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## The Public Trust Doctrine and the Climate Crisis: Panacea or Platitude?

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# THE PUBLIC TRUST DOCTRINE AND THE CLIMATE CRISIS: PANACEA OR PLATITUDE?

Joseph Regalia\*

*Over a year of shutting down the global economy during the COVID pandemic achieved about .01 degrees of improvement in global warming. Not even a drop in the bucket. We continue to face a monumental climate crisis. And of the many ways that crisis threatens our environment, winnowing water resources is one of the scariest. One solution that many scholars have turned to is the public trust doctrine. At first blush, this doctrine sounds like a panacea for water management problems: When our water resources are threatened enough that current and future citizen's access to it is in peril, the trust kicks in. The government must take steps to protect our waterbodies. So no surprise that scholars have flocked to the doctrine and analyzed just about every angle of the public trust. Save perhaps one: Does it even work? Much less attention has been paid to what concrete impact the public trust is having on real litigation. There is no shortage of language in case law or state statutes about the trust. But does that language do any good? This article tries to answer that question, collecting data about state court decisions mentioning the public trust doctrine in thirty states. Our team reviewed the cases and coded them based on how authorities used the public trust doctrine. Our goal was to answer a key question: When does the public trust doctrine matter in real cases? In other words, when do courts use the doctrine to protect natural water resources? Beyond shedding light on how effective the doctrine is on the ground, this article's goal is to offer insights about both successful and unsuccessful cases. What can we learn from the cases in which it does work that might equip litigants to wield this weapon better in the future? In most cases reviewed, the public trust doctrine was ineffective at combatting climate change or other harms to natural water resources. But the data offers ideas for moving forward towards a version of the public trust that will have teeth in the climate fight.*

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## INTRODUCTION

As COVID-19 swept across the world, mass quarantines and social distancing slammed the breaks on global industry. Fewer cars were on the road, fewer factories were burning coal, and less carbon was leaking into the atmosphere. Greenhouse gas emissions plummeted to their lowest levels in thirty years.<sup>1</sup> People were quick to point out this silver lining.<sup>2</sup> The world's worst greenhouse gas emitters were suddenly dropping to levels that, if maintained, could start unwinding the climate crisis altogether.<sup>3</sup>

But it was a brief respite. Greenhouse emissions are returning to pre-COVID levels.<sup>4</sup> “Looking further ahead to 2030, simple climate models have estimated that global temperatures will only be around 0.01C [degrees Celsius] lower as a result of Covid-19.”<sup>5</sup> More than a year of effectively shutting down the global economy achieved .01 degrees of improvement—not even a drop in the bucket. After all, scientists estimate that we would need a 7.6% decline “every year over the next decade” to meet the goal of halting global temperatures from rising more than 1.5 degrees Celsius.<sup>6</sup>

There is no question that we continue to face a monumental climate crisis. And of the many ways that crisis threatens our environment, winnowing water resources is one of the most concerning.<sup>7</sup> The Western U.S., for example, faces the worst water crisis in history,<sup>8</sup> and climate change continues to alter water resources

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1. See Kate Larsen, Hannah Pitt, & Alfredo Rivera, *Preliminary U.S. Greenhouse Gas Emissions Estimates for 2020*, THE RHODIUM GROUP (Jan. 12, 2021), <https://rhg.com/research/preliminary-us-emissions-2020>.

2. See *id.*

3. See Brad Plumer, *Covid-19 Took a Bite From U.S. Greenhouse Gas Emissions in 2020*, THE NEW YORK TIMES (Jan. 12, 2020), <https://www.nytimes.com/2021/01/12/climate/2020-greenhouse-gas-emissions.html>.

4. See Piers Forster, *Covid-19 Paused Climate Emissions – But They're Rising Again*, BBC FUTURE (Mar. 15, 2021), <https://www.bbc.com/future/article/20210312-covid-19-paused-climate-emissions-but-theyre-rising-again>.

5. *Id.*

6. Benjamin Storrow, *Why CO2 Isn't Falling More During a Global Lockdown*, E&E NEWS (Apr. 24, 2020), <https://www.scientificamerican.com/article/why-co2-isnt-falling-more-during-a-global-lockdown/>.

7. See generally UNITED NATIONS ENVIRONMENT PROGRAMME, CLIMATE CHANGE SCIENCE COMPENDIUM 2009 (Catherine P. McMullen & Jason Jabbor eds. 2009), <http://wedocs.unep.org/bitstream/handle/20.500.11822/7798/-Climate%20Change%20Science%20Compendium%202009-2009881.pdf?sequence=3&isAllowed=y>.

8. See Amir Agha Kouchak et al., Comment, *Water and Climate: Recognize Anthropogenic Drought*, 524 NATURE 409, 409 (2015).

across the nation.<sup>9</sup> Take these threats to water and combine them with greater demands for water generally—and we have a water catastrophe on our hands.<sup>10</sup>

We have water problems, and we need solutions. One solution that many scholars have turned to is the public trust doctrine.<sup>11</sup> At first blush, this doctrine sounds like a panacea for water management problems. The concept is simple: since the United States' founding, the federal and state government have been charged with trust-like obligations over our public water resources.<sup>12</sup> Governments can generally manage water as they see fit, whether it is conserving, selling, or using the resource.<sup>13</sup> When our water resources are threatened enough that current and future citizen's access to it is in peril, the trust doctrine kicks in.<sup>14</sup> The government must take steps to protect our unreplaceable waterbodies.<sup>15</sup> The most classic U.S. description of the trust comes from the Supreme Court's decision in *Illinois Central Railroad Co. v. Illinois*: “[T]he state holds the title to the lands under the navigable waters . . . in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”<sup>16</sup>

In theory this doctrine sounds quite useful. And if one reads some of the seminal cases that mention the doctrine, it sounds even better. Justice Holmes, for example, famously commented that it is hard to imagine a “more obvious, [or] indisputable” responsibility than the state’s obligation “to maintain the rivers” of our nation.<sup>17</sup>

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9. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT, at 7-10 (The Core Writing Team, Rajendra K. Pachauri & Andy Reisinger eds. 2007), [https://www.ipcc.ch/site/assets/uploads/2018/02/ar4\\_syr\\_full\\_report.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/ar4_syr_full_report.pdf); see also GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES, at 41 (Thomas R. Karl, Jerry M. Melillo, & Thomas C. Peterson eds. Cambridge University Press 2009) (“Evidence is mounting that human-induced climate change is already altering many of the existing patterns of precipitation in the United States, including when, where, how much, and what kind of precipitation falls.”).

10. See, e.g., Patrick C. McGinley, *Climate Change and the Public Trust Doctrine*, 65 PLAN. & ENV'T L. 7 (2013); Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010).

11. McGinley, *supra* note 11, at 8.

12. *Id.*

13. See Craig, *supra* note 11, at 56.

14. *Id.*

15. *Id.*

16. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892); see also Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past and Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 667 (2012) (“Simply stated, however, the doctrine provides that certain natural resources are held by the government in a special status—in ‘trust’—for current and future generations. Government officials may neither alienate those resources into private ownership nor permit their injury or destruction.”).

17. Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 356 (1908); see also Noah D. Hall & Joseph Regalia, *Interstate Groundwater Law Revisited: Mississippi v. Tennessee*, 34 VA. ENV'T. L.J. 152, 166 (2016).

States, too, have been involved in the conversation and for quite a while. States have enacted legislation, and even constitutional language, mentioning trust-like obligations over water.<sup>18</sup> Indeed, nearly every state has issued some sort of proclamation claiming that natural water resources are subject to protections.<sup>19</sup>

Given the attention courts and states have paid the doctrine, and the pressing need for tools to help combat water challenges, it should be no surprise that water and environmental scholars have flocked to the public trust for years. These scholars have applied it to everything from the atmosphere to soil,<sup>20</sup> penning hundreds of law review articles, and theorizing how the doctrine could be used to protect natural resources or calling out the doctrine's flaws.<sup>21</sup>

Scholars have thoroughly explored just about every angle of the public trust, save one. Does the public trust doctrine work? Much less attention has been paid, at least on the national level, to what concrete impact the public trust has on real cases. Likewise, authors often describe the doctrine using vague and aspirational language that makes it hard for litigants trying to use the doctrine in court or agency disputes to protect the water.<sup>22</sup>

Now, there is no shortage of language in cases or state statutes about the trust. But does that language do any good? For example, in preparing this article, we conducted broad searches for every piece of scholarship mentioning the term "public trust" in its title. Out of thousands of results, less than 5% mentioned anything about practical applications in their title. Far from empirical, but still telling. The public trust doctrine is mired in platitudes about protecting important resources, famous waterbodies, and the public's interest in enjoying water now and in the future, while the case law is full of empty truisms.<sup>23</sup>

This article takes a step towards answering this question: How useful is the public trust doctrine in everyday water litigation? Over the last two years, my team gathered data about state court decisions mentioning the public trust doctrine in thirty states. We then coded hundreds of the cases on several metrics. But most

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18. See Joseph Regalia & Noah D. Hall, *Waters of the State*, 59 NAT. RES. J. 59, 62 (2019) (cataloguing state statutes and constitutions that mention trust obligations over water).

19. *Id.*

20. Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of National Audubon Society v. Superior Court*, 45 ENV'T. L.R. 561, 568 (2015).

21. See Michael C. Blumm & Mary Christina Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law* (3d ed. Carolina Academic Press 2021) (attaching a table of secondary sources listing more than 200 scholarly articles on the public trust doctrine).

22. I waded into this area recently, urging courts to adopt a more flexible but specific test that can be readily applied in real water disputes when natural resources are threatened. See Joseph Regalia, *A New Water Law Vista: Rooting the Public Trust Doctrine in the Courts*, 108 KY. L.J. 1, 5 (2020) ("Courts and litigants have struggled to craft a theory that will allow the state's trust duties to extend to more water and more uses and, perhaps most importantly, be enforceable in both state and federal courts.").

23. See, e.g., *Marks v. Whitney*, 6 Cal. 3d 251, 259 (1971) (describing the trust doctrine in aspirational terms of preserving resources "in their natural state," so they can be used for study, as "open space," and as "environments which provide food and habitat").

importantly, we reviewed the data to answer a key question: How often does the public trust doctrine successfully protect natural water resources in real cases?

Beyond shedding light on the practical effectiveness of the public trust doctrine, our second goal was to offer initial insights about cases that are both successful and unsuccessful at protecting natural water resources from harm. What can we learn from these cases that might equip litigants to wield this weapon to better protect natural resources in the future?

The results are not encouraging. In most cases we reviewed, the public trust doctrine was ineffective at protecting natural water resources.<sup>24</sup> Courts often mention the doctrine, complete with lofty language and promising ideals, but then fail to meaningfully apply it to tip the scales in favor of the public's interest.

This article hopes to encourage scholars, courts, and legislatures to refine public trust standards so that they are more useful on the ground. Beyond that, scholars should consider expanding the attention paid to practical uses of the doctrine in water litigation. The real water problems our nation faces require doctrines that work.

## I. THE PUBLIC TRUST DOCTRINE'S PAST: A SCHOLAR'S PARADISE

### A. Getting to Know the Public Trust

The public trust doctrine has a rich history, winding its way back through U.S., English, Spanish, French, and Roman law.<sup>25</sup> In broad strokes, the concept is that water is so fundamental to human wellbeing, it is charged with a special value under the law.<sup>26</sup> This special value means that governments and individuals should be more strictly regulated when doing things that harm our collective current and future interests in water.<sup>27</sup> Water is a "commons" good that no single person or

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24. See *infra* Section IV.

25. See, e.g., Gail Osherenko, *New Discourses on Ocean Governance: Understanding Property Rights and the Public Trust*, 21 J. ENV'T L. & LITIG. 317, 350 (2006); J. INST. PROEMIUM, 2.1.1 (T. Sandars trans. 4th ed. 1867); KING JOHN OF ENGLAND, MAGNA CARTA clause 33 (Eng. 1215); SIR MATTHEW HALE, A TREATISE DE JURE MARIS ET BRACHIORUM EJUSDEM (1670); FRANCIS HARGRAVE, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 1 (T. Wright 1st ed. 1787); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENV'T L. 425, 428-31 (1989) (tracing the roots of the PTD to 13th Century Spain, 11th Century France, the Ch'in dynasty 200 years before Christ, and beyond); see also Hall & Regalia, *supra* note 18, at 166.

