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E C O L O G Y

The Public Trust Doctrine and Coastal Zone Management in Washington State

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The Public Trust Doctrine and Coastal Zone Management in Washington State

Prepared by:

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for

Shorelands and Coastal Zone Management Program
Washington Department of Ecology
Olympia, WA 98504-8711

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I. Introduction and Executive Summary

A. Introduction

The use and management of Washington state's coastal resources is a subject of intense interest to many different groups: state and local government agencies responsible for shoreline management, courts adjudicating policy and administrative issues, and of course, the public that owns and utilizes the tidelands, shorelands, and waters of Washington's rivers, lakes, and coastline. Statutes and regulations proliferate as governments attempt to regulate and protect the coastal environment. One state statute in particular, the Shoreline Management Act of 1971,¹ attempts a comprehensive approach to managing the coastal area, and implicates local, state and federal actions in its implementation.

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

The public trust doctrine differs from regulatory schemes for coastal management in several respects. First, the doctrine is created, developed and enforced by the judiciary. While the doctrine is fully binding law on state government, it stems from the courts rather than the legislature. The doctrine also contains several features not generally found in statutes. Its scope is flexible, and courts may expand or limit it on a case-by-case basis. When properly invoked, the doctrine can limit private property rights while avoiding claims of unconstitutional takings. Unlike statutes, the doctrine has a quasi-constitutional nature. The legislature may extinguish the doctrine, but only in limited, explicitly-stated circumstances, and only for other public purposes.

¹Wash. Rev. Code ch. 90.58 (1989).

The public trust doctrine arises out of the universally recognized need to protect public access to and use of such unique resources as navigable waters, beds, and adjacent lands.² This public need is met through recognition of a burden akin to an easement, a burden that is owned by the state and subject to state control for the benefit of the public interest in navigation, commerce, environmental quality, recreation, etc. This public interest is a property right, like an easement. If the state wishes to control the use of this burden, including use by either the private owner or by the public, the state is merely controlling a right that it already owns.³ It is not regulating private property. The exercise of these state management or ownership rights do not therefore raise “takings” questions under the federal or state constitution because no regulation of private property is involved.

This Article considers several elements of the public trust doctrine. First, the public trust is a state law doctrine, and its geographic scope and the interests it protects vary from state to state.⁴ Second, the doctrine is a product of judicial decisionmaking; it was initially recognized in the courts of the United States and England as an incident of sovereignty and is explained and implemented in these courts. The courts continue to determine its scope and usage.⁵ A member of the public has legal standing to bring suit to protect public trust resources.⁶ The suit can be brought against a private landowner who threatens to interfere

²The law has long recognized special public rights for navigable waterways. The public has a clear right of navigation and fishery in such waters. Even on non-navigable-for-title waters an appropriator is prohibited in Washington from pumping water out and lowering the lake level to the damage of other lakeside owners. We accept the existence of state and federal navigation servitudes with their respective implications for private property. We accept without reservation that a local or state government can zone navigable waters for “natural” uses or open space only. In Washington we accept the rule illustrated by *Bach v. Sarich*, 74 Wash. 2d 575 (1968) that all riparians have rights to prohibit nonriparian (non-water-dependent) fills or construction out into lakes. Such activity is presumed to be unreasonable if it is not riparian.

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

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

⁴*Phillips Petroleum Co. v. Mississippi*, 481 U.S. 469, 475 (1988); *Shively v. Bowlby*, 152 U.S. 1, 26 (1893).

⁵*See, e.g., Owsichek v. State, Guide Licensing and Control Board*, 763 P.2d 488 (Alaska, 1988); *CWC Fisheries, Inc. v. Bunker*, 755 P. 2d 1115 (Alaska, 1988); *Wilbour v. Gallagher*, 77 Wash. 2d 306, 462 P.2d 232 (1969), cert. denied, 400 U.S. 878 (1970).

⁶*Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); *Wilbour v. Gallagher*, 77 Wash. 2d 306, 462 P.2d 232, (1969), cert. denied, 400 U.S. 878 (1970).

with or destroy public trust resources, or against a state agency where it fails to protect public trust interests in the management of state-owned land.

Third, the public trust is a true common law doctrine -- it is flexible, and courts enlarge and diminish it according to changing public needs on the one hand, and legitimate private expectations on the other. The doctrine defines both the public interest in private property and the uses that can be made of such property consistent with the doctrine. It also determines the policies that control management of publicly owned lands.⁷ In sum, it determines the intersection of private ownership and public trust rights, as well as the intersection of public ownership and public trust duties.

B. Scope of Study

This Article examines the relationship of the public trust doctrine with legislatively promulgated coastal resource management laws. The Shoreline Management Act and other state environmental statutes rely on a combination of the public trust doctrine and the state “police” or regulatory power that governs the use of private property. The interrelationship of the public trust doctrine with the regulatory power expressed in these statutes is an important part of this Article.

Part II presents a history of the development of the public trust doctrine. Roman jurists first elucidated the doctrine, and courts imported it into the United States by way of English common law. Part II presents a brief history of the doctrine's origins and early history, then traces the chronological development of the public trust doctrine in Washington. The state constitution contains several articles that embody public trust principles. The doctrine has also been developed by the Washington courts. In early cases the Washington Supreme Court recognized certain public rights, such as the right of navigation, but did not explicitly label these decisions as public trust doctrine cases. The 1969 case of Wilbour v. Gallagher⁸ is such an example. Two 1987 cases explicitly identified the doctrine as part of Washington law.⁹

Part II continues with an examination of several state statutes that express the values of the doctrine. The harbor area system,¹⁰ the Seashore Conservation Act, the Shoreline Management Act,¹¹ and the Water Resources Act¹² each regulate either public or private

⁷See Orion Corporation v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), cert. denied, 108 S. Ct. 1996 (1988).

⁸77 Wash. 2d 306, 462 P.2d 232 (1969), cert. denied, 400 U.S. 878 (1970).

⁹Caminiti v. Boyle, 107 Wash. 2d 662, 732 P.2d 989 (1987); Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987).

¹⁰**Wash. Const.**, art. XV; **Wash. Rev. Code** 79.90.010-.070.

¹¹**Wash. Rev. Code** ch. 90.58.

lands and waters subject to the public trust. The Aquatic Lands Act¹³ has set forth proprietary goals and standards for management of state lands. This section identifies congruities found between the regulatory goals of these statutes and the values expressed by the public trust doctrine.

This section also analyzes the obligations placed on state government for management of state-owned lands that are subject to the public trust doctrine.

Part III examines the practical elements of the doctrine, including its geographic scope and the variety of interests it protects. The doctrine is not extensively developed in Washington, but the state Supreme Court has indicated it may be expanded to cover new interests and areas. This Article therefore examines decisions from state courts around the country that address relevant coastal management issues, and that may provide guidance to Washington courts and practitioners in predicting the future scope of the doctrine. Part III also sets forth the ways in which the public trust may be defeated, both by state and private action, and describes the various remedies available for conduct inconsistent with the public trust. Part III concludes with an analysis of the interrelationship of the public trust doctrine as a state law doctrine with federal legal principles, including takings doctrine, supremacy and preemption, and the consistency requirements of the federal Coastal Zone Management Act (CZMA), the federal counterpart of the state Shoreline Act.

Part IV concludes with observations about the possible future direction and use of the public trust doctrine in this state.

C. General Observations

The public trust doctrine is part of Washington law. Its complete geographic scope and the interests it protects are, however, not yet known. Many of the interests protected by the public trust doctrine can also be protected by state exercise of its regulatory power. Although constitutional takings questions may be raised when regulations are used, there is ample evidence that these challenges will ordinarily be rejected if the regulations are designed properly. Why then do we need the public trust doctrine? Or, to put it another way, what are the significant differences between reliance on the public trust doctrine and reliance on the regulatory power of the state?

The public trust doctrine is a judicial doctrine, with ancient common law roots. History tells us that the interests protected by this doctrine are so important that their protection cannot be entrusted entirely to unfettered control by state legislatures.¹⁴ Some courts speak about the public trust doctrine as if it were a constitutional clause. In fact it lies somewhere between an

¹²Wash. Rev. Code ch. 90.54.

¹³Wash. Rev. Code chs. 79.90 - 79.96.

¹⁴See *Illinois Central Railway v. Illinois*, 146 U.S. 387 (1892).

ordinary rule of law, and a constitutional requirement. It is more powerful than the ordinary rule of law, but not quite so powerful as a constitutional clause that justifies striking down inconsistent legislation. It might be labeled a “quasi”-constitutional doctrine.

Police power regulation is a product of the legislative process. This process can be slow, unwieldy, and costly, and in the meantime permanent damage may be done to public trust interests. Once navigable waters have been filled, or buildings built, they are seldom removed. The loss of open space, wetlands, navigable capacity, fish and wildlife, is often permanent. The public trust doctrine is premised on the belief that these interests are so profoundly important that they justify judicial review of legislation adversely impacting them, involving both the courts and the legislature in coastal management.

As a practical matter, successful reliance on the public trust doctrine means that the takings issue is significantly diminished, if not avoided altogether. In addition, whereas individual citizens often have no standing in court to enforce environmental regulations, they generally do have standing to file suit under the public trust doctrine. Also, legislation may provide only partial protection for the interests involved, contain “loopholes,” and may become out-of-date. Enforcement of legislation may be spotty, or inadequate. The public trust doctrine is premised on the theory that these limitations in the legislative approach justify continuation and indeed expansion of the public trust doctrine.

The decisions of other state courts suggest future directions for consideration by Washington courts in interpreting the scope of the public trust doctrine. Other courts have, for example, applied the doctrine to cover the dry sand area of beaches, non-navigable tributaries, related wetlands, and the surfaces of non-navigable waters. Other state courts have also recognized evolving public trust values, such as aesthetic beauty and the right of the public to walk over privately owned tidelands. These cases suggest possible applications of the doctrine that may be accepted by the Washington courts, and are examined in detail below.

The public trust doctrine initially applied to all state owned beds of navigable rivers, lakes, and salt waters when the state of Washington entered the Union in 1889. Subsequent to statehood, about 60% of the tidelands on Puget Sound were conveyed into private ownership. Nothing was said in these conveyances about abolishing the public trust doctrine. In other states when such “bare legal title” conveyances have occurred, the public trust burden was not destroyed.¹⁵ The Washington court has also supported this view. The Washington Supreme Court has described the public trust doctrine as similar to a covenant running with the land. Unlike other burdens on private property, however, landowners need receive no express notice of the public trust burden on their lands.

¹⁵See, e.g., *Berkeley v. Superior Court of Alameda Co.*, 162 Cal Rptr. 327, 606 P.2d 362 (1980); *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913).

State and local officials must consider the public trust doctrine and its values when issuing permits or making administrative decisions affecting public trust resources. State statutes often incorporate or reflect public trust values. If the state law appear to be inconsistent with public trust values, the law should be implemented only when that inconsistency is clearly intended by the legislation.

II. History of the Public Trust Doctrine

A. Origins and Early History

The public trust doctrine originated from the widespread public practice, since ancient times, of using navigable waters as public highways for navigation, commerce, and fisheries. The earliest articulation of the doctrine is sometimes attributed to the Institutes of Justinian of 533 A.D.¹⁶ which provided that the doctrine applied to the air, running water, the sea, and the seashores.

In England the doctrine was well established by the time of the Magna Charta.¹⁷ Leading English court decisions¹⁸ recognized that the Crown held the beds of navigable waters in trust for the people for navigation,¹⁹ commerce, and fisheries.²⁰ Even the Crown could not destroy this trust.²¹

In the United States cases as early as Arnold v. Mundy,²² decided in 1821, recognized and upheld the doctrine. In Mundy the New Jersey court declared the trust as we know it today. The dispute concerned an oyster bed which was part of a pre-statehood conveyance from the King of England. Conveyances eventually led to Arnold's ownership and use as a private oyster bed. This exclusive use was challenged by Mundy, who insisted the public had a right to take oysters in this area as it had done for many years. The court ruled in favor of Mundy, giving the first clear formulation to the doctrine. It said that under the natural law, civil law,

¹⁶J. Inst. 2.1.1. The Institutes of Justinian, a general textbook of Roman law, was issued around 533 A.D. **B. Nicholas, An Introduction to Roman Law** 41 (1962). See Lazarus, Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine, 71 Iowa L.Rev. 631 at 633-34 (1986).

¹⁷Clause 33, Magna Charta. See U.S. Fish & Wildlife Service Region 1, Ecological Services, "Public Trust Rights," (1978) (prepared by Helen F. Althaus) for a comprehensive analysis of Roman, civil law, and common law development of the public trust doctrine.

¹⁸See 2 **H. Bracton, On the Laws and Customs of England**, 16-17, 39-40 (S. Thorne, trans. 1968).

¹⁹Attorney General v. Parmeter, 10 Price 378, 147 Eng. Rep. 345 (Ex. 1811) aff'd by the House of Lords, under the name of Parmeter v. Gibbs, 10 Price 412, 147 Eng. Rep. 356 (H.L. 1813).

²⁰The Royal Fishery of the River Banne, Davis 55, 80 Eng. Rep. 540 (K.B. 1610). Carter v. Murcot, 4 Burr. 2162, 98 Eng.Rep. 127 (K.B. 1768). See 1 **Water and Water Rights** at 179-80 (Clark, Ed. (1970)).

²¹See "Public Trust Rights," supra note 17. The author summarizes the English authorities, saying that the king had a private right (ius privatum) which could be granted to others but the public right (ius publicum) was held by the Crown for his subjects and "could not be alienated."

²²6 N.J.L. 1 (1821).

and common law, the navigable rivers in which the tide ebbs and flows, and the beds and waters of the seacoast are held by the sovereign in trust for the people.²³

The court said that the states, being sovereign governments, had succeeded to the English trust which was held by the Crown and that a grant purporting to divest the citizens of these common rights was void. The people, through their government, may regulate public trust resources, by building ports, basins, docks and wharves, reclaiming land, building dams, locks and bridges, and improving fishing places, but the sovereign power itself “cannot . . . make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.”²⁴

Seventy years later, in Illinois Central Railway v. Illinois, the United States Supreme Court built upon the principles articulated in Mundy and used the public trust doctrine to invalidate one of the more outrageous land giveaways of the 19th century.²⁵ In 1869 the Illinois legislature deeded the bed of Lake Michigan along the entire Chicago waterfront to the Illinois Central Railroad. In 1873 the legislature, suffering pangs of conscience, repealed the grant. Ten years later the state sued in state court to establish the invalidity of the railroad's continued assertion of ownership over the harbor bed.²⁶ The Supreme Court held the revocation valid, saying that a grant of all the lands under navigable waters of a state was “if not void on its face, [then] subject to revocation.” The state cannot “abdicate its trust over property in which the whole people are interested... [any more than it can]...abdicate its police powers.”²⁷

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

In England the doctrine was applied primarily to the bed of the sea and to tidelands.²⁸ The United States, in contrast, has large navigable rivers, such as the Mississippi and the

²³Id. at 76-77.

²⁴Id. at 78.

²⁵146 U.S. 387 (1892).

²⁶The company removed the case to federal court, raising the issue whether the repeal offended the contracts clause and the fourteenth amendment due process clause of the federal constitution. Id. at 433.

²⁷Id. at 453-54.

²⁸Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892). More contemporary authors contend the public trust doctrine applied to navigable fresh waters in England too. 4 **Waters and Water Rights** 105 (R. Clark, ed. 1970); “Public Trust Rights,” supra note ____, at 29 (1978).

Columbia, flowing inland for hundreds of miles. Not surprisingly the United States courts extended the doctrine to cover navigable fresh waters.²⁹ Thus in this country the doctrine covers all waters “navigable in fact,” whether fresh or salt. Under the equal footing doctrine the title to the beds of all navigable waters, fresh or salt, automatically went to each state at statehood.³⁰ As the original thirteen states held title to the beds of navigable waters, so must each new state hold such title if they are to be on an equal footing with the original thirteen. Accordingly, analysis of navigability for title determines what lands left the federal domain and passed to the states at statehood. Because state law cannot control the disposition of the federal domain, the test of navigability for title is necessarily a federal test,³¹ and is determined as of the date the state entered the union.³² The subsequent disposition of these lands is a matter solely of state law. Prior to statehood the federal government held title to these lands, which were chiefly valuable for “commerce, navigation, and fisheries . . . in trust for the future states.”³³ The government could convey these beds away only in case of some “international duty or public exigency.”³⁴

At a minimum the public trust doctrine protects the public interest in the beds of navigable waters, up to mean high tide on the ocean, and mean high water mark on fresh waters.³⁵ No use can be made of the beds of such waters without meeting conditions imposed by the doctrine. Beyond this, other states have interpreted the doctrine as applying to waters that are only navigable for recreational uses, even though the beds are privately owned. In other words, in some courts the public trust doctrine is not limited to those waters and beds which the state owns, or once owned, under the equal footing doctrine.

²⁹Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co., 429 U.S. 363 (1977).

³⁰The equal footing doctrine arises by implication from the United States Constitution, and provides that new states must be admitted on an equal footing with the original thirteen states. New states therefore have the same governing powers, including the power of governance over federal lands, as the original states. New states also acquire, as of the instant of statehood, the title to the beds of navigable rivers and lakes, because the original thirteen states held such titles. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842).

³¹*United States v. Utah*, 283 U.S. 64 (1931); *United States v. Holt State Bank*, 270 U.S. 49 (1926); and *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922).

³²*United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1941); *United States v. Utah*, 283 U.S. 64, 75 (1931).

³³*Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894).

³⁴*Id.* at 50. These duties include performance of international obligations, improvements to facilitate commerce with foreign nations or among the states. *Id.* at 48.

³⁵*Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). Most states extend public trust rights from the seaward limit of the territorial sea to the mean high tide line. A handful of states, however, only recognize full public trust protection seaward of the low tide line. These states include Delaware, Maine, Massachusetts, Pennsylvania, and Virginia. *See D. Slade, et al., Putting the Public Trust Doctrine to Work* 59 (1990).

Federal courts have had little occasion to speak about the parameters of the doctrine, with the exception of Illinois Central Railway v. Illinois,³⁶ and recently, Phillips Petroleum Co. v. Mississippi.³⁷ The task of defining the scope of the doctrine has been left largely to state courts. California and Massachusetts have developed the doctrine more extensively than most states, with Wisconsin, Minnesota, New Jersey, Michigan, and a few other states not far behind. The doctrine has not been totally rejected in any state, although its application varies state by state and its application to particular facts has been denied.³⁸

Courts around the country have employed the public trust doctrine in literally hundreds of cases in recent years.³⁹ Several trends are apparent. First, courts are applying the doctrine in new geographical contexts in order to reach and promote new interests. In particular, courts are finding and preserving public access to coast and shorelines.⁴⁰ A second important trend is the use of the doctrine as a method of environmental protection.⁴¹

Finally, coastal resource managers and state agencies are beginning to incorporate the public trust doctrine into the administrative decision making process. State officials must identify both known and potential parameters of the doctrine, and determine the extent to which current regulatory decisions should be scrutinized for adherence to public trust values. Officials must also determine whether any past decisions are subject to public trust review as well.⁴²

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

Washington courts have only recently explicitly addressed the public trust doctrine in state cases. Nonetheless, the public trust has existed in Washington since statehood, and burdens all public trust resources, including tidelands, shorelands, and beds of navigable waters as well as the waters themselves. Certain uses of these resources are specially protected by the doctrine, including navigation, commercial fisheries, and “incidental rights of fishing,

³⁶146 U.S. 387 (1892).

