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Michael Blumm
Lewis & Clark Law School, blumm@lclark.edu

Lynn Schafer

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THE FEDERAL PUBLIC TRUST DOCTRINE: MISINTERPRETING JUSTICE KENNEDY AND *ILLINOIS CENTRAL RAILROAD*

BY

MICHAEL C. BLUMM* & LYNN S. SCHAFFER**

In Alec L. v. McCarthy*, an atmospheric trust case, the D.C. Circuit, in an unreflective opinion, rejected the plaintiffs' claim that the public trust doctrine demanded action on the part of the federal government to curb atmospheric greenhouse gas emissions. The court relied on dicta in Supreme Court opinions to declare that the public trust doctrine does not apply to the federal government, but exists instead entirely as a creature of state law. In this Article, we take issue with the D.C. Circuit's conclusory opinion, maintaining that it rests on a misreading of the Supreme Court's articulation of the public trust doctrine in* Illinois Central Railroad v. Illinois*, a century-old opinion in which the Court struck down a state conveyance of Chicago Harbor to the railroad as a violation of the public trust doctrine without any reliance on state law. Consequently, the D.C. Circuit's interpretation of the* Illinois Central *opinion as a reflection of state law is erroneous. Similarly, recent statements by Justice Kennedy concerning the distinction between the equal footing and public trust doctrines were misinterpreted by the D.C. Circuit—as well as some other courts.*

We maintain that the public trust doctrine is an inherent limit on all sovereign authority, not just states. Illinois Central *is best interpreted as an application of the Tenth Amendment's reserved powers doctrine, which reserved certain rights "to the people." Just as the Supreme Court limited state sovereignty to enjoin Illinois from privatizing Chicago Harbor, the reserved powers doctrine should apply to the federal government, a government of limited powers. Application*

* Jeffrey Bain Faculty Scholar & Professor of Law, Lewis & Clark Law School. This Article is substantially adapted from a Supreme Court amicus brief in support of a petition for a writ of certiorari drafted by the authors for 53 law professors and submitted by William H. Rodgers, Jr., counsel of record, in *Alec L. ex rel. Loorz v. McCarthy*. Amicus Curiae Brief of Law Professors in Support of Granting Writ of Certiorari, Alec L. *ex rel.* Loorz v. McCarthy, *cert denied* 135 S. Ct. 774 (2014) (No. 14-405), 2014 U.S. S. Ct. Briefs LEXIS 3897. *See* Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: A Law Professors' Amicus Brief* (Lewis & Clark Law School Legal Studies Research Paper No. 2014-18, 2014), *available at* http://ssrn.com/abstract=2518260. Laura Westmeyer (J.D. anticipated 2015) provided helpful research.

** LL.M. Lewis & Clark Law School, anticipated 2015; J.D. Vermont Law School 2006.

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of the public trust doctrine to the federal government calls for close judicial oversight of federal conveyance of public resources or attempts to create monopolies, not judicial deference. We think that such judicial skepticism is warranted if the federal government is to fulfill its duties to protect and preserve public resources for future generations.

I. INTRODUCTION

Alec L. v. Jackson (*Alec. L.*),[1] a 2012 decision of the federal district court for the District of Columbia, rejected the children plaintiffs' argument that the public trust doctrine imposed a fiduciary duty on the federal government to take action to prevent the emission of unsafe amounts of greenhouse gas emissions into the atmosphere.[2] The court's opinion relied heavily on the Supreme Court's decision in *PPL Montana, L.L.C. v. Montana* (*PPL Montana*)[3] for the proposition that the public trust doctrine is exclusively a matter of state law, inapplicable to the federal government.[4] Thus, the district court concluded that the children failed to raise a federal question sufficient to invoke the court's jurisdiction.[5]

The D.C. Circuit affirmed in a brief, unreflective, unpublished opinion on the same grounds.[6] These decisions might convince other courts that the public trust doctrine has no applicability to the federal government, not only in the case of greenhouse gas emissions but also in other areas of federal

1 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd sub nom.* Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7 (D.C. Cir.), *cert denied* 135 S. Ct. 774 (2014).

2 *See Alec L.*, 863 F. Supp. 2d at 11.

3 132 S. Ct. 1215 (2012).

4 *Alec L.*, 863 F. Supp. 2d at 15 (citing *PPL Montana*, 132 S. Ct. at 1235).

5 *Id.*

6 Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7, 8 (D.C. Cir. 2014) ("The Supreme Court in *PPL Montana*, however, repeatedly referred to 'the' public trust doctrine and directly and categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation.") (citing *PPL Montana*, 132 S. Ct. at 1234–35).

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preeminence like public lands management, ocean governance, and wetlands protection.[7]

This Article maintains that the D.C. courts misinterpreted the scope of the public trust doctrine in the *Alec L.* cases by failing to understand the limited nature of Justice Kennedy's dicta in his *PPL Montana* opinion. Kennedy's interpretation of the source and significance of the public trust doctrine was unassailable,[8] but the D.C. courts' extrapolation of his opinion—concluding that he denied the applicability of the doctrine to the federal government[9]—was more than the *PPL Montana* opinion said and inconsistent with the origin and practical effect of the public trust doctrine. The public trust doctrine, properly understood, is an inherent limit on all sovereigns—not merely state sovereigns. Some recent decisions recognize this fact,[10] and nothing in Justice Kennedy's *PPL Montana* opinion is inconsistent with such an interpretation.

Admittedly, dicta in some Supreme Court opinions have suggested that the public trust doctrine is of state law origin[11] but, upon close examination, these statements have no real basis in fact. On the other hand, there is considerable precedent applying the public trust doctrine to the federal government, particularly to public land management,[12] and there is ample evidence that Congress intended the doctrine to be more widely applied than the courts have thus far recognized.[13]

7 The *Alec L.* case is among several recent cases that have interpreted Justice Kennedy's statements to foreclose a federal public trust, but it is the first to arise out of the District of Columbia. *See, e.g.*, Sansotta v. Town of Nags Head, 724 F.3d 533, 537 n.3 (4th Cir. 2013); United States v. 32.42 Acres of Land, 683 F.3d 1030, 1038 (9th Cir. 2012); Nat'l Post Collaborative v. Donahoe, 2014 WL 4544094, at *2 (D. Conn. Sept. 12, 2014); Brigham Oil & Gas, LP. v. N. Dakota Bd. of Univ. & Sch. Lands, 866 F. Supp. 2d 1082, 1084 (D.N.D. 2012). Each of these federal cases relied on *PPL Montana* to support the proposition that there is no federal public trust. For an example of a similar analysis in the state context, see Butler *ex rel.* Peshlakai v. Brewer, 2013 WL 1091209, at *3 n.3 (Ariz. App. Div. Mar. 14, 2013).

8 *See PPL Montana*, 132 S. Ct. at 1226–35.

9 *See supra* notes 3–6 and accompanying text.

10 *E.g.*, Robinson Twp. v. Pennsylvania, 83 A.3d 901, 948 n. 36 (Pa. 2013) (plurality opinion) ("[C]ertain rights are inherent to mankind, and thus are secured rather than bestowed by the Constitution."); Parks v. Cooper, 676 N.W.2d 823, 837 (S.D. 2004) ("History and precedent have established the public trust doctrine as an inherent attribute of sovereign authority."); Citizens for Responsible Wildlife Mgmt. v. State, 103 P.3d 203, 208 (Wash. 2004) ("[T]he sovereign's duty to manage its natural resources recognized in the public trust doctrine is not time limited, and the primary beneficiaries of the sovereign's exercise of its public trust are those who have not yet been born or who are too young to vote."); *In Re* Water Use Permit Applications (*Waiahole Ditch*), 9 P.3d 409, 443 (Haw. 2000) ("Regarding water resources in particular, history and precedent have established the public trust as an inherent attribute of sovereign authority that the government ought not, and ergo, . . . cannot surrender.") (internal quotation marks omitted); *see also infra* note 47 and accompanying text.

11 *See infra* Part IV.

12 *See infra* Part VI.A.

13 *See infra* Part VI.B.

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The mistake of the D.C. courts was, in part, their failure to carefully examine the so-called lodestar case[14] of the public trust doctrine, *Illinois Central Railroad v. Illinois*,[15] (*Illinois Central*) an 1892 opinion written by Justice Stephen J. Field, the longest serving justice of the nineteenth century.[16] A close look at *Illinois Central* reveals that the decision had no state law basis,[17] despite the unreasoned dicta in later Supreme Court cases, which claimed that it did.[18] If, as we maintain, the Supreme Court grounded its *Illinois Central* decision in federal law, the D.C. courts' rationale in *Alec L.* is flawed and should not prevail in other circuits or in the Supreme Court.

We reexamine the basis of the federal public trust doctrine in this Article. Part II considers Justice Kennedy's statements about the nature of the public trust in *PPL Montana* and in his earlier 1997 opinion in *Idaho v. Coeur d'Alene Tribe*.[19] Part III briefly unpacks the seminal *Illinois Central* case, in which the Court used the public trust doctrine to strike down an attempted privatization of the inner Chicago Harbor. Although that decision was the subject of a comprehensive historical analysis a decade ago,[20] that analysis did not attempt to locate the source of the public trust doctrine that the Court employed.[21]

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14 Professor Sax referred to the *Illinois Central* case as the "Lodestar in American Public Trust Law." Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1970).

15 146 U.S. 387 (1892).

16 Justice Field broke Chief Justice John Marshall's record for longevity, serving for 34 years. His opinions profoundly influenced American legal doctrine:

> As a westerner from California, [Field] wrote many influential public lands decisions and was also influential in the Court's adoption of the doctrine of substantive due process to reign in state police powers, which might help explain his unwillingness to rely on the state's police power to regulate the railroad in *Illinois Central*. His reasoning in dissent in the *Slaughterhouse Cases*, 83 U.S. 36 (1873), and *Munn v. Illinois*, 94 U.S. 113 (1877), eventually became majority opinions after he left the Court in decisions like *Lochner v. New York*, 198 U.S. 45 (1905).

MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 74 n.9 (1st ed. 2013).

17 *See infra* notes 65–95 and accompanying text.

18 *See infra* notes 23–64, 114–138 and accompanying text.

19 521 U.S. 261 (1997).

20 Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHIC. L. REV. 799 (2004); *see infra* notes 66–68 and accompanying text.

21 *Id.* at 803, 928–29. Kearney and Merrill observed that the question of whether the public trust doctrine rests on federal or state law remains one of the enduring ambiguities resulting from the *Illinois Central* decision, and although they did not directly address the issue, they concluded that the possibility of a federal law basis for the decision was not frivolous:

> Our story also sheds some light on whether the doctrine implicates federal interests in such a way as to justify grounding it in federal rather than state law. The federal government played a much larger role in the Chicago lakefront controversy than would appear from just reading the *Illinois Central* opinion, where, for peculiar reasons, the United States asked that the Court not rule on the issues that it had presented in the court below. . . . Whether [the underlying facts] might justify a federal rule of decision is

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Part IV proceeds to describe the ensuing judicial interpretation of *Illinois Central*, upon which Justice Kennedy relied, and which we claim amounts to mere conclusory dicta. Part IV also explains that most states have interpreted *Illinois Central* in stark contrast to the Supreme Court's dicta, since most state courts consider the case to establish binding federal law. Part V discusses why statutory displacement—which the Supreme Court recently applied in the case of common law nuisance—cannot credibly be applied to the public trust doctrine. Part VI considers both Supreme Court case law and congressional statutes recognizing the federal public trust doctrine. We conclude that the D.C. courts' assumption that there is no federal public trust doctrine is neither supported by Justice Kennedy's opinions nor a fair reading of *Illinois Central* and should not be considered persuasive by other federal circuit courts of appeal or the Supreme Court.

