

The Public Trust Doctrine in Washington

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I. INTRODUCTION

The Washington Supreme Court recently held that the public trust doctrine "has always existed in the State of Washington."¹ This observation is difficult to accept uncritically, however, after the scores of court decisions over the years that, while implicating public trust values, have virtually ignored the doctrine's existence. What makes the observation in *Caminiti v. Boyle* particularly vexing is that the Washington courts have consistently been reluctant to assume an active role in protecting and promoting public access to the sea and its wealth. In a state whose citizens place a premium on the quality of their natural surroundings, it is a curious phenomenon that the Washington courts have failed to promote shorelines and aquatic lands conservation within the established realm of the public trust doctrine.

A survey of the resource places the issues in perspective. Washington has 2,337 miles of marine coastline² adjoining 15 counties,³ approximately 40 cities of significant size, and more than 200 islands. Geographic features framing Washington's coastal region vary widely: precipitous, 500 foot rocky bluffs

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1. *Caminiti v. Boyle*, 107 Wash. 2d 662, 669-70, 732 P.2d 989, 944-95 (1987).

2. It is customary to preface a discussion of traditional public trust theory with a brief definition of the terms that will be used to describe geographically distinct land and water features. The land area lying between ordinary high tide and extreme low tide in "marine" or tidal water areas will be termed "tidelands," and the area located between the lines of ordinary high and extreme low water areas along a navigable body of fresh water, "shorelands." Land located below extreme low tide and extreme low water in any navigable water body will be denominated "submerged" lands, or the beds of navigable waters. For an understanding of the jurisdictional boundaries established pursuant to Washington's Shoreline Management Act of 1971 (SMA) and Aquatic Lands Act of 1982 (ALA), see WASH. REV. CODE §§ 90.58.030, 79.90.010-.050 (1986).

3. Clallam, Grays Harbor, Island, Jefferson, King, Kitsap, Mason, Pacific, Pierce, San Juan, Skagit, Snohomish, Thurston, Wahkiakum, and Whatcom Counties.

rim portions of Puget Sound,⁴ while the state's Pacific Coastal Dune Area extends to 7,000 feet in width. Broad reaches of the Washington coast form one leg of the western flyway and constitute a rookery for numerous species of migratory and resident water fowl. The 50 mile Pacific Ocean Strip of the Olympic National Park, created by executive order of President Theodore Roosevelt, constitutes one of the few remaining stretches of wilderness beach in the continental United States. Other Washington coastal localities noted for their unique ecology include the shallow estuarine systems of the Chehalis, Skagit, Snohomish, and Nisqually Rivers, whose intertidal marshes provide nursing areas for juvenile marine finfish, shellfish, water fowl, and other animals; and the Hood Canal, whose glacially-carved fjord-like estuary is widely recognized for its natural beauty.⁵

In the past two decades, residents of the state have witnessed a dramatic increase in competition for the use of Washington's coastal regions. For example, less than twenty percent of the tidelands of Hood Canal are owned by the state and available for public use. The shorelines of this environmentally sensitive embayment are owned in large part by private residential homeowners, the federal government, two native Indian tribes, and numerous commercial business entities. Continued economic growth along Hood Canal will ultimately fuel an increase in coastal development, raising the specter of continued inter-tidal fill and the destruction of vital estuarine habitat systems.

Together with their value as natural habitat systems, tidelands and uplands along Puget Sound also provide an attractive location for residential and water-related commercial and industrial development. The character and intensity of uses

4. The Puget Sound region includes the north (main basin from Admiralty Inlet to the Tacoma Narrows) and south (extending from the Tacoma Narrows southward) subregions, the Hood Canal, the waterways east of Whidbey Island, the San Juan Islands, and the Juan de Fuca, Georgia, Haro, and Rosario Straits. For a thorough discussion of the many interest and user groups vying for the marine resources of Puget Sound, see Bish, Warren, Weschler, Crutchfield, Harrison, *Coastal Resource Use: Decisions on Puget Sound*, 14-18 (Washington Sea Grant Program 1975) (hereinafter cited as Bish).

5. See Washington Department of Ecology, *Washington Coastal Zone Management Program* 5 (June, 1976) (describing the state's "areas of particular concern" under the SMA). See also WASH. REV. CODE §§ 90.58.030(e), .202(1-7), .090(2) (1986) ("shorelines of statewide significance" in the Washington Shoreline Management Act of 1971, *infra* notes 106-125, and accompanying text).

vary within and among the different regions. The urbanization and industrialization that characterize the shorelines of Seattle, Tacoma, and Everett appear to a lesser degree in the smaller communities located along Puget Sound. Some coastal areas, notably those surrounding Hood Canal and Whidbey and Camano Islands, are devoted in significant part to private residential uses. Other coastal areas, like those surrounding the islands of the San Juan archipelago, are largely sport, recreation, and wilderness oriented.

The relatively quiet Puget Sound waters provide convenient terminal locations for commercial shipping, a major use component of Washington's coastal zone. World class shipping companies maintain home ports in Seattle and Tacoma. State ferry terminals as well as private marine transportation systems exist throughout Puget Sound's main basin. Oil refineries located on Puget Sound serve the petroleum transfer corridor located in the state's northern marine waters. Numerous marinas serve the moorage and other needs of recreational boaters and are found throughout the navigable waters of the state. Ship construction and repair facilities occupy the coasts of Washington's major fishing and shipping communities, notably Seattle, Tacoma, Everett, Port Townsend, Anacortes, and Bellingham.

What the foregoing serves to illustrate is that Washington's coastal zone is unique and beautiful, immeasurably valuable in terms of its diversity of ecological, residential, commercial, and industrial uses. It is well documented that the virtually infinite variety of uses of Washington's coastal area has been the source of conflict.⁶ User conflict is manifested, for example, when environmentalists oppose the construction of a proposed Puget Sound oil refinery;⁷ when recreational fishing and boating enthusiasts trespass upon their landed neighbors' private tidelands; and when hydropower dam and water storage projects drastically curtail (or in some

6. See, e.g., Pacific Northwest River Basin Commission, Puget Sound Task Force, *Puget Sound and Adjacent Waters* (1970), a multi-volume study of the water-related land uses, water recreation, water quality, power, fish, wildlife, and other resources of the Puget Sound region, cited in Bish, *supra* note 4, at 14; see also R. BISH, GOVERNING PUGET SOUND (Washington Sea Grant Program 1982) (hereinafter GOVERNING PUGET SOUND).

7. One such proposal was by Atlantic-Richfield Company to place a refinery in the area around Kayak Point, located on Port Susan Bay in Snohomish County. See *J.T. Chrobuck v. Snohomish County*, 78 Wash. 2d 858, 480 P.2d 489 (1971); see also Bish, *supra* note 4, at 121-27.

cases virtually destroy) natural propagation of wild salmon or steelhead stocks in aboriginal river systems.⁸ In the face of these and other conflicts, the management of Washington's Puget Sound and Pacific Coastal regions presents an intricate study in resource allocation.

The concept and practice of resource allocation presupposes the existence of certain individual and group rights as well as priorities of use. An owner of tidelands claims a private entitlement to the exclusive possession and enjoyment of his property. A free citizenry claims a collective bundle of rights to swim in the sea, to walk its beaches and to wade for crabs and dig for clams. A purchaser of commercially valuable tidelands claims the right to use his property for log storage to the exclusion of his formerly riparian neighbor. From what legal authority are these "rights" derived? What is their genesis, and what, if any, is the scope of any such bundle of rights? Where one set of perceived rights comes in conflict with another, whose rights are accorded priority, and on what basis are such decisions properly made?

This Article addresses these questions, first, by presenting a brief description of the historical and legal foundation of coastal resource allocation in the United States: the "public trust doctrine." Second, a survey of the Washington experience demonstrates, surprisingly, that a state whose 2,337 miles of marine coastline approximately equals the length of the entire remaining coastline of the contiguous western United States,⁹ has managed to establish a viable and responsive regulatory regime governing coastal resource use with scarcely a mention in its laws of the "public trust doctrine."¹⁰

The question to be explored here is this: with the public trust doctrine so firmly entrenched in the natural resource law

8. See generally, B. BROWN, MOUNTAIN IN THE CLOUDS: A SEARCH FOR THE WILD SALMON, Chapter 6 (1982). The controversy over impacts of hydropower development on this state's fishery habitat areas has caught the attention of Congress, which in 1980 passed the Northwest Power Act, Pub. L. No. 96-501, 94 Stat. 2697 (1980), (codified at 16 U.S.C. § 839). The Act calls on the Northwest Power Planning Council to, *inter alia*, develop and revise the Columbia Basin Fish and Wildlife Program. At this writing, the Council has issued a draft amendment to the program on which public comments are currently being solicited. See Northwest Power Planning Council, Columbia River Basin Fish and Wildlife Program 1986 Draft Amendment Document (Sept. 1, 1986).

9. *Bish*, *supra* note 4, at 9.

10. See generally GOVERNING PUGET SOUND *supra* note 6. The author posits that Washington's interjurisdictional coastal management system facilitates public access, promoting a regime of "governance" that exhibits both flexibility and responsiveness.

of many other jurisdictions, most notably California,¹¹ why is it that Washington's generally well-respected¹² coastal environmental policy evolved outside the legal realm of the public trust doctrine? In *Caminiti v. Boyle*, the Washington Supreme Court announced that the doctrine has always existed in this state.¹³ Despite the observations in *Caminiti*, however, can the doctrine exist in the absence of active judicial participation in natural resource conservation practice?

This article assesses the historical treatment of coastal resource user friction in Washington and analyzes the relationship between the state's present legal regime and conventional public trust theory.¹⁴ In this survey of the Washington experience, coastal and aquatic conservation legislation is explored. The central question is whether the public trust — originally a

11. Early California cases demonstrate strong judicial support for modern public trust theory in coastal resources law. See *infra* notes 84 & 86 and accompanying text. In fact, the Washington Supreme Court has cited California law in cases involving significant public trust issues. See *Orion Corp. v. State of Wash.*, 103 Wash. 2d 441, 693 P.2d 76 (1985); *Hill v. Newell*, 86 Wash. 227, 149 P. 951 (1915). Both of these decisions are discussed *infra*.

12. Washington was the first state whose coastal zone management plan (CZMP) was federally approved under the Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. § 1451-64 (1982)). There exists a general consensus, however, that the Washington CZMP affords inadequate protection to upland watershed areas, a critical habitat zone for anadromous fish and, in terms of ecosystem management, a vitally important part of Washington's coastal zone. See Washington State Department of Ecology, *Adjacent Lands Guidance*, (Oct. 1982), discussed in R. Hildreth and R. Johnson, *CZM in California, Oregon, and Washington*, 25 NAT. RES. J. 103, 128-129 (Jan. 1985).

13. See *supra* note 1. *Caminiti* is discussed in greater detail at *infra* note 164 and accompanying text.

14. Before proceeding any further it should be noted what this analysis will not attempt. Outside the scope of this paper are public trust issues in the use of the state's tidelands lying within or in front of incorporated cities. These are "harbor areas," designated as such by the Harbor Line Commission pursuant to constitutional and legislative authority. See WASH. CONST. art. XV, § 1 (conferring authority on the state to locate and establish inner and outer harbor lines within or in front of cities, and forever reserving harbor areas so designated to landings, wharfs, streets, and other conveniences of navigation and commerce); WASH. REV. CODE §§ 79.90.010-.020 (1986). Further, no analysis is undertaken here with respect to what public trust issues may exist within the exterior boundaries of Indian reservations or federal enclaves within Washington state. While there are significant public trust issues to be discussed in these contexts, the questions raised concerning state law jurisdiction over lands lying within Indian reservations and federal public lands and enclaves involve issues generally beyond the limited scope of this paper. The public trust in harbor areas is a matter extensively and ably considered elsewhere in the literature. See R. Johnson and E. Cooney, *Harbor Areas and the Public Trust in Washington Navigable Waters*, 54 WASH. L. REV. 275 (1979). To the extent these coastal areas are considered here in discussing public trust theory generally, the reader is advised to refer elsewhere for a more thorough analysis.

judicial doctrine — survives now as merely an anachronistic adjunct to a comprehensive package of natural resources legislation. The conclusion here is that it does not.