26. See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1253-54 (D. Or. 2016) *motion to certify appeal denied*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. June 8, 2017) (discussing the trust theory of the doctrine).

27. *Id.* at 1253; see also Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 455 (1892).

government should keep for their own.<sup>28</sup> Indeed, the trust dates to the Code of Justinian.<sup>29</sup> The Code holds that “air, flowing water, the sea and, consequently, the shores of the sea” are “common to all.”<sup>30</sup>

In theory, the public trust requires that certain water resources be protected, restricting the government’s ability to dispose of it.<sup>31</sup> That is the trust piece: The government is a trustee for the public’s right to water.<sup>32</sup> As the U.S. Supreme Court has explained: “[t]he control of the state for the purposes of the trust can never be lost,” unless “promoting the interests of the public.”<sup>33</sup> This trust requires the sovereign to try to protect public water resources while also preventing that sovereign from substantially harming them.<sup>34</sup> The doctrine is thus sword and chain.

Historically, the trust has not been applied to all water resources, only significant water resources that implicate the public’s interest.<sup>35</sup> The trust has also been limited in terms of what public interests in the water are protected.<sup>36</sup> In early U.S. history, that meant the trust applied to major waterways and ocean-touching courses, like the Mississippi.<sup>37</sup> And only limited public interests like fishing and bathing were protected.<sup>38</sup> *Illinois Central* is the most influential example of the public trust in the U.S.<sup>39</sup> The State of Illinois passed legislation to transfer some of Lake

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28. See HALE, *supra* note 26; see also *In re* Water Use Permit Applications, 9 P.3d 409 (Haw. 2000) (applying public trust obligations to state agency); *Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. 1987); *State v. Central Vermont Ry., Inc.*, 571 A.2d 1128, 1130 (Vt. 1989); *Nat’l Audubon Soc’y*, 658 P.2d at 718; *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837) (opinion of Baldwin, J.) (explaining that “[b]y the common law, it is clear, that all arms of the sea, coves, creeks, etc. where the tide ebbs and flows, are the property of the sovereign,” but that this title is held on behalf of U.S. citizens); *Stockton v. Baltimore & N.Y.R. Co.*, 32 F. 9, 19 (C.C.D.N.J. 1887); *St. Croix Waterway Ass’n v. Meyer*, 178 F.3d 515 (8th Cir. 1999); *El Dorado Irrigation. Dist. v. State Water Res. Control Bd.*, 48 Cal. Rptr. 3d 468 (2006); *Brannon v. Boldt*, 958 So. 2d 367 (Fla. Dist. Ct. App. 2007); *Bauman v. Woodlake Partners, LLC*, 199 681 S.E.2d 819 (N.C. 2009).

29. See J. INST. 2.1.1-4 at 90 (the concept *extra nostrum patrimonium* meaning belonging to all men discussed in the Code of Justinian is similar to the concept of a trust)

30. *Id.*

31. A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 8:4 (2005).

32. *Id.*

33. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 458 (1892) (applying limitations on state power).

34. See, e.g., *McBryde Sugar Co. v. Robinson*, 504 P.2d 1330, 1344 (Haw. 1973).

35. See JOSEPH J. KALO et al., *COASTAL AND OCEAN LAW* 30 (3d ed. 2006).

36. See Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don’t Hold Water*, 3 FLA. ST. U.L. REV. 511, 567 (1975).

37. *Id.* at 570; Patrick Deveney, *Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 54 (1976).

38. DAVID C. SLADE et al., *COASTAL STATES ORG. INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK* 14 (2d ed. 1997); see also *Shively v. Bowlby*, 152 U.S. 1, 13 (1894) (emphasizing the public rights of fishing and navigation).

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

Michigan's shoreline to a company.<sup>40</sup> The U.S. Supreme Court applied the public trust doctrine and held that a state could not rebuff its obligations over such a major waterway.<sup>41</sup> At the state level, the *Mono Lake* decision is the totemic case on the public trust.<sup>42</sup> The California Supreme Court sat en banc and held that legislatures are empowered to define the reach of the doctrine beyond traditional norms.<sup>43</sup> The court then held that the public trust (at least in California) extends to even small waterbodies like tributaries that affect navigable waterways.<sup>44</sup>

The public trust doctrine has mostly concerned states, at least in recent history. Other than a few notable cases, any federal version of the trust is rarely mentioned.<sup>45</sup> Courts have understood that states took ownership to the beds of most major waterways and therefore are the proper keepers of the trust much of the time.<sup>46</sup>

In recent years, there have been attempts to extend the trust to protect more waterways and more public interests, including the public's interest in the climate and the future health of our water resources.<sup>47</sup> Legislatures and courts have pushed trust duties into smaller water courses and more diverse public causes.<sup>48</sup> But application of the trust has been varied and complicated. Private water rights, especially in Western states that apply the prior appropriation framework, have created questions about when the public trust applies, and especially when it outweighs private interests in water.<sup>49</sup>

A key feature of the doctrine is that the public often has a right to sue to enforce it.<sup>50</sup> States can use their *parens patriae* powers to enforce their trust rights.<sup>51</sup> But the public can use the trust to force their government to respect their own

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40. *Id.* at 402.

41. *Id.* at 452 (emphasis added).

42. See Dave Owen, *The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS L. REV. 1099, 1111 (2012).

43. Nat'l Audubon Soc'y v. Superior Ct., 658 P.2d 709, 719 (Cal. 1983).

44. *Id.* at 712.

45. See, e.g., Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 798 (2010) (noting that most of the "relevance of state public trust doctrines for climate change adaptation derives from their status as state common law").

46. See *Utah v. United States*, 403 U.S. 9, 10 (1971).

47. See *infra* Section IV.

48. See Michael C. Blumm & Courtney Engel, *Proprietary and Sovereign Usufructuary Public Trust Obligations: From Justinian and Hale to Lamprey and Oswego Lake*, 43 VT. L. REV. 1, 20-22 (2018).

49. See *id.* at 22.

50. *Paepcke v. Pub. Bldg. Comm'n.*, 263 N.E.2d 11, 18 (Ill. 1970) (finding PTD provides grounds for standing to the public); Mary Turnipseed et al., *The Silver Anniversary of the United States' Exclusive Economic Zone; Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust*, 36 ECOLOGY L.Q. 1, 19 (2009) (describing the PTD as presumptive grounds for standing).

51. See Hall & Regalia, *supra* note 18, at 179.

governmental obligations under the doctrine.<sup>52</sup> And that is what makes the doctrine a *potential* weapon to preserve the climate and the environment.<sup>53</sup>

*B. The Current State of Affairs: Scholars and Legislatures Have Much to Say*

The public trust doctrine is a scholar favorite. It is one of the most written-about doctrines out there.<sup>54</sup> There are likely a few reasons for this.<sup>55</sup> For one, the doctrine, in theory, can apply to a broad array of environmental issues.<sup>56</sup> It embodies fundamental principles of justice and public rights.<sup>57</sup> It also pits those rights against private interests and the government.<sup>58</sup> All of these are ripe areas for scholars to visit. And scholars have analyzed just about every aspect of the doctrine, from diving deeply into every state's legislative approach to analyzing the historical roots in ancient archives.<sup>59</sup>

Does the doctrine work?<sup>60</sup> And if so, when does it work? And how? Of course, asking whether a legal doctrine “works” is relative. But practically speaking, scholars have cataloged and analyzed just about everything related to the doctrine except when and how it has been used (and can be used) to meaningfully change water rights and allocations on the ground.<sup>61</sup> If the doctrine is not used to affect real-life problems, it is worth asking why.

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52. See, e.g., *Juliana v. United States*, 217 F. Supp. 3d 1224, 1224, 1261 (D. Or. 2016) (addressing a public suit under the public trust).

53. See *id.*

54. See, e.g., Barton H. Thompson, *The Public Trust Doctrine: A Conservative Reconstruction and Defense*, 15 SE. ENV'T. L.J. 47 (2006); Eric Nelson, *The Public Trust Doctrine and the Great Lakes*, 11 ALB. L. ENV'T. OUTLOOK J. 131 (2006); George D. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations within a Penumbra*, 33 BOSTON C. ENV'T. AFF. L. REV. 307 (2006); Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENV'T. L. & POL'Y F. 57, 61-86 (2005); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986); Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*, 1995 ECOLOGY L.Q. 541 (1995).

55. Michael Blumm & Thea Schwartz, *Mono Lake and the Evolving Trust in Western Water*, 37 ARIZ. L. REV. 701, 713 (1995).

56. *Id.* at 709.

57. *Id.* at 712.

58. *Id.* at 712-13.

59. *Id.* at 713.

60. For example, in preparing this article, the author conducted broad searches for every piece of scholarship mentioning the term “public trust” in its title. Less than 5% of the results mentioned anything about practical application in the title. This is not an empirical approach, but it highlights the dearth of scholarship asking practical questions about how and when to use the doctrine to meaningfully create change.

61. See, e.g., Blumm & Schwartz, *supra* note 56, at 714-15 (Blumm and Schwartz have extensive citations cataloging statutes and scholarship on PTD, without discussion of how it can create change on the ground).

Courts have also enjoyed talking about the public trust quite a bit. But like the scholarship in this area, judges often seem to be referring to general principles of fairness and justice more than practical tools that apply to facts and change outcomes in everyday cases. Justice Holmes, for example, offered a description of the doctrine emblematic of many others jurists':

[F]ew public interests are more obvious, indisputable, and independent of a particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state and grows more pressing as population grows.<sup>62</sup>

The doctrine sounds more theoretical and aspirational than anything else. Yes, there is an “omnipresent” interest that resides somewhere, invisible, in water. But when does that principle become a practical tool that can protect a river or stream?

State court opinions also remain abstract. States vary widely in describing the doctrine but most are consistent in using vague language rather than specific, concrete standards that are easily applied in real-life water disputes or allocations.<sup>63</sup> In describing the trust, states have varied in what interests might be protected: Logging may be protected in one state and fishing in another.<sup>64</sup> Most states have taken a fairly narrow view of the doctrine, avoiding the need to confront it.<sup>65</sup>

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62. Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 356 (1908).

63. See Alaska Stat. § 38.05.965(14) (enacting sweeping language about the public's interest in water but offering no concrete standards to apply to real cases).

64. See *id.*; see also Craig, *supra* note 11; Joseph J. Kalo, "It's Navigable in Fact So I Can Fish in It": *The Public Right to Use Man-Made, Navigable-in-Fact Waters of Coastal North Carolina*, 89 N.C. L. REV. 2095, 2106 (2011) (noting states claiming that public trust principles extend to artificial waters).

65. See Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, All In-stream Flows Material Paper 16, 76. (2010). ("Among the western states, Colorado and Idaho have most clearly adhered to the strict and limited traditional view of public rights in their public trust doctrines. Relying on the federal test of navigability, the Colorado Supreme Court has declared almost all streams in Colorado to be non-navigable."); see also Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENV'T. L. REV. 1, 24 (2007). ("Alabama has a poorly developed public trust doctrine that has never been expanded beyond the basic federal doctrine. Similarly, while recognizing log floatation, Missouri has not otherwise expanded its public trust doctrine beyond the federal test. Finally, although West Virginia has barely developed its public trust doctrine, it is clearly and strongly based on the federal public trust doctrine. In addition, West Virginia views the public trust properties as public lands and manages them as such . . .").

