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## Blueprint for the Great Lakes Trail

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# BLUEPRINT FOR THE GREAT LAKES TRAIL

*Melissa K. Scanlan\**

*The Great Lakes are vast yet vulnerable. There is a need to focus the public's attention on the significance of the lakes for the region as a cohesive, binational whole. To address this need, build on existing water law, and engage the public, this Article provides a blueprint to establish a Great Lakes Trail on the shores of the Great Lakes. The Trail will link together 10,000 miles of coastline and provide the longest marked walking trail in the world. It will demarcate an already existing, yet largely unrecognized, public trust easement and engage the public with their common heritage in the lakeshore.*

*The Great Lakes Trail is rooted in longstanding legal rights in the beach commons that have been forgotten and eroded over time. The Trail will provide a tangible way to restore the public's coastal history and reinvigorate public trust rights.*

*In the United States, when each of the Great Lakes states entered the Union, the federal government transferred to them the waters and lakebeds of the Great Lakes up to the ordinary high water mark on the beach. The states were to hold these lands and waters in trust for the public use and enjoyment. In 2005, the Michigan Supreme Court held in favor of the public's right to access and walk along this beach. This is the only Great Lakes state court decision to directly address the public's right to walk along the Great Lakes, and it provides an excellent contemporary model decision for the region. On the Canadian side of the Great Lakes, there is an existing movement to build a Waterfront Trail along all of the Great Lakes and St. Lawrence River, as well as legislative efforts to recognize a right of passage on foot along the Great Lakes shoreline. However, the states and provinces lack consistency in how they address public access to this coast, and have not identified it as a broad public asset like the Appalachian Trail.*

*Establishing the Great Lakes Trail will be a monumental effort, requiring a multidisciplinary approach. It will require generating local, and especially lakeshore property owners' support for the Trail; developing a system of local volunteers; working with artists and educators to design art installations and signs that reflect each community's values and educate the public about Great Lakes ecological and legal issues; building local tourism economies with chambers of commerce to promote trail-oriented businesses; and partnering with GIS mappers and app*

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\* Melissa K. Scanlan is an Associate Professor, Associate Dean, and Director of the Environmental Law Center at Vermont Law School. The author thanks Professors Sandra Zellmer and Noah Hall for comments on earlier drafts; the Berkeley Exchange for providing a forum to share this idea and receive feedback from colleagues; and, Katherine Michel and Margaret Bettenhausen for their able research on the Great Lakes Trail. With this Article, the author wants to remember Joseph Sax (1936-2014) for his prior public trust work and encouragement on this path.

developers to produce real time local business information and mapping. Ultimately, allowing people to utilize their public trust rights in walking the coasts of the Great Lakes actively engages them in seeing the importance of the Great Lakes as an ecological, political, economic, and cultural asset, which is a precursor to developing and implementing cooperative Great Lakes governance structures.

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INTRODUCTION

While writing an article on coastal property rights in the United States, I started hiking segments of one of the U.S. National Scenic Trails. At my computer, I was sketching the origins of the public trust doctrine and the original transfer of trust property from the federal government to the states under the equal footing doctrine. On the trail, I was appreciating the views and the people who had worked to provide this national treasure.

At one point along the trail, the easement across private land ended and the trail was routed onto a public road. The lack of participation by the adjacent private property owner was a reminder about the many easements landowners had to contribute or sell to make this trail a reality.

It was at that moment that I envisioned the Great Lakes Trail within the public trust easement that already exists on the shores of the Great Lakes. Unlike the easements that people needed to obtain to build the National Scenic Trail on which I was hiking, the states already hold the public trust easement along the Great Lakes coastline. Yet, it is not seen as a cohesive whole, a connected system, like one of the National Scenic Trails. Only one Great Lakes state supreme court has clearly addressed the issue of walking along the shores of the Great Lakes: in 2005 the Michigan Supreme

Court held that walking is a historic and enduring right within the inalienable public trust easement.<sup>1</sup>

This Article offers a vision for a new National Scenic Trail, the Great Lakes Trail, within this existing and enduring public trust easement. This Article then identifies the legal grounding for the Trail in the Northwest Ordinance, the equal footing doctrine, the public trust doctrine, and the National Trails System Act. Finally, it outlines the interdisciplinary efforts needed to create the Great Lakes Trail.

## I. VISION

The Great Lakes are the quintessential commons. The interconnected system of lakes Superior, Michigan, Huron, Erie, and Ontario are shared by millions of people for consumption, transportation, power, recreation, and a variety of other uses. They contain eighty-four percent of the fresh surface water supply of North America.<sup>2</sup>

With 10,900 miles (17,500 kilometers) of shoreline in the United States and Canada, the Great Lakes shoreline is equal to almost forty-four percent of the circumference of the earth.<sup>3</sup> The Great Lakes Trail will demarcate an already existing, yet unrecognized, public footpath along this fresh coast, on the strip of land between the ordinary high water mark (OHWM) and the water.<sup>4</sup> The Trail will engage the public with their public trust rights in the lakeshore and the lakes. The vision for this trail is rooted in longstanding legal rights in the beach commons that have been forgotten and eroded over time. The Great Lakes Trail provides a tangible way to restore the public's coastal heritage and reinvigorate the public trust doctrine.

The Great Lakes Trail will provide the longest marked public walking trail in the world, more than the combined length of the Triple Crown of the U.S. National Scenic Trails: the Appalachian, the Continental Divide, and the Pacific Crest Trails.<sup>5</sup> In fact, the State of Michigan's coastline alone

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1. *Glass v. Goeckel*, 703 N.W.2d 58, 74 (Mich. 2005).

2. *Great Lakes Facts and Figures*, GREAT LAKES INFORMATION NETWORK, <http://www.great-lakes.net/lakes/ref/lakefact.html> (last visited Oct. 9, 2014).

3. *Id.*

4. The OHWM is "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. And where the bank or shore at any particular place is of such a character that is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark." *Glass*, 703 N.W.2d at 72 (quoting *Diana Shooting Club v. Husting*, 145 N.W. 816, 820 (Wis. 1914)).

5. The Appalachian Trail, the Continental Divide Trail, and Pacific Crest Trail form the "Triple Crown" of long distance hiking trails in the United States, all of which are

is 2232 miles long, providing more potential trail miles than the iconic Appalachian Trail.<sup>6</sup>

In the United States, when each of the Great Lakes states entered the Union, the federal government granted them the waters and lakebeds of the Great Lakes up to the OHWM.<sup>7</sup> The portion of the beach below the OHWM is to be held in trust for the use and enjoyment of the public.<sup>8</sup> In 2005, Michigan's Supreme Court recognized the public's right to access and walk along this coast as a long-standing right that predates statehood.<sup>9</sup> However, the Great Lakes states lack consistency in how they address public access to this coast. In particular, they have failed to identify the coastline as a broad public asset like the Appalachian Trail.

Although Canada has a less articulated public trust doctrine, Canada and the United States share a common foundation in English common law and its public trust principles.<sup>10</sup> There is already an existing movement in Canada to build a Waterfront Trail that will link all of the Great Lakes and the St. Lawrence River.<sup>11</sup> There is also a Canadian effort to pass legislation

recognized as national scenic trails under section 5 of the National Trails System Act, 16 U.S.C. § 1244 (2013). The Appalachian Trail stretches from Georgia to Maine, covering 2,180 miles. *About the Trail*, APPALACHIAN TRAIL CONSERVANCY, <http://www.appalachiantrail.org/about-the-trail> (last visited Oct. 9, 2014). The Continental Divide Trail is 3,100 miles long and runs between the borders with Canada and Mexico. *About the CDT*, CONTINENTAL DIVIDE TRAIL COALITION, <http://www.continentaldividetrail.org/about-the-trail/> (last visited Oct 9, 2014). The Pacific Crest Trail runs 2,650 miles between the borders with Canada and Mexico and crosses the Sierra Nevada and Cascade mountain ranges. *Thru-hiker FAQ*, PACIFIC CREST TRAIL ASS'N, <http://www.pcta.org/discover-the-trail/long-distance-hiking/thruhiker-faq/> (last visited Oct. 9, 2014).

6. *Shorelines of the Great Lakes*, MICH. DEP'T OF ENVIL. QUALITY, [http://www.michigan.gov/deq/0,4561,7-135-3313\\_3677-15959--,00.html](http://www.michigan.gov/deq/0,4561,7-135-3313_3677-15959--,00.html) (last visited Oct. 9, 2014). There are 2147 mainland shore miles and 85 connecting river miles, excluding shore miles on islands and their connecting rivers. *Id.*

7. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892) (citing Pollard v. Hagan, 44 U.S. 212 (1845)). Two years later, the Court built on the foundation it established in *Illinois Central*, identifying the boundary of the original grant from the federal government to the states as covering "soil below [the] high-water mark." *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894).

8. *Shively v. Bowlby*, 152 U.S. at 57-58.

9. *Glass v. Goeckel*, 703 N.W.2d at 74 (Mich. 2005).

10. JAMES M. OLSON ET AL., FLOW FOR WATER, IN CONJUNCTION WITH MAUDE BARLOW, COUNSEL OF CANADIANS, REPORT TO THE INTERNATIONAL JOINT COMMISSION ON THE PRINCIPLES OF THE PUBLIC TRUST DOCTRINE 1-33 (2011), available at <http://flowforwater.org/wp-content/uploads/2013/02/Edited-12-01-11-Report-to-IJC-on-Public-Trust-Principles-w-cover-pg.pdf>.