Rather, this Article suggests that the public trust doctrine exists in contemporary natural resources law for the same reason that it was spawned as a judge-made doctrine in this country in the 19th century: to promote maximum resource utilization over time and to provide a baseline level of protection to fundamental natural rights of access to the sea and its resources. Under the public trust doctrine, the role of the judiciary in the allocation and utilization of coastal resources historically has been to provide checks and balances protection from wasteful or ill-considered legislative conveyances and commitments of trust property. Any dedication of public coastal resources to private (or less public) uses is considered a delegation of the trust responsibility for which the public trust doctrine provides a judicially-recognized floor. Where the public interest is diffuse or otherwise under-represented in the allocation of coastal resources, the doctrine offers the Washington courts strong historical support for requiring a compelling justification for legislative or agency-level decision-making in derogation of the public trust.

II. THE PUBLIC TRUST DOCTRINE GENERALLY

A. *Genesis*

The public trust doctrine is neither new nor universal in acceptance or application. Simply stated, the doctrine at common law is a recognition of the sovereign right of the individual states to protect inviolable public entitlements in certain natural resources associated with the coastal environment. Implicit in the doctrine is the fundamental notion that a state may not alienate to private entities the totality of a recognized and highly regarded public interest in certain resource commons. Both the geographic reach and the scope of interests protected under the public trust doctrine have varied substantially among the states whose courts, legislatures, or constitutions have adopted it. Thus, it should be noted preliminarily that any sweeping definitions that purport to encompass the whole of the American doctrine should be viewed as suspect.

The origins of the public trust doctrine have been often and ably described in literature and need not be thoroughly

reviewed here.¹⁵ What is important to recognize from the outset, however, is that the American version of the doctrine finds its roots in English common law through the writings of Bracton,¹⁶ Blackstone,¹⁷ and others declaring the shores of the sea to be inalienable, the "common property of all."¹⁸

In England, the King was assigned not only sovereign dominion over the sea and the arms of the sea, but a vested property right in its soil and subsoil as well.¹⁹ Thus, he owned the sea and its bed in a dual capacity: as proprietor and as trustee for the public. The interest in the soil owned by him in his proprietary capacity was termed the *jus privatum* and was as freely alienable as any other property interest held by the King. The interest in the soil over which he exercised mere dominion, on the other hand, was held by the King in trust for

15. Contemporary public trust commentators have described the origin of the doctrine in some detail. See Comment, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970) for a thorough development of the doctrine from early Roman times, through the English common law, to the present. Some early legal theorists saw the English common law of the seashore as a contorted but nonetheless logical extension of the Institutes of Justinian, viewed by some to be an accurate memorialization of the civil law of ancient Rome. For the views of one ardent public trust proponent, see J. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND IN THE SOIL AND SHORES THEREOF 19, 31 (2d ed. 1847) (hereinafter ANGELL ON TIDEWATERS). Others, however, ascribe historical legitimacy neither to Justinian's Institutes (claiming them to be the law reviews of yesteryear), nor to the works of Bracton, whose concept of a common right of the public on the seashore "has been supposed to prove too much." *Blundell v. Catterall*, 106 Eng. Rep. 1190 (K. B. 1821) (opinion of Best, J.). In addition to the foregoing, see generally, T. Digges, *Arguments Proving The Queen Majesties Propertye in the Sea-Lands, and Salt Shores Thereof, and That No Subject Can Lawfully Hold Any Part Thereof But By The Kings Especially Grante*, reprinted in S. Moore, HISTORY OF THE FORESHORE 180-211 (3rd ed., 1888), and cited in Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 634 n. 14 (March 1986) (hereinafter cited as Lazarus); 2 H. BRACTON, OF THE LAWS AND CUSTOMS OF ENGLAND 39-40 (S. Thorne trans. 1968); W. BLACKSTONE, THE COMMENTARIES OF THE LAWS OF ENGLAND 33-34 (4th ed. 1876); JUSTINIAN INSTITUTES 1, 2.2., 2.3, 2.10 (J. B. Moyle trans. 4th ed. 1889).

16. See Bracton *supra* note 15.

17. *Id.*

18. "And truly by natural right, there be common to all; the air, running water, and the sea, and hence the shores of the sea. Nobody is, therefore, prohibited to come to the sea shore." JUSTINIAN INSTITUTES, *supra* note 15, at 2.1.1.

19. ANGELL ON TIDEWATERS, *supra* note 15, at 20. This distinction represents the primary conceptual footing underlying public trust theory at common law — the dual property system. Considered in greater detail below, the English common law version of the dual property system recognizes that everything capable of occupancy and susceptible of ownership must be assigned a proprietor. Those things incapable of being exclusively owned and enjoyed, the "commons," were placed with the King on the principle that not only is he the "universal occupant," but the "foundation from whence, in contemplation of law, all authority and privilege proceed." *Id.* at 19-20.

the public's use: the *jus publicum*. The King's proprietorship interest and his trusteeship interest each embodied a concept of property "rights" in the sovereign distinct from, and to some degree repugnant to, the other. Yet the same resource commons, the sea and seabed about which Bracton and others wrote, were simultaneously burdened with the rights and limitations inherent in each component of this "dual property" system: the *jus privatum* and the *jus publicum*.

Early on, questions arose among English common law scholars concerning the scope of the doctrine and the geographic reach of this dual property concept. Regarding this question of scope, the doctrine at early English common law²⁰ was fashioned to accommodate only certain public uses—navigation and fishery—the prevailing source of trade and wealth in England at that time.²¹ These valuable yet incorporeal rights of navigation and fishery (and their corollary, commerce) were deemed paramount to any assertion of a private interest in the trust *res*. This triumvirate of public trust uses²²—fishery, navigation and commerce—survived intact upon the American courts' adoption of public trust theory. Vestiges of this historically narrow scope remain today.²³

20. For a discussion of the modern scope of the doctrine in Washington, see *infra* note 120 and accompanying text.

21. This is quite obviously a simplification of the roots of public trust theory. For an excellent and very readable discussion of the development of the common law, feudal England, protected trust uses, and the rights and duties of riparians, the sovereign and other users of the sea shore, see ANGELL ON TIDEWATERS, *supra* note 15, at 19, 31.

22. An historical curiosity should be mentioned here concerning the restrictive manner in which the courts have interpreted "public" use claims for which protection has been sought under the public trust umbrella. A 19th century case from the King's Bench is often cited for the proposition that bathing and swimming are not considered among traditional common law public trust uses of the sea shore: *Blundell v. Catterall*, 106 Eng. Rep. 1190 (K.B. 1821). In that trespass case, the defendant argued in favor of a common law right in all of the King's subjects to bathe on the sea shore and to pass over the dry sand area for that purpose. The court disagreed, and acknowledging the existence of a custom of bathing in certain coastal localities, it nonetheless decided broadly that no such "right" existed at all. The case is criticized as having no foundation in logic for distinguishing between the general custom of fishing (custom being at the root of the common law) and the local custom of bathing, where each custom cannot be considered anything but equally "general" among the same class of persons - the coastal inhabitants. See R. HALL, AN ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT, IN THE SEA SHORES OF THE REALM (1830); cf. Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C.DAVIS L. REV. 185, 189-90 (1980).

23. See, e.g., *Nat'l Audubon Soc'y v. Super. Ct. of Alpine County*, 33 Cal.3d 419, 658 P.2d 709, 723-24, 189 Cal. Rptr. 346, 360 (1983).

The geographic reach of the doctrine was similarly a source of controversy at early English common law.²⁴ Because the doctrine historically has been interpreted as having its sole application in the realm of navigable tidal waters and the soil and subsoil beneath them, questions have revolved for centuries around the issue of a water body's navigability.²⁵ These issues, too, have importance beyond their historical significance.²⁶

Nonetheless, it is history that provides the true perspective on the evolution of public trust theory from its ancient Roman origins to the present. Secession from England by the colonies left seemingly endless stretches of American coastline to the disposal of Congress, and it soon became apparent to America's new proprietors that its navigable waters, submerged lands, and tidelands were altogether different in character and expanse from those found across the Atlantic. Together with the novel questions raised by popular sovereignty and federalism, these factors serve to illustrate that the public trust doctrine would require extensive judicial retooling before any principled application in the United States.

B. The Public Trust Doctrine in America.

With its decision in *Illinois Central R.R. v. Illinois*²⁷ the United States Supreme Court wove the first threads of public trust theory into the fabric of American natural resources law. At issue in this seminal public trust case were a series of state legislative acts granting to the Illinois Central Railroad virtually the entire harbor of the City of Chicago. Under charges of corruption, a subsequent legislature repealed the grants, and the railroad company brought an action to quiet title.

The issue in *Illinois Central* was the power of the Illinois legislature to alienate into private hands the whole of its inter-

24. For a discussion of the geographic reach of contemporary public trust theory in Washington, see *infra* note 115 and accompanying text.

25. ANGELL ON TIDEWATERS, *supra* note 15, at 80.

26. Law review articles are legion on the concept of navigability and its relationship to the public trust, the federal navigational servitude, water law and related takings and other issues. In their casebook, Professors Hildreth and Johnson neatly define the various navigability concepts as they arise in different legal contexts. See R. HILDRETH & R. JOHNSON, OCEAN AND COASTAL LAW 26 n. 4 (1983) [hereinafter HILDRETH & JOHNSON]. For a general discussion on the subject of navigability as it presently finds application to shoreline ownership, see Corker, *Where Does the Beach Begin, and to What Extent is This a Federal Question*, 42 WASH. L. REV. 33 (1966).

27. 146 U.S. 387 (1892).

est in the lakebed adjacent to the shores of Chicago's harbor area. The United States Supreme Court ruled that the State of Michigan held title to the bed of Lake Michigan pursuant to the same sovereign authority by which a state holds title to tide waters and tidelands under the common law of the seashore—the public trust doctrine.²⁸ The lands so burdened were held by the state in trust for its people and for the purpose of promoting traditional trust uses: fishing, navigation and commerce. These interests subsumed a trust that the Court labeled inalienable by the legislature, except, importantly, “as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.”²⁹

Thus, the adoption of public trust theory into American property and coastal law was as abrupt as it was complete. With some important variations the public trust doctrine adopted in *Illinois Central* essentially mirrored the prevailing English common law theory.³⁰ But this cornerstone of public

28. A more complete analysis of the means by which each of the original thirteen states acquired title to the tidelands and beds of navigable waters within their respective borders, and the placing of all subsequent states on an “equal footing” with the former thirteen, requires a discussion which, while not outside the scope of this paper, is amply available in public trust literature. See ANGELL ON TIDEWATERS, *supra* note 15, at 36, 53 (discussing *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842) and *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845)). See also HILDRETH & JOHNSON, *supra* note 26, at 23-24; *Shively v. Bowlby*, 152 U.S. 1 (1894).

29. *Illinois Central R.R. v. Illinois*, 146 U.S. at 453.

30. Under English common law, the sea and all lands flowed over by waters subject to tidal influences, from the line of high tide seaward to the limits of national jurisdiction, “were *prima facie publici juris*, or cloaked with a public interest.” *Blundell v. Catterall*, 106 Eng. Rep. 1190, 1201 (K.B. 1821) (Holroyd, J.); see also the discussion of the “cannonball rule” in Note, *Right, Title, and Interest in the Territorial Sea: Federal and State Claims in the United States*, 4 GA. J. INT'L & COMP. LAW 463 (1974) (cited in HILDRETH & JOHNSON, *supra* note 26, at 171). While custom may have been found to override the *jus publicum*, a presumption existed that tidelands and the beds of navigable waters were subject to the public trust. An appropriation for general public use of the King's land lying below the line of low tide was not *ipso facto* a public nuisance, but to the extent it did in fact constitute an obstruction to navigation not even the King could license it. *Blundell*, 106 Eng. Rep. at 1201. On the other hand, in *Illinois Central* the Court rejected as inapplicable to the conditions of navigable waters in this country the English admiralty rule limiting to salt-water cases the assertion of domination and sovereignty over “navigable” waters. The doctrine was originally founded upon the utility of preserving from private encroachment valuable public rights in navigable waters, and the reasoning supporting the continued viability of this principle applied equally to navigable fresh water as to water influenced by the tides. Moreover, in apparent contradiction to the rule in *Blundell*, the court in *Illinois Central* expressly left open the question, to be firmly decided later, whether a state

trust law in the United States was soon to be expanded and shaped to meet the often conflicting uses of the nation's shore areas.

