The Public Trust Doctrine in Environmental and Natural Resources Law

FOURTH EDITION

2025 SUPPLEMENT

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P. 166. Add to the end of Note 5's carryover paragraph:

The Line 5 controversy is procedurally complex. Michigan has attempted to revoke the Enbridge easement for years, claiming continuation of the pipeline created an unreasonable risk of a catastrophic oil spill and consequent environmental damage, citing, among other sources, the state's public trust doctrine. The state claimed the easement was invalid since its conception, since it failed to acknowledge the existence of the doctrine, and that the easement was inconsistent with the public's rights to the Great Lakes and the state's obligation to protect those rights.

Enbridge responded to the state's claims by attempting to remove the case to federal court, asserting that: 1) the federal Pipeline Safety Act's safety standards preempted state public trust law; and 2) the state's easement revocation was inconsistent with the Constitution's interstate and foreign commerce clauses. The federal district court dismissed the state's claim that the suit was barred by the state's sovereign immunity under the 11th amendment because the Enbridge case fell within the so-called *Ex parte Young* exception to 11th amendment immunity.

In March 2025, the Sixth Circuit affirmed the lower court's ruling in *Enbridge v. Whitmer*, No. 24-1608 (6th Cir. April 27, 2025) and rejected the state's claim that Enbridge's suit was barred by the state's sovereign immunity under the 11th amendment, since it sought only prospective injunctive relief, consistent with the *Ex Parte Young* exception, and did not threaten the state's ownership or regulatory control.
But in 2024, in *Enbridge v. Nessle,* No. 23-1671 (6th Cir. June 17, 2024), the Sixth Circuit reversed a lower court decision and ruled against Enbridge's effort to remove the case to federal court because its petition was untimely filed. So, Enbridge's suit may proceed under the *Whitmer* decision, but only in state court according to *Nessel.* However, Enbridge successfully petitioned the U.S. Supreme Court, so the Court will apparently decide whether the state's case against Enbridge will proceed in federal or state court. *Enbridge v. Nessel,* No. 24-783 (June 30, 2025). The intervention of the Court will probably ensure that the pipeline's fate will not be decided before the next Michigan gubernatorial election.

P. 166. Add to end of Note 5:

The Bad River Band successful suit in *Bad River Band v. Enbridge,* No. 19-cv-602-wmc (W.D. Wisc. June 16, 2023), has been appealed to the 6th Circuit by all parties. Meanwhile, Enbridge proposed a 41-mile reroute of the pipeline around the reservation,

at an estimated cost of $450 million, that the tribe and environmental groups oppose. The state issued permits in late 2024. A required federal permit from the U.S. Army Corps of Engineers is pending as of this writing. Public hearings on the reroute proposal have drawn significant opposition, with over 150,000 comments against issuance of the Corps permit, compared to 14,000 in favor.

P. 351. Add a second paragraph to note 7:

The case, which resulted from the 2016 closure of the plantation, produced an extensive, 67-page opinion, which the court held that the Commission's granting of several surface water use permits conflicted with its constitutional and statutory directives to restore instream flows to the extent practicable and to justify its decisions with findings of fact and conclusions of law. The court faulted the Commission for failing to ensure that the water allocations were based on actual water needs or to satisfy *Waihole*'s requirement that Commission decisions exhibit the "level of openness, diligence, and foresight required where vital public trust resources like water are at stake." *Id.* at 1182.

The court supplied a veritable treatise on the PTD's application to water resources, reiterating that "[t]he public trust doctrine applies to all water resources without exception or distinction," imposing duties to maintain water resources in their natural state; protect domestic water supplies, including drinking water; preserve and restore traditional and customary Native Hawaiian water rights; and respect water rights reserved by the state water code. *Id.* at 1197, citing *Waihole*. According to the unanimous court, "[t]he public trust doctrine is a dual concept of sovereign right and responsibility," including an affirmative duty "to take the public trust into account in the planning and allocation of water resources, and to protect public trust resources whenever feasible." *Id.* at 1197-98. The court clarified that fulfilling trust duties was a constitutionally imposed duty requiring the weighing of public and private uses to ensure a proper balance that protects the public trust and its foundational principles. This balancing demands "a higher level of scrutiny" when assessing private commercial uses. *Id.* at 1198. The court announced that "[u]nder no circumstances . . . do[es] the constitution or [the water code] allow the Commission to grant permit applications with minimal scrutiny." *Id.* at 1201.