11. WATERFRONT TRAIL, <http://www.waterfronttrail.org/> (last visited Oct. 10, 2014). Currently, the Waterfront Trail covers "over 1400km along the Canadian shores of Lake Ontario, Lake Erie, Lake St. Clair and the Niagara, Detroit and St. Lawrence Rivers . . . connect[ing] 68 communities and over 405 parks and natural areas including wetlands, forests and

that would explicitly recognize a right of passage for walking along the Great Lakes coastline.<sup>12</sup>

The Great Lakes Trail could weave these currently isolated Canadian and United States trail efforts together in a tangible unified project. The Great Lakes, surrounded by eight Great Lakes states and two Canadian provinces,<sup>13</sup> are home to diverse communities who at times collaborate on protections for the lakes. The recent Great Lakes-St. Lawrence Sustainable Water Resources Agreement is an example of this collaboration.<sup>14</sup> However, the Great Lakes Trail will bind together these Great Lakes communities in the United States and Canada as a bioregion in a way that has not been previously accomplished. By getting this region to work together to build a binational walking trail, the Great Lakes Trail lays the groundwork for additional collaboration on shared issues related to the Great Lakes and its governance.

The Great Lakes Trail will increase public access and use of these coastal shorelines for walking. According to recent data from the National Survey on Recreation and the Environment, “walking for pleasure” is the most popular outdoor recreation activity in the United States.<sup>15</sup> Every year, millions of Americans hike and volunteer on national trails,<sup>16</sup> resulting in

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beaches.” *Id.* Unlike the Great Lakes Trail, the Waterfront Trail is not located on the shores of the Great Lakes below the OHWM.

12. Great Lakes Shoreline Right of Passage Act, 2008, B. 43, 39th Leg., 1st Sess. (Ont. 2008), available at <http://www.ontla.on.ca/bills/bills-files/39-Parliament/Session1/b043.pdf>.

13. The Provinces of Ontario and Quebec and the States of Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, and New York comprise the Great Lakes provinces and states. See *The Great Lakes*, GREAT LAKES INFORMATION NETWORK, <http://www.great-lakes.net/lakes/> (last visited Oct. 10, 2014).

14. Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement, Dec. 13, 2005, available at [http://www.cglg.org/projects/water/docs/12-13-05/Great\\_Lakes-St\\_Lawrence\\_River\\_Basin\\_Sustainable\\_Water\\_Resources\\_Agreement.pdf](http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf) (last visited Oct. 10, 2014).

15. U.S. Dep’t of Agric. Forest Serv., *Recent Outdoor Recreation Trends 2* (Jan. 2012), <http://www.srs.fs.usda.gov/trends/pdf-iris/IRISRec23rptfs.pdf>.

16. See, e.g., *2,000-Milers: Facts and Statistics*, APPALACHIAN TRAIL CONSERVANCY, <http://archive.today/qY8Fg> (last visited Oct. 10, 2014) (stating that an estimated three to four million people hike a portion of the Appalachian Trail each year); *Discover the Trail*, PACIFIC CREST TRAIL ASS’N., <http://www.pcta.org/discover-the-trail/> (last visited Oct. 10, 2014) (“Untold thousands of hikers and equestrians enjoy this international treasure each year.”); *Volunteer Your Passion for the PCT*, PACIFIC CREST TRAIL ASS’N., <http://www.pcta.org/volunteer/> (last visited Oct. 10, 2014) (stating that 1500 individuals volunteered on the Pacific Crest Trail in 2013); ICE AGE TRAIL ALLIANCE, 2013 ANNUAL REPORT 1 (2013), available at [http://www.iceage-trail.org/shop/www.iceagetrail.org/files/1396050734\\_2013\\_IATA\\_Annual\\_Report.pdf](http://www.iceage-trail.org/shop/www.iceagetrail.org/files/1396050734_2013_IATA_Annual_Report.pdf) (stating that 1300 individuals volunteered on the Ice Age Trail in 2013).

health and economic benefits to trail users and surrounding communities.<sup>17</sup> Because the Great Lakes Trail will go through a variety of cities, it will open new walking opportunities for low income people and people of color who have less access to more remote National Scenic Trails.

More public access should increase awareness about the ecological health of the Great Lakes.<sup>18</sup> Nothing animates complicated ecological problems, such as invasive species, quite like physically experiencing them. For example, after the author Loreen Niewenhuis walked the Great Lakes shoreline, she described how the experience changed and deepened her appreciation for the immense beauty and the incredible ecological threats facing the Great Lakes.<sup>19</sup>

One of the threats facing the Great Lakes is an unprecedented rate of evaporation.<sup>20</sup> This is a reality that has largely come to pass out of sight and out of mind of many. Bringing the public into closer contact with the shoreline will provide a visual reminder about the impacts of warmer air and water temperatures due to climate disruption.

Clearly demarcating the existing public trust easement will make the invisible visible. This will benefit the public as well as private littoral property owners. When the line between public and private property along the beach is unclear, it makes excesses on the part of the public or private rights holders more likely. Identifying the Great Lakes Trail and limiting the scope of public activities to walking and accessing the water is consistent and compatible with neighboring private uses. The Trail, likewise, can be used to engage and educate the public about the public trust doctrine and the protections it affords the shared beaches and waters of the Great Lakes.

There should be a binational master plan and map for the Great Lakes Trail that contains the entirety of the trail and uses uniform trail identifica-

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17. See generally ROGER L. MOORE & KELLY BARIHLOW, N.C. STATE UNIV., *THE ECONOMIC IMPACTS AND USES OF LONG-DISTANCE TRAILS* (1998), available at <http://ntl.bts.gov/lib/12000/12200/12275/12275.pdf>; *Health and Wellness Benefits*, RAILS-TO-TRAILS CONSERVANCY, <http://atfiles.org/files/pdf/healthTGC.pdf> (last visited Oct. 10, 2014).

18. The Great Lakes face a range of threats from pollution, habitat loss, and invasive or exotic species. See generally *The Great Lakes Today: Concerns*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/glnpo/atlas/glat-ch4.html#Exotic%20Species> (last updated June 25, 2012).

19. LOREEN NIEWENHUIS, *A 1,000-MILE GREAT LAKES WALK: ONE WOMAN'S TREK ALONG THE SHORELINES OF ALL FIVE GREAT LAKES* (2013). See also LOREEN NIEWENHUIS, *A 1000-MILE WALK ON THE BEACH: ONE WOMAN'S TREK OF THE PERIMETER OF LAKE MICHIGAN* (2011) (Loreen Niewenhuis includes a special message inserted into her book about transforming concern for the Great Lakes into action by supporting the nonprofit, Alliance for the Great Lakes.)

20. Dan Egan, *Once-Steady Great Lakes' Flow Altered by Dredging, Dams and Now Warming Temperatures*, MILWAUKEE J. SENTINEL, July 27, 2013, <http://www.jsonline.com/news/wisconsin/once-steady-great-lakes-flow-altered-by-dredging-dams-and-now-warming-temperatures-217150821.html>.

tion markings. However, to maximize public involvement and volunteerism, the trail should be divided into sections, with local groups of volunteers in charge of their section. This is an opportunity for local communities to develop public art and educational signs highlighting key cultural, historical, and ecological features of their segment of the trail. This will serve the dual purpose of engaging local volunteers and educating the public about the global significance of the Great Lakes.

Establishing and promoting a Great Lakes Trail will increase Great Lakes tourism and appreciation for these binational gems. Unlike other National Scenic Trails that traverse wilder and more remote locations, such as the Pacific Crest Trail,<sup>21</sup> many parts of the Great Lakes Trail will be in close proximity to population centers. The many towns and cities that populate the shores of the Great Lakes will benefit from receiving an influx of walking-oriented tourism. This could be especially beneficial in rural parts of the Great Lakes that lack sufficient economic activity. Like the walking tours in England, Ireland, and Scotland, new companies will develop to provide services for walkers along the Great Lakes Trail.<sup>22</sup> There will be an increased demand for accommodations, restaurants, and guides. All of these businesses can be mapped along the Trail through the development of a Trail app for smartphones hikers can use to track their progress. This is an opportunity for area chambers of commerce to build local tourism economies by promoting Trail-oriented businesses.

Ultimately, when people utilize their public trust rights in walking the shores of the Great Lakes, it will highlight the importance of the Great Lakes as an ecological, political, economic, and cultural whole. This is a precursor to meaningful progress on developing and implementing cooperative Great Lakes governance structures.

## II. LEGAL GROUNDING

### A. *Northwest Ordinance, Equal Footing Doctrine, and Public Trust Easements*

The legal foundation for recognizing the Great Lakes Trail is long-standing and rooted in the Northwest Ordinance, the equal footing doctrine, and the public trust doctrine on the United States side of the Great Lakes. This section covers these United States legal fundamentals and then turns to the Canadian legal support for the existence of the Trail.

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21. See generally CHERYL STRAYED, WILD: FROM LOST TO FOUND ON THE PACIFIC CREST TRAIL (2012).

22. See, e.g., COTSWOLD WALKS, <http://www.cotswoldwalks.com> (last visited Oct. 10, 2014) (walking tour company from the walking capital of England, the Cotswolds).



The Great Lakes Trail will exist, where physically possible, along that massive coastline between the ordinary high water mark (OHWM) and the water's edge. The physical location of the OHWM is generally thought of as the discernible line landward of the point at which the water contacts the shore. Michigan and Wisconsin look to find the line where "the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic."<sup>23</sup> All the other Great Lakes states have their own definitions of what how to identify the OHWM.<sup>24</sup>

Great Lakes coastal property below the OHWM is clearly included in the property the federal government transferred to the Great Lakes states when they entered the Union on equal footing with the original thirteen states.<sup>25</sup> It is well settled federal law under the equal footing doctrine that the federal government transferred title to the new states over the sub-

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23. *Diana Shooting Club v. Husting*, 145 N.W. 816, 820 (Wis. 1914) (citations omitted); *State v. Trudeau*, 408 N.W.2d 337, 344 (Wis. 1987) (quoting *State v. McFarren*, 215 N.W.2d 459 (Wis. 1974)); *accord Glass v. Goeckel*, 703 N.W.2d at 62, 72-73 (Mich. 2005) (adopting Wisconsin's definition of OHWM).

