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Tortious Interference with Public Trust

ABSTRACT

The public trust doctrine in America derives from common law, and each new state became the trustee following independence. The public trust doctrine gives the state the right to sue for natural resource damage, among other things. To prevail, the state need show only (1) a protectable public trust interest, (2) unreasonable interference, and (3) a nexus between that interference and a loss to that protected interest. The case law, however, reflects confusion or imprecision about a number of matters. First, courts and advocates often talk about the trustee proving, say, a public nuisance cause of action. My argument is that proof of public nuisance, or other common law causes, goes to demonstrating—among other proofs—the unreasonableness of the interference. Tortious interference with the public trust is neither derivative to nor dependent on other causes of action. Second, courts

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and advocates often comingle the public trust doctrine and the distinct parens patriae *doctrine, which are different. Under* parens patriae*, the state proves a separate tort claim, such as public nuisance or trespass. Public trust is a standalone claim. Third, although courts understand that the public trust doctrine evolves in light of the changing public interest, they sometimes focus on what has been done in prior cases instead of what needs to be done now to maintain the dynamic nature of the public trust.*

I
INTRODUCTION

Tortious inference with the public trust has always been actionable under state law as a substantive right of the state trustee in its fiduciary capacity suing on behalf of the public for injury or impairment to natural resources belonging to the people.[1] That right arose "when the [American] revolution took place," and the thirteen colonies won their independence, thus making King George transfer the trusteeship to the thirteen colonies at the conclusion of the Revolutionary War, not upon ratification of the Constitution.[2]

Two things are tricky with the public trust doctrine, and that is what this Article addresses. First, what is the subject matter of the public trust and how should it evolve? Second, what tools are available to the trustee to protect the public trust? Most state public trust doctrines at least provide that the tidelands and lands beneath tidal and navigable waters are held in trust by the state to promote the public interest.[3] Navigation, commerce, and fishing were originally seen as serving the public interest.[4] But a lot has changed since colonial times, and our conception of the public interest has evolved to include values like

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1 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, 111 (2005) [hereinafter Kanner, *Public Trust*].

2 Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842). This is true of the original thirteen colonies. Later-admitted states received title to land from the federal government but should enjoy "equal footing" to the original thirteen states. States own title to the riverbed of their navigable waters as "an essential attribute of sovereignty." Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 283 (1997) (quoting Utah Div. of State Lands v. United States, 482 U.S. 193, 195 (1987)). The source of title determines the law that governs the scope of that title. *See* United States v. Oregon, 295 U.S. 1, 14 (1935).

3 *See, e.g.*, Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 55 (N.J. 1972).

4 Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 119 (2005) (history of public trust doctrine); Barton H. Thompson Jr., *The Public Trust Doctrine: A Conservative Reconstruction & Defense*, 15 SE. ENV'T L.J. 47, 67–68 (2006).

recreation, preservation, and restoration of natural resources. The public trust doctrine protects the public interest even in the face of private property rights:

> The law we are asked to interpret in this case—the public trust doctrine—derives from the English common law principle that all of the land covered by tidal waters belongs to the sovereign held in trust for the people to use. That common law principle, in turn, has roots in Roman jurisprudence, which held that "[b]y the law of nature[,] . . . the air, running water, the sea, and consequently the shores of the sea," were "common to mankind." . . . No one was forbidden access to the sea, and everyone could use the seashore "to dry his nets there, and haul them from the sea. . . ." The seashore was not private property, but "subject to the same law as the sea itself, and the sand or ground beneath it." In *Arnold v. Mundy*, the first case to affirm and reformulate the public trust doctrine in New Jersey, the Court explained that upon the Colonies' victory in the Revolutionary War, the English sovereign's rights to the tidal waters "became vested in the people of New Jersey as the sovereign of the country, and are now in their hands."[5] *Arnold*, addressed the plaintiff's claim to an oyster bed in the Raritan River adjacent to his farm in Perth Amboy. Chief Justice Kirkpatrick found that the land on which water ebbs and flows, including the land between the high and low water, belongs not to the owners of the lands adjacent to the water, but to the State, "to be held, protected, and regulated for the common use and benefit."[6]

This is an exciting time in the development of the public trust doctrine. Courts are more frequently recognizing a standalone public trust action[7] or natural resource damages action,[8] empowering trustees to protect the public interest by undoing decades of pollution. These recent developments have built on earlier cases[9] and portend future developments.[10]

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5 Arnold v. Mundy, 6 N.J.L. 1, 78 (1821).