Arizona,<sup>66</sup> Idaho,<sup>67</sup> and Kansas have all heavily limited their trust obligations despite enacting statutes that would seem (in theory) to protect the public's interest broadly.<sup>68</sup> Indeed, the Colorado Supreme Court has taken most of the state's waters outside the doctrine, despite that the state has a Constitution that suggests that water is at least partially public property.<sup>69</sup>

Then you have states with even more protective-sounding statutes. California courts have used some of the strongest trust language, stating, "[t]he state's right to protect fish is not limited to navigable or otherwise public waters but extends to any waters where fish are habitated or accustomed to resort and through which have the freedom of passage to and from the public fishing grounds of the state."<sup>70</sup> Hawaii's approach is similar.<sup>71</sup>

In the end, though, this may have all been much ado about nothing. Even in states that say (legislatively or through their courts) that they respect public trust rights, the state often stops short of enacting clear, required standards that would protect water resources.<sup>72</sup> Some states have created schemes where deference is given to the state's decisions about water allocation, which is odd given the trust doctrine is supposed to protect against that very thing.<sup>73</sup> California courts, for example, have held that state agencies get deference on these matters.<sup>74</sup> Indeed, no case "has set

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66. *Defenders of Wildlife v. Hull*, 18 P.3d 722, 727 (Ariz. Ct. App. 2001) (applying federal navigability test).

67. *Kootenai Env't. All., Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088 (Idaho 1983).

68. *See e.g.* *State ex rel. Meeke v. Hays*, 785 P.2d 1356, 1364 (Kan. 1990). Additionally, Montana and Nevada have limited public trust doctrine via case law. *See* *Montana v. United States*, 450 U.S. 544, 553-57 (1981) (Montana); *State Eng'r v. Cowles Bros, Inc.*, 478 P.2d 159, 160 (Nev. 1970) (Nevada).

69. *See e.g.*, *People v. Emmert*, 597 P.2d 1025 (Colo. 1979) (The Colorado Supreme Court held that Colorado waters are bound under the rule of private ownership, which renders the public trust doctrine void in Colorado);

*see also* COLO. ART. XVI, § 5 (the wording of the Colorado state constitution suggests water is a public property).

70. *Golden Feather Cmty. Ass'n v. Thermalito Irrigation Dist.*, 257 Cal. Rptr. 836, 840 (Ct. App. 1989) (quoting *People v. Truckee Lumber Co.*, 116 Cal. 397, 48, 374, 399 (1897))

71. *See In re Water Use Permit Applications*, 9 P.3d 409, 441 (Haw. 2000); *see also* *Robinson v. Ariyoshi*, 658 P.2d 287, 310-11 (Haw. 1982).

72. Douglas L. Grant, *Public Interest Review of Water Right Allocation and Transfer in the West: Recognition of Public Values*, 19 ARIZ. ST. L.J. 681, 683 (1987) (discussing varying approaches to what weight public interest plays in state water management systems).

73. California is an example of one such state. *See* Justice Ronald B. Robie, *Effective Implementation of the Public Trust Doctrine in California Water Resources Decision-Making: A View from the Bench*, 45 U.C. DAVIS L. REV. 1155, 1167-69 (2012).

74. For a discussion of California Water Resources Control Board cases, *see id.* at 1169-70.

aside an agency decision on public trust grounds” there.<sup>75</sup> “Rather, California courts show a prevailing trend of deference to [agencies] on public trust issues.”<sup>76</sup>

The public trust doctrine is often written about, but when you look closely, the contours are fuzzy. Is this a doctrine doing real work in the courts so that we should be investing in working out the details to support water conservation and use? Or is this a doctrine that should be relegated to a law review footnote of background principles?

### C. Hope for the Public Trust as a Tool of Change: *Juliana v. United States*

Then came *Juliana v. United States*.<sup>77</sup> More than 20 children and young adults sued the government for infringing their right to a sustainable climate.<sup>78</sup> Among the theories the youths raised was the public trust doctrine.<sup>79</sup> They contended that the government was infringing the public trust by letting harm befall our water and other natural resources through climate change.<sup>80</sup> The case gained international attention.<sup>81</sup> Fossil fuel industry groups even intervened as defendants, though they were later dropped from the case.<sup>82</sup>

The suit was first filed in the U.S District Court for the District of Oregon in 2015.<sup>83</sup> The government moved to dismiss, as expected for such a novel case.<sup>84</sup> Remarkably, the district judge denied the motion, holding that the public trust and other theories could legally support the claims.<sup>85</sup>

After setting aside standing and other issues, the court reasoned that climate change certainly inflicted harm on major water sources, most notably the sea.<sup>86</sup> Ocean

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75. Owen, *supra* note 43, at 1123-24.

76. Stephen H. Leonhardt & Jessica J. Spuhler, *The Public Trust Doctrine: What It Is, Where It Came From, and Why Colorado Does Not (and Should Not) Have One*, 16 U. DENV. WATER L. REV. 47, 77 (2012).

77. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016).

78. *Id.*

79. *Id.*

80. *Id.* at 1267.

81. See, e.g., *The Climate Change Lawsuit*, NEW YORK TIMES, <https://www.nytimes.com/2019/06/04/climate/climate-lawsuit-juliana.html> (last visited October 31, 2021); *Youth Climate Change Lawsuit Grows Support*, NATIONAL GEOGRAPHIC ONLINE, <https://www.nationalgeographic.com/environment/2019/03/youth-climate-change-lawsuit-grows-support> (last visited October 31, 2021).

82. *Fossil Fuel Groups Want Out of Children’s Climate Change Lawsuit*, INSIDE CLIMATE NEWS, <https://insideclimatenews.org/news/26052017/children-climate-change-lawsuit-fossil-fuel-api/> (last visited October 31, 2021).

83. *Id.*

84. *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).

85. *Id.* at 1263.

86. *Id.* at 1264.

acidification and rising ocean temperatures are well supported, after all, and so the court found that these could sustain a plausible claim.<sup>87</sup>

Eventually, the Ninth Circuit dismissed the case on standing, failing to take on the public trust issues themselves.<sup>88</sup> The court offered language that favored the plaintiffs' theories in many respects. But it ultimately focused on the plaintiffs' requested remedy.<sup>89</sup> Writing for the majority, Judge Hurwitz wrote that "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."<sup>90</sup>

Even though the Ninth Circuit ended *Juliana*, it did little to blunt the importance of the lower court's decision. *Juliana* signals a federal court using the public trust doctrine to strike a strong blow in the climate change fight. And it stands as an example that other courts could follow. Besides the few obvious examples like *Juliana*, however, is the public trust doctrine doing any practical good?

## II. THE CATEGORIES AND THE METHODOLOGY

The goal of this project was to gather data about what practical use the public trust has in real-life litigations about water allocations or other environmental issues. I do not suggest this is an empirical take on the matter. But it stands as an initial effort to collect data, provide descriptive analysis, and further the conversation.

Our team<sup>91</sup> designed a methodology to collect as much data as possible about cases that have mentioned or applied the public trust doctrine, particularly in states that have not been extensively analyzed in prior scholarship. Because we are mostly interested in how the doctrine is used today, we limited our search to the last 60 years. We also limited our search to 30 states.<sup>92</sup> We limited our search to those states both to create a manageable list of cases that our team could carefully review, and because these states are less studied in the scholarship, so there is less said about them.<sup>93</sup> The review process was unusually labor intensive because deciphering how

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87. *Id.* at 1256.

88. *Id.* at 1174.

89. *Id.*

90. *Id.* at 1171.

91. I worked on this project with help from excellent research assistants Greg Cloward and Katrina Well.

92. States searched for this project include: Alabama, Alaska, Arizona, Arkansas, Florida, Idaho, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Montana, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, and Washington.

93. For example, popular Western states like California and Colorado have been written about at length. *See, e.g.*, Craig, *supra* note 11.

the public trust doctrine was being used in any given case often took several full re-reads of the case, and even then judgment calls occasionally had to be made. Finally, we limited our search to state court decisions, the jurisdiction that most often handles the doctrine.

We used a set of search terms in two popular legal research databases, Westlaw and Lexis, to collect as many trial courts orders and appellate opinions as possible that mentioned “public trust” and several variants of the term.<sup>94</sup> This resulted in a database of several thousand court decisions across federal and state jurisdictions.<sup>95</sup>

We then created a coding scheme to identify how the public trust doctrine was used in the case. Our goal was to identify as many permutations as possible across the cases reviewed. To draw the most qualitative insights from the sets of cases we reviewed, we created nine coding categories. We added several of these categories during the review process to account for unanticipated outcomes. The result was the following coding scheme, corresponding to the different ways that courts applied (or failed to apply) the public trust doctrine among those cases we reviewed:

*Courts Using the Public Trust to Modify an Allocation of Water.* Here, courts used the public trust doctrine as direct legal grounds to reduce a water allocation or otherwise protect a water resource from harm. These are cases in which the public trust doctrine is doing some real work.

*Cases When the Public Trust Has Been Used to Strike Legislation.* In these cases, the public trust doctrine seemed to succeed. Courts used the public trust doctrine to strike down legislation or state decisions that harmed water resources.

*Cases Applying the Public Trust and Finding that the Doctrine Does Not Apply to a Particular Use or Waterbody.* This tag was applied to every case in which the court actively applied the doctrine to settle a dispute, holding that the public trust did not apply to protect the particular waterbody or use at issue.

*Cases Mentioning the Doctrine but Not Directly Applying It.* This tag was applied to cases that made some mention of the public trust doctrine but did not appear to actually apply it to the facts raised in the party’s dispute. In these cases, courts mentioned the doctrine merely as a background principle.

*Cases Considering Justiciability and the Public Trust.* This tag applied to any case in which the court applied the public trust doctrine but ended up ruling on justiciability grounds. *Juliana*, for example, would fit this tag.

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94. Our team conducted many search terms tests over several days to isolate terms that had the highest chances of returning decisions related to the public trust doctrine. This process involved reviewing the search results of dozens of searches, and finally selecting the data set with both the largest set of results and the most accurate results, based on random sampling. Our search was designed to collect cases from every state and federal court with reported decisions on these databases.

95. Many cases were false hits, mentioning the words “public” and “trust,” but it was clear that the court did not mean the public trust doctrine. Another group of cases we excluded were cases mentioning the public trust with respect to natural resources other than water.

*Cases in which the public trust was mentioned only in a dissent.* In these cases, the only mention of the public trust doctrine came in the dissent. Judges or justices in these cases typically were using the trust doctrine to call for protection of a water resource.

*Cases denying application of the doctrine by holding it did apply to state action.* In these cases, courts held that the particular action the state took did not trigger any public trust obligations at all.

*Cases in which the court held the trust did not apply to a particular user.* In these cases, a court held that the public trust did not reach to the user complaining about harm to a water resource.

### III. THE RESULTS

#### *A. The Overall Results: The Public Trust Doctrine Is Talked about More than It Is Used*

Of the 288 cases our team ultimately coded, the public trust doctrine mostly failed to concretely protect water resources.<sup>96</sup> It was not always obvious if the public trust played some small, unmentioned role in a positive decision that resulted in protecting water resources. But on balance, most cases either barely mentioned the doctrine or held that it did not apply to protect the water in dispute.<sup>97</sup>

In 91 cases, the public trust was held not to protect the use or waterway in question. In 99 cases, the doctrine was generically mentioned but our reviewers were unable to identify the court applying the doctrine to the parties' dispute. Only in 62 cases, out of a total of 288 reviewed, was the public trust doctrine used either to modify an allocation of water or to strike down legislation that was found to be harming critical water resources.<sup>98</sup> And in most of those cases, the trust's impact appears to have had little impact on the ultimate outcome. .

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96. Although our team collected several thousand cases initially that mentioned "public trust," we found many false positives where courts were using the term in contexts unrelated to water or the environment. We ended up using several rounds of limiting searches to best identify cases that mention both the public trust and some sort of water dispute. This results in a total of 288 cases that were finally reviewed and coded for this project.