³⁷484 U.S. 469 (1988).

³⁸See, e.g., Bell v. Town of Wells, 557 A.2d 168 (Me. 1989); MacGibbon v. Bd. of Appeals of Duxbury, 369 Mass. 512, 340 N.E.2d 487 (1976); O’Neill v. State Highway Dep’t, 50 N.J. 307, 235 A.2d 10 (1967).

³⁹See D. Slade, et al., supra note 35.

⁴⁰See, e.g., Owsichek v. State, 763 P.2d 488 (Alaska 1988); Matthews v. Bay Head Improvement Assoc., 95 N.J. 306, 471 A.2d 355 (1984).

⁴¹See infra Section III.C.1.

⁴²See, e.g., National Audubon Society v. Sup’r Court of Alpine County, 33 Cal.3d 419 (1983).

boating, swimming, water skiing, and other related interests.”⁴³ Because the public trust doctrine is dynamic and may change with contemporary needs, the scope of the doctrine will probably expand in the future.⁴⁴ This section traces the development and current status of the doctrine in Washington law, constitutional, judicial, and statutory.

1. Constitution

Prior to and at the time of statehood, tidelands and shorelands fronting harbor areas were areas of intensive economic development and interest. Following much lobbying and debate, the state constitutional convention approved three articles addressing ownership and management of the new state's tidelands and shorelands.⁴⁵ Each of these articles has direct bearing on the scope of the state's public trust powers and obligations.

First, the state Constitution declares state ownership of the beds and shores of all navigable waters, except where a federal patent was perfected prior to statehood.⁴⁶ Second, the Constitution invalidated prior acts of the territorial legislature granting tidelands to railroad companies and establishing riparian rights.⁴⁷ Finally, the Constitution established harbor boundaries, and placed a restraint on disposition of beds underlying navigable waters outside of certain harbor lines.⁴⁸ This article directed the legislature to provide for the appointment of a commission to draw harbor lines in the navigable waters that lie within or in front of the corporate limits of any city, or within one mile on either side. The state may not alienate any rights whatever in the waters beyond such harbor lines. Areas lying between harbor lines and the line of ordinary high water, within specified limits, are reserved for landings, wharves, streets, and other conveniences of navigation and commerce.⁴⁹

The public policy expressed in these constitutional provisions is generally consistent with public trust principles, the state reserving complete ownership in the beds and shores of

⁴³Mentor Harbor Yacht Club v. Mentor Lagoons, 170 Ohio St. 193, 199, 163 N.E.2d 373, 377 (1959) (holding that if waters were naturally navigable, then an artificial extension of a channel brought the extended waters under the public trust doctrine).

⁴⁴See *infra* Section III for a detailed analysis of the current scope of the public trust doctrine.

⁴⁵K. Conte, *The Disposition of Tidelands and Shorelands, Washington State Policy 1889-1982*, at 10-20 (unpublished master's thesis, 1982).

⁴⁶Wash. Const. art. XVII.

⁴⁷Wash. Const. art. XXVII, § 2.

⁴⁸Wash. Const. art. XV.

⁴⁹Wash. Const. art. XV, §§ 1, 2. See also Johnson & Cooney, *Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters*, 54 Wash. L. Rev. 275 (1978).

navigable waters.⁵⁰ The Constitution did not, however, prohibit the sale of tidelands and shorelands. Instead, the state was permitted to dispose of first class tide⁵¹ and shore⁵² lands, which it did under statutory authorization until 1971.⁵³ Second class tide⁵⁴ and shore⁵⁵ lands continue to be eligible for sale only to public entities.⁵⁶

2. Cases

Early Washington cases, although not relying explicitly on the public trust doctrine, recognized legally protectable public interests in the state's navigable waters and underlying beds.⁵⁷ In Hill v. Newell,⁵⁸ the court explicitly approved the reasoning of the leading California public trust case.⁵⁹ In State v. Sturtevant,⁶⁰ the court acknowledged that the state held the right of navigation “in trust for the whole people of this state.”⁶¹ The court did not

⁵⁰See Section II.B.3.6.(1) infra for further discussion of the interrelationship between the statutory harbor line system and the public trust doctrine.

⁵¹The term "first class tidelands" means the shores of navigable tidal waters belonging to the state, lying within or in front of the corporate limits or any city, or within one mile thereof upon either side and between the line of ordinary high tide and the inner harbor line; and within two miles of the corporate limits on either side and between the line of ordinary high tide and the line of extreme low tide. **Wash. Rev. Code** § 79.90.030.

⁵²"First class shorelands" means the shores of a navigable lake or river belonging to the state, not subject to tidal flow, lying between the line of ordinary high water and the line of navigability, or inner harbor line where established and within or in front of the corporate limits of any city or within two miles thereof upon either side. Id. § 79.90.040.

⁵³See Hughes v. State, 67 Wash. 2d 799, 410 P.2d 20 (1966) for additional historical information.

⁵⁴"Second class tidelands" means the shores of navigable tidal waters belonging to the state, lying outside of and more than two miles from the corporate limits of any city, and between the line of ordinary high tide and the line of extreme low tide. **Wash. Rev. Code** § 79.90.035.

⁵⁵"Second class shorelands" means the shores of a navigable lake or river belonging to the state, not subject to tidal flow, lying between the line of ordinary high water and the line of navigability, and more than two miles from the corporate limits of any city. Id. § 79.90.045.

⁵⁶Id. § 9.94.150(2). See Conte, supra note 45, at 170-84, for an account of the controversy surrounding the enactment of this statute.

⁵⁷Madson v. Spokane Valley Land & Water Co., 40 Wash. 414, 82 P. 718 (1905); Dawson v. McMillan, 34 Wash. 269, 75 P. 807 (1904).

⁵⁸86 Wash. 227, 149 P. 951 (1915).

⁵⁹People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913). The court noted that the reasoning of the California court expressed its own views. 86 Wash. at 231.

⁶⁰76 Wash. 158, 135 P. 1035 (1913)

⁶¹Id. at 165, 135 P. at 1037.

expressly use the term “public trust” in Wilbour v. Gallagher,⁶² but it gave strong protection to the public right of navigation, one of the interests traditionally protected under the public trust doctrine.

More explicit judicial recognition of the public trust doctrine in Washington occurred in 1987, in Caminiti v. Boyle.⁶³ Principles and policies of the doctrine are evident in our state law, however, going back as far as 1891. One line of early cases examined the nature of the state's ownership of tidelands and the beds of navigable waters. The state Supreme Court concluded in a series of decisions over several decades that the state owned these lands in fee, and that entry into statehood extinguished all riparian rights of adjacent landowners to navigable waters.⁶⁴ This proprietary ownership, as contrasted with sovereign trusteeship, enabled the state to dispose of tidelands, in fee, as provided by statute.⁶⁵ But, the state conveyed only the bare legal title, leaving the public trust in place.

A parallel line of cases at this time examined both the nature of the state's disposition of tidelands and the remaining public interests in the lands and waters above them. In Eisenbach, the Court cited public interests in preservation of navigation and fishing as a necessary basis for the state's power to grant lands into private hands.⁶⁶ New Whatcom v. Fairhaven Land Co. analogized the state's ownership of lands to that exercised by the king of England, and described the public's interest as “an easement in [all navigable waters] for the purposes of travel.”⁶⁷ Sequim Bay Canning Co. v. Bugge⁶⁸ acknowledged a public right to navigable waters and fisheries, but denied a public right of clamming on privately leased lands between the high and low water marks.⁶⁹

In State v. Sturtevant the state Supreme Court commented that the state was charged only with preserving the public interest in navigation following grant of shorelands into private ownership.⁷⁰ On rehearing, the court left open the question whether a public right to fisheries

⁶²77 Wash. 2d 306, 462 P.2d 1232, cert. denied, 400 U.S. 878 (1969).

⁶³107 Wash. 2d 662, 732 P.2d 989 (1987).

⁶⁴Eisenbach v. Hatfield, 2 Wash. 236, 26 P. 539 (1891).

⁶⁵Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 89, 102 P. 1041 (1909); Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542, 551, 103 P. 833 (1909).

⁶⁶2 Wash. 236, 253, 102 P. 1041 (1891).

⁶⁷24 Wash. 493, 504, 64 P. 735 (1901).

⁶⁸49 Wash. 127, 94 P. 922 (1908).

⁶⁹See infra Section III.C.2.a for a discussion of the current state of this issue.

⁷⁰76 Wash. 158, 165, 138 P. 650 (1913).

was reserved out of tideland grants.⁷¹ Concurrently, the Court decided two cases explicitly discussing the public interests remaining in tidelands⁷² and an abandoned navigable riverbed⁷³ conveyed into private ownership. The court found all public interests to have been extinguished.

Two important points emerge from these cases. First, the Washington legislature early followed a strong public policy encouraging private ownership of tidelands and concomitant development and industrial expansion. The state Supreme Court implicitly approved this policy in its decisions.⁷⁴

Second, although the Court did not use the term “public trust doctrine” when analyzing these cases, it did invoke the leading public trust doctrine cases of the day, including Illinois Central⁷⁵ and California Fish,⁷⁶ as authority for its analysis. The Court did not, however, apply the presumption against destruction of public trust interests that is the hallmark of the contemporary cases on the public trust doctrine. Instead, particularly with Palmer⁷⁷ and Hill,⁷⁸ the court engaged in perfunctory review of the statutes enabling the grants at issue, and their negative impact on public trust interests.⁷⁹

Wilbour v. Gallagher⁸⁰ marks the modern genesis of public trust doctrine decisions in Washington. The Court found that a shoreland owner's right to develop intermittently submerged property was circumscribed by the public interest in navigation at high water. The thirteenth footnote is particularly significant where the Court encouraged a more

⁷¹86 Wash. 1, 149 P. 33 (1915).

⁷²Palmer v. Peterson, 56 Wash. 74, 105 P. 179 (1909).

⁷³Hill v. Newell, 86 Wash. 227, 149 P. 951 (1915).

⁷⁴See, e.g., Harris v. Hylebos Industries, Inc., 87 Wash. 2d 770, 505 P.2d 457 (1974); Grays Harbor Boom Co., supra note 65.

⁷⁵Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892), cited in Palmer v. Peterson, 56 Wash. at 76.

⁷⁶People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913), cited in Hill v. Newell, 86 Wash. at 231-32.

⁷⁷56 Wash. 74, 105 P. 179.

⁷⁸86 Wash. 227, 149 P. 951.

⁷⁹This problem continues. Recently, Division I of the Washington State Court of Appeals failed to analyze the extinguishment of public trust interests in tidelands, despite its review obligations. See, Reed v. State (unpublished opinion), Dkt. No. 25106-6-I (5-21-90).

⁸⁰77 Wash. 2d 306, 462 P.2d 232 (1969).

systematic method of permitting fill.⁸¹ This footnote is generally thought to have inspired the Shoreline Management Act of 1971.⁸²

Nevertheless, doctrinal development of the public trust remained inconsistent even after Wilbour. The court in Harris v. Hylebos Industries, Inc.⁸³ found that the “legislative intent regarding use of tidelands in harbors of cities is manifestly that . . . such harbors . . . shall consist of commercial waterways, and that the filling and reclaiming of the tidelands . . . shall be encouraged.”⁸⁴ The Court did note that the recently enacted Shoreline Act was not argued in the case as evidence of legislative policy reversal.⁸⁵

More recently, the state Supreme Court has explicitly addressed the role of the public trust doctrine in Washington's coastal management in two cases. In Caminiti v. Boyle,⁸⁶ the Court found that the public trust doctrine had always existed in Washington law.⁸⁷ While acknowledging the power and extent of the public trust doctrine the Court nevertheless found the legislative act at issue, a revocable license to waterside owners to build private recreational docks on state-owned tidelands and shorelands,⁸⁸ not inconsistent with public trust interests in navigable waters.

⁸¹Id. at 316. Footnote 13 of the opinion states:

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

⁸²Laws of 1971, ch. 286, p. 1496 (now codified at **Wash. Rev. Code** Ch. 90.58).

⁸³81 Wash. 2d 770, 786, 505 P.2d 457.

⁸⁴Id. at 786.

⁸⁵Id. at n.11.

⁸⁶107 Wash. 2d 662, 732 P.2d 989 (1987).

⁸⁷Caminiti involved state-owned land, and focused on management of state land consistent with the doctrine rather than regulation of private land.

⁸⁸**Wash. Rev. Code** § 79.90.105. Abutting residential owners may maintain docks without charge if such docks are used exclusively for private recreational purposes and the area is not subject to prior rights. Permission is subject to local regulation and may be revoked by the state upon a finding of public necessity.

The Court in Orion Corp. v. State⁸⁹ made affirmative use of the public trust doctrine in curtailing development of privately owned land where the fills and housing would conflict with public interests in navigable waters. While the state clearly had the power to dispose of tidelands and shorelands, that disposition was not unqualified. Rather, it was limited by public trust concepts of public access for navigation and fisheries. Orion is particularly noteworthy for its analysis of a constitutional “takings” claim. The tidelands owner argued that its property had been taken without just compensation as required by the state and federal constitutions. The Court remanded the case to the trial court for consideration of the relation of the public trust to the burden it placed on the property.

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

3. Legislation

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

a. Judicial Review Function

Usually the judiciary will defer to legislative judgment when reviewing statutes. If a court can find a “rational basis” for a challenged statute, it will decline to substitute its own judgment for that of the legislature.⁹⁰ The courts make an exception to this deferential review, however, when certain constitutional issues are implicated. Courts will, for example, strictly scrutinize statutes that violate principles of equal protection and certain fundamental rights.⁹¹

The public trust doctrine invites another form of heightened judicial scrutiny, not necessarily based on constitutional foundations⁹² but on historical common law traditions and the unique

⁸⁹109 Wash. 2d 621, 642, 747 P.2d 1062, 1073 (1987).

⁹⁰Duke Power v. Carolina Environmental Study Group, 438 U.S. 59 (1978); Williams v. Lee Optical Co., 348 U.S. 483 (1955); State v. Brayman, 110 Wash. 2d 183, 751 P.2d 294 (1988).

⁹¹Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982); Moore v. East Cleveland, 431 U.S. 494 (1977); Myrick v. Board of Pierce Cy. Comm'rs, 102 Wash. 2d 698, 677 P.2d 140, 687 P.2d 1152 (1984).

⁹²Although courts in other states have so implied. See H. Dunning, Instream Flows, The Public Trust, and the Future of the West, presented at Instream Flow Protection in the Western United States: A Practical Symposium (Mar. 31-Apr. 1, 1988) (conference proceedings available from Natural Resources Law Center, University of Colorado).

value and importance of navigable waters and coastlines.⁹³ Thus, the courts have used the public trust doctrine to carefully examine statutes for consistency with public trust principles. Rather than deferring to legislative judgment about coastal management, the doctrine enables courts to compare that judgment with public trust values.⁹⁴

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

b. Statutes

(1) Harbor Line System

The constitutionally mandated harbor line system⁹⁵ gave rise to the first state statutes addressing public trust interests. The harbor line system provides for state ownership and management of all lands lying outside of established harbor lines. The proprietary interest reflected in the constitutional articles providing for the system,⁹⁶ and the implementing statutes,⁹⁷ clearly embody the public trust interest in these lands. The geographic scope of the public trust doctrine exceeds that of the harbor line system, but where they correlate, they are the same. As Johnson & Cooney noted:

“ . . . The existence of the [public trust] doctrine in Washington is important because . . . harbor lines have been established in only a small percentage of the state's waters, and even where harbor lines do exist, they do not perfectly reflect contemporary public values in navigation and in the beds of navigable waters. The public trust doctrine may be available to protect these values in a proper case.”⁹⁸

⁹³See supra Section II.A.

⁹⁴*Caminiti v. Boyle*, 107 Wash. 2d 662, 732 P.2d 989 (1987); *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913); Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 *Mich. L. Rev.* 471 (1970).

⁹⁵**Wash. Const.** art. XV, § 1.

⁹⁶**Wash. Const.** art. XVII. See supra Section II.B.1.

⁹⁷**Wash. Rev. Code** §§ 79.90.010 - .090.

⁹⁸*Johnson & Cooney*, supra note 49, at 287.

The purposes of the harbor line system and the public trust doctrine also correlate. The harbor line system serves to limit the uses of harbor areas to “landings, wharves, streets, and other conveniences of navigation and commerce.”⁹⁹ These purposes mandate public use of the harbor area and in fact embody historic public trust uses.

“Nothing in the Washington harbor line system . . . should be taken to negate the public trust doctrine in this state. . . . The harbor line system has reduced the need for reliance on the public trust doctrine and has, at least until recently, given adequate protection to many of the same public interests which otherwise would have received public trust doctrine protection.”¹⁰⁰

While the harbor line system seeks to reserve and retain public control and access over important commercial waterfronts, it is not clear how other public trust interests, such as fisheries and recreation, would fare in conflict with the harbor line system.

State policy during the first eight decades of statehood clearly favored disposition of tidelands and shorelands into private ownership,¹⁰¹ a policy contemplated and advanced by the harbor line system. Several statutes delineated the functions of the Harbor Line Commission and established programs for the sale of tidelands and leases of navigable water beds.¹⁰² In 1971, the state legislature halted further sales of tidelands and shorelands into private ownership.¹⁰³ By that time, however, 60% of all tidelands and 30% of all shorelands were, and remain, privately owned.¹⁰⁴ Importantly, this private ownership does not extinguish public trust interests.

(2) The Shoreline Management Act

In 1971, the state legislature enacted the Shoreline Management Act.¹⁰⁵ The Shoreline Act establishes a management scheme and ethic for local¹⁰⁶ comprehensive planning and land use control for all shorelines of the state, extending from extreme low tide inland 200 feet, for all

⁹⁹Wash. Const. art XV, § 1.

¹⁰⁰Johnson & Cooney, *supra* note 49, at 286.

¹⁰¹See Conte, *supra* note 45.

¹⁰²See Wash. Rev. Code Titles 43, 53, and 79.

¹⁰³Wash. Laws 1971, Ex. Sess., ch. 217, § 2 (now codified Wash. Rev. Code § 79.94.150).

¹⁰⁴Conte, *supra* note 45, at Introduction, p. x.

¹⁰⁵Wash. Rev. Code Ch. 90.58.

¹⁰⁶The state retains power of approval over local master programs to insure consistency with the policies of the Act. Wash. Rev. Code § 90.58.090.

streams and rivers with flows greater than twenty cubic feet per second, for all lakes twenty acres and larger, and for all associated wetlands.¹⁰⁷ Many of these waters and underlying lands are public trust resources. Whether the doctrine extends to cover all of the lands and waters subject to the jurisdiction of the Shoreline Act is a question yet unanswered by the Washington courts.

The Shoreline Act reflects a legislative intent to protect public trust resources. The statute designs a land use program that governs both state-owned and private lands that fall under its jurisdiction.¹⁰⁸ The Act emphasizes preservation of these waters for public access and water-related or water-dependent uses, and promotes environmental and aesthetic values.