6 *Raleigh Ave. Beach Ass'n*, 879 A.2d at 119.

7 State v. Hess Corp., 20 A.3d 212, 217, 221 (N.H. 2011); Rhode Island v. Atlantic Richfield, 357 F. Supp. 3d 129, 144 (D.R.I. 2018) (MTBE); N.J. Dep't Env't Prot. v. Deull Fuel, No. ATL-L-1839-18 (N.J. Super. Law Div. Aug. 8, 2019); N.J. Dep't Env't Prot. v. ExxonMobil, No. GLO-L-000297-19 (N.J. Super. Ct. Ch. Div. Feb. 14, 2020) (PCB); State v. Monsanto, No. 18-cv-00540 at 17 (D. Or. 2017) (PCB).

8 State v. 3M, Dkt. No. 547-6-19 Cncv, 2 (Chittenden Cnty. Super. Ct., May 28, 2020) (Order, Toor, J.) (PFAS).

9 *See generally In re* Steuart Transp. Co., 495 F. Supp. 38 (E.D. Va. 1980) (migratory birds); State v. Gillette, 621 P.2d 764 (Wash. Ct. App. 1980) (fisheries habitat); State v. City of Bowling Green, 313 N.E.2d 409 (Ohio 1974); Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972); State v. Amerada Hess Corp., 350 F. Supp. 1060 (D. Md. 1972).

10 WILLIAM H. RODGERS, ENVIRONMENTAL LAW (HORNBOOK) 176 (1977 & Supp. 1984) (stating that the public trust "can be invoked offensively by the government as in a suit to collect damages to trust property").

II
PUBLIC TRUST

Most courts today acknowledge that the public trust must be allowed to evolve to meet changing conceptions of the public interest,[11] such as recreation,[12] ecological management and restoration,[13] and environmental justice.[14] States have the right to protect and manage the water,[15] air, and land[16] over which they are trustees to advance the public interest. The doctrine itself "imposes duties on government[,] instills certain inalienable rights in the people[, and] . . . constitutes the sovereign legal obligation that facilitates the reproduction and survival of our society. . . ."[17] Under the public trust doctrine, citizens stand as beneficiaries, holding public property interests in these essential natural resources. The public trust significantly demarcates a society of "citizens rather than of serfs."[18] Today, the public interest is generally seen to encompass a broader range of interests expanding the trustee's duties.[19] The tools available to protect the public trust should be clarified and improved. In states with a narrower judicial definition of the public trust doctrine, the state as trustee often sues as *parens patriae* in its quasi-sovereign capacity to protect public health, safety, and the environment.[20] Other states prefer to sue directly for interference with

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11 State v. Cent. Vt. Railway, 571 A.2d 1128, 1130 (Vt. 1989).

12 Raleigh Ave. Beach Ass'n v. Atlantis Beach Club Inc., 879 A.2d 112, 119 (N.J. 2005).

13 Georgia v. Tenn. Copper, 206 U.S. 230, 237–38 (1907).

14 MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECONOMICAL AGE xviii (2013).

15 State v. Hess Corp., 20 A.3d 212, 217 (N.J. 2011); State v. Amerada Hess Corp., 350 F. Supp. 1060, 1067 (D. Md. 1972).

16 Georgia v. Tenn. Copper, 206 U.S. 230, 237 (1907) ("the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.").

17 Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281, 283 (2014).

18 Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1970).

19 *See* Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54 (N.J. 1972) (public interest extends to recreational activities).