The Commission had, according to the court, a "constitutional and statutory duty" to restore the Maui streamflows to the extent practicable. *Id.* The court criticized the Commission for failing to explain why it retained the status quo for inseam flows in the wake of the closed sugar operations without examining whether additional flows were "practicable and in the public interest," in light of its duty to make decisions with "openness, diligence, and foresight commensurate with the high priority these right command under the laws of our state." *Id.* 1203. Without specific findings about the

feasibility of practicable restoration, the court stated that "the Commission's action appears to be the result of a "passive failure" to take the initiative to protect the public trust" in the wake of the plantation's closure. *Id.* at 1204-05. In addition, the court also faulted the Commission for failing to satisfy its constitutional duty "to preserve and protect traditional and customary native Hawaiian rights to the extent feasible." *Id.* at 1207. The decision set aside the permit decisions and remanded the case to the Commission.

P. 356. Add a new note 7:

The Great Salt Lake, the largest saline lake in North America and the eighth largest terminal lake in the world, had by 2022 lost roughly 73% of its water and 60% of its surface area, due largely to municipal and agricultural diversions from its tributary streams. The decline caused serious ecological, economic, and health damage, threatening the lake's brine shrimp fishery, causing serious airborne dust pollution, and loss of access to the lake for navigation. The decline even harmed the local ski industry, since the evaporation from the lake increased annual snowfall by 5-10%.

In *Utah Physicians for a Healthy Environment v. Utah Dept of Natural Resources,* Case No. 230906637 *(*Utah, March 27, 2025*)*, a constitutional challenge to the dewatering of the lake, a Utah district court refused the state's motions to dismiss the case. The court concluded that the state's public trust doctrine included the Great Salt Lake and its submerged lands, imposing a fiduciary duty to preserve and protect the lake from substantial impairment for navigation, commerce, fishing, and recreational purposes. The court decided that physicians and their environmental co-plaintiffs had standing to claim that the state had violated its trustee duties by failing to take feasible steps to protect the waters of the lake and preserve them for trust purposes. The plaintiffs asked the court to order the state to identify and implement feasible actions necessary to maintain a minimum lake level and to exercise continuous supervision to modify water allocations that are inconsistent with the restoration and maintenance of the lake.

The state denied any legal obligation to protect and preserve the lake, arguing that the Utah constitution established a trust only for submerged lands, not for the overlying waters. The court rejected this defense as inconsistent with *Coleman v. Utah State Land Bd.,* 795 P.2d 622 (Utah 1990). But the court also indicated that the plaintiffs' request for a directive that the state review and modify any diversions from the Great Salt Lake watershed "may violate the political question doctrine." And although the court apparently decided that setting a minimum lake level was not an unreviewable political question, it declined to set a specific lake level "at this juncture." (case, at n. 32)

Despite avoiding injunctive relief, the Utah court declared that explaining the contours of the state's public trust doctrine--in what the court said was "a limited declaratory judgment"--was not a political question beyond the court's justiciability. The court described the public trust doctrine as "an inherent attribute of sovereignty that predates Utah statehood, is firmly established in Utah common law, and is harmonious with the Utah Constitution." *Id.* at 17 (slip op.), stating that if a court determined that the doctrine imposed a legal duty to act, it could "instruct the trustee on its duties and determine whether those duties had been breached" and rejected any claim that there are no "judicially management standards" to supervise the state's management duties *Id.* & n. 40. These standards, the court suggested, include "the extensive public trust doctrine case law and the whole body of law setting forth standards applicable to trustees." *Id.* at 18. The court cited an Iowa case to the effect that the origin of the doctrine lay in its protection of navigable waters from "effective alienation through pollution." *Id.* at 18, citing *Iowa Citizens for Community Improvement v. Iowa,* 962 N.W.2d 780, 805 (Iowa 2021) (Appel, J., dissenting).