In *Appleby v. New York*,³¹ for example, the Court held that the state could in fact convey the *jus publicum* if the legislature clearly decided that an alienation of trust land to private exclusive use was in the public interest. Signalling a possible doctrinal retreat from the non-delegation thrust of *Illinois Central*, the court ruled that the power of the state to part with property underlying navigable waters was governed by the law of that state. That law, the Court observed, could be derived from statutes and decisions in force when the proprietary grant was made.³² This being so, and the will of the people of New York being ostensibly reflected in the laws of that state, a conveyance of the *jus publicum*—together with the proprietary interest, the *jus privatum*—would be upheld when to do so would be in keeping with the prevailing public interest.³³

After *Appleby*, the authority of a state to make tideland grants for reclamation, harbor improvement, and industrial expansion was deemed paramount to what rights an amorphous public had in navigation and a free fishery. Except with respect to the courts' recognition of an overriding federal interest in shore zone areas³⁴ or a state constitutional constraint clearly delineating prohibited uses,³⁵ it was not until the

could abdicate its responsibility over the navigable waters within its borders completely free of the public trust. See *Appleby v. New York*, 271 U.S. 364 (1926); see also *infra* note 31 and accompanying text.

31. 271 U.S. 364 (1926).

32. *Id.* at 380.

33. *Id.* at 393-95, 399-400.

34. One such interest was that of the federal government in determining the extent and validity of property rights owned or conveyed by the United States. See *Hughes v. Washington*, 389 U.S. 290 (1967); *Borax Ltd. v. Los Angeles*, 296 U.S. 10 (1935); *Joy v. City of St. Louis*, 201 U.S. 332 (1906). Another federal concern was for the scope of Indian rights on reservation land. See *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963). For an early recognition of the federal navigation servitude in favor of the United States over a state's interest in its navigable waters, see *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 89 (1824); *Morris, The Federal Navigation Servitude: Impediment to the Development of the Waterfront*, 45 ST. JOHNS L. REV. 189 (1970). While not decided on the basis of any perceived violation of the public trust, these sources do illustrate federal primacy over the coastal states' power of disposition over tidelands within their respective borders.

35. Examples of state constitutional provisions incorporating public trust values include: CAL. CONST. art. X, §§ 3, 4; MICH. CONST. art. IV, § 52; PA. CONST. art. I, § 27; VA. CONST. art. XI, §§ 1-3; WASH. CONST. art. XV.

advent of offshore oil production that the public trust doctrine was revived as a judicial tool to encourage responsible legislative action restraining the improvident use of the nation's coastal resources.

C. From 1970 To The Present: A Renewed Judicial Activism

A major oil spill in 1969 off the coast of Santa Barbara, California provided an impetus for a renewed, vigorous judicial activism in the regulation of competing uses in the coastal zone.³⁶ The late 1960's witnessed a groundswell of pressure for legislative reform designed to alleviate the lack of representation by environmental and other public interest groups in agency-level decision-making that directly affected the quality of life in the coastal environment.

One proposal was offered to supplant this traditional mode of low-participation, low-visibility administrative decision-making. In his influential article on modern public land law and the public trust doctrine, Professor Joseph P. Sax advocated a heightened level of judicial activism.³⁷ He argued that traditional agency decision-making could be made more responsive to the popular will through a new and broadly-based application of public trust theory, thus serving to democratize and legitimize the process-function which previously was lacking in coastal and aquatic resource decision-making.³⁸ The present administrative practice regulating public lands and resources could be validated, according to Professor

36. See generally *Hearings Before the Subcommittee on Air and Water Pollution - 1969*, 91st Cong., 1st Sess. pts. 2, 3, 4 (1969) cited in Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 497 n.76 (1970). Testimony before that congressional subcommittee revealed that the Department of the Interior opted not to hold public hearings prior to the issuance of a permit to allow offshore oil development along the California coast. The resulting pollution disaster led to a reexamination of administrative processes which denied valuable procedural due process rights to interested individuals, most notably those directly impacted by the spill. Administrative rule-making and adjudicative procedures such as those increasingly relied upon by the U.S. Department of the Interior served to alleviate congestion in the courts and, simultaneously, to delegate complicated and highly technical natural resource allocation and production issues to agencies best suited to decide them. Traditionally, the courts observed on review that agencies presumptively acted "in the public interest," often refusing to second guess the outcome of an agency decision. The result was an exclusion of an interested and affected public from the decision-making process, and issues of denial of process rights became instantly visible upon the event of the Santa Barbara oil spill.

37. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

38. *Id.* at 491-556.

Sax, only when the agency whose constituent resource is examined is forced to demonstrate the level of expertise it claims to possess. Otherwise, goes the argument, the courts are justified in refusing to blindly accept agency decisions as an appropriate exercise of discretion.³⁹ The role of the judiciary, under the Sax model, is to more closely scrutinize "perfunctory and essentially predetermined public hearings"⁴⁰ by either requiring the intervention of an agency more representative of the public interest in the controversy, or by calling upon the legislature to make an express and clear policy determination on the matter at issue.⁴¹

The Sax thesis argues that public trust theory offers a viable means of democratizing an essentially lopsided process in which one interest is afforded greater representation in, and access to, the legislature or administrative agency, while the often diffuse competing interests tend to be under-represented in the political process.⁴² Having surveyed the experiences of California, Wisconsin, Massachusetts, and other states in applying the public trust doctrine to public land management issues, Sax posited that public trust theory provides the courts with a principled mechanism for promoting a wide consideration of all public interests by requiring that decisions be made by a body with a constituency sufficiently broad to be responsive to the whole range of significant potential trust land uses.⁴³

When these factors demonstrate a clear justification for requiring enhanced accountability, the next step is to affirmatively examine which problems require judicial attention. According to Sax, representative imbalance in the decision-making process is evidence of political diffusion, and the latter indicates a weak organizational and financial base. Under these circumstances, no presumption of full and complete consideration of all competing public trust uses is accorded the agency determination. By removing the administrative leverage favoring preliminary agency determinations, the leveling process is begun. The courts should then search for basic substantive fairness in the allocation decision and in the process of decision as well.⁴⁴

39. *Id.* at 518.

40. *Id.* at 558.

41. *Id.*

42. *Id.* at 560.

43. *Id.* at 560-61.

44. Professor Sax listed the following indicia to which the courts had looked to

Viewed in this modern context, the public trust doctrine encourages the courts to scrutinize legislative and agency decision-making, both in terms of process and substantive fairness. It operates to validate—not undermine—the broader functions of agency practice by assuring in the appropriate case that decisions are explained, justified, and rationalized. In his 1970 work, Professor Sax examined the relatively obscure public trust decisions of a handful of states, extracted common fibers of reason and analysis, and ultimately provided his readers a calculus for extrapolating the doctrine's previously modest application to a broad variety of issues in public land use law.

Public trust theory enjoyed a period of overwhelming acceptance and doctrinal enlargement during the 1970's.⁴⁵ While in many states its traditional scope still exists to some degree, the public trust doctrine is now barely recognizable solely in terms of its original function—the protection of commerce, navigation, and fisheries. The geographic limitations of its English common law heritage, too, are all but gone. The doctrine has been invoked with varying degrees of success in attempts to press for "public trust" review of the dry sand areas of a beach,⁴⁶ of an historic battlefield,⁴⁷ and of an alley adjoining a junk yard.⁴⁸ One innovative proponent of the public trust would attempt to invoke a public interest in art.⁴⁹

On the other hand, the heightened standard of protection under modern public trust theory has often been rejected in a number of situations in which it has been invoked. The public trust doctrine witnessed a slight ideological decline in the 1980's; it has been described as anachronistic and having no place in the context of contemporary natural resource property theory.⁵⁰ Some currently view the doctrine as an obstacle to a

find evidence of unfair resource use allocations: (a) whether the property has been disposed of at less than market value; (b) whether the government has granted resource use decision-making authority to an entity more likely to subordinate the general public interest to private interests; (c) whether diffuse public uses have been reallocated to private (or less broadly public) uses; and (d) whether a resource is being used for its natural function. *Id.* at 562-565.

45. For an exhaustive collection of public trust literature and case law published since 1970, see Lazarus, *supra* note 15, at nn. 69-83.

46. *Van Ness v. Borough of Deal*, 78 N.J. 174, 393 A.2d 571 (1978).

47. *Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 203, 311 A.2d 588, 595-96 (1973) (Roberts, J., concurring).

48. *Mamolella v. First Bank of Oak Park*, 97 Ill. App. 3d 579, 423 N.E.2d 204 (1981).

49. Comment, *Protecting the Public Interest in Art*, 91 YALE L.J. 121 (1981).

50. See citations in Lazarus, *supra* note 15, at n. 396.

comprehensive theory of natural resources law.⁵¹ One author has argued against its application in the water law allocation model,⁵² and even the United States Supreme Court recently evidenced a modest retreat from applying traditional public trust theory in certain narrow circumstances.⁵³

Under the prevailing and better view, however, the public trust doctrine is a valuable tool to enhance public participation in natural resource allocation practice at the administrative level and clearly has evolved from a property-oriented doctrine to a process-oriented one. Widespread judicial acceptance of the Sax theory has moved legislatures and state natural resource agencies toward an enhanced public involvement and accountability in natural resource decisionmaking.

With this understanding of the evolution of public trust theory from its origins in Roman civil law and the English common law into its post-Revolutionary American version, and having observed both the renaissance of the public trust doctrine after acceptance of the Sax model by the American judiciary in the early 1970's, and the modest decline of the doctrine in the 1980's, our focus again turns to the Washington experience.

III. THE PUBLIC TRUST DOCTRINE IN WASHINGTON.

Given the settled principle under *Illinois Central* that the lands beneath the navigable waters of a state are owned by it upon statehood and held in trust for its people, the issue is this: what significance can be drawn from the historical absence of the public trust doctrine from Washington's constitutional, legislative, and, before Caminiti,⁵⁴ decisional law?

A. *The Delegation Preference: Early Tidelands Disposition in Washington.*

One early case decided two years following Washington's admission to statehood supports the view that the state had early recognized its public trust responsibilities without specifi-

51. See generally *id.*

52. Trelease, *Governmental Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638 (1957).

53. See *Summa Corp. v. Cal.*, 466 U.S. 198 (1984) (holding that while doctrine is still valid, no public trust easement exists where private grantees' predecessors-in-interest had their interests confirmed in a federal patent proceeding under federal statute implementing an international treaty).

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

cally adopting the public trust mantle.⁵⁵ One year before *Illinois Central*⁵⁶ was decided by the United States Supreme Court, the Washington Supreme Court in *Eisenbach v. Hatfield* undertook to define the nature and extent of riparian rights in the tidelands abutting Puget Sound. A textbook case of tidelands use conflict, the *Eisenbach* court held that, under Articles 15 and 17 of the Washington Constitution, "riparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as an incident to their estate."⁵⁷

The *Eisenbach* decision clearly accepted the basic precepts of public trust theory. The court first discussed the powers of the sovereign as they were derived from English common law and adopted into American public land law through the decisions of the United States Supreme Court.⁵⁸ Central to *Eisenbach* was the notion that the state had the power, derived through constitutional provisions and legislative enactments, to regulate tideland use in derogation of privately-held expectations, when that regulation was determined to be in the public interest. According to the Washington Supreme Court, the authority of the state to convey the *jus privatum*⁵⁹ in its tidelands cannot be abridged without injury to its "powers of self-development."⁶⁰ Thus, in *Eisenbach*, the power of the state to preserve its tidelands for the "public right of navigation and fishing"⁶¹ was clearly preserved (curiously, however, through the power to make a private tidelands grant). But the court declined to specifically invoke the public trust doctrine to ensure protection of public rights in and over Washington's tidelands.⁶²

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

56. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892), discussed in the text accompanying note 28, *supra*.

57. *Eisenbach*, 2 Wash. at 253, 26 P. at 543-44.

58. The court cited *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842), and *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). These cases were chiefly relied upon by the United States Supreme Court in its later decision, *Illinois Central*. See *supra* note 28 and accompanying text.

59. Chief Justice Anders did specifically recognize that common law was the rule of decision in the absence of legislative authority, and while he did address the "*jus privatum*" of the English common law, curiously no reference is made to its symbiotic twin, the "*jus publicum*." *Eisenbach*, 2 Wash. at 240, 26 P. at 540.

60. *Id.* at 253, 26 P. at 544.

61. *Id.* at 240, 26 P. at 540.

62. Not so with the dissent of Justice Stiles, however. He argued with vigor that the state owns no submerged lands in a proprietary capacity but merely as a sovereign,

Twenty two years later, in an action to quiet title to land uncovered by the receding waters of Lake Washington resulting from the construction of a ship canal connecting it to Lake Union and Puget Sound,⁶³ the issue raised was whether the "right *jus publicum*"⁶⁴ could be asserted by the state against riparian owners who claimed an ownership right in the exposed shorelands. A freshwater controversy, *State v. Sturtevant* stands as one of the few early Washington cases in which explicit trust language can be found in the text of the decision. Discussing the right of a riparian to extend his ownership of second class shorelands to the line of navigability,⁶⁵ the court observed: "The only right which the state has ever undertaken to maintain in trust for the whole people is the right of navigation."⁶⁶ Writing for the court on rehearing en banc, Justice Chadwick subsequently declined an invitation to rule on the "right *jus publicum*" of the state until an appropriate opportunity was presented.⁶⁷ Clearly, however, the tenor of the decision favored privately held rights in tidelands.