97. See Figure 1.

98. *Id.*

Reasoning	Ultimate Outcome
Used to modify water allocation	52
Used to strike legislation harming water	10
Otherwise used to prevent harm	6
Does not apply to waterbody	2
Mentioned but not applied	99
Denied on justiciability grounds	14
Dissent only	6
Does not apply to state action	8
Does not protect plaintiff's use	91
<b>Total Coded Cases</b>	<b>288</b>

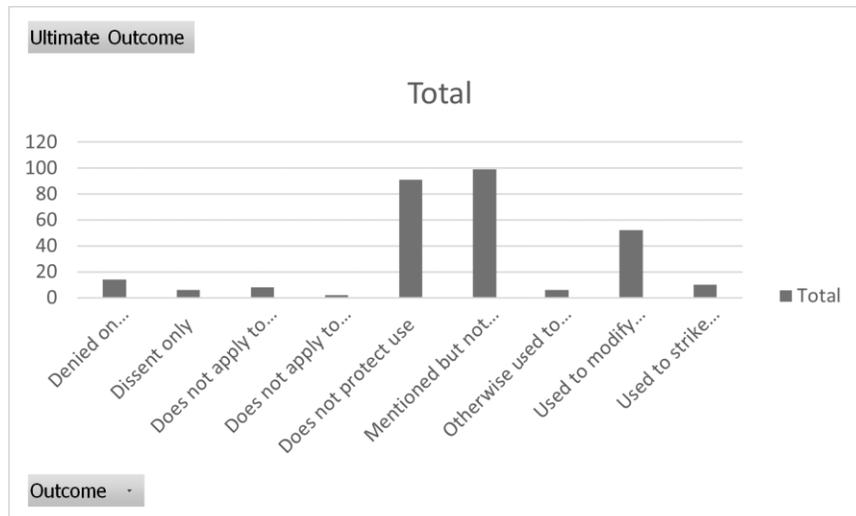
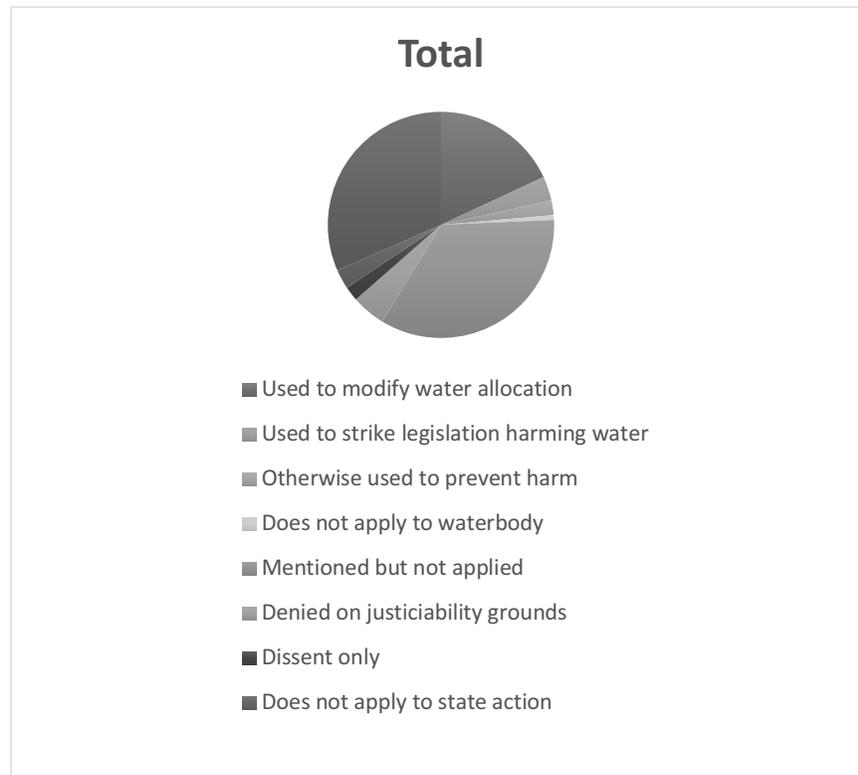


Figure 1: Coding Results of all Cases Reviewed.



**Figure 2: Graph Depicting Results of All Cases Reviewed.**

Overall, there were relatively few public trust cases in the 30 states reviewed. The doctrine does not appear to be a common tool for everyday litigants, at least in a majority of the states we reviewed.<sup>99</sup> Compare, for example, that the same search methods we used in these 30 states to identify 288 clear public trust doctrine cases (an average of 9.6 cases per state) turn up over 100 state cases in California, widely held to be the public trust doctrine capital.<sup>100</sup>

Another helpful insight is how these figures have changed over time. Cases declining to apply the doctrine have stayed fairly consistent over the years, as shown in Figures 3 and 4. Figure 3 shows the number of cases where the public trust doctrine was found to not protect use of the water body. Figure 4 shows that number of cases where the public trust doctrine was mentioned but not applied.

99. Of course, some of this variance is due to the nature and frequency of water disputes generally within a state, an issue examined at more length below.

100. See Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of National Audubon Society v. Superior Court*, 45 ENV'T. L. 561, 609 (2015) (discussing California's historical public trust doctrine, including the Mono Lake decision, which is widely regarded as the most expansive view of the public trust doctrine in the country).

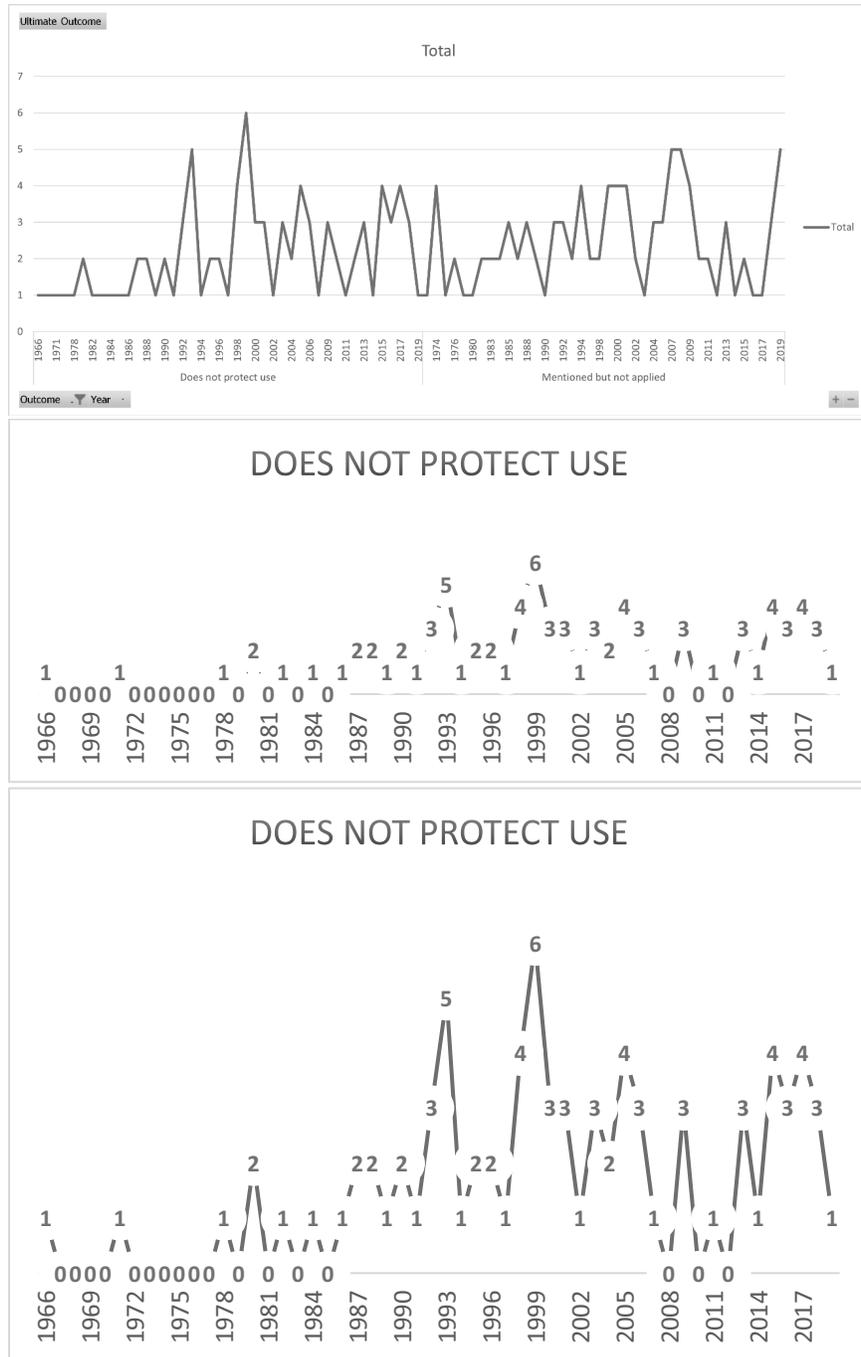


Figure 3: Number of Times Courts Held the Public Trust Did Not Protect a Use

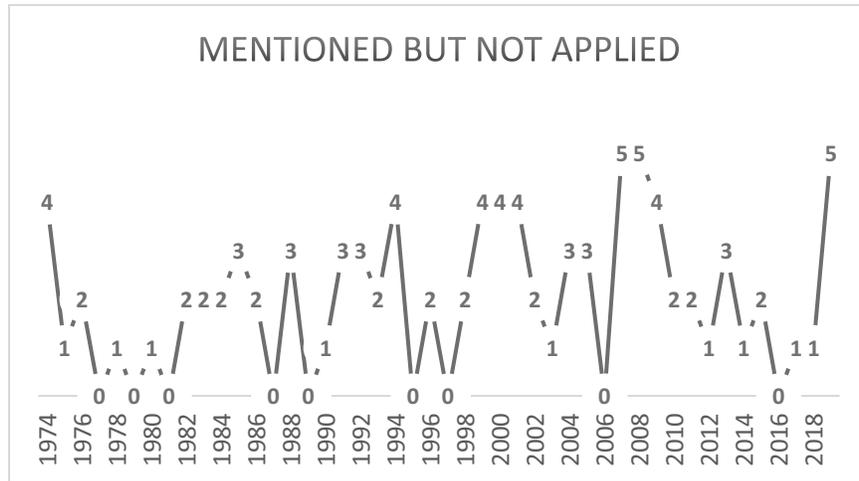
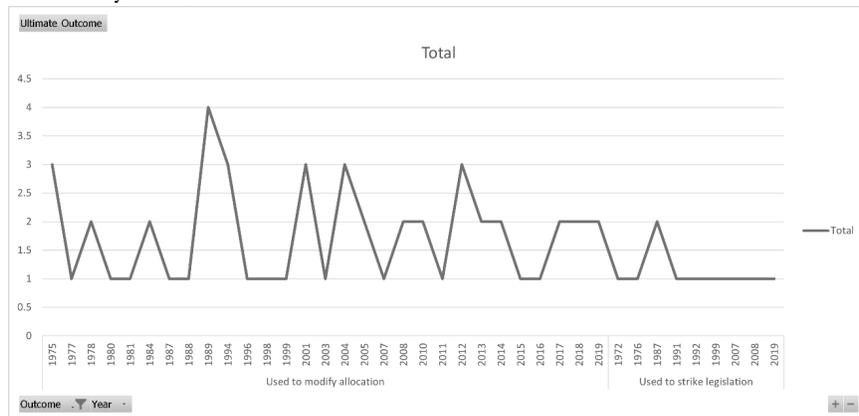
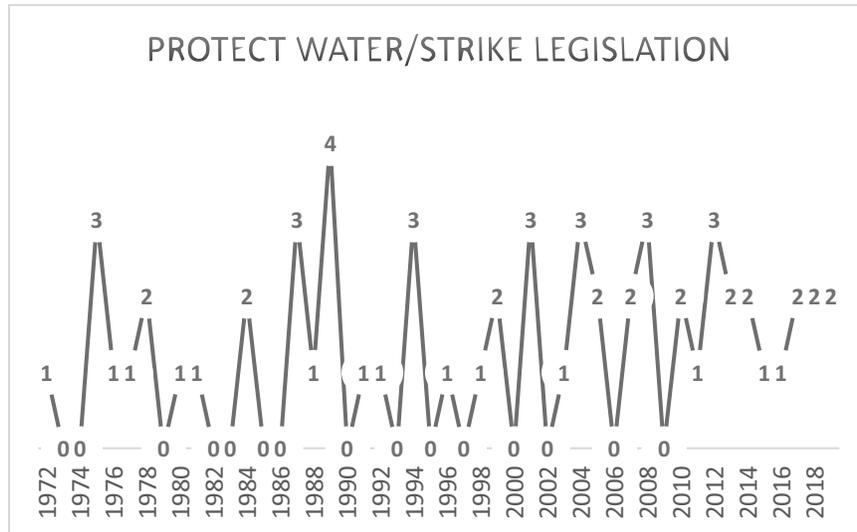


Figure 4: Number of Times Courts Mentioned the Doctrine but Did Not Apply It.