As a multi-purpose planning statute, the Shoreline Act's goals and functions are far broader than those of the public trust doctrine. Nevertheless, certain public trust values are reflected in the Act's legislative findings, use preferences, and guidelines for master program contents. The Orion Court observed that the Shoreline Act reflects public trust principles in its underlying policy, that is, “protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.”¹⁰⁹

While the Shoreline Act represents an exercise of state regulatory power, the public trust doctrine supplements execution of the Act. When regulatory power is applied to trust resources, limiting them to specific trust uses, no takings issue arises. Private land is subject to the trust burden, which pre-dates virtually all private ownership. A takings issue can arise if regulations exceed public trust protections. For example, the Orion court found that the public trust easement on the tidelands at issue precluded their fill and residential development. The tidelands could, however, be used for aquacultural activities under the public trust burden, but not under the Shoreline Act. Hence, Orion Corporation could claim a regulatory taking of its tidelands equal to their value as an aquaculture site, but not for other development.¹¹⁰ The public trust doctrine effectively shields the state's regulatory actions from takings claims, where those actions mirror the scope of the doctrine.

Although the Orion court clearly distinguished between the public trust doctrine and the Shoreline Act, earlier cases indicate the doctrine was nearly merged into the Act. The Court in Caminiti noted that “the requirements of the “public trust doctrine” are fully met by the

¹⁰⁷Id. § 90.58.030(2).

¹⁰⁸This authority may be contrasted with that of other statutes and departments, which exercise authority only over state-owned lands.

¹⁰⁹Orion Corp. v. State, 109 Wash. 2d 621, 641 (1987)(citing Portage Bay-Roanoke Park Comm'ty Coun. v. Shorelines Hearings Bd., 92 Wash. 2d at 641 n. 10, 747 P.2d at 1073 n. 10. (1979)).

¹¹⁰Id. at 660-62. The Court remanded for factfinding on this issue.

legislatively drawn controls imposed by the Shoreline Act of 1971.”¹¹¹ Previously, the court observed that “. . . any common-law public benefit doctrine this state may have had prior to 1971 . . . has been superseded and the Shoreline Act is the present declaration of that doctrine.”¹¹² In Orion, however, the public trust doctrine made a strong appearance in contrast to the Shoreline Act. Thus, while the Shoreline Act may reflect elements and policies of the public trust doctrine, it does not supersede it.

(3) The Waters Resources Act

The Water Resources Act of 1971¹¹³ (WRA) promulgates state policy governing the “utilization and management of the waters of the state,” providing guidelines and priorities for allocation and use of primarily freshwater bodies, especially rivers. This statute represents an intersection between the prior appropriation¹¹⁴ and public trust doctrines, and is explicitly binding on local governments and agencies.¹¹⁵ While the statute does not address navigation interests, it does cite environmental quality, particularly with respect to wildlife, as a priority in water allocation.¹¹⁶ The statute also implies a requirement of base flows to support navigation.¹¹⁷

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

The WRA's function is to provide policy guidance on the use of state waters, such that they are “protected and fully utilized for the greatest benefit to the people of the state.”¹¹⁸ A number of the Act's administrative guidelines are clearly congruent with public trust values,

¹¹¹Caminiti, at 670 (quoting Portage Bay). Nevertheless, the residential preference cited as authoritative in Portage Bay is, arguably, in conflict with public access goals of the public trust doctrine, even though the Shoreline Act cites residential preference as facilitating public access.

¹¹²Id. at 4 (citation omitted).

¹¹³**Wash. Rev. Code** ch. 90.54.

¹¹⁴A common law system of water allocation based on the principle of "first in time, first in right."

¹¹⁵**Wash. Rev. Code** § 90.54.090.

¹¹⁶Id. § 90.54.020(3).

¹¹⁷Id.

¹¹⁸Id. § 90.54.010.

although important exemptions exist. For example, the Act seeks to protect water quality and explicitly requires consideration of base flows in lakes and streams in order to protect environmental quality and fish and wildlife resources.¹¹⁹ The WRA also, however, provides for a variety of other uses, private and public, and exempts existing water rights from the policies of the Act.¹²⁰ Public trust values are in fact only a few of many interests to be considered.

The Water Code of 1917¹²¹ is the basic water appropriation code in Washington, and created the process for establishing priorities among various diverters. The Water Code is potentially inconsistent with the public trust doctrine in that it purports to issue water consumptive use rights that sometimes damage and destroy public trust interests. The public trust doctrine, or the interests protected by that doctrine, were not discussed or considered when the code was adopted. Because no explicit intent to abolish the public trust doctrine is evident in the 1917 Code, or permits issued thereunder, the public trust doctrine should still be applicable to prior appropriation water rights.¹²²

(4) The State Environmental Policy Act

The State Environmental Policy Act of 1971 (SEPA)¹²³ was the third in the trilogy of environmental statutes enacted in that year. SEPA is designed to achieve a balance between resource utilization and environmental protection through evaluation of state and local governmental activities. This evaluation provides a comprehensive analysis of development activities and their impacts in light of potential environmental impacts. The use of and impacts on public trust resources are only one element to be considered in environmental evaluations under SEPA. Nevertheless, the statute substantively guarantees aesthetic and environmental quality to the state's residents. These rights are congruent with those protected by the public trust doctrine, and public trust jurisprudence may support claims to environmental quality of trust resources made through the SEPA process.

¹¹⁹Id. § 90.54.120(2).

¹²⁰Id. § 90.54.900.

¹²¹**Wash. Rev. Code** Ann. § 90.44.010-.900 (1962 and Supp. 1990).

¹²²See infra Section III.B.2.a for a discussion of the retroactive effect of the public trust doctrine on water diversion permits issue in California.

¹²³**Wash. Rev. Code** ch. 43.21C.

(5) The Aquatics Land Act

In 1982, the legislature enacted the Aquatic Lands Act (ALA), consolidating a number of separate statutes relating to the lease and sale of state-owned tidelands and shorelands.¹²⁴ The ALA was further revised in 1984.

The ALA covers a significant portion of public trust lands. Aquatic lands are defined as “all state-owned tidelands, shorelands, harbor areas, and the beds of navigable waters.”¹²⁵ The scope of the common law public trust doctrine differs in that it also embraces privately-owned aquatic lands, and may extend further inland than the line of high water and high tide.¹²⁶

The policies and administration of the ALA have important implications for the public trust doctrine, and the ALA is a prime example of legislation providing for management of state-owned public trust resources in a manner consistent with the doctrine. The ALA recites the great value of aquatic lands and requires that they be managed to benefit the public.¹²⁷ The Act provides guidelines prioritizing use of aquatic lands: public use and access, water-dependent use, environmental protection, and renewable resource use are the most important public benefits to be promoted.¹²⁸ State-wide interests are preferred over local interests. Non-water-dependent uses are permitted only under exceptional circumstances, where compatible with water-dependent uses. When evaluating tideland lease proposals, the managing agency, the state Department of Natural Resources, is instructed to consider the natural values of the land as wildlife habitat, natural area preserve, representative ecosystem, or spawning area, and it may withhold leasing where it finds the lands have significant natural values.¹²⁹

A specific provision of the ALA was at issue in Caminiti v. Boyle,¹³⁰ the first case in which the state Supreme Court explicitly acknowledged the public trust doctrine as a part of Washington law. The court found a harmony between the challenged statute and the Shoreline Act, which it cited as a legislative manifestation of the public trust doctrine. The court upheld the ALA provision at issue, finding it was not in conflict with public trust values.

¹²⁴Id. chs. 79.90 - 79.96.

¹²⁵Id. § 79.90.010.

¹²⁶See infra Section III.B.

¹²⁷**Wash. Rev. Code** § 79.90.450.

¹²⁸Id. § 79.90.455.

¹²⁹Id. § 79.90.460.

¹³⁰107 Wash. 2d 662, 732 P.2d 989 (1987).

(6) The Seashore Conservation Act

The most recent legislative protection for public trust resources was enacted in the 1988 amendments to the Seashore Conservation Act (SCA).¹³¹ Originally enacted in 1967, the SCA explicitly dedicates Washington state ocean beaches to public recreation. The function of the statute is to preserve this public trust resource for public use in perpetuity. The SCA declares that “[t]he ocean beaches within the Seashore Conservation Area are ... declared a public highway and shall remain forever open to the use of the public...”¹³² The legislature based this policy on the increasing public pressure for recreational use of the ocean beaches,¹³³ including swimming, surfing, hiking, hunting, fishing, clamming and boating. General public recreational use is anticipated, but choices and priorities are also expressed, e.g., that most of the beaches shall be available only for pedestrians, not motor vehicles.¹³⁴ Management of these lands is vested under the jurisdiction of the Washington State Parks and Recreation Commission.

The Seashore Conservation Act expresses the policies of the public trust doctrine, and provides rules and a system for management of these important state lands for the public benefit.

C. Summary

The public trust doctrine has burdened all pertinent lands in Washington since statehood. Early cases referenced trust interests without explicitly calling them such. Recently, the state Supreme court has explicitly recognized the doctrine and adopted it into the law. The state Constitution also identifies and promotes the state's interests in public trust resources, and provides a basis for legislative manifestations of the doctrine. Congruence between public trust values and several statutes governing use of the state's natural resources is common. These statutes have become increasingly important resource management tools, and the extent to which they embody or reflect public trust values has increased over time as well.

III. Description, Analysis and Potential Application of the Public Trust Doctrine.

This section begins with a discussion of the fact that the public trust doctrine is primarily a state law doctrine with varying degrees of development from state to state. The following subsections describe the geographical scope of the doctrine, the interests protected by the

¹³¹Wash. Rev. Code §§ 43.51.650-.765.

¹³²Id. § 43.51.760.

¹³³Id. § 43.51.650.

¹³⁴Id. § 43.51.710.

doctrine, and actions by the state and by individuals that are inconsistent with the public trust doctrine. Each of these subsections begins with a discussion of what can clearly be discerned from Washington case law. The scope of the discussion in each subsection then expands to consider how Washington courts might develop the doctrine in light of cases from other jurisdictions, state legislative policies, and academic commentary. This approach is supported by the Washington Supreme Court's reference to all of these sources in discussing the public trust doctrine.¹³⁵

Next, this section turns to several other matters that can impact the effectiveness of the public trust doctrine. First, there is a subsection which discusses who can bring an action for activities that are inconsistent with the public trust doctrine. Second, there is a subsection discussing how the public trust doctrine affects takings claims under both the federal and Washington State Constitutions. Finally, there is a subsection on the interplay of federal and state powers, and its effects on the public trust doctrine.

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

Although the United States Supreme Court has articulated many of the basic public trust principles in a few Supreme Court decisions, the public trust doctrine remains primarily a state law doctrine. The Court's description in Shiveley v. Bowlby of the variation among state assertions of title to tidelands is equally applicable to the public trust doctrine:

[T]here is no universal and uniform law on the subject; . . . each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.¹³⁶

Thus one could say that there is not one, but many, public trust doctrines in America, or at least many different forms of that doctrine.

Variations in the doctrine from state to state are the product of decisions made after statehood. Under the equal footing doctrine, each state entered the Union with the same ownership rights as the original states possessed in lands beneath navigable waters and waters affected by the ebb and flow of the tides.¹³⁷ The federal government held those lands in trust for the state, and upon statehood the state gained title to those lands. Federal law controls whether waters are navigable for title, i.e. navigable so that the state acquired title at

¹³⁵See, e.g., Orion Corp., 109 Wash. 2d at 639-42, 747 P.2d at 1072-72.

¹³⁶Shively v. Bowlby, 152 U.S. 1, 26 (1894).

¹³⁷Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

statehood under the equal footing doctrine.¹³⁸ Subsequent developments in state law, however, control the scope of the doctrine in each state.¹³⁹ Some states have conveyed much of these lands into private hands, and recognize fairly limited public trust interests in them.¹⁴⁰ Other states, such as California and New Jersey, have been at the forefront in expanding the doctrine.

There is some support for a federal public trust doctrine which requires the federal government to act in accordance with trust principles. This may be important in states where the federal government owns large areas of coastal property. After tracing the growing preservationist attitude in public land law, one academic authority said that a federal public trust may exist which places several limits on federal power by 1) constraining congressional action, 2) constraining administrative action, 3) providing a rule of construction for federal legislation that protects trust interests, and 4) forcing the federal government to undertake actions to protect trust resources.¹⁴¹ Court decisions have reached varying conclusions about the existence of a federal public trust doctrine that would constrain management of federal resources.¹⁴²

There is a federal doctrine, the navigation servitude, that closely parallels the public trust doctrine. The federal navigation servitude, though not denominated a federal public trust doctrine, shares common features with the state doctrine. The navigation servitude imposes a

¹³⁸Under federal law, navigability for title is determined by considering the condition of the waters at the time the state was admitted to the Union. See *Utah v. United States*, 403 U.S. 9, 10 (1971); *United States v. Oregon*, 295 U.S. 1, 14 (1935).

¹³⁹*Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

¹⁴⁰Delaware, Pennsylvania, and Virginia recognize that an upland grant from the state extends seaward to the low water mark. Massachusetts and Maine give upland owners the right to tidelands out to the low water mark, or to 100 rods from the high water mark, whichever is less. **D. Slade et al.**, supra note 35, at 48 n.60 (1990). Consistent with the preference for private property, states like Massachusetts and Maine have construed public rights to lands between the high and low water marks narrowly. See, e.g., *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) (holding that state legislation giving the public a right to use privately owned intertidal lands for recreation was an unconstitutional taking under both the U.S. and Maine constitutions); In re Opinion of the Justices 313 N.E. 2d 561 (Mass. 1974) (finding a public right to fish, fowl and navigate, but no public right of passage on foot). See infra, Section III.C.2.a.

¹⁴¹*Wilkinson, The Public Trust Doctrine in Public Land Law*, 14 U.C. **Davis L.Rev.** 269 (1980).

¹⁴²See, e.g., *United States v. 1.58 Acres of Land*, 523 F. Supp. 120 (D. Mass. 1981) (finding dual sovereign nature of public trust when Coast Guard condemned land near Boston Harbor); *City of Alameda v. Todd Shipyards Corp.* 632 F. Supp. 333 (N.D. Cal. 1986) and 635 F. Supp. 1447 (N.D. Cal. 1986) (holding that clause in original conveyance from state to city barring transfer of the trust lands to private ownership also prohibited the federal government from transferring the land to private ownership after it had exercised eminent domain); but cf. *U.S. v. 11.037 Acres*, 685 F. Supp. 214 (N.D. Cal. 1988) (holding that when the federal government exercises its power of eminent domain, the state public trust easement is extinguished).

dominant easement on navigable waters and beds.¹⁴³ One of its primary functions is to justify nonpayment of compensation to private persons who claim their property interests have been damaged or destroyed by a government project on navigable waters in aid of navigation.¹⁴⁴ The navigation servitude protects the public interest in navigation and commerce. It derives from the fact that at statehood the federal government was delegated a servitude under the constitution's commerce clause which applies to federal projects in aid of navigation on all navigable waters. Navigability, for purposes of the navigation servitude, is considerably broader than navigation for the equal footing doctrine.¹⁴⁵ States also have navigation servitudes, having delegated to the federal government only a portion of their reserved sovereign power over navigation. Some state navigation servitudes, as in Alaska,¹⁴⁶ require that the state project be in aid of navigation to trigger the servitude. Others, such as California,¹⁴⁷ apply the servitude even though the state project damages or destroys navigation. The state navigation servitude is closely related to the public trust doctrine, and may, in fact, be considered a special branch of that doctrine. All three of these doctrines, the federal navigation servitude, the state navigation servitude, and the public trust doctrine, reduce the government's obligation to pay damages for taking or damaging private property. Federal management of navigable waters and their beds constitutes management of the federal government's own servitude, and is not regulation of private property.¹⁴⁸ In all three situations the relevant doctrine imposes a pre-existing burden on private property. When the government applies or regulates this burden it is managing its own property rather than that of a private owner.

¹⁴³The navigation servitude, however, applies to waters that are navigable in fact. This is a broader definition, covering more waters, than are covered in the navigable for title test.

¹⁴⁴See, e.g., United States v. Rands, 389 U.S. 121 (1967); see also Johnson, Public Trust Protection for Stream Flows and Lake Levels, 14 U.C. Davis 233, 246-48 (1980).

¹⁴⁵As United States v. Appalachian Elec. Power Co., 311 U.S. 377, 408-09 (1940), made clear, the class of waters that are navigable for purposes of Congress' commerce power are much broader than the class of waters that are navigable for title. Congress' commerce power extends not only to those waters navigable at statehood, but also those that are capable of being navigable. Therefore, the federal navigation servitude, based on Congress' commerce power, extends to more waters than the equal footing doctrine does.

The U.S. Supreme Court has even held that the federal navigation servitude applies to non-navigable tributaries of navigable waters, where the purpose of a project was to aid navigation on the lower, navigable part of a river. United States v. Grand River Dam Auth., 363 U.S. 229 (1960). In Grand River Dam the U.S. Supreme Court held that the U.S. government owed no compensation for waterpower values in a dam site it had condemned as part of a flood control and navigation project. But cf. United States v. Kansas City Life Ins., Co., 339 U.S. 799 (1950) (granting compensation to farmer whose farm was ruined when the United States raised the level of the Mississippi, thereby backing up water on the non-navigable tributary on which the farm lay).

¹⁴⁶Wernberg v. State, 516 P.2d 1191 (AK 1974).

¹⁴⁷Colberg, Inc. v. State ex rel. Dept. of Public Works, 67 Cal. 2d 408, 62 Cal. Rptr. 401, 432 P.2d 3 (1967), cert. denied, 390 U.S. 949 (1968).

¹⁴⁸See infra Section III.H.1.

A federal public trust doctrine, if found to exist, would presumably apply only to federal lands. It would not override state public trust doctrines as applied to state or private lands, or the interpretation of the doctrine by state courts. Theoretically, Congress could enact explicit legislation preempting this field of law, but it has not done so, and is unlikely to do so in the future.¹⁴⁹

If there is a federal public trust doctrine, it might mean that the federal government has an obligation to protect public trust interests in federal lands.¹⁵⁰ The federal consistency requirement of the Coastal Zone Management Act¹⁵¹ may diminish the significance of a federal public trust doctrine. The consistency requirement shows Congress' explicit intent to leave coastal management under state control. It obligates federal agencies and federal permittees to comply with state coastal management programs. State coastal management programs include relevant state judicial and administrative decisions that define and apply state property law.¹⁵² This includes the public trust doctrine. The federal government must act consistent with this aspect of the state coastal management program, as with other aspects of the state's program. Therefore, the discussion which follows focuses on the definition and application of Washington's public trust doctrine.

B. The Geographical Scope of the Doctrine

1. The Established Geographical Scope in Washington

As mentioned earlier, under the equal footing doctrine each state obtained title to the beds of its navigable waters and waters subject to the ebb and flow of the tides. At statehood Washington asserted in its state constitution all possible rights under the equal footing doctrine: “The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within

¹⁴⁹See *infra* notes Section III.H.1.

¹⁵⁰Wilkinson, *supra* note 45, *citing* *Sierra Club v. Department of the Interior*, 376 F. Supp. 90 (N.D. Cal. 1974); *Sierra Club v. Department of the Interior*, 398 F. Supp. 284 (N.D. Cal. 1975); *Sierra Club v. Department of the Interior*, 424 F. Supp. 172 (N.D. Cal. 1976).

¹⁵¹16 U.S.C. § 1456 (198); *see infra* notes Section III.H.2.

