

THE PUBLIC TRUST IN PUBLIC WATERWAYS

BERTRAM C. FREY*

The public trust doctrine constitutes a practical tool for those who seek to preserve the natural character and scenic beauty of waterways throughout the nation.¹ These waterways, their contents, and lands beneath or adjacent to them are subject to competing public and private uses.² In addition to supporting the few commercially harvestable fish that remain, this same real estate provides waterbased recreation—boating, swimming and sport fishing. As a locus of economic activity, these areas also harbor shipping and transportation industries and afford prime industrial development sites. A prodigious managerial effort by state and federal governments along with decisive citizen action is necessary to protect an already altered ecological balance, curb pollution and circumvent the governmental maze of

* Third year student, Washington University School of Law; B.A., Haverford College, 1969.

1. See J. SAX, DEFENDING THE ENVIRONMENT 1 (1971); Stone, *Public Rights in Water Uses and Private Rights in Land Adjacent to Waters*, 1 WATERS AND WATER RIGHTS 177 (R. Clark ed. 1967) [hereinafter cited as Stone]; V. YANNAcone & B. COHEN, 1 ENVIRONMENTAL RIGHTS AND REMEDIES ch. 2 (1971); Cohen, *The Constitution, the Public Trust Doctrine, and the Environment*, 3 UTAH L. REV. 388 (1970); Esposito, *Air and Water Pollution: What to Do While Waiting for Washington*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 32 (1970); Fraser, *Title to the Soil Under Public Waters—A Question of Fact*, 2 MINN. L. REV. 313 (1918); Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391 (1970); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 WIS. L. REV. 335; Comment, *Private Fills in Navigable Waters: A Common Law Approach*, 60 CALIF. L. REV. 225 (1972); Note, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970); Note, *Governmental Restriction of Water Use*, 1959 WIS. L. REV. 341; Comment, *Role of Local Government in Water Laws*, 1959 WIS. L. REV. 117; Note, *Alienations of the Beds of Public Lakes—The Trust Doctrine*, 5 WIS. L. REV. 34 (1928). Cf. Montgomery, *The Public Trust Doctrine in Public Land Law: Its Application in the Judicial Review of Land Classification Decisions*, 8 WILLAMETTE L.J. 135 (1972).

2. See, e.g., PORTO, *The Coastal and Estuarine Zone: A National Interest*, 19 N.J. ST. B.J. 6 (1970).

concurrent jurisdictions.³ This Note traces the historical development of the public trust doctrine and the problems it creates, and then suggests ways that the doctrine may be applied today.

I. HISTORICAL ROOTS OF THE DOCTRINE OF PUBLIC TRUST IN WATERWAYS

The doctrine of public trust⁴ in waterways⁵ has ancient roots. Effective use of the doctrine requires an understanding of its Roman origins, its evolution under English common law, and its early application in American courts.⁶ The doctrine's history reveals that its application is entirely dependent upon the socio-economic conditions existing at the time in the jurisdiction in which the public trust is enforced. Crucial to its continuing vitality is a recognition of the various interests—governmental, commercial, recreational and aes-

3. The admiralty jurisdiction of the United States extends to every species of tort committed on waters navigable in fact. *United States v. Matson Navig. Co.*, 201 F.2d 610, 613 (9th Cir. 1953). State courts have jurisdiction over torts committed within the state. *See, e.g.*, MD. ANN. CODE art. 75, §§ 95, 96 (1964). *See also* MD. ANN. CODE art. 75, §§ 81, 82 (1964).

4. Generally, a public trust is defined as a right of property, real or personal, held by one party for the benefit of the public at large or of some considerable portion thereof. *Goodwin v. McMinn*, 193 Pa. 646, 44 A. 1094 (1899); *Boyce v. Mosely*, 102 S.C. 361, 86 S.E. 771 (1915). *See Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892). Public trusts and charitable trusts may be considered synonymous expressions. *Bauer v. Myers*, 244 F. 902, 911 (8th Cir. 1917). These trusts differ from private trusts in that their beneficiaries are uncertain and their duration is or may be perpetual. *Id.* at 912. For purposes of this Note, the corpus of the public's trust comprises certain natural resources and the scenic, historic and esthetic values of the environment entrusted to a sovereign or state for the benefit of its subjects or people.

5. A "waterway" or "watercourse" is generally understood to be a natural or man-made channel through which water flows; it usually consists of flowing water, a bed, banks and shore. *Smith v. Cameron*, 123 Ore. 501, 505-06, 262 P. 946, 948 (1928). *See* L. HOUCK, A TREATISE ON THE LAW OF NAVIGABLE RIVERS 1 (1868) [hereinafter cited as HOUCK].

There must be a stream, usually flowing in a particular direction, though it need not flow continuously. It may sometimes be dry. It must flow in a definite channel, having a bed or banks, and usually discharges itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of the tract of land, occasioned by unusual freshets or other extraordinary causes.

BLACK'S LAW DICTIONARY 1763 (rev. 4th ed. 1968). *See generally* *Leader v. Matthews*, 192 Ark. 1049, 1050, 95 S.W.2d 1138, 1139 (1936); *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 P. 585 (1899).

6. For an excellent historical inquiry into this subject see Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970) [hereinafter cited as *The Public Trust in Tidal Areas*].

thetic—that compete for dominion over the waters or possession of the adjacent or underlying land.⁷

Deriving its legal heritage from the seafaring Greeks⁸ and developing in a commercial society, Roman jurisprudence held that by fundamental “natural law” navigable waterways were public property.⁹ Private appropriation of waterways or of tidal or submerged

7. See Sax, *supra* note 1.

8. INSTITUTES 1.2.2, 3, 10.

9. Roman law distinguished between navigable rivers and the sea, the former being classed among *res publicae*, and the latter among *res communes*. *Id.* at 2.1.1, 2.1.2, DIGEST 1.7.5.; see 1 H. BRACTON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE ch. 12, §§ 3, 5, 6 (T. Twiss ed. 1878); J. GOULD, LAW OF WATERS 104 n.3 (1883). The Roman law distinction between things public and things common, “acknowledged by both Bracton and Fleta, found those things public which relate to the use of mankind only, and those things common which respect all living animals indiscriminately.” H. SCHULTES, AQUATIC RIGHTS 65, 66 (1839). Schultes further examines the distinction between things common and things public:

Common is derived by some from *Kolvow*, which [according] to the Grecian etymology, is *communico cum aliquo*. By others it is derived from *communis*, as compounded of *con*, together, and *munus*, a gift of office; but according to both Bracton and Fleta, the earliest of our writers, *common*, in legal acceptation, is derived from *communia*, a word compounded of *una* and *cum*, and we think implies according to its literal interpretation, not only a right or service exercised together with others, but such an intercourse as may be free enjoyed; and the strongest circumstance to justify the presumption is, that *common*, e.g., common fishery, might be a free tenement. . . . It appears to be an old term of designation, signifying a freedom or partaking some benefit with others

Common may [also] be applied to a general class of rights.

Where common and public rights are alluded to in the books, we consider them usually as having the same meaning, and implying freedom. The civilians frequently blend them together, though they profess a distinction between public, common, and private things; this is apparent by this passage amongst many others which might be adduced: “All rivers and ports are *public*, and therefore the right of fishing in a port or river is in common;” and, besides, in the old annotation on the *Pandects of Justinian*, (in Bibliotheca Bodleiana,) the word *public* is expressly defined common (*publicum id est commune*). Fleta, also, who transcribes copiously from the Imperial law, says, some things are *common*, as the air, the sea, and sea-shore, and others are *public*, as the right of fishing and using rivers and ports, “*aliae communes sunt, ut ser, mare, et littus maris, aliae publicae, ut jus piscandi, et applicandi flumina et portus.*”

This public or common right relates to public streams, and is contradistinguishable from rights or services belonging to private property.

[T]he word *publicum* is derived from the word *populus*. Hence, if we consider the natural advantage which accrues from a thing, we say that such a thing is common; but if we consider the use of it among men as it arises from industry, we call it a thing public if it extends to public use, and therefore a thing may be said to be common by a promiscuous intercourse and exercise of a public thing, the terms *public* and *common*, may become convertible, as experience constantly shows.