II. JUSTICE KENNEDY AND THE PUBLIC TRUST

Justice Anthony Kennedy—whose votes often prove pivotal,[22] particularly in natural resources and environmental law[23]—has discussed the public trust doctrine in two cases, which both the D.C. District Court and the D.C. Circuit thought were determinative in the *Alec L.* cases.[24] We examine both of Kennedy's opinions in this Part.

A. Idaho v. Coeur d'Alene Tribe

The people of the Coeur d'Alene Tribe have lived in what is now the panhandle of Idaho for thousands of years, in an area extending from the southern end of Lake Pend Oreille in the north, to the North Fork of the Clearwater River in the south, between the Bitterroot Range of Montana in

> a topic for another day. But they surely suggest that the possibility is not frivolous—at least if the doctrine is confined to controversies over lands beneath navigable waters.

Id. at 928–29.

22 *See* Kenneth M. Murchison, *Four Terms of the Kennedy Court: Projecting the Future of Constitutional Doctrine*, 39 U. BALT. L. REV. 1, 2 (2009) (describing Kennedy as the ideological center of the Court and the most important Supreme Court Justice). Supreme Court litigator Thomas Goldstein, founder of SCOTUSblog, has observed that Justice Kennedy frequently provides the Court's "center vote," guided by a "pervasive sense of individualism." Thomas C. Goldstein, Partner, Goldstein & Russell, P.C., *Reflections of a Supreme Court Practitioner*, Sixth Annual Justice Anthony Kennedy Lecture Series at Lewis & Clark Law School (Sept. 23, 2014) (notes on file with author); *see also* Thomas C. Goldstein, *Reflections of a Supreme Court Practitioner*, 19 LEWIS & CLARK L. REV. (forthcoming 2015).

23 *See* Michael C. Blumm & Sherry L. Bosse, *Justice Kennedy and Environmental Law: Property, States' Rights, and a Persistent Search for Nexus*, 82 WASH. L. REV. 667, 669–70 (2007) (noting several environmental and natural resources law cases in which Justice Kennedy wrote majority opinions).

24 *Alec L.*, 863 F. Supp. 2d 11, 15 (D.D.C. 2012) (discussing Justice Kennedy's opinion in *PPL Montana*, 132 S.Ct. 1215 (2012)); Alec L. *ex rel.* Loorz v. McCarthy, 561 Fed. App'x 7, 8 (D.C. Cir. 2014) (discussing Justice Kennedy's opinions in both *PPL Montana*, 132 S. Ct. at 1235, and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997)).

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the east, and roughly to Spokane Falls in the west.[25] The center of the tribes' territory was Lake Coeur d'Alene, which, along with rivers like the St. Joe and the Spokane, provided tribal members with fishing for salmon, trout, and whitefish; they also hunted and gathered throughout the area.[26] An 1873 executive order signed by President Ulysses Grant established a reservation for the tribe, confining them to roughly 600,000 acres.[27] Ensuing congressional statutes reduced the tribe's reservation to 345,000 acres south of the town of Coeur d'Alene.[28]

In 1991, the tribe filed suit, contesting the authority of the State of Idaho to regulate the fishing of tribal members on Lake Coeur d'Alene, claiming that a substantial part the bed of the lake was not owned by the state but instead was part of the tribe's reservation.[29] The tribe sought to quiet title to those submerged lands.[30] Rather than answer the complaint, the state filed a motion to dismiss, arguing that the Eleventh Amendment precluded federal jurisdiction in the case.[31] The district court granted the motion to dismiss, ruling that the tribe could not sue the state without the state's consent.[32] The Ninth Circuit affirmed the district court's dismissal but allowed the tribe's claim against state officials concerning future federal law violations.[33]

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25 *See* Idaho v. Coeur d'Alene Tribe of Idaho (*Coeur d'Alene Tribe*), 521 U.S. 261, 264 (1997) (describing the land of the Coeur d'Alene Tribe).

26 The Coeur D'Alene Tribe, *Culture: Environment*, http://www.cdatribe-nsn.gov/cultural/Environment.aspx (last visited Apr. 17, 2015); The Coeur D'Alene Tribe, *Culture: Reservation*, http://www.cdatribe-nsn.gov/cultural/reservation.aspx (last visited Apr. 17, 2015); The Coeur D'Alene Tribe, *Culture: Ancestral Lands*, http://www.cdatribe-nsn.gov/cultural/ancestral.aspx (last visited Apr. 17, 2015).

27 Exec. Order of Nov. 8, 1873 (codified in Act of Mar. 3, 1891, ch. 543, § 19, 26 Stat. 1026–1029), *reprinted in* 1 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 837 (1904); U.S. DEP'T OF AGRIC., ROADLESS AREA CONSERVATION, NATIONAL FOREST SYSTEM, TRIBAL SPECIALISTS REPORT 2 (2008), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm8_036244.pdf.

28 *See* General Allotment Act (Dawes Act), Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (authorizing the President of the United States to survey Native American Indian tribal land and divide it into allotments for individual Native Americans); The Coeur D' Alene Tribe, *Culture: Reservation*, *supra* note 26.

29 Coeur d'Alene Tribe v. Idaho, 798 F. Supp. 1443, 1445 (D. Idaho 1992), *aff'd in part, rev'd in part*, 42 F.3d 1244 (9th Cir. 1994), *rev'd in part sub nom.* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997).

30 *Id.*

31 *Id.; see also* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

32 Coeur d'Alene Tribe v. Idaho, 798 F. Supp. at 1446, 1448. The district court also dismissed the tribe's claims to quiet title and for declaratory judgment against individual state officials, relying on Eleventh Amendment immunity. *Id.* at 1449.

33 Coeur d'Alene Tribe v. Idaho, 42 F.3d 1244, 1247 (9th Cir. 1994) ("We agree that the Eleventh Amendment bars all claims against the State and the Agencies, as well as the quiet title claim against the Officials, and affirm the district court's judgment on these claims."). However, the Ninth Circuit reversed the district court and allowed the tribe's claims for declaratory and injunctive relief against individual state officials under the exception recognized by *Ex parte Young—see infra* note 40, reasoning that those claims were based on Idaho's ongoing interference with the tribe's alleged ownership rights, and the court thought it conceivable that the tribe could prove facts entitling it to relief on those claims. *Id.* at 1247–48, 1251, 1257.

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The Supreme Court reversed the Ninth Circuit's decision on the tribe's ability to proceed against state officials and dismissed the claims, ruling that the tribe could not maintain its claim against the state or its officials, due to the state's immunity from suit under the Eleventh Amendment.[34] The case was an important Eleventh Amendment decision concerning state sovereign immunity.[35] But since the state's Eleventh Amendment immunity does not run against the federal government,[36] the federal government under the Clinton Administration, exercising its trust responsibilities,[37] decided to take up the tribe's claim in the wake of the Supreme Court's decision.[38] When the case eventually again reached the Supreme Court,[39] the tribe prevailed on the merits in a precariously close 5–4 vote.[40]

Writing for the Court majority in the initial sovereign immunity decision, Justice Kennedy explained the close historical connection between ownership of submerged lands, like those under the navigable Lake Coeur d'Alene, and state sovereignty:

> The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence "became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. . . ." [T]he Court concluded that States entering the Union after 1789 did so on an "equal footing" with the original States and so have similar ownership over these "sovereign lands." In consequence of this rule, a State's title to these lands arises from the equal footing doctrine and is "conferred not by Congress but by

34 *Coeur d'Alene Tribe*, 521 U.S. 261, 269, 287–88 (1997); *see also* U.S. CONST. amend. XI, *supra* note 31.

35 The Supreme Court reversed the Ninth Circuit on the question of whether the tribes could bring suit against state officials under the *Ex parte Young* exception, concluding that the ties between submerged lands and the state's own sovereignty made the exception inapplicable under the "special circumstances" of the case. *Coeur d'Alene Tribe*, 521 U.S. at 287–88. Under the *Ex parte Young* exception, where the state has acted unconstitutionally, suits may proceed in federal courts against officials acting on behalf of states of the union despite state sovereign immunity. *See Ex parte* Young, 209 U.S. 123, 167 (1908).

36 *See, e.g.*, West Virginia v. United States, 479 U.S. 305, 311 (1987) ("States have no sovereign immunity as against the Federal Government . . . .").

37 *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 5, 15 (Nell Jessup Newton et al. eds., 2005) (describing the federal government's trust relationship with Indian tribes).

38 United States v. Idaho, 95 F. Supp. 2d 1094, 1095 (D. Idaho 1998).

39 Idaho v. United States, 533 U.S. 262 (2001). Both the district and circuit courts held that Congress clearly intended to defeat state title to the submerged lands and reserve them for the tribes, and therefore the tribe owned the lands submerged beneath Coeur d'Alene Lake and the St. Joe River within the boundaries of the reservation. *United States v. Idaho*, 95 F. Supp. 2d at 1095; United States v. Idaho, 210 F.3d 1067, 1080 (9th Cir. 2000).

40 Justice Souter wrote for the majority, which held that Congress specifically negotiated with the tribes for the submerged lands at issue, and that Congress was aware that they would be retained by the tribe in exchange for reservation lands transferred to the United States. *Idaho*, 533 U.S. at 280. Justice Kennedy joined the concurrence in the case, which maintained that the intent of the Executive Branch to retain submerged lands for the tribe was simply not enough to defeat an incoming state's title to submerged lands within its borders under the equal footing doctrine. *Id.* at 281 (Rehnquist, J., concurring).

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> the Constitution itself." The importance of these lands to state sovereignty explains our longstanding commitment to the principle that the United States is presumed to have held navigable waters in acquired territory for the ultimate benefit of future States and "that disposals during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." . . . The principle arises from ancient doctrines.[41]

Justice Kennedy's 1997 opinion was significant because it reflected at least three important precepts. First, he explained the reason why there are special rules about navigable waters and their submerged lands: they "uniquely implicate sovereign interests," echoing the *Illinois Central* Court's recognition of interests that implicate important "public concerns."[42] These concerns would seem to be capable of responding to contemporary issues affecting trust resources.[43]

Second, Justice Kennedy grounded the equal footing conveyance—implied in all statehood acts and an extraordinary conveyance from the federal government to the states—in the Constitution, presumably in the statehood admissions clause.[44] Third, Kennedy's opinion recognized that before the equal footing conveyance occurred, a trust applied to the federal

41 *Coeur d'Alene Tribe*, 521 U.S. 261, 283–84 (1997) (citations omitted). Justice Kennedy proceeded to cite Justinian for the proposition that "Rivers and ports are public; hence the right of fishing in a port, or in rivers are in common" to the public. *Id.* at 284. He noted that the special treatment of navigable waters in English law was recognized in Bracton's time. *Id.* He also stated that "[a]ll rivers and ports are public, so that the right to fish therein is common to all persons. The use of river banks, as of the river itself, is also public." *Id.* (internal quotation marks omitted) (noting that the Magna Carta promised the Crown would remove fish weirs from the Thames and other rivers).