Judge Scott's opinion proceeded to supply an extensive treatise on the origins and contemporary meaning of the public trust and equal footing doctrines, the state public trust doctrine, including finding that "Utah's prior appropriation doctrine is not hostile to the public trust doctrine or fundamentally inconsistent with it." *Id.* at 29. She described the public trust doctrine as a "fundamental societal mandate to preserve navigable waters for future generations, id. at 40, explaining the origin and scope of the public trust doctrine in the following terms:

> [T]he public trust doctrine is a longstanding doctrine of public rights and governmental duties to ensure access to, and protection of, important trust resources like navigable waters and submerged lands. These public rights and governmental duties are inherent in sovereignty. They may be recognized in constitutions and statutes, but they are not created by them. Thus, while states may expand the public trust doctrine--and many have done so--a state cannot limit it, whether in a constitution, statute, case, or otherwise. Indeed, the court has been unable to find any persuasive authority for [the state's] position that [it] can excise navigable waters from the public trust. But even if it could, the court is not persuaded that Utah has done so. Finally, the court is not persuaded that Utah's prior appropriation doctrine is hostile to the public trust doctrine or fundamentally incompatible with the State's duties as trustee of Utah's public trust, which includes the waters of the Great Salt Lake.

Id. at 24-25.

Although the court suggested that the doctrine might not require "mandatory curtailments of perfected water rights," it explained that it neither requires the exclusion of navigable waters from the public trust nor "excuse[s]" the State from preserving and protecting them." *Id.* In particular, the state must 1) avoid taking actions that will substantially impair public uses in navigable waters, and 2) take feasible steps to restore the public trust when it has been impaired. *Id.* at 42. Although conceding that the state maintains considerable discretion in determining how best to protect and restore trust resources like the Great Salt Lake, the court announced that "the State must always fulfill its duties of loyalty, impartiality, and prudent administration." *Id.* at 42. Although the court did not elaborate as to how the state can fulfill these protective trust responsibilities without reviewing and modifying upstream diversions that are largely the cause of the Great Salt Lake's current state, the decision did suggest that the state "affirmatively investigat[e] and eliminat[e] wasteful uses of water and expand[] and implement[] feasible measures identified by the Great Salt Lake Strike Team." *Id.* at 46. Presumably, the resolution of this issue will be at issue in fact-finding by the trial court.

A law professors' amicus brief in the case is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5024147.

P. 539. Add a new note 2.a:

In 2022, a dozen Virginia youth filed a constitutional climate lawsuit against the state, charging that Virginia's historic and ongoing permitting of fossil fuels contributes to the climate crisis, violating the youth's constitutional rights. In *Layla H v. Commonwealth of Virginia,* 81 Va. App. 116 (Va. Ct. App. 2025) , the plaintiffs claimed that the state violated its public trust duty by continuing to rely on fossil fuels as its main energy source, exacerbating climate change by polluting the atmosphere with excessive greenhouse gas emissions.

A Virginia trial court dismissed the case on sovereign immunity grounds, and the Virginia Court of Appeals affirmed, although on standing grounds. The appellate court concluded that the youth plaintiffs failed to establish "the necessary particularized injury" caused by the state, nor that they "would receive a tangible benefit simply from a judgment declaring unconstitutional portions of the Virginia Gas and Oil Act." Va. Code Ann. § 45.2-1600 et seq. (2025).

The Virginia Supreme Court denied review, stating that there was no reversible error in the lower court, ignoring amicus briefs filed by the Virginia Clinicians for Climate Act and 21 law professors. The law professors' brief, which emphasized the state's duty

to take action in light of the inherent nature of the public trust doctrine, is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5014737.

P. 510. Add a new Note 4.a:

A coalition of environmental, indigenous, youth, and neighboring plaintiffs filed suit against the state of New Mexico for an alleged failure to adequately prevent pollution and environmental damage from oil and gas pollution. Since 2010, oil production in the state's Permian Basin, one of the largest oilfields in the world, has increased nearly 10-fold, producing significant air, water and climate pollution. The plaintiffs principally alleged that state officials violated a "pollution control clause" added to the state's constitution a half-century ago, which states that:

> "The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people."