Id. at 62-66.

lands was impossible,¹⁰ since title to these was held by the Roman government, whose sovereignty extended over all tidelands and navigable watercourses. But the right to occupy these areas belonged to all Roman citizens universally,¹¹ with unlimited freedom to fish, navigate and take water.¹²

With the decline of the Roman Empire, commerce, navigation and effective territorial administration declined throughout Europe. In England, feudal lords came to occupy these once "commonly held" waterways and tidelands. Ultimately, these areas came under the dominion of the absolute sovereign.¹³

At the time of the *Magna Carta*,¹⁴ "[R]iver navigation was threatened by a large number of weirs (permanent fishing structures fixed to the bottom) and other such devices—so much that Chapter 33 [of the Great Charter] specifically prohibits them: 'all Kydells [weirs] for the future shall be removed from Thames and Medway, and throughout all England, except on the seashore.'"¹⁵ This section and

10. INSTITUTES 2.1.1-2.1.6.

11. *Id.*

12. *Id.*

13. See S. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO ch. 1 (1888); Note, *California's Tideland Trust: Shoring It Up*, 22 HASTINGS L.J. 759 (1971).

14. Prior to the *Magna Carta*, the King or his riparian grantees of river bed soil either held title to the middle of a navigable stream, if they owned property on only one bank of the stream, or held title to the entire stream and bed, if they owned property on both sides of the stream. LORD HALE, C.J., DE JURE MARIS ET BRACHIORUM EJUSDEM chs. 1, 2, 4, reprinted in 1 HARGRAVE, TRACTS RELATIVE TO THE LAWS OF ENGLAND 5 (1787) [hereinafter cited as HALE]. Theoretically, the King or his riparian grantees could have exacted a fee for passage or right of fishing, dammed the river, or otherwise impeded navigation and commerce.

15. *The Public Trust in Tidal Areas* 766. Chapter 33 of the *Magna Carta* is contained in chapter 23 of the revised "Great Charter" of 1225. The last four words excepting the seashore were added by Henry III in the revised version, which is still on the English state books. See J. Holt, *MAGNA CARTA* 1 (1965); *Magna Carta* ch. 33, reprinted in R. THOMSON, *ESSAY ON THE MAGNA CARTA* 112 (1829). Thompson elaborates:

The intent of this brief fragment of old Common Law, was to prevent any person from appropriating to themselves a fishery of any part of the River Thames which was common property; and thereby committing a *Purpresture*, as it was anciently called, from the French, *pourpris*, an enclosure. Every public river or stream, says Lord Coke, is the King's highway, which cannot be privately occupied; and Glanvill adds, in his definition of *Purprestures*, that to erect any obstruction over public waters across their regular course, was to be considered as such. Such too, are Wears in general, which are large dams made across rivers for the taking of fish or the

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Chapter 16 of the *Magna Carta* as modified by subsequent acts of Parliament¹⁶ prohibited the King, though owner of all public lands and waterways, from granting away any of these areas to private subjects. While the King could not alienate public lands and waterways, Parliament did, however, have the power to do so. Subsequently, even Parliament's right to alienate public lands and waters was restricted¹⁷ as the common law sought to broaden the public interest.¹⁸

Prior to the American Revolution, the Crown held all colonial tidelands and beds of navigable waters in trust for the public use and benefit.¹⁹ After the Revolution, title to the submerged lands of

conveyance of water to a mill; and the peculiar kind mentioned in the text [of the *Magna Carta*] called Kydells, were dams having a loop or narrow cut in them, and furnished with wheels and engines for catching fish. They are now called Kettles, or Kettle-nets, and are still in use on the seacoasts of Kent and Cornwall. The removal of these instruments from Thames and Medway is directed in several ancient Charters, beside the present; as in 1197 by King Richard I; in 1199 by John; in 1226-27 by Henry III; in 1333 by King Edward III; and by numerous acts of Parliament

Id. at 214.

For additional common law commentaries concerning purprestures compare 9 R. GLANVILL, *DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIAE* ch. 11 (Beames ed. 1900) with E. COKE, *INSTITUTE OF THE LAWS OF ENGLAND** 277.b, 294.a. In *Attorney Gen. v. Ewart Booming Co.*, 34 Mich. 462 (1876), Chief Justice Cooley defined and commented upon a purpresture:

A purpresture may be defined as an enclosure by a private party of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large. . . . [However,] a purpresture . . . is not necessarily a public nuisance. . . . [A] purpresture may exist without putting the public to any inconvenience whatever.

The appropriation by an individual of a part of a public common may therefore be a purpresture, and as it would constitute an invasion of a public right, it would be proper that proceedings for its abatement should be taken on behalf of the state. An unauthorized enclosure of a part of a highway may also be a purpresture and a public wrong, whether the highway be one by land or by water.

Id. at 472, 473.

Cf. *Cobbs v. Commissioners of Lincoln Park*, 202 Ill. 427, 67 N.E. 5. (1903). *See also* HALE 85; J. GOULD, *supra* note 9, § 21.

16. Chapter 16 of the *Magna Carta* and succeeding statutes of Henry III states: "None shall be distrained to do more for a Knight's-Fee, nor any other *free tenement*, that what is due from thence." (emphasis added). R. THOMSON, *supra* note 15, at 75. *See also Id.* at 51, 110, 122, 135, 149, 196, 197.

17. *See generally* J. ANGELL, *A TREATISE ON THE RIGHTS OF PROPERTY IN TIDEWATERS* 67, 69 (2d ed. 1847); HALE.

18. J. ANGELL, *A TREATISE ON THE LAW OF WATERCOURSES* 194 (2d ed. 1840).

19. *Morris v. United States*, 174 U.S. 196, 226 (1899); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410, 416 (1842).

navigable waterways passed to the original thirteen sovereignties.²⁰ In interpreting colonial grants of seashores and riverbeds, the United States Supreme Court and lower federal courts generally followed the English common law, effectively transposing much of that law into American law.²¹

II. THE MODERN TRUST DOCTRINE AND PUBLIC WATERWAYS

A. *Pre-emptive Federal Authority*

American courts did, however, make one significant change in the common law; they expanded the concept of navigability beyond the mere ebb and flow of the tides,²² to include all waters that were "navigable-in-fact."²³ At present, this "navigable-in-fact" test defines

20. *Morris v. United States*, 174 U.S. 196, 226 (1899); *cf. Shively v. Bowlby*, 152 U.S. 1, 15 (1894).

21. V. YANNAGONE & B. COHEN, *supra* note 1, at 23.

22. HOUCK xiii, 8. *See* 3 J. KENT, COMMENTARIES 427; The Royal Fisheries in the River Banne, Sir John Davies Reports 149 (K.B. 1611), *cited in* HOUCK 8. In the case of the *River Banne*, reprinted in 80 Eng. Rep. 540 (K.B. 1611), it was resolved:

[T]hat there are two kinds of rivers, navigable and not navigable; that every navigable river, so high as the sea ebbs and flows in it, is a *royal* river, and belongs to the King, by virtue of his prerogative; but in every other river, and in the fishery of such other river, the *ter*-tenants on each side have an interest of common right; the reason for which is, that so high as the sea ebbs and flows, it participates of the nature of the sea, and is said to be a branch of the sea so far as it flows.

HOUCK 8. Houck considers this holding dictum, and argues that although the common law tidal test was a convenient test of navigability, it was not necessarily the only one; and that wherever a public navigation existed, there the rights of adjoining property owners of land were limited to the high water mark, and the title to the soil of the river was in the Crown, in England, and in this country, in the States. HOUCK 8, 9. *Contra*, J. ANGELL, LAW OF WATER-COURSES § 535 (7th ed. 1877).

23. The American definition of navigable water derives from the famous quotation in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870):

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when 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. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

Id. at 563.

For modern elaborations on this standard see Comment, *Private Fills in*

not only the admiralty jurisdiction of the federal courts²⁴ but also the scope of the federal power to regulate navigation.²⁵

The federal government has several sources of power²⁶ that inherently limit the exercise of individual water rights and state trusteeship over navigable water or lands lying beneath, along, or adjacent to navigable waterways. Pre-emptive federal authority over navigation, derived from the commerce clause,²⁷ enables the United States government to regulate the flow of navigable streams.²⁸ This power has been exercised by Congress in its enacting the Rivers and Harbors Act of 1899²⁹ and in its allocating waters of the Colorado River by legislation.³⁰

B. State Trusteeship of the Components of a Waterway

States, not the federal government, hold title to tidelands and lands beneath navigable waters.³¹ In England, since the time of Lord Hale,³² the Crown has held title to navigable tidelands and riverbeds and dominion thereto has been vested in him as representative of the nation and for the public benefit.³³

In the New World, the Crown's trusteeship (*jus publicum*) over

Navigable Waters: A Common Law Approach, 60 CALIF. L. REV. 225, 230 n.32 (1972).