42 *Id.* at 284; Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 455 (1892) ("The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State.").

43 Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 719 (Cal. 1983) ("The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways."); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) ("The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another."); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972) ("The public trust doctrine . . . should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."). *See also* Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J. L. & POL'Y 281, 286–87 (2014); David C. Slade, THE PUBLIC TRUST DOCTRINE IN MOTION, 1997–2008 (2008).

44 The equal footing doctrine, not expressly enumerated in the Constitution, reflects an interpretation of the admissions clause of the U.S. Constitution, Art. IV § 3, Cl. 1, which states: "New States may be admitted by the Congress into this Union . . . ." The equal footing doctrine interprets this clause to guarantee new states both political power and property conveyances equal to that held by the original states in their sovereign capacity. For a discussion of the common history of the equal footing doctrine and the public trust doctrine, see James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 30–34 (1997).

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lands that were subject to the conveyance.[45] This trust governed conveyances in the pre-statehood era, which the Supreme Court has rigorously enforced since the nineteenth century.[46]

All of Kennedy's observations are telling. His recognition that public ownership of submerged lands is grounded in sovereignty is perhaps the most significant for it suggests that the public trust doctrine—as inherent in the concept of sovereignty—antedates the Constitution, a concept with a good deal of support in state case law.[47] His declaration of the constitutional grounding of the equal footing conveyance of the beds of submerged navigable waters from the federal government to the admitted states is also quite revealing. This observation reinforces the notion that the trust pre-dated statehood, evidenced by case law in which the Supreme Court disallowed attempted federal conveyances of land grants pre-statehood.[48] Kennedy's observation that there was a pre-statehood trust further supports the notion that the federal public trust doctrine antedates statehood.

Neither of the reviewing courts in the *Alec L.* decisions examined Justice Kennedy's statement, although both cited him for the proposition that there is no federal public trust.[49] We think they did so erroneously.

B. PPL Montana v. Montana

Justice Kennedy also opined on the public trust and equal footing doctrines in *PPL Montana, L.L.C. v. Montana*, a case involving the state's effort to collect rent from federally licensed hydroelectric projects for the use of allegedly state-owned riverbeds.[50] The Montana courts upheld the state's authority to charge some $41 million in back rent, agreeing with the

45 Sometimes the trust operated as a rule of construction, as in *Shively v. Bowlby*, 152 U.S. 1 (1894), in which the Court narrowly construed the federal grant under the Oregon Donation Act in order to uphold the state's ability to control submerged lands. Sometimes the trust operated to limit the ability of the federal government to privatize submerged lands and preserved the lands for state ownership, as in *Utah v. United States*, 403 U.S. 9 (1971).

46 *See, e.g.*, Martin v. Waddell's Lessee, 41 U.S. 367, 382–83 (1842) (relying on English law and the king's rights in preserving "the sea and its arms" to impose limitations on private ownership); Pollard v. Hagan, 44 U.S. 212, 216 (1845) ("Rivers must be kept open; they are not land, which may be sold, and the right to them passes with a transfer of sovereignty."); *Shively*, 152 U.S. at 11, 14 (relying on English law's preservation of navigable waters for the king, and imputing that concept to American law because of England's claim by discovery over the American colonies).

47 *See supra* note 10; *see also infra* notes 155–163 and accompanying text. The Supreme Court has similarly recognized the inherent, sovereign character of the power of eminent domain. *See* Boom v. Patterson, 98 U.S. 403, 406 (1878) ("[T]he right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty.").

48 *See supra* note 46. Kennedy's third observation—that the trust requires that dispositions are not "lightly to be inferred" without clearly expressed intent—certainly seems applicable to the federal trust that applied pre-statehood, as well as post-statehood. *Coeur d'Alene Tribe*, 521 U.S. 261, 285 (1997).

49 Alec L., 863 F. Supp. 2d 11, 15 (D.D.C. 2012); Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7, 8 (D.C. Cir. 2014).

50 *PPL Montana*, 132 S. Ct. 1215 (2012).

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state that the projects were located on navigable waters whose riverbeds were owned by the state under the equal footing doctrine.[51] PPL Montana, the utility licensee, appealed to the Supreme Court, claiming that the state courts erred by not requiring the state to closely examine the historic navigability of each of the river segments involved.

The Supreme Court unanimously agreed with the utility and reversed the Montana Supreme Court.[52] Justice Kennedy wrote for the Court, stating that the lower court improperly ignored the Court's settled test for determining the navigability of a river, which is a factual analysis of a river segment's use as a commercial highway at the time of statehood,[53] 1889, in Montana.[54] The state argued—and the state court decided—that river navigability could be determined generically.[55] But Justice Kennedy, for the Court, ruled that navigability required a particularized, segment-by-segment assessment of a river's commercial navigability at the time of statehood.[56]

In his *PPL Montana* opinion, Kennedy elaborated on the relationship between the equal footing and public trust doctrines:

> The public trust doctrine is of ancient origin. Its roots trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands in the state laws of this country. . . . Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law, . . . subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power. While equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, . . . the contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.[57]

51 The $41 million covered only the rent due for the years 2000 to 2007. PPL Montana, L.L.C. v. State, 229 P.3d 421, 454, 449 (Mont. 2010) (concluding that the rivers in question were navigable at statehood because PPL Montana failed to demonstrate any "'long reaches of non-navigability' but instead merely point[ed] to relatively short interruptions" in the rivers which impeded uninterrupted navigation but did not affect their use as channels for commerce).

52 *PPL Montana*, 132 S. Ct. at 1221, 1235.

53 *Id.* at 1230 ("A segment approach to riverbed title allocation under the equal footing doctrine is consistent with the manner in which private parties seek to establish riverbed title. For centuries, where title to the riverbed was not in the sovereign, the common-law rule for allocating riverbed title among riparian landowners involved apportionment defined both by segment (each landowner owns bed and soil along the length of his land adjacent) and thread (each landowner owns bed and soil to the center of the stream).").

54 *Id.* at 1222.

55 *PPL Montana, L.L.C. v. State*, 229 P.3d at 448, 449.

56 *PPL Montana*, 132 S. Ct. at 1229–30.

57 *Id.* at 1234–35 (citations omitted).

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This passage warrants close analysis, because both the D.C. District Court and the D.C. Circuit quoted and relied upon it.[58] First, Justice Kennedy reiterated the constitutional underpinnings of the equal footing doctrine he articulated in the *Coeur d'Alene Tribe* decision.[59] Second, he contrasted the federal constitutional nature of equal footing with the state law origins of the public trust doctrine, determining that the trust doctrine is part of the residual power of states, which possess the "power to determine the scope" of the doctrine.[60] Third, the test for equal footing lands, which were implicitly conveyed by the federal government to new states at statehood, is a federal test.[61]

Finally, while contrasting the federal equal footing doctrine from state public trust doctrine, Justice Kennedy never stated that there was no federal public trust doctrine.[62] He did, however, claim in a parenthetical that the Court's lodestar public trust opinion, *Illinois Central*, was "necessarily a statement of Illinois law."[63] This parenthetical might have been the reason for the lower courts' conclusions that the public trust doctrine is exclusively a matter of state law. We take issue with that parenthetical in this Article, maintaining that the cases on which it relied—particularly *Appleby v. City of New York*[64]—do not support the notion that there is no federal public trust doctrine.

Ascertaining the origins and nature of the public trust doctrine thus requires a close look at the Supreme Court's *Illinois Central* case, as well as subsequent interpretations by the Court. The next two Parts of this Article take up those chores.

58 *Alec L.*, 863 F. Supp. 2d 11, 15 (D.D.C. 2012); Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7, 8 (D.C. Cir. 2014).

59 *Coeur d'Alene*, 521 U.S. 261, 284 (1997).

60 *PPL Montana*, 132 S. Ct. at 1235 ("Under accepted principles of federalism, the States retain *residual power* to determine the scope of the public trust . . . .") (emphasis added). Fifteen years earlier, in *Coeur d'Alene*, Justice Kennedy affirmed the importance of the states' sovereign duty to regulate public trust resources, describing lands submerged beneath navigable waters as "sovereign lands" with a "unique status in the law . . . infused with a public trust the State itself is bound to respect." 521 U.S. at 283.

One of the cases Justice Kennedy cited in *PPL Montana* was the California Supreme Court's decision in the Mono Lake case, *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709, 721 (Cal. 1983), in which the California court expanded the scope of the state's public trust doctrine to non-navigable waters and to water rights. Thus, expansion of the scope of the public trust beyond the beds of navigable waters is clearly not a federal issue under those circumstances.

61 *See PPL Montana*, 132 S. Ct. at 1235. That is, the beds of waterways which were navigable-in-fact at statehood. *See id.* ("[The] equal-footing doctrine . . . is the constitutional foundation for the navigability rule of riverbed title . . . .").

62 *See id.* at 1234–35.

63 *See id.* at 1235 (citing Appleby v. City of New York, 271 U.S. 364, 395 (1926) for the "same" proposition as *Coeur d'Alene*, 521 U.S. at 285).

64 *See infra* notes 116–133 and accompanying text for discussion of *Appleby*.

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III. DECONSTRUCTING THE *ILLINOIS CENTRAL* OPINION

The seminal Supreme Court public trust doctrine case is *Illinois Central Railroad Co.*, an 1892 decision which invalidated the state's large-scale conveyance of Chicago's inner harbor to a railroad for violating the public trust doctrine.[65] The state legislature granted the harbor to the railroad in a corrupt deal in 1869 but, after an election, had an apparent change of heart and revoked the grant in 1873.[66] The State of Illinois filed suit in the Circuit Court for the Northern District of Illinois, asserting ownership rights over the submerged lands of the lakebed.[67] The case lingered in the lower courts for years,[68] finally landing in the Supreme Court in 1892.[69]

The Supreme Court, in an opinion by Justice Stephen J. Field,[70] upheld the state court decisions, ruling that although the state held title to the submerged land, the title was qualified—and largely inalienable.[71] Consequently, the Court struck down the 1869 grant because title to submerged lands was "different in character from that which the state holds in lands intended for sale."[72] The Court did suggest that the state might privatize submerged lands to foster navigation and other public purposes but ruled it could not abdicate its control of the navigable waters of an entire harbor:

> Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has interest, cannot be relinquished by a transfer of the property.[73]

65 *See* Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 460 (1892) ("There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust.").

66 *See* Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799, 906, 912 (2004) (noting that "[c]orrupt inducements may have facilitated the passage of the Lake Front Act in 1869").

67 *See* Illinois v. Illinois Cent. R.R. Co., 33 F. 730, 733 (C.C.N.D. Ill. 1888), *available at* https://ia801409.us.archive.org/10/items/gov.uscourts.f1.033/033.f1.pdf (discussing the railroad company's rights to "promot[e] . . . its own business," conduct "commerce and navigation generally," and "erect and maintain" various harbor buildings, with respect to the submerged lands).