¹⁵²16 U.S.C.A. § 1453 (6a) (Supp. 1991).

the banks of all navigable rivers and lakes”¹⁵³ The state constitution, however, was silent on the issue of the use and sale of state-owned shorelands and tidelands, leaving that issue to the politics of future legislatures and to the interpretation to be given Article 17 by the Washington Supreme Court.¹⁵⁴ Washington State was eager to encourage growth and development, so it transferred approximately sixty-one percent of its tidelands and thirty percent of its shorelands into private hands between 1889 and 1979.¹⁵⁵ Those transfers, however, did not in themselves extinguish the jus publicum, or public interest, in tidelands and shorelands. Public and private interests co-exist in those parcels conveyed into private hands,¹⁵⁶ so long as these lands are still usable for public trust purposes.

Washington's Supreme Court has not expressly addressed the geographical scope of the public trust doctrine. The Washington Supreme Court's opinions in Orion and Caminiti suggest, however, that the geographical scope of the public trust doctrine extends at least to the tidelands and shorelands that the state held title to at the time of statehood.¹⁵⁷ In Caminiti, the court may have applied the doctrine up onto upland owners' lands for limited purposes when it said that the public must be able to get around docks built on state-owned

¹⁵³**Wash. Const.** art. XVII, § 1. In Hughes v. State, the Washington Supreme Court defined the line of ordinary high tide: "[W]e deem the word 'ordinary' to be used in its everyday context. The 'line of ordinary high tide' is not to be fixed by singular, uncommon, or exceptionally high tides, but by the regular, normal, customary, average, and usual high tides. . . . Thus the line of 'ordinary high tide' is the average of all high tides during the tidal cycle." 67 Wash. 2d 799, 810, 410 P.2d 20, 26, (1966) rev'd on other grounds, 389 U.S. 290 (1967). The language of the opinion and the diagram the court provided in the opinion, further suggest that the line of ordinary high tide is synonymous with the line of vegetation. Id. at 803, 410 P.2d at 22. As Professor Corker noted, the court's decision to fix the boundary between tidelands and uplands at the vegetation line lacked both significant legal precedent and practical justification. Corker, Where Does the Beach Begin, and to What Extent is This a Federal Question, 42 **Wash. L. Rev.** 33, 43-54 (1966). The Washington Court's fixing the boundary between uplands and tidelands at the vegetation line differs from the federal test announced in Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10 (1935) which adopted a boundary of the mean high tide established by the average elevation of all tides as observed at a location through a tidal cycle of 18.6 years. Professor Corker's assertion that in case of divergence between these two lines, the vegetation line will always be inland, appears sound. Corker, *supra*, at 41 n.29. Thus, the Washington Supreme Court's interpretation of the term "ordinary high tide" means that through its constitution the state of Washington asserted ownership up to the level of vegetation, creating a broad area of publicly owned intertidal lands. As the discussion below indicates, however, natural and man-made changes may affect the state's ownership rights. See *infra*, notes Section H.3.a.

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

¹⁵⁴Hughes, 67 Wash. 2d at 805, 410 P.2d at 23.

¹⁵⁵K. Conte, *supra* note 45, at Introduction, p. x.

¹⁵⁶Orion Corp. v. State, 109 Wash. 2d 621, 639, 747 P.2d 1062, 1072 (1987); Caminiti v. Boyle, 107 Wash. 2d 662, 668-69, 732 P.2d 989, 993-94 (1987).

¹⁵⁷Orion, 109 Wash. 2d at 639, 747 P.2d at 1072; Caminiti, 107 Wash. 2d at 666-67, 732 P.2d at 992.

tidelands and shorelands.¹⁵⁸ These cases should not, however, be read as strictly limiting the geographic scope of the doctrine in Washington. No cases have tested how far the Washington Supreme Court will extend the scope of the doctrine. In deciding the scope of the doctrine, the court would likely consider precedents from other jurisdictions, state legislative policies, and academic commentary.

2. Does the Doctrine apply to Lands Other than those Under Navigable-for-Title Waters or Beneath Tidal Waters

a. Non-navigable for Title Tributaries

The California Supreme Court applied the public trust doctrine to cover non-navigable tributaries in National Audubon Society v. Superior Court of Alpine County (the Mono Lake case).¹⁵⁹ Mono Lake is a large, navigable, scenic lake that sits at the base of the Sierra Nevadas in California. While this saline lake contains no fish, it does contain brine shrimp, which are a source of food for large numbers of migratory and nesting birds. Small islands in the middle of the lake serve as nesting grounds for many of these birds. In 1940, the California Division of Water Resources granted Los Angeles a permit to divert water from the non-navigable tributaries of Mono Lake. Since that time, Los Angeles had been diverting virtually the entire flow of four of the five non-navigable tributaries that originally fed the lake. In this hot, arid, region those diversions had a devastating impact on the lake. By the time the California court heard the case, the surface area of the lake had shrunk by a third and many of the islands in the lake became linked to the mainland, exposing the birds to predators.¹⁶⁰

The plaintiffs in Mono Lake filed suit to enjoin the diversions on the theory that the public trust protects the shores, bed and waters of Mono Lake. Thus, the California Supreme Court squarely faced the issue of whether public trust principles covered activities on non-navigable tributaries that affected navigable waters. The court concluded that the public trust doctrine “protects navigable waters from harm caused by diversion of nonnavigable tributaries.”¹⁶¹ It follows from the logic of the Mono Lake case that California might regulate other types of upland activities that cause harmful spillover effects on public trust resources.¹⁶² Under this interpretation upstream pollution and appropriations of water which

¹⁵⁸The court should logically extend the application of the doctrine so as to allow portages over private lands to get around obstacles or dangerous rapids in streams. See Montana Coalition for Stream Access v. Hildreth, 684 P.2d 1088 (Mont. 1984); Montana Coalition for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984).

¹⁵⁹33 Cal.3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, cert. denied, 464 U.S. 977 (1983).

¹⁶⁰33 Cal.3d at 425, 658 P.2d at 711, 189 Cal.3d at 348.

¹⁶¹Id. at 437, 658 P.2d at 721, 189 Cal. Rptr. at 357.

¹⁶²Admittedly, one could just as easily denominate the result of Mono Lake an extension of the public trust doctrine to upland uses rather than an extension of the geographic scope of the doctrine.

reduce the volume, and therefore the assimilative capacity of the public trust resources, would be subject to state control under the public trust doctrine. The Washington Supreme Court has not had occasion to address this issue. Other states have cited the Mono Lake decision favorably,¹⁶³ and academics have generally praised the decision¹⁶⁴ but no public trust decisions have actually applied (or rejected) the Mono Lake principle to prior appropriation rights.¹⁶⁵

b. Related Wetlands and Uplands

Recognizing the interconnectedness of water systems and the importance of wetlands to water quality and wildlife preservation, courts in some states have extended the public trust doctrine to cover wetlands and even uplands related to navigable water bodies. For example, the high court of Massachusetts extended the doctrine to cover state parks¹⁶⁶ and swamps.¹⁶⁷ The Wisconsin Supreme Court in Just v. Marinette County¹⁶⁸ considered a case in which landowners had filled wetlands without obtaining the necessary permit. The court recognized that Wisconsin had an active duty under the doctrine to preserve water quality, and it noted that wetlands serve a vital role in purifying the waters in the state's lakes and streams.¹⁶⁹ The Wisconsin Supreme Court therefore concluded that filling of wetlands implicated the state's duties under the public trust doctrine.¹⁷⁰ The Washington Court has not

¹⁶³See, e.g., State v. Central Vermont Railway, 571 A.2d 1128 (Vt. 1989); CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1118, 1121 n. 15 (Alaska 1988); Kootenai Environmental Alliance, Inc., v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1093-94 (Idaho 1983).

¹⁶⁴See, e.g., Wilkinson, The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine, 19 Envtl. L. 425, 466 (1989); Sax, The Limits of Private Rights in Public Waters, 19 Envtl. L. 473, 474 (1989); Dunning, The Public Trust: A Fundamental Doctrine of American Property Law, 19 Envtl. L. 515, 518 (1989).

¹⁶⁵Subsequent California appellate decisions have touched on the relation between the public trust doctrine and the prior appropriation system. Golden Feather Community Assoc. v. Thermalito Irrigation District, 199 Cal. App. 3d 422, 244 Cal. Rptr. 830 (1988), reh'g granted, 209 Cal. App. 3d 1276, 257 Cal Rptr. 836 (1989) (declining to apply public trust doctrine to prevent appropriators from a non-navigable tributary of an artificial lake from lowering the level of the lake); United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 150, 227 Cal. Rptr. 161, 201 (1986) (confirming the water board's authority under the public trust doctrine to supervise appropriators to protect fish and wildlife).

¹⁶⁶Gould v. Greylock Reservation Comm., 350 Mass. 410, 215 N.E.2d 114 (1966).

¹⁶⁷Robbins v. Department of Public Works, 355 Mass. 328, 244 N.E.2d 577 (1969).

¹⁶⁸56 Wis.2d 7, 201 N.W.2d 761 (1972).

¹⁶⁹201 N.W.2d at 769.

¹⁷⁰Id.

addressed this issue directly.¹⁷¹ If the Washington court follows Wisconsin it might rule that the doctrine covers wetlands and related uplands that affect public trust interests.

It should be remembered, as stated earlier, that regulation can accomplish many of the same objectives as the public trust doctrine. Frequently police power regulations and the public trust doctrine can be considered as alternatives to the same goal.

c. The Dry Sand Area

Courts have employed numerous legal doctrines, including the public trust doctrine, and “custom” to recognize public rights in the dry sand area of ocean beaches (i.e. those areas above ordinary high tide).¹⁷² For example, in Matthews v. Bay Head Improvement Assoc.¹⁷³ the New Jersey Supreme Court recognized that in order for the public to fully exercise its right to swim and bathe below the mean high water mark, the public must also have both a right of access and a right to use the dry sand area of beaches. In other words, in New Jersey the public is not only entitled to cross private dry sand areas; it also has the right to sunbathe and generally enjoy recreational activities. The court, however, stopped short of saying that all dry sand areas will be subject to public rights, by saying that the extent of the public's rights under the doctrine will depend on the circumstances.¹⁷⁴

The Oregon Supreme Court recognized public rights in the dry sand area of all state beaches through the ancient doctrine of custom in State ex rel Thornton v. Hay.¹⁷⁵ The Oregon Court listed a seven-part test to determine whether the public had acquired a customary right to Oregon's ocean beaches. First, the public's use must be ancient and used “so long that the memory of man runneth not to the contrary.”¹⁷⁶ Second, the customary right must be exercised without interruption.¹⁷⁷ Third, the customary use must be peaceable and free from dispute.¹⁷⁸ The fourth requirement is that the customary right be reasonable.¹⁷⁹ The fifth

¹⁷¹The Court did, however, cite Just in Orion. Orion Corp. v. State, 109 Wash.2d 621, 641 n.10, 747 P.2d 1062, 1073 n.10 (1987).

¹⁷²Other legal theories, such as implied dedication (Gion v. Santa Cruz, 2 Cal.3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970)) and prescriptive easements have also been used to find public rights, but these are generally applied only to site-specific locations.

¹⁷³95 N.J. 306, 471 A.2d 355 (1984).

¹⁷⁴471 A.2d at 365.

¹⁷⁵254 Or. 584, 462 P.2d 671 (1969). The Oregon relied in part on Native Americans' ancient use to establish customary public rights.

¹⁷⁶Id., 462 P.2d at 677 (quoting 1 **Blackstone, Commentaries** 75-78).

¹⁷⁷Id., 462 P.2d at 677.

¹⁷⁸Id.

requirement, certainty, was satisfied by the visible boundaries of the dry sand area and the character of the land.¹⁸⁰ Sixth, the custom must be obligatory; “that is . . . not left to the option of each owner whether or not he will recognize the public's right to go upon the sand area for recreational purposes.”¹⁸¹ Finally, custom must not be repugnant, or inconsistent, with other customs or with other laws.¹⁸² The Oregon Supreme Court found that all seven requirements of the doctrine of custom had been satisfied and declared the public's customary right to the dry sand area of beaches. Courts in other states have also recognized the doctrine of custom as a way to protect public rights.¹⁸³

Other states have recognized the public's rights in the dry sand area through statutes and state constitutional provisions. For example, under a Texas statute, all parts of the Gulf of Mexico beach between the vegetation line and the mean low tide line are subject to the public's right of ingress and egress regardless of private ownership where the public has acquired a right through prescription, dedication, or continuous right.¹⁸⁴ California's Constitution recognizes the public's right of access to tidelands and shorelands.¹⁸⁵

Once again, the Washington Supreme Court has never had the opportunity to directly address the issue of whether public trust rights exist in the dry sand areas of beaches in this state.¹⁸⁶ The Shoreline Management Act of 1971 clearly favors uses which promote public access to and recreation along tidelands and shorelands.¹⁸⁷ A Washington State attorney general's opinion concludes that the public has the right to use and enjoy the dry sand area of ocean

¹⁷⁹Id.

¹⁸⁰Id.

¹⁸¹Id.

¹⁸²Id.

¹⁸³*Matcha v. Mattox*, 711 S.W. 2d 95, 98-99 (Tex. App. 1986); *State ex rel. Haman v. Fox*, 100 Idaho 140, 594 P.2d 1093, 1101 (1979); *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73, 78 (Fla. 1974); *County of Hawaii v. Sotomura*, 517 P.2d 57, 61 (Haw. 1973); but cf *Graham v. Walker*, 78 Conn. 130, 133-34, 61 A. 98, 99 (1905).

¹⁸⁴**Tex. Nat. Res. Code Ann.** § 61.011 (1978).

¹⁸⁵**CA Const.** art. X, § 4. California courts have recognized this section of California's Constitution as a codification of the public trust doctrine. *Carstens v. California Coastal Commission*, 182 Cal. App. 3d 277, 289, 227 Cal. Rptr. 135, 143 (1986); see also *Golden Feather Community Assoc. v. Termalite Irrigation Dist.*, 209 Cal. App. 3d 1284, 257 Cal. Rptr. 836, 842 (1989) (looking to Cal. Const., art X, § 4, to define the scope of the public trust doctrine).

¹⁸⁶For a discussion of the public's right to walk over privately held tidelands, see infra Section III.C.2.a.

¹⁸⁷**Wash. Rev. Code** § 90.58.020 (1989).

beaches through the doctrine of “custom” recognized by the Oregon Supreme Court in Thornton.¹⁸⁸

Whether the court would go beyond recognizing the public's right of ingress and egress and recognize public rights in sunbathing and recreating in the dry sand area, as the court did in New Jersey, is unclear. Alternatively, the Washington Supreme Court might follow those courts reluctant to expand public access at the expense of private property.¹⁸⁹

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

In defining the geographic scope of the public trust doctrine, Washington courts might also look to the Shoreline Act for legislative policy support. The coverage of the Shoreline Act is extremely broad, covering all navigable salt water, all navigable-for-title fresh water, and most waters that are navigable only for pleasure craft. The Act's coverage extends to all uplands lands lying within two hundred feet of the high water mark of all navigable waters and most non-navigable for title waters, both rivers and lakes.¹⁹⁰ It also covers flood plains, flood ways, bogs, swamps and river deltas.¹⁹¹ Because of an expansive definition of shorelines, the Act covers shorelines on lakes and streams which could not meet the test for navigability for title,¹⁹² and thus covers lands that were never owned by the state under the equal footing doctrine. The Shoreline Act and the public trust doctrine are distinctly different, though symbiotically related.¹⁹³ Recently the court found it worth noting that public trust principles are reflected in the Shoreline Act's underlying policies.¹⁹⁴ This

¹⁸⁸AGO 1970 No. 27.

¹⁸⁹Maine and Massachusetts probably would not recognize public rights in the dry sand area. Those states even refuse to recognize a public right to recreate or walk over privately owned intertidal lands. *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989); *In re Opinion of the Justices*, 313 A.2d 561 (Mass. 1974); see *infra*, notes xx-xx and accompanying text.

¹⁹⁰**Wash. Rev. Code** § 90.58.030 (f) (1989). The "ordinary high water mark" itself extends all the way up to the vegetation line. **Wash. Rev. Code** § 90.58.030 (b) (1989).

¹⁹¹**Wash. Rev. Code** § 90.58.030 (f), (g) (1989); **Wash. Admin Code** § 173.22 (1989).

¹⁹²**Wash. Rev. Code** § 90.58.030 (d) (1989) provides that shorelines "means all of the water areas of the state, including reservoirs, and their associated wetlands, together with the lands underlying them except (i) shorelines of state-wide significance; (ii) shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments; and (iii) shorelines on lakes less than twenty acres in size and wetlands associated with such lakes . . ." (emphasis added).

¹⁹³See infra, Section II.B.3.b.(2).

¹⁹⁴For example, in Orion the court noted that "We have also observed that trust principles are reflected in the SMA's underlying policy . . ." *Orion Corp. v. State*, 109 Wash.2d 621, 641 n.11, 747 P.2d 1062, 1073 (1987) citing *Portage Bay-Roanoke Park Comm'ty Council v. Shorelines Hearings Bd.*, 92 Wash.2d 1, 4, 593 P.2d 151 (1979).

suggests that the legislature is both aware of the public trust doctrine, and willing to enact legislation in furtherance of the goals of the doctrine.

This legislative expression of policy could lend encouragement to the Washington Court, as Wisconsin and other courts have done, to rule that the public trust doctrine applies to waters navigable only for recreational purposes, where title to the beds are privately owned and never passed through state ownership. Extension of the public trust doctrine to the areas covered by the Shoreline Act could conceivably help control harmful spillover effects from many non-navigable tributaries and uplands and assure public access--values which other state courts have considered important when extending the geographic scope of the public trust doctrine.

All state owned lands within the coverage of the public trust doctrine are also subject to state management regulations. The Seashore Conservation Act¹⁹⁵ is an example. Under this Act all state-owned ocean beaches between ordinary high tide and extreme low tide are declared public highways, forever open to the use of the public. These lands are managed by the Washington parks and recreation commission for public recreational purposes. A second example is the extensive Aquatic Lands Act,¹⁹⁶ covering all state-owned tidelands, shorelands, harbor areas, and the beds of navigable waters.¹⁹⁷ This Act contains detailed instructions for management of these lands by the state, primarily through the Department of Natural Resources. Presumably the geographic scope of the public trust doctrine could be extended to protect lands subject to these regulations from harmful upland uses.

¹⁹⁵Wash. Rev. Code § 43.51.650 et seq.

¹⁹⁶Wash. Rev. Code ch. 79.90.

¹⁹⁷Wash. Rev. Code § 79.90.010

e. Rights of Riparians and the Public to Use the Surfaces of Non-navigable-for-title Waters

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

Washington cases on riparian and public rights to non-navigable streams are neither recent nor logically consistent. In Griffith v. Holman,¹⁹⁸ decided in 1900, the court took a dim view of public rights to boat and fish on non-navigable streams. The plaintiff sued for trespass because the defendant had cut a wire fence the plaintiff had put across the Little Spokane River and caught fish while floating across plaintiff's property. The State Supreme Court upheld the trial court's award of \$250 for damaging the fence, and \$250 for the fish--no small award in those days.¹⁹⁹ Paradoxically, a year later the court recognized the right of loggers to float their logs down non-navigable streams in Watkins v. Dorris.²⁰⁰ In a relatively more recent case, Snively v. Jaber²⁰¹ the court held that riparians and their licensees have the right to use the entire surface of non-navigable-for-title lakes.²⁰² This sounds, at first blush, different than saying that the "public" has a right to use the surface of these waters. But the difference is more apparent than real. Other riparians, and their licensees, can use these lake surfaces. Licensees include anyone who has the riparian's permission, whether that permission is obtained by fee, or for free. The state is a riparian if it acquires an access road to a lake. The state can allow the public as licensees to use this access. By comparison, if the law said the "public" has a right to use these waters, this public right would only be available to those who could get onto the lake without trespassing on private property.²⁰³ That is, the public must, in effect, be licensees of a riparian.