When it comes to the cases in which the public trust was successfully used to protect water resources, the trends have not been positive. Of the few cases that have struck down state legislation, few successful cases have been handed down in recent years. And as for other cases when the doctrine has been held to protect water and modify a use, the trend has declined.





**Figure 5: Number of Times Courts Used the Public Trust Doctrine to Protect Water or Strike Legislation**

Why do courts decline to apply the public trust? The reasons vary, but the most common reason is that the plaintiff pressed an interest that the court did not recognize.<sup>101</sup> This often meant that courts held that a water body did not trigger trust obligations, or that the state simply was not violating whatever abstract obligations the trust imposed.<sup>102</sup> Courts also declined to apply the trust, on occasion, based on justiciability or other grounds. As things sit in most states, courts have many ways to avoid applying the public trust when they choose.

Finally, another key metric from the data is the connection between the state and both how often the public trust is raised and how often it is successful. In broad strokes, the public trust is much more likely to protect water resources if it is raised in certain states than others.

101. See Figure 1 (noting 91 cases in which courts held that the public trust did not protect the plaintiff's asserted interest).

102. See, e.g., *State, Dep't of Nat. Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1211 (Alaska 2010).

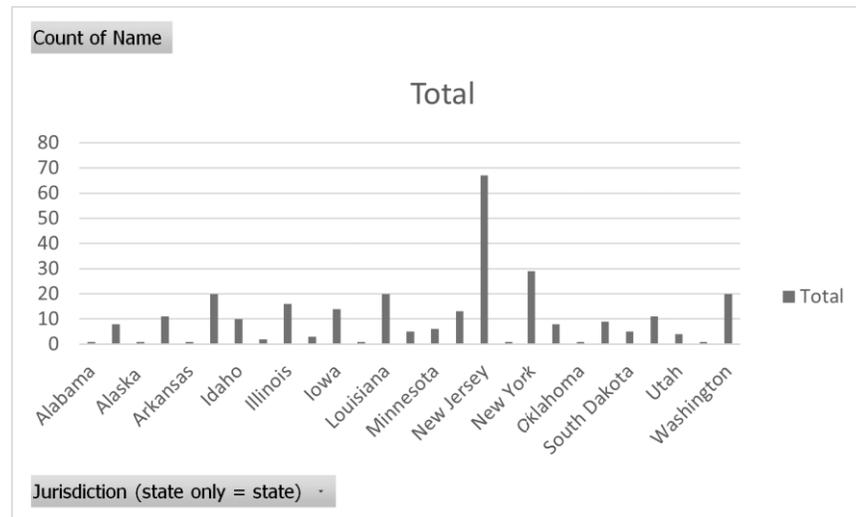


Figure 6: Public Trust Doctrine Cases by State

Because the set of cases we reviewed is not exhaustive and only reflects a portion of the states, we cannot draw absolute conclusions about the trends in these states. But qualitatively, some broad takeaways emerge. For one, in some states, the public trust doctrine was rarely invoked over the prior decades, at least in the state courts where the doctrine plays its main role. For example, the doctrine was rarely raised in Alabama and Arkansas. Indeed, only a couple of recent mentions of the doctrines appeared at all in those states. The cases themselves shed little light on what so many public trust doctrine cases appear in some states, while in others, they appear rarely if at all. Variance in state law, an issue not tackled in this article but thoroughly analyzed in other scholarship, could play some role in this variance.<sup>103</sup> The nature of water resources in various states, including the scarcity of water resources generally, could also play a role.<sup>104</sup>

To get a better sense of what these results mean, it helps to understand more about the sorts of cases that fall into each category. Next, we explore some emblematic cases from the major categories we identified.

### B. *The Categories*

To better understand the trends across the states we reviewed and the coding information itself, it is helpful to see key examples of cases that fit into each

103. See generally Craig, *supra* note 11.

104. Arkansas, for example, had quite healthy water resources, with no noted increasing droughts in recent history. See *America's Water Stress Index*, COLUMBIA WATER CENTER, <https://water.columbia.edu/content/americas-water-stress-index> (last visited September 14, 2021) (collecting data on water scarcity and stress across the United States. A lack of droughts means there is less insecurity over water scarcity, which results in fewer fights over this precious resource.)

category. Because courts vary significantly in how they discuss a legal doctrine (especially an aspirational one like the public trust doctrine), few cases applied the doctrine in precisely the same way. Thus, the following case studies within each coding category are emblematic, but not identical, to other cases that fell within that category.

Positive cases when the doctrine has been used to affirmatively protect water resources are reviewed first. Those categories are followed by the several categories in which courts mentioned the doctrine but failed to use it to protect a water resource.

### 1. Courts Using the Public Trust to Modify an Allocation of Water

In the 60 cases where courts use the public trust doctrine to modify rights to water or otherwise to protect it, the cases reflect courts using the public trust doctrine in a couple of main ways, including providing the public with more access to water resources as well as preventing harms to water bodies by private parties. Several decisions<sup>105</sup> dealing with beachfront property in New Jersey provide a first example.<sup>106</sup>

In *Borough of Neptune City v. Borough of Avon-By-The-Sea*, the Supreme Court of New Jersey examined a local ordinance setting beach user fees which charged nonresidents a higher rate than residents.<sup>107</sup> The borough implemented the fee schedule as an amendment to its ordinance in 1970. The schedule made the rate for a monthly badge the same as the rate for a full season badge, and limited the purchase of full season badges to residents and taxpayers of Avon.<sup>108</sup> The ordinance restricted resident status to those living in the borough at least sixty days per year.<sup>109</sup>

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105. Anchored in the principle that the state's public trust doctrine is neither "fixed [nor] static" but should "be molded and extended to meet changing conditions and needs of the public it was created to benefit." See, e.g., *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 54 (N.J. 1972); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (1984); *City of Long Branch v. Liu*, 4 A.3d 542, 549 (2010).

106. New Jersey had recognized its public trust doctrine over seventy years before the Supreme Court's *Illinois Central* decision in *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821). There, the New Jersey supreme court held that a plaintiff could not prevail on a claim of trespass where another person harvested the oysters the plaintiff planted on the banks of a navigable river. *Id.* at 53–54.

107. *Avon-By-The-Sea*, 294 A.2d at 50.

108. *Id.*

109. *Id.* at 51. Apparently the sixty days corresponded with the beach-going season, as the court noted that a non-resident would have to purchase two monthly badges to receive the same benefit as a season pass. *Id.* The parties had stipulated to the fact that Avon's year-round population of 1850 ballooned to 5500 people every summer, not including day visitors. *Id.* at 49. The court also explained that Avon had followed suite with other beachfront municipalities by first implementing a fee system to limit congestion at beaches caused by "the advent of automobile traffic and [an] ever-increasing number of vacationers." *Id.*

The court approached the case from the “viewpoint of the modern meaning and application of the public trust doctrine.”<sup>110</sup>

The Supreme Court of New Jersey focused its holding on one aspect of the public trust doctrine: the inclusion within the doctrine “of public accessibility . . . for recreation and health, including bathing, boating and associated activities.”<sup>111</sup> The court found the public trust doctrine extended beyond the “ancient prerogatives of navigation and fishing” to include modern recreational uses.<sup>112</sup> The court held that it must follow “that, while municipalities may validly charge reasonable fees for the use of their beaches, they may not discriminate in any respect between their residents and nonresidents.”<sup>113</sup> The court concluded that the public trust required that all residents and nonresidents should have access to the water resource.<sup>114</sup>

Four years after *Avon*, the Supreme Court of New Jersey released two opinions on the same day examining local ordinances of beachfront municipalities. In *Van Ness v. Borough of Deal* the court reaffirmed that municipally owned sand areas next to tidal waters must remain “open to all on equal terms and without preference,” and that whether a municipality had designated its beaches for public use was immaterial.<sup>115</sup> And in *Hyland v. Borough of Allenhurst*, the court held that it is an abuse of municipal power to bar users of a public beach from using toilet facilities.<sup>116</sup> The court next revisited the public trust doctrine as it relates to beachfront property in *Matthews v. Bay Head Improvement Association*.<sup>117</sup> There, the court again expanded the bounds of its public trust to hold that even privately owned beaches must be made

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110. *Id.* at 51.

111. *Id.* at 53. While not its focus, the court devoted some space to examining the legislature’s power to alienate trust land to private parties. *Id.* at 53–54. Briefly addressing this aspect of the state’s public trust doctrine for its “tangential bearing” on the case, the court observed that its early decisions stated, “that the State’s power to vacate or abridge public rights in tidal lands is absolute and unlimited.” *Id.* Noting the issue that some of the court’s past statements on the doctrine “may well be too broad” and that past conveyances by the legislature to private parties might have constituted “an improper alienation of trust property,” the court offered no opinion on it as the case did not require doing so. *Id.* at 54.

112. *Id.* The court cited several other states that had recently made a similar finding. *Id.* at 55.

113. *Id.*

114. *Id.*

115. *Van Ness v. Borough of Deal*, 393 A.2d 571, 573 (N.J. 1978). It also did not matter, the court held, that the beach area was the man-made result of the levelling off and grading of a bluff as part of a casino construction project. *Id.* at 574 (“Whether natural, or man-made, the beach is an adjunct to ocean swimming and bathing and is subject to the Public Trust Doctrine.”).

116. *Hyland v. Borough of Allenhurst*, 393 A.2d 579, 582 (N.J. 1978). The *Hyland* court upheld Allenhurst’s restriction of changing rooms and lockers to beach club members. *Id.* Such accommodations, the court held, were not “in the same category as toilet facilities, which are related to the public health and welfare” and the beach club did not have general changing areas that could be made available to the public. *Id.*

117. *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355 (N.J. 1984)

available to the public for both beach access and recreational use such as sunbathing.<sup>118</sup>

An example of cases that use the public trust to protect water resources is *City of Long Branch v. Liu*, decided in 2010.<sup>119</sup> The City of Long Branch sued to take the Lius' property using the power of eminent domain after the Luis had rejected an offer to purchase it.<sup>120</sup> The case teed up a key public trust conflict: Private interests in water versus a government's trust interest in protecting water resources.<sup>121</sup>

A government-sponsored beach replenishment program had expanded the private landowner's beach 225 feet seaward—extending the total property area by more than two acres.<sup>122</sup> The Lius claimed title as the beach's upland owner.<sup>123</sup> The City wanted control of the beachfront as trustee.<sup>124</sup> The Court ultimately used state law principles to hold that the new beachfront fell under the control of the City, and thus the City's trust was triggered.<sup>125</sup> The result was that the City's trust extended to this new beach so that the public could enjoy it.<sup>126</sup>

The takeaway from the affirmative cases where the public trust doctrine has teeth is that there are certainly some cases where the trust is doing work to both

118. *Id.* at 363–64. The court explained that without access, the public's right to use the beaches would be meaningless. *Id.* at 364. And that "[t]he complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation at the water's edge." *Id.* at 365. The court later applied *Mathews* as a factor-test in holding that the public trust doctrine required public access to a privately-owned "area of undeveloped upland sand and dunes at the end of a street in a town that does not have public beaches." *Raleigh Ave. Beach Ass'n v. Atlantic Beach Club, Inc.*, 879 A.2d 112, 121–24 (N.J. 2005).

119. 4 A.3d 542, 542 (N.J. 2010).

120. *Id.* at 546.