68 *See* Kearney & Merrill, *supra* note 66, at 800–01. *See also* Illinois v. Illinois Cent. R.R. Co., 33 F. at 748 (tracing the procedural history of the case); People of State of Illinois *ex rel.* McCartney v. Illinois Cent. R.R. Co., 16 F. 881, 881, 888 (C.C.N.D. Ill. 1883), *available at* https://ia600400.us.archive.org/34/items/gov.uscourts.f1.016/016.f1.pdf (holding that removal to federal court was proper because the railroad alleged federal questions, including violation of Section 10, Article 1, and the Fourteenth Amendment of the Constitution).

69 *See Illinois Central*, 146 U.S. 387.

70 *Id.* at 433.

71 *Id.* at 452–54.

72 *Id.* at 452.

73 *Id.* at 453.

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The opinion identified no source of state law imposing this trust obligation on the state.[74] The Court proceeded to amplify the nature of the trust obligation:

> A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them . . . than it can abdicate its police powers . . . .[75]

The Court again identified no state law imposing this trust obligation.[76]

Justice Field, however, twice emphasized the trust's link to property in which "the public" or "the whole people" have an interest.[77] These statements imply that the trust the Court enforced would be capable of evolving with public needs, something widely recognized in state courts.[78] The Court analogized the trust doctrine to the state's police powers, suggesting that, like police power authority, the public trust doctrine is inherent in state sovereignty.[79] The difference, of course, is that the police power is a grant of authority, while the public trust doctrine is a limitation on that authority. We think that both are part of a sovereign's reserved powers recognized by the Tenth Amendment.

With no state law on which to rely, the *Illinois Central* Court must have been applying federal law.[80] The source of that law presumably resides in the U.S. Constitution.[81] Since the Court relied heavily on *Newton v. Commissioners*,[82] a case involving an intergenerational dispute over the Ohio legislature's ability to relocate a county seat, in which the Court had upheld a legislative reversal of a prior legislative decision.[83] The *Illinois Central* Court thought that the *Newton* case meant that there were no irreplaceable public laws because

74 *See id.* at 455 ("We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation.").

75 *Id.* at 453. The Court also identified two exceptions to the nonalienability rule: 1) "for the improvement of the navigation and use of the waters," or 2) "when parcels can be disposed of without impairment of the public interest in what remains . . . ." *Id.*

76 *See id.* at 453–56 (citing no state law imposing a trust obligation).

77 *Id.* at 453.

78 *See Coeur d'Alene Tribe*, 521 U.S. 261, 285–88 (1997) (explaining that some states have public trust doctrines that extend in scope). *See also supra* note 43.

79 *Illinois Central*, 146 U.S. at 453.

80 *Id.* at 435 ("It is the settled *law of this country* that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found . . . .") (emphasis added).

81 *See* John Edward Davidson, *Draft Atmospheric Trust Litigation Amicus Brief*, i, 8–12, 16–31 (Nov. 30, 2013), available at http://ssrn.com/abstract=2361780 (explaining the theoretical and jurisprudential connections between the public trust doctrine and the reserved powers doctrine and the way in which both doctrines reflect fundamental constitutional principles).

82 100 U.S. 548 (1879).

83 *See Illinois Central*, 146 U.S. at 459, citing Newton v. Commissioners, 100 U.S. 548 (1879).

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> [E]very succeeding legislature possesses the same jurisdiction and power as its predecessors . . . [and] it is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil.[84]

The Court made no effort to ground this proposition in state law.[85]

With no state law on which to rely, we think that the Court was invoking the reserved powers doctrine of the Constitution,[86] the notion that there are inherent limits on state legislative authority. As the Court later explained, the Tenth Amendment's reserved powers doctrine recognizes that there are inherent limits on sovereignty that the legislature cannot override:

> [I]t is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.[87]

The reserved powers doctrine applies not only to states but also to the federal government.[88] The Supreme Court has stated that "the will of a particular Congress . . . does not impose itself upon those to follow in succeeding years."[89] This premise appears in modern cases as well; Justice Scalia, for example, has twice recognized the applicability of the reserved powers doctrine to the federal government.[90]

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84 *Id.*

85 *See Illinois Central*, 146 U.S. at 459.

86 U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

87 Atlantic Coast Line R.R. Co. v. City of Goldsboro, 232 U.S. 548, 558 (1914) (holding that a municipal ordinance restricting time and manner of railroad operations did not deprive the plaintiff railroad company of private property without compensation or due process of law, and did not impair the plaintiff's constitutional right to contract, but rather, was a proper exercise of the state's police powers).

88 *See* Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932) (ruling that Congress could alter the use of public land previously designated as park land without resulting in a "taking" of neighboring property; the congressional act establishing the park did not place restrictions on the land in favor of neighboring property owners or guarantee that the park would be continued for any length of time); *see also* Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 ARIZ. ST. L.J. 849, 870–74 (2001) (arguing that Congress' power, like state police power, is based on an agency rationale in which the relationship is temporal in nature, meaning that one legislature cannot bind a future legislature because it extends the agency relationship beyond its terms); Davidson, *supra* note 81, at i, 12, 16, 31 (rooting the federal reserved powers doctrine in constitutional provisions including the Preamble, Article I's vesting clause and anti-nobility clauses, the equal protection clause, and the due process clauses).

89 *Reichelderfer*, 287 U.S. at 315, 318.

90 United States v. Winstar Corp., 518 U.S. 839, 922–23 (1996) (Scalia, J., concurring) (recognizing that the logic of the reserved powers doctrine applies to the federal government,

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The *Illinois Central* Court embraced the reserved powers doctrine when it concluded that "[a] grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power . . . ."[91] As Justice Field explained, the reserved powers doctrine prevents one legislature from privatizing submerged lands because otherwise "every harbor in the country [would be] at the mercy of a majority of the legislature of the State in which the harbor is situated."[92] The doctrine forbids a legislature from bargaining away essential sovereign powers, and thus protects the authority of future legislatures—and future generations—to take action on what the *Illinois Central* opinion referred to as issues "of concern to the whole people."[93]

The *Illinois Central* Court cited no state law authority in applying the reserved powers doctrine.[94] Moreover, a majority of state courts citing the Court's decision have considered it binding upon them, presumably due to its federal nature.[95] To the extent the *Illinois Central* decision has been assumed to be applicable only to state sovereigns, the decision seems to be quite misunderstood.

In fact, just two years after *Illinois Central*, the Court continued to emphasize the federal framework concerning ownership of submerged lands and the public trust obligation that inheres in their sovereign control. In *Shively v. Bowlby*,[96] the Court interpreted the constitutional equal footing doctrine as it applied to tidelands in Oregon.[97] In a decision that the Court later described as the "seminal case in American public trust

but concluding it has no force where the "private party to a contract does not seek to stay the exercise of sovereign authority, but merely requests damages for breach of contract"); Lockhart v. United States, 546 U.S. 142, 147–48 (2005) (Scalia, J., concurring) ("[O]ne legislature . . . cannot abridge the powers of a succeeding legislature.") (alteration in original) (quoting Fletcher v. Peck, 10 U.S. 87 (1810)).

91 Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

92 *Id.* at 455.

93 *Id.*; *see* Grant, *supra* note 88, at 856–67 (tracing the origin of the reserved powers doctrine to the Contract Clause which precludes governments from bargaining away essential sovereign powers). *See also* Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?*, 35 COLUM. J. ENVTL L. 287, 311–12 (2010) (describing the reserved powers doctrine as an enforceable norm limiting the scope of sovereign powers, observing that reservation of state sovereignty by the Tenth Amendment preserves pre-existing rights of the people, and stating that "[s]ince [the] public trust doctrine is a pre-existing limit on the scope of state sovereignty . . . the pre-existing rights of the people in trust assets—at a minimum, rights to navigation and fishing—are reserved by the Tenth Amendment").

94 *See generally* Crystal S. Chase, *The* Illinois Central *Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 113, 130–31 (2010) (explaining that the Court's decision in *Illinois Central* relied heavily on federal common law, the equal footing doctrine, and the notion that "states were 'subject to the same trusts and limitations' as those held by the English Crown").

95 *See id.* at 151–53 (indicating that of 35 state courts relying on *Illinois Central*, 29 consider it to be controlling).

96 152 U.S. 1 (1894).

97 *Id.*

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jurisprudence,"[98] the Court upheld a state court decision in favor of a state tidelands grantee over a prior federal grantee who received a land patent under the federal Oregon Donation Land Claim Act.[99] The Court proceeded to declare—apparently by federal rule—that the King of England conveyed to colonial proprietors and eventually to the states, as "incident to the powers of government,"[100] the lands beneath navigable waters in trust for the public. The *Shively* opinion acknowledged the diversity of state tidelands rules, declaring that "there is no universal and uniform law."[101] Significantly, the Court proceeded to distinguish between the *jus publicum*—the title underpinning the sovereign's trust obligation—from the *jus privatum*—the private interest—in tidelands with no reference to any state law, relying on Sir Mathew Hale's treatise and a long line of federal case law.[102]

The limits imposed by the public trust doctrine were not at issue in *Shively*. Instead, the case concerned whether a pre-statehood federal grant included submerged federal lands.[103] The Court's opinion established the rule that such pre-statehood federal grants privatizing submerged lands were disfavored, allowable only in unusual circumstances: 1) to fulfill an "international duty," or 2) where justified by a "public exigency."[104] These limits were clearly not imposed by Oregon state law.[105] Applying this rule of narrow construction, the Court concluded that the pre-statehood federal grant did not include submerged lands; instead, those lands were reserved for the future state and subsequently conveyed at statehood under the equal

98 Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473 (1988) (internal quotation marks omitted).

99 9 Stat. 496, ch. 76 (1850); *see also Shively*, 152 U.S. at 57–58.

100 *Shively*, 152 U.S. at 16 (quoting Martin v. Waddell's Lessee, 41 U.S. 367, 413 (1842)).

101 *Id.* at 26.

102 *See id.* at 11–13, 17–18, 48–49. The Court quoted Lord Hale in its discussion of the *jus publicum* and the *jus privatum*:

> [T]hough the subject may thus have the propriety of a navigable river part of a port, yet these cautions are to be added .... That the people have a public interest, a jus publicum, of passage and repassage with their goods by water, and must not be obstructed by nuisances; for the jus privatum of the owner or proprietor is charged with and subject to that jus publicum which belongs to the king's subjects, as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified.

Id. at 12 (internal quotation marks omitted). The importance of the conceptual distinction between *jus privatum* and *jus publicum* is evident in the cases discussed *infra* notes 120–128 and accompanying text.

103 *Shively*, 152 U.S. at 1.

104 *Id.* at 49–50.

105 *See id.* at 3–4 (describing an Oregon statute from 1874, in which coastal landowners had the right to purchase state tide lands).

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footing doctrine.[106] Although the state grantee prevailed in *Shively*,[107] that result was due to the Court's interpretation of federal law.[108]

Modern cases do not contradict this interpretation of *Shively*. For example, in *Phillips Petroleum Co. v. Mississippi*,[109] the Court relied on *Shively* to conclude that "it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[110] If that statement simply recognized the states' role in charting the outer boundaries of their public trust doctrines, it accurately describes existing law. But it certainly does not mean that there is no federal public trust doctrine.