¹⁹⁸23 Wash. 347, 63 P. 239 (1900).

¹⁹⁹Later, in Snively v. Jaber, 48 Wash. 2d 815, 296 P.2d 1015 (1956), the court said that the Griffith decision was based on a fencing statute.

²⁰⁰24 Wash. 636, 64 P. 840 (1901).

²⁰¹48 Wash. 2d 815, 296 P.2d 1015 (1956).

²⁰²For a long while the state's Department of Wildlife followed a policy of obtaining waterfront lots along non-navigable lakes, thereby becoming riparians and opening up lakes to public use. But there are limits to this practice, as the court indicated in Botton v. State, 69 Wash. 2d 751, 420 P.2d 352 (1966). There the court held that although the state may admit the public to use the lake, the state's failure to control public use of the lake was an unreasonable interference with the riparian rights of private lakefront owners.

²⁰³A float plane could land on a non-navigable-for-title lake without trespassing. But the number of such incidents is so small as to be virtually irrelevant.

These differences in Washington law between lakes and streams can best be explained in terms of the social and economic needs of the time.²⁰⁴ Supporting logging operations has been important since the earliest days in Washington's history. Recreation on non-navigable lakes was also deemed important, whereas irrigation appropriations from lakes is relatively less significant. With the growing social and economic importance of recreational uses of small streams, it is likely that the Washington Supreme Court would either distinguish or overrule Griffith today. As the population of the state grows, the public demand for recreational uses of small streams will continue to increase. Several other western states have recognized public rights of navigation on streams that are not commercially navigable but are navigable for pleasure craft only.²⁰⁵ Washington may follow the example set by those other states for streams. It has already done so for lakes.

3. Other Issues Affecting the Geographical Scope

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

(1) Accretions/Reliction

The natural world, always dynamic, pays little heed to the boundaries set by humans. Coasts and shores change. The Long Beach Peninsula, located in Pacific County in southwestern Washington State, is a good example. In historical times, large accretions have extended the ocean beaches along this peninsula hundreds of feet to the west.²⁰⁶ Thus, the question of ownership of accretions in our state is not just an academic one; it implicates very real, and valuable, public and private interests.

The general rule in most states is that gradual changes by accretion or reliction change the boundaries of privately owned uplands and public trust lands. Washington follows this rule for shorelines along fresh water rivers and lakes.²⁰⁷

²⁰⁴Johnson, Riparian and Public Rights to Lakes and Streams, 35 **Wash. L. Rev.** 580, 612-14 (1960).

²⁰⁵See Montana Coalition for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984); People ex rel. Younger v. County of El Dorado, 96 Cal. App. 3d 403, 157 Cal. Rptr. 815 (1979); Hitchings v. Del Rio Woods Recreation & Park Dist., 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1976); People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961); but cf. People v. Emmert, 597 P.2d 1025 (Colo. 1979) (holding that the public has no right to use waters overlying private lands for recreational purposes). In 1987, the Oregon Legislature enacted two statutes that apply the public trust doctrine to all waters of the state. **Or. Rev. Stat.** §§ 537.336, .460 (1987).

²⁰⁶Washington State Parks and Recreation Commission, The Evolution of Accreted Lands Ownership on the Ocean Beaches of the Long Beach Peninsula, 3 (Unpublished Report, 1981).

²⁰⁷Ghione v. State, 26 Wash. 2d 635, 644, 175 P.2d 955, 961 (1946); Spinning v. Pugh, 65 Wash. 490, 118 P. 635 (1911).

The state does, however, assert ownership to accretions to ocean beaches that occurred after 1889 statehood. In Hughes v. State,²⁰⁸ the Washington Supreme Court held that accretions to ocean beaches that occurred after statehood in 1889 belonged to the State of Washington, not the upland owner. Mrs. Hughes appealed the case to the U.S. Supreme Court. The high court held that because Mrs. Hughes' predecessor in title had received the property from the U.S. prior to Washington statehood, her right to accretions to her land was governed by federal, not state law. According to the Court, under federal common law Mrs. Hughes was entitled to the accretions to her property.²⁰⁹ After a brief flirtation with expanding the role of federal common law in determining the rights of federal patentees, the Court limited the application of federal law to cases like Hughes where ocean front property was involved on the ground that international relations were implicated.²¹⁰

The Seashore Conservation Act²¹¹ provides that all accretions along the ocean shores owned by the state are declared public highways the same as ocean tidelands. The Washington State Parks and Recreation Commission, however, has established a negotiation system to try and solve the management issues for these accreted lands.²¹²

(2) Avulsion

Under Washington law, the addition or loss of land due to avulsion or sudden catastrophe does not affect the seaward boundary.²¹³ Most other states adhere to this fixed boundary rule

²⁰⁸67 Wash. 2d 799, 410 P.2d 20, 29 (1966) rev'd 389 U.S. 290 (1967); see also Wash. Rev. Code § 79.94.310 (1989).

²⁰⁹The Court in Hughes did not address the question of whether the federal rule applied to accretions to property where the title was acquired from the federal government after statehood. Description of the Hughes holding in California ex rel. State Lands Commission, 457 U.S. 273, 280 (1982), suggests that this federal rule on accretion ownership applies to all federal patents along oceanfronts, not just pre-statehood patents.

²¹⁰Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 377 n.6 (1977). In a more recent decision, California States Lands Commission v. United States, 457 U.S. 273, 279-82 (1982), the United States Supreme Court reaffirmed the application of federal law to accretions along the ocean when it held that federal law dictates that accretions to federal lands belong to the federal government.

²¹¹**Wash. Rev. Code** § 43.51.650.

²¹²In April, 1968, negotiations between private landowners and WSPRC [Washington State Parks and Recreation Commission] led to the establishment of a Seashore Conservation Line [SCL], and a program to secure dedications west of this line from persons who had clear title up to the Pacific Ocean. As a result, the boundary of the SCA [Seashore Conservation Area] has changed -- where applicable -- to this new coordinate line, established by WSPRC, approximately 150 feet east of the line of vegetation on the peninsula. The agreement also required the SCA to be reestablished in 1980 and every ten years thereafter to insure it remains the same distance from the line of mean high tide.

T. Terich & S. Snyder, The Evolution of Accreted Land Claims on the Long Beach Peninsula of Washington State, 59 (Western Washington University).

²¹³Harper v. Holston, 119 Wash. 436, 442, 205 P. 1062, 1064 (1922).

for avulsive changes.²¹⁴ Thus if a navigable river changed its course suddenly by avulsion, title to the original bed would remain in the state, and would still be subject to the public trust doctrine. The new location of the river would also be subject to the public trust doctrine, although the bed would be privately owned.

(3) Artificial Changes

States generally treat artificial changes in the shoreline the same as avulsive changes--i.e. boundaries remain fixed. This is particularly true if the owner of the upland property brings about the change to add to his/her property.²¹⁵ Where the owner of property is not involved in, or is a "stranger" to, the cause of the change, several courts have held that title will vest in the upland owner.²¹⁶ Such changes in the shoreline often occur where a neighboring owner or the state has erected a seawall, pier, or breakwater.

Artificial changes along coastlines and shorelines may also raise other issues besides title. For example, if a waterside owner fills or alters tidelands, will they still be subject to the public trust? The California Supreme Court in Berkeley v. Superior Court balanced the interests of the public and of landowners when it stated that the trust still applies to tidelands "still physically adaptable for trust uses" but not to lands "rendered substantially valueless for those purposes."²¹⁷ The Washington Supreme Court quoted Berkeley on this point in Orion,²¹⁸ and might follow a similar rule.²¹⁹

Yet another issue is whether the public trust doctrine applies to artificially created tidelands, shorelands, bottomlands or submerged lands. Some states courts have held that the trust does not apply to such lands,²²⁰ but another court held that it does.²²¹

²¹⁴See e.g., Cinque Bambini Partnership v. State, 491 So.2d 508, 520 (Miss. 1986), aff'd 484 U.S. 469 (1988) ("By way of contrast to our law regarding accretion and reliction, boundaries and titles are not affected by avulsions.").

²¹⁵See, e.g., Menominee River Lumber Co. v. Seidl, 149 Wis.2d 316, 320, 135 N.W. 854 (1912).

²¹⁶See, e.g., State Dept. of Natural Resources v. Pankratz, 538 P.2d 984, 989 (Alaska, 1975).

²¹⁷26 Cal.3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, cert. denied, Santa Fe Land Improvement Co. v. Berkeley, 449 U.S. 840 (1980). In applying this test, the court said that tidelands that have been filled, whether or not they have been substantially improved, are free from the trust to the extent that they are no longer subject to tidal action. The court noted that parcels which no longer have Bay frontage were obvious examples of where the trust had been extinguished. Id. at 534, 162 Cal. Rptr. at 338-39.

²¹⁸109 Wash. 2d 621, 640 n.9, 747 P.2d 1062, 1072 n.9 (1987).

²¹⁹The Washington Supreme Court's decision in Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969), cert. denied, 400 U.S. 878 (1970) suggests that our Court will have little tolerance for those who fill public trust lands. In that case, the court required that fill be removed from Lake Chelan.

²²⁰See, e.g., Cinque Bambini Partnership v. State, 491 So.2d 508, 520 (Miss. 1986); O'Neill v. State Highway Dept., 50 N.J. 307, 235 A.2d 10 (1967).

b. Lands Exempt from the Public Trust Doctrine

There are also several categories of land that may be exempt from the public trust doctrine. These fall under three categories: 1) lands conveyed prior to statehood, 2) federal acquisitions of state public trust lands and 3) lands covered by Indian treaties.

First, it is possible that tidelands and shorelands conveyed prior to statehood may not be subject to the public trust. Extinguishment of the trust could only occur where the words of the original grant expressly and unequivocally expressed that intent.²²² Given the federal government's responsibility to hold lands in trust, the amount of federal grants that extinguish the public trust interest is likely to be small.

The history of federal grants in Washington, however, indicates that the public trust continues to apply to pre-statehood grants in this state. Many pre-statehood grants to private parties suggest that the boundary of their lands extended out to the meander line. The government meander line, when compared to the line of mean high tide, is often far out in the water. Government surveyors in the 1870s and 1880s were paid by the mile, and often did not adhere to the actual contours of the shoreline, but followed the path of least resistance.²²³ The federal government, however, generally had no right to convey lands below the high water mark, but held those lands in trust for future states under the equal footing doctrine.

Nevertheless, the Washington State Constitution provided that this section [declaring public ownership] shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.²²⁴

While on its face, this phrase appears to be only a disclaimer of ownership to lands that the federal government validly conveyed into private hands, the Washington Supreme Court early in its history held that this provision of the Constitution was a present grant of the State's interest in lands that had been previously patented.²²⁵ As the court wrote in Scurry v. Jones:

²²¹ Mentor Harbor Yacht Club v. Mentor Lagoons, 170 Ohio St. 193, 199, 163 N.E.2d 373, 377 (1959) (holding that if waters were naturally navigable, then an artificial extension of a channel brought the extended waters under the public trust doctrine).

²²² East Haven v. Hemingway, 7 Conn. 186, 199 (1828) (A pre-statement grant could convey public rights into private hands, but only with "words so unequivocal, as to leave no reasonable doubt concerning the meaning.")

²²³ K. Conte, supra note 45.

²²⁴ Was. Const. art. xvii, § 1.

²²⁵ See, e.g., Cogswell v. Forest, 14 Wash. 1, 43 P. 1098 (1896); Scurry v. Jones, 4 Wash. 468, 30 P. 726 (1892). Subsequent cases following Scurry include Smith Tug & Barge v. Columbia-Pac., 78 Wash. 2nd 975, 978-79, 482 P.2d 769 (1971); Bleakley v. Lake Washington Mill Co., 65 Wash. 215, 221-23, 118 P. 5 (1911); Washougal Transp. Co. v. Dalles, etc. Nav. Co., 27 Wash. 490, 68 P. 74 (1902).

And as the state, in the section immediately preceding this, had asserted its title to all such lands, whether occupied or unoccupied, which had not been thus patented, it seems clear to us that the evident intent of the disclaimer was to ratify the action of the United States in the issuance of such patents. In our opinion, the interest of the state passed as fully to the grantees in such patents, or to those holding under them, as it would have done had there been express words of grant used in the constitution. Any other interpretation of the language used would deprive it of any beneficial force whatever.²²⁶

Thus it was the state, not the federal government, that actually gave these lands to private parties. The state is bound by the public trust doctrine, and any conveyances of tidelands that the disclaimer clause did make to private parties would not have destroyed the public trust interest in those land.²²⁷

Congress may convey public trust lands prior to statehood in accordance with international obligations. In Shively v. Bowlby the Supreme Court stated that “Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations”²²⁸ Second, when the federal government exercises its power of eminent

²²⁶ Scurry, 4 Wash. at 470.

²²⁷ Recently, there was a dispute over the waterward boundary between uplands owned by a private landowner and tidelands owned by Washington State. See State's Memorandum in Support of Summary Judgment and in Opposition to Defendant's Request for a Preliminary Injunction, State v. Lund, No. 249864 (Pierce County, filed Aug. 4, 1989). Although the case ultimately settled, the state's memo raises several interesting issues, such as whether post-statehood patentees also had a waterward boundary of the meander line, and whether such a boundary is a moving boundary so that an erosion occurred along the Lunds' property, their property line moved landward.

²²⁸ 152 U.S. 1, 48 (1894). The United States Supreme Court's decision in Summa Corp. v. California Land Commission, 466 U.S. 198 (1984) comes closest to an example of an extinguishment of the public trust doctrine in accordance with the federal government's international obligations. The Summa case involved the question of whether a lagoon near Los Angeles was subject to the public trust doctrine. Summa Corporation's title dated back to an 1839 Mexican title. Pursuant to the 1848 Treaty of Guadalupe Hidalgo, Congress set up a Board of Land Commissioners in 1851 to decide the rights of those claiming title to lands under the Spanish or Mexican governments. Id. at 203. Summa Corporation's predecessors in title finally had their rights in the land at issue confirmed in 1873. While the Court acknowledged that ordinary federal patents purporting to convey tidelands located within a states are invalid because the federal government holds such tidelands in trust for states, the situation was different with patents confirmed under the 1851 Act, because the United States was discharging its international obligations. The Court held that California's failure to assert its public trust interest during the confirmation process precluded it from claiming a public trust easement applied at the present time.

domain to acquire trust burdened lands, those lands may become exempt from the trust. The few case precedents on this issue, however, are conflicting.²²⁹

Third, lands may be exempt from the public trust doctrine because of an Indian treaty or agreement²³⁰ entered into prior to statehood. Presumably the trust would not apply to Indian country because of the rule that state law does not apply to Indian reservations unless Congress clearly expresses such an intent.²³¹ Whether a treaty gives a tribe title to the beds underlying navigable waters, involves conflicting presumptions. On the one hand, a fundamental principle in interpreting Indian treaties is that they are to be interpreted in the way the Indians would have understood them.²³² Most Indians presumably believed they were receiving the water bodies and beds within or alongside their reservations. On the other hand, under the equal footing doctrine, the federal government held the lands underlying navigable waters in trust for each future state until they entered the Union. These two legal principles collided directly in Montana v. United States.²³³ The Court there found that the Crow treaty language did not overcome the presumption that the beds of navigable waters remain in trust for future states and pass to the new states when they assume sovereignty. The Court noted that the Crow Tribe had historically depended on buffalo and other upland game rather than on fishing. Therefore, it concluded that the state, not the tribe, held title to the bed of the Big Horn River. Whether an Indian tribe or the state holds title to the bed of navigable waters is likely to turn on the language of the treaty or agreement, and on whether the tribe has historically depended on resources located in the water or on submerged land.²³⁴ If the tribe has title then the public trust interest under state law is probably extinguished, on the theory that state law does not generally apply on an Indian reservation unless Congress clearly expresses such an intent.²³⁵

²²⁹See, e.g., U.S. v. 1.58 Acres, 523 F. Supp. 120, 124 (D. Mass. 1981) (noting that the federal government is as restricted in its ability as states are in abdicating its sovereign *jus publicum* to private individuals); but cf. United States v. 11.037 Acres, 695 F.Supp. 214 (N.D. Cal. 1988) (holding that where the federal government exercises its powers of eminent domain, the state public trust doctrine is extinguished). See also supra Section III.A. for a discussion of the existence of a federal public trust doctrine.

²³⁰No treaties were signed with Indian tribes after 1871. However, reservations were created thereafter, usually by agreement between the tribe and the Executive, approved by Congress. Additional reservations were created by Executive Order and by congressional legislation. **F. Cohen, Federal Indian Law** 103 (1982 ed.).

²³¹For a general discussion of federal preemption of state law, see **Cohen, supra** at 270-79.

²³²United States v. Winans, 198 U.S. 371 (1905).

²³³450 U.S. 544 (1981).

²³⁴For a recent case where the court found that a tribe had title to the water beneath a navigable waterway, see Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983), cert. denied, 465 U.S. 1049 (1984). See also Note, Not on Clams Alone: Determining Indian Title to Intertidal Lands, 65 **Wash. L. Rev.** 713 (1990).

²³⁵**Cohen, supra** at 270-79.

C. Interests Protected by the Doctrine

1. Interests Protected Under Washington Law

The classic list of interests protected by the public trust include commerce, navigation, and fisheries.²³⁶ The Washington Supreme Court has followed the general trend by recognizing a broad range of public interests. The court noted in Orion that it had extended “the doctrine beyond navigational and commercial fishing rights to include `incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes.”²³⁷

Under Washington law, environmental quality and water quality are probably also protected interests. The public's interest in fishing can only be realized if water quality and quantity are adequate to support fish.²³⁸ Moreover, the Washington Supreme Court indicated in Orion that it would look favorably on a claim that protecting the environment is a public trust interest. The court noted how it has found trust principles embodied in Shoreline Act underlying policy, “which contemplates `protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life . . .”²³⁹ Moreover, in another footnote, the court cited Marks v. Whitney, a California case which recognized the public interest not only in ecological values, but also in preserving tidelands in their natural state.²⁴⁰ Therefore, given the proper case, the Washington Supreme Court may well follow several other states by recognizing water quality and environmental

²³⁶Johnson, Water Pollution and the Public Trust Doctrine, 19 *Envtl. L.* 485, 495 (1989). Even early cases like Arnold v. Mundy, 6 N.J.L. 1, 12 (1821) recognized a broad spectrum of public interests that included “fishing, fowling, sustenance and all other uses of the water and its products.”

²³⁷Orion Corp. v. State, 109 Wash. 2d 621, 641, 747 P.2d 1062, 1073 (1987), quoting Wilbour v. Gallagher, 77 Wash. 2d 306, 316, 462 P.2d 232 (1969) cert. denied, 400 U.S. 878 (1970).

²³⁸United States v. State Water Resources Board, 182 Cal. App. 3d 150, 227 Cal. Rptr. 161, 201 (1986) (holding that Water Board had authority to supervise appropriators under the public trust doctrine to protect fish and wildlife); Johnson, Water Pollution and the Public Trust Doctrine, 19 *Envtl. L.* 485, 488 (1989).