After *State v. Sturtevant*, therefore, the question remained unanswered: whether the "right *jus publicum*" in the state's citizens to a free fishery would be afforded similar protection under decisional law, when that right came in conflict with the

a pointed and telling distinction and one not drawn by the majority. Rather than bow to bald assertions of state "ownership" of tidelands, Justice Stiles ably argued that the state merely holds these lands as trustee for its people as an incident of sovereignty. Sovereign power alone confers no authority to divest its citizens (including a riparian owner) of their common right of access to fish in the sea by making an outright grant of the soil. *Id.* at 272-74 (Stiles, J., dissenting). Is there not some irony in the observation that, while the right of exclusive possession was sought by both the defendant (tidelands grantee) and the plaintiff (riparian proprietor) in their respective claims of superior title, each party defended his *private* claim in part on the ground that a contrary ruling would circumscribe a valuable *public* right—the right of public access! *Id.* at 267 (Stiles, J., dissenting).

63. *State v. Sturtevant*, 76 Wash. 158, 135 P. 1035 (1913).

64. *Id.* at 180.

65. "Second-class shorelands" were defined at the time to include "lands bordering on the shores of navigable rivers and lakes below the line of ordinary high water and not subject to tidal flow." RAM. & BAL. CODE § 6641 (Laws of 1897, p.230 § 4). Today the statutory definition of shorelands includes such lands waterward to the line of navigability. See WASH. REV. CODE § 79.90.045 (Supp. 1986).

66. *Sturtevant*, 76 Wash. at 165, 135 P. at 1037. This would appear at odds with the suggestion to the contrary implicit in *Eisenbach*, 2 Wash. at 240 26 P. at 540 ("navigation and fishing").

67. 76 Wash. at 180, 135 P. at 1037. From *Sturtevant*, therefore, the proposition is established that, in 1913, Washington recognized one of the two traditionally protected public entitlements under then prevailing public trust theory—the public right of navigation.

right of a private tidelands owner to the peaceful and exclusive enjoyment of his property. As might be expected, much of the law concerning public fishing rights in the shore area would turn on the question of private fee ownership of tidelands.

Two related cases reaffirmed that the state acquired upon statehood a fee interest in its tidelands: *Grays Harbor Boom Co. v. Lownsdale*⁶⁸ and *Lownsdale v. Grays Harbor Boom Co.*⁶⁹ Acknowledging the argument for a mere sovereign trusteeship in the state's tidelands, instead of a proprietary fee interest in the property vesting upon statehood, the Washington Supreme Court stated in its *per curiam* opinion in *Grays Harbor Boom Co.*:

While it would be interesting, it would not be profitable, nor is it possible within the scope of this opinion, to trace the conflicting theories whether the King (the public) originally held title to the shore and tide lands in fee, or subject to the riparian or littoral rights of the upland owner.⁷⁰

One month later, analyzing the provisions of Article 17, Section 1 of the Washington Constitution,⁷¹ the court in *Lownsdale* described the nature of state ownership of tidelands as "a reservation of a title in fee, carrying with it all of the attributes of such a title."⁷² To recognize riparian rights in abutting shoreline owners, thus restricting the power of the state to dispose of its tidelands in the manner provided by statute, would

be to make public and practically destroy property of untold value that has been, up to this time, supposed to be susceptible of private ownership; in fact such a rule would open to the commons all of the immense bodies of tide and shore lands which the state has conveyed to individuals and which is now held as private property.⁷³

68. *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 P. 1041, *reh'g denied*, 104 P. 267 (1909).

69. *Lownsdale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 P. 833 (1909).

70. *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. at 98, 104 P. at 269.

71. Article XVII provides in relevant part:

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

WASH. CONST. art. XVII, § 1.

72. *Lownsdale*, 54 Wash. at 549, 103 P. at 836.

73. *Id.* at 551, 103 P. at 837.

It should be emphasized that these two later cases arose in the context of riparian rights and did not directly involve issues of public trusteeship *per se*. However, what the cases do reflect is a strong policy preference formulated early in Washington's history favoring private ownership rights, reclamation, and commercial and industrial development along the shores of Washington's navigable waters. The Washington Supreme Court reaffirmed its view that the state possessed an unqualified fee ownership in lands beneath its navigable waters. Riparian rights, strongly protected elsewhere in the country, were extinguished in Washington in favor of a full power of tidelands disposition devolving upon the legislature upon statehood. While the Washington court recognized its obligation to maintain navigable waters open for the public right of navigation, early decisions reflected a judicial antipathy toward this obscure and ill-defined legal obstacle to what then was among the most desirable shore zone uses — development and industrialization. At the expense of riparian proprietorship, the public trust vindicated the state's power to assure clear title to the private property interests of its development-oriented tidelands grantees.

This policy preference favoring private property holdings in tidelands became more apparent in the controversy over a grant in fee of second class tidelands bordering Kitsap County in Puget Sound pursuant to the provisions of an act relating to the purchase and sale of oyster lands.⁷⁴ In *Palmer v. Peterson*, an action to restrain a trespass and to award damages was brought by a tidelands grantee seeking to prevent the defendant and his employees from entering upon or passing over the tidelands in question, "either upon foot or by boat, or other water craft"⁷⁵ In a terse three-page opinion, the court observed that the grant in question was absolute in form, carrying with it the right to exclusive possession and enjoyment. The court, quoting *Illinois Central*, held that the incidents of ownership of and dominion and sovereignty over the lands beneath a state's navigable waters entitled the state to make such conveyances to the extent the same could be accomplished without "substantial impairment of the interest of the public in the waters, and subject always to the paramount right

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

75. *Id.* at 75, 105 P. at 180. The tidelands were covered to a depth of 7 or 8 feet at high tide. *Id.* at 76, 105 P. at 180.

of Congress to control their navigation"⁷⁶ Following a cursory survey of Washington case law, the court summarily concluded:

The conveyance by the state of tide lands covered and uncovered by the flow and ebb of the tide is not a substantial impairment of the interest of the public in the navigable waters of the state, and does not interfere with the paramount right of Congress to regulate commerce with foreign nations and among the several states. [Citations omitted] Judgment affirmed.⁷⁷

What the Washington Supreme Court accomplished in *Palmer v. Peterson* is both illuminating and confusing. Relying on *Illinois Central*, the court clearly held that the acts of the legislature in granting certain tidelands into private hands extinguished any public right of navigation and fishery in the waters flowing over those lands. Confusing, however, was the court's failure to scrutinize the legislation enacted in derogation of the public trust, considering that a hard judicial inquiry was the theoretical cornerstone of the case cited in support of its decision—*Illinois Central*. With no mention of the extent of the grant in question or the location of the remaining tidelands to which the defendant (or the public) might have a similarly convenient right of salt water access, the trespass and damages award were affirmed. Read closely, the holding would seem to sanction a tacit "several" (private) fishery incidental to any tidelands grant by the state into private hands. At a high tide depth of seven or eight feet, the waters over plaintiff's tidelands would appear quite capable of supporting most forms of (circa 1909) commercial and recreational navigation; however, as to the defendants, at least, even that right was summarily extinguished. The public trust was not a favored doctrine in the law of Washington in 1909.

Six years later in *Hill v. Newell*,⁷⁸ the court considered a dispute involving the proposed construction of a bulkhead along the Duwamish River to divert the natural stream into a channel cut for the purpose of straightening the waterway. Appellants, abutting property owners to the natural meander of the Duwamish River, sought to enjoin the respondent

76. *Id.* at 76, 105 P. at 180; see also *Lownsdale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 P. 833 (1909); *Eisenbach v. Hatfield*, 2 Wash. 236, 26 P. 539 (1891).

77. *Palmer*, 56 Wash. at 76-77, 105 P. at 79.

78. 86 Wash. 227, 149 P. 951 (1915).

municipal waterway district from completing the rechannelization project, which would result in the gradual accumulation of sediment and silt and the ultimate filling of the original riverbed; in effect, it would cause an abandonment of the public's navigation interest in that original portion of the Duwamish River. The "real question," according to the court, was "whether the title to the abandoned bed is in appellants or the waterway district."⁷⁹

Citing section 1 of article 17 to the Washington Constitution, the court first reiterated its position that the state and not a riparian proprietor owns the bed and shores of navigable tidal waters to the line of ordinary high tide.⁸⁰ Significantly, it also quoted the general rule of statutory construction that a grant of public lands from the state will not be enlarged by construction and must be strictly construed against the grantee.⁸¹

The court ruled that, under *Shively v. Bowlby*,⁸² the state was entitled to administer its own property laws when passing on the extent of its own grant. Since *Eisenbach*⁸³ taught that riparian rights in Washington were extinguished at statehood by constitutional fiat, the right of the state (i.e., the public) was paramount in beds and tidelands beneath navigable tidal waters. In recognition of the state's duty to administer these lands in a manner consistent with the best interests of the public, the court relied on the reasoning of a lodestar decision in California public trust law decided only two years previously, *People v. California Fish Co.*⁸⁴

79. *Id.* at 228, 149 P. at 951.

80. *Id.* at 229, 149 P. at 952.

81. "The general rule of construction applying to grants of public lands by a sovereign to corporations or individuals is that the grant must be construed liberally as to the grantor and strictly as to the grantee, and that nothing shall be taken to pass by implication." *Hill v. Newell*, 86 Wash. at 229, 144 P. at 452.

82. 152 U.S. 1 (1894).

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

84. In *People v. Cal. Fish Co.*, 166 Cal. 576, 138 P. 79 (1913), the California Supreme Court was faced with the decision whether to allow private ownership to continue at the expense of public rights in tidal lands granted by the state into private hands. Utilizing a theory of public trust derived from *Illinois Central*, the California court found a solid middle ground upon which to decide whether a public easement for navigation and fishing had been extinguished in favor of a private tidelands grantee. Paraphrasing, the reasoning and decision of the court can be characterized as follows: (1) tidelands are and have always been dedicated to the public use for navigation and fishery; (2) title to these lands is in the state, held in trust for the people, and the trust is to be administered by the legislature; (3) the powers of the state as trustee are not expressed but implied, to be exercised commensurate with the duties necessary to the

Quoting the relevant passages from *California Fish*,⁸⁵ the *Hill v. Newell* court expressly adopted the underpinnings of then-contemporary public trust theory in California.⁸⁶ Having done so, however, the Supreme Court curiously proceeded to decide *Hill v. Newell* with absolutely no inquiry whether the legislation empowering the waterway district to undertake the rechannelization effort evidenced a "clearly expressed or necessarily implied" legislative intention to abandon the *jus publicum* in the original bed of the Duwamish River.

In *Hill v. Newell*, therefore, the Washington court relied on a California case famous for its searching reason and thorough analysis of the public trust doctrine—a case ultimately supporting the considered act of the California legislature in abandoning its trust responsibilities in affected California tidelands. In practice, however, what the Washington court adopted from *California Fish* was merely its result. As in *Palmer v. Peterson*,⁸⁷ decided six years previously, the court in *Hill v. Newell* eschewed an opportunity for a hard look at the subject legislation, and as a consequence public rights in the original bed of the Duwamish River water course were summarily extinguished.⁸⁸

As these early cases demonstrate, the public trust doctrine in Washington was a preservationist, even socialist, legal doctrine searching for application in an economically hostile environment.⁸⁹ With proper assurances that full fee ownership of

execution and administration of the trust; (4) if necessary in the administration of its trust responsibilities the state may extinguish the trust and irrevocably convey the tidelands free of the trust easement; (5) *statutes purporting to so extinguish the trust will be scrutinized to determine whether such an intention is "clearly expressed or necessarily implied"*; (6) a clear indication of an intent to extinguish the public trust will be given effect, but where no such intention appears, the court, where reasonably possible, will interpret the statute in such a manner as not to involve a termination of the *jus publicum*. *Id.*, 138 P. at 87-88.

85. *Hill v. Newell*, 86 Wash. at 231-32, 149 P. at 952-53.

86. For a discussion of California's continued adherence to public trust principles, see Note, *Increased Public Trust Protection for California's Tidelands — City of Berkeley v. Super. Court*, 14 U.C. DAVIS L. REV. 399 (1980).