24. Illinois and Indiana use the International Great Lakes Datum-1985 (IGLD-85) ordinary high water elevation of 581.5 feet. ILLINOIS DEPARTMENT OF NATURAL RESOURCES, GUIDELINES FOR THE SUBMITTAL OF APPLICATIONS FOR ILLINOIS DEPARTMENT OF NATURAL RESOURCES, OFFICE OF WATER RESOURCES PERMITS FOR SHORE PROTECTION IN LAKE MICHIGAN 1, available at [http://www.dnr.illinois.gov/waterresources/documents/lakemichiganpermitguidelines\\_2012.pdf](http://www.dnr.illinois.gov/waterresources/documents/lakemichiganpermitguidelines_2012.pdf); 312 IND. ADMIN. CODE 1-1-26(2) (2014). In Minnesota, "the ordinary high water level is an elevation delineating the highest water level that has been maintained for a sufficient period of time to leave evidence upon the landscape, commonly the point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial." MINN. STAT. § 103G.005(14) (2014). Finally, in New York, "'mean high water' means . . . the approximate average . . . high water level for a given body of water at a given location, that distinguishes between predominantly aquatic and predominantly terrestrial habitat as determined, in order of use, by the following: (1) available hydrologic data, calculations, and other relevant information concerning water levels (e.g., discharge, storage, tidal, and other recurrent water elevation data); (mean high water elevations are established, using this method, for certain waterbodies as presented in Section 608.11 of this Part); (2) vegetative characteristics (e.g., location, presence, absence or destruction of terrestrial or aquatic vegetation); (3) physical characteristics (e.g., clear natural line impressed on a bank, scouring, shelving, or the presence of sediments, litter or debris); and (4) other appropriate means that consider the characteristics of the surrounding area." N.Y. COMP. CODES R. & REGS. tit. 6, § 608.1(r) (2014). Ohio is the only state to reject the use of the OHWM in favor of the "natural shoreline" as the boundary of the public trust doctrine; the court asserts this line does not change "as the water rises and falls" and defines this as "the line at which the water usually stands when free from disturbing causes." *State ex rel. Merrill v. Ohio Dep't of Natural Res.*, 955 N.E.2d 935, 949 (Ohio 2011).

25. See cases cited *supra* note 7.

merged lands beneath all navigable and tidal waters within their boundaries up to the OHWM.<sup>26</sup>

The property protected by the public trust doctrine, as well as the scope of the public rights that can be exercised on this property, are key issues that define the contours of public and private rights on beaches.<sup>27</sup> When held by the state, the prevailing view is that these lands are to be managed as a public trust.<sup>28</sup> At its core, the public trust doctrine provides that lands under navigable waters up to the OHWM are held in trust by states for the benefit of the public uses for navigation, commerce, and fishing.<sup>29</sup> The right of passage on foot has also been recognized as included in the core or historic public trust rights in England and early United States cases.<sup>30</sup> Courts also describe the right of passage as necessary to access the water and effectuate the other public trust rights.<sup>31</sup>

A critical issue, however, is the extent to which states are free to alienate these original public trust lands and the impact of alienation on the exercise of public rights.<sup>32</sup> In other words, can a state grant private title to

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26. *Shively v. Bowlby*, 152 U.S. at 57–58 (1894); *see also Hardin v. Jordan*, 140 U.S. 371, 381 (1891) (stating that when the federal government granted newly formed states title to submerged land, the boundary for the title was from the submerged land to the high-water mark). The rule that states hold title to navigable and tidal waters in their sovereign capacity has its origins in English common law. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1226 (2012). In *PPL Montana*, the Supreme Court noted that, under the equal footing doctrine, “a State’s title to these lands was conferred not by Congress but by the Constitution itself.” *Id.* at 1227 (quoting *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977)) (internal quotation marks omitted).

27. For an understanding of the English common law foundation and the historical development of the public trust doctrine, see Melissa K. Scanlan, *Shifting Sands: A Meta-Theory for Public Access and Private Property Along the Coast*, 65 S.C. L. REV. 295, 307-13 (2013).

28. See Bertram C. Frey & Andrew Mutz, *The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States*, 40 U. MICH. J.L. REFORM 907, 918-19 (2007) (comparing the Great Lakes states’ doctrinal approaches).

29. See *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

30. See, e.g., *Shively*, 152 U.S. at 12 (recognizing 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” even on land privately held in fee (citation omitted) (internal quotation marks omitted)).

31. E.g., *Glass v. Goeckel*, 703 N.W.2d 58, 74 (Mich. 2005) (stating that a “right of passage over land below the ordinary high water mark,” which includes walking, is necessary to engage in other protected public rights of “fishing, hunting, and navigation for commerce or pleasure”).

32. Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 CLEV. ST. L. REV. 1, 20-24 (2010). Prof. Kilbert describes this original grant of land from the federal government to the states as the “starting point” for the demarcation line between public and private, and clarifies that states are free to later change the boundaries of private title to extend below the OHWM, but must nonetheless retain public trust protections below the

public trust lands? And if so, does that eliminate all public rights to use the land? While there is strong legal precedent and historical grounding for a perpetual public trust easement below the OHWM, there are divergent holdings on this topic.<sup>33</sup>

The U.S. Supreme Court's landmark *Illinois Central* decision spoke to this issue.<sup>34</sup> It centered on a possible divestment of trust property under Lake Michigan. The Court concluded, "[t]he sovereign power, itself, therefore, cannot . . . make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right."<sup>35</sup> If after being admitted into the Union, a state chooses to transfer the title to property below the OHWM to private owners, those lands are still burdened with a public trust easement.<sup>36</sup> Professor Robert Abrams argues public trust rights along the United States' "great waters, including the Great Lakes, derive from the very essence of sovereignty as it is embedded in the American system of government."<sup>37</sup> In other words, there is an inalienable public trust easement below the OHWM on the Great Lakes coastline.

The historical origins of the public trust doctrine, received from the English common law, imports concepts of overlapping public and private rights into the American law governing rights of use in the near shore area. Tracing the matter further back, the English law of the near shore area draws heavily on the Roman law. In Roman law, the rights in the foreshore tilted strongly in favor of facilitating public use.<sup>38</sup> In English law, the *jus privatum* (the legal title to the land) may be held by a private owner below

OHWM. *Id.* at 18, 25. Below the OHWM, states alienate trust lands but such grants cannot interfere with the supervening rights of public use and navigation. *See Shively*, 152 U.S. at 13 (citation omitted) (recognizing that small grants for the erection of perpestures are permissible).

33. Within the Great Lakes states there are two conflicting state Supreme Court decisions on this, however, only the Michigan decision deals directly with the Great Lakes. *Compare Glass*, 703 N.W.2d at 75 (recognizing the public's right to walk along the beach below the OHWM on a Great Lake), *with Doemel v. Jantz*, 193 N.W. 393, 398 (Wis. 1923) (recognizing exclusive right of private property owner against beach walkers between OHWM and water line on an inland lake). *See also* Robert Haskell Abrams, *Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in Glass v. Goeckel*, 40 U. MICH. J.L. REFORM 861, 893-902 (2007). Outside the Great Lakes states, there are also divergent holdings on this, yet the majority of states recognize a perpetual public trust easement. Scanlan, *supra* note 27, at 315-24.

34. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

35. *Id.* at 456 (quoting *Arnold v. Mundy*, 6 N.J.L. 1, 78 (N.J. 1821)) (internal quotation marks omitted).

36. *Id.*; *see also* *Diana Shooting Club v. Husting*, 145 N.W. 816, 819 (Wis. 1914) (declaring it "beyond the power of the state to alienate [the river bed] freed from such [public trust] rights") (citations omitted).

37. Abrams, *supra* note 33, at 861.

38. *Id.* at 880.

the OHWM, while the *jus publicum* (the government's right to hold property in trust for the public benefit) remained with the King.<sup>39</sup> Thus, the boundary line for ownership purposes was not the same as the boundary for public trust rights.

The Wisconsin Supreme Court's seminal public trust case, *Diana Shooting Club v. Husting*, further elucidates this point.<sup>40</sup> In *Diana Shooting Club*, the court explained that although Wisconsin decided to divest its ownership of the beds of navigable rivers and allow private ownership, public rights must limit that private title.<sup>41</sup> According to the court, "[a]s long as the state secures to the people all the rights they would be entitled to if it owned the beds of navigable rivers, it fulfills the trust imposed upon it by the organic law, which declares that all navigable waters shall be forever free."<sup>42</sup>

With regard to public trust rights, the Wisconsin Supreme Court concluded that "it is entirely immaterial who holds the title, the state or the riparian owners. . . . It is beyond the power of the state to alienate [beds underlying navigable waters] freed from such rights."<sup>43</sup> Thus, in *Diana Shooting Club* the court viewed public trust rights as a perpetual easement that burdened the private estate and could never be eliminated.<sup>44</sup> This easement prevented the state from conveying the typical ownership right to exclude, along with the private title to the riverbed. The Michigan Supreme Court came to the same conclusion when it upheld the public's right to walk the beaches of the Great Lakes.<sup>45</sup>

Even before six of the Great Lakes states entered the union, they recognized public trust rights in navigable waters, which certainly included the Great Lakes. The Great Lakes states of Minnesota, Wisconsin, Illinois, Indiana, Michigan, and Ohio share a common pre-statehood origin of being part of the Northwest Territory. The Northwest Ordinance of 1787 is part of the foundation of these Great Lakes states' public trust doctrines.<sup>46</sup> The Northwest Ordinance required the territories to hold all navigable waters, as well as the lands beneath and between them, in trust for the public's shared use and enjoyment.<sup>47</sup> According to the Northwest Ordinance, navi-

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39. Kilbert, *supra* note 32, at 4-5.

40. 145 N.W. 816.

41. *See id.* at 819.

42. *Id.*

43. *Id.* (citing *People v. N.Y. & Staten Island Ferry Co.*, 68 N.Y. 71 (1877); *Priewe v. Wis. State Land & Improvement Co.*, 79 N.W. 780 (Wis. 1899)).

44. *See id.* at 819-20.

45. *Glass v. Goeckel*, 703 N.W.2d 58, 62 (Mich. 2005).

46. *See* An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio (Northwest Ordinance of 1787) § 1, *reprinted in* U.S.C.A. Organic Laws, at 17 (West 2004).