24. See note 3 *supra*.

25. See note 3 *supra* and note 26 *infra*.

26. No express reference to water resources exists in the United States Constitution. Federal powers are derived from the commerce clause, property clause, war and treaty powers, the general welfare clause, the interstate compact provision, and the original jurisdiction of the United States Supreme Court in suits between the states.

27. See *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851); *Gibbons v. Odgen*, 22 U.S. (4 Wheat.) 1 (1824). See also *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

28. The federal navigable-in-fact test applies here. See note 23 *supra*.

29. 33 U.S.C. § 403 (1899).

30. *Arizona v. California*, 373 U.S. 546 (1963). Cf. *Fish and Wildlife Coordination Act*, 16 U.S.C. §§ 661-668 (1958); *Refuse Act*, 33 U.S.C. §§ 407, 407a (1899); *Water Quality Improvement Act*, 33 U.S.C. §§ 1151-1175 (1970); *National Environmental Policy Act*, 33 U.S.C. §§ 4321, 4331-4335 (1970); *Water Quality Standards Act of 1972*, 42 U.S.C. §§ 1251-1376 (Supp. II 1972); *Submerged Lands Act*, 43 U.S.C. §§ 1301-1303, 1311-1315, 1331-1343 (1953).

31. See cases cited note 20 *supra*.

32. *Circa* 1675.

33. *Shively v. Bowlby*, 152 U.S. 1, 11 (1894).

navigable waters passed to the grantees in the Royal Charters.³⁴ Upon independence, the trust interest was vested in the original states, subject to the rights surrendered under the Constitution of the United States.³⁵ Since 1845,³⁶ it has been clear that rights in tidelands and in lands under navigable waters within state boundaries are governed and controlled by state rather than by federal law.³⁷

At present, the generally recognized rule is that the states own tidelands and lands beneath navigable waters subject to a public trust (*i.e.*, subject to the *jus publicum*), which upon alienation runs with the land, in favor of the public as beneficiary.³⁸ A majority of state courts have upheld the power of the state to convey an interest to a private owner, so long as the interests of the public are safeguarded or enhanced by the grant.³⁹ A few courts have denied the power of the state to alienate these lands.⁴⁰

The banks and shores of a watercourse are usually defined as that property lying between high and low water mark.⁴¹ It is this property which is known as tideland, and it is in this area that the state's sovereign interest reigns.⁴² Status as marshland, meadowland, or swampland, on the other hand, is of no legal significance.⁴³

Most courts rule that the state holds all lands below mean high water mark in trust for the benefit and use of the public,⁴⁴ subject

34. *See, e.g.*, *Browne v. Kennedy*, 9 Md. (5 Har. & J.) 156, 163-64 (1821), wherein the terms of the grant to the Lord Proprietor of Baltimore are quoted.

35. *Morris v. United States*, 174 U.S. 196, 226 (1899); *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

36. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845).

37. Although the states acquired tidelands and lands beneath navigable waters pursuant to federal law, they are not restricted in this area by federal law. *See Stone* 196 n.81. *But cf. Shively v. Bowlby*, 152 U.S. 1, 43 (1894). The original thirteen states may never have surrendered any rights to tidelands or navigable riverbed soil.

38. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

39. *See generally Stone*.

40. *Id.* at 197 n.86.

41. *Houck* 119.

42. *Porro, Invisible Boundary—Private and Sovereign Marshland Interests*, 3 NATURAL RESOURCES LAW. 512, 516 (1970).

43. *Id.*

44. *Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10, 17, *rehearing denied*, 296 U.S. 664 (1935); *Morris v. United States*, 174 U.S. 196, 226 (1899); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410, 416 (1842). *Cf. Shively v. Bowlby*, 152 U.S. 1, 15 (1894).

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to easements granted to riparian owners.⁴⁵ Pursuant to this trusteeship, the state regulates such uses and rights as navigation, free passage, commerce, fisheries, recreation, bathing, seaweed and shells, and the "public interest,"⁴⁶ where such are found below the mean high water mark.

Four states⁴⁷ recognize state title interest in navigable tidelands only to the mean low water mark.⁴⁸ Three other states⁴⁹ draw the line between sovereign and private interest at mean low water mark, or 100 rods outward from mean high water mark, whichever is less.⁵⁰ These seven minority states, however, extend their trusteeship into the tideland area to protect beneficial public uses for navigation, ports, free passage and fishing.⁵¹ To date, none of these minority states has followed the lead of some majority states in recognizing any additional public uses of tideland areas.⁵² The majority states not only extend the physical boundaries of state trusteeship in tidelands but also recognize a greater number of public uses.

As a general rule, the ownership of navigable water is vested in the public or in the state in trust for the benefit of the public.⁵³ The

45. *E.g.*, to construct bulkheads, wharves, piers. Nevertheless, the Army Corps of Engineers, pursuant to the Rivers and Harbors Act of 1899, and most states strictly regulate dredge and fill operations in navigable waters. *See Private Fills in Navigable Waters*, *supra* note 23.

46. *See generally The Public Trust in Tidal Areas.*

47. Connecticut, Delaware, Pennsylvania and Virginia.

48. *Town of Orange v. Resnick*, 94 Conn. 573, 109 A. 864 (1920) (expressing a special interest in a private littoral owner, though the balance of ownership seems to be in the state); *Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435 (1882); *Citizens' Elec. Co. v. Susquehanna Boom Co.*, 270 Pa. 517, 113 A. 559 (1921); *Black v. American Int'l Corp.*, 264 Pa. 260, 107 A. 737 (1919); *Palmer v. Farrell*, 129 Pa. 162, 18 A. 761 (1889); *Scott v. Doughty*, 124 Va. 358, 97 S.E. 802 (1919) (by statute). *See McDonald v. Whitehurst*, 47 F. 757 (E.D. Va. 1891), *aff'd*, 52 F. 633 (4th Cir. 1892).

49. Maine, Massachusetts and New Hampshire.

50. *Sinford v. Watts*, 123 Me. 230, 122 A. 573 (1923); *Snow v. Mt. Desert Island Real Estate Co.*, 84 Me. 14, 24 A. 429 (1891); *Glancey v. Houdlette*, 39 Me. 451 (1855); *Iris v. Town of Hingham*, 303 Mass. 401, 22 N.E.2d 13 (1939); *Home for Aged Women v. Commonwealth*, 202 Mass. 422, 89 N.E. 124 (1909); *Clement v. Burns*, 43 N.H. 609 (1862); *Nudd v. Hobbs*, 17 N.H. 524 (1845) (dictum saying that New Hampshire would probably follow Massachusetts on this point).

51. *See Shively v. Bowlby*, 152 U.S. 1 (1894).

52. *See Stone* 273, 274. *But cf. DEL. CODE ANN. tit. 7, §§ 6601 et seq.*, 7001 *et seq.* (Supp. 1973).

53. *See Shively v. Bowlby*, 152 U.S. 1, 38 (1894).

waters of navigable streams are not ordinarily subject to private property interests. Title to non-navigable waters, on the other hand, generally lies with the owner or owners of the land over which they flow or in which they stand.⁵⁴ In some western jurisdictions,⁵⁵ the water of natural streams is declared by constitution or by statute to be the property of the public and subject to appropriation.⁵⁶ States have the authority to establish for themselves rules regarding ownership of watercourses and other bodies of water within their borders, subject to the constitutional restraint against interfering with vested property interests⁵⁷ or denying due process of law by taking private property for public use without just compensation.⁵⁸

Prior to the *Magna Carta*, there existed three kinds of fishing rights in England.⁵⁹ The King claimed the right of "several fisheries,"⁶⁰ an exclusive right to fish, which allowed him, at his pleasure, to take a net down many English rivers through private or "free fisheries." The second type of fishery, these "free fisheries," were granted by royal franchise.⁶¹ The third type of fishery, the right of common piscary, was defined as a "liberty of fishing in another man's water."⁶² It survived as a remnant of the Roman common fishing right.

According to Lord Chief Justice Hale,⁶³ the King stopped exercising his right of "several fisheries" before the 1600's, "for it created a great trouble to the country, and little benefit or addition of pleasure to the King."⁶⁴ Free fisheries still exist, of course, in the United

54. *Masonite Corp. v. Burnham*, 164 Miss. 840, 146 So. 292 (1933); *New England Trout & Salmon Club v. Mather*, 68 Vt. 338, 35 A. 323 (1896).

55. *E.g.*, Arizona, Colorado and Wyoming.

56. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 45-101 (1956). *See also* *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220 (1912); *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 P. 258 (1900).

57. *Arkansas v. Tennessee*, 246 U.S. 158 (1918); *United States v. Cress*, 243 U.S. 316 (1917).

58. Cases cited note 57 *supra*.

59. *See* 2 W. BLACKSTONE, COMMENTARIES *34, 39, 40 [hereinafter cited as BLACKSTONE]; R. HALL, ESSAY ON THE RIGHTS OF THE CROWN AND PRIVILEGES OF THE SUBJECT IN THE SEA SHORE OF THE REALM 106 (2d ed. 1875); S. MOORE, *supra* note 13.

60. *See* BLACKSTONE *39, 40; HALE 7.

61. *See* J. ANGELL, *supra* note 22, ch. 3; BLACKSTONE *39, 40; S. MOORE & H. MOORE, THE HISTORY AND THE LAW OF FISHERIES 81 (1903).

62. BLACKSTONE *34.

63. HALE 5-8, 10-17.

64. *Id.* at 8.

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States and in England in the forms of various fishing licenses.⁶⁵ The right of common fishery survives in navigable waters and in many states includes a limited right to take shellfish, oysters, clams, and other aquatic animals and plants.⁶⁶ The present English and American rule is that the state or the Crown owns finfish, shellfish, seaweed, or other aquatic or marine life before they are caught or harvested.⁶⁷ Afterwards, if the catch otherwise conforms to state or royal regulations, the fisherman acquires title.⁶⁸

Before separating water from its general source,⁶⁹ water rights, as distinguished from ownership of the corpus of water, are usufructuary in nature.⁷⁰ These rights include the right to the reasonable use of the water, the right to use the flow of the stream, but cannot in any way be understood to be private ownership of the corpus of water, whether based on ownership of riparian land or on a right of appropriation.⁷¹

65. Many states also strictly regulate the taking of oysters, clams, shellfish and various other aquatic or marine animals and plants. *See, e.g.,* MD. ANN. CODE art. 66c, §§ 237-314 (Supp. 1972).

66. *See The Public Trust in Tidal Areas. Cf. Carson v. Hercules Powder Co.*, 240 Ark. 887, 402 S.W.2d 640 (1966), in which a duly licensed, local commercial fisherman had standing to allege damages to his fishing rights in a non-navigable stream.

67. *State ex rel. Wear v. Springfield Gas & Elec. Co.*, 204 S.W. 942 (Mo. App. 1918); *Columbia River Fishermen's Protective Union v. City of St. Helens*, 160 Ore. 654, 87 P.2d 195 (1939).

68. *See* cases cited note 67 *supra*. Rules governing ownership of the contents of navigable waterways have generally paralleled those determining ownership of the corpus of the water and the tidal and river bed soil thereunder. The contents of a waterway may include dissolved minerals, sand, salt, shells, wrecks, flotsam, seaweed, and most importantly, aquatic animal life. Because the common law has been chiefly concerned with commercially valuable, aquatic animal life, only common law fishing rights are discussed here.

69. *See Clark & Martz, Classes of Water and Character of Water Rights and Uses*, 1 WATERS AND WATER RIGHTS 349 n.30 (R. Clark ed. 1967).

70. *Id.* at 349 n.31. *See also* Wiel, *Running Waters*, 22 HARV. L. REV. 190 (1909). Wiel states three "first principles" of the law of running waters:

(1) Running water in a natural stream is not the subject of property, but is a wandering, changing thing without an owner, like the very fish swimming in it, or like wild animals, the air in the atmosphere, and the negative community in general. (2) With respect to this substance the law recognizes a right to take and use it, and to have it flow to the taker so that it may be taken and used,—a usufructuary right. (3) When taken from its natural stream, so much of the substance as is actually taken is captured, and, passing under private possession and control, becomes private property during the period of possession.

Id. at 213.

71. Hutchins, *Selected Problems in Western Water Law* 27 (U.S.D.A. Misc. Pub. No. 418, 1942).

Based on riparian principles, the American majority rule is that each proprietor of land adjacent to a stream or river has the right to the usufruct of the stream, and it is only for an unreasonable use of this common benefit that an action will lie.⁷² It is a riparian's fundamental right to have the body of water maintained in its natural state, neither diminished in quantity nor impaired in quality.⁷³ Correlatively, each riparian has a duty not to infringe upon the riparian rights of others.

Water rights in a minority of states, chiefly western,⁷⁴ are acquired by priority of appropriation.⁷⁵ In these states, water rights are not dependent on the location, ownership, or use of particular land.⁷⁶ Contrary to riparian principles, the appropriative right is based on actual use of water.⁷⁷ The prior appropriator has no right to the water except the actual use. In western states exclusively following the doctrine of prior appropriation, a person having no right in the flow acquired by prior appropriation has no cause for complaint if the natural flow past his land is interfered with by an appropriator.⁷⁸ It has been held, however, that appropriative water right filings, or approved applications, are property rights and constitute a possessory interest in real property pending perfection of the appropriator's ability and right to take and use the water.⁷⁹

72. See Clark & Martz, *supra* note 69, at 352. Although it has been frequently said that the right to use the water is inseparably annexed to the soil, this is correct only in the sense that it is normally part and parcel of the land belonging to the riparian proprietor by virtue of his ownership of the land. Water rights may be separated from the land and may be acquired as against the riparian proprietor by grant or adverse use, or by condemnation. See, e.g., *Stanford v. Felt*, 71 Cal. 249, 16 P. 900 (1886); *Lux v. Haggin*, 69 Cal. 255, 10 P. 674 (1886).

73. *Harrell v. City of Conway*, 224 Ark. 100, 271 S.W.2d 924 (1954). Before the constitutional amendment of 1928 in California, the riparian owners had the unrestricted right to the natural flow of water. *Hand v. Carlson*, 138 Cal. App. 202, 31 P.2d 1084 (1934); *Kennebunk, Kennebunkport & Wells Water Dist. v. Maine Turnpike Authority*, 145 Me. 35, 71 A.2d 520 (1950); *Jessup & Moore Paper Co. v. Zeitler*, 180 Md. 395, 24 A.2d 788 (1942). See Clark & Martz, *supra* note 69, at 352.

74. See Hutchins, *supra* note 71.

75. *Id.*

76. *Coffin v. The Left-Hand Ditch Co.*, 6 Colo. 443 (1882).

77. *Rock Creek Ditch & Flume Co. v. Miller*, 93 Mont. 248, 17 P.2d 1074 (1933).

78. See Hutchins, *supra* note 71, at 311.

79. *Miller & Lux, Inc. v. Bank of America*, 212 Cal. App. 2d 719, 28 Cal. Rptr. 401 (1963).

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Water rights may be adjudicated by courts in the same manner as other property interests. A suit to quiet title to water rights is in the nature of an action to quiet title to real estate.⁸⁰

Protection of the quality and continuous flow of surface waterways within a state demands the broadest exercise of state trusteeship powers over public waters. For this reason, the "navigability" test⁸¹ as determining the "publicness" of a state waterway should be abandoned. In its place the "suitability" test⁸² is suggested. Adoption of this test, which defines the publicness of a waterway in terms of its suitability for use by a group of people having a common interest in the waterway,⁸³ broadens the scope of state power. Furthermore, it provides extensive state trusteeship and police powers over surface waterways within state boundaries.

As indicated by an early Supreme Court case,⁸⁴ rights in navigable waters vary greatly from state to state, despite the fact that the federal navigable-in-fact test has been adopted in some form in most states.⁸⁵ In addition, navigability has meaning only when the purposes for which the standard is used and the context in which it applies is properly understood. For example, navigability may be used to determine: federal admiralty jurisdiction;⁸⁶ title to beds of lakes and streams for federal⁸⁷ and state purposes;⁸⁸ the validity of various

80. *Swift v. Goodrich*, 70 Cal. 103, 11 P. 561 (1886); *Frank v. Hicks*, 4 Wyo. 502, 35 P. 475 (1894); *cf. Gutheil Park Inv. Co. v. Town of Montclair*, 32 Colo. 420, 76 P. 1050 (1904). A water right, because of its usufructary character, is an incorporeal hereditament, *In re Bear River Drainage Area*, 2 Utah 2d 208, 271 P.2d 846 (1954), and should not be treated as an easement that can be annexed to the land. *Wright v. Best*, 19 Cal. 2d 368, 121 P.2d 702 (1942). An early California case, however, calls an appropriate water right a corporeal hereditament. *Hill v. Newman*, 5 Cal. 445, 63 Am. Dec. 140 (1855).