²³⁹Orion, 109 Wash. 2d at 641 n.11, 747 P.2d at 1073 n. 11, quoting Portage Bay-Roanoke Park Comm'ty Council v. Shorelines Hearings Bd., 92 Wash. 2d 1, 4, 593 P.2d 151 (1979).

²⁴⁰Orion, 109 Wash. 2d at 641 n. 10, 747 P.2d at 1073 n.10.

preservation as public trust interests.²⁴¹ If water quality is a protected interest, then the public trust doctrine might affect activities which degrade water quality, including discharges of wastes into public waters, activities which cause erosion and thus silting of waterbodies, and prior appropriations which reduce the assimilative capacity of waterbodies and thus result in quality degradation.²⁴² Needless to say, any application of the public trust doctrine in these areas would have to take account of existing federal and state laws on water pollution, the prior appropriation code, and the legitimate economic expectations of those affected.

Early courts did not often expressly address environmental quality as a protected public trust right. It was widely thought that nature's bounty was limitless. More recent experience has shown that pollution can limit or destroy public enjoyment of trust resources just as much as filling or committing tidelands and shorelands to private, monopoly uses.²⁴³ In the past, the public trust doctrine did not allow such monopolization; now that the threat to public environmental rights is in the form of pollution and environmental degradation, the courts are expanding their interpretation of the public trust doctrine to protect the public rights from that threat.

²⁴¹Several courts have recognized environmental quality as a public trust interest. See, e.g., *National Audubon Society v. Superior Court of Alpine County*, 33 Cal.3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983); *Marks v. Whitney*, 6 Cal.3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971); *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 632, 671 P.2d 1085, 1095 (1983) (extending the doctrine to cover "navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality"); *Treuting v. Bridge and Park Commission of Biloxi*, 199 So.2d 627 (Miss. 1967); *Just v. Marinette*, 56 Wis. 7, 17, 201 N.W. 761, 768-69 (1972) (finding a public right to preserve wetlands because "they serve a vital role in nature"). In 1987 the Oregon Legislature enacted two statutes indicating that the public trust doctrine covers water quality. **Or. Rev. Stat.** §§ 537.336, .460 (1987). See also *Johnson*, *supra* note 235, at 496-98. But cf. *MacGibbon v. Board of Appeals of Duxbury*, 369 Mass. 512, 517-18, 340 N.E.2d 487, (1976) (holding that preservation of ocean food chain and tidelands in natural state was not as "practical" or "productive" as dredging and filling wetlands).

²⁴²*Johnson*, *supra* note 35, at 505.

²⁴³**D. Slade, et al.**, *supra* note 35, at 133.

2. Interests Potentially Protected in Washington

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

The Washington Supreme Court has not had an opportunity to consider whether the public has a right to walk across privately owned tidelands, or whether the public may dig clams on those tidelands. One commentator notes that nearly all states recognize that the public trust doctrine provides the public a right to pass and repass over public trust tidelands.²⁴⁴ While states' courts have issued opinions which generally lend support to the public's right of access, precious few have directly addressed the issue of whether the public has a right to walk across privately owned tidelands.

For example, the Rhode Island Supreme Court in Jackvony v. Powel,²⁴⁵ looked to Rhode Island's Constitution which guarantees to the people "all the privileges of the shore," and concluded that one of those privileges included the right to pass along the shore.²⁴⁶ The case did not, however, involve the public's rights to pass along a privately held beach. It involved an attempt by a beach commission to fence off a beach owned by the city of Newport. Similarly, in Tucci v. Salzhauer,²⁴⁷ a New York court held that the public had a right to pass and repass over lands owned by the Town of Hempstead. Thus, Tucci, like Jackvony, recognized a public right of passage, but did not specifically address the question of whether the public would have a right to pass over privately held tidelands.

New Jersey Supreme Court decisions suggest that the public would have a right to walk over privately held tidelands. The public's rights to use tidal lands and water "encompasses navigation, fishing and recreational uses, including bathing, swimming and other shore activities."²⁴⁸ Presumably, "other shore activities" would include the right to walk along tidelands. Also significant is the fact that New Jersey has recognized the public's right to use the dry sand area of privately owned beaches under the public trust doctrine.²⁴⁹ Because the New Jersey Supreme Court was willing to go so far as to recognize public's right to use privately owned dry sand areas of beaches, it probably would not have a problem recognizing the public's right to walk over privately held tidelands.

²⁴⁴**D. Slade et al.**, supra note 35, at 162.

²⁴⁵21 A.2d 554 (R.I. 1941).

²⁴⁶Id. at 558. See also Nixon, Evolution of Public and Private Rights to Rhode Island's Shore, 24 **Suffolk U.L. Rev.** 313, 325-26 (1990) (discussing a recent amendment to the Rhode Island Constitution that listed a right to pass along the shore as a public right).

²⁴⁷40 A.D. 2d 712, 336 N.Y.S.2d 721 (1972). The court noted that the public's right of passage even included the right to push a baby carriage along the shore. Id., 336 N.Y.S.2d at 724.

²⁴⁸Matthews v. Bay Head Improvement Association, 471 A.2d 355 (N.J. 1984).

²⁴⁹Id.

California would also probably recognize the public's right to walk along privately held tidelands. In Marks v. Whitney,²⁵⁰ the California Supreme Court noted that the public trust easement on privately held lands includes the public's "right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state. . . . The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs."²⁵¹ This language suggests that California would recognize a public right to walk over privately held tidelands.

In Massachusetts and Maine, however, the public's rights do not include the right to pass over privately held tidelands. In In re Opinion of the Justices,²⁵² the Massachusetts Supreme Court considered the constitutionality of a proposed statute that would have given the public a right of passage over privately held tidelands. In determining the scope of public rights remaining in privately held tidelands, the court considered the colonial ordinance of 1641-47. In that ordinance the Massachusetts colony extended the titles of upland owners to encompass land as far as the mean low water line or 100 rods from the mean high water line, whichever was less. The court found that the original ordinance had only reserved the public's rights in fishing, fowling, and navigation, and it refused to take a more expansive view of public rights which would include the right to pass along, or enjoy recreation on, privately held tidelands.²⁵³ Therefore, it found the proposed ordinance to be an unconstitutional taking of private property without compensation.

The Supreme Court of Maine recently followed Massachusetts's course in a close 4-3 opinion, Bell v. Town of Wells.²⁵⁴ Maine, which was originally a district of Massachusetts, shares a common legal history with that state. The majority in Bell found that Maine's constitution had confirmed the seventeenth century Massachusetts statute giving upland owners title to tidelands. The court traced the description of public rights through cases from Massachusetts and Maine. Its conclusion mirrored that of the Massachusetts court: the public's rights are limited to those of navigation, fishing and fowling.²⁵⁵ The court specifically mentioned "recreational walking" as a right that it refused to recognize.²⁵⁶

The results of the Massachusetts and Maine decisions are somewhat anomalous. As one commentator noted, Massachusetts's approach does not in fact preclude the public from

²⁵⁰6 Cal. 3d 251, 98 Cal. Rptr. 790, 491 P.2d 374 (1971),

²⁵¹Id. at 259, 98 Cal. Rptr. at 796, 491 P.2d at 380.

²⁵²313 N.E.2d 561, 566-67 (1974).

²⁵³Id. at 567.

²⁵⁴557 A.2d 168 (Me. 1989).

²⁵⁵Id. at 175-76.

²⁵⁶Id. at 175.

walking on the foreshore. Instead, it simply requires that a person desiring to stroll along the shore carry a fishing line or net.²⁵⁷

Washington has no ordinances similar to Massachusetts' 1641-47 ordinance which gave upland owners title to tidelands. Our court has also recently recognized a broad range of recreational rights under the public trust doctrine.²⁵⁸ These facts suggest that the Washington Supreme Court might support the public's right to walk over privately held tidelands, but the eventual outcome on this issue remains uncertain.

Similarly, the public's right to gather shellfish on privately held lands also remains uncertain in Washington. An early Washington case, Sequim Bay Canning Co. v. Bugge,²⁵⁹ favored private rights to shellfish over public rights. The plaintiff canning company leased tidelands from the state, and raised local and eastern clams on them. The defendants were a competing cannery and had its employees, who happened to be Indians, go on to the plaintiff's tidelands and collect shellfish. The court held that plaintiffs were entitled to injunctive relief prohibiting the defendant or his employees from trespassing and digging clams. The court reasoned that because clams live in the soil under the waters, they belong to private owners or lessees of the tidelands.²⁶⁰

Sequim Bay Canning, however, is not solid authority against a public trust right to harvest shellfish. First, the plaintiff in that case leased lands for the specific purpose of artificially raising clams.²⁶¹ Without a secure right to raise clams on those lands, the company's lease would have been worthless.²⁶² Where a party owns or leases tidelands for a purpose other

²⁵⁷Comment, Coastal Recreation: Legal Methods for Securing Public Rights in the Seashore, 33 Me. L.Rev. 69, 83 (1981).

²⁵⁸The public's rights include "' incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes . . .'" Orion Corp. v. State, 109 Wash. 2d 621, 641, 747 P.2d 1062, 1073 (1987) (quoting Wilbour v. Gallagher, 77 Wash. 2d 306, 316, 462 P.2d 232 (1969), cert. denied, 400 U.S. 878 (1970)). Moreover, on ocean beaches, a Washington State Attorney General's Opinion has recognized the public's customary rights, and those rights would presumably include the public's right to walk along tidelands. AGO 1970 No. 27. The public might also resort to other legal theories, such as dedication and prescription.

²⁵⁹49 Wash. 127, 94 P. 922 (1908).

²⁶⁰49 Wash. at 131. Similarly, in Palmer v. Peterson, 56 Wash. 74, 105 P. 179 (1909), the Washington Supreme Court held that when the state deeded oyster lands to a private party, that party received a right to exclusive possession of those tidelands. A later decision, State v. Van Vlack, 101 Wash. 503, 505-06, 172 P. 563 (1918), also described shellfish as private property. The appellant in that case claimed that the state could not prohibit private owners of tidelands from harvesting shellfish between April 1 and September 1 (which is when shellfish reproduce) because the shellfish were their property. The court acknowledged the public's interest in shellfish by upholding the state's efforts to limit the harvesting of shellfish as a valid exercise of the state's police power.

²⁶¹The Department of Natural Resources still issues leases to private parties for raising oysters, geoducks, shellfish and other agricultural uses. **Wash. Rev. Code** ch. 79.96.

²⁶²49 Wash. at 129.

than raising shellfish, it is unclear that the court would find such a compelling private property interest in shellfish located on that land. Second, Sequim Bay Canning did not involve the general public's right to gather clams. It involved hostile efforts by one cannery to destroy another. Therefore, if the Washington Supreme Court faced the issue of whether the public has a right to gather shellfish on privately owned tidelands, Sequim Bay Canning might not be controlling. Significantly, even states like Maine and Massachusetts, which have been very conservative about expanding the public's rights to privately owned tidelands, have recognized the public's right to gather shellfish on privately held tidelands.²⁶³

b. Rights of Riparians and the Public to Boat and Fish on the Surfaces of Non-navigable for Title Waters

This subject was previously discussed as an extension of the geographic scope of the public trust doctrine.²⁶⁴ Alternatively, one may view it as a public interest.

c. Aesthetic Beauty

Extension of the list of protected public trust interests to include preservation of aesthetic or scenic beauty is rather unproblematic. Indeed, for the sightseer, the enjoyment of natural beauty is a form of recreation, which the court has already recognized as a protected interest.²⁶⁵ Several other states have recognized aesthetic beauty as a legitimate public trust interest.²⁶⁶ Aesthetic beauty is also a value mentioned in the Shoreline Act.²⁶⁷

²⁶³See Bell v. Town of Wells, 557 A.2d 168, 173 (Me. 1989) (Broadly construing the public's right to fish to include "digging for worms, clams and shellfish"); Town of Wellfleet v. Glaze, 525 N.E. 2d 1298, 1301 (Mass. 1988). "While the public clearly has the right to take shellfish on tidal flats, there is no general right in the public to pass over the land, or use it for bathing purposes." Other states, such as North Carolina and Florida have decisions which strongly support the public's right to shellfish. State ex rel. Rohrer v. Credle, 369 S.E.2d 825, 831-32 (N.C. 1988); State v. Gerbing, 47 So. 353, 356 (Fla. 1908).

²⁶⁴See supra Section III.B.2.e.

²⁶⁵Orion, 109 Wash. 2d at 641 n.10 (citing In re Stevart Transp. Co., 495 F.Supp. 38 (E.D. Va. 1980).

²⁶⁶See, e.g., National Audubon Society v. Superior Court of Alpine County, 33 Cal.3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983) (holding that protection of the scenic views of Mono Lake and its shore are covered by the public trust); Marks v. Whitney, 6 Cal.3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); Kootenai Environmental Alliance v. Panhandle Yacht Club, 105 Idaho 622, 632, 671 P.2d 1085, 1095 (1983) (including the protection of "aesthetic beauty" under the public trust doctrine); State v. Trudeau 139 Wis. 2d 91, 104, 408 WN.W.2d 337 (1987) (rights of citizens in bodies of water held in trust by the state include the enjoyment of natural scenic beauty).

²⁶⁷Wash. Rev. Code § 90.58.020 (1989).

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

As a “dynamic common law principle” courts will likely continue to shape the public trust doctrine to fit the ever-evolving public interest.²⁶⁸ The Washington Supreme Court has explicitly stated that it has not defined the total scope of the doctrine,²⁶⁹ thus suggesting that it might extend the doctrine even further in the future to meet evolving public needs, especially where those needs were not taken into account when private rights were acquired.

As the list of protected public trust uses grows, new questions arise. Conflicts will arise between two or more public trust interests.²⁷⁰ For example, what should happen when the interests of commerce or recreation conflict with the interest in preserving the environmental integrity of trust resources? It is unlikely that courts will or even should set up a rigid hierarchy of public trust uses. Perhaps the best answer is balancing competing uses. Currently, the Shoreline Management Act balances competing uses, while giving priority to certain values and uses, such as water dependent uses, and furthering public access and enjoyment of the states waters.²⁷¹

D. Public Trust Restrictions on State Power

When Washington became a state, it asserted ownership over tidelands and shorelands. Seeking to foster economic development, however, the state has sold 60% of tidelands and 30% of shorelands prior to 1971. Early Washington cases recognized an almost unfettered power of the legislature to dispose of those lands.²⁷²

More recently, in Caminiti, the Washington Supreme Court dealt with the application of the public trust doctrine to public lands. Preliminarily, the court discussed the origin and background of the doctrine, as well as its application to private property, saying that while the state could convey private interests in tidelands and shorelands, it could never “sell or

²⁶⁸Orion Corp. v. State, 109 Wash.2d 621, 640-41, 747 P.2d 1062, 1073 (1987) (“Recognizing modern science’s ability to identify the public need, state courts have extended the doctrine beyond its navigational aspects.”); Marks v. Whitney, 6 Cal. 3d 251, 259, 98 Cal. Rptr. 790, 796, 491 P.2d 374 (1987) (“The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs.”) But cf. Lazarus, Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine, 71 Iowa L. Rev. 631, 656 (1986) (describing the public trust doctrine as a convenient legal fiction used by courts to avoid judicially perceived limitations or consequences of existing rules of law).

²⁶⁹Orion Corp. v. State, 109 Wash. 2d 621, 641, 747 P.2d 1062, 1073 (1987).

²⁷⁰See, e.g., Carstens v. California Coastal Commission, 182 Cal. App. 3d 277, 227 Cal Rptr. 135 (1986).

²⁷¹Wash. Rev. Code § 90.58.020 (1989).

²⁷²Eisenbach v. Hatfield, 2 Wash. 236, 244-45, 26 P. 539, 541 (1891) (stating that tidelands “belong to the state in actual proprietary, and that the state has full power to dispose of the same, subject to no restrictions, save those imposed upon the legislature by the constitution of the state and the constitution of the United States . . .”).

otherwise abdicate state sovereignty” over them.²⁷³ According to the court, “The state can no more convey or give away this jus publicum interest than it can `abdicate its police powers in the administration of government and the preservation of the peace.”²⁷⁴ In adopting this position the Court adopted a role as reviewer of state conveyances to assure they are consistent with public trust obligations.²⁷⁵

The Washington Supreme Court in Caminiti adopted a test for determining when state legislation modifies the public trust doctrine as applied to state lands. The court relied heavily on the U.S. Supreme Court's seminal opinion in Illinois Central Railroad v. Illinois.²⁷⁶ First, the court must inquire whether the state, by reason of the legislation, has given up its right to control the jus publicum.²⁷⁷ If the court finds that it has, then the court must determine whether by doing so the state has promoted the interests of the public in the jus publicum or has not substantially impaired the jus publicum.²⁷⁸

The court nonetheless held that the statute at issue in Caminiti did not violate the public trust doctrine.²⁷⁹ In Caminiti, the plaintiffs had challenged the validity of a statute which granted private landowners the right to build recreational docks out onto abutting public shorelands and tidelands without paying money to the state.²⁸⁰ The court began its discussion by commenting on the interrelationship of the public trust doctrine and the Shoreline Act. It noted that the requirements of the public trust are met by the legislatively drawn controls of the Shoreline Act. The Shoreline Act lists among its preferred uses single family residences and piers. Therefore, the court concluded that the statute at issue in Caminiti was consistent with the Shoreline Act, and, by implication, with the public trust doctrine.²⁸¹ The court found that the state did not give up its right of control over the jus publicum by allowing private landowners to build docks on public shorelands and tidelands, supporting its position by several arguments, including that: the statute did not allow for private docks in harbor areas; private docks were only to be used for recreational purposes; the Department of

²⁷³Caminiti v. Boyle, 107 Wash. 2d 662, 666, 732 P.2d 989, 992 (1987).

²⁷⁴Id. at 669, 732 P.2d at 994, quoting Illinois Central R.R. v. Illinois, 146 U.S. 387, 453 (1892).

²⁷⁵For the crucial role of the judiciary in enforcing the public trust, see Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 **Mich. L. Rev.** 471 (1970).

²⁷⁶146 U.S. 387 (1892).

²⁷⁷Caminiti, 107 Wash. 2d at 670, 732 P.2d at 994.

²⁷⁸Id. at 670, 732 P.2d at 994-95.

²⁷⁹For a critique of the Caminiti case, see Allison, The Public Trust Doctrine in Washington, 10 **U. Puget Sound L. Rev.** 633, 671-73 (1987).

²⁸⁰**Wash. Rev. Code** § 79.90.105 (1989).

²⁸¹Caminiti, 107 Wash. 2d at 670, 732 P.2d at 995.

Natural Resources has the authority to revoke a property owner's right to maintain such a dock; and these residential private docks are subject to local regulations governing construction, size and length.²⁸² Thus the government retained adequate control over the docks to satisfy the requirements of the public trust doctrine.

Next, the court found that the construction of private docks on public tidelands and shorelands actually promoted the public's interest in the jus publicum as defined in the Shoreline Act.²⁸³ Finally, the court concluded that such docks do not impair the public interest.

Although the court set forth a test indicating that it would seriously scrutinize legislative actions affecting trust property, in actual practice it barely scrutinized the legislation at issue in Caminiti. As a result, the outcome of future cases is unclear. Will the court give real substance to the test it enunciated, or will it continue to defer to the legislature?