20 Kanner, *Public Trust*, *supra* note 1 at 111–12. The states have also developed various protections for public use of waters. These use protections often cover waters that are not owned by the state under the state's public trust doctrine. *See, e.g.*, Brosnan v. Gage, 133 N.E. 622, 624 (Mass. 1921) (public has right of passage for commercial and pleasure craft on nontidal navigable streams not subject to state ownership); Bos. Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 359–60 (Mass. 1979) (public can access private land between low-tide and high-tide line, even though private property extends to low-tide marker); Pierson v. Coffey, 706 S.W.2d 409, 412 (Ky. Ct. App. 1985) (public has right to

the public trust.[21] States may even sue in their proprietary capacity where they own the natural resource, such as water bottoms. Although there are clear differences among suits to protect the public trust as *parens patriae* or in a proprietary capacity, advocates and judges often muddle their reasoning, comingling, say, public trust language and *parens patriae* language. Because there are limits to the reach of *parens patriae*, it is important to skip the verbiage and focus on the substantive content of common law public trust claims.[22]

The term "public trust" refers to a fundamental understanding that "we the people" share equally in certain natural resources, that private property rights are limited by the public's interest in certain natural resources, that government must protect the public as a fiduciary, and that no legislature may legitimately abdicate its core sovereign responsibility by undermining the public interest in natural resources.[23]

In a constitutional system of checks and balances, the public trust is among the fundamental checks on government. In a nonenvironmental case, *Stone v. Mississippi*, the Supreme Court held the following:

> No legislature can bargain away the public health or the public morals . . . The supervision of both these subjects of governmental power is continuing in its nature . . . [T]he power of governing is a trust committed by the people to the government, no part of which can be granted away.[24]

The public trust doctrine prohibits complete privatization of sovereign resources because privatization would constitute an impermissible transfer of governmental power into private hands, wrongfully limiting the powers of later legislatures and the rights of the public to safeguard crucial societal interests.

The public trust doctrine also focuses on the government's obligation to protect. Nonalienation is only one aspect of this—as is the

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commercial and recreational boating and temporary anchorage on private riverbeds); Pointe, LLC v. Lake Mgmt. Ass'n, Inc., 50 S.W.3d 471, 476 (Tenn. Ct. App. 2000) (public has right to use navigable rivers, even where the riverbed may be privately owned because the river is not necessary for commerce). In these cases, a *parens patriae* suit might be warranted.

21 State v. Hess Corp., 20 A.3d 212, 217, 221 (N.H. 2011).

22 *See* Kanner, *Public Trust*, *supra* note 1 at 100–01. Some state constitutions explicitly embrace the public trust. *See, e.g.*, PA. CONST. art. I, § 27; MONT. CONST. art. IX, § 1; HAW. CONST. art. XI, § 1; ILL. CONST. art. XI, § 1.

23 *See* Kanner, *Public Trust, supra* note 1 at 76–77.

24 101 U.S. 814, 819–20 (1879). *See also* Butchers' Union v. Crescent City, 111 U.S. 746, 766 (1884) (Field, J., concurring).

state's obligation to protect and, if necessary, restore the public trust.[25] "The State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public . . . are protected, and to seek compensation for any diminution in that trust corpus."[26] This is crucial because the trustee cannot have a duty without the ability to discharge that duty by litigation for damages or equitable relief. The duties owed by a public trustee to protect the public trust are generally analogous to those of a private trustee.[27] For example, courts have adopted § 174 of the *Restatement (Second) of Trusts*, which states that "[t]he fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care."[28] The comments to § 174 of the *Restatement (Second) of Trusts* clarify that if the trustees were selected because they have specialized knowledge or training, they will be held to that standard of skill and care: "[I]f the trustee procured his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is liable for a loss resulting from the failure to use such skill as he has."[29] Trustees, therefore, have the authority and duty to protect the public trust from tortious interference and to protect the State's natural resources for the benefits of its citizens.[30] In New Jersey, a suit in the State's capacity as *parens patriae* and a suit in its capacity as public trustee of the State's

25 Tortious interference with the public trust has suffered from courts and commentators confusing a public trust action with a *parens patriae* one. Kanner, *Public Trust*, *supra* note 1, at 59–62.

