors as well. Then, without establishing a framework, there is nothing to conflict with the *Illinois Central* Minimum's cause of action. Without a conflict, the

190. 2022-NMSC-020, ¶ 42, 519 P.3d 46.

191. The Department of Game and Fish is likely the agency through which this right may be limited. See N.M. STAT. ANN. § 17-2-1(D)-(E) (2019) (granting the state game commission, which is attached to the Department of Game and Fish, the power to "authorize or prohibit the killing or taking of any . . . game fish" and to "prescribe the manner, methods and devices that may be used in hunting, taking or killing . . . game fish"). The Water Quality Act and subsequently any WQCC rules and procedures do not apply to the right since both manage water pollution and despoilment. See *id.* §§ 74-6-1 to -17 (1993) (creating the Water Quality Control Commission and requiring the Commission to create standards on water quality). Further, bureaus such as the Surface Water Quality Bureau or Ground Water Quality Bureau in the New Mexico Environment Department would not affect the right to recreate since their rules manage water quality. N.M. ADMIN. CODE 20.6.2.2 (2011) (granting the scope of each bureau's rules to "All persons subject to the Water Quality Act"). This is also true for the Interstate Stream Commission. See *supra* note 180 and accompanying text. Then, DGF currently has no valid rules that manage this right.

192. *Adobe Whitewater Club*, 2022-NMSC-020, ¶ 2, 519 P.3d 46.

193. *Id.* ¶ 7, 519 P.3d at 50.

194. *Id.* ¶ 1, 519 P.3d at 49.

195. *Id.* ¶ 8, 519 P.3d at 50.

196. *Id.* ¶ 42, 519 P.3d at 58.

197. *Id.* ¶¶ 2, 42, 519 P.3d at 49, 58.

198. *Id.* ¶¶ 28–31, 519 P.3d at 54–56.

199. *Id.* ¶ 32, 519 P.3d at 56.

legal right survives. Therefore, the *Illinois Central* Minimum cause of action survives in its entirety.

This point is bolstered by the very fact that the court entertained—and eventually sided with—a judicial cause of action alleging a violation of New Mexico’s public trust duties. The court placed the right to recreation squarely within the public trust doctrine.²⁰⁰ Then, even though it was not stated in these terms, the petitioner’s enforced their right to recreate *through the judiciary*. That is, a violation of this public trust right can be enforced and has been enforced in the judiciary. This suggests that there remains a common law cause of action for breaching this right.

In conclusion, New Mexico’s public trust for water has the following causes of action. The public may sue the state if it breaches the duty to ensure navigable-for-title waters remain open for navigation, commerce, or fishing. However, this duty applies to a limited number of waters since there are very few navigable-for-title waters in the state. Finally, a beneficiary may sue the state if the state infringes on the public’s right to recreate in certain waters.

IV. WITHOUT A CAUSE OF ACTION, THE PUBLIC TRUST HAS LOST ITS UTILITY

Resources in the public trust, generally, are susceptible to the tragedy of the commons. The tragedy of the commons as described in the Introduction is a collective action problem. “In communal property systems, each individual enjoys the benefit of exploiting the resource to its maximum, while the cost of this increased utilization is spread out over all users.”²⁰¹ Garrett Hardin presented the theory rather succinctly: “Freedom in a commons brings ruin to all.”²⁰² If given free rein, individuals will exploit a resource until it is depleted. The public trust doctrine attempts to protect public resources by putting certain common resources in a trust.

The doctrine ensures the state avoids the tragedy by granting the public a cause of action. Before Joseph Sax’s 1970 article popularized the public trust, it was difficult to assert a legal interest in environmental degradation cases.²⁰³ “The legal right, moreover, had to be either one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.”²⁰⁴ The public trust doctrine addresses this problem. It provides the public a cause of action regarding the state’s duties to protect certain natural resources. The public trust doctrine, that is, provides “a formal legal right to environmental quality” cases.²⁰⁵ It gave the public a legal avenue to protect natural resources.

However, as discussed above, the New Mexico Court of Appeals pulled the teeth out of New Mexico’s public trust. As was shown, there are very few ways for a citizen to enforce the state’s duties. Take the duty to control pollution and

200. *Id.* ¶ 19, 519 P.3d at 52–53 (“the scope of public trust to waters in New Mexico includes fishing and recreation”).

201. Erin A. Clancy, Note, *The Tragedy of the Global Commons*, 5 *IND. J. GLOB. LEGAL STUD.* 601, 605 (1998).

202. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968).

203. Lazarus, *supra* note 3, at 658 (1985).

204. *Id.* (quotation omitted).

205. *Id.*

despoilment of water and air as an example. The *Sanders-Reed* court emphasized how a member of the public may participate in EIB and WQCC proceedings. However, a citizen cannot enforce the duties to control pollution or despoilment through the EIB or WQCC. For both, a person may propose rules.²⁰⁶ A person may participate in a hearing.²⁰⁷ However, no one can bring an action against either board, commission, or agency to enforce its duty to control pollution or despoilment of air or water. They can argue there is a duty,²⁰⁸ but nothing in the Water Quality Act, the Air Quality Control Act, the WQCC procedures, or the EIB procedures indicates that the public has a legal right to bring a claim based solely on the breach of public trust duties. They must get through the door on other grounds.