47. *Id.* at art. IV, *reprinted in* U.S.C.A. Organic Laws, at 22 (West 2004).

gable waters and “the carrying places” between them are “common highways” that are to be “forever free” for all inhabitants of the territory.<sup>48</sup>

It was not until Michigan’s 2005 *Glass v. Goeckel*<sup>49</sup> case that any state court addressed whether the Northwest Ordinance and subsequent state-based public trust doctrines protected the public’s right to walk the shores of the Great Lakes below the OHWM.<sup>50</sup> In *Glass v. Goeckel*, a neighbor filed a complaint to stop a littoral property owner on Lake Huron from interfering with her right to walk along the lakeshore on the strip of land between the OHWM and the lake. The littoral property owners, the Goeckels, claimed that Joan Glass “trespasses on their private land when she walks the shoreline.”<sup>51</sup> The irony of this counterclaim came into focus in Mr. Goeckel’s deposition when the littoral property owner admitted that he and others also regularly walked the beaches “near the water line traveling across other people’s property.”<sup>52</sup> This shows how deeply imbedded beach walking is in the Great Lakes culture, even in someone engaged in litigation to extinguish it.

In reaching its holding in favor of the public trust right to walk the Great Lakes beaches, the court likewise showed how deeply imbedded beach walking is as a legally protected right. First the court had to interpret the meaning of a private property deed that purported to grant private rights below the OHWM.<sup>53</sup> The landowners’ title to that property under their deed, which proclaimed ownership to “the meander line of Lake Huron,” was undisputed.<sup>54</sup> Similar to the Wisconsin Supreme Court’s rationale in *Diana Shooting*, the Michigan Supreme Court reasoned that, although the state may “convey lakefront property to private parties, it necessarily conveys such property subject to the public trust.”<sup>55</sup>

Even if the state issues patents to private parties that extend below the OHWM, it cannot convey the property free of the public trust easement. “[T]he state lacks the power to diminish those [public trust] rights when

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48. *Id.*

49. 703 N.W.2d 58 (Mich. 2005).

50. *See id.* at 61.

51. *Id.*

52. Abrams, *supra* note 33, at 862-63.

53. *Glass*, 703 N.W.2d at 63 n.5.

54. *Id.* at 62-63.

55. *Id.* at 65 (emphasis omitted). Unlike in Michigan, in Wisconsin, the state cannot convey property to the lakebed below the ordinary high-water mark. *Ill. Steel Co. v. Bilot*, 84 N.W. 855, 856 (Wis. 1901). Wisconsin did allow private title to river beds; but, like Michigan, Wisconsin only did so while preserving public trust protections. *Diana Shooting Club v. Husting*, 145 N.W. 816, 819 (Wis. 1914) (citing *Willow River Club v. Wade*, 76 N.W. 273 (Wis. 1898)).

conveying littoral property to private parties.”<sup>56</sup> Like English common law, whether private property extends to the high or low water mark is irrelevant to the question of public rights: “Because the public trust doctrine preserves public rights separate from a landowner’s fee title, the boundary of the public trust need not equate with the boundary of a landowner’s littoral title.”<sup>57</sup>

In rejecting the court of appeals’ grant of exclusive use of the beach to the private titleholder, the Michigan Supreme Court stated that the lower court reached an erroneous decision that “upset the balance between private title and public rights along our Great Lakes and disrupted a previously quiet status quo.”<sup>58</sup> Although the state may “convey lakefront property to private parties, it necessarily conveys such property *subject to the public trust*.”<sup>59</sup> The court highlighted this as a “vital distinction” in public trust law: public rights limit private title.<sup>60</sup>

A key feature of the *Glass v. Goeckel* decision was that it understood the status quo of public trust rights to include beach walking below the OHWM. Beach walking rights predate Michigan statehood. Pursuant to Article IV of the Northwest Ordinance of 1787—the “forever free” provision—the court said it “must protect the Great Lakes as ‘common highways.’”<sup>61</sup> The court described this public trust right as a “common sense assumption,” noting agreement among the litigants that walking along the shore “falls within public [trust] rights traditionally protected.”<sup>62</sup>

The court further explained that “walking along the lakeshore is inherent in the exercise of traditionally protected public rights of fishing, hunting, and navigation.”<sup>63</sup> The court recognized the traditional right of passage is necessary in order to engage in these other rights of fishing, hunting and navigation.<sup>64</sup> “Consequently, the public has always held a right of passage in and along the lakes.”<sup>65</sup>

The Michigan Supreme Court described its *Glass v. Goeckel* decision as striking a balance consistent with the expectations of public and private rights holders. “In this way, we preserve littoral title as landowners have

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56. *Glass*, 703 N.W.2d at 62.

57. *Id.* at 70.

58. *Id.* at 61.

59. *Id.* at 65.

60. *Id.* at 68.

61. *Id.* at 74 (quoting Northwest Ordinance of 1787 at art. IV, reprinted in U.S.C.A. Organic Laws, at 17 (West 2004)).

62. *Id.* at 73–74.

63. *Id.* at 62.

64. *Id.* at 74.

65. *Id.*

always held it, and we preserve public rights always held by the state as trustee.”<sup>66</sup>

*Glass v. Goeckel* is a workable model for how to interpret these disputes and balance competing rights when they meet on the shores of the Great Lakes. It should serve as a guide to other Great Lakes states and Canadian provinces. It is the leading precedent to allow for the establishment of the Great Lakes Trail in Michigan. If other Great Lakes states and provinces similarly apply the public trust doctrine to protect a public right of passage on foot over the entire coastline of the Great Lakes, this would ensure a legal means for using the Great Lakes shoreline as a public trail.

In addition to Michigan’s Supreme Court precedent, New York has codified into state code walking as a recognized public trust right on public trust lands, including the shores of Lakes Erie and Ontario.

“Public trust lands” means those lands below navigable waters, with the upper boundary normally being the mean high water line, or otherwise determined by local custom and practice. Public trust lands, waters, and living resources are held in trust by the State or by the trustees of individual towns for the people to use for *walking*, fishing, commerce, navigation, and other recognized uses of public trust lands.<sup>67</sup>

The Great Lakes Trail fits squarely within the public rights articulated by New York.

No other Great Lakes states have similarly settled the issue of the public right of passage along the Great Lakes. However, the public trust jurisprudence in these remaining states indicates how amenable they would be to finding an inalienable public trust easement below the OHWM that could accommodate a Great Lakes Trail.

The equal footing doctrine is a matter of federal law, and the United States Supreme Court held that navigability for title includes the shores of the Great Lakes up to the OHWM.<sup>68</sup> Although unnecessary as a matter of law, almost all of the Great Lakes states have state court decisions that concur that title to the Great Lakes up to the OHWM passed to the states

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66. *Id.* at 76.

67. N.Y. COMP. CODES R. & REGS. tit. 19, § 600.2(z) (2014) (emphasis added). This appears in the definition section for the rules implementing the Waterfront Revitalization of Coastal Areas and Inland Waterways Act. Under the same part, the term “[c]oastal area” includes “coastal waters and the adjacent shorelands” of “Lakes Erie and Ontario.” *Id.* at § 600.2(h).

68. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892).

when they entered the Union. In addition to Michigan<sup>69</sup> and New York,<sup>70</sup> the states of Illinois,<sup>71</sup> Indiana,<sup>72</sup> Minnesota,<sup>73</sup> Ohio,<sup>74</sup> and Wisconsin concur in their receipt of navigable waters and lakebeds up to the OHWM at the time of statehood.<sup>75</sup> Pennsylvania law is silent on this point.

Most of the Great Lakes states continue to recognize the state holds lands to the OHWM in public trust, even if they also allow for private title below the OHWM. In addition to Michigan and New York, the states of Illinois,<sup>76</sup> Minnesota,<sup>77</sup> and Wisconsin<sup>78</sup> acknowledge that a public trust easement continues to extend to the OHWM. In all of these states, the continuation of the state holding title or a public trust easement to land below the OHWM is an important factor to establish the Great Lakes Trail. If this perpetual public trust easement allows the public to utilize it for walking, there would be no need to purchase lands and easements to establish the Great Lakes Trail along the coasts of these states, except in areas needed to bypass existing structures and areas dominated by cliffs or otherwise lacking a beach.

However, open questions about public access to the shores below the OHWM remain in Indiana, Ohio, and Pennsylvania. Indiana allows acqui-

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69. *Glass*, 703 N.W.2d at 69-73.

70. *People ex rel. Burnham v. Jones*, 20 N.E. 577, 579 (N.Y. 1889) (recognizing riparian's title ends at high water mark of Lake Ontario).

71. *Schulte v. Warren*, 75 N.E. 783, 785 (Ill. 1905); *Revell v. People*, 52 N.E. 1052, 1057-58 (Ill. 1898) (citing *Shively v. Bowlby*, 152 U. S. 1 (1894)); *see also Ill. Cent. R.R. Co.*, 146 U.S. at 435 (citing *Pollard v. Hagan*, 44 U.S. 212 (1845)).

72. *Lake Sand Co. v. State*, 120 N.E. 714, 716 (Ind. 1918) (citing *Ex parte Powell*, 70 So. 392 (Fla. 1915)).

73. *State v. Korrer*, 148 N.W. 617, 621 (Minn. 1914) (recognizing public rights to OHWM).

74. *State v. Cleveland & P. R. Co.*, 113 N.E. 677, 680 (Ohio 1916) (recognizing upon admission to the Union, states have title to the lands under navigable water up to the high-water mark); *see also OHIO REV. CODE ANN.* § 1506.10 (West 2014) (declaring Lake Erie's waters and lakebed belong to Ohio).

75. *State v. Trudeau*, 408 N.W.2d 337, 341 (Wis. 1987).

76. *Schulte*, 75 N.E. at 785; *Revell*, 52 N.E. at 1057-58 (citing *Shively v. Bowlby*, 152 U.S. 1 (1894)). *See also Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 455-56. Meanwhile, the private property line can be below the OHWM at the water's edge. *Revell*, 52 N.E. at 1054.