87. 56 Wash. 74, 105 P. 179 (1909).

88. A closer look at the authorities cited in *California Fish* discloses that a case strikingly similar to *Palmer v. Peterson* was decided quite dissimilarly in the California courts. The California Supreme Court ruled that, in view of CAL. CONST. art. XV, § 2 (1908) protecting the public right of navigation, a tidelands grantee may not exclude boaters from passing over lands submerged at high tide absent an express extinguishment of the public right of navigation. *Forestier v. Johnson*, 164 Cal. 24, 127 P. 156 (1912). Compare, *Palmer v. Peterson*, 56 Wash. 74, 105 P. 179; WASH. CONST. arts. XV, § 1 and XVII, § 1.

89. For a fascinating history of the individuals and institutions responsible for

tidelands included the right to exclude others, private holdings in Washington's tidelands increased at the expense of a rapidly diminishing public domain.⁹⁰ Development along Washington's marine shorelines was a preferred, even encouraged practice during the state's early commercial and economic expansion, proceeding largely as a consequence of the burgeoning wood products and fisheries industries.

One early example of the legislative reaction to the economic pressures inherent in natural resource exploitation was the enactment in 1927 of the state's Public Lands Act.⁹¹ Designating (*inter alia*) tidelands "belonging to or held in trust by the state"⁹² as "public lands" under the 1927 Act, the legis-

much of the early coastal development along Elliott and Port Gardner Bays in Puget Sound, see M. MORGAN, *SKID ROAD: AN INFORMAL PORTRAIT OF SEATTLE* (1982); N. CLARK, *MILL TOWN: A SOCIAL HISTORY OF EVERETT, WASHINGTON FROM ITS EARLIEST BEGINNINGS ON THE SHORE OF PUGET SOUND TO THE TRAGIC AND INFAMOUS EVENT KNOWN AS THE EVERETT MASSACRE* (1970).

90. A word should be mentioned here relative to the disposition of tidelands into the hands of private grantees. The Washington legislature has declared certain Pacific Ocean shores and beaches to be "public highway[s] forever, and as such highway[s] shall remain forever open to the use of the public." See *State v. Wright*, 84 Wash. 2d 645, 646, 529 P.2d 453, 454 (1974) (quoting relevant but now superceded portions of Washington's Pacific Ocean Beach Highways Laws: WASH. LAWS ch. 54, § 1; WASH. LAWS ch. 105, § 1; WASH. LAWS ch. 110, § 1, formerly codified as WASH. REV. CODE §§ 79.16.130, .160, .170 *repealed by and amended by*, 1982 WASH. LAWS 1st Ex. Sess., ch. 21, § 183, and currently codified as, and amended by WASH. REV. CODE §§ 79.94.340-.370 (1985)). Since 1901 these enactments have served to prevent the sale of Washington's Pacific Coast beach area tidelands. By contrast, conveyancing of tidelands in the Puget Sound region continued unimpeded until 1971. Generally, under prior law an upland owner was accorded a preferential right to purchase adjoining first-class tide or shorelands upon having first received notice of sale. WASH. REV. CODE § 79.94.070 (1986). The upland proprietor preference option was, theoretically at least, considered to be bargained for by riparians in exchange for the extinguishment of riparian rights in adjacent navigable water bodies. See *State v. Sturtevant*, 76 Wash. 158, 135 P. 1035 (1913). Abutting proprietors to second class shorelands were secured a similar preference right, but second class tide lands were sold in the same manner as other state-owned public lands. See WASH. REV. CODE §§ 79.94.090, .260 (1986). In 1971, the Washington legislature passed a law prohibiting the further sale of Puget Sound tidelands by the state into private fee ownership. WASH. REV. CODE § 79.94.150(2) (1986). Currently, much of Washington's Pacific Ocean shore and beach areas are reserved from sale for public use. WASH. REV. CODE §§ 79.94.340-.360 (1986). Private individuals may only lease state-owned tidelands in the Puget Sound region, and then only under the terms of Washington's new comprehensive Aquatic Lands Act of 1982, WASH. REV. CODE §§ 79.90.010-.96.907 (1986). See *infra* notes 144-163 and accompanying text (discussion of the Aquatic Lands Act).

91. 1927 WASH. LAWS ch. 255 (originally codified as WASH. REV. CODE §§ 79.04.010-.090, based on 1897 WASH. LAWS ch. 89, and 1895 WASH. LAWS ch. 178; see also REM. REV. STAT. § 7797-1 (re-codified as WASH. REV. CODE §§ 79.01.004-.900)).

92. WASH. REV. CODE § 79.01.004 (1962).

lature in effect recognized its sovereign responsibility to manage these lands as a valuable natural resource, held by the State of Washington in trust for its citizens. In practice, however, the Act was little more than a comprehensive tidelands and submerged lands disposition and leasing program. The Washington Supreme Court had held that the recognized public policy of the state since its admission to statehood was to encourage development of Washington's tidelands through the grant of long-term tidelands leases.⁹³ The Public Lands Act of 1927 was unquestionably the legislative embodiment of that policy.⁹⁴

Outside the state's harbor areas,⁹⁵ prior to the mid-1960's, Washington witnessed a legislative program excluding private ownership of ocean beach tidelands and a Puget Sound tidelands leasing and disposition policy that tended to encourage the virtually unrestrained private occupation and development of what had become recognized as an invaluable public resource commons, the coast. Historically, Washington's marine coastline could accommodate the diversity of commercial shellfish cultivation, residential, commercial and industrial development, recreation, and other traditional shoreline uses. Although public navigation was an ostensibly protected right,⁹⁶ this right was not generally perceived as threatened by the exclusion of the boating or shipping public from passing over, for example, private oyster lands. Tidelands, the Washington

93. *Boyer v. State*, 19 Wash. 2d 134, 142 P.2d 250 (1943).

94. Washington's 1927 Public Lands Act did include a provision requiring that any lease of tidelands in an oyster reserve be subject to the possibility of reverter in the state should the tidelands cease to be used for oyster cultivation. 1927 WASH. LAWS ch. 255, § 148 (originally codified as WASH. REV. CODE § 79.20.070; recodified as WASH. REV. CODE § 79.20.588 (repealed 1982)). Under the Bush (Oyster) Act of 1895, the sale of tidelands in an oyster reserve created a similar possibility of reverter in the state. 1895 WASH. LAWS chs. 24, 25 (codified as REM. REV. STAT. § 8040 (repealed 1935)); *see also* Halversen v. Pacific County, 22 Wash. 2d 532, 156 P.2d 907 (1945). It could be argued that the oyster lands use preference embodied in the sale and lease provisions cited above was among the earliest legislative expressions of the public trust in tidelands resources in Washington State — in effect, an early coastal resource management policy. The "oyster lands" laws served the interests of both the Lockean oyster cultivator (by allowing the *opportunity* for the fee or lease interest to continue in perpetuity) and the "public" in its oyster fishery resource commons (by requiring the sale or lease terms to include a possibility of reverter in the state). *See, e.g.,* Wiegardt v. State, 27 Wash. 2d 1, 175 P.2d 969 (1947). This dual property philosophy (property at once both public and private) exemplified the property-based essence of common law public trust theory.

95. *See* Johnson and Cooney, *Harbor Lines and the Public Trust in Washington Navigable Waters*, 54 WASH. L. REV. 275 (1979); *see also supra* note 14.

96. *See* *State v. Sturtevant*, 76 Wash. 158, 135 P. 1035 (1913).

Supreme Court implied, were always abundantly available for public access and use.⁹⁷

B. Non-Delegation: The Lake Chelan Decision

Coastal development flourished in the first half of the twentieth century in Washington. Prosperity fostered growth, and the finite character of Washington's coastal environment soon became obvious to those claiming a right to a piece of it. Not until the state witnessed a large-scale population growth in the post-war era did the friction between coastal user groups become apparent. History will reflect that coastal environmental planning emerged in Washington as a direct result of one seemingly innocuous footnote to the opinion of Justice Hill in the landmark case of *Wilbour v. Gallagher*.⁹⁸

At issue in *Wilbour v. Gallagher* was the right to fill privately-owned land covered and uncovered by the artificial raising and lowering of the waters of Lake Chelan, a large and navigable fresh water lake located at the foot of the eastern slope of Washington's Cascade range. Defendants, the Gallaghers, asserted a right to fill their privately-owned shorelands above the line of high water. Plaintiffs, the Wilbours and others, brought a class action to have the Gallaghers' fill removed and sought damages for the reduction in value of their own properties. The trial court concluded that plaintiffs were estopped from requiring the Gallaghers to remove the fill, but awarded damages for the diminution in value of their respective properties resulting from loss of view and, to a lesser degree, from the inability of plaintiffs to use the water over the filled lands for navigation, fishing, swimming, and other purposes related to general recreation.⁹⁹ Defendants appealed, asserting a right to fill their land and claiming that damages sustained by plaintiffs were "damnum absque injuria"; plaintiffs cross-appealed, arguing that the completed fills should have been abated by the trial court.¹⁰⁰

The *Wilbour* decision opened a new chapter in Washington tide-and shorelands law. Significantly, the court declined an invitation to decide the case on a theory of prescriptive rights, but decided instead that the fills constituted an impedi-

97. See *Palmer v. Peterson*, 56 Wash. 74, 105 P. 179 (1909).

98. 77 Wash. 2d 306, 462 P.2d 232 (1969).

99. *Id.* at 312, 462 P.2d at 235.

100. *Id.*

ment to navigation and must therefore be removed. According to Justice Hill, the defendant shoreland¹⁰¹ owners could exercise the rights of any private landholder while the land was not submerged, and could do with the land as they wished "consistent with the right of navigation when it is submerged."¹⁰² Accordingly, since at high water the fills constituted an obstruction to public navigation, a protected public right, the court required that the fills be removed.

Despite its straightforward reasoning, however, the court was troubled by the time-honored practice surrounding Lake Chelan of allowing similar fills to proceed unchallenged. In footnote thirteen to *Wilbour v. Gallagher*, Justice Hill wrote:

There undoubtedly are places on the shore of the lake where developments . . . 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 within which certain fills could be made, together with carefully planned zoning . . . to preserve for the people of this state the lake's navigational and recreational possibilities. . . .¹⁰³

This brief but highly significant comment reintroduced debate in Washington over the need for comprehensive shoreline planning. It left in its wake a controversy among legal scholars and practitioners whether this newly-recognized public right in the waters over shorelands and tidelands jeopardized the time-hardened right of unrestricted private ownership of non-public submersible lands.¹⁰⁴ Clearly expressed, how-

101. The opinion was not actually couched specifically in terms of shorelands ownership, as the waters ebbed and flowed as a result of artificial fluctuations caused by the raising and lowering of Lake Chelan for the purposes of hydroelectric power generation. However, the court decided that, for all practical purposes, it was unnecessary to recognize any legal distinction under the circumstances between artificial and natural fluctuations in lake levels. The term "shoreland" is used here for reasons of conceptual clarity.

102. *Wilbour v. Gallagher*, 77 Wash. 2d at 316, 462 P.2d at 329.

103. *Id.* at 317 n.13, 462 P.2d at 239 n.13.