Phillips actually had nothing to do with the existence of the federal public trust. The case concerned Mississippi's claim that non-navigable tidelands were owned by the state under its public trust doctrine, which the state courts affirmed.[111] The Supreme Court upheld the state courts, declaring that the scope of the equal footing grant to the states at statehood included lands beneath tidal waters.[112] The federal government played no role in the litigation, and no one raised the issue of the federal public trust doctrine.[113]

IV. THE COURT'S MISINTERPRETATION OF *ILLINOIS CENTRAL*

Despite the federal law basis of *Illinois Central*, as underscored by *Shively*, some later Supreme Court decisions inexplicably morphed *Illinois*

106 *Id.* at 30, 58.

107 The state's ensuing grant to the private landowner presumably conveyed only the *jus privatum*, reserving the *jus publicum* to the state. *See infra* note 120 and accompanying text.

108 *See Shively*, 152 U.S. at 15–16, 57 (recognizing—through federal common law cases such as *Martin v. Waddell's Lessee*, 41 U.S. 367, 411–13 (1842)—that the sovereign's ownership of tidelands passed to grantees in royal charters, and subsequently to the states). *See also supra* notes 96–102 and accompanying text.

109 484 U.S. 469 (1988).

110 *Id.* at 475. Although the *Phillips* Court noted that some states had "abandoned the common law with respect to tidelands," the Court took pains to limit the scope of its statement. The Court clearly recognized that title to the tidelands passed to the states at statehood, and although some states eventually recognized more private interests in tidelands than historically outlined by the common law, such conveyance of limited private interests did not run afoul of *Shively*. *Id.* More importantly, the Court observed that even in some states that recognized greater private interests over tidelands, public rights to use the tidelands for the purposes of fishing, hunting, or bathing survived private conveyance. *Id.* at 483 n.12 ("It is worth noting, however, that even in some of these States—i.e., even where tidelands are privately held—public rights to use the tidelands for the purposes of fishing, hunting, bathing, etc., have long been recognized. Limiting the public trust doctrine to only tidelands under navigable waters might well result in a loss to the public of some of these traditional privileges.") (citations omitted).

111 *See, e.g.*, Cinque Bambini P'ship v. Mississippi, 491 So.2d 508, 510–11 (Miss. 1986).

112 *Phillips Petroleum Co.*, 484 U.S. at 473, 476.

113 *Id.* at 472 (identifying the actual parties as the state of Mississippi and record titleholders of Mississippi land underlying a bayou and a number of streams); *id.* (stating that at issue was whether Mississippi, "when it entered the Union in 1817, took title to lands lying under waters that were influenced by the tide running in the Gulf of Mexico, but were not navigable in fact").

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Central's pronouncement into a matter of state law, albeit in dicta.[114] These interpretations ignored the fact that there was no reliance on Illinois law in the *Illinois Central* opinion.[115]

The erroneous interpretation of *Illinois Central* began with *Appleby v. City of New York*, a 1926 decision that did not actually involve the public trust doctrine at all, in which the Court erroneously suggested that "the extent of the power of the State and city to part with property under navigable waters . . . is a state question."[116] *Appleby* concerned two lots of submerged lands in the navigable Hudson River conveyed to Appleby by the city of New York in fee simple.[117] Prior to the city's grant, the state had granted the entire tidelands of Manhattan to the city.[118]

The city dredged Appleby's submerged lands to accommodate proposed docks and mooring spaces, and Appleby sued to enjoin the dredging, alleging an unconstitutional breach of contract.[119] After the lower courts ruled that the city had the right to dredge plaintiff's lands to improve navigation,[120] the Supreme Court reversed, holding that the city's dredging unconstitutionally interfered with the contract rights the city had granted Appleby.[121] The case never raised the issue of whether the state's grant of submerged lands to the city was valid under the public trust, since it involved only Appleby's request for injunctive relief against the city's dredging.[122] Because the city never attempted to defend on public trust grounds, the Court never took up the issue—and in fact the Court took pains to distinguish the facts of the case before it from the conveyance at issue in *Illinois Central*.[123] Nonetheless, the

114 *See infra* notes 122–138 and accompanying text.

115 *See supra* notes 74–95 and accompanying text.

116 *See* Appleby v. City of New York, 271 U.S. 364, 364–66, 380 (1926) (discussing only plaintiff's request for injunctive relief against the city's dredging based on a breach of contract).

117 *Id.* at 364–66.

118 *Id.* at 366.

119 *See id.* at 369–71. The city had initiated condemnation proceedings on these submerged lots some years earlier, but had abandoned those proceedings, presumably due to lack of funds. *Id.* at 370.

120 The lower courts held that while Appleby's submerged lands remained unfilled, the city retained the right to dredge those lands for public purposes—specifically, to enhance navigation in the harbor. Appleby v. City of New York, 192 N.Y.S. 211, 221 (1922). The Supreme Court disagreed, however, concluding that the grant of the submerged lands by the city to a private party was absolute and was not encumbered by the *jus publicum*. *Appleby*, 271 U.S. at 398–99 ("Our conclusions are that [plaintiffs] were vested with the fee simple title in the lots conveyed, and . . . the city had parted with the *jus publicum* and the *jus privatum* . . . and that the city can only be revested with them by a condemnation of the rights granted.").

121 *Appleby*, 271 U.S. at 391.

122 *Id.* at 400–03.

123 In distinguishing the facts in *Appleby* from the *Illinois Central* case, the Court relied on another New York case, *People v. Steeplechase Park Co.*, 113 N.E. 521 (N.Y. 1916), in which the state sought to remove certain encroaching structures from the Coney Island foreshore, asserting that they interfered with the public's right to use the foreshore. The New York Court of Appeals affirmed a lower court's injunction concerning some of the lands (while reversing some others), noting that "[w]hatever we may think of the wisdom of [the] grant [of a section of foreshore to a private party], the propriety or validity of the grant is not attacked in this action. Although the action is brought in the name of the people, it is not brought to review . . . or set aside or amend the grant." *Id.* at 526. *Appleby* distinguished the state grant in *Illinois Central*

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Court proceeded to announce—without analysis—that "the conclusion reached [in *Illinois Central*] was necessarily a statement of Illinois law."[124] The Court gave no indication of what state law governed the result in *Illinois Central*. Moreover, the Court immediately contradicted this declaration by recognizing the federal basis, and apparently binding nature, of the rule of *Illinois Central*, noting that "the general principle . . . ha[s] been recognized the country over."[125] The latter statement is, of course, entirely consistent with the state courts' interpretation of the federal nature of *Illinois Central*.[126] But courts that have cited *Appleby*[127] have not focused on that decision's acceptance of *Illinois Central* as a restatement of federal law "recognized the country over."[128]

Unfortunately, ensuing Supreme Court decisions lifted—without close analysis—the *Appleby* dictum about the *Illinois Central* result being a consequence of state law. The Court repeated the *Appleby* dictum about *Illinois Central* in *Coeur d'Alene Tribe* in 1997[129] and again in *PPL Montana* in 2012.[130] But as discussed above,[131] in neither case did the Court explain what

from the Coney Island grant in *Steeplechase*, referencing the following discussion from a concurring opinion in *Steeplechase*:

> If the grant of lands under water for beneficial enjoyment (or, in other words, in fee simple) was so vast in extent as to amount practically to an alienation of the state's governmental functions along the ocean shore of Long Island, it would, I think, be invalid under the doctrine of Illinois Central . . . where the grant exceeded 1,000 acres, embracing the whole outer harbor of Chicago. For example, I should not be willing to construe the statute as authorizing the commissioners of the land office to shut off the public from the entire south shore of Long Island by granting the strand to the upland owners for beneficial enjoyment as a series of amusement parks. But the exclusive grant of a few hundred feet, for enjoyment in a manner which does not interfere with navigation, appears to be sanctioned by the letter and spirit of the law, whatever we may think of the wisdom of exercising the power. The question, it seems to me, is largely one of degree.

Steeplechase, 113 N.E. at 527 (Bartlett, J., concurring). The *Appleby* Court emphasized that the rule of *Illinois Central* was not applicable to the small type of grant at issue in the case. *Appleby*, 271 U.S. at 396.

124 *Appleby*, 271 U.S. at 395.

125 *Id.*

126 *See supra* note 93.

127 *PPL Montana*, 132 S. Ct. 1215, 1235 (2012); *Coeur d'Alene Tribe*, 521 U.S. 261, 285 (1997).

128 *Appleby*, 271 U.S. at 395 ("[*Illinois Central*] arose in the Circuit Court of the United States, and the conclusion reached was necessarily a statement of Illinois law, but the general principle and the exception have been recognized the country over and have been approved in several cases in the State of New York.").

129 521 U.S. at 285 ("An attempted transfer was beyond the authority of the legislature since it amounted to abdication of its obligation to regulate, improve, and secure submerged lands for the benefit of every individual. *Illinois Central*, 146 U.S. at 455–460. While *Illinois Central* was 'necessarily a statement of Illinois law,' *Appleby v. City of New York*, 271 U.S. 364, 395 (1926), it invoked the principle in American law recognizing the weighty public interests in submerged lands.") (citations omitted).

130 132 S. Ct. at 1234–35 ("Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law, see *Coeur d'Alene Tribe*, [521 U.S.] at 285 (*Illinois Central*, a Supreme Court public trust case, was " 'necessarily a statement of Illinois law' "); *Appleby v.*

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state law governed the *Illinois Central* result. Neither case involved the federal government, nor squarely addressed the federal public trust doctrine.[132] Moreover, as discussed above,[133] a careful analysis of each decision reveals substantial support for the existence of a federal public trust doctrine.

V. THE CONGRESSIONAL DISPLACEMENT ISSUE

As a constitutionally based inherent attribute of sovereignty, the relationship between the public trust doctrine and federal statutes is fundamentally different from the relationship between common law and federal statutes. As Justice Kennedy observed in the *Coeur d'Alene* decision, "navigable waters uniquely implicate sovereign interests."[134] This unique sovereign role in trust resources limits as well as empowers and is not based on common law that is reversible by statutes.[135] If the public trust were merely a common law doctrine, the statutory grant in *Illinois Central* would not have been reversed by the Supreme Court.[136]

Federal statutes may, of course, displace common law remedies.[137] A recent example was *American Electric Power Co. v. Connecticut* (*AEP*),[138] in which the Supreme Court decided that the Clean Air Act[139] displaced a common law nuisance cause of action against greenhouse gas emitting electric power plants.[140] However, a sovereign obligation to protect public trust assets not only for present but also future generations is fundamentally different than a common law right, like allocating rights among neighboring landowners. Consequently, the public trust doctrine is not displaceable by a statute, even when that statute "speaks directly" to the question at issue.[141] Instead, a sovereign trustee—just like a private trustee—is judged on the effectiveness of its acts in protecting trust assets.[142]

City of New York, 271 U.S. 364, 395 (1926) (same), subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power.").

131 *See supra* notes 41–49, 57–63 and accompanying text.

132 *Id.*

133 *Id.*

134 *Coeur d'Alene Tribe*, 521 U.S. at 284.

135 *See* discussion *infra* Part V.

136 *See* discussion *infra* Part V.

137 *See, e.g.*, Int'l Paper Co. v. Oulette, 479 U.S. 481 (1987) (holding that the Clean Water Act preempted state nuisance common law claims against an out-of-state source, but did not preempt state claims against parties under the common law of the source state); City of Milwaukee v. Illinois, 451 U.S. 304, 315 (1981) (holding that the Clean Water Act displaced any federal common law of nuisance, at least as applied to claims brought by the state).