77. *Korrer*, 148 N.W. at 623. This co-exists with the private property line drawn at the low water mark. *Id.*

78. All of Wisconsin's modern decisions find the state holds in trust navigable waters up to the OHWM. *E.g.*, *R.W. Docks & Slips v. State*, 628 N.W.2d 781, 787-88 (Wis. 2001) (quoting *Trudeau*, 408 N.W.2d at 341 (Wis. 1987)); *Diana Shooting Club v. Husting*, 145 N.W. 816, 818 (Wis. 1914). However, Wisconsin has not directly overruled an older case that erroneously drew the private property boundary at the low water mark of an inland lake to prohibit walking below the OHWM when water was not present. *See Doemel v. Jantz*, 193 N.W. 393, 397 (Wis. 1923). In light of the weight of all other modern public trust decisions by the Wisconsin Supreme Court, *Doemel* should be seen as an outlier.



sition of private title to land on Lake Michigan out to the dock or harbor line, if the state grants a permit.<sup>79</sup> It is unclear whether Indiana recognizes a continuing public trust easement regardless of private title granted below the OHWM. Ohio appears to have reduced the scope of public trust lands held by the state by defining the boundary for private title and public trust as the “natural shoreline.”<sup>80</sup> It is unclear where below the OHWM the “natural shoreline” is in Ohio. Pennsylvania draws the private property line at the water’s edge, but does not clearly define whether the OHWM remains the boundary of the public trust easement.<sup>81</sup> Therefore, prevailing law in these states remains unsettled as to whether littoral property owners may lawfully exclude the public from the shores of the Great Lakes below the OHWM.

Conversely, in the states where the law is settled, such as Michigan and New York, the public clearly has the right to walk below the OHWM on the shores of the Great Lakes. These should be the legal models for establishing the Great Lakes Trail within the perpetual public trust easement.

### B. Canada’s Framework

Canada, which shares with the United States a common grounding in English common law, also has a basis for developing the public trust doctrine in the Great Lakes provinces.<sup>82</sup> A 2004 Canadian Supreme Court case suggests a willingness to apply the public trust doctrine, noting this common foundation in English common law.<sup>83</sup>

Related legislative efforts to pass a law that protects the public’s right to walk the shores of the Great Lakes below the OHWM have been underway in Canada since at least 2008.<sup>84</sup> Kim Craitor, a former member of the Leg-

79. IND. CODE § 14-18-6-4 (2014).

80. See, e.g., OHIO REV. CODE ANN. § 1506.10 (2014); State *ex rel.* Merrill v. Ohio Dep’t of Natural Res., 955 N.E.2d 935, 937 (Ohio 2011).

81. See *Lakeside Park Co. v. Forsmark*, 153 A.2d 486, 489 (Pa. 1959) (citing *Conneaut Lake Ice Co. v. Quigley*, 74 A. 648 (Pa. 1909)); *Conneaut*, 74 A. at 650 (“[W]here the lake is navigable in fact, its waters and bed belong to the state in its sovereign capacity [as trustee for the people for public use], and that the riparian patentee takes the fee only to the water’s edge.” (quoting *Lamprey v. Metcalf*, 53 N.W. 1139 (Minn. 1893))); *Sprague v. Nelson*, 6 Pa. D. & C. 493, 496 (Erie Cnty. Ct. C.P. 1924) (“There is no highway for travel on foot, by horse or carriage, along the shore of a navigable stream . . .”).

82. See OLSON ET AL., *supra* note 10, at 28-32; see also Jane Matthews Glenn, *Crown Ownership of Water in situ in Common Law Canada: Public Trusts, Classical Trusts and Fiduciary Duties*, 51 LES CAHIERS DE DROIT 493, 501-07 (2010).

83. See generally *British Columbia v. Canadian Forest Prods.*, [2004] 2 S.C.R. 74 (Can.). This case did not involve the Great Lakes or public beach walking.

84. See Great Lakes Shoreline Right of Passage Act, 2008, B. 43, 39th Leg., 1st Sess. (Ont. 2008), available at [http://www.ontla.on.ca/bills/bills-files/39\\_Parliament/Session1/b043.pdf](http://www.ontla.on.ca/bills/bills-files/39_Parliament/Session1/b043.pdf).

islative Assembly of Ontario, first introduced the Great Lakes Shoreline Right of Passage Act, in 2008, and reintroduced the bill in 2010 and 2012.<sup>85</sup> As indicated by its title, the bill clarifies a public right of passage on foot along the Great Lakes shores below the high water mark. It explicitly states “nothing in this Act interferes with property rights along the shoreline of the Great Lakes.”<sup>86</sup> To date, these legislative efforts have not resulted in a clearly protected right of passage on the Canadian shores of the Great Lakes.

In the absence of this legislation, Canadian court decisions interpreting the boundaries of littoral property on Lake Erie could pose an obstacle to the Great Lakes Trail. In *Attorney General of Ontario v. Walker*, the Canadian Supreme Court determined that private property owners’ title to land abutting Lake Erie extended to the water’s edge.<sup>87</sup> In reaching this conclusion, the Court relied solely on the title to the property. The Court held that when a patent from the Crown indicates a piece of property is bounded by water, such boundary extends to the water’s edge unless the grant expressly says otherwise.<sup>88</sup>

Similarly, the Ontario Court of Appeal looked to the land patent to determine beach property boundaries in *Gibbs v. Grand Bend Village*.<sup>89</sup> Unlike the patents in *Walker*, the patent in *Gibbs* included language that the Crown reserved for its “loving subjects” the navigable waters and their “beds and banks.” The court interpreted the patent to set the littoral owner’s property boundary at the water’s edge, and to reserve the use of the bank of the beach for the public.<sup>90</sup>

In reaching these decisions, the Canadian Supreme Court did not apply the public trust doctrine as it is conceptualized in a majority of the Great Lakes states. In contrast to the majority approach to interpreting titles to lake property in the Great Lakes states, if a public use is not reserved in the patent in Canada, the Court will not find a perpetual public trust easement. Thus, establishing a Great Lakes Trail on the Canadian shores of the Great Lakes below the OHWM will require a patchwork effort of looking at the

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85. *Id.*; Great Lakes Shoreline Right of Passage Act, 2010, B. 32, 39th Leg., 2nd Sess. (Ont. 2010), available at [http://www.ontla.on.ca/bills/bills-files/39\\_Parliament/Session2/b032.pdf](http://www.ontla.on.ca/bills/bills-files/39_Parliament/Session2/b032.pdf); Great Lakes Shoreline Right of Passage Act, 2012, B. 103, 40th Leg., 1st Sess. (Ont. 2012), available at [http://www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&Intranet=&BillID=2652](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=2652).

86. Ont. B. 103 § 5. The Bill had a first reading on June 6, 2012.

87. [1975] 1 S.C.R. 78, 80 (Can.).

88. *See id.* The Crown disputed the littoral owners’ claim to ownership based on Crown ownership and history of public use of the beach for swimming, horseback riding, strolling, and camping, without objection from the abutting property owners.

89. *Gibbs v. Grand Bend (Vill.)*, [1995] 26 O.R. 3d 644, 645 (Can. Ont. C.A.).

90. *Id.* at 645–46 (internal quotation marks omitted).

patents to littoral land or a comprehensive legislative effort, such as the “Great Lakes Shoreline Right of Passage Act.”<sup>91</sup> Enacting the Shoreline Right of Passage Act is the preferable route to facilitate establishing of the Great Lakes Trail to tie together the entire region.

### C. National Trails System Act

On the United States side of the Great Lakes, another legal avenue to establish the Great Lakes Trail is in the National Trails System Act (the Act).<sup>92</sup> The Great Lakes Trail should be recognized as a new National Scenic Trail because the Great Lakes Trail fits squarely within the intent and purpose of the Act.<sup>93</sup>

In 1968, Congress created the Act to “promote public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas of the Nation.”<sup>94</sup> The Act established a system for designating and protecting a national network of public trails for walking, biking, and other non-motorized recreation.<sup>95</sup>

The Act seeks to establish trails “(i) primarily, near the urban areas of the Nation, and (ii) secondarily, within scenic areas and along historic travel routes of the Nation, which are often more remotely located.”<sup>96</sup> The Great Lakes Trail fits both purposes of the Act, with segments that will pass through urban areas of the nation, such as Milwaukee, Chicago, Gary, Detroit, Cleveland, Erie, Buffalo, and Duluth, as well as more remote and scenic areas, as well as historic travel routes.

The Act establishes national scenic trails.<sup>97</sup> The purpose of a scenic trail is to “provide for maximum outdoor recreation potential and for the conservation and enjoyment of the nationally significant scenic, historic, natural, or cultural qualities of the areas through which such trails may pass.”<sup>98</sup> The Great Lakes are clearly significant natural and scenic binational features the Great Lakes states and provinces have agreed to conserve. The opening of the Great Lakes and St. Lawrence Agreement between the Great Lakes

91. Ont. B. 103.

92. National Trails System Act, 16 U.S.C. §§ 1241-51 (2013).

93. *See id.* § 1241(a).

94. National Trails System Act, Pub. L. No. 90-543, § 2(a), 82 Stat. 919, 919 (1968) (current version codified at 16 U.S.C. § 1241(a)) (stating, “to promote *the preservation of*, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas *and historic resources of the Nation*” (emphasis added)).

95. *See id.* §§ 3-6 (current version codified at 16 U.S.C. §§ 1242-45).

96. 16 U.S.C. § 1241(a) (2013).

97. *Id.* § 1242(a)(2). Since its inception, Congress has established eleven scenic trails under the Act. 2013 FED. INTERAGENCY COUNCIL ON TRAILS ANN. REP. 3. *See also* § 1244(a) (listing all currently designated scenic trails).