26 N.J. Dep't of Env't Prot. v. Jersey Cent. Power & Light Co., 308 A.2d 671, 674 (N.J. Super. Law Div. 1973), *aff'd*, 336 A.2d 750 (N.J. Super. Ct. App. Div. 1975), *rev'd*, 351 A.2d 337 (N.J. 1976); *see also* Hackensack Meadowlands Dev. Comm'n v. Mun. Sanitary Landfill Auth., 348 A.2d 505, 518 (N.J. 1975), *vacated* 430 U.S. 141 (1977). ("In this area [of environmental concern] the state has not only a right to protect its own resources, but also has the duty to do so, in the interests of its citizens, as well as others.").

27 Times of Trenton Pub. Corp. v. Lafayette Yard Cmty. Dev. Corp., 846 A.2d 659, 667, (N.J. Super. Ct. App. Div. 2004), *aff'd*, Times of Trenton Pub. Corp. v. Lafayette Yard Cmty. Dev. Corp., 874 A.2d 1064 (N.J. 2005).

28 F.G. v. MacDonell, 696 A.2d 697, 704 (N.J. 1997) (citing RESTATEMENT (SECOND) OF TRUSTS § 174 (1959)).

29 RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

30 *See* Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985) ("Under the common law of trusts, . . . trustees are understood to have all 'such powers as are necessary or appropriate for the carrying out of the purposes of the trust.'" (quoting 3 A. SCOTT, LAW OF TRUSTS § 186, at 1496 (3d ed. 1967))); *See* GEORGE G. BOGERT, BOGERT ON TRUSTS AND TRUSTEES § 582 (2011); *see also* City of Milwaukee v. State, 214 N.W. 820, 830 (Wis. 1927).

groundwaters generally afford the State identical remedies.[31] In effect, New Jersey already recognizes a standalone public trust claim, including the protection of the public to have meaningful access to the state's beaches.[32]

There are a number of reasons favoring the more articulated use and development of tortious interference with the public trust. First, *parens patriae* actions for public nuisance involve a balancing of interests, which often fails to give due weight to the public's interest or *jus publicum*, trumping private interests or the *jus privatum*. Second, these same public nuisance claims do not compensate the public trust for loss of use of the damaged property and the delta between abatement and restoration to pre-nuisance conditions. In multi-defendant cases, a series of abatement orders may produce a patchwork of fixes as opposed to an appropriate trustee-implemented master plan.[33] Third, a minority of courts have not favored public nuisance claims against a product manufacturer.[34] Fourth, a minority of courts have failed to allow the state to sue for trespass despite the *jus publicum* because a *parens patriae* plaintiff does not have a sufficient property interest to sustain a trespass action for natural resources which belong to everyone. The argument generally is that the trustee lacks a right to exclusive possession of the resource which belongs to everyone.[35]

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31 N.J. Dep't of Env't Prot. v. Jersey Cent. Power & Light Co., 336 A.2d 750, 759 (N.J. Super. Ct. App. Div. 1975) (rejecting "artificial differences between the State's role as public trustee and its role under the fiction of *parens patriae*"), *rev'd on other grounds*, 351 A.2d 337 (N.J. 1976). This does not appear to be the view of the majority of states.

32 *See, e.g.*, Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 119 (N.J. 2005).

33 New Jersey has recognized that an award of money damages is appropriate in natural resource damages public nuisance cases, N.J. Dep't Env't Prot. v. Hess, No. A-2893-18T2, 2020 WL 1683180, at *6 (N.J. Super. Ct. App. Div. Apr. 7, 2020). Vermont has adopted this approach. State of Vt. v. 3M Co., No. 547-6-19, slip op. at 14–15 (Vt. Super. Ct. May 8, 2020) (order granting 3M's motion to dismiss) (regarding PFAS contamination).

34 *3M Co.*, No. 547-6-19 at 6–7.