104. Professor Charles E. Corker advocated the position that the decision in *Wilbour v. Gallagher* cast considerable doubt whether in the future private tidelands or shorelands owners could fill in derogation of certain public rights of navigation and recreation. See Corker, *Thou Shalt Not Fill Public Waters Without Public Permission—Washington's Lake Chelan Decision*, 45 WASH. L. REV. 65 (1970). Arguing "in the spirit of an advocate" for developers, Edward A. Rauscher advanced the argument that the decision in *Wilbour v. Gallagher* should be limited in application to its particular factual circumstances. See Rauscher, *The Lake Chelan Case - Another View*, 45 WASH. L. REV. 523 (1970).

ever, was a reaffirmation of the public right of navigation, together with a newly recognized right of recreation on the navigable waters of Washington and the necessity for comprehensive planning and management of the state's shorelines to assure uniformity and consistency in shorelines land use decision-making. Though not burdened with the doctrinal baggage of its traditional counterpart, the public trust in Washington's shore areas was implicated in *Wilbour v. Gallagher*. Following that decision, the onus fell squarely upon the legislature to confront and address an impending coastal rights conflict between the private owner and an increasingly aggressive public user interest.¹⁰⁵

C. *The Legislative Response: The Shoreline Management Act of 1971*

Coalesced in opposition to the potentially harsh repercussions of *Wilbour v. Gallagher*, coastal development interests, title insurers, institutional lenders, local port authorities and

105. Recall the central premise of public trust theory — that the judiciary will recognize the wholesale disposition of submerged and submersible lands only when an intention to do so is clearly expressed or necessarily implied by legislative enactments, taking into account the interest of the public in the waters remaining. The obvious corollary of this rule can be stated: Without a clear statement of intent and an adequate consideration of the public interest in the waters remaining, the judiciary may restrain the flow of resource wealth from public into exclusively private hands. In essence, footnote 13 says no more and no less — upon adequate consideration, but not until, the legislature may alienate the *jus publicum*. Perhaps *Wilbour v. Gallagher* can be read to embody the public trust doctrine in its purest sense—the power in the courts derived from the common law to restrain the extinguishment of public rights in resource commons, not creating or expanding upon the extent of public rights but rather acting to protect existing ones in the absence of a clear expression of legislative intent to the contrary. So interpreted, the public trust underpinnings of *Wilbour v. Gallagher* do not signal an unwarranted judicial intrusion into the realm of considered legislative judgments, a common criticism of public trust application generally. See Jawetz, *The Public Trust Totem in Public Land Law: Ineffective - and Undesirable - Judicial Intervention*, 10 *ECOL. L.Q.* 455 (1982); Tannenbaum, *The Public Trust Doctrine in Maine's Submerged Lands: Public Rights, State Obligation and the Role of the Courts*, 37 *MAINE L. REV.* 105 (1985). Given the implicit policy statement in *Wilbour v. Gallagher* that public rights in the resource commons will not be extinguished in the absence of an explicit legislative directive (the “non-delegation” policy), remaining unanswered is the appropriate standard of judicial review to be employed when examining wasteful or inefficient legislative or administrative coastal or aquatic resource allocation decisions. It would seem that the present differential standard of judicial review does not offer adequate protection of the public trust. See *Weyerhaeuser Co. v. King County*, 91 *Wash. 2d* 721, 736, 592 P.2d 1108, 1117 (1979) (Shorelines Hearings Board decision that logging practices outside “shoreline” areas cannot be regulated under the SMA must be given “considerable weight.”).

the state Department of Natural Resources (DNR) formed a curious partnership in 1970 with Governor Evans and environmental groups in a joint effort to obtain legislative support for a comprehensive shoreline-related environmental conservation proposal.¹⁰⁶ From legislative compromise and conciliation emerged the Shoreline Management Act of 1971,¹⁰⁷ a coastal land use regulatory regime whose pronounced goal was stated to be the prevention of the "inherent harm in an uncoordinated and piecemeal development of the state's shorelines."¹⁰⁸

A permit system was set in place under the SMA by which local governments, whose approved "master programs"¹⁰⁹ frame the parameters for local regulation of shorelines, have "primary responsibility for initiating and administering the regulatory program of [the Act]."¹¹⁰ And while local authorities have the primary regulatory authority over "shorelines of the state" generally, certain other shore areas ("shorelines of statewide significance") were felt to be sufficiently important to the citizens of the state as a whole that the Washington State Department of Ecology (DOE) was endowed with more substantial planning authority to regulate land and water uses in these vital shore areas.¹¹¹ The Act places a check on local controls by providing a state-level override of local master program proposals which do not meet the preferential uses contemplated for "shorelines of statewide significance."

The Act also provides for shoreline master program jurisdiction over "wetlands"¹¹² and "wetland areas,"¹¹³ certain wetlands "associated with"¹¹⁴ a body of water covered by the Act, and all land located within 200 feet of the high water mark.¹¹⁵

106. In fact, prior to the decision in *Wilbour v. Gallagher*, the Washington Environmental Council and other environmental groups already had a shoreline development initiative underway following the earlier defeat of a bill designed to regulate shoreline development. For a thorough review of the events leading to the enactment of the SMA, see Bish, *supra* note 4, at 153-175.

107. WASH. REV. CODE § 90.58.010-.930 (1985). For an early discussion and analysis of the SMA, see Crooks, *The Washington Shoreline Management Act of 1971*, 49 WASH. L. REV. 423 (1974).

108. WASH. REV. CODE § 90.58.020 (1985). Note that the term "shoreline" refers to all water areas (salt- and freshwater) of the state, together with the lands underlying them, with certain notable exceptions. WASH. REV. CODE § 90.58.030(2)(c)-(e).

109. WASH. REV. CODE §§ 90.58.020, .030(3)(b) (1986).

110. WASH. REV. CODE § 90.58.050 (1985).

111. WASH. REV. CODE §§ 90.58.020, .030(2)(e) (1986).

112. *Id.*, § 90.58.030(2)(f).

113. *Id.*

114. WASH. REV. CODE § 90.58.030(2)(e)(vi) (1986).

115. WASH. REV. CODE § 90.58.030(2)(e)(4) (1986).

Lands "adjacent"¹¹⁶ to shorelines must also be considered in shoreline master programs to achieve the systematic shoreline management purposes of this comprehensive legislation.

Thus, in terms of its geographic reach, Washington's Shoreline Management Act provides protection for a recognized¹¹⁷ public interest in lands completely submerged¹¹⁸ by the waters¹¹⁹ of the state, in submersible (i.e., shorelands and tidelands) lands, in associated wetlands, and in some adjacent upland areas. Consistent with the geographic reach of conventional public trust theory in the United States, the SMA embodies a legislative attempt to compromise user conflict not only at the land-water interface, but seaward to the boundaries of state jurisdiction and landward to the reach of water influences, and even beyond.

A review of the scope of public interests afforded general protection under the Act demonstrates as well its roots in public trust theory. Despite the time-worn declaration in *State v. Sturtevant* that the "only right which the state has ever undertaken to maintain in trust for the whole people is the right of navigation,"¹²⁰ the SMA explicitly recognizes the interest of the public in its enjoyment of the physical and aesthetic qualities of the natural shorelines of the state.¹²¹

Public access and water-relatedness are key policy objectives under the Act.¹²² Where applicable, every shoreline master program must include a series of "elements" implementing these broad policy objectives; these elements require local officials to consider recreational, conservationist, historical, cultural, scientific, educational, and other values in shoreline planning.¹²³ Exemptions are also provided; a close parallel to conventional public trust theory is found in the SMA under

116. WASH. REV. CODE § 90.58.340 (1986). See also *Merkel v. Port of Brownsville*, 8 Wash. App. 844, 849, 509 P.2d 390, 394 (1973); Washington State Department of Ecology, *Adjacent Lands Guidance*, (Oct. 1982) (discussed *supra*, note 12).

117. See WASH. REV. CODE § 90.58.020 (1985). The legislative findings and policy announcement contained in this section make numerous references to the "public interest" in the state's shorelines.

118. "'Shorelines' means all the water areas of the state . . . together with the lands underlying them. . . ." WASH. REV. CODE § 90.58.030(2)(d) (1986).

119. *Id.* Note also that certain classifications of water areas are specifically exempted from SMA regulation. *Id.*

120. *State v. Sturtevant*, 76 Wash. 158, 165, 135 P. 1035, 1037 (1913); see also *supra* note 67 and accompanying text.

121. WASH. REV. CODE § 90.58.020 (1986).

122. WASH. REV. CODE §§ 90.58.020, .100(2) (1986).

123. WASH. REV. CODE § 90.58.100(2)(g) (1985).

the legislative declaration removing from the requirements of the Act certain areas which, as a result of "alterations of the natural conditions of the shoreline," no longer meet the definition of "shorelines of the state."¹²⁴

As a consequence of the parallels that exist between conventional public trust theory and Washington's SMA, some might argue that the call for heightened judicial scrutiny under Professor Sax' public trust model is obviated. Under the SMA, the Washington legislature provided a means for public participation in the coastal use decision process and simultaneously instituted a mechanism for substantive resource conservation. Process obligations are imposed which require a pause in the administrative shuffle to consider, explain, and justify any proposed alienation of the *jus publicum* in Washington's shore areas. Recall that the Sax model¹²⁵ advocates a heightened judicial scrutiny when management authority over public trust lands is delegated into private or less public hands under circumstances which fail to evidence a full, complete, and unambiguous intention to consider and extinguish state trusteeship. Public participation in coastal decision-making is facilitated under the SMA where local officials are given the authority to make coastal land use decisions. Local master program use elements favoring water-related uses along the shorelines of the state are the specifically stated policy of the community and must be considered by these local officials in approving or denying any proposed shoreline use. Substantive environmental protection through wise resource conservation is the ethic; the process-oriented local shoreline master program permit system and public hearing forum provide a means for effective grassroots input in coastal land use decision-making.

It is fundamentally wrong, however, to suppose that the role of the judiciary in coastal resource allocation has been substantially diminished with the enactment of the SMA. To assume that public trust protections are exclusively in the hands of the legislature is to ignore the relativistic holdings of

124. "Properties that have been filled, whether or not they have been substantially improved, are free of the trust to the extent the areas of such parcels are not subject to tidal action." *City of Berkeley v. Superior Court of Alameda*, 26 Cal.3d 515, 534, 606 P.2d 362, 373, 162 Cal. Rptr. 327, 338 (1980) (discussed in Note, *Increased Public Trust Protection for California's Tidelands—City of Berkeley v. Super. Court*, 14 U.C. DAVIS L. REV. 399, 414 (1980).

125. See *supra* note 37 and accompanying text.

Illinois Central, *Appleby*, and *California Fish*. The principal thrust of *Illinois Central* centered on the limitations of state legislative power to make excessive delegations of public resources to private or less public uses. *Appleby* is not to the contrary; it confirms the principles in *Illinois Central*, and then sharpens the inquiry by placing Illinois' excessive conveyances in perspective when the Court affirmed the power in the New York legislature to make an explicit but narrow alienation of the *jus publicum*. Under circumstances evidencing a full and balanced consideration of protected trust uses, a conveyance of certain trust lands may be justified when considered in relation to the public interest in the whole.

So viewed, the public trust doctrine confirms the relative spheres of state judicial and legislative power. Under this theory, no single branch of state government is permitted an exclusive hold on resource allocation practice. This concept is no less applicable today, where the doctrine, as shaped by these early cases, continues to provide guidance to all who participate in the coastal resource allocation process. The enactment of a shorelines law may as a general proposition indicate a rational and consensus-oriented state coastal resource allocation regime, but in the myriad situations involving individual, value-based judgments under the SMA—particularly in shorelines administration at the local or county level—judicial review must take place in an informed and responsible manner. The public trust doctrine not only contemplates continued judicial scrutiny of public rights under Washington's SMA, but demands it, and on a scale warranted under the unique circumstances surrounding each individual case.

D. "Takings" and the Public Trust Doctrine: The Orion Case

One of the enduring aspects of public trust theory is its relationship to the law of eminent domain and taking by excessive regulation. Grounded in constitutional law, takings claims are often made by landowners whose property development expectations are frustrated by state and local planning efforts designed to mitigate shoreline land use conflicts by regulations that seek to reconcile property development with natural resource conservation.

Often in shoreline land use disputes, the question is not whether the property is or is not adequately protected by environmental regulation. Shoreline management is well

entrenched in the contemporary realm of land use law, and there is little question now that states may simply legislate certain large scale shoreline development expectations out of existence. A landowner cannot legitimately complain that his expectations were unfairly frustrated by zoning restrictions in place prior to his acquisition of development property. A separate matter, however, is the imposition by state or local planning authorities of zoning-type restrictions on property already slated for development. The question, then, is whether the state is required to compensate owners for lost development opportunities in order to advance the legitimate objectives of the public trust doctrine.

This was precisely the question raised in *Orion Corp. v. State*,¹²⁶ a classic controversy between private rights and public trusteeship in Washington's shore zone. In the early 1960s, the Orion Development Corporation ("Orion") began acquiring property and options to purchase property adjacent to one of the state's most ecologically diverse and productive marine habitats: Padilla Bay, located in Skagit County on the coast of Puget Sound. Orion acquired the property with a goal in mind. The developers envisioned a dredge and fill operation in Padilla Bay to allow for the construction of a residential, Venetian-style community, one supporting a planned local population of approximately 30,000 with retail, commercial and recreational facilities. Before the developers' expectations could be realized, however, Washington's Shoreline Management Act¹²⁷ became law in 1971.

The Skagit County Shoreline Management Master Program ("SCSMMP"), was approved by the Washington Department of Ecology on October 5, 1976.¹²⁸ Under the SCSMMP, a significant portion of Orion's property was designated an aquatic area, destined only for such uses as would be compatible with the SCSMMP's applicable use categories. It is sufficient to say here that the County's "aquatic area" use designation effectively precluded implementation of the type of residential and commercial development Orion had previously planned.