98. 16 U.S.C. § 1242(a)(2) (2013).

states and Canadian provinces calls the Great Lakes a “shared public treasure” and positions the states and provinces as “stewards” with a “shared duty to protect, conserve and manage these renewable but finite” lakes.<sup>99</sup>

The Great Lakes have over 10,000 miles of coastline, and Michigan alone has the longest freshwater coastline on the planet.<sup>100</sup> To put the establishment of the Great Lakes Trail in perspective, the Trail along Michigan’s coastline alone will be slightly longer than the Appalachian Trail, which is described as the “world’s longest continuous hiking trail that is maintained and marked.”<sup>101</sup> Establishing the Great Lakes Trail will increase public recreational opportunities to access the natural heritage in the Great Lakes. It will connect to existing National Scenic Trails, and recreational infrastructure for biking, hiking, camping, and boating, as well as encourage the establishment of new Trail-oriented businesses throughout the Great Lakes Basin. Lastly, establishing the Trail will increase funding opportunities for the conservation of the Great Lakes coastline, a special ecosystem, unique in the world.<sup>102</sup>

In order to designate a new National Scenic Trail, Congress must act.<sup>103</sup> The first step in this process is a Congressionally authorized study to show the feasibility and desirability of the Trail.<sup>104</sup> The National Park Service typically undertakes the feasibility study and completes it within three years.<sup>105</sup>

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99. Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement, Dec. 13, 2005, at 1, *available at* [http://www.cglg.org/projects/water/docs/12-13-05/Great\\_Lakes-St\\_Lawrence\\_River\\_Basin\\_Sustainable\\_Water\\_Resources\\_Agreement.pdf](http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf) (last visited Oct. 10, 2014).

100. *Shorelines of the Great Lakes*, *supra* note 6; *Coastal Management*, MICH. DEP’T OF ENVIL. QUALITY, [www.mi.gov/coastalmanagement](http://www.mi.gov/coastalmanagement) (last visited Oct. 11, 2014).

101. Compare John C. Inscoc, *Appalachian Trail*, NEW GEORGIA ENCYCLOPEDIA, <http://www.georgiaencyclopedia.org/articles/sports-outdoor-recreation/appalachian-trail> (last visited Oct. 11, 2014) (Appalachian Trail runs 2167 miles), with *Shorelines of the Great Lakes*, *supra* note 6 (Michigan’s mainland and connecting rivers shoreline totals 2232 miles).

102. See generally THE NATURE CONSERVANCY, CONSERVATION OF BIOLOGICAL DIVERSITY IN THE GREAT LAKES BASIN ECOSYSTEM: ISSUES AND OPPORTUNITIES (1994), *available at* <http://www.epa.gov/ecopage/gldb/issues/index.html>.

103. 16 U.S.C. § 1244(a) (2013) (“National scenic . . . trails shall be authorized and designated only by Act of Congress.”).

104. *Id.* § 1244(b).

105. *Id.* In the legislation authorizing the study, Congress assigns responsibility for the study to either the Secretary of the Interior or the Secretary of Agriculture. *Id.* The Secretary then delegates responsibility for the study to the “agency most likely to administer the trail.” BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, MANUAL 6280 – MANAGEMENT OF NATIONAL SCENIC AND HISTORIC TRAILS AND TRAILS UNDER STUDY OR RECOMMENDED AS SUITABLE FOR CONGRESSIONAL DESIGNATION 1-1 (2012). The Park Service contributed to or completed each trail feasibility study for the eleven designated scenic trails, including the studies for those five scenic trails that are now administered by the Forest Service. See *Current National Parks*

Two factors influence the agency's feasibility determination: (1) "whether or not it is physically possible to develop a trail along a route being studied," and (2) "whether the development of a trail would be financially feasible."<sup>106</sup> The Great Lakes Trail satisfies both feasibility factors. It is physically possible to develop the Trail. One woman has walked around the Great Lakes already, and she provided a detailed account in her books on the journey.<sup>107</sup> The financial feasibility of the Trail will be influenced by how much land is accessible and protected by a permanent public trust easement below the OHWM. In states like Michigan and New York, which have clearly protected this land through an existing public trust easement, there will be minimal additional easements needed. Easements will only be needed for uplands necessary to avoid hazards, such as power plants, and natural obstacles along the coastline. More easements to uplands will need to be purchased in areas dominated by rocky cliffs, such as parts of Lake Superior. However, there are existing trails on uplands in some areas that could be used to offset these costs.

If the study shows the Great Lakes Trail is feasible, establishing a National Scenic Trail under section 1244(a) takes an additional act of Congress.<sup>108</sup> There are six specific criteria for national scenic trails: national

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*Legislation: Hearing on S. 1774, S. 2255, S. 2359, S. 2943, S. 3010, S. 3017, S. 3045, S. 3096, H.R. 1143, and H.R. 3022 Before the Subcomm. on Nat'l Parks of the S. Comm. on Energy and Natural Res., 110th Cong. 2 (2008) (statement of Sen. Maria Cantwell (WA) explains that the National Park Service and the Forest Service completed a feasibility study for the Pacific Northwest Trail in 1980); NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, METACOMET MONADNOCK MATTABESSETT TRAIL SYSTEM: NATIONAL SCENIC TRAIL FEASIBILITY STUDY AND ENVIRONMENTAL ASSESSMENT 5-6 (2006); NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, COMPREHENSIVE TRAIL PLAN: NATCHEZ TRACE 1, 5 (1987) (stating that the original trail feasibility study was completed by the National Park Service in 1979); NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, FLORIDA TRAIL STUDY 1 (1980); BUREAU OF OUTDOOR RECREATION, U.S. DEP'T OF THE INTERIOR, CONTINENTAL DIVIDE TRAIL STUDY REPORT 1 (1976) (the Park Service was one of several Federal agencies that contributed to the study); BUREAU OF OUTDOOR RECREATION, U.S. DEP'T OF THE INTERIOR, PROPOSED NORTH COUNTRY TRAIL: FINAL ENVIRONMENTAL STATEMENT 2-3 (1975) (noting the contribution of the Park Service to the feasibility study); BUREAU OF OUTDOOR RECREATION, U.S. DEP'T OF THE INTERIOR, POTOMAC HERITAGE TRAIL 2 (1974) (noting the completion of the reconnaissance study by the Park Service).*

106. 16 U.S.C. § 1244(b).

107. NIEWENHUIS, *supra* note 19.

108. 16 U.S.C. § 1244(a); *How to Establish a National Trail*, NAT'L PARK SERVICE, [http://www.nps.gov/nts/national\\_trail\\_more.html](http://www.nps.gov/nts/national_trail_more.html) (last updated Mar. 5, 2013). Bills to designate new scenic trails typically start in the Senate Committee on Energy and Natural Resources or the House Committee on Natural Resources. From there, bills are typically referred to the Senate Subcommittee on National Parks or the House Subcommittee on Public Lands and Environmental Regulation. See *Jurisdiction*, SENATE COMM. ON ENERGY AND NATURAL RES., <http://www.energy.senate.gov/public/index.cfm/jurisdiction> (last visited Oct. 12, 2014); *Subcommittee on Public Lands and Environmental Regulation*, HOUSE COMM. ON NATURAL RES.,

significance, route selection to provide maximum outdoor recreation, access points at reasonable intervals, placement on land, length of at least several hundred miles, and continuity.<sup>109</sup> Once a National Scenic Trail is estab-

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<http://naturalresources.house.gov/subcommittees/subcommittee/?SubcommitteeID=5064> (last visited Oct. 12, 2014). See also Arizona National Scenic Trail Act, H.R. 552, 111th Cong. (as introduced in House, Jan. 15, 2009) (noting bill's referral to House Committee on Natural Resources); *H.R. 552 (111th): National Scenic Trail Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/111/hr552> (last visited Oct. 12, 2014) (noting bill's referral to Subcommittee on Public Lands and Environmental Regulation).

109. FOREST SERVICE, U.S. DEP'T OF AGRIC., COMPREHENSIVE MANAGEMENT PLAN FOR THE PACIFIC CREST NATIONAL SCENIC TRAIL 3 (1982). In full, the management plan defines the criteria as follows:

#### National Significance

National scenic trails, for their length or the greater portion thereof, should incorporate a maximum of significant characteristics, tangible and intangible, so that these, when viewed collectively, will make the trail worthy of national scenic designation. National significance implies that these characteristics; i.e., the scenic, historical, natural, or cultural qualities of the areas through which the trail passes, are superior when compared to those of other trails—not including national scenic trails—situated throughout the country. National scenic trails should, with optimum development, be capable of promoting interest and drawing power that could extend to any section of the conterminous United States.

#### Route Selection

1. The routes of national scenic trails should be so located as to provide for maximum outdoor recreation potential and for the conservation and enjoyment of the nationally significant scenic, historic, natural, or cultural qualities of the areas through which such trails may pass. They should avoid, insofar as practicable, established highways, motor roads, mining areas, power transmission lines, existing commercial and industrial developments, range fences and improvements, private operations, and any other activities that would be incompatible with the protection of the trail in its natural condition and its use for outdoor recreation.
2. National scenic trails of major historic significance should adhere as accurately as possible to their main historic route or routes.

#### Access

National scenic trails should be provided with adequate public access through establishment of connecting trails or by use of trail systems other than the National Trail System. Access should be provided at reasonable intervals and should take into consideration the allowance for trips of shorter duration.

#### Placement

National scenic trails shall be primarily land based.

#### Length

National scenic trails shall be extended trails, usually several hundred miles or longer in length.