35 *See, e.g.*, N.J. Dep't of Env't. Prot. v. Deull Fuel Co., No. ATL-L-1839-18 (N.J. Super. Ct. Law Div. Aug. 8, 2019) (denying defendants' motion to dismiss trespass claim on the basis that the broad application of the public trust doctrine trumps the exclusivity element of a trespass claim), *c.f.* N.J. Dep't. of Env't. Prot. v. ExxonMobil Corp., No. UNN-L-3026-04, 2008 WL 4177038 (N.J. Super. Ct. Law Div., Aug. 29, 2008) (rejecting a trespass claim because of lack of exclusive possession). From an economic point of view, this encourages pollution of public resources where such tortious invasions are not actionable as trespass and not actionable for loss of use under a public trust theory. In a standalone public trust claim, the *jus publicum* of the people would count as a protected interest allowing the trustee to act to deter and remedy tortious invasions of the public trust. The standalone public trust tort could bring a trespass-like action including an undoing of the invasion and resulting damages. This is a superior approach to protecting the public trust.

However, it is well settled that in other contexts a trustee may sue for trespass to property owned by trust beneficiaries.[36] Trespass which tolerates no invasion of interests may be a better fit for public trustees than public nuisance. Fifth, *parens patriae* causes of action lack the evolutionary purpose of public trust cases as set forth in cases like *Illinois Central*. Sixth, remedies that are suited to private individuals may not work for natural resources protected by the public trust. For example, public nuisance is often limited to abating the nuisance, though some courts have moved away from this, recognizing that the trustee can only undo damages to scarce natural resources with money to pay for natural resource damages. We are seeing more *parens patriae* cases attempting to invoke the public trust doctrine to address these and related concerns.[37] However, both *parens patriae* and tortious interference with public trust can and should also evolve independently.

The public trust means the *jus publicum* trumps the *jus privatum*. This was the case in *Illinois Central*. Likewise, in *Just v. Marinette County*, the Wisconsin Supreme Court upheld wetland regulations that diminished property values under the public trust doctrine without finding a takings, meaning the *jus privatum* takes subject to the *jus publicum*:

> This case causes us to re-examine the concepts of public benefit in contrast to public harm and the scope of the owner's right to use of his property. In the instant case we have a restriction on the use of a citizens' property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizens' property. We start with the premise that lakes and rivers in their natural state are unpolluted and the pollution which now exists is man-made. The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. This is not, in a legal sense, a gain or a securing of a benefit by the maintaining of the natural status quo of the environment. What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty. Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the

36 *See generally Deull Fuel Co*., No. ATL-L-1839-18.

37 *See, e.g.*, State v. Hess Corp., 20 A.3d 212, 217 (N.H. 2011).

> balance of nature and are essential to the purity of the water in our lakes and streams.[38]

Cases like *Just v. Marinette County*, and others,[39] remind us that the public trust requires us to look at the positives to the trust and its beneficiaries, not just the negatives, as is often the case in some *parens patriae* litigation.[40] Thus, for example, a public trust approach allows for loss of use damages and restoration for damaged resources both to compensate the public and to incentivize the tortfeasor to restore resources as quickly as possible.[41]

Parens patriae often focuses on loss and requires "an injury to a 'quasi sovereign' interest" (an interest different from the interest of private parties), and that the injury is to a "substantial segment of the population."[42] *Alfred L. Snapp & Son v. Puerto Rico*, was decided as a *parens patriae* case.[43] The underlying issue arose in the labor context but does a good job of explaining the concept:

> *Parens patriae* means literally "parent of the country." The *parens patriae* action has its roots in the common-law concept of the "royal prerogative." The royal prerogative included the right or responsibility to take care of persons who "are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property." At a fairly early date, American courts recognized this common-law concept, but now in the form of a legislative prerogative: "This prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves."[44]

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38 Just v. Marinette County, 201 N.W. 2d 761, 767–68 (1972). However, the court veered into an abbreviated discussion of its quasi-sovereign interests before returning to a public trust analysis. *Id.*

39 *See* Nat'l Ass'n of Home Builders v. N.J. Dep't Env't Prot., 64 F. Supp 2d 354 (D.N.J. 1999).

40 *See, e.g.*, *In re* Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980); Nat'l Ass'n of Home Builders v. N.J. Dep't Env't Prot., 64 F. Supp. 2d 354 (D.N.J. 1999).