Further, if water and air are any indication, the doctrine has lost its bite regarding the state's duties for other entrusted resources. Each resource is likely regulated by a state agency. The agency likely has procedures similar to those with the WQCC or EIB that outline how a member of the public may participate in regulating the resource. Finally, even though the state has a duty to control pollution and despoilment of all its resources, there is likely no enforcement of it. Without enforcement, the state has no obligation to fulfill its duty. Additionally, without direct enforcement, very little stops the state from misusing and abusing the protected resources. This is to say, without a mechanism that incentivizes the state to comply with its duty, the resources in the public trust are protected against the tragedy of the commons in name only.

V. YET, THERE IS HOPE

This Comment proposes both a direct and an indirect solution. The direct solution would be for a legislator to propose a bill that establishes a cause of action under the public trust doctrine for the public to enforce the state's duties under the public trust. If the bill were to pass and be signed into law, the problem presented in this Comment would be solved. The state, through threat of litigation, would be incentivized to ensure the entrusted resources are protected. Further, if the state fails to fulfill its duties under the public trust, the public could sue the state.

However, this may not be necessary; there is an indirect solution as well. In the 2022 New Mexico Regular Session, Senators Sedillo Lopez, Soules, Steinborn Pope Jr., and Representative Ferrary proposed a constitutional amendment to alter the state's bill of rights²⁰⁹ to create a new fundamental right.²¹⁰ The proposed amendment sought to create a right "to a clean and healthy environment, including

206. N.M. STAT. ANN. § 74-6-6(B) (1993) ("Any person may petition in writing to have the [WQCC] adopt, amend or repeal a regulation or water quality standard."); *Id.* § 74-2-6(A) (1992) ("Any person may recommend or propose regulations to the environmental improvement board or the local board for adoption.").

207. For the WQCC, any member of the public may participate in abatement, N.M. ADMIN. CODE § 20.1.3.17(F) (2010), and variance hearings, ADMIN. § 20.1.3.18(D). For the EIB, members of the public may testify at hearings. ADMIN. § 20.1.2.207(B)(1) (2006).

208. *Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 15, 350 P.3d 1221 ("[O]ne may raise arguments concerning the duty to protect the atmosphere, but such arguments must be raised within the existing constitutional and statutory framework and not alternatively through a separate common law cause of action.").

209. N.M. CONST. art. II.

210. S.J.R. 2, 55th Leg., Reg. Sess. (N.M. 2022).

pure water, clean air, healthy ecosystems and a stable climate, and to the preservation of the natural, cultural, scenic and healthful qualities of the environment.”²¹¹ The amendment stalled in the Senate, yet this was not the legislators’ first session in which they proposed it. They proposed the same in the 2021 Regular Session.²¹²

If the proposed constitutional amendment ever becomes law,²¹³ it would create a fundamental right. As a fundamental right, the public would have a cause of action under the New Mexico Civil Rights Act.²¹⁴ The Act allows “a person” to sue “a public body” for “actual damages and equitable or injunctive relief,” if the public body “depriv[es the person] of any rights, privileges or immunities pursuant to the bill of rights of the constitution of New Mexico.”²¹⁵ The Act defines a “public body” to include “a state or local government, an advisory board, a commission, an agency or an entity created by the constitution of New Mexico or any branch of government.”²¹⁶ Any person, if the amendment becomes law, would be able to sue the state if the state does not provide its citizens with “pure water [or] clean air.” For example, if the EIB failed to provide the public with clean air, a person would not only be able to sue the EIB but also the state for depriving her of her right. Although the cause of action would not be under the public trust, it would fall squarely within the spirit of New Mexico’s public trust duties.

CONCLUSION

New Mexico’s public trust covers all natural resources. The state must control its pollution and despoilment. On its face, it appears to be a powerful legal tool that promotes environmental protection and conservation. However, the New Mexico Court of Appeals pulled out most of the trust’s teeth in *Sanders-Reed*. After its decision, there are very few separate causes of action under the trust. The public, now, cannot ensure the state complies with its duties in many instances. However, there is hope.²¹⁷ If the New Mexico legislature creates a separate cause of action under the public trust, the legislature will salvage the doctrine. Additionally, if the legislature successfully passes the constitutional amendment creating a fundamental right to a healthy environment and the public votes in favor of it, the public will have a cause of action under the New Mexico Civil Rights Act. Although this will not be a cause of action under the trust (meaning the issues under it remain), the cause of action would create a route that protects the state’s natural resources aligning with the spirit of New Mexico’s public trust.

211. *Id.*

212. S.J.R. 3, 55th Leg., Reg. Sess. (N.M. 2021). The ActionText for the resolution indicates the resolution was before the Senate Judiciary Committee when the 2021 regular session ended. 2021 REGULAR SESSION – SJR 3, <https://www.nmlegis.gov/Legislation/Legislation?chamber=S&legType=JR&legNo=3&year=21> [<https://perma.cc/X57B-HAX7>].

213. To amend the state’s constitution, a senator or representative must carry the amendment through both chambers of the legislature. N.M. CONST. art. XIX, § 1. If the amendment passes both, it will then be placed on the ballot in the next election cycle. *Id.* If the amendment receives a majority of affirmative votes, the amendment will be enacted. *Id.*

214. N.M. STAT. ANN. §§ 41-4A-1 to -13 (2021).

215. *Id.* § 41-4A-3(B).

216. *Id.* § 41-4A-2.

217. And this excites you.