81. *See* note 23 *supra*.

82. *See* *Stone* 212-217.

83. An early case supporting this view is *Lamprey v. State*, 52 Minn. 181, 53 N.W. 1139 (1893).

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

85. *See* note 23 *supra*. *See also* *Leighty*, *supra* note 1.

86. *See* note 3 *supra*.

87. *See, e.g., United States v. Utah*, 283 U.S. 64 (1931); *United States v. Holt State Bank*, 270 U.S. 49 (1926); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

88. *See, e.g., State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353 (1908); *Obrecht v. National Gypsum Co.*, 361 Mich. 339, 105 N.W.2d 143 (1960); *State v. Longyear Holding Co.*, 224 Minn. 451, 29 N.W.2d 657 (1947); *Coxe v. State*, 144 N.Y. 396, 39 N.E. 400 (1895); *Pacific Elevator Co. v. City of*

federal statutes and the legitimate scope of authority of Congress with respect to water under its express and implied powers under the Constitution;⁸⁹ the extent of public⁹⁰ and riparian⁹¹ rights to surface use under state law when the beds are privately held; the right of public or private riparian access to the water;⁹² and specific rights under state statutes.⁹³ Furthermore, whether the body of water is characterized as a lake or stream may be of consequential importance in many of the above instances.

The federal navigability test, determinative of the scope of federal admiralty jurisdiction and navigation power, extends federal power into a potentially broad area where it may pre-empt or restrict state-created public and private water-related rights. One commentator⁹⁴ has placed present federal restrictions in the following perspective:

- 1) Federal controls over navigable waters have been exercised only in areas of legitimate national concern.
- 2) The federal test for navigability is mandatory only in the narrow situation in which ownership of the beds of navigable waters is determinative.
- 3) State-owned beds may be disposed of under state law.
- 4) Rights to surface use both by the public and by private riparians is determined, for the most part, by state law.
- 5) There is a strong likelihood that the Supreme Court, if directly confronted today with the issue of whether the federal test of navigability or a conflicting state test of navigability is controlling in the context of conflicts over surface uses of water, would hold that the state test controls.⁹⁵

Portland, 65 Ore. 349, 133 P. 72 (1913); *City of Milwaukee v. State*, 193 Wis. 423, 214 N.W. 820 (1927). *See also* *Shively v. Bowlby*, 152 U.S. 1 (1894); *Hardin v. Jordan*, 140 U.S. 371 (1891); *Barney v. Keokuk*, 94 U.S. 324 (1876).

89. *See, e.g., United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

90. *See, e.g., Harris v. Brooks*, 225 Ark. 436, 283 S.W.2d 129 (1955); *Kerley v. Wolfe*, 349 Mich. 350, 84 N.W.2d 748 (1957); *Elder v. Delcour*, 364 Mo. 835, 269 S.W.2d 17 (1954).

91. *See, e.g., Carson v. Hercules Powder Co.*, 240 Ark. 887, 402 S.W.2d 640 (1966). *See also* cases cited in note 90 *supra*.

92. *See, e.g., Bolsa Land Co. v. Burdick*, 151 Cal. 254, 90 P. 532 (1907); *Driesbach v. Lynch*, 71 Idaho 501, 234 P.2d 446 (1951); *McGlone v. Maynard*, 303 Ky. 415, 197 S.W.2d 918 (1946). *See also* Waite, *supra* note 1.

93. *See, e.g., L.A. CIV. CODE ANN.* art. 455 (1952).

94. Leighty, *supra* note 1.

95. *Id.* at 433.

Thus, defining the limits of the state navigability test becomes crucial.

A review of all the cases dealing with the publicness of waterways under a state test of navigability or otherwise is well beyond the scope of this inquiry.⁹⁶ Nonetheless, several tests for the publicness of state waterways can be distinguished. There are numerous decisions which restrict public uses exclusively to watercourses which are navigable under the federal test or to those where the bed is publicly owned.⁹⁷ Strong authority supports public use of water over private lands, based either on a broader state theory of "navigability" than that enunciated in the federal test,⁹⁸ or simply on the theory that the waterway in question is *suitable* for use by a group of people having a common interest in it.⁹⁹ Many court decisions favor the protection of public use by requiring only that the water be capable of floating a skiff, a canoe, or, most frequently a log.¹⁰⁰ An early case¹⁰¹ suggested many additional public uses of waterways: "sailing, rowing, fishing, fowling, bathing, skating, . . . and other public purposes that cannot now be enumerated or even anticipated."¹⁰²

The suitability test for determining the publicness of state waterways permits judicial recognition of these additional public water uses, all worthy of protection if reasonably exercised, while the cases employing the traditional federal "navigability" test do not permit such broad protection.

Navigability as defined for federal purposes is as outmoded today for state purposes as was the restrictive English test of navigability

96. For a comprehensive discussion of public rights in navigable state waters see Leighty, *Public Rights in Navigable State Waters—Some Statutory Approaches*, 6 *LAND & WATER L. REV.* 459 (1971).

97. See, e.g., *Parker v. Moore*, 222 Ark. 811, 262 S.W.2d 891 (1953); *Lake-side Park Co. v. Forsmark*, 396 Pa. 389, 153 A.2d 486 (1959); *Monroe v. State*, 111 Utah 1, 175 P.2d 759 (1946); *Boerner v. McCallister*, 197 Va. 169, 89 S.E.2d 23 (1955).

98. See note 23 *supra*.

99. An early case supporting this view is *Lamprey v. State*, 52 Minn. 181, 53 N.W. 1139 (1893).

100. *Attorney Gen. ex rel. Comm'r. v. Taggart*, 306 Mich. 432, 11 N.W.2d 193 (1943); *People v. Kraemer*, 7 Misc. 2d 373, 164 N.Y.S.2d 423 (Police Ct. 1957); *Roberts v. Taylor*, 47 N.D. 146, 181 N.W. 622 (1921); *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 170 Ohio St. 193, 163 N.E.2d 373 (1959); *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W.2d 441 (1935); *Muench v. Public Serv. Comm'n.*, 261 Wis. 492, 53 N.W.2d 514, *aff'd on re-hearing*, 261 Wis. 515c, 55 N.W.2d 40 (1952). See *Stone* 216 n.69.

101. *Lamprey v. State*, 52 Minn. 181, 185, 53 N.W. 1139, 1143 (1893).

102. *Id.*

for federal purposes a century ago.¹⁰³ The public opportunity and demand for surface water use is no longer limited to fishing and commercial navigation as it was during the developmental period of the federal navigability test for public waterways. With increased leisure time, millions of Americans annually seek waterbased recreation. The internal combustion engine has not only made transportation to water available to the general public, but has also opened up new waterbased means of recreation. Recreational interests, though commercially valuable, define the public interest in waterways at least as much as do those interests described in commercial navigability terms.¹⁰⁴ The suitability test allows easy judicial recognition of the increasingly important public recreational interests in state waterways.

III. STANDING TO PROTECT THE ENVIRONMENT

"If th[e] [public trust] doctrine is to provide a satisfactory tool, it must meet three criteria: It must contain some concept of a legal right in the general public; it must be enforceable against the government; and it must be capable of an interpretation consistent with contemporary concerns for environmental quality."¹⁰⁵ These three criteria are seldom encountered in case law. The trend in some states is nevertheless towards their recognition in the legislatures and in the courts. Wisconsin and Massachusetts have made the most significant contributions to the development of the public trust doctrine.¹⁰⁶ They have adopted statutory and constitutional bases to enforce the public trust over public lands. Recently, through statutory enactment, constitutional amendment, or court interpretation, Florida,¹⁰⁷

103. See Stone 212-17.

104. See Waite, *Pleasure Boating in a Federal Union*, 10 BUFFALO L. REV. 427 (1961).

105. Sax, *supra* note 1, at 474.

106. Professor Sax thoroughly examines public trust law development in California, Massachusetts and Wisconsin. Sax, *supra* note 1, at 474. See V. YANNA-CONE & B. COHEN, *supra* note 1, ch. 2. In a recent and important case, *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), the Supreme Court of Wisconsin held that the state's public trusteeship over marshlands prohibited a private landowner from dredging and filling marshy areas on his property. In addition, the court refused to allow compensation to the landowner for restricting the use of his land.

107. FLA. STAT. ANN. §§ 403, 412 (Supp. 1972).

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Michigan,¹⁰⁸ Pennsylvania,¹⁰⁹ California,¹¹⁰ New Jersey,¹¹¹ and Maryland¹¹² have made noteworthy contributions to public trust law.