121. *Id.*

122. *Id.* at 547.

123. *Id.*

124. *Id.* at 548.

125. *Id.* at 554. The court also rejected the Lius' claim that "natural equity" should serve "as a basis for giving oceanfront owners and indefeasible right of direct contact with the water," and chided them for raising such an argument. *Id.* at 553 ("[N]atural equity is hardly a concept to be invoked by a property owner who is asking to be compensated in a condemnation action for new beachfront property created by a taxpayer-funded beach replenishment program.").

126. *Id.* at 555. The approach of the New Jersey Supreme Court in this line of cases mirrors that of other states contemplating the boundaries of their respective public trust doctrines. For example, the Supreme Court of Montana held that its state's public trust doctrine protected the public's rights to use the Dearborn River for recreational activities even where the river ran through the property of an oil company. *Montana Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 171 (Mont. 1984). And the Iowa Supreme Court held that the public trust doctrine protects the public's right to use land adjacent to a navigable river for access to the river and took judicial notice that Iowans' use of public trust land had expanded beyond navigation and fishing to recreational activities including hiking, biking, and picnicking near rivers and streams. *State v. Sorensen*, 436 N.W.2d

358, 363 (Iowa 1989). As a final example, the Supreme Court of Alaska used the public trust doctrine to protect the public's right to fish on tidelands conveyed by the state to private owners, even where the conveyance is so small that only one fisherman may fish it at any given time. *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1120 (Alaska 1998).

afford the public access to water resources as well as affirmatively protecting water resources from private interests, when necessary.

## 2. Cases When the Public Trust Has Been Used to Strike Legislation

Another vein of the cases where the public trust has been affirmatively used to protect water or the public's interest are legislation cases. These 10 cases, like many of the modification cases just discussed, pitted the interests of private property owners against those of the state's entire populace. The doctrine has been used to strike down both legislation that violates the state's duty to protect trust lands for the use of its people as well as legislation that gives the public too broad a right to infringe on the property interests of private individuals. Thus, the doctrine is being used both to protect water and to protect private interests.

For an example of the doctrine protecting water from private harm, the Illinois Supreme Court struck down legislation conveying submerged land to a private party in *Scott v. Chicago Park District*.<sup>127</sup> Evoking memories of *Illinois Central*, the challenged legislation conveyed to the United States Steel Corporation 194.6 acres of land submerged in the waters of Lake Michigan for \$19,460.<sup>128</sup> After laying out an exhaustive history of the state's public trust jurisprudence,<sup>129</sup> the court explained that any attempted ceding of a portion of Lake Michigan must "withstand a most critical examination" given the public trust implications.<sup>130</sup> The court concluded that United States Steel's plan to extend its plant infringed too heavily on the public's interest to withstand the public trust doctrine.<sup>131</sup>

The *Scott* court weighed what it perceived to be a private purpose for the conveyance against the removal of a portion of Lake Michigan from the public's use.<sup>132</sup> It rejected United States Steel's argument that the project would benefit the public by creating jobs and boosting Chicago's economy.<sup>133</sup> For the court, such benefits were "only incidental and remote," and too "intangible and elusive" to satisfy

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127. 360 N.E.2d 773, 781 (Ill. 1976).

128. *Id.* at 775.

129. *Id.* at 777-80.

130. *Id.* at 780.

131. *Id.* at 780-81.

132. *Id.*

133. *Id.* at 781. The state's General Assembly had expressly stated in the bill that the act was "made in aid of commerce and [would] create no impairment of the public interest in the lands and waters remaining, but [would] instead result in the conversion of otherwise useless and unproductive submerged land into an important commercial development to the benefit of the people." *Id.* The court explained that the "self-serving recitation of a public purpose within a legislative enactment is not conclusive of the existence of such purpose." *Id.* (internal citation omitted).

the public purpose requirement.<sup>134</sup> The court concluded that the legislation was void in violation of the public trust doctrine.<sup>135</sup>

The Supreme Court of Montana, on the other hand, struck down legislation expanding on the types of recreational uses to which its public could put public trust resources in *Galt v. Department of Fish, Wildlife and Parks*.<sup>136</sup> In response to two decisions holding that the public had a right to use waters—including the beds and banks up to the high water mark—for recreational purposes,<sup>137</sup> the state legislature enacted legislation providing for “a public right to build duck blinds, boat moorages, and camp overnight, so long as not within sight of or within 500 yards of an occupied dwelling, whichever [was] less.”<sup>138</sup> The court reaffirmed its previous holdings that the public’s right to use trust waters included the right to use the beds and banks and that Montana’s public trust doctrine applied to any waters within the state that could be used for recreational purposes.<sup>139</sup> But it still struck down the legislation by finding that the legislature had too broadly extended the public’s rights.

The court first noted that “there is no attendant right that [recreational use of trust waters] be as convenient, productive, and comfortable as possible.”<sup>140</sup> Rather, the public’s use is only protected to the point necessary “[for] utilization of the water itself.”<sup>141</sup> The court highlighted many recreational uses permitted by the legislature which had only an attenuated relationship to the use of trust waters including overnight camping, the construction of permanent duck blinds, and big game hunting.<sup>142</sup> The court concluded by holding that any use of the beds and banks owned by private individuals must have only minimal impact.<sup>143</sup>

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134. *Id.* The court noted that virtually any reclamation project involving the submerged lands would provide employment and economic benefits. *Id.*

135. *Id.* at 781. Like Illinois, the Arizona State Legislature has a history of dispensing property to private owners in violation of its public trust duties. *See, e.g., San Carlos Apache Tribe v. Superior Ct.*, 972 P.2d 179 (Ariz. 1999); *Arizona Ctr. for Law in Pub. Int. v. Hassell*, 837 P.2d 158 (Ariz. 1991). For a comprehensive background on the *San Carlos Apache Tribe* decision and the legislative history of the bills it partially struck down as violating the public trust doctrine, see Sean E. O’Day, *San Carlos Tribe v. Superior Court: Rejecting Legis. Favoritism in Water Rights Allocation*, 4 U. DENV. WATER L. REV. 29, 50–70 (2000).

136. 731 P.2d 912 (Mont. 1987).

137. *See Montana Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 170 (Mont. 1984); *Montana Coal. For Stream Access, Inc. v. Hildreth*, 684 P.2d 1088, 1093 (Mont. 1984).

138. *Galt*, 731 P.2d at 915.

139. The court had held that “any surface waters that are capable of recreational use may be so used by the public.” *Curran*, 682 P.2d at 171. The question of “navigability for use,” the court had explained, was a matter of state law. *Id.* at 170. This rather than “navigability for title,” which a federal test governs. *Id.* at 166–69.

140. *Galt*, 731 P.2d at 915.

141. *Id.*

142. *Id.* at 915–16.

143. *Id.* at 916.

Cases where the public trust doctrine has been used to strike legislation are few and far between, and the results were mixed. In some cases, the public trust doctrine has struck down attempts to harm or threaten important public water resources. In other cases, the doctrine has been used to narrow the public trust, giving it less relevance to water conservation.

### 3. Courts Applying the Public Trust and Finding that the Doctrine Does Not Apply to a Particular Use or Waterbody.

Now to the many more cases where the public trust doctrine appeared but did not meaningfully change anything in the case. The bulk of these decisions, 101 to be exact, were cases where a court sidestepped the public trust doctrine by holding that it simply did not apply to the issues raised in the dispute.<sup>144</sup> Like the Montana legislation example above, these cases represent courts either narrowing or declining to extend the public trust doctrine's protection to water resources. Because there are many more cases to sift, this section warrants more extensive analysis and examples than many other categories.

This category of cases often involves a court determining the bounds of its state's public trust doctrine, finding that the doctrine does not extend to a particular waterbody or use claimed by the public. This can be a mixed bag when it comes to water conservation. Sometimes these cases concern competing private interests over water and do not strongly implicate protecting the water resources at issue. In other cases, the doctrine was raised to urge more access to public resources, which could even create more harm to the waterbody.<sup>145</sup> In still other cases, parties attempted to protect public water resources using the doctrine, but failed.

The Supreme Court of Alaska, for example, declined to extend the state's public trust doctrine in *Hayes v. A.J. Associates*.<sup>146</sup> A father and son—the Hayes's—had leased the mining rights to a plot of underlying tidelands and submerged lands from A.J. Associates (“A.J.”).<sup>147</sup> The state had previously conveyed the property to A.J., while reserving the mineral rights to itself.<sup>148</sup> When the lease ended and negotiations for a lease extension fell through, Hayes argued that the state, and not

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144. In 91 cases courts held that a use was not protected, in eight it was held that the state's action in question did not trigger its own trust duties, and in two others, courts held that the waterbody in question was not protected by the trust.

145. In these cases, declining to recognize the public trust may be a good thing for water conservation, because courts are holding that the public cannot do as much, or take as much, as they want to. *See, e.g., Hayes v. A.J. Assoc.* 846 P.2d 131 (Alaska 1993).

146. *Id.* at 133.

147. *Id.* at 132.

148. *Id.*

A.J., owned the mineral resources in the tideland.<sup>149</sup> A.J. filed for ejectment and the trial granted partial summary judgment in its favor.<sup>150</sup>

On appeal, Hayes argued that, as filled tidelands, the property was reserved to the public under the state's public trust doctrine.<sup>151</sup> The court rejected Hayes's argument. It looked to *Illinois Central*, where the Supreme Court declared that use of lands under navigable waters is reserved to the public, in part, to "carry commerce over them."<sup>152</sup> The Supreme Court of Alaska held that, in addition to not falling within *Illinois Central*'s holding, mining is quite the opposite of a "public use"—it is the depletion of a non-renewable resource for private profit.<sup>153</sup> Thus, the state's public trust doctrine did not extend so far as to protect private mining interests on filled tidelands.<sup>154</sup>

An example of a case raising public access issues is *City of Daytona Beach Shores v. State*.<sup>155</sup> The case concerned "user fees" charged to motorists for entry to beaches within a few local jurisdictions.<sup>156</sup> The state attorney sued to enjoin the local governments from collecting the user fees to access the beaches.<sup>157</sup> After explaining that the state's public trust doctrine requires the beaches to be accessible to the public, the court declined to hold that the user fees were a per se violation of that requirement.<sup>158</sup> Instead, the fees could be appropriate, so long as the revenue brought in from them was "expended solely for the protection and welfare of the public using that particular beach, as well as for improvements that will enhance the public's use of the sovereign property."<sup>159</sup>

Likewise, in a criminal appeal, the Supreme Court of Washington examined whether the public trust doctrine protects the unauthorized taking of naturally occurring clams from privately-owned tidelands.<sup>160</sup> Timothy Longshore had been convicted of second degree theft for harvesting 340 pounds of clams on waterfront property owned by another.<sup>161</sup> On appeal, Longshore argued the State had failed to

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149. *Id.*

150. *Id.*

151. *Id.* at 133.

152. *Id.*; see also *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892) ("[Land under navigable waters is] held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.").

153. *Hayes v. A.J. Assoc.* 846 P.2d 131, 133 (Alaska 1993).

154. *Id.*

155. 483 So. 2d 405 (Fla. 1985).

156. *Id.* at 406.

157. *Id.* at 407.

158. See *id.* at 408.

159. *Id.*

160. *State v. Longshore*, 5 P.3d 1256 (Wash. 2000).