The plaintiffs claimed that the clause gave them a right to a safe and clean environment, which the state had violated by its failure to curb oil and gas production pollution.

A lower court denied the state's motions to dismiss, finding the plaintiffs had a cognizable claim for which relief could be granted. However, the New Mexico Court of Appeals, in *Atencio v. State,* No. A-1-CA-42006 (N.M. Ct. App. June 3, 2025), reversed, ruling that the relief requested by the plaintiffs under the pollution control clause would violate separation of powers and raised a nonjusticiable political question. The court decided that the plaintiffs consequently lacked standing, since the provision created no individualized rights but was only a general directive to the legislature to achieve "adequate" pollution control while fulfilling the constitutional directive to develop the state's natural resources. The court also rejected due process and equal protection claims. The plaintiffs have vowed to appeal to the New Mexico Supreme Court.

P. 529. Add a new note 7:

In *Lighthiser v. Trump,* following the successful *Montana v. Held* decision (p. 523), youth plaintiffs from across the U.S., but primarily from Montana, sued the Trump administration challenging some of its executive orders. The plaintiffs alleged that Executive Order 14154: "Unleashing American Energy," 90 Fed. Reg 8353 (Jan. 20,

2025)), was unconstitutional because the 5th amendment prohibits the deprivation of life and health without due process. Such a deprivation, they claimed, requires the government to meet strict scrutiny, demonstrating a compelling state interest. The plaintiffs maintained that there is no compelling reason to "unleash" energy in a way that deprives them of their rights to life and health.

The plaintiffs also argued that Trump administration Executive Orders 14156, "Declaring a National Energy Emergency," 90 Fed. Reg. 8433 (Jan 29, 2025)) and 14261, "Reinvigorating America's Beautiful Clean Coal Industry and Amending Executive Order 14241," 90 Fed. Reg.15517 (April 8, 2025)) violated Article I of the Constitution because Congress authorized the Environmental Protection Agency (EPA) to promulgate regulations to abate pollution and protect human health and the environment, and the executive orders' deregulatory and polluting objectives conflict with that those statutory directives. The plaintiffs claimed that the executive branch lacks the authority to expand or contract the scope of EPA jurisdiction; only Congress may do so.

P. 596. Add a new Note 5.a:

In 2008 Ecuador became the first country in the world to recognize nature as a rights-bearing entity, accomplishing this through a constitutional referendum. Article 73 of Ecuador's Constitution obliges the state to apply preventive and restrictive measures against activities that could lead to species extinction, ecosystem destruction, or disruption of natural cycles. In 2021, the Constitutional Court delivered a landmark ruling commonly known as the "Los Cedros Decision." Constitutional Court of Ecuador, Ruling No. 1149-19-JP/21 (Nov. 10 2021). The court held that mining permits for exploration in the Los Cedros Protected Forest, an area celebrated for its biodiversity and ecological sensitivity, violated the constitutional rights of Ecuadorian citizens and of nature itself and ordered the permits annulled. This decision brought the Rights of Nature in Ecuador from an abstract ideal into a binding legal mandate. *See* Ecojurisprudence Monitor, *Ecuador Court Case on Rights of Nature Violations from Mining in the Los Cedros Protected Forest,* https://ecojurisprudence.org/initiatives/los-cedros/ (2025).

P. 654, Add a new note 7.a:

The Eco-Jurisprudence Monitor (available at: www.ecojurisprudence.org) recognizes 170 eco-jurisprudential initiatives in the United States. These initiatives are largely modeled after successful initiatives abroad, such as New Zealand's recognition of the rights of the Whanganui River and Colombia's recognition of the rights of the Atrato River.

The Whanganui River is culturally, spiritually, and ecologically significant to the Maori people and the local ecosystem. In 2017 the river became the first river to gain legal personhood. The river has two “guardians” – one from the government of New Zealand and another from the Whanganui iwi people – that jointly protect the river’s interests. These include prohibiting activities that could potentially harm the river including mining and gravel extraction. Because mining rights along the river are subject to the river guardians’ consent, the framework works as a mechanism for pausing or preventing extractive industry.