At issue in *Orion* was whether the trial court correctly

126. 103 Wash. 2d 441, 693 P.2d 1369 (1985).

127. See *supra* notes 106-124 and accompanying text.

128. As is pointed out above, DOE approval of local shoreline master programs elevates them, under the SMA, to the status of a state-wide administrative regulation. See WASH. REV. CODE § 90.58.100(1) (1985); WASH. ADMIN. CODE § 173-16-040 (1985).

denied a motion for summary judgment filed by defendants, Skagit County, and the State of Washington. Defendants argued that Orion had failed to exhaust its administrative remedies, pointing out that not once had the developer even sought to secure a substantial development permit from Skagit County planners.¹²⁹ Plaintiff countered, pointing to a consistent pattern of permit denial by state and county planners of Orion's (and others') development plans for Padilla Bay. It argued an exception to the "exhaustion doctrine" recognized in Washington: that no administrative appeal is required when to do so would be futile under the circumstances.¹³⁰

The Washington Supreme Court affirmed. Upon review of the evidence, it was evident to the court that the state and county¹³¹ had made a specific policy choice to prevent development of Padilla Bay.¹³² Following enactment of the SMA and the state's approval of the SCSMMP, Orion, despite its efforts, had nevertheless been unable to arrive at a use plan acceptable to state and county officials. Holding that a permit application by Orion would have constituted a "vain and useless act,"¹³³ the court remanded the cause to the lower court for a trial on the merits.

The majority opinion in *Orion* was not rendered without criticism. In his dissent, Justice Dore chastised the majority for emasculating the administrative appeals procedure established by the legislature under the SMA. But in a cautiously worded concurring opinion, Justice Utter provided the parties with a vexing insight. "[P]roperty rights in privately owned tidelands," he observed, "may not be identical to those in pri-

129. *Orion*, 103 Wash. 2d at 467, 693 P.2d at 1384 (Dore, J., dissenting).

130. See *South Hollywood Hills Citizens Assn. v. King County*, 101 Wash. 2d 68, 73-74, 677 P.2d 114 (1984) (citing *Zylstra v. Piva*, 85 Wash. 2d 743, 539 P.2d 823 (1975)).

131. The court relied in part on the fact that the Washington State Coastal Zone Management Program (WSCZMP) labeled Padilla Bay an "area of particular concern." *Orion*, 103 Wash. 2d at 448-49, 643 P.2d at 1374. While the WSCZMP itself imposed no regulation on Padilla Bay, the court found this factor to be relevant to the state's overall objective, addressed in the SMA, to "recognize and protect statewide interests over local interest." WASH. REV. CODE § 90.58.020(1) (1981) (cited in *Orion*, 103 Wash. 2d at 449). Another factor in the balance was the establishment on August 29, 1980 of the Padilla Bay National Estuarine Sanctuary. See 16 U.S.C. § 1461 (1986); 15 CFR 921 (1986) (discussed in *Orion*, at 103 Wash. 2d 453-54, 693 P.2d at 1376). On remand, the trial court ruled that a taking had occurred not later than the date the Sanctuary was established. Order Granting Plaintiffs' Motion Establishing Date of Taking Not Later Than August 29, 1980, *Orion*, No. 82-2-00391-6 (Skagit Co. Sup. Ct. March 7, 1986).

132. *Orion*, 103 Wash. 2d at 460, 693 P.2d at 1380.

133. *Id.*

vately owned uplands."¹³⁴ A quotation in full is warranted:

Even prior to enactment of the Shoreline Management Act of 1971, the extent to which Orion might have been able to develop its tidelands property is unclear. Article 17 of the Washington Constitution vests ownership of tidelands in the State. However, disposal of tidelands by the State is subject to the public interest in navigation and the fishery.¹³⁵

Read in its historical context, this observation is highly significant in two primary respects. First, it reaffirmed the principle, virtually dormant since *Hill v. Newell*,¹³⁶ that the state's Article 17 power to alienate tidelands into private ownership is not an unlimited one.

But perhaps the most significant aspect of his concurring opinion is that Justice Utter provided the parties with a roadmap for further analysis of the taking issue. Acknowledging, as the parties did, that denial of Orion's tidelands development rights was a *fait accompli*, the concurring opinion revived a proposition central to conventional public trust theory: that public access to Washington shorelines for navigation and the fishery is given a paramount status over the state's otherwise unlimited power of disposition. On remand, then, the question was whether Orion or its predecessors had secured all the incidents of fee ownership when the state originally conveyed the lands in question. The trial court's task was to examine the nature and extent of public and private ownership of lands burdened with the public trust. If these lands were in fact burdened with a public trust "easement" as of the date of the original grant from the state, then no taking could result from land use regulations designed to promote public rights of navigation, commerce, and fishery. Under this analysis, it may be argued that shoreline development is not a right upon which a tidelands owner is said to have reasonable "investment-backed expectations."¹³⁷

While arguably unfair, non-deed restrictions concerning proposed uses of private property are not unique to the public

134. *Id.*, 1093 Wash. 2d at 464, 693 P.2d at 1382. (Utter, J., concurring) (citing Crooks, *The Washington Shoreline Management Act of 1971*, 49 WASH. L. REV. 423, 456 (1974)).

135. *Orion*, 103 Wash. 2d at 464, 693 P.2d at 1382 (Utter, J., concurring) (citations omitted).

136. 86 Wash. 227, 149 P. 951 (1915) (discussed *supra* note 79).

137. See *Penn Coal v. Mahon*, 260 U.S. 292 (1922). See also *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979); *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104 (1978).

trust arena. The cornerstone of any land title system is the public notice function upon which property vendees rely for assurance of title quality. But one need only refer to the string of Supreme Court zoning cases in order to find support for the constitutional validity of unrecorded restrictions on uses of private property.¹³⁸ Short of permanent physical occupation of the property, land use regulation will not often be found to constitute a taking for which compensation must be paid.¹³⁹

In support of the public trust "easement" concept, it may be said that the navigation servitude was reserved by the United States under the Commerce Clause, such that the states themselves, upon statehood, never actually received the full incidents of fee ownership of the shore zone.¹⁴⁰ Or, perhaps the scope of the federal navigation servitude is not as broad as that of the public trust easement, which the state may be said to have reserved to itself.¹⁴¹ Whatever the approach, the result is the same: the tidelands owner has fewer than the full spectrum of rights typically associated with unrestricted upland fee ownership.

On remand, the trial court in *Orion* partially adopted the public trust rationale but managed to achieve the inevitable accommodation. It ruled that a taking had occurred, but adjusted *Orion's* measure of damages to reflect no reduction in property value "resulting from the inability of plaintiffs to use their tidelands in a manner which would substantially impair public navigational rights."¹⁴²

The trial court's accommodation of interests appears to correctly apply the common law public trust doctrine to the broadly regulated field of Washington shorelines law. It evidences compromise but without prioritization of competing interests; public resources are conserved over time, while the property owner is offered a fair and equitable measure of relief. *Orion* thus presents a classic public-versus-private rights clash, and the trial court's solution illustrates that com-

138. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

139. See J. NOWAK, R. ROTUNDA, N. YOUNG, *CONSTITUTIONAL LAW*, 483-89 (2d ed. 1983).

140. See *Shively v. Bowlby*, 152 U.S. 1 (1894); see also *supra* note 28.

141. *But see Colberg, Inc. v. State*, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), cert. denied, 390 U.S. 949 (1968) (recognizing a state navigation servitude where Congress has not seen fit to exercise the reserved federal navigation power).

142. Order on Public Trust Doctrine, *Orion*, No. 82-2-00391-6 (Skagit Co. Sup. Ct. March 7, 1986).

mon law public trust principles offer a workable formula for accommodating divergent interests in coastal and aquatic resource allocation decision-making.

Another lesson of *Orion* is that a substantial advantage may be won in the name of environmental protection where, after a "hard look," the courts conclude that the public benefit to be derived from trust-protective shoreline regulation should not be effectively diluted by requiring the state to repurchase the full fee value of broadly regulated tidelands. Whether a "taking" occurs is a constitutional issue that the courts are uniquely qualified to address, and, in this context, the judiciary's role in environmental protection is a critical one. Considerable authority exists for the proposition that a "taking" should not result from the exercise of a navigational servitude. The *Orion* case typifies the tidelands controversy in Puget Sound, and presents the Washington courts with a unique perspective on shoreline management under the SMA. Whether the Supreme Court will uphold a trial court's modified "rule of no compensation"¹⁴³ depends in large part upon a broader acceptance of the Sax model, encouraging a renewed judicial activism in the allocation of scarce public resources.

E. Other Recent Trust-Protective Legislation

The SMA is only one of many recent legislative enactments that have brought the light of public scrutiny to bear on the management of traditionally protected public trust uses and resources in Washington. Consider, for example, Washington's Aquatic Lands Act of 1982 ("ALA").¹⁴⁴ The ALA is part of a comprehensive package of public lands legislation enacted

143. See, e.g., Morreale, *Federal Power in Western Waters: The Navigation Power and Rule of No Compensation*, 3 NATURAL RESOURCES JOURNAL 1, 2 (1963). See also Comment, *The Navigation Servitude as a Method of Ecological Protection*, 75 DICK. L. REV. 256 (1970); Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 OR. L. REV. 1 (1968); Stoebuck, *Condemnation of Riparian Rights: A Species of Taking Without Touching*, 30 LA. L. REV. 394, 432-35 (1970).

144. WASH. REV. CODE §§ 79.90.010-96.907 (1986); see also WASH. REV. CODE § 79.24.580 (1986). The Aquatic Lands Act of 1982 was the first step taken to comprehensively amend and compile the public land laws relating to Washington's aquatic resources. The Act was subsequently amended in 1984 following sharp legislative debate concerning the need for specificity and uniformity in the establishment of aquatic land lease rates. See 1984 WASH. LAWS ch. 221. One provision authorizing abutting landowners to maintain (free of charge) private recreational docks on state-owned shorelands, tidelands and bedlands recently withstood constitutional and public trust attack. See *Caminiti v. Boyle*, 107 Wash. 2d 662, 732 P.2d 989 (1987) (discussed *infra* note 166).

in 1982 to allow more effective management of the state's aquatic resources.¹⁴⁵ The Act contains many of the provisions formerly scattered throughout the Code authorizing and defining the scope of state management authority over the state's aquatic lands, consolidating them under a principled management program for the orderly administration of the state's aquatic resource commons.

The Washington Department of Natural Resources (DNR) is delegated the authority to manage state-owned aquatic lands "for the benefit of the public."¹⁴⁶ These lands are recognized by the legislature to constitute "a finite natural resource of great value and an irreplaceable public heritage."¹⁴⁷ A management philosophy is expressed in the Act directing DNR to "provide a balance of public benefits for all citizens of the state."¹⁴⁸ Indeed, DNR regulations go a step further, providing that the state's aquatic lands "are managed as a public trust. . . ."¹⁴⁹

The Aquatic Lands Act promotes a decidedly conservationist objective in the management of the state's aquatic lands. Public benefits to be derived from a considered management policy include public use and access, the fostering of water-dependent uses, environmental protection, the utilization of renewable resources, and, not surprisingly, the generation of revenue in a manner consistent with the state's trust

145. "Aquatic lands" is a term originally defined in the 1982 ALA to include "all state-owned tidelands, shorelands, harbor areas, and the beds of navigable waters." WASH. REV. CODE § 79.90.010 (1986). The 1984 ALA amendments, while retaining the above provision, added a new section defining "state-owned aquatic lands" to mean "those lands and waterways administered by the department of natural resources or managed . . . by a port district. 'State-owned aquatic lands' does not include aquatic lands owned in fee by, or withdrawn from the use of, state agencies other than the department of natural resources." WASH. REV. CODE § 79.90.465(12) (1986). Care should be taken to distinguish between the alternative uses of these phrases found throughout the ALA.

146. WASH. REV. CODE § 79.90.450 (1986). Generally, DNR is responsible for the management of approximately 11 square miles of harbor area, 140 square miles of shorelands, 205 square miles of tidelands, and the beds of all navigable waters of the state. The tidelands under DNR management have a frontage of approximately 1,300 miles. See WASH. ADMIN. CODE § 332-30-100(1) (1983); see also 1 Department of Natural Resources, Aquatic Lands Newsletter 1 (1983). For a brief outline of the history and use of DNR's aquatic lands, see *id.*, (citing Washington Department of Natural Resources, *Totem*, (1982)).