A crucial standing case is *Maryland Department of Natural Resources v. Amerada Hess Corp.*¹¹³ This case raised two critical issues: first, whether the state had a property interest in its navigable waters; and second, whether it could maintain a common law action for damages to the condition of the water. Plaintiff sought damages for an oil discharge into the waters of Baltimore Harbor.¹¹⁴ Although granting in part defendants' motions to dismiss and directing the state to file an amended complaint, the court held that even though Maryland had not enacted timely legislation prohibiting defendants' acts of pollution, the state could nevertheless seek relief under the public trust doctrine in a common law action for damages against defendants.¹¹⁵ Maryland has long recognized that "although the State is said to be owner of the navigable waters within its boundaries, it holds them, not absolutely, but as a *quasi trustee* for the public benefit."¹¹⁶ Defendants contended that the "quasi trusteeship" of the state was merely an expression of state police power to regulate, thus granting the state only an usufructary rather than an ownership interest.¹¹⁷ The state claimed that its "trusteeship" presupposed a "technical

108. MICH. STAT. ANN. § 14.528(202) (Supp. 1972).

109. PA. CONST. art. I, § 27 (1971).

110. Cf. CAL. CONST. art. XV, § 2. See also *Private Fills in Navigable Waters*, *supra* note 45; Note, *California's Tideland Trust: Shoring It Up*, 22 HASTINGS L.J. 759 (1971).

111. *New Jersey Sports & Exposition Authority v. McCrane*, 119 N.J. Super. 457, 292 A.2d 580 (L. Div. 1971), *aff'd*, 61 N.J. 1, 292 A.2d 545 (1972).

112. *Maryland Dept. of Natural Resources v. Amerada Hess Corp.*, 350 F. Supp. 1060 (D. Md. 1972).

113. 350 F. Supp. 1060 (D. Md. 1972).

114. *Id.* at 1062.

115. *Id.* at 1067. The state brought suit for damages under a public nuisance theory. After conferring standing to the state to sue for damages, the court held that defendants' acts of pollution failed to constitute a public nuisance and denied the state's claim for abatement costs.

116. *Mayor of Baltimore v. Baltimore & Philadelphia Steamboat Co.*, 104 Md. 485, 493-94, 65 A. 353, 356 (1906).

117. *Accord*, *Toomer v. Witsell*, 334 U.S. 385, *rehearing denied*, 335 U.S. 837 (1948); *Geer v. Connecticut*, 161 U.S. 519 (1896); *Stevens v. State*, 89 Md. 669, 43 A. 929 (1899). See also *Corsa v. Tawes*, 149 F. Supp. 771 (D. Md.), *aff'd*, 355 U.S. 37 (1957).

ownership"¹¹⁸ that conferred a legal right to bring suit on behalf of the public in order to serve "the common good"¹¹⁹ of the citizens. The court concluded: "[I]f the state is deemed the trustee of its waters, then as trustee, the state must be empowered to bring suit to protect the corpus of the trust—*i.e.*, the waters—for the beneficiaries of the trust—*i.e.*, the public."¹²⁰ This conclusion is buttressed by the court's assertion that the state agencies charged with protecting the public's interest have a right of recourse for damages to compensate for the loss to the public.¹²¹

Even without statutory authority, the attorney general of Maryland can now maintain a common law action under the public trust doctrine for damages when injury occurs to the navigable waters of the state. This result raises the question of who constitutes the "public." In addition to the state attorney general who, if anyone, has standing to sue to protect the corpus of the trust?

The holding in *Amerada Hess* expresses the general rule, extant in England even before the enactment of the Statute of Charitable Uses in 1601,¹²² that absent statutory authority to the contrary or a special interest in a private party, only the attorney general has the right to enforce a public or charitable trust.¹²³ A person having a

118. See *Toomer v. Witsell*, 334 U.S. 385, 408 (1948) (Frankfurter, J., concurring). Mr. Justice Frankfurter's language is most appropriate: "A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership confers." *Id.* at 408.

119. 350 F. Supp. at 1067.

120. *Id.*

121. *Id.*

122. The Statute of Charitable Uses, 43 Eliz. ch. 4 (1601), was not recognized in Maryland until 1931. Prior to then, the common law was in force and the courts of Maryland were without jurisdiction to enforce a charitable use under the old statute. See MD. ANN. CODE art. 16, § 195 (1966). This statute has been held not retroactive. *Fletcher v. Safe Deposit & Trust Co.*, 193 Md. 400, 67 A.2d 386 (1949). An obvious question is presented whether public trusteeship in the sense of "technical ownership" of the corpus of the navigable waters of the state constitutes a charitable use for purpose of the Statute of Charitable Uses.

123. See MD. ANN. CODE art. 16, § 195 (1966); A. SCOTT, *THE LAW OF TRUSTS* 2754 (1954). The suit may be brought by the attorney general on his own initiative, or it may be brought by him on the relation of a third party. The relator need not have a direct interest in the trust's enforcement. He is, however, liable for the costs which would otherwise have been assumed by the state, and even if the relator brings the action, the attorney general and not the relator

special interest in the enforcement of a public trust can, however, maintain a suit for its enforcement. He must show that he is entitled to receive a benefit under the trust which is not merely the benefit to which members of the public at large are entitled.¹²⁴ On the other hand, a person having no special interest in the performance of a public or charitable trust cannot maintain a proceeding, by mandamus or otherwise, to compel the attorney general to bring an action to enforce the trust.¹²⁵ According to the language of a Maryland statute, "Courts of equity within this state shall have full jurisdiction to enforce trusts for charitable purposes, upon suit by the Attorney General or upon suit of any person having an *interest* in the enforcement thereof."¹²⁶

A. Federal Court Standing

Many cases which turn upon the question of the "navigability" of a waterway fall within the admiralty jurisdiction of the federal courts.¹²⁷ For this reason, federal standing requirements become important to determine whether certain "public" beneficiaries of the public trust in navigable waterways have standing to sue.

In federal courts, "[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue."¹²⁸ In terms of the article III limitation of federal court jurisdiction:¹²⁹

has charge of the conduct of the suit. *Attorney Gen. v. Parker*, 126 Mass. 216 (1879); *Attorney Gen. v. Butler*, 123 Mass. 304 (1877).

124. *Schell v. Leander Clark College*, 10 F.2d 542 (8th Cir. 1926); *Harger v. Barrett*, 319 Mo. 633, 5 S.W.2d 1100 (1928); *Larkin v. Wikoff*, 75 N.J. Eq. 462, 72 A. 98 (Ch. 1909), *aff'd*, 77 N.J. Eq. 589, 78 A. 1134 (Ct. Err. & App. 1910). *Cf. Wexler Constr. Co. v. Housing Authority*, 149 Conn. 602, 183 A.2d 262 (1962); *M.W. Watson, Inc. v. City of Topeka*, 194 Kan. 585, 400 P.2d 689 (1965); *Loughborough Dev. Corp. v. Rivermass Corp.*, 213 Md. 239, 131 A.2d 461 (1957); *Nugent ex rel. Collins v. Vallone*, 91 R.I. 145, 161 A.2d 802 (1960).

125. *Ames v. Attorney Gen.*, 332 Mass. 246, 124 N.E.2d 511 (1955); *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 302 A.2d 886 (1973); *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 13 Adams Co. L.J. 75 (Pa. C.P. 1971) (a recent Pennsylvania case which construes the public trust language in the "Environmental Amendment" to PA. CONST. art. 1, § 27 (1971)). *See also* A. SCOTT, *supra* note 123, at 2760.

126. MD. ANN. CODE art. 16, § 195 (1966) (emphasis added).

127. *See* notes 3, 23 *supra*, and text accompanying note 86 *supra*.

128. *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972). *See* Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Comment, *Judicial Review of Agency Action: The Unsettled Law of Standing*, 69 MICH. L. REV. 540 (1971).

129. U.S. CONST. art. III, § 2.

Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," . . . as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."¹³⁰

The Supreme Court has stated two tests regarding the federal adversary requirement: 1) "[W]hether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise,"¹³¹ and 2) "[W]hether the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."¹³² Recently, in deciding the sufficiency of allegations by persons who claimed injury of a non-economic nature that was widely shared,¹³³ the Supreme Court held that the party seeking review must himself have suffered an injury.¹³⁴

B. State Court Standing

The strict common law standing requirement discussed above¹³⁵ has prohibited most "interested" members of the public from suing to enforce a public trust. To circumvent these strict requirements, three methods for conferring standing upon environmentalists or other private parties in state courts have been suggested. These in-

130. *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972), citing *Baker v. Carr*, 369 U.S. 186, 204 (1962), and *Flast v. Cohen*, 392 U.S. 83, 101 (1968).