138 131 S. Ct. 2527 (2011).

139 42 U.S.C. §§ 7401–7671q (2012)

140 *AEP*, 131 S. Ct. at 2532.

141 *Id.* at 2537.

142 *See* Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J. L. & POL'Y 281, 310–11 (2014).

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Unlike the public nuisance claim in *AEP*, which asked the judiciary to determine a reasonable level of emissions for the electric utilities,[143] a public trust claim inquires as to whether the sovereign is protecting trust assets sufficiently to safeguard the interest of present and future beneficiaries.[144] The Supreme Court decided in *Illinois Central* that the doctrine protects against sovereign "substantial impairment" of trust resources. The Court explained that the public trust cannot be lost or extinguished, except in the case of conveyances that promote trust purposes or avoid "substantial impairment of the public interest in the lands and waters remaining."[145] Applying this standard involves a fundamentally different—and much simpler—judicial calculus than attempting to determine whether a particular emitter of pollution is acting reasonably under the circumstances—as required by the nuisance claim at issue in the *AEP* case.[146]

As noted above,[147] Justice Kennedy described equal footing lands—those conveyed under federal trust to the state as part of statehood and now subject to the public trust doctrine—as implicating unique sovereign interests.[148] The Supreme Court earlier referred to sovereign ownership of lands submerged beneath navigable waters as "an incident of sovereignty."[149]

State courts agree that the public trust doctrine implicates unique and inherent sovereign interests. For example, the Washington Supreme Court has repeatedly declared that the "doctrine has always existed in Washington law."[150] The Pennsylvania Supreme Court recently expressed similar sentiments when construing that state's constitutional amendment codifying the public trust doctrine: "The Declaration of Rights assumes that the rights of the people articulated in Article I of our Constitution . . . are inherent in man's nature and preserved rather than created by the Pennsylvania Constitution."[151] The Hawaiian Supreme Court has also described its constitutionally grounded public trust doctrine as "an inherent attribute of sovereign authority that the government . . . 'cannot surrender.'"[152] As in

143 The plaintiffs in the *AEP* case asked the lower court to determine a "practical, feasible, and economically viable" level of emissions reduction. *AEP*, 131 S. Ct. at 2540 (internal quotation marks omitted).

144 *See, e.g.*, Gerald Torres & Nathan Bellinger, *supra* note 147, at 305, 307; *see generally* Lynn S. Schaffer, Comment, *Pulled From Thin Air: The (Mis)Application of Statutory Displacement to a Public Trust Claim in* Alec. L v. Jackson, 19 LEWIS & CLARK L. REV. 169 (2015).

145 *Illinois Central*, 146 U.S. 387, 453 (1892).

146 *See AEP*, 131 S. Ct. at 2534.

147 *See supra* note 41 and accompanying text.

148 *Coeur d'Alene Tribe*, 521 U.S. 261, 284 (1996).

149 Montana v. United States, 450 U.S. 544, 551 (1981) ("[T]he ownership of land under navigable waters is an incident of sovereignty.").

150 Citizens for Responsible Wildlife Mgmt. v. State, 103 P.3d 203, 208 (Wash. 2004) (Quinn-Brintall, J., concurring); Weden v. San Juan Cnty., 958 P.2d 273, 283 (Wash. 1998); Caminiti v. Boyle, 732 P2d. 989, 994 (Wash. 1987); Orion Corp. v. State, 747 P.2d 1062, 1072 (Wash. 1987).

151 Robinson Twp. v. Commonwealth, 83 A.3d 901, 948 (Pa. 2013) (plurality opinion).

152 *In re* Water Use Permit Applications, 9 P.3d 409, 443 (Haw. 2000).

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Illinois Central, the Hawaiian court rejected legislative extinguishment of the trust.[153]

Many other state courts have expressly articulated the basic understanding that the public trust doctrine is an inherent attribute of sovereignty that cannot be legislatively abrogated.[154] These include the Nevada Supreme Court,[155] the South Dakota Supreme Court,[156] and the Arizona Supreme Court,[157] among others.[158] As the federal District Court of Massachusetts stated when recognizing the trust's applicability to both the federal and state governments, the trust "can only be destroyed by the destruction of the sovereign."[159] And more than a century ago, the U.S. Supreme Court characterized sovereign controls over the taking of wildlife as an "attribute of government . . . which was thus recognized and enforced by the common law of England . . . passed to the States with separation from the mother country, and remains in them at the present day."[160] The Court did not hesitate to recognize a public trust in such common property resources:

> Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State,

153 *Id.* at 442–43 ("The further suggestion that such a statute could extinguish the public trust, however, contradicts the doctrine's basic premise, that the state has certain powers and duties which it cannot legislatively abdicate.").

154 *See infra* notes 155–158 and accompanying text.

155 Lawrence v. Clark Cnty., 254 P.3d 606 (Nev. 2011) ("As an initial matter, we note that the public trust doctrine is not simply a common law remnant. Indeed, in addition to the Nevada caselaw discussed above, public trust principles are contained in Nevada's Constitution and statutes and are inherent from inseverable restraints on the state's sovereign power.").

156 Parks v. Cooper, 676 N.W.2d 823, 837 (S.D. 2004) ("History and precedent have established the public trust doctrine as an inherent attribute of sovereign authority.").

157 San Carlos Apache Tribe v. Superior Court, 972 P.2d 179, 199 (Ariz. 1999) ("The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people. . . . The Legislature cannot by legislation destroy the constitutional limits on its authority.").

158 *See supra* note 10; *see also* Arizona Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 168 (Ariz. App. 1991) ("From *Illinois Central* we derive[d] the proposition[s] that the state's responsibility to administer its watercourse lands for the public benefit is an inabrogable attribute of statehood itself . . . [and that] the state must administer its interest in lands subject to the public trust consistently with trust purposes."); Karam v. Dep't of Envtl. Protection, 705 A.2d 1221, 1228 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 723 A.2d 943, *cert. denied*, 528 U.S. 814 (1999), *abrogated in part on other grounds in* Panetta v. Equity One, Inc., 920 A.2d 638, 646 (N.J. 2007) ("[T]he sovereign never waives its right to regulate the use of public trust property."); State v. Central Vt. Ry., 571 A.2d 1128, 1136 (Vt. 1989), *cert. denied*, 495 U.S. 931 (1990) ("[Public trust claims] cannot be barred through either laches or estoppel. . . . [T]he state acts as administrator of the public trust and has a continuing power that extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust.") (internal quotation marks omitted).

159 United States v. 1.58 Acres of Land, 523 F. Supp. 120, 124 (D. Mass. 1981).

160 Geer v. Conn., 161 U.S. 519, 527–28 (1896).

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> resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people . . . .[161]

This widespread judicial recognition that the public trust doctrine is inherent in sovereignty makes statutory displacement of the doctrine beyond legislative authority.

VI. FEDERAL RECOGNITION OF THE PUBLIC TRUST DOCTRINE

There is, in fact, widespread recognition of the existence of the federal public trust doctrine, particularly with respect to federal public lands.[162] This acknowledgement is reflected both in case law and in federal statutes.[163]

A. Federal Case Law

Several Supreme Court decisions have recognized a public trust obligation in the federal government's management of public lands.[164] The Court first acknowledged the applicability of the public trust doctrine in 1890—two years before the *Illinois Central* decision—in a case involving public coal lands in Colorado.[165] The Court stated that "[i]n the matter of disposing of the vacant coal lands of the United States, the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. . . . [These lands] were held in trust for all the people . . . ."[166] The following year the Court referred to the Secretary of the Interior as the "guardian of the people of the United States over the public lands," noting that the "obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted."[167] In upholding the application of the Unlawful Enclosures Act[168] to prevent a landowner from enclosing public lands, the Court observed that Congress

161 *Id.* at 529.

162 *But see* Eric Pearson, *The Public Trust Doctrine in Federal Law*, 24 J. LAND RESOURCES & ENVTL. L. 173, 174 (2004) (suggesting that the public trust doctrine exists "only nominally" in federal law).

163 *See infra* Part VI.A–B.

164 For a survey of the federal case law acknowledging the public trust authority in the public lands context, *see* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 279–80 (1980); Susan D. Baer, *The Public Trust Doctrine—A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources*, 15 B.C. ENVTL. AFF. L. REV. 385, 391 (1988) (both noting that in the mid-nineteenth century the federal government saw its role as merely a temporary custodian of public lands intended for sale, but federal policy began to change during the last quarter of the nineteenth century toward the protection and management of public property for future generations). *See also* GEORGE C. COGGINS & ROBERT L. GLICKSMAN, 1 PUBLIC NATURAL RESOURCES LAW § 2:10–15 (2nd ed. 2007) (observing that in the beginning of the twentieth century, congressional policy shifted towards government retention of remaining public lands).

165 United States v. Trinidad Coal & Coking Co., 137 U.S. 160 (1890).

166 *Id.* at 170.

167 Knight v. U.S. Land Ass'n, 142 U.S. 161, 181 (1891).

168 43 U.S.C. §§ 1061–1066 (2012).

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"would be recreant in its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain."[169] The public trust as an anti-monopolization doctrine is thus quite evident in public land law.[170]

In 1911, the Court reiterated that "[a]ll public lands of the nation are held in trust for the people of the whole country" in a case upholding the federal Forest Service's authority to impose criminal sanctions against violators of its grazing regulations, even though the regulations imposed fencing rules inconsistent with state law.[171] The Court viewed the alternative to trust management of the public lands—that is, proprietary management—as unpalatable in a nation that had rejected the special privileges associated with Royal management of public lands in aristocratic England: "the United States do[es] not and cannot hold property as a monarch may, for private and personal purposes."[172]

Consequently, the federal public land trust is the vehicle to ensure that federal land management reflects the republican values that animated the American Revolution,[173] not the monopolistic practices that characterized Royal public land management.[174] As the Court later stated:

> The United States holds resources and territory in trust for its citizens in one sense, but not in the sense that a private trustee holds for [a private beneficiary]. The responsibility of Congress is to utilize the assets that come into its hands as sovereign in the way that it decides is best for the future of the Nation.[175]

Creating the kind of monopolies characteristic of Royal management would presumably violate the trust responsibility and trigger judicial oversight.

169 Camfield v. United States, 167 U.S. 518, 524 (1897).

170 In addition to the federal cases discussed here, the Department of Interior has recently recognized its role as trustee of the public lands under its jurisdiction. Interior Secretary Sally Jewell stated, in reference to new regulations requiring detailed information from the oil and gas industry on hydraulic fracturing operations; "We really are upholding the public trust here . . . . There's a lot of fear, a lot of public concern, particularly about groundwater and the safety of water supplies . . . I think the industry recognizes that thoughtful regulation can help them, because it reassures the public that we're protecting them." *See* Kate Sheppard, *Department Of Interior Issues New Rules For Fracking On Public Lands*, HUFFINGTON POST (Mar. 20, 2015), *available at* http://www.huffingtonpost.com/2015/03/20/fracking-public-land-rule_n_6910922.html. The Department cited authority for the rules in the Federal Public Lands Management Act. 80 Fed. Reg. 16,141 (Mar. 26, 2015) (citing 43 U.S.C. § 1740).