147. WASH. REV. CODE § 79.90.450 (1986).

148. WASH. REV. CODE § 79.90.455 (1986).

149. WASH. ADMIN. CODE § 332-30-100(1) (1983); see also WASH. ADMIN. CODE 332-30-106(53) (1985) (defining "public trust").

responsibility.¹⁵⁰

Included in the ALA are general provisions relating to the leasing of state-owned aquatic lands,¹⁵¹ provisions establishing easements and rights-of-way,¹⁵² harbor areas,¹⁵³ and waterways and streets¹⁵⁴ on tide- and shorelands; provisions relating to the preference for, and the classification, sale, and reservation of certain tide- and shorelands;¹⁵⁵ provisions relating to leases of the beds of navigable waters¹⁵⁶ and for aquacultural uses;¹⁵⁷ and, perhaps most importantly here, provisions relating to the establishment of the Aquatic Lands Enhancement Account (ALEA).¹⁵⁸

The ALEA is an account created by the legislature in 1984, funded by 40% of the net revenues generated from the "sale or lease of state-owned aquatic lands."¹⁵⁹ The Act provides that:

After appropriation, these funds shall be used solely for aquatic lands enhancement projects; further purchase, improvement, or protection of aquatic lands for public purposes; for providing and improving access to such lands; and for volunteer cooperative fish and game projects¹⁶⁰

Net revenues generated from aquatic lands leases or sales are directed to the capital purchase and development account (CPDA),¹⁶¹ and earnings on both the ALEA and CPDA are credited to the general fund.¹⁶²

Just as tidelands and shorelands are regulated under the SMA to minimize the spill-over effects of coastal user conflict under the SMA, so are the state's publicly-held aquatic lands subjected to the conservation-oriented public benefits and "water-dependent" concepts of the ALA to minimize the

150. WASH. REV. CODE § 79.90.45 (1986). *But see* *Caminiti v. Boyle*, 107 Wash. 2d 662, 732 P.2d 989 (1987) (upholding free use of state aquatic lands for recreational docks by abutting waterfront property owners).

151. WASH. REV. CODE §§ 79.91.010-.902 (1986).

152. WASH. REV. CODE §§ 79.91.010-.900 (1986).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. WASH. REV. CODE §§ 79.96.010-.907 (1986).

158. WASH. REV. CODE § 79.24.580 (1986).

159. WASH. REV. CODE § 79.24.580 (1986). Note the use of the term "state-owned aquatic lands"; *see also supra* note 145.

160. WASH. REV. CODE § 79.24.580(1) (1986).

161. Or, alternatively, into the building bond redemption fund in the event certain enumerated revenue bonds are issued. *See* WASH. REV. CODE § 79.24.580(25) (1986).

162. WASH. REV. CODE § 79.24.580(25) (1986).

inherent friction in competition for the state's public aquatic resources.

Public trust theory in its classical form recognizes that the shore areas and the beds of navigable waters are to be held by the state in trust for all its people. Recognizing the need for efficiency in the orderly administration of the trust *res*, the Washington legislature created a process under the ALA by which the state's renewable aquatic resource commons is utilized (in theory, at least) to the benefit of all. Aquatic resource productivity is maximized over time (a utilitarian concept) while resource wealth remains open in common for this and future generations (the absolutist mandate of the public trust doctrine).¹⁶³ Issues of delegation from public to private trust lands management, the favorite "process" target of the public trust doctrine, are not implicated where DNR maintains a responsible grip on allocation practice. Thus, where substantive resource protection is maintained through conservation practice, and where the public has not been divested of its rights of management and control over, or access to Washington's aquatic lands, there would appear little justification in the abstract for a judicial "hard look" at public trust protection in aquatic lands management. As will become apparent below, however, aquatic lands management in Washington does not always deserve the level of judicial deference it commands.

F. Confirmation and Repudiation: The Public Trust Doctrine After CAMINITI V. BOYLE

*Caminiti v. Boyle*¹⁶⁴ represents a milestone in public trust law in Washington, marking the first occasion on which the judicial public trust doctrine was first explicitly acknowledged in this state. In *Caminiti*, a conservation-oriented shoreline rights organization petitioned the Washington Supreme Court seeking an original writ of mandamus directed to the state Commissioner of Public Lands and State Treasurer. At issue was the constitutionality of the Revised Code of Washington Section 79.90.105, which authorizes shoreline owners to build and maintain private recreational docks on public tidelands and shorelands without compensation to the state. In *Caminiti*, having finally breathed life into the judicial public trust

163. See W. RODGERS, ENVIRONMENTAL LAW §§ 2.16(b), (c) (Supp. 1984).

164. 107 Wash. 2d 662, 732 P.2d 989 (1987).

doctrine in Washington,¹⁶⁵ the court nevertheless refused to invalidate the state's wholesale relinquishment of fee revenues for the private use of public lands.

The statute challenged in *Caminiti*—one notorious among shoreline interest circles in Washington¹⁶⁶—was attacked on two fronts. First, petitioners sought to invalidate the statute on the theory that a free private use of public lands constitutes an unconstitutional gift of property.¹⁶⁷ Second, petitioners urged the court to explicitly adopt the public trust doctrine, and to employ it as a measure of judicial control over excessively generous delegations of public resources into private hands.

The court responded predictably. Over the lone dissenting opinion of Justice Dore, who agreed that the statute authorized an unconstitutional gift of public property, the majority in *Caminiti* perpetuated¹⁶⁸ the curious notion in Washington that a fundamental right of shoreline public access is facilitated by allowing waterfront property owners the free and exclusive use of state tidelands and shorelands. As it had done in the past,¹⁶⁹ the court once again ironically institutionalized the flow of public resource wealth into private hands. Reciting regulatory controls under the SMA,¹⁷⁰ the court suggested that public interests in the *jus publicum* are promoted by the challenged statute, "albeit to a limited degree."¹⁷¹

The failure of the *Caminiti* analysis lies in the court's refusal to scrutinize the history of the recreational dock statute and the fundamentally unequal distribution of public benefits that it bestows. The political realities are that waterfront

165. *Id.* at 670, 732 P.2d at 995.

166. In 1981, respondent Commissioner Boyle intensified efforts to collect lease fees for private recreational docks on public tidelands. Enforcement difficulties and the relatively high cost of administering the program rendered DNR oversight vulnerable, however, and in 1983, over DNR's objection, a bill sponsored by Bellevue and Mercer Island-area legislators was enacted in the final hours of a long legislative session. See 1983 WASH. LAWS 2nd Ex. Sess., ch.2, § 2 (formerly SB 3290). That law, now WASH. REV. CODE §§ 79.90.105, set a "dangerous" precedent by sanctioning the flow of public resource wealth into private hands without a mechanism for compensating payment. See Hatch, *Court's Tideland Ruling Attacked*, Seattle Times, March 11, 1987, G12, col. 4-6.

167. WASH. CONST. art. VIII, § 5.

168. *Caminiti v. Boyle*, 107 Wash. 2d 662, 677, 732 P.2d 989, 998 (1987). This attitude has prevailed in the Washington courts since statehood. See *Eisenbach v. Hatfield*, 2 Wash. 236, 26 P. 539 (1891) (discussed at *supra* note 55).

169. See *Eisenbach v. Hatfield*, 2 Wash. at 238-39, 26 P. at 540-41.

170. *Caminiti v. Boyle*, 107 Wash. 2d at 671-73, 732 P.2d at 995-96.

171. *Id.*, 107 Wash. 2d at 673, 732 P.2d at 996.

property owners lobbied strongly for Senate Bill 3290, and that the bill was opposed only by an ineffective and diffuse public interest. The state Department of Natural Resources did not effectively pursue collection of recreational dock leasing fees prior to the offending statute's enactment in 1983, nor, obviously, did it ultimately block passage of the bill before the legislature.

Under the Sax model, these indicators point to basic lack of fairness and efficiency in the natural resource allocation process. Judicial indifference to incremental delegations of resource wealth indicates a cumulative waste of the public commons over time; more significantly, it leaves an affected but under-represented public without recourse in the courts. In this respect, the *Caminiti* analysis is squarely at odds with the contemporary and better authority that any alienation of trust-protected property requires a strong justification in the courts.¹⁷² Faced with precisely these circumstances, the court in *Caminiti* sharpened the dilemma by acknowledging Washington's public trust doctrine only for what it does not protect.¹⁷³

IV. CONCLUSION

Considering the court's recent decision in *Caminiti v. Boyle*,¹⁷⁴ whether the public trust doctrine truly has "always

172. See, e.g., Opinion of the Justices, 437 A.2d 597, 607 (Me. 1981) ("[A]ny legislation giving up any such public rights must satisfy a particularly demanding standard of reasonableness."); *Kootenai Env'tl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 662, 673, 671 P.2d 1085, 1092 (1983) ("[T]his court will take a 'close look' at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action."); *People ex rel. Scott v. Chicago Park Dist.*, 66 Ill. 2d 65, 79, 4 Ill. Dec. 660, 667, 360 N.E.2d 773, 780 (1977) (requiring a "most critical examination" of a legislatively-approved sale of submerged lands to a private corporation).

173. At this writing, *Caminiti* is before the court again on petitioners' motion for reconsideration. Together with their reiteration of the constitutional and public trust issues, petitioners also challenge the original decision by seeking disqualification of five Justices for potential conflicts of interest. Petitioners' Motion for Reconsideration, *Caminiti*, No. 52459-9 (Wash. S. Ct., filed March 3, 1987). Attached as exhibits to petitioners' motion are public disclosure statements filed by the Justices pursuant to the state's Public Disclosure Act, WASH. REV. CODE § 42.17, indicating their individual ownership of waterfront property. The court's original ruling, and the conflict of interest contention, caught the attention of the media. See Hatch, *Court's Tideland Ruling Attacked*, Seattle Times, March 11, 1987, p. G12, col. 4-6.

174. *Caminiti v. Boyle*, 107 Wash. 2d 662, 732 P.2d 989 (1987) (discussed *supra* note 166).

existed"¹⁷⁵ in Washington is a fairly debatable question. As a property-oriented statement of sovereign responsibility, the public trust doctrine was implicitly recognized by the Washington Supreme Court in 1891, one year prior to its formal adoption by the United States Supreme Court in *Illinois Central*. As judicial leverage to encourage legislative consideration of a comprehensive state-wide shoreline management regime, the public trust doctrine was implicitly invoked in an opinion of the Washington Supreme Court which pre-dated the Sax public trust model and most of contemporary public trust law in California, Massachusetts, and Wisconsin. The doctrine has spawned shorelines legislation in Washington that also pre-dated its federal counterpart, the Coastal Zone Management Act of 1972. As a legislative statement of state aquatic lands management policy, public trust principles have been expressly acknowledged.

However, as a means to promote such traditional trust values as shoreline public access and aquatic or coastal resource conservation in the courts, the public trust doctrine in Washington is still virtually unrecognized. In the final analysis, the court's observation in *Caminiti* did nothing to protect public rights in the state's coastal environment; it confirmed an effectively exclusive right of salt water access by sanctioning the construction of private recreation docks on public tidelands without the requirement of compensating payment. Instead of requiring a more explicit and narrow alienation of the *jus publicum* by invoking a stricter standard of review in such cases, the Washington court ignored the contemporary environmental thrust of public trust protection and set a distressingly deferential precedent.

Not surprisingly, public trust issues arise in many real and tangible controversies and are not merely of academic interest. The trial court's post-remand decision in *Orion*, adjusting downward the developer's due compensation to reflect public rights of navigation and commerce, could (if upheld) set an important precedent for the measure of just compensation in regulatory takings of tideland use rights. Also, procedural protections offer the individual public interest litigant valuable leverage in administrative and judicial proceedings, where the burden of persuasion may be relaxed or even reversed under circumstances indicating a violation of the public trust.

175. *Id.* at 669-70, 732 P.2d at 994-95.

At this writing, however, the Washington Supreme Court appears uninterested in promoting coastal and aquatic resource conservation under the hard look doctrine. Nevertheless, non-deferential judicial review under the public trust doctrine in contemporary natural resources law offers the Washington courts a tie-breaker: leverage with which to require legislative responsiveness, to force agency compliance with trust-protective statutory mandates, and to encourage negotiation and conciliation through enhanced public involvement in natural resources decision-making. It demands a consideration of reasonable and acceptable alternatives within the strict tolerances of the law. *Caminiti's* recent recognition of the public trust doctrine offers the Washington courts an opportunity to assume a vigorous role in challenging and often technical aquatic and coastal resource allocation practice through the hard look of judicial review. Considering the trends of history, neither the doctrine nor its role in contemporary environmental law should be lightly regarded.