161. *Id.* at 1257–58.

prove he had taken “property of another” because shellfish are “public trust resources” that cannot be conveyed to a private party.<sup>162</sup> The court explained that individual states have the “long-established” right to define the bounds of their respective public trusts<sup>163</sup> and declined to extend Washington’s public trust doctrine to encompass a right to harvest clams on private property.<sup>164</sup>

Other cases turn on whether a conveyance decreases a state’s control over public trust property as far as the public trust doctrine is triggered—and thus threaten harm to water resources. For example, in *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, the Supreme Court of Idaho examined whether granting a permit to make an encroachment on Coeur d’Alene Lake constituted a conveyance prohibited by the public trust doctrine.<sup>165</sup> An environmental group—the Kootenai Environmental Alliance—sued after the Department of Lands granted Panhandle Yacht Club’s application to build a 112-boat marina on the lake.<sup>166</sup> Considering Coeur d’Alene Lake is seventy square miles in size, the court explained, the marina would impede navigation on about .01% of the lake’s total area.<sup>167</sup>

The court condensed *Illinois Central*’s holding into a two part test for determining the validity of a grant of public trust property: (1) does the grant further public uses of navigation or commerce; and (2) does the grant substantially impair the public interest in the remaining trust property.<sup>168</sup> The court ultimately agreed with the Department of Lands that the grant to Panhandle Yacht Club did not violate *Illinois Central*’s holding.<sup>169</sup> It did, however, note that the state had not “given away

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162. *Id.* at 1262. Longshore also argued the clams were animals *ferae naturae* and thus subject to the general common law rule that clams and oysters are not subject to theft statutes unless artificially raised outside of their naturally occurring beds. *Id.* at 1260. The court rejected this argument because Washington does not adhere to the general rule but rather holds that naturally occurring clams on private property belong to the property’s owner. *Id.*

163. The Supreme Court of Iowa, for example, has expressly noted that its state’s public trust doctrine is “narrow,” and has cautioned against extending the doctrine too far. *See* *Bushby v. Wash. Cnty. Conservation Bd.*, 654 N.W.2d 494, 497–98 (Iowa 2002) (declining to invoke the public trust doctrine to prevent a conservation board from removing natural timber); *see also* *Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 813–14 (Iowa 2000) (explaining the public trust doctrine’s narrow scope in Iowa and holding the doctrine does not extend to city streets and alleyways). Longshore (the clam-digger) had based his argument exclusively on cases from other states. *Longshore*, 5 P.3d at 1263.

164. *Id.*

165. 671 P.2d 1085, 1087 (Idaho 1983). For further background on the case, see generally Scott W. Reed, *The Public Trust Doctrine in Idaho*, 19 ENV’T. L. 655, 657–60 (1989).

166. *See Kootenai Env’t. All., Inc.*, 671 P.2d at 1087. Panhandle Yacht Club’s permit was for a ten-year lease, with the ability to renew the lease for successive ten-year terms. *Id.*

167. *Id.*

168. *Id.* at 1089; *see also* *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

169. *Kootenai Env’t All., Inc.*, 671 P.2d at 1094. *Kootenai Environmental Alliance, Inc.* was the first major case in which the Supreme Court of Idaho discussed the state’s public trust doctrine. Reed, *supra* note 166, at 657–60. The court took the opportunity to methodically trace the doctrine’s development in Massachusetts, Wisconsin, and California and to adopt certain approaches from each respective state as

or sold the discretion of its successors” and that the grant remained subject to the public trust.<sup>170</sup> The state would be free, in the future, to determine that the grant was no longer compatible with the public trust.<sup>171</sup> Thus, the doctrine did not help protect the water resource, but the court acknowledge that there would still be room in the future for it to do so.

Similarly, in *Friends of Parks v. Chicago Park District*, the Supreme Court of Illinois examined whether legislation enabling the use of public financing for improvements to Chicago’s Burnham Park violated the public trust.<sup>172</sup> Located on land that was once the navigable water of Lake Michigan, neither party disputed that Burnham Park was public trust property.<sup>173</sup> Solider Field, home to the Chicago Bears, is located within Burnham Park and the team was set to profit off of the improvement project.<sup>174</sup> Friends of Parks argued that the terms of the project violated the public trust doctrine because the Bears would be able to use and control Solider Field to its private benefit with no corresponding public benefit.<sup>175</sup>

The court held the legislation did not violate the public trust doctrine.<sup>176</sup> It explained that the Park District was not conveying the Soldier Field property to the Bears nor was it relinquishing control of the property.<sup>177</sup> The court also noted that Solider Field would play host to artistic and cultural events and that improvements at Burnham Park would in fact improve the public’s access to area museums and to the lakefront itself.<sup>178</sup> While the Bears would no doubt benefit from the project, the project furthered public use of the property rather than impeding it to the point of running afoul the public trust.<sup>179</sup> This is thus another example of courts declining to impose more onerous trust obligations over water resources, but acknowledging that if more concrete harm occurs in the future, the public trust may still be implicated.

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the court’s own. *Kootenai Env’t. All., Inc.*, 671 P.2d at 1089–91, 1091–93, 1093–94. From Massachusetts, the Supreme Court of Idaho adopted the approach that public trust resources could only be alienated through “open and visible actions, where the public is in fact informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made . . .” *Id.* at 1091. The court looked to Wisconsin for authority that it is the judiciary that makes the final determination on whether a conveyance of public trust property violates the public trust doctrine. *Id.* at 1092. And it followed California in adopting the rule that the public trust doctrine trumps even vested water rights and that grants to private individuals are generally construed as subject to the public trust doctrine. *Id.* at 1094.

170. *Id.* at 1094.

171. *Id.*

172. See *Friends of Parks v. Chicago Park Dist.*, 786 N.E.2d 161, 163 (2003).

173. *Id.* at 163, 169.

174. See *id.* at 165, 168, 169 (discussing financial benefits to the Bears from the project).

175. *Id.* at 169.

176. *Id.* at 170.

177. *Id.*

178. *Id.*

179. *Id.*

This category of cases—in which courts declined to apply the public trust doctrine because the claimed use or water was not within the state’s trust—made up a large part of all cases reviewed. They were also a mixed bag for water conservation. Certainly, these cases are not clear examples of the public trust doctrine affirmatively protecting water resources. But sometimes courts were declining to allow the public more access to a water resource, which could aid conservation, if anything. In other cases, courts at least use language suggesting that they are not unreceptive to the public trust when harm to a water resource is concrete enough. On the other hand, these cases stand for the plurality response to the public trust doctrine: avoid it altogether.

#### 4. Cases Mentioning the Doctrine but Not Directly Applying It

Courts commonly mention the public trust doctrine but fail to actually apply it to the dispute. These cases may be the most concerning because they could signal courts unwilling to meaningfully apply the doctrine on the ground. At least the courts just discussed, which apply the doctrine but hold it does extend to the use or water body, generally recognize the trust doctrine is a meaningful legal principle that could in theory resolve disputes. In these 99 cases, courts decline to engage even at that level.

This category of cases encompasses a wide range of topics including takings, judicial reviews of administrative decisions, natural resource rights, and more. In some cases, a court examines the doctrine as a backdrop to the appeal before it. In others, a court discusses the doctrine as an alternative method for analyzing the case before it. And in still others, a dissent urges the doctrine applies but is ignored.

Courts first discussed the public trust doctrine, without applying it, in cases involving claims of unconstitutional takings. The Supreme Court of Oregon has done so, for example, on at least two occasions. In *Stevens v. City of Cannon Beach*, the plaintiffs argued that the government’s denial of their application to build a seawall on their dry sand beach property amounted to a taking without just compensation.<sup>180</sup> And eight years earlier, the court had heard an appeal from four utility companies challenging the City of Portland’s order requiring the companies to relocate their facilities to make way for a new light rail system under the same legal theory.<sup>181</sup> In the former case, the court noted that a public trust doctrine analysis might also resolve the case—but the court disposed of it on other grounds.<sup>182</sup> In the latter, the court explained that roads had, in other cases, been protected by the public trust as dedicated thoroughfares<sup>183</sup> but ultimately rejected the appeal because the city was not

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180. 854 P.2d 449, 450–51 (Or. 1993)

181. *Nw. Nat. Gas Co. v. City of Portland*, 711 P.2d 119, 120–23 (Or. 1985)

182. *City of Cannon Beach*, 854 P.2d at 453 n.11. An amicus brief had been filed arguing for the public trust doctrine to be used. *Id.*

183. *Nw. Natural Gas Co.*, 711 P.2d at 129.

taking any other private property.<sup>184</sup> The Florida and Louisiana supreme courts have similarly touched upon the public trust doctrine in takings cases.<sup>185</sup>

Judicial reviews of administrative decisions also commonly generate a discussion about the public trust doctrine, even where it is not central to a court's holding. For example, courts have mentioned the doctrine without applying it in reviews of permit applications for groundwater appropriation,<sup>186</sup> the construction of a private dock,<sup>187</sup> and fish propagation.<sup>188</sup> In *Shokal v. Dunn*, the Idaho supreme court corrected a statement by the district court judge which appeared to ignore the state's public trust doctrine before ultimately holding the judge's order adequately resolved any such issues.<sup>189</sup> And in *Postema v. Pollution Control Hearings Board*, the Supreme Court of Washington declined the appellants' request to reconsider the public trust implications of groundwater appropriation because state statutes properly established duties and standards for the Department of Ecology's application decisions.<sup>190</sup>

Miscellaneous cases leading to a discussion about the public trust doctrine include a trio of cases from the Supreme Court of North Dakota analyzing private claims to mineral rights,<sup>191</sup> riparian rights,<sup>192</sup> and oil rights.<sup>193</sup> In each case the court noted the public interests protected by the doctrine.<sup>194</sup> Both the Alaska and Louisiana supreme courts have discussed the public trust doctrine in cases examining the law-making authority of the legislature in the domain of natural resources. In each case, the court declined to conclude that the doctrine granted the legislature exclusive law-making authority over natural resources.<sup>195</sup>

The New Jersey supreme court declined to opine on whether the public trust doctrine would require the same conclusion in an appeal where it held that a

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184. *Id.* at 132.

185. *See, e.g.*, *Walton Cnty. v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1109–11 (Fla. 2008) (describing the state's public trust duties in a case holding that a beach restoration project was not an unconstitutional taking of upland owners' littoral rights); *La. Seafood Mgmt. Council v. La. Wildlife & Fisheries Comm'n*, 715 So. 2d 387, 389, 394–95 n.8 (La. 1998) (acknowledging that marine fishing resources are held in trust by the state for the public benefits in a case concluding the restricting the use of gill nets among commercial fishermen did not amount to a taking of property).

186. *Postema v. Pollution Control Hearings Bd.*, 11 P.3d 726, 730, 744 (Wash. 2000).

187. *Dupont v. Idaho State Bd. of Land Comm'rs*, 7 P.3d 1095, 1097, 1102 (Idaho 2000).

188. *Shokal v. Dunn*, 707 P.2d 441, 443–44, 447 n.2, 451 (Idaho 1985).

189. *Id.* at 447 n.2, 451.

190. 11 P.3d at 744.

191. *Reep v. State*, 841 N.W.2d 664, 667 (N.D. 2013).

192. *Sprynczynatyk v. Mills*, 592 N.W.2d 591, 592–93 (N.D. 1999).

193. *J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production Co.*, 423 N.W.2d 130, 131, 136, 140 (N.D. 1988).

194. *Reep*, 841 N.W.2d at 670; *Sprynczynatyk*, 592 N.W.2d at 593; *J.P. Furlong Enterprises, Inc.*, 423 N.W.2d at 140.

195. *Brooks v. Wright*, 971 P.2d 1025, 1031–33 (Alaska 1999); *State v. All Pro Paint & Body Shop, Inc.*, 639 So. 2d 707, 719–20 (La. 1994).

nonprofit corporation tasked with redeveloping 3.1 acres of city property was a “public body” for open meeting and open record laws.<sup>196</sup> Finally, in *State v. Pettijohn*, the Supreme Court of Iowa explained the importance of the public trust doctrine in reviewing a conviction for operating a motor boat while under the influence.<sup>197</sup> Noting that boating “implicates the ‘paramount’ right of Iowans to use state waterways for navigational and recreational purposes,” the court held that the fact that Pettijohn faced the loss of boating privileges weighed against a finding that he consented to law enforcement’s breath test.<sup>198</sup>

The takeaway from this category may be that, for many courts, the public trust doctrine is more aspirational language than it is a meaningful tool to resolve water disputes. Given how many cases fall into this category, one wonders whether courts are often more comfortable using the public trust doctrine as a policy note instead of a legal principle that changes outcomes.