1. State Projects

The Shoreline Act applies to all shorelines owned and administered by the state and local governments.²⁸⁴ Therefore, under Caminiti, state projects that fall within the Shoreline Act list of preferred uses would likely be consistent with the public trust doctrine.²⁸⁵

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

Washington state policy strongly encourages comprehensive planning.²⁸⁶ In general, comprehensive planning helps to coordinate administrative decisions involving the physical development and use of land, air, and water resources. The time at which planners balance alternatives and develop recommendations may be an opportune time for consideration of public trust values. Significantly, the Washington Supreme Court's Orion decision involved

²⁸²Id. at 672, 732 P.2d at 996.

²⁸³Id. at 673-74, 732 P.2d at 996.

²⁸⁴**Wash. Rev. Code** § 90.58.280 (1989).

²⁸⁵Of course, the state project would also have to pass under other state environmental regulation, such as the State Environmental Policy Act. **Wash. Rev. Code** ch. 43.21c (1989).

²⁸⁶With the passage of the Growth Management Act in 1990, the emphasis on comprehensive planning in Washington is stronger than ever before. For example, the 1990 Growth Management Act requires that more populous counties that have recently experienced growth (this includes all twelve Puget Sound counties and the cities within them) adopt comprehensive plans by July 1, 1993. **Wash. Rev. Code Ann.** § 36.70A.040 (1991). Zoning consistent with those plans must be adopted within a year thereafter. **Wash. Rev. Code Ann.** § 36.70A.120 (1991).

the legitimacy of two comprehensive plans, and the court implicitly approved comprehensive planning as a method of protecting public trust resources and uses.²⁸⁷

The scope and scale of planning varies, depending on the resource, the purpose, jurisdictional authority, and the need for coordination. Planning efforts may be state-wide and quite complex in organization. However, the fundamentals of the planning process--assessing needs, determining relative costs and benefits, and presenting alternatives--remain basically the same. Accordingly, comprehensive planning is done at both the state and local levels. The state generally assumes responsibility for ensuring coordination, technical assistance, policy compliance, and consistency.

Authority for regional planning is delegated principally to counties, but extends to all levels of government through the Planning Enabling Act.²⁸⁸ The Act describes planning as an essential process to insure multiple uses of environmental resources.²⁸⁹ On both the state and local levels, comprehensive plans serve a wide variety of functions, including state agency operating plans, port and harbor improvement districts, aquatic lands leasing and utility operations. Each comprehensive plan must promote the public interest, where appropriate, and include both mandatory and optional elements.²⁹⁰ The planning process delineates resources and uses traditionally found under the public trust doctrine, designing standards that allow them to coexist with surrounding uses. Despite their acknowledged importance, comprehensive plans do not directly regulate property rights or land uses.²⁹¹ Traditionally, comprehensive plans have been a kind of "blueprint" which influence regulatory regimes such as local zoning codes and environment designations. They have also guided political decision-making. The 1990 Growth Management Act, however, further enhances the

²⁸⁷The two comprehensive plans in Orion were the Skagit County Shoreline Master Program and the Padilla Bay National Estuarine Research Reserve Management Plan.

²⁸⁸**Wash. Rev. Code** ch. 36.70; see also **Wash. Rev. Code** ch. 35A.63 (providing for planning and zoning in code cities).

²⁸⁹According to the Act, the purpose of planning is ". . . assuring the highest standards of environment for living, and the operation of commerce, industry, agriculture, and recreation, and assuring the maximum economies and conserving the highest degree of public health, safety, morals, and welfare." **Wash. Rev. Code** § 36.70.010 (1989). The language of the Act clearly aligns planning with the regulatory police powers of government.

²⁹⁰See **Wash. Rev. Code** § 36.70.470 regarding promotion of the public interest. Under **Wash. Rev. Code** § 36.70.340 and .350, required elements include land use, circulation, and supporting materials such as maps, diagrams and charts. Optional elements include conservation, recreation, rights of way, ports, harbors and public use. An analysis of these elements would entail consideration of public trust lands, waters and uses if they are present in the geographic area under review.

²⁹¹**Wash. Rev. Code** § 35A.63.080 (1989).

importance of comprehensive plans in those counties and cities covered by the Act by requiring that development regulations be consistent with their plans.²⁹²

Some forms of comprehensive planning bear directly on preserving elements of the public trust. The Shoreline Management Act which requires a combination of state and local planning, is an example. The SMA clearly states the need for comprehensive planning to allow multiple uses of the state's shorelines while protecting the public interest.²⁹³ Such planning is essential to the creation of local shoreline master programs (SMP)²⁹⁴ which implement the plans. In general SMPs regulate use in, on, or over shorelines. This feature appears in zoning classifications including natural, conservation, rural, and urban which specify appropriate, conditional, and prohibited uses for each environment. SMPs may also incorporate any other element deemed appropriate or necessary to effectuate the policy of the SMA.²⁹⁵ This clause is an open invitation for local SMPs to incorporate explicitly public trust doctrine principles. Finally, SMPs, unlike other comprehensive plans, are adopted as WACs and become part of the state's Shoreline Master Program. As such, all local SMP rules, regulations, designations and guidelines become state law and are enforceable.²⁹⁶ In this manner, protection of public trust resources and uses becomes binding.

Comprehensive planning also coordinates environmental review. The State Environmental Policy Act of 1971 (SEPA) established a state-wide review process for evaluation and decision-making on land use proposals.²⁹⁷ The intent of SEPA is to ascertain the proper balance between development and environmental protection. In reality, SEPA review is made effective only through comprehensive planning. As part of its review criteria, SEPA

²⁹²Wash. Rev. Code Ann. § 36.70A.120 (1991). The Act requires counties which adopt plans under the Act to designate wetlands, steep slopes, and flood plains, and adopt critical area protection regulations. Counties and cities that are not required or do not choose to regulate under the provisions of the Growth Management Act must also develop regulations to protect critical areas by March 1, 1992. Washington Act Relating to Growth Strategies, Reengrossed Substitute House Bill 1025 (July 16, 1991). This may provide additional opportunities to consider public trust values.

²⁹³Wash. Rev. Code 90.58, and WAC 173-14 through 28. Language from 90.58.020 specifically states, ". . . coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest." Broadly stated, the public interest is to be held superior to private rights when planning.

²⁹⁴WAC 173. SMPs are defined as comprehensive plans in RCW § 90.58.03(3)(a). These plans are developed locally and must be consistent with the policies of RCW 90.58 before approval by the Department of Ecology. For the most part, the state functions in an advisory capacity but has the authority to revise, amend, or reject SMPs until they are compliant.

²⁹⁵Wash. Rev. Code 90.58.100(2)(h).

²⁹⁶Id. § 98.59.100.

²⁹⁷Id. ch. 43.21C and WAC 197.

does establish a “trustee” responsibility;²⁹⁸ it seeks the widest range of beneficial uses; and looks to preserve important cultural, and natural aspects of our national heritage.²⁹⁹ This invites consideration of the public trust doctrine. In practice, however, SEPA reviews are handled in a generic fashion, rarely (if ever) explicitly referring to the public trust doctrine. But because many proposals fall under SEPA, and because this review may be linked to more stringent reviews such as shoreline substantial development permits,³⁰⁰ it is important to note that opportunities to apply public trust doctrine principles exist.

From a land management perspective, area management programs should reflect both public trust principles and comprehensive planning.³⁰¹ Balancing appropriate uses to provide the greatest public benefit or interest is a commonly stated goal of both management and the public trust. Area management programs diverge primarily in matters of detail. However, when viewed cumulatively, they embody most of the principles found under the public trust doctrine.³⁰²

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

3. Licensees and Lessees of the State

By licensing and leasing public trust resources, states can control their use and receive revenue. In this section we are explicitly concerned with state management of state-owned land, which was the central issue in Caminiti. In other words, what duties are imposed on the state by the public trust doctrine in the management of state-owned lands that are covered by the Seashore Conservation Act, and Aquatic Lands Act?

²⁹⁸Wash. Rev. Code § 43.21C.020(2)(a).

²⁹⁹Id. § 43.21C.020 (2)(d).

³⁰⁰Id. 90.58.030(e) and WAC 173-14-064. In general, the projects over \$2,500 dollars in value, or for projects that may substantially effect the public's use and interests in the shoreline.

³⁰¹There are numerous examples of area management programs which protect and preserve public trust rights and lands including: DNR multiple use management (Wash. Rev. Code 79.68.90); Natural area preserves (Wash. Rev. Code 79.70); Natural resource conservation area (Wash. Rev. Code 79.92); Scenic Rivers System (Wash. Rev. Code 79.92); Aquatic lands leasing (Wash. Rev. Code 79.90, WAC 332-30); Shellfish harvesting areas (Wash. Rev. Code 75.08.080); Habitat preserves (Wash. Rev. Code 77.12.650); Integrated transportation systems (Wash. Rev. Code 47.01.071); Seashore conservation area (Wash. Rev. Code 43.51.660); and State park system (Wash. Rev. Code 43.51, WAC 352).

³⁰²One observer has even argued that the Department of Natural Resources Aquatic Land Enhancement Account (ALEA) is a direct application of the public trust doctrine in management. Snow, "The Aquatic Land Enhancement Account: Operationalizing the Public Trust in Washington Submerged land Management" (Masters Thesis, 1989).

First, a court will inquire whether the legislature has relinquished control of the trust resource. Caminiti indicated that if the state imposes conditions in state licenses, and the rights of the licensee are subject to revocation, then a court may find that the state has not relinquished control of the resource. As a practical matter, however, if a state tries to maintain too much control over shorelands and tidelands, it may discourage all development. For example, if a state agency attempted to lease tidelands subject to too many conditions, for a short term with no right of renewal, private investors would not likely undertake development. Prospects for a return on investment would be too uncertain, and financing would be difficult. In Washington, DNR leases generally may not exceed fifty-five years for tidelands and shorelands;³⁰³ thirty years for the beds of navigable waters;³⁰⁴ and ten years for leases for mariculture.³⁰⁵ DNR has various other ways to strengthen state control, such as canceling the leases of those out of compliance and refusing renewals.

State relinquishment of control over a trust resource will be upheld only if it promotes, or does not substantially impair that interest. The Washington Supreme Court decision in Caminiti indicates that it may look to the Shoreline Act for guidance on whether a given use promotes the public interest. Even though the Shoreline Act has dubious preferences such as the one for single family residences, it nonetheless provides some protection for the public interest. For example, one of the stated preferences in the Shoreline Act is for water uses that are “unique to or dependent upon use of the state's shoreline.”³⁰⁶

In defining the scope of the public interest, the court could also look to its list of public trust interests in Orion, as well as interests recognized by other courts.³⁰⁷ The whole idea of “promoting the public interest” raises several other issues as well. For example, would it be inconsistent with the public trust doctrine to allow leasing or licensing of uses which are neither within the Shoreline Act's list of preferred uses nor within the judicially recognized list of public interests, but which are accessory or incidental to permitted uses? Could the state lease or license land for a use that would not further the public trust if the developer agreed to take measures, such as public accessways that would promote the public interest?³⁰⁸

³⁰³Wash. Rev. Code § 79.94.150(3) (1989). Interestingly, however, the state recently issued a 99 year lease of Smith Cove, site of Pier 91.

³⁰⁴Wash. Rev. Code § 79.95.020 (1989).

³⁰⁵Wash. Rev. Code § 79.96.010 (1989).

³⁰⁶Wash. Rev. Code § 90.58.020 (1989).

³⁰⁷For a discussion of the public trust interests which the court has recognized or might recognize in Washington, see supra Section III.C.2.d.

³⁰⁸See **D. Connors & J. Archer, The Public Trust Doctrine: Its Role in Managing America's Coasts** 48 n.100 (Aug. 2, 1990 Draft) (suggesting that a state agency might be able to lease or license land under both of these circumstances).

4. State obligation to abide by public trust principles on state owned land.

Because Caminiti is the only major Washington case in which state action has been challenged on the theory that it was inconsistent with the public trust doctrine, state law is not well developed in this area. The Washington Supreme Court could, however, derive some valuable principles and learn some valuable lessons by looking at cases from other states.

First, the California Supreme Court's decision in National Audubon Society (the Mono Lake case) indicated that the state had an on-going duty to uphold public trust values. The original Water Board decision allocating the waters in the Mono Basin had not taken public trust interests into account when it approved Los Angeles's appropriation permit. In Mono Lake the court remanded the case to the Water Board to reconsider the allocation of water in the basin in light of public trust values. Similarly, the Washington Supreme Court could require the state to re-evaluate permits, licenses and leases made in the past in light of evolving public trust doctrine principles.

Some courts have allowed legislatures to convey trust lands for purposes that have nothing to do with public trust uses, only requiring some advancement of the general public interest, as opposed to a public trust interest. For example, courts have found conveyances of land valid for offshore oil production,³⁰⁹ marketability of title for structures,³¹⁰ construction of a YMCA,³¹¹ a restaurant, a bar and a shopping complex,³¹² because they were in the public interest. It is unlikely that the Washington Supreme Court would take such an approach if it continues to look to the Shoreline Act for policy guidance. Generally, the Shoreline Act has a preference for water-related uses, so the court will likely limit the scope of the public interest in a more principled manner.

E. Private actions that are inconsistent with the Public Trust Doctrine.

Even where the state has conveyed tidelands and shorelands to private individuals, those lands generally continue to be burdened by the public trust doctrine.³¹³ One way the Washington Supreme Court has conceptualized this is by saying that the ownership of tidelands and shorelands has two different aspects, the jus privatum or proprietary interest which may be conveyed by the state, and the jus publicum, or public authority interest which

³⁰⁹Boone v. Kingsbury, 206 Cal. 148, 189-93, 273 P.2d 797, 815-16 (1928).

³¹⁰Opinion of the Justices, 383 Mass. 972, (1981).

³¹¹People v. City of Long Beach, 51 Cal.2d 875, 879-80, 338 P.2d 177, 179 (1959).

³¹²Martin v. Smith, 184 Cal. App. 2d 571, 578, 7 Cal. Rptr. 725, 728 (1960).

³¹³Orion Corp. v. State, 109 Wash. 2d 621, 640, 747 P.2d 1062, 1072 (1987).

cannot be conveyed.³¹⁴ Thus, when the state conveys tidelands and shorelands to a private individual, it conveys only the jus privatum, and retains the jus publicum, or public authority interest, for itself. The court has also likened the trust to “a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land's dependent wildlife.”³¹⁵ Private citizens or the attorney general³¹⁶ may bring suits to enjoin private landowners from damaging public trust interests.

Tidelands and shorelands in private hands are not, however, invariably burdened by the public trust. As has already been mentioned, where land is no longer adaptable to trust uses, then it is no longer burdened by the trust.³¹⁷ It should not follow, however, that the public trust burden should be applied less stringently to tidelands which are still usable for trust purposes, but are surrounded by built-up tidelands.³¹⁸

Although the Washington Supreme Court has not had the opportunity to address the issue, it could find that prior appropriators, who significantly reduce the flow of rivers or dry up waterbodies, are acting inconsistently with the public trust.³¹⁹ The California Supreme Court in National Audubon Society (the Mono Lake case) found that Los Angeles appropriations from the tributaries of Mono Lake were damaging public trust resources by lowering the level of the lake. This increased the salinity (pollution) of the lake and endangered the brine shrimp that were a major source of food of the bird population. Therefore, the court required the Water Board to reconsider Los Angeles's appropriation permit in light of the public trust doctrine. Although the Washington Supreme Court has not had occasion to hold that appropriative rights are subject to the public trust doctrine, it has held that appropriations of water from lakes that lower lake levels can unreasonably interfere with riparian rights. In In re Martha Lake,³²⁰ the Washington Supreme Court held that appropriators could not damage riparian rights by lowering the level of the lake by twelve inches, thus exposing eight to fifty

³¹⁴Id. at 639, 747 P.2d at 1072.

³¹⁵Id. at 640, 747 P.2d at 1072-73, quoting Reed, The Public Trust Doctrine: Is it Amphibious? 1 **Envtl. L. & Litigation** 107, 118 (1986).

³¹⁶For a discussion of who can bring an action to enforce the public trust doctrine, see infra Section III.F.

³¹⁷Orion, 109 Wash. 2d at 640 n.9, 747 P.2d at 1072, quoting Berkeley v. Superior Court, 26 Cal.3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, cert. denied, 449 U.S. 840 (1980).

³¹⁸In State Department of Ecology v. Ballard Elks Club, the court suggested that part of the reason the Elks Club could build its non-water-dependent lodge over tidelands was because the site was located in a densely developed portion of Shilshole Bay, where other non-water-dependent structures extended out over tidelands. Now that the court has more firmly committed itself to the public trust doctrine, it seems less likely that the court would allow a non-water-dependent use such as this, considering the overall cumulative impact.

³¹⁹See Johnson, Public Trust Protection for Stream Flows and Lake Levels, 14 **U.C. Davis L.Rev.** 233, 257-58 (1980).

³²⁰152 Wash. 53, 277 P. 382 (1929).

feet of muddy lake bottom in front of the riparian lands. The court might also limit appropriations which adversely affect public trust rights.³²¹ The state's strong policy of preserving minimum instream flows would add further support for protection of public trust resources from damage by prior appropriators.³²²

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

1. Enforcement by the Attorney General

The attorney general has the power to protect state and public interests by bringing suit to enforce the public trust doctrine.³²³ Also the attorney general has authority to enforce the Shoreline Act.³²⁴

2. Enforcement by Private Citizens and Private Groups

The issue of standing should not pose a serious obstacle to suits by private citizens and private groups. In Caminiti, the plaintiffs were an individual, Ms. Caminiti, and the members of the Committee for Public Shorelines Rights.³²⁵ They challenged a state statute which allowed private upland owners to build docks on public tidelands and shorelands without paying any rent to the state. The plaintiffs contended that they had an interest in the amount of revenue collected by the state, and they contended that the presence of private recreational docks affected their access to use public lands.³²⁶ These uses included, but were not limited to, their ability to fish, swim, navigate, water ski, beachcomb, procure shellfish, sunbathe, observe natural and undisturbed wildlife, play on open beaches, and enjoy seclusion.³²⁷ There appears to have been no serious issue over standing, because the court in Caminiti never addressed the matter. Therefore, if private citizens or citizens groups can allege that their interests in public trust resources are affected by state or private action, and can specifically list their personal interests, then standing should not be a barrier to a suit. In doctrinal terms, this would be adequate to establish that there was an injury in fact and that

³²¹See Johnson, Public Trust Protection for Stream Flows and Lake Levels, 14 U.C. Davis L. Rev. 233, 244-45 (1980).

³²²See Wash. Rev. Code ch. 90.22, ch. 90.54 (1989).

³²³Wash. Rev. Code § 43.10.030 (1989).

³²⁴Wash. Rev. Code § 90.58.210 (1989).

³²⁵107 Wash. 2d 662, 732 P.2d 989 (1987).

³²⁶Id. at 665, 732 P.2d at 992.

³²⁷Id.

the plaintiffs are among the injured parties. This liberal standard for standing is in accord with the national trend toward loosening standing requirements in environmental suits.³²⁸

3. Other Ways for Public Trust Issues to Come Before the Court

Yet another way that the courts will have to address public trust issues is when a private property owner takes the initiative by claiming that state regulation has caused the inverse condemnation of his or her property. As the following section will demonstrate, the public trust doctrine must be considered in determining whether a taking by excessive regulation has occurred.