131. *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 152 (1970).

132. *Id.* at 153. *Barlow v. Collins*, 397 U.S. 159, 164 (1970).

133. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

134. *Id.* at 735. "[A] mere 'interest in a problem,' no matter how longstanding the interests and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' . . ." *Id.* at 739.

135. See notes 122-126 *supra* and accompanying text. Standing requirements derived from public nuisance law are similar. To entitle a person to maintain an action to restrain a public nuisance he must show that he has sustained or will sustain some special damage other than and beyond the general inconvenience and injury sustained by the public. *Donahue v. Stockton Gas & Elec. Co.*, 6 Cal. App. 276, 92 P. 196 (1907); *Costas v. City of Fond du Lac*, 24 Wis. 2d 409, 129 N.W.2d 217 (1964); see *Medcalf v. Strawbridge, Ltd.*, 2 K.B. 102 (1937); *Fritz v. Hobson*, XLII, L.T.R. (n.s.) 225 (Ch. 1880). Some states, including Maryland, require that "a person seeking to redress a public wrong . . . must prove special damages from such a wrong, differing in *character* and *kind* from that suffered by the general public" (emphasis added). *Loughborough Dev. Corp. v. Rivermass Corp.*, 213 Md. 239, 242, 131 A.2d 461, 463 (1957).

clude 1) by statute, 2) by state constitutional amendment, and 3) by judicial interpretation. Thus far, the statutory method, as developed in Michigan,¹³⁶ appears most effective.

Section 2 of Michigan's Environmental Protection Act of 1970¹³⁷ expressly confers citizen standing to sue. Thus, in Michigan, one does not have to allege a special interest in the enforcement of a public trust or special damages in order to redress certain environmental injuries.¹³⁸ This statute, which has not been held unconstitutional,¹³⁹ should allow for effective redress of environmental injuries.

A state constitutional amendment provides another vehicle for the creation of citizen standing to sue absent a special interest or special damages. Pennsylvania's recent "Environmental Amendment"¹⁴⁰ provides:

136. MICH. STAT. ANN. § 14.528(202) (Supp. 1972). *See also* FLA. STAT. ANN. § 403.412 (Supp. 1972); MINN. STAT. ANN. § 116B.03 (Supp. 1972).

137. MICH. STAT. ANN. § 14.528(202) (Supp. 1972):

Action in the circuit court; granting of relief.

Sec. 2 (1) The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

(2) In granting relief provided by subsection (1) where there is involved a standard for pollution or for an anti-pollution device or procedure, fixed by rule or otherwise, by an instrumentality or agency of the state or a political subdivision thereof, the court may:

(a) Determine the validity, applicability and reasonableness of the standard.

(b) When a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.

138. *See* Sax, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003, 1019 (1972). *See generally* Bartke, *Dredging, Filling and Flood Plain Regulation in Michigan*, 17 WAYNE L. REV. 861, 874 (1971); Heyman & Twiss, *Environmental Management of Public Lands*, 58 CALIF. L. REV. 1364, 1410 (1970); Johnson, *An Optimal State Water Law: Fixed Water Rights and Flexible Market Prices*, 57 VA. L. REV. 345 (1971); Leighty, *Aesthetics as a Legal Basis for Environmental Control*, 17 WAYNE L. REV. 1347, 1357 (1971); Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761, 786 (1971).

139. *See* *Roberts v. Michigan*, — Mich. App. —, 206 N.W.2d 466 (1973). Sax, *supra* note 138, at 1019, 1064. *See also* note 169 *infra*.

140. PA. CONST. art. I, § 27 (Supp. 1971).

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.¹⁴¹

As interpreted,¹⁴² however, the constitutionally created trust in the state's public natural resources can only be enforced by the attorney general of Pennsylvania.¹⁴³

Possible recognition of citizen standing to sue, without an allegation of a special interest in the enforcement of a public trust, is suggested by a line of New Jersey decisions. New Jersey courts have traditionally taken a broader approach to the standing question than have the federal courts.¹⁴⁴ Plaintiffs have standing if they allege that their concern with the subject matter evidences real adverseness and a sufficient stake in the outcome of the controversy, giving due weight to the interests of individual justice along with the public interest.¹⁴⁵ Crucial to this standing test is what constitutes a "concern" for the environment. For instance, do renowned conservation and environmental non-profit organizations have standing in their own right in New Jersey courts to raise questions of enforcement of the state's public trust over public property?¹⁴⁶ Because New Jersey courts have

141. *Id.*

142. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 302 A.2d 886 (1973); *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 13 Adams Co. L.J. 75 (Pa. C.P. 1971). A drafter of Pennsylvania's "Environmental Amendment," however, has suggested that beneficiaries of the public trust have standing to sue for injury to the public natural resources of the Commonwealth. See Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of HB 958*, 41 PA. B. Ass'n Q. 421 (1970).

143. *Commonwealth v. National Gettysburg Battlefield Tower*, 13 Adams Co. L.J. 75 (Pa. C.P. 1971).

144. *Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 N.J. 98, 101, 275 A.2d 433, 434 (1971).

145. *Id.* at 107, 275 A.2d at 437.

146. In New Jersey there are two kinds of public property, "one reserved for the necessities of the state, and used for the public benefit." *Arnold v. Mundy*, 6 N.J.L. 1, 71 (Sup. Ct. 1821), the other "common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which govern their use, and are called common property." *Id.* This common property consists of navigable rivers, ports, bays, sea coasts, including land under the water which could be utilized for "navigation, fishing, fowling sustenance,

traditionally fashioned standing criteria broader than those of federal courts,¹⁴⁷ they might be inclined to find that these environmental groups have standing to sue in their own right. A ruling of this kind would nonetheless fly in the face of common law public trust requirements and possibly of proper judicial construction of "real adverseness" and "sufficient stake."

Evidence of real adverseness and a sufficient stake in the outcome of a civil proceeding limits and defines what sort of "concern" in a subject matter a party can assert in order to have standing. Thus, an environmental group asserting a concern in the enforcement of a public trust must show the sufficiency of the group's stake in the outcome of the judicial proceeding and the reality or concreteness of its adverse interest as against that of the other party or parties to the proceeding. Two common situations in which standing problems might arise are an environmental group's suit against a private developer to enjoin his proposed development and an environmental group's suit against a state agency to enjoin its alleged unconstitutional, illegal, or unauthorized actions (*e.g.*, sale of public lands held under a public trust,¹⁴⁸ issuance of permits to pollute,¹⁴⁹ or failure to enforce a public trust¹⁵⁰).

In the first instance, the environmental group's interests are adverse to those of the developer in that their respective purposes are contrary: the environmentalists seek to preserve the natural character and perhaps the scenic beauty of the site, while the developer desires a profit from his proposed construction. The environmental group's financial stake in the outcome, however, is far smaller than that of the developer. It would be difficult for the group to show an

and other uses of the water and its products" *Id.* at 77. Since by its nature this common property did not permit title to vest in the people, the common law "placed it in the hands of the sovereign power to be held, protected, and regulated for the common use and benefit." *Id.* See *New Jersey Sports & Exposition Authority v. McCrane*, 119 N.J. Super. 457, 520-533, 292 A.2d 580, 615-623 (L. Div. 1971), *aff'd*, 61 N.J. 1, 292 A.2d 545 (1972).

147. *Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 N.J. 98, 101, 275 A.2d 433, 434 (1971).

148. See, *e.g.*, *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

149. See, *e.g.*, *United States v. Interlake Steel Corp.*, 297 F. Supp. 917 (N.D. Ill. 1969).

150. See, *e.g.*, *New Jersey Sports & Exposition Authority v. McCrane*, 119 N.J. Super. 457, 292 A.2d 580 (L. Div. 1971), *aff'd*, 61 N.J. 1, 292 A.2d 545 (1972).

injury to an economic interest which differs from that suffered by the public at large unless it joins as a party plaintiff, a member-owner of adjacent land the value of which will be affected by the project. Thus, if the sufficiency of the group's stake in the outcome is defined solely with reference to economic injury, absent joinder of a co-plaintiff the group would fail to show a sufficient stake necessary for the court to confer standing to sue.