41 N.J. Dep't of Env't Prot. v. ExxonMobil, 923 A.2d 345, 353–54 (N.J. Super. Ct. App. Div. 2007).

42 Alfred L. Snapp & Sons, Inc. v. Puerto Rico, 458 U.S. 592 (1982); State v. Hess Corp., 20 A.3d 212, 217 (N.H. 2011); State v. City of Dover, 891 A.2d 524, 529 (N.H. 2006); Rhode Island v. Atlantic Richfield Co., 357 F. Supp. 3d 129, 136 (D. R.I. 2018); Quapaw Tribe of Okla. v. Blue Tee Corp., 653 F. Supp. 2d 1166, 1178 (N.D. Okla. 2009).

43 *Alfred L. Snapp & Sons, Inc.*, 458 U.S. at 607.

44 *Id.* (footnotes omitted) (citing Mormon Church v. United States, 136 U.S. 1, 57 (1890)).

Tortious interference with the public trust action is a stand-alone claim tied to government's fiduciary duties regarding public resources.[45] *Parens patriae* is a tool of the state's police power. The *parens patriae* claim gives the state standing to protect its quasi-sovereign interests by prosecuting the nongovernmental rights of its citizens under various state causes of action, such as public nuisance,[46] strict liability,[47] trespass,[48] and unjust enrichment,[49] among others.[50] In some cases, the state may sue under the public trust and as *parens patriae*[51] for damages and unjust enrichment.[52]

In re Matter of Steuart Transportation likewise relied on both public trust and *parens patriae* language to find state and federal rights to sue for the loss of migrating waterfowl resulting from an oil spill while explaining their differences:

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45 *Hess Corp.*, 20 A.3d at 216–17; State v. City of Bowling Green, 313 N.E.2d 409, 411 (Ohio 1974); Md. Dep't of Nat. Res. v. Amerada Hess Corp., 350 F. Supp. 1066 (D. Md. 1972); N.J. Dept. of Env't. Prot. v. Deull Fuel, No. ATL-L-1839-18 (N.J. Super. L. Aug. 8, 2019) (basing trespass on public trust).

46 *See*, *e.g.*, N.J. Dept. Env't. Prot. v. Hess Corp., 2020 WL 1683180, at *6 (N.J. Super. Ct. App. Div. April 7, 2020) (recognizing public nuisance and right to monetary damages for abatement).

47 *See, e.g.*, *id.* (recognizing strict liability).

48 State v. City of Dover, 891 A.2d 524, 527, 530 (N.H. 2006) (state has *parens patriae* authority to bring claims including trespass).

49 Wyandotte Trans. Co. v. U.S., 389 U.S. 191, 200–01 (1967).

50 For example, New Jersey caselaw on *parens patriae* has emphasized that a state alone is "the proper party to sue for recovery of damages to the environment," and has even rejected an earlier decision negating a state's authority to sue in trespass, because the earlier decision had improperly denied a state's "property right" in natural resources. Dept. of Env't Prot. v. Jersey Cent. Power & Light, 336 A.2d 750, 759 (N.J. Super. Ct. App. Div. 1975) (rejecting Com. v. Agway, Inc., 232 A.2d 69 (Pa. Super. Ct. 1967)), *rev'd on other grounds*, 351 A.2d 337 (1976); *accord* Lansco, Inc. v. Dept. Env't Prot., 350 A.2d 520, 524 (N.J. Super. Ct. Ch. Div. 1975) (parens patriae doctrine recognizes that a "sovereign's interest in the preservation of public resources . . . enables it to maintain an action to prevent injury thereto"), *aff'd*, 368 A.2d 363 (N.J. Super. Ct. App. Div. 1976).

51 *In re* Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980).

52 Entry Denying Defendants' Motion to Dismiss, *State v. Monsanto Co.*, No. A 1801237, slip op. (Sept. 19, 2018) (Lisa Allen, J.):

> As previously stated, Ohio's suit follows the actions brought by the States of Oregon and Washington to bring these claims in its parens patriae capacity to redress the injuries to the health and well-being of its citizens through exposure to its environment made toxic by PCBs. Monsanto accurately states that parens patriae, while recognized as the instrument that allows and instructs the State of Ohio to bringing claims against other entities to protect the rights and health of its citizens, only serves as a mechanism of standing. The public trust doctrine, however, may yet prove to stand as its own cause of action as society's needs change. *See e.g.*, State v. City of Bowling Green, 313 N.E.2d 409 (Ohio 1974); State v. Monsanto Co., No. 3:18-cv-00238 (D. Or. 2017).