G. Interface of the Public Trust Doctrine with the Takings Clause of the Washington and Federal Constitutions.

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

Even where the state has conveyed tidelands and shorelands to private individuals, those lands are still burdened by the public trust. The trust resembles a “covenant running with the land” for the benefit of the public.³²⁹ As a result, private property owners never had the right to do anything that was inconsistent with the public trust.

Private landowners cannot claim a taking has occurred when regulations prevent them from doing things that would adversely affect public trust interests. Whether or not the landowner had notice of the burden the public trust doctrine imposed on the land is irrelevant; no restrictions need to be in the original conveyance by the state.³³⁰ Instead, courts impose the public trust doctrine as a matter of law. The U.S. Supreme Court's recent opinion in Phillips Petroleum Co. v. Mississippi³³¹ illustrates the fact that explicit notice about the public trust to private landowners is unnecessary. In Phillips Petroleum the Court held that lands beneath non-navigable streams which were influenced by the ebb and flow of tides from the Gulf of Mexico were public trust lands and passed to Mississippi upon statehood under the equal footing doctrine. The Court rejected the equitable arguments of the landowners, who insisted that they were entitled to the land because they held the lands under a pre-statehood grant, and they had paid taxes on the lands. The Court insisted that earlier Mississippi cases had

³²⁸See, e.g., Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59 (1978); United States v. S.C.R.A.P., 412 U.S. 669 (1973); see also L. Tribe, American Constitutional Law 107-29 (2d ed. 1988).

³²⁹Orion Corp. v. State, 109 Wash. 2d 621, 640, 747 P.2d 1072 (1987).

³³⁰By contrast, Washington state requires all other encumbrances and liens to be registered so as to protect purchasers. Wash. Rev. Code § 58.19.010 (1989). At least one commentator has suggested that public rights such as access ought to be similarly registered. J. Scott, An Evaluation of Access to Washington's Shorelines Since Passage of the Shoreline Management Act of 1971, Washington State Department of Ecology, Shorelands Division (Sept. 1983).

³³¹484 U.S. 469 (1988).

made the state's claim to private tidelands clear.³³² If the Court considers such notice adequate to allow states to take possession of tidelands, a fortiori such notice should be adequate to apprise private land owner's of the public trust easement covering their property.

In Orion³³³ the Washington Supreme Court explored the relationship between takings claims and the public trust doctrine. Orion Corporation owned a large part of the tidelands in Padilla Bay, an ecologically important estuary that is navigable at high tide. Orion planned to dredge and fill the bay in order to create a residential, Venetian-style community. In 1971 the Shoreline Act identified the bay as a shoreline of statewide significance, and declared that state policy required preservation and protection of the area. The Skagit County Shoreline Management Master Program (SCSMMP) was later approved by the state, and it designated Orion's lands as "aquatic," thus prohibiting dredging and filling. The only possible uses of any value were nonintensive recreation and aquaculture, the latter of which required a conditional use permit.³³⁴

In Orion the court decided that the tidelands of Padilla Bay were burdened by the public trust doctrine. The court concluded that "Orion never had the right to dredge and fill its tidelands, either for a residential community or farmland. Since a `property right must exist before it can be taken,' [citation omitted] neither the Shoreline Act nor the SCSMMP effected a taking by prohibiting Orion's dredge and fill project."³³⁵ Thus, the public trust doctrine can largely preclude a successful takings claim because private property owners never had a right to act in a manner inconsistent with public trust interests.

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

The public trust doctrine does not bar all takings challenges. If state and local regulation significantly burden uses that would be consistent with the public trust, then private landowners may have a takings action. As the Washington Supreme Court's opinion in Orion indicates, the test for whether a regulatory taking has occurred is somewhat unclear, but presumably the legitimacy of the state's interest, and the impact on the landowner's reasonable, investment-backed expectations would be factors in determining whether a

³³²But cf. Justice O'Connor's spirited dissent. 484 U.S. at 485.

³³³Orion Corp. v. State, 109 Wash. 2d 621, 641, 747 P.2d 1062, 1073 (1987).

³³⁴Id. at 626-29, 747 P.2d at 1065-67.

³³⁵Id. at 641-42, 747 P.2d at 1073.

taking has occurred.³³⁶ The Washington Supreme Court has indicated that although the state's analytical approach may be different, the breadth of constitutional protection against takings without compensation is virtually the same under both the state and federal constitutions.³³⁷

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

While it is true that application of the public trust doctrine to lands traditionally within the trust will successfully prevent most takings challenges, extension of the public trust doctrine to tributaries, uplands and related lands may raise more serious takings issues. The U.S. Supreme Court in Phillips Petroleum v. Mississippi³³⁸ indicated that there are no constitutional limits on states from recognizing preexisting public trust rights, for example, to lands subject to the ebb and flow of the tide and lands under navigable for title waterways. As indicated above, however, the geographic scope of the public trust doctrine has been expanded by some courts to regulate appropriations on non-navigable tributaries, regulate related wetlands, guarantee public access to the dry sand areas of beaches, and extend the public's right to use non-navigable lakes and streams.³³⁹

Those extensions of the doctrine could raise takings issues. For example, one commentator has suggested that the Wisconsin court's extension of the doctrine to wetlands may be constitutionally suspect.³⁴⁰ Another commentator, Professor Lazarus, insists that where the state tries to extend the doctrine beyond those lands that it acquired at statehood, landowners should have a valid takings claim against the state.³⁴¹ Several courts, however, have looked to the practical and environmental realities of preserving public rights in extending the scope of the doctrine. For example, the New Jersey Supreme Court recognized the practical problem that inadequate access poses to the full exercise of public rights, and extended the doctrine to the privately owned dry sand area of beaches. Other courts, such as the Supreme Court of Wisconsin, have recognized the interconnectedness of water resources, and extended the scope of the doctrine to prevent indiscriminate filling of wetlands. In extending the doctrine to cover these areas, courts have sought to preserve and effectuate public rights, not to adhere to inflexible legal doctrine.

³³⁶Id. at 655-56, 747 P.2d at 1080-81.

³³⁷Id. at 657, 747 P.2d at 1082.

³³⁸484 U.S. 469 (1988).

³³⁹See supra Section III.C.2.

³⁴⁰Note, The Public Trust Doctrine: Accommodating the Public Need Within Constitutional Bounds, 63 **Wash. L. Rev.** 1087, 1106-07 (1988) (discussing the Wisconsin court's opinion in Just v. Marinette, 56 Wis. 2d 7, 201 N.W.2d 761 (1972)).

³⁴¹Lazarus, supra note 268, at 648-49.

3. Banishing the Spectre of the Nollan Decision

Armed with the Supreme Court's decision in Nollan v. California Coastal Commission,³⁴² many owners of land along beaches and shores claim a taking has occurred whenever the state seeks to provide public access to and along beaches. In Nollan, the California Coastal Commission tried to condition its grant of permission to rebuild a house on the transfer of an easement across private beachfront property. The easement would have secured lateral public passage along the beach, across the Nollan's property in the dry sand area, i.e. a strip of sand between the mean high tide line and a seawall. The U.S. Supreme Court found that a taking had occurred because there was no nexus between the governmental purpose of the permit condition and the development ban.

The Nollan decision does not, however, limit the application of the public trust doctrine. First, the parties did not raise the public trust doctrine as an issue.³⁴³ If, as some courts have held, the public trust doctrine covers the dry sand area,³⁴⁴ a state would not need to obtain such an easement. It would simply state what is already law. Similarly, if the doctrine of “custom” provides the public a right to the dry sand area of beaches, then public access does not constitute a taking of private property. Second, even if we apply the Nollan reasoning, a state may be able to meet the nexus requirement by adequately showing that a permit condition such as a lateral access easement is related to legitimate state interests affected by the development. Perhaps if a state raised the public trust doctrine and the multitude of public interests protected by the doctrine, a court would be more likely to realize that beachfront and shorefront development does affect a substantial, legally recognized, public interest.

H. Federal/State Powers and the Public Trust Doctrine

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

State attempts to use the public trust doctrine can run up against federal power. Under the Supremacy Clause of the federal Constitution, the “Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, . . . shall be the Supreme Law of the Land.”³⁴⁵ Accordingly, the courts have developed the doctrine of federal preemption to determine when federal legislation prevents states from enacting laws. The Supreme Court has succinctly described its preemption analysis:

³⁴²483 U.S. 825 (1987).

³⁴³In dissent, Justice Blackmun specifically stated that Nollan did not implicate in any way the public trust doctrine. Id. at 865.

³⁴⁴See, e.g., Matthews v. Bay Head Improvement Assoc., 95 N.J. 306, 471 A.2d 355 (1984).

³⁴⁵U.S. Const. art. VI, cl. 2.

[S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes of Congress.³⁴⁶

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

In general, state attempts to protect public trust resources are not likely to run up against too many preemption problems.³⁴⁷ The Court maintains a presumption against federal preemption when federal legislation enters an area of traditional state power.³⁴⁸ The public trust doctrine, which protects local public interests and the environment, is clearly in an area traditionally governed by the states. Furthermore, the federal government's efforts to protect the environment have generally stressed the importance of a collaborative effort between the states and the federal government.³⁴⁹ The U.S. Supreme Court has found that some state laws, however, such as bans on supertankers over a certain size, and standards for vessel design, construction, and navigational equipment, were preempted by the federal Ports and Waterways Safety Act.³⁵⁰ The Court found that the federal legislation demonstrated congressional intent that there be national uniformity in tanker design standards.³⁵¹ Nevertheless, the Court's most recent case involving the issue of preemption of a state environmental law, California Coastal Commission v. Granite Rock Co.,³⁵² indicates the court's continued reluctance to find preemption of state laws that protect the environment.

³⁴⁶Silkwood v. Kerr-McGee Corp., 464 U.S. 238, xxx (1984).

³⁴⁷For a discussion of federal preemption and state efforts to control oil pollution, see Johnson, Oil and the Public Trust Doctrine in Washington, 14 **U.P.S.L. Rev.** 671 (1991).

³⁴⁸Rice v. Santa Fe Elevator, 331 U.S. 218, 230 (1947).

³⁴⁹See, e.g., The Federal Water Pollution Prevention and Control Act (The Clean Water Act) 33 U.S.C. § 1251 (b) (1988); Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973).

³⁵⁰Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); but cf. Chevron U.S.A., Inc., v. Hammond, 726 F.2d 483 (9th Cir 1984) (holding that Alaska's deballasting statute covering tankers was not preempted because it was covered tanker operations that could affect the environment, not a design feature).

³⁵¹Ray, 435 U.S. at 165-68.

³⁵²480 U.S. 572 (1987) (upholding California's right to review and require a permit for a private mining project on U.S. Forest Service lands, despite federal legislation such as the Federal Land Policy and Management Act, the National Forest Management Act, and the Coastal Zone Management Act).

In addition, state public trust activities may be precluded as an encroachment upon Congress's commerce power.³⁵³ Congress's power over navigation under the commerce clause extends primarily to waterbodies that are navigable in fact.³⁵⁴ Although Congress has paramount power over state law in the area of interstate navigation, state regulation of navigation is given substantial leeway where there is no applicable congressional act, no need for national uniformity, and no evidence that state action impedes interstate commerce.³⁵⁵

The federal government's sovereign immunity may also prohibit states from enforcing the public trust doctrine against federal projects. Federal projects "are subject to state regulation only when and to the extent that Congressional authorization is clear and unambiguous."³⁵⁶ In practice, however, state regulation of federal projects has often been allowed because of the policies Congress has set forth that suggest that federal and state governments share responsibility in environmental protection and natural resource management.³⁵⁷

In Friends of the Earth v. U.S. Navy,³⁵⁸ the Ninth Circuit recently rejected the Navy's claim that Washington's Shoreline Act could not regulate its project because of sovereign immunity. The Clean Water Act, however, waives federal sovereign immunity with respect to state programs to control the discharge of dredged or fill material and to control and abate water pollution.³⁵⁹ The court reasoned that Washington's Shoreline Act was such a program, and therefore the Navy could not assert sovereign immunity to avoid the Act's requirements.³⁶⁰ The Friends of the Earth decision indicates that courts are likely to have little tolerance for the antiquated doctrine of sovereign immunity in light of states' legitimate interests in preserving their coastal environments.

³⁵³U.S. Const. art. I, § 8, cl.3.

³⁵⁴Waterbodies are navigable in fact if "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water." Daniel Ball, 10 Wall. 577, 563. Waterbodies need not be navigable in their original state, but only need to be made navigable by reasonable improvements in order to be navigable in fact. United States v. Appalachian Power Co., 311 U.S. 377 (1940).

³⁵⁵D. Connors & J. Archer, The Public Trust Doctrine: Its Role in Managing America's Coasts, 282-83 (Aug. 2, 1990 Draft).

³⁵⁶Environmental Protection Agency v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 211 (1976).

³⁵⁷See, e.g., California Coastal Commission v. Granite Rock, 107 S.Ct. 1419, 1425 (1987); Kleppe v. New Mexico, 426 U.S. 529, 543 (1976); Hancock v. Train, 426 U.S. 167, 179 (1977).

³⁵⁸841 F.2d 927 (9th Cir. 1988).

³⁵⁹Id. at 934-35.

³⁶⁰Id.

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

Under their coastal zone management programs, states can limit, modify or prohibit activities of federal agencies and private actions requiring federal permits under the consistency provisions of the federal Coastal Zone Management Act.³⁶¹ By including public trust principles in their coastal zone management programs, states can effectively influence federal activities and avoid federal preemption questions.

Under the consistency requirement, federal agency activities directly affecting the coastal zone must be consistent “to the maximum extent practicable” with the enforceable policies of approved state management programs.³⁶² “Enforceable policies” include not only state policies contained in constitutional provisions, laws, regulations, land use plans and ordinances, but also judicial or administrative decisions.³⁶³ Therefore, federal agency activity must be consistent not only with legislative and regulatory expressions of the public trust doctrine; federal agency activity must also be consistent with the public trust doctrine as expressed by state courts. The National Oceanic and Atmospheric Administration's regulations have interpreted the phrase “to the maximum extent practicable” to require “full consistency” unless federal law prevents the federal agency from meeting this requirement.³⁶⁴ Although the regulations provide for mediation of disputes between the states and federal agencies, in practice the states have generally gone to federal court to get injunctions against federal agencies.³⁶⁵

If private activity affects the land or water of the coastal zone, an applicant for a federal permit must certify to the relevant federal agency that the activity or project is consistent with the state's enforceable policies.³⁶⁶ Once again, “enforceable policies” means not only state laws and regulations, but also judicial opinions such as Orion³⁶⁷ and Caminiti³⁶⁸ which recognize the public trust doctrine in Washington. If the state objects to the proposed project, the only way for the project to get approved is for the Secretary of Commerce to override the state's objection. The Secretary of Commerce, however, can only override a

³⁶¹ 16 U.S.C.A. § 1456 (Supp. 1991).

³⁶² 16 U.S.C.A. § 1456(c)(1)(A) (Supp. 1991). The term “federal activity” means any functions performed by or on behalf of a federal agency in the exercise of its statutory responsibilities. 15 C.F.R. § 930.31 (1991).

³⁶³ 16 U.S.C.A. § 1453(6a) (Supp. 1991).

³⁶⁴ 15 C.F.R. § 930.32 (1990).

³⁶⁵ **Connors & Archer**, *supra* note 355, at 296.

³⁶⁶ 16 U.S.C.A. §§ 1456(c)(3)(A), (B) (Supp. 1991).

³⁶⁷ *Orion Corp. v. State*, 109 Wash.2d 621, 747 P.2d 1062 (1987).

³⁶⁸ *Caminiti v. Boyle*, 107 Wash.2d 662, 732 P.2d 989 (1987).

state objection if the project is consistent with the national objectives of the federal Coastal Zone Management Act or the activity is necessary for national security.³⁶⁹

The state of Washington has clearly indicated in the Shoreline Act that it will enforce the federal consistency requirement: “Where federal or interstate agency plans, activities or procedures conflict with state policies, all reasonable steps available shall be taken by the state to preserve the integrity of its policies.”³⁷⁰ In addition to following the Shoreline Act, federal agency activity and federal permittees must also follow several other state legislative programs.³⁷¹ The Department of Ecology, which manages the state coastal management program, conducts the federal consistency reviews for the state of Washington. The geographic scope of the coastal zone is very large in Washington state, covering all fifteen Pacific Ocean and Puget Sound Coastal counties. The Department of Ecology even reviews federal activities outside of the coastal zone, but west of the crest of the Cascade Range, to avert potential spillover effects that directly affect the coastal zone.³⁷²

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

³⁶⁹ 16 U.S.C.A. §§ 1456(c)(3)(A), (B) (Supp. 1991); 15 C.F.R. §§ 930.120 -.134 (1990).

³⁷⁰ **Wash. Rev. Code** § 90.58.260 (1989).

³⁷¹ See State of Washington Federal Consistency Procedures. These include the State Environmental Policy Act, **Wash. Rev. Code** ch. 43.21C; the Water Pollution Control Act, **Wash. Rev. Code** ch. 90.48; the Clean Air Act, **Wash. Rev. Code** ch. 70.94, and the Energy Facility Site Evaluation Council, **Wash. Rev. Code** ch. 80.50.

³⁷² State of Washington Federal Consistency Procedures at 7.

IV. Conclusions and Recommendations

The public trust doctrine is now firmly established in Washington law. Its complete geographic, scope and the interests it will protect are, however, not yet known. Several findings are pertinent.

State statutes such as the Shoreline Act and Aquatic Lands Act use public trust values to express and reach regulatory goals. These statutes do not supplant the doctrine, but reflect it in part. As a consequence, when considering the geographic extent of the public trust doctrine, or whether it protects a given interest, courts may look to these statutes for guidance in recognizing public values.

The decisions of other state courts may also provide guidance for Washington's courts in developing the public trust doctrine. Other courts have applied the doctrine to cover the dry sand area of beaches, non-navigable-for-title waters tributaries, related wetlands, and the surfaces of recreationally navigable waters. Other state courts have also recognized new public trust values, such as aesthetic beauty and the right of the public to walk over and harvest shellfish on privately owned tidelands.

The public trust doctrine applied to state lands upon entry into the Union, and predates most private ownership of trust resources. When considering whether property has been “taken” by regulatory action, the public trust doctrine effectively shields government from such a claim if, in fact, trust resources and interests are at issue. Thus, the public trust doctrine diminishes the impact of the U.S. Supreme Court decision in Nollan v. California Coastal Commission,³⁷³ which found a taking of beachfront property by California coastal zone regulations. The public trust doctrine was not posed as a defense or otherwise considered in that case. The Washington Supreme Court has described the public trust doctrine as a covenant running with the land. Unlike other burdens on private property, however, landowners need receive no express notice of the public trust burden on their lands.

When considering and developing the public trust doctrine, courts distinguish between the property-based concepts of the public trust doctrine, and the police power basis of regulatory statutes. Each may influence the other, but they remain separate, the public trust doctrine providing a substantive review function over governmental activity that purports to advance public interests.

While the doctrine contains a degree of flexibility, to accommodate changing public priorities, past jurisprudence provides guidelines to courts when incrementally developing new public trust protected interests.

³⁷³483 U.S. 825 (1987).

When confronted with choices between competing public trust values, a balancing process can be anticipated. It is not possible to compile a set hierarchy of public trust values; priorities must be determined on a case-by-case basis.

Regulators should consider the public trust doctrine and its values when making decisions affecting public trust resources. State statutes incorporate or reflect public trust values, but agency administrators must ensure that statutes and regulations are strictly congruent with those values and that activities do in fact consider and promote the public trust.