#### Continuity

National scenic trails should be continuous for the duration of their length. *Id.*

lished, a Memorandum of Understanding between the primary federal agencies encourages interagency cooperation on trail management.<sup>110</sup> However, typically one agency is designated to administer the trail and create a comprehensive management plan.<sup>111</sup> The Park Service is the agency most likely to carry out these steps because it administers twenty-one scenic and historic trails, significantly more than the Bureau of Land Management or the Forest Service.<sup>112</sup>

As established above, the existence of a public trust easement will contribute significantly to the successful completion of the Great Lakes Trail. For the majority of national trails designated since 1978, the federal government may only purchase lands outside the borders of federally administered areas from “willing sellers.”<sup>113</sup> Further, Congress has only authorized condemnation for four of the thirty designated scenic and historic trails.<sup>114</sup> Un-

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110. The Bureau of Land Management, National Park Service, Fish and Wildlife Service, Forest Service, Army Corps of Engineers, and Federal Highway Administration are the parties to this 2006 MOU for the National Trails System. National Trails System Memorandum of Understanding (2006), *available at* <http://www.nps.gov/nts/memorandum2006.html>. The MOU states that it “encourages long-term interagency coordination and cooperation under the authorities of the Act to enhance visitor satisfaction, to coordinate trailwide administration and site-specific management, to protect resources, to promote cultural values, to foster cooperative relationships, to share technical expertise, and to fund lands and resources associated with the National Trails.” *Id.*

111. See *How to Establish a National Trail*, *supra* note 108.

112. The Park Service administers the Appalachian NST, the Oregon NHT, the Mormon Pioneer NHT, the Lewis and Clark NHT, the North Country NST, the Overmountain Victory NHT, the Ice Age NST, the Potomac Heritage NST, the Natchez Trace NST, the Santa Fe NHT, the Trail of Tears NHT, the Juan Bautista de Anza NHT, the California NHT, the Pony Express NHT, the Selma to Montgomery NHT, the Ala Kahakai NHT, the El Camino Real do los Tejas NHT, the Captain John Smith Chesapeake NHT, the Star-Spangled Banner NHT, the New England NST, and the Washington-Rochambeau Revolutionary Route NHT, and partners with the Bureau of Land Management to administer the El Camino Real de Teirra Adentro NHT and the Old Spanish NHT. *Nat'l. Trails System Frequently Asked Questions*, NAT'L PARK SERV., [http://www.nps.gov/nts/nts\\_faq.html](http://www.nps.gov/nts/nts_faq.html) (last updated Mar. 6, 2014). The Bureau of Land Management administers one historic trail and the Forest Service administers the remaining six scenic and historic trails. *Id.*

113. See, e.g., 16 U.S.C. § 1244(a)(22) (designating the Ala Kahakai National Historic Trail and stating, “[n]o land or interest in land outside the exterior boundaries of any federally administered area may be acquired by the United States for the trail except with the consent of the owner of the land or interest in land”).

114. See *id.* § 1244(a)(12) (designating the Natchez Trace National Scenic Trail without a “willing seller” restriction); *id.* § 1244(a)(20) (designating the Selma to Montgomery National Historic Trail without a “willing seller” restriction); *id.* § 1244(a)(27) (designating the Arizona National Scenic Trail without a “willing seller” restriction); National Trails System Act, Pub. L. No. 90-543, §§ 5(a)(1), 7(g), 82 Stat. 919, 920, 924 (1968) (currently codified at 16 U.S.C. §§ 1244(a)(1), 1246(g) (designating the Appalachian National Scenic Trail without a “willing seller” restriction, but stating that “condemnation is prohibited with respect to all acquisition of lands or interest in lands for the purposes of the Pacific Crest Trail”).

like the other national trails, the existence of a public trust easement along the Great Lakes coastline shifts the primary focus from purchasing easements for land to demarcating a trail along land that is already in the public domain.

### III. INTERDISCIPLINARY IMPLEMENTATION

Creating the Great Lakes Trail will require an interdisciplinary effort among thousands of people. This will include, at a minimum, the skills of community engagement, congressional persuasion, Geographic Information Systems (GIS) mapping, Great Lakes science, and sustainable business development. This section provides a sketch of how to implement the Great Lakes Trail as a broad binational public asset for current and future generations.

#### A. *Identify Stakeholders and Engage the Community*

The National Trails System Act underscores the importance of coordination between local property owners; federal, state, and local agencies; non-profit organizations; grassroots organizations; and volunteers in establishing and maintaining a trail.<sup>115</sup> A first step is to identify the interested parties as early as possible in the process, and then coordinate a work plan with those parties. Starting in Michigan, this requires extensive engagement with private lakefront property owners,<sup>116</sup> federal and state agencies, local governments, tribal governments,<sup>117</sup> local chambers of commerce, trails, and other nonprofit organizations,<sup>118</sup> and other interested parties, to support establishing the Great Lakes Trail. Engaging people with a stake in the Trail will be essential in building congressional support to direct a feasibility study and ultimately to establish a National Scenic Trail.

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115. See, e.g., 16 U.S.C. §§ 1241(c), 1244(b), 1246 (2013).

116. In Michigan, there are at least six Great Lakes property owner groups, and likely more: Save Our Shoreline, Great Lakes Coalition, Michigan Waterfront Alliance, Michigan Chamber of Commerce, Michigan Lakes and Streams Association, Mackinac Center for Public Policy.

117. In Michigan, there are twelve federally recognized tribal governments. For a listing and contact information, see MICHIGAN DEP'T OF CIVIL RIGHTS, MICHIGAN INDIAN DIRECTORY 4-6 (2012-2013 ed.), available at [http://michigan.gov/documents/mdcr/2012\\_2013\\_MichiganIndianDirectoryfinal\\_377530\\_7.pdf?20140921175152](http://michigan.gov/documents/mdcr/2012_2013_MichiganIndianDirectoryfinal_377530_7.pdf?20140921175152).

118. In Michigan there are at least three non-governmental organizations (NGOs) supporting Michigan scenic trails: Michigan Trails and Greenway Alliance, North Country Trail Association, and Michigan Sea Grant. There are at least six NGOs promoting public trust access to Michigan's beaches: FLOW, Michigan Land Use Institute, Michigan Environmental Council, Michigan Wetlands Association, the Great Lakes Environmental Law Center, and Michigan Citizens for Water Conservation.



This will involve developing and communicating the benefits of the Great Lakes Trail. While there are the obvious public benefits of accessing the Great Lakes and increasing tourism, the benefits to adjacent private property owners may need greater emphasis. A primary benefit to littoral property owners is to define the public trust easement both spatially (with a boundary mark) and functionally (limiting the Trail for foot traffic only).<sup>119</sup> While proponents of public trust rights may see this as a limitation of public rights, littoral property owners will appreciate the certainty it brings.<sup>120</sup>

Leadership from the members of Congress who represent Great Lakes constituents will be essential. Some congressional leaders will inevitably step forward and galvanize support for the Trail as a way to create a legacy for the Great Lakes akin to the work of the late Gaylord Nelson. Still these leaders will need to hear from impacted constituents about the value and importance of the Trail to the region's economic development, ecologic, and public health.

Even in the absence of a National Scenic Trail designation, work on the Trail can begin. The founders of the Appalachian Trail provide an instructive example. In 1925, well before the National Trails System Act of 1968, Benton MacKaye, who first conceived of an Appalachian Trail, worked with the Federated Society on Planning and Parks to gather a conference focused on creating the trail. At the conclusion of the conference, attendees "voted to establish the Appalachian Trail Conference as a 'permanent body'" to coordinate the trail building and planning efforts that were already underway at the local level.<sup>121</sup> They also formed an executive committee from a

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119. See 16 U.S.C. § 1246(c) (prohibiting motorized vehicle use on designated national scenic trails). This limitation is subject to the caveat that the Secretary charged with administering the trail may authorize the use of motor vehicles "when, in his judgment, such vehicles are necessary to meet emergencies or to enable adjacent landowners or land users to have reasonable access to their lands or timber rights." *Id.*

120. Limiting the scope of public rights to walking is contrary to the approach taken by some states, which allow a wide array of beach activities within the public trust easement. For instance, New Jersey not only recognizes public trust rights include a general right to engage in recreational activities within the public trust easement, but also provides a right to access upland municipal beaches, subject to reasonable regulation; a right of passage across private uplands; and a right to engage in recreational activities on privately owned beaches, in accordance with a multifactor test for determining if use of private lands is necessary to reasonably access the public trust easement. Scanlan, *supra* note 27, at 356-61.

121. Larry Anderson, *Benton MacKaye and the Path to the First A.T. Conference*, APPALACHIAN TRAILWAY NEWS (SPECIAL 75TH ANNIVERSARY ISSUE), July 2000, at 17, 21 (2012). At the time of the conference, volunteers and outdoors clubs had already built approximately one-third of the 1,700-mile Trail that MacKaye had originally proposed. *Id.* at 17. The ATC still exists today, although the organization has since changed its name to the Appalachian Trail Conservancy. See APPALACHIAN TRAIL CONSERVANCY, [www.appalachiantrail.org](http://www.appalachiantrail.org) (last visited Oct. 12, 2014).

mosaic of representatives from local, state, and federal levels of government and non-governmental organizations (NGOs). The original executive committee included state and national park managers, national Forest Service officials, representatives of other trail clubs, regional planners, and the national Conference on Outdoor Recreation.<sup>122</sup> Organizing for the Great Lakes Trail should be similarly broad based, and people should not wait to build the Great Lakes Trail until there is congressional approval or recognition of a National Scenic Trail.

### B. Engage in Great Lakes Regional Planning

Organizers of the Great Lakes Trail will need to create a Great Lakes regional plan of action to establish the Great Lakes Trail. The National Trail System Act, unlike other United States public lands statutes, invites direct citizen involvement in trail planning and management.<sup>123</sup> Including broad community involvement in planning and mapping the Great Lakes Trail will likely bolster the public's sense of commitment to protecting these recreation resources.<sup>124</sup> The plan should include both the regional master plan and local segments, over which community groups can take leadership. Diffuse and diverse involvement will build support for congressional recognition of the Great Lakes Trail as a National Scenic Trail.

An initial order of business should be to develop an action plan to obtain recognition as a National Scenic Trail. This is consistent with the way

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122. Brian B. King, *Trail Years*, in APPALACHIAN TRAILWAY NEWS, *supra* note 121, at 2, 7.