In recent decisions,¹⁵¹ the Supreme Courts of both the United States and New Jersey have asserted that injury to a party's interests need not merely be economic for him to maintain a suit.¹⁵² When injury to non-economic interests is asserted, as it would be in the above hypothetical situation, the question presented is whether trees, fish, and natural areas have standing to sue.¹⁵³ Mindful of the Supreme Court's recent decision which, in effect, denied standing to inanimate objects,¹⁵⁴ the New Jersey court, nevertheless, has the *power* to grant standing to non-profit groups to sue in their own right on behalf of inanimate objects, solely because they allege a longstanding interest in environmental matters. But without statutory authority or a constitutional amendment granting standing to environmental or public interests,¹⁵⁵ it is likely that the Supreme Court of New Jersey will follow the lead of the United States Supreme Court.

In the second situation involving standing problems, where an environmental group seeks to enjoin a state agency from despoiling public lands, the problem of sufficiency of stake in the outcome of the suit arises in much the same form as it does when the environmentalists sue a private party. Solution to the problem depends upon whether the group can show an injury to its interests, economic or otherwise, which differs from that sustained by the public at large. Here, the adverseness issue arises in a slightly different way. The

151. *See* *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 N.J. 98, 275 A.2d 433 (1971).

152. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 N.J. 98, 101, 275 A.2d 433, 434 (1971).

153. *See* *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).

154. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

155. For example, to enforce a public trust in wild animals and in certain public lands and waterways. *See* *LaCoste v. Department of Conservation*, 263 U.S. 545 (1924); *Geer v. Connecticut*, 161 U.S. 519 (1896). In *Geer* the Supreme Court definitively traced the evolution of the public ownership—sovereign ownership in wild animals.

positions of both parties, advocating the public's rights, are ultimately identical. They may differ markedly, however, in the means believed necessary to protect those rights. Both the state and the environmentalists will allege that they are the genuine advocate and true representative of the public interest. Each party will claim that it is promoting the public health and welfare, protecting the quality of the environment, and managing trust property for the common use and benefit of the public. If an "ultimate public interest" test is applied to determine real adverseness, then it is questionable whether sufficiently concrete antagonism can be found between the parties. Alternatively, if the means by which the public trust is managed or enforced is dispositive of the matter, then true adverseness clearly exists. In many situations, environmentalists could easily allege that the means employed by the state agency in managing the corpus of the trust actually defeats the purpose of the trust.

IV. PROPOSAL FOR IMPLEMENTING THE PUBLIC TRUST DOCTRINE

Perhaps the rules derived from *State v. Public Service Commission*¹⁵⁶ come close to implementing the public trust doctrine in public waterways. In that case, the City of Madison wanted to fill certain portions of a park lagoon and lake-bed to use it for parking cars and other "public" uses.¹⁵⁷ The Wisconsin supreme court concluded that the proposed changes were not objectionable because they increased the public usage of the area.¹⁵⁸ Applying the factors enumerated below, the court acknowledged that the trust doctrine prevented a grant for a purely private purpose; and "even for a public purpose, the state could not change an entire lake into dry land nor alter it so as to destroy its character as a lake."¹⁵⁹ Nonetheless, "the trust doctrine [did] not prevent minor alterations of the natural boundaries between water and land."¹⁶⁰

The factors considered by the Supreme Court of Wisconsin were as follows. 1) Public bodies will control the use of the area. 2) The area will be devoted to public purposes and open to the public. 3) The diminution, pollution, or destruction of the area will be very

156. 275 Wis. 112, 81 N.W.2d 71 (1957).

157. *Id.* at 113-15, 81 N.W.2d at 71, 72.

158. *Id.*

159. *Id.* at 118, 81 N.W.2d at 74.

160. *Id.*

small when compared with the effect of the change or proposed change upon the surrounding area. 4) No one of the public uses of the area will be destroyed or greatly impaired. 5) The disappointment of those members of the public who may desire to boat, fish, swim, or otherwise lawfully use the area to be altered is negligible when compared with the greater convenience to be afforded those members of the public who will use the area.¹⁶¹

These standards could be applied to the oil spill in the Baltimore Harbor in *Amerada Hess* as follows. 1) The Maryland Department of Natural Resources and the Maryland Port Authority control the use of the Baltimore Harbor. 2) The Harbor is devoted to a public purpose and open to the public. 3) The damage caused by the single spill was temporary, but it still affected a large area of the Harbor. 4) The public uses of navigating and fishing were not permanently destroyed or greatly impaired, though they may well have been impaired in parts of the harbor for several weeks. 5) The oil spill was inconvenient to everyone, even to the spillers, who lost valuable oil. Failing to meet this last test and perhaps also the third test, the public trust in a public waterway has been violated by defendant oil spillers, and they should be assessed at least the cost of abating the pollution.

SUMMARY AND CONCLUSION

Public rights in surface waterways have long been established in the common law. In the United States these rights have been accepted and expanded. The public trust doctrine and citizen standing requirements which do not necessitate a showing of a special interest in the enforcement of a public trust provide a solid legal foundation for the protection of these public rights.

States have had primary responsibility for protecting public rights in surface waterways. State protection of these rights, where it has not been pre-empted by federal regulation, has been primarily based upon the police power, and has usually been based in statute. Public trust theory provides an alternative and more comprehensive legal basis for state ownership and effective management of public waterways.

"Navigability," though still the test under federal and most states' laws, is outmoded as the sole criterion for the publicness of a surface waterway. In its place the "suitability" test, which considers the many

161. *Id.* at 118, 81 N.W.2d at 73.

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and varied uses, especially recreational uses, of waterways by the public should be adopted.

If the public trust in the waterways of a state is to be effective, it must include the right of a state citizen, as beneficiary of the public trust, to sue to protect the corpus of that trust. This right must be enforceable against state agencies, whose duties include enforcement of the public's interest.

Traditionally, absent a showing of a special interest in the enforcement of a public trust, only the state attorney general has been able to enforce public or charitable trusts. Most attempts, at both state and federal levels, to change this common law standing requirement have failed. Of the three methods urged thus far, namely, constitutional amendment, statutory enactment, and judicial interpretation, only statutory abrogation of the common law rule appears to have been successful, and this only in Michigan.¹⁶² Even there, the constitutionality of the citizen's standing provision, allowing suits against state agencies to enjoin the "pollution, impairment, or destruction of the environment" under public trust theory, has not as yet been upheld by the highest court.¹⁶³

Public trust theory not only provides the legal foundation for protection of public rights in state surface waterways but also can become the legal cornerstone for preservation of the entire environment.¹⁶⁴ Public trust theory has already been applied in the cases of air pollution,¹⁶⁵ wild game,¹⁶⁶ public lands,¹⁶⁷ parks,¹⁶⁸ and highways and roads.¹⁶⁹ Public trust doctrine can provide a theoretical legal basis

162. MICH. STAT. ANN. § 14.528(202)(1) (Supp. 1972).

163. See *Roberts v. Michigan*, — Mich. App. —, 206 N.W.2d 466 (1973), which reversed on other grounds the lower court's finding that the citizen's standing provision of the Michigan Environmental Protection Act of 1970 was unconstitutional. *Roberts v. Michigan*, 2 E.R.C. 1612 (Mich. Cir. Ct. 1971). See also Comment, *Judicial Alteration of Administrative Water Pollution Standards*, 7 URBAN L. ANN. 362 (1974).

164. See J. SAX, *supra* note 1.

165. See PA. CONST. art. 1, § 27 (Supp. 1971).

166. *LaCoste v. Department of Conservation*, 263 U.S. 545 (1924); *Geer v. Connecticut*, 161 U.S. 519 (1896).

167. *Light v. United States*, 220 U.S. 523 (1911); *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160 (1890); *Van Brocklin v. Tennessee*, 117 U.S. 151 (1886).

168. *City of Davenport v. Buffington*, 97 F. 234 (8th Cir. 1899).

169. *Jefferson County v. Tennessee Valley Authority*, 146 F.2d 564 (6th Cir.), *cert. denied*, 324 U.S. 871, *rehearing denied*, 324 U.S. 891 (1945).

for curtailing private use of any property in which the public has a substantial interest.¹⁷⁰ There is no reason why comprehensive environmental zoning could not be accomplished and justified under public trust theory instead of under the conventional zoning doctrine.¹⁷¹ And there is every reason for those who seek to preserve the natural character of our air, water, and land to employ the public trust doctrine in defending the environment.

170. *See, e.g.,* *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). *See also* note 106 *supra*.

171. Zoning is traditionally upheld if it bears a rational relation to a proper purpose of state police power. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).