171 Light v. United States, 220 U.S. 523, 537 (1911) (quoting United States v. Trinidad Coal & Coking Co., 137 U.S. 160 (1890)).

172 *Id.* at 536 (quoting Van Brocklin v. Tennessee, 117 U.S. 151, 158 (1886)).

173 *See* Dale D. Goble, *Three Cases/Four Tales: Commons, Capture, the Public Trust, and Property in Land*, 35 ENVTL. L. 807, 833 (2005).

174 *See id.* at 832.

175 Alabama v. Texas, 347 U.S. 272, 277 (1954) (Reed, J., concurring) (holding that Congress had authority to dispose of property belonging to the United States without limitation and denying states leave to file complaints challenging the constitutional validity of the Submerged Lands Act of 1953).

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B. Federal Statutes

In addition to the widespread judicial recognition of federal trust authority in the case law, Congress has repeatedly recognized the existence of a federal trust over natural resources.[176] In numerous statutes, Congress has used language invoking the principles of the federal trust.[177] These congressional expressions of the trust take one of two forms. Under the first model, the statute plainly defines the contours of the trust relationship and explicitly establishes substantive rights.[178] Under the second model, Congress incorporates trust language as part of a policy statement or declaration.[179]

The plain language of these statutes reflects a clear legislative intent to recognize and incorporate a pre-existing public trust responsibility into federal management of public resources and judicial interpretations have agreed. For example, the Redwood National Park litigation[180] involved an attempt by environmental groups to force the Secretary of the Interior to protect the primeval coastal redwood forests in the newly formed national park from external activities. Logging near the park threatened the protection of the ancient trees inside the park's borders, and the Sierra Club sought an injunction ordering the Secretary to take action.[181] The result was a series of three decisions by the federal court for the Northern District of California.[182]

In its first opinion, *Sierra Club I*, the court declared that the Secretary of the Interior had a duty to take action to protect the park, concluding that both the National Park Service Organic Act[183] and the Redwood National Park Act,[184] read together, imposed an affirmative duty on the Secretary to

176 *See infra* notes 208–228 and accompanying text.

177 *Id.*

178 *See infra* note 217 and accompanying text.

179 *See infra* notes 208–216, 218–228 and accompanying text.

180 Sierra Club v. Dep't of Interior (*Sierra Club I*), 376 F. Supp. 90, 92 (N.D. Cal. 1974); Sierra Club v. Dep't of Interior (*Sierra Club II*), 398 F. Supp. 284, 285 (N.D. Cal. 1975); Sierra Club v. Dep't of Interior (*Sierra Club III*), 424 F. Supp. 172, 172 (N.D. Cal. 1976).

181 *Sierra Club I*, 376 F. Supp. at 92.

182 *Id.* at 90; *Sierra Club II*, 398 F. Supp. at 284; *Sierra Club III*, 424 F. Supp. at 172.

183 National Park Service Organic Act of 1916, 16 U.S.C. §§ 1–4 (2012). The National Park Organic Act contains public trust language in its declaration of purposes:

> The service thus established *shall* promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to [their] fundamental purpose . . . *to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations*.

Id. § 1 (emphasis added).

184 Redwood National Park Expansion Act, 16 U.S.C. §§ 79a–79q (2012). The *Sierra Club I* court concluded that the language of the statute "impose[d] a legal duty on the Secretary to utilize the specific powers given to him whenever reasonably necessary for the protection of the park." *Sierra Club I*, 376 F. Supp. at 95. The court also noted that the duty to protect the park

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take action to protect the park resources.[185] The court reasoned that the Organic Act imposed a general trust obligation on the Secretary,[186] describing the Secretary of the Interior as "the guardian of the people of [the] United States over the public lands."[187] The court proceeded to interpret the Redwood National Park Act to impose trust obligations as well, "[i]n addition to [the] general fiduciary obligations" imposed by the Organic Act, concluding that both statutes imposed a duty on the Secretary to act.[188]

Following the decision in *Sierra Club I*, the Secretary issued a draft plan proposing cooperative agreements and a buffer zone in an apparent attempt to protect the park. The plaintiffs again challenged the Secretary, and in *Sierra Club II*, and the district court considered whether the Secretary's efforts fulfilled his trust obligation to act to protect park resources laid out in *Sierra Club I*.[189] The court concluded that the Secretary's draft plan failed to fulfill the trust duty, and alternatively ruled that even if the Secretary's actions were sufficient, he had unreasonably delayed taking action.[190] The court consequently ordered the Secretary to take "reasonable steps within a

derived from both a general trust obligation and the statute itself, and that such duty was paramount to any discretion vested in the Secretary, citing the Redwood National Park Act:

> In order to afford as full protection as is reasonably possible to the timber, soil, and streams within the boundaries of the park, the Secretary is authorized . . . to acquire interests in land from, and to enter into contracts and cooperative agreements with, the owners of land on the periphery of the park and on watershed tributary to streams within the park designed to assure that the consequences of forestry management, timbering, land use, and soil conservation practices conducted thereon, or of the lack of such practices, will not adversely affect the timber, soil, and streams within the park as aforesaid.

Id. at 94 (citing 16 U.S.C. § 79c(e)).

185 The courts in both *Sierra Club I* and *Sierra Club II* rooted the Secretary's general trust duty in the National Park Service Organic Act.

> As pointed out in this court's previous decision, there is, in addition to these specific powers, a general trust duty imposed upon the National Park Service, Department of the Interior, by the National Park System Act, 16 U.S.C. § 1 et seq., to conserve . . . and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations . . . .

Sierra Club II, 398 F. Supp. at 287. This trust language led the court to construe the permissive language of the Redwood Park Act to be mandatory. In that sense, the court used the trust as a rule of statutory interpretation. *See* William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 U.C. DAVIS L. REV. 693, 698 (2012).

186 *Sierra Club I*, 376 F. Supp. at 95–96.

187 *Id.* at 93 (quoting Knight v. United Land Ass'n, 142 U.S. 161, 181 (1891)).

188 *Id.* at 93, 95–96. The court emphasized that the Secretary's duty to protect the park was nondiscretionary: "[A]ny discretion vested in the Secretary concerning time, place and specifics of the exercise of such powers is subordinate to his paramount legal duty imposed, not only under his trust obligation but by the statute itself, to protect the park." *Id.* at 96. The court did not reach the merits of the dispute as to whether the Secretary violated his duty. *Id.*

189 *Sierra Club II*, 398 F. Supp. 284.

190 *Id.* at 293.

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reasonable time" and outlined a series of possible protective actions,[191] stopping short of prescribing a specific remedy but requiring the Secretary to protect the park "from adverse consequences of timbering and land use practices."[192]

In response to *Sierra Club II*, the Secretary of the Interior engaged in a series of actions to comply with the court's orders.[193] The Sierra Club pursued a third challenge, as logging near the park's borders had not ceased.[194] Reviewing the Secretary's efforts, the court decided that the Secretary had met his obligation because the Interior Department had made a good faith effort to meet its duties, and that further protection of the park required congressional intervention.[195] Congressional action soon followed, in the Redwood Expansion Act of 1978,[196] which expanded the park's boundaries, thereby increasing protection from adjacent logging and associated noise and water pollution.[197]

The Redwood Park litigation illustrates how the trust doctrine can call for both administrative and congressional action to protect trust resources. The district court twice ruled that the Secretary had a duty—not merely the discretion—to undertake remedial action.[198] Although ultimately declining to

191 *Id.* at 294. The court's order required the Secretary to submit a progress report of compliance or an explanation for noncompliance, and suggested the following possible actions that would satisfy the Secretary's duty to protect the park:

> [S]uch action shall include, if reasonably necessary, acquisition of interests in land and/or execution of contracts or cooperative agreements with the owners of land on the periphery or watershed, as authorized in 16 U.S.C. § 79c(e); that such action shall include, if reasonably necessary, modification of the boundaries of the Park, as authorized in 16 U.S.C. § 79b(a); and that such action shall include, if reasonably necessary, resort to the Congress for a determination whether further authorization and/or appropriation of funds will be made for the taking of the foregoing steps, and whether the powers and duties of defendants, as herein found, are to remain or should be modified.

Id.

192 *Id.* The court extrapolated these duties from the statute itself, which authorizes the Secretary "to assure that the consequences of forestry management, timbering, land use, and soil conservation practices conducted thereon, or of the lack of such practices, will not adversely affect the timber, soil, and streams within the park." 16 U.S.C. § 79c(e) (2012).

193 The Secretary 1) sought additional funding through the Office of Management and Budget; 2) made a report to Congress on alternative protection proposals (although the agency concluded it did not have adequate funding to implement any of the proposals); 3) attempted to negotiate voluntary compliance with harvesting guidelines by timber companies; and 4) requested cooperation from the California State Board of Forestry. *Sierra Club III*, 424 F. Supp. 172, 173–74 (1976).

194 *Id.* at 172.

195 *Id.* at 175–76.

196 Redwood Expansion Act of 1978, Pub. L. No. 95–250, 92 Stat. 163 (1978) (amending 16 U.S.C. § 1a–1).

197 The Act authorized purchase of an additional 48,000 acres for the park, expanding it from 58,000 to 106,000 acres. *Id.* The Act "also provided extensive economic benefits for timber workers whose jobs would be affected by the park expansion." BLUMM & WOOD, *supra* note 16, at 254.

198 *See Sierra Club I*, 376 F. Supp. 90, 95–96 (1974); *Sierra Club II*, 398 F. Supp. 284, 293 (1975).

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interpret the trust to expand the Secretary's authority to take action beyond his statutory authority, the court recognized the public's ability to demand evidence of a good faith attempt to fulfill all statutory directives, even those that seemed on their face to be entirely discretionary.[199] Moreover, the court's decisions evidently produced an educative effort on Congress, which responded to the litigation with therapeutic legislation.[200]

The federal District Court of Colorado similarly concluded that the National Park Service Organic Act,[201] together with the Wilderness Act,[202] imposed nondiscretionary duties on the government in *High Country Citizens' Alliance v. Norton*.[203] In that case, the federal government entered into an agreement with the State of Colorado, under which it would relinquish the early priority date of federal reserved water rights for Black Canyon in the Gunnison National Park, including a designated wilderness area. The relinquished priority date was 1933. Under the agreement, the government's water right would have a priority date of 2003—subordinating the federal right to all state-issued water rights between 1933 and 2003.

Recognizing that "the value of this property [(reserved water rights)] is its priority," the federal district court invalidated the agreement, ruling that the federal government had "unlawfully disposed of federal property without Congressional authorization."[204] The court also concluded that the government had violated "nondiscretionary duties to protect the Black Canyon's resources," explaining that "the National Park Service has a legal obligation to protect the resources of national parks."[205] Although the court rooted the government's nondiscretionary duties in the National Park Service Organic Act and the Wilderness Act,[206] the results mirror remedies that enforcement of a federal public trust doctrine would impose. The court concluded that the government unlawfully delegated federal decision-

199 The Redwood Park Act includes authority to acquire interests in land, to execute contracts or cooperative agreements with neighboring landowners, and to modify the boundaries of the Park. 16 U.S.C. §§ 79b(a), 79c(e) (2012). The *Sierra Club II* court ordered the Secretary to take "reasonable steps" within a "reasonable time" to exercise those statutory powers. *Sierra Club II*, 398 F. Supp. at 294.