123. See 16 U.S.C. § 1246(h)(1) ("The Secretary charged with the administration of a national recreation, national scenic, or national historic trail . . . shall cooperate with and encourage the States to operate, develop, and maintain portions of such trails which are located outside the boundaries of federally administered areas. When deemed to be in the public interest, such Secretary may enter written cooperative agreements with the States or their political subdivisions, landowners, private organizations, or individuals to operate, develop, and maintain any portion of such a trail either within or outside a federally administered area."); § 1241(c) ("[I]t is further the purpose of [the Act] to encourage and assist volunteer citizen involvement in the planning, development, maintenance, and management, where appropriate, of trails").

124. See generally *id.* at 16 ("The opportunity to participate in trail planning processes gives stakeholders a sense of ownership, which typically translates into grassroots support for physical trail development." (citation omitted)); RAY MCPADDEN, BUILDING A LONG DISTANCE NATIONAL TRAIL: VICTORY AND STRUGGLE ON THE ANZA TRAIL 5 (2013) ("The shared-power environment of a trail is not necessarily something federal land management agencies are accustomed to handling. For example, in the flagship units of the National Park System —like Yellowstone and Yosemite —the land and resources are in the exclusive control of the NPS, and external relationships are a secondary concern."); Thomas C. Downs, *The National Trails System: A Model Partnership Approach to Natural Resources Management*, 30 ENVTL. L. REP. 10091 (2000) (arguing that the NTSA's unique model of cooperative administration may be useful in other areas of natural resource management).

national trails are managed in the United States through partnerships between state and federal agencies, trail organizations, and local volunteers.<sup>125</sup> In 1983, Congress added a new subsection to the Act's statement of policy, declaring, "it is further the purpose of this Act to encourage and assist volunteer citizen involvement in the planning, development, maintenance, and management, where appropriate, of trails."<sup>126</sup> The amendment authorized federal trail administrators "to encourage volunteers and volunteer organizations to plan, develop, maintain, and manage, where appropriate, trails throughout the Nation" and to "make available Federal facilities, equipment, tools, and technical assistance to volunteers and volunteer organizations."<sup>127</sup> Building these collaborative planning and management processes into the Great Lakes Trail will aide its successful implementation before and after congressional recognition as a National Scenic Trail.

### C. *Link With Existing Trails*

There are a variety of existing trails centered on the Great Lakes, but not utilizing the public trust easement below the OHWM. The organizers of the Great Lakes Trail should identify and map these existing and planned trails and build the Great Lakes Trail as part of a larger identified network of trails. Examples of existing trail efforts include: the Canadian Waterfront Trail, which is an 870-mile mostly on-road, paved trail;<sup>128</sup> the Bay to Bridge Trail in St. Claire County, Michigan, which is a 54-mile, mostly-paved bike and pedestrian trail;<sup>129</sup> the Lake Michigan Water Trail, which aims to be a 1600-mile water trail along Lake Michigan's shoreline;<sup>130</sup> and the Superior Hiking Trail, which is a 296-mile path that follows the

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125. See generally Downs, *supra* note 124; see also NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, ICE AGE NATIONAL SCENIC TRAIL: COMPREHENSIVE PLAN FOR MANAGEMENT AND USE 1 (1983) ("As originally passed in 1968, the National Trails System Act contained the authorities for pursuing a rather traditional Federal acquisition, development, and management approach to national trails, but subsequent amendments have mandated that trails in the national system be established and managed through the cooperative efforts of Federal, State, and local governments and private trail interests.").

126. National Trails System Act Amendments of 1983, Pub. L. No. 98-11, § 202, 97 Stat. 42, 42 (currently codified at 16 U.S.C. § 1241(c)).

127. *Id.* sec. 210, §§ 11(a)(1), 11(c) (currently codified at 16 U.S.C. §§ 1250(a)(1), 1250(c)).

128. WATERFRONT TRAIL, <http://www.waterfronttrail.org/> (last visited Oct. 12, 2014).

129. *Bridge to Bay Trail*, SAINT CLAIR CNTY., <http://www.stclaircounty.org/offices/parks/btob.aspx> (last visited Oct. 12, 2014).

130. *The Trail*, LAKE MICHIGAN WATER TRAIL ASSOCIATION, <http://www.lmwt.org/thetrail.html> (last visited Oct. 12, 2014).

rocky ridgeline above Lake Superior from Duluth, Minnesota, to the Canadian border.<sup>131</sup>

Additionally, the Great Lakes Trail could link to existing national scenic trails, which would add value to the network of national trails. The Ice Age National Scenic Trail and the North Country National Scenic Trails would both link to the Great Lakes Trail at a variety of points. The Ice Age Trail “meander[s] approximately 1,000 miles across Wisconsin following a chain of glacial landscape features.”<sup>132</sup> It starts in Potawatomi State Park in Door County, on Lake Michigan, and goes through Point Beach State Forest in Manitowoc County, also on Lake Michigan.<sup>133</sup>

When complete, the North Country Trail “will be the longest continuous hiking trail in the United States,”<sup>134</sup> totaling between 4200 and 4500 miles.<sup>135</sup> The North Country Trail begins in Crown Point, New York, and runs through Pennsylvania, Ohio, Michigan, Wisconsin, and Minnesota, ending in North Dakota.<sup>136</sup> There are multiple points on the North Country Trail in Upper Michigan, Wisconsin, and Minnesota, along Lake Superior, where the trail could link to the Great Lakes Trail.<sup>137</sup>

Not only will the Great Lakes Trail be the longest marked hiking trail in the world, it will link to a network of existing trails across America. The public recreational value of recognizing these public lands along the shores of the Great Lakes that already exist, but remain forgotten and unmarked as a trail, will add substantial social wealth to the Great Lakes region.

#### D. Partner to Produce GIS Mapping of Coastline

At the outset of organizing support for the Great Lakes Trail, partnering with a university to produce GIS mapping of the Great Lakes coastline

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131. SUPERIOR HIKING TRAIL ASSOCIATION, <http://www.shta.org/> (last visited Oct. 1, 2014).

132. See NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, *supra* note 125, at 1. Approximately 643 miles of the 1,000-mile trail are actually open to the public. 2013 FED. INTERAGENCY COUNCIL ON TRAILS ANN. REP. 14.

133. 126 Cong. Rec. 25569 (1980) (statement of Rep. Henry Reuss).

134. *North Country Trail*, NAT'L PARK SERV., <http://www.nps.gov/noco/index.htm> (last visited Oct. 12, 2014).

135. *North Country Trail Frequently Asked Questions*, NAT'L PARK SERV., <http://www.nps.gov/noco/faqs.htm> (last visited Oct. 12, 2014).

136. NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, NORTH COUNTRY TRAIL: COMPREHENSIVE PLAN FOR MANAGEMENT AND USE 7-15 (1982).

137. See *Trails Map*, P'SHIP FOR THE NAT'L TRAILS SYST., <http://www.pnts.org/national-trails-map> (last visited Oct. 12, 2014) (showing the North Country Trail generally following the southern side of Lake Superior, but only touching the shore at points). See also *Arrowhead Re-route*, NORTH COUNTRY TRAIL ASSOCIATION, <http://northcountrytrail.org/get-involved/advocacy/arrowhead-re-route/> (last visited Oct. 12, 2014) (discussing the proposal, waiting for Congressional approval, to re-route the North Country trail along Lake Superior's North Shore in Minnesota near Boundary Waters National Wilderness).

and potential connecting trails will illuminate the potential for the public. The mapping should include points of existing public access, obstacles to access like existing power plants, and local tourism options for users of the trail.<sup>138</sup> To be most usable, the mapping should be available through a smartphone app for people to access while hiking.

### E. *Establish a Funding Base*

Trail organizers should establish a funding base and program to secure additional easements where necessary to connect segments and provide access points. National Scenic Trails have increased funding opportunities, including resources from Federal Highway Administration's Recreational Trails Program<sup>139</sup> and the Land and Water Conservation Fund.<sup>140</sup> However, NGOs, such as the Ice Age Trail Alliance, are also a critical way to raise private donations to support land or easement purchases.<sup>141</sup>

## CONCLUSION

Shared by millions, the Great Lakes coastline is a vast, yet underappreciated public asset. There is a need to focus the public's attention on the significance of the Great Lakes for the region as a cohesive, binational whole. To address this need, build on existing water law, and bring the public in closer contact with the lakes, we should recognize and mark a Great Lakes Trail on the shores of the Great Lakes. The Trail will link together 10,000 miles of coastline and provide the longest marked walking trail in the world. It will demarcate a pre-existing and inalienable public trust easement and allow the public to finally enjoy their common heritage in the lakeshore.

Establishing the Great Lakes Trail will be a monumental effort, requiring a multidisciplinary approach, with thousands of volunteers, businesses, land owners, and participation by federal, state, provincial, tribal, and local

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138. Information on existing public access should be readily available. For instance, Ohio law places a mandatory duty on the director of natural resources to prepare and update such an inventory every five years. The inventory includes "public access facilities and areas for the Ohio shoreline of Lake Erie, including, without limitation, shoreline parks, cultural resources, natural areas, wildlife refuges, harbors of refuge, boat launch ramps, shoreline fishing areas, and beaches." OHIO REV. CODE ANN. § 1506.05.

139. *Nat'l Trails System Frequently Asked Questions*, NAT'L PARK SERV., [http://www.nps.gov/nts/nts\\_faqs.html](http://www.nps.gov/nts/nts_faqs.html) (last updated Mar. 6, 2014).

140. *Land & Water Conservation Fund Current Funding for Grants*, NAT'L PARK SERV., <http://www.nps.gov/nrcr/programs/lwcf/funding.html> (last updated Oct. 29, 2014).

141. ICE AGE TRAIL ALLIANCE, <http://www.iceagetrail.org> (last visited Oct. 12, 2014); see also APPALACHIAN TRAIL CONSERVANCY, <http://www.appalachiantrail.org> (last visited Oct. 12, 2014).

governments. Ultimately, getting people to utilize their public trust rights in walking the coasts of the Great Lakes will help illuminate the Great Lakes as an essential ecological, political, economic, and cultural asset. This broadly shared public understanding is a precursor to developing and implementing cooperative Great Lakes governance structures.