## 5. Cases Considering Justiciability and the Public Trust

The final category worth briefly exploring are cases in which justiciability issues arise around the public trust. This category is mentioned because justiciability has been a key means for courts to avoid public trust claims in the past (including in the *Juliana* decision).

For example, the Supreme Court of Alaska recently examined justiciability issues raised by the public trust doctrine in *Kanuk v. Department of Natural Resources*.<sup>199</sup> Six Alaskan children sued the state for “breaching its public trust obligations’ by failing ‘to protect the atmosphere from the effects of climate change and secure a future’” for Alaska’s children.<sup>200</sup> In dismissing the complaint, the district court had ruled that all the children’s claims were non-justiciable.<sup>201</sup> The supreme court first turned to standing.

The plaintiffs claimed to have what the court called “interest-injury standing” which required, the court explained, “sufficient personal stake in the outcome of the controversy to ensure the requisite adversity.”<sup>202</sup> All that was needed to meet this burden was “an identifiable trifle,” such as an affected aesthetic or

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196. *Times of Trenton Pub. Corp. v. Lafayette Yard Cmty. Dev. Corp.*, 874 A.2d 1064, 1072–73 (N.J. 2005)

197. *State v. Pettijohn*, 899 N.W.2d 1, 10 (Iowa 2017).

198. *Id.* at 35–36. The court acknowledged that the loss of his boating privileges would “weigh more strongly against a finding of voluntariness if it had implicated his ability to earn a living” as well. *Id.* at 36.

199. 335 P.3d 1088 (Alaska 2014).

200. *Id.* at 1091.

201. *Id.*

202. *Id.* at 1092.

environmental interest.<sup>203</sup> The court held that the children-plaintiffs had done so, citing the effects of climate change outlined in the complaint including, among others, ice melt flooding a village, a shrinking glacier, and a Spruce Bark Beetle infestation.<sup>204</sup> The court rejected the state's claims that the plaintiffs' standing was lost because climate change affects the population as a whole and not just the plaintiffs.<sup>205</sup>

The court then turned to whether the political question doctrine rendered the plaintiffs' claims non-justiciable, concluding that it did for some of them.<sup>206</sup> In their original complaint, the plaintiffs had requested that the court declare that "the best available science" dictate the state's obligation to protect the atmosphere by reducing carbon dioxide emissions by "at least 6% each year until 2050."<sup>207</sup> The plaintiffs had further asked the court to order the state to reduce emissions by at least six percent each year until 2050 and to order the state to "prepare a full and accurate accounting" of Alaska's emissions and do so each year later.<sup>208</sup> These claims, the court held, were non-justiciable "most obviously" because of "the impossibility of deciding [them] without an initial policy determination of a kind clearly for nonjudicial discretion."<sup>209</sup>

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203. *Id.* The court noted that Alaska has a "broad interpretation of standing and [a] policy of promoting citizen access to the courts. *Id.* at 1093 (internal citation omitted).

204. *Id.* at 1092–93.

205. *Id.* at 1093–94 ("[D]enying injured persons standing on grounds that others are also injured—effectively preventing judicial redress for the most widespread injury solely because it is widespread—is perverse public policy."). The court also rejected the state's argument that "all Alaskans are indispensable parties" and that it would be impracticable to join them all to the suit. *Id.* at 1094–95 ("To join all Alaskans in every suit that involves challenges to state law and policy would be 'impractical and unnecessarily burdensome.' And to require dismissal of such lawsuits because all possible viewpoints cannot be represented would create unacceptable barriers to the courts."). In an even more recent concurrence, Justice Christine Durham of the Supreme Court of Utah argued that navigability-for-title claims were identical to claims for quiet title and that any private citizen would have standing to bring a public trust claim, provided the individual could show a particularized injury and an interest in the land. *Utah Stream Access Coal. v. Orange St. Dev.*, 416 P.3d 553, 562–66 (Utah 2017) (Durham, J., concurring). And, in 2014, an Illinois appellate court examined at length standing under the public trust doctrine in a lawsuit where the plaintiff alleged a scheme to defraud the sanitary district's taxpayers by diverting connection fees to private individuals. *See Fiala v. Wasco Sanitary Dist.*, Nos. 2-13-0253, 2-13-0653, 2014 WL 1878604, at \*3–12 (Ill. App. 2d May 7, 2014), *appeal denied*, 20 N.E.3d 1253 (Ill. 2014). The New Jersey Supreme Court has held that invoking the public trust doctrine only gives an individual standing where a conveyance or alienation of trust land is at issue, not just the potential for such a conveyance at a future time. *N.J. Sports & Exposition Auth. v. McCrane*, 292 A.2d 545, 560 (N.J. 1972). Similarly, a New York trial court explained that no cause of action exists, under the public trust doctrine, where a lawsuit either does not involve a navigable waterway, or involves a navigable waterway but does not interfere with the public's right to use it. *Evans v. City of Johnstown*, 410 N.Y.S.2d 199, 207 (Sup. Ct. 1978).

206. *Kanuk*, 335 P.3d at 1096–1103.

207. *Id.* at 1097.

208. *Id.*

209. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

The *Kanuk* court did hold that the plaintiffs' request for declaratory judgment on the nature of the public trust doctrine were justiciable claims. These included, among others, that "the atmosphere is a public trust resource," and that the state has "an affirmative fiduciary obligation to protect and preserve it."<sup>210</sup> Such questions, the court explained, were not political questions but questions that the judiciary is "well equipped to answer."<sup>211</sup> Even so, the court held, while justiciable, the claims should have been dismissed on prudential grounds.<sup>212</sup> The same year, the Oregon Court of Appeals heard a case which mirrored *Kanuk*.<sup>213</sup> It too held that whether the public trust doctrine included the atmosphere was justiciable, but remanded the case to the trial court.<sup>214</sup>

The takeaway for the many cases in this category is mixed. In some cases, justiciability has been used to avoid public trust claims. A growing number of cases, like *Juliana*, have recognized that standing may not bar important public trust claims aimed at protecting natural resources. But thus far, none of those cases has survived all too long. Courts have still found ways to sidestep the trust.

#### IV. TAKEAWAYS: THE PUBLIC TRUST HAS TEETH, BUT IT COULD HAVE MORE

Stepping back, what conclusions can we draw from this sampling of cases? First, the doctrine was not used very often in the 30 states we reviewed (at least in our review of cases mentioning the public trust doctrine verbatim). In some states, we found only a few cases that had mentioned the public trust in recent years. These cases suggest that, in at least some states, perhaps many advocates have not raised the public trust doctrine or courts are less inclined to apply the doctrine in real disputes. It may be that simply encouraging more litigations to pursue public trust claims could increase traction for the doctrine.

The public trust doctrine successfully protected water resources in only 21.5% of the cases in which it was mentioned.<sup>215</sup> In the healthy majority of cases—all but 62—the trust doctrine did not help protect water or other environment interests.<sup>216</sup> Even in the cases in which a court used the doctrine to strike down legislation or modify water rights or access, sometimes the decisions cut in favor of more use of water resources rather than more protection of them. For example, in

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210. *Id.* at 1099.

211. *Id.* at 1100.

212. *Id.* at 1100–03.

213. *Chernaik v. Kitzhaber*, 328 P.3d 799 (Or. Ct. App. 2014).

214. *Id.* at 808.

215. *See supra* Sec. IV.A, Figure 1.

216. *Id.*

some of these cases, courts were using the public trust doctrine to give the public more access and use to a waterbody.<sup>217</sup>

Often, the doctrine was mentioned generally but not applied to the parties' dispute.<sup>218</sup> This included mentions by majority courts, dissents, and trial courts. This could suggest that courts themselves do not view the public trust doctrine as a workable tool but see it instead as a background principle. The sheer number of these cases at least raises questions about how useful courts believe it to be, with well over 100 cases fitting in this category.

Another possible reason for the relatively low number of applications is that the doctrine is so broad, perhaps litigants are applying it to cases that it does not neatly fit. Take *Kanuk*: The public trust doctrine was claimed in a case about climate change.<sup>219</sup> Raising the public trust creatively is not necessarily a bad thing, but it does raise questions about why the tool is not more effective in the core water cases from which it was born.

Another takeaway (that again emphasizes the doctrine's squishiness) is that courts decline to apply the public trust for a host of reasons. Whether it is because a waterway is not big enough, a use is not a traditional one, deference to state water regulators, or standing (either prudential or otherwise), courts take many avenues to avoiding the public trust's impact.<sup>220</sup> The truth is, the public trust standard is so spottily applied that it is no surprise that courts can easily avoid the doctrine when they want to and mention it when it seems a helpful platitude.<sup>221</sup>

In the few cases when the public trust played a moving role in protecting water or other environmental resources, courts were less likely to strike down legislation or otherwise act against the government's decisions. Instead, most of the successful cases we reviewed involved relatively modest, and often recreational, disputes.<sup>222</sup> Beyond seminal cases that have made waves, like the *Mono Lake* decision or *Illinois Central* itself, the public trust is rarely analyzed and applied to compel the government to protect water on a meaningful scale.<sup>223</sup>

Most importantly, the data clarifies a critical truth: The public trust doctrine is more likely to be used as a platitude than it is an actionable doctrine in everyday cases. Courts most often treat the public trust as a background principle or narrow tool that does not apply in most cases.

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217. This is not to suggest that such decisions are normatively good or bad, only that they did not further water resource protection, which is the primary question raised in this article.

218. *Supra* Sec. IV.A, Figure 1.

219. *See also* *Juliana v. United States*, 217 F. Supp. 3d 1224, 1252 (D. Or. 2016).

220. *See supra* section IV.E.

221. *See* *Regalia & Hall, supra* note 19, at 67 (discussing the high-level language used to describe the public trust obligation).

222. *See supra* section IV.B.a-b.

223. *See generally* Erin Ryan, *A Short History of the Public Trust Doctrine and Its Intersection with Private Water Law*, 38 VA. ENV'T. L.J. 135 (2020) (discussing the handful of historically significant public trust cases, including the *Mono Lake* decision).

The case review also suggests that there is value in diving deeper into the lower court decisions that apply the public trust. This may be a ripe area for future research and attention. Without a sense of how the trust doctrine is being used in water disputes today, scholars and courts are hamstrung in developing a more nuanced application of the doctrine. Scholars and courts would do well to invest in a more concrete version of the test that can be readily applied to water disputes. Further, large-scale analytics could be valuable in more meaningfully tracking how the public trust is working across the nation.

Some states have enacted regulatory systems that attempt to do more, requiring water permitting agencies to consider specific criteria related to conserving water resources for current and future users.<sup>224</sup> Given the many ways courts apply the public trust, and fail to apply it at all in most cases, a lack of understanding may be the public trust's main failing. Perhaps most concerning, though, is the high number of cases in which courts mentioned the doctrine but did not meaningfully apply it to the dispute. This could suggest that courts do not find the public trust to be a workable, readily applicable doctrine.

## CONCLUSION

The public trust doctrine is often talked about, but it is rarely applied, and even rarer still, applied successfully. The field often talks about a handful of seminal public trust cases, like *Illinois Central* and the *Mono Lake* decision, while less attention is paid to the practical, everyday applications of the doctrine in real water disputes.

With this article's attempt to initially collect and parse data from a set of states and courts, one reason less attention has been paid to practical applications is because there are not many of them to consider in the first place. In many cases, courts have thrown up their hands, mentioning the public trust as little more than a truism.

And the frequency that happens should tell us something. Perhaps courts struggle to apply this doctrine because it is hard to apply. It varies much from state to state, and court to court. And as many other scholars have analyzed at length, its contours are notoriously hard to pin down. If nothing else, the number of cases that mention the public trust but fail to apply it meaningfully should make us all take stock of the doctrine's role in ongoing environmental disputes. To be effective, courts likely need more concrete, readily-applicable versions of the public trust that is easier to apply to real disputes. Otherwise, perhaps our energy is better spent on other solutions.

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224. See Robie, *supra* note 74, at 1163; see also CAL. WATER CODE § 275 (Deering 2010) (requiring the State Water Resources Control Board to "prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state).