200 *See supra* notes 196–197 and accompanying text; *see also* Sierra Club v. Andrus, 487 F. Supp. 443, 447–49 (D.D.C. 1980) (describing the statutory duties associated with the amendment of the National Park Service Organic Act). Under the language of the statute, "[t]he Secretary has an absolute duty, which is not to be compromised, to fulfill the mandate of the 1916 Act to take whatever actions and seek whatever relief as will safeguard the units of the National Park System." *Id.* at 448 (quoting S. REP. NO. 95-528, at 9 (1977)) (internal quotation marks omitted). The Secretary's "absolute duty" includes the conservation of National Park resources so as to "leave them unimpaired for the enjoyment of future generations." *Id.* at 447, 448; *see also* 16 U.S.C. §§ 1, 1a–1 (1982).

201 National Park Service Organic Act of 1916, 16 U.S.C. §§ 1–4 (2012).

202 Wilderness Act, 16 U.S.C. §§ 1131–1136 (2012), *amended by* Pub. L. No. 111-11.

203 448 F. Supp. 2d 1235 (D. Colo. 2006).

204 *Id.* at 1248. The anti-monopoly sentiment central to the public trust doctrine also underlies the origins of the prior appropriation system of water law. *See* DAVID B. SCHORR, THE COLORADO DOCTRINE: WATER RIGHTS, CORPORATIONS, AND DISTRIBUTIVE JUSTICE ON THE AMERICAN FRONTIER (2012).

205 *Id.* at 1248, 1250.

206 *Id.* at 1252.

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making authority over park protection to the state, unlawfully disposed of federal property—reserved water rights—without congressional authorization, and violated nondiscretionary duties.[207]

The National Park Service Organic Act contained express trust language, declaring that the Secretary "shall" protect the parks "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[208] This same intergenerational language—a keystone principle of the public trust—exists in several other federal statutes.[209] For example, the National Forest Management Act of 1976[210] announced that the National Forest System was "dedicated to the long-term benefit for present and future generations."[211] The Coastal Zone Management Act[212] declared a national policy "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations."[213] Other examples of statutes with similar declarations of intergenerational responsibility include the Wild and Scenic Rivers Act,[214] the National Wildlife Refuge Act,[215] and the National Wilderness

207 Reed Benson has observed that the *High Country Citizens' Alliance* decision emphasized the profound importance of the public participation component of NEPA in the context of a government decision with long-term significance for a national park. Reed D. Benson, *A Bright Idea from the Black Canyon: Federal Judicial Review of Reserved Water Right Settlements*, 13 U. DENV. WATER L. REV. 229, 255 (2010) (citing *High Country Citizens' Alliance*, 448 F. Supp. 2d at 1245–46) ("A decision to enter into agreements which permanently give up a priority to a resource which must be 'saved for all generations' must be made in public view and not behind closed doors."). Although the *High Country Citizens' Alliance* case involved reserved water rights within a National Park, the background principle—that the government has nondiscretionary duties to protect national resources—seems clearly to apply to wilderness areas as well. *See* Sierra Club v. Yeutter, 911 F.2d 1405, 1413–14 (10th Cir. 1990) (concluding that although plaintiffs' claims asserting reserved water rights were not ripe for review, the Wilderness Act imposed an affirmative duty on the Forest Service to administer the wilderness areas so as "to preserve [their] wilderness character").

208 National Park Service Organic Act of 1916, 16 U.S.C. § 1 (2012).

209 Executive agencies can also recognize the public trust through executive policy choices implementing federal statutes. *See supra* note 175.

210 National Forest Management Act of 1976, 16 U.S.C. §§ 1600–1614 (2012).

211 *Id.* § 1609(a) (2012).

212 Coastal Zone Management Act, 16 U.S.C. §§ 1451–1466 (2012).

213 *Id.* § 1452. The Coastal Zone Management Act is a statute that embodies "co-trustee" responsibilities between the states and the federal government. *See id.* §§ 1451–1466 (2012). *See* Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 84 (2009) (describing the role of sovereigns as cotenant trustees over shared assets).

214 Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287, 1271 (2012) ("It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.").

215 National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. § 668dd–668ee (2012). Section 668dd announced that "[t]he mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate,

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Preservation Act.[216] In other statutes, Congress has expressly appointed trustees to recover damages incurred by natural resources.[217]

restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans."

216 Wilderness Act, 16 U.S.C. §§ 1131–1136 (2012), *amended by* Pub. L. No. 111-11. Section 1131 declared:

> In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.

Id. § 1131(a). For recent evaluations of the Wilderness Act, see *Symposium on the Wilderness Act at Fifty*, 44 Envtl. L. 287 (2014).

217 For example, Congress established a trustee model for enforcement in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601–9675 (2012), where section 9607(f)(1) gives the "public trustee" authority to initiate actions to value damage to public property. CERCLA explicitly authorizes both "federal and state natural resource damage 'trustees' to assess and recover from 'responsible parties' damages for 'injury to, destruction of, or loss of' publicly owned or controlled natural resources, caused by the release of hazardous substances." *See* Colorado v. U.S. Dep't of Interior, 880 F.2d 481, 483 (D.C. Cir. 1989) (citing CERCLA § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C)), (describing "trustee" scheme established in CERCLA). The Act specifically authorizes the President to act as a trustee on behalf of the public to recover damages and specifies how the trustee may use the recovered funds:

> The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State.

42 U.S.C. § 9607(f)(1) (2012). The Oil Pollution Act of 1990 similarly incorporated explicit trust enforcement language and established an "Oil Spill Liability Trust Fund." 33 U.S.C. § 2706(a)–(b) (2012). The Act defines "natural resources" with specific reference to the federal trust as follows:

> "natural resources" includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government . . . .

33 U.S.C. § 2701(20) (2012). Section 311 of the Clean Water Act authorizes the President to act as a trustee on behalf of the public to recover damages in language similar to that of CERCLA:

> The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

Federal Water Pollution Control Act, 33 U.S.C. § 1321(f)(5) (2012). These statutes established comprehensive funding and enforcement schemes, but the authority of the federal government to recover damages to natural resources pre-dated the statutes. *See* In Re Steuart Transp. Co.,

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Courts should interpret these codifications of trust language and impositions of intergenerational responsibilities as congressional recognition of the public trust doctrine which, as in the Redwood Park litigation, imposes procedural rigor on the government trustee.[218] One neglected example of the federal trust doctrine's procedural rigor lies in the procedures imposed on all federal agencies by the National Environmental Policy Act (NEPA).[219] NEPA, the "basic national charter for protection of the environment,"[220] expressly imposed, in section 101(b), a federal duty to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."[221] This congressional recognition of federal trust responsibilities is often overlooked, but we think its expression may have led to the scrutiny with which the courts have interpreted the NEPA procedures specified in section 102(2)(C).[222]

As in the National Park Service Organic Act, NEPA's references to the federal responsibility to future generations and its express invocation of the trust responsibility may fairly be read to delegate a nondiscretionary duty to federal agencies to preserve federal resources for succeeding generations.[223] Fulfilling NEPA's trust duty requires a convincing federal showing of the use of "all practicable means" of fulfilling the duty to protect the interests of succeeding generations.[224] This convincing showing in the form of environmental impact statements and environmental assessments,[225] now partially codified in regulations,[226] was mostly the result of close judicial oversight of the trust duties that NEPA has imposed on all federal agencies.[227] The Redwood Park and Black Canyon cases imposed similar

495 F. Supp. 38, 38 (E.D. Vir. 1980) (affirming the government's right to make a claim under the public trust doctrine for damages for waterfowl killed as a result of oil spill); United States v. Burlington Northern R.R. Co., 710 F. Supp. 1286, 1286 (D. Neb. 1989) (upholding a federal action to recover damages for destroyed wildlife on public lands). Courts should therefore interpret these statutory trust duties *in addition to* preexisting trust duties, as in the Redwood Park litigation. *See supra* notes 186–207 and accompanying text.

218 *See supra* part VI.B.

219 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2012).

220 Ilioulaokalani Coal. v. Rumsfeld, 464 F.3d 1083, 1093 (9th Cir. 2006) (quoting 40 C.F.R. § 1500.1(a)).

221 42 U.S.C. § 4331(b)(1) (2012).

222 *See generally* DANIEL L. MANDELKER, ET AL., NEPA LAW & LITIGATION (2014). *See also* Baer, *supra* note 164, at 399 ("Although NEPA does not specify congressional intent regarding enforcement, courts have interpreted the Act to establish judicially-enforceable obligations.").

223 *See* Baer, *supra* note 164, at 398–99 (1988) ("NEPA embodies an all-encompassing statutory delegation of public trust duties. . . . In imposing a duty to preserve the 'environment' for future generations, NEPA is a direct and complete codification of the public trust doctrine.").

224 42 U.S.C. § 4331(b) (2012).

225 40 C.F.R. §§ 1502.1–.25 (2012) (regulations outlining requirements for the preparation of environmental impact statements); 40 C.F.R. §§ 1501.3–.4 (regulatory guidance for environmental assessments).

226 *See* 40 C.F.R. pts. 1500–1508 (regulations promulgated by the Council on Environmental Quality, applicable to all federal agencies).

227 *See* Michael C. Blumm & Keith Mosman, *The Overlooked Role of the National Environmental Policy Act in Protecting the Western Environment: NEPA and the Ninth Circuit*,

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obligations on the Secretary of the Interior.[228] These statutes, which reflect the federal public trust recognized in the case law examined in the previous section,[229] at a minimum seem to require close judicial oversight and administrative procedural rigor. The federal public trust doctrine should be understood to require no less for all federal trust resources.

VII. CONCLUSION

The D.C. Circuit's assumption that the public trust doctrine does not apply to the federal government was erroneous because it was based on isolated statements in cases that simply did not have the federal public trust issue before them. None of those cases even attempted to explain how or why the result in *Illinois Central* was a reflection of state law,[230] and most state courts have interpreted *Illinois Central* to be binding federal authority.[231] Many well-considered federal court opinions have assumed the existence of a federal public trust doctrine,[232] and many state courts consider the public trust to have always existed,[233] meaning that state constitutional or statutory codifications of the public trust merely reflect a pre-existing sovereign duty.

The public trust doctrine imposes an inherent limit on sovereignty—whether that sovereignty is exercised by the state or federal governments. In much the same fashion as the federal Constitution recognized but did not impose state police powers, the Constitution reflects the public trust doctrine as a reserved power withheld from all legislatures and executives, regardless of whether they are state or federal.

2 WASH. J. ENVTL. L. & POL'Y 193 (2012); Michael C. Blumm & Marla S. Nelson, *Pluralism and the Environment Revisited: The Role of Comment Agencies in NEPA Litigation*, 37 VT. L. REV. 5 (2013).

228 *See supra* notes 180–207 and accompanying text.

229 *See supra* Part VI.A.

230 *See supra* notes 41–49, 57–64, 113–133 and accompanying text.

231 *See supra* notes 94–95 and accompanying text.

232 *See supra* notes 162–175 and accompanying text.

233 *See supra* notes 150–158 and accompanying text.

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