> This Court is of the opinion that both of these doctrines are viable and support the State and the Federal claims for the waterfowl . . . . Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people. Likewise, under the doctrine of parens patriae, the state acts to protect a quasi-sovereign interest where no individual cause of action would lie. In the case currently before this Court, no individual citizen could seek recovery for the waterfowl, and the state certainly has a sovereign interest in preserving wildlife resources.[53]

In some cases, the trustee may "bring suit [as *parens patriae*] to protect a broader range of natural resources than the public trust doctrine because it does not require state ownership of such resources."[54] Many opinions recognize tort remedies including strict liability, nuisance, and trespass, as tools for the state or its trustee to fulfill its fiduciary duty to the public. However, these same opinions are unclear as to whether the action is based on the public trust or on a *parens patriae* theory.

Because of some overlap (in the sense of both being applicable to a given case) and some jurisprudential confusion, some courts erroneously label public trust claims as "*parens patriae*" cases, and vice versa. These courts, and other courts, seemingly improperly examine public trust cases in terms of the elements of other tort claims, such as public nuisance. Sometimes the court gets it right when the advocate may not.[55] On the other hand, as shown below, the tort of tortious interference involves an unreasonable interference with the public trust.[56] Clearly, a wrongful interference exists if defendant engaged in trespass-like conduct[57] or a public nuisance-like situation, for example, so we are not faulting that analysis; instead, we address the labeling of the underlying state claim that the court is vindicating.[58] In some cases, the label may not matter to the outcome, but it often

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53 *Id.* at 40 (citations omitted).

54 State v. Hess Corp., 20 A.3d 212, 216 (N.H. 2011) (citing New Mexico v. Gen. Elec., 467 F.3d 1223, 1243 n.30 (10th Cir. 2006)).

55 *Hess Corp.*, 20 A.3d at 217 ("Here, however, the State does not explicitly rely upon the public trust doctrine as a separate cause of action").

56 *Id.*; *In re* Steuart Transportation Co., 495 F. Supp 38, 40 (E.D. Va. 1980).

57 State of Rhode Island v. Atlantic Richfield, 357 F. Supp. 3d 129 (D.R.I. 2018); N.J. Dep't of Envtl. Prot. v. Deull Fuel Co., No. ATL-L-1839-18 (N.J. Super. Law Div. Aug. 8, 2019).

58 *Hess Corp.*, 20 A.3d at 217 (where court acknowledges the expansion of *parens patriae* standing in the context of whether damages relating to privately owned wells was available to the State).

does matter. Specifically, the elements of tortious interference do not require proof of a public nuisance, trespass, or any other tort.

III
ELEMENTS OF TORTIOUS INTERFERENCE

A. Elements

In order to show tortious interference with the public trust,[59] the State needs to show

(1) a protectable public trust interest;[60]

(2) an unreasonable interference with that interest;[61] and

(3) a reasonable likelihood that the interference caused the loss to that protected interest or nexus.[62]

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59 *Id.*

60 Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 459–460 (1892) (stating each state's public trust doctrine may vary within certain boundaries).

61 *Hess Corp.*, 20 A.3d at 216 ("To bring a successful [public trust] claim, the State must prove an unreasonable interference with the use and enjoyment of trust rights.") (citing Kanner, *Public Trust*, *supra* note 1, at 59). An interference can be unreasonable in many ways, including: (1) the interest pursued is illegitimate, or (2) the means used are inappropriate. Johnson & Johnson v. Guidant Corp., 525 F. Supp. 2d 336, 360 (S.D.N.Y. 2007). By way of analogy, and recognizing that public rights may vary between a public trust claim and a *parens patriae* action for public nuisance, Section 821B(1) of the Restatement refers us to three circumstances listed in § 821B(2), any of which may sustain a holding that an interference with a public right is unreasonable: (1) "[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience;" (2) "whether the conduct is proscribed by a statute;" or (3) "whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right." *Id.* § 821B(2)(a)–(c). The Restatement comments that these three circumstances for determining unreasonable interference:

> are not conclusive tests controlling the determination of whether an interference with a public right is unreasonable. They are listed in the disjunctive; any one may warrant a holding of unreasonableness. They also do not purport to be exclusive. Some courts have shown a tendency, for example, to treat significant interferences with recognized aesthetic values or established principles of conservation of natural resources as amounting to a public nuisance. The language of Subsection (2) is not intended to set restrictions against developments of this nature.

Id. § 821B, cmt. E.

62 N.J. Dep't Env't Prot. v. Dimant, 51 A.3d 816, 829–31 (N.J. 2012) (nexus required).

B. Protectable Public Trust Interest

In a natural resource damage case, a protectable public trust interest includes water bottoms,[63] waterfront land,[64] migratory birds,[65] fisheries habitat,[66] groundwater,[67] air, land and water,[68] coastal waters,[69] wildlife, and other natural resources by which the injured resource is no longer able to serve the everchanging public interest. Protected public trust interests continue to develop at common law and include both the defense, restoration, or enhancement of natural resources damages[70] and access to those resources.[71]

This has become particularly clear in recent cases involving the injury to natural resources caused by products like MTBE,[72] PCBs,[73] PFAS[74], and legacy pollution cases.[75] The courts focus on the substance of the interest, not necessarily its form.[76] The public interest preexisted

63 Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842) (water bottoms as part of public trust).

64 Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 389 (1892); State v. Cent. Vt. Ry., 571 A.2d 1128, 1134 (Vt. 1989).

65 *In re* Steuart Transp. Co., 495 F. Supp 38, 39 (D. Va. 1980) (such rights derive from duty owing to the people, not ownership of the resources).

66 State v. Gillette, 621 P.2d 764, 820 (Wash. Ct. App. 1980) (fiduciary obligation of trustee to seek damages for injury to trust).

67 State v. Hess, 20 A.3d 212, 216 (N.H. 2011) (public trust claim for groundwater).

68 Georgia v. Tenn. Copper Co., 206 U.S. 230, 238 (1907).

69 State Dep't Nat. Res. v. Amerada Hess Corp., 350 F. Supp 1060, 1067 (D. Md. 1972).

70 State v. 3M, Co., Dkt. No. 547-6-19 Cncv (Vt. Super. Ct., May 27, 2020) (recognizing natural resource damage cause of action).

71 *E.g.*, Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54–55 (N.J. 1972); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (ecological benefits of tidelands).

72 Rhode Island v. Atlantic Richfield Co., 357 F. Supp. 3d 129, 143–44 (D.R.I. 2018) (protecting natural resources, but as a federal court sitting in diversity, rejecting application of public trust to groundwater).

73 State v. Monsanto, No. 18-cv-00540, at 17.

74 State v. 3M Co., Dkt. No. 547-6-19 Cncv (Vt. Super. Ct., May 28, 2020); State v. 3M Co., Dkt. 216-2019-cv-00445 (N.H. Super. Ct. June 25, 2020) (Order, Nicolosi, J).

75 N.J. Dep't of Env't Prot. v. Deull Fuel Co., No. ATL-L-1839 (N.J. Super. Ct. Law Div. Aug. 8, 2019).

76 The trial court concluded that "absent an agreement that would obligate Sharp to continue doing business with Printing Mart v. Sharp Elec. Corp., 563 A.2d 31, 36 (N.J. 1989). . . , there was no basis for an intentional-interference claim." *Id.* The Supreme Court reversed, holding that although a complaint based on tortious interference must allege facts that show a protectable right such as a prospective economic or contractual relationship, "the right need not equate with that found in an enforceable contract[.]" *Id.* at 751. Conduct is considered wrongful if the defendant interfered with the public trust for the sake of appropriating its benefits. Conduct is also wrongful if the defendant acted for the purpose

and survived the creation of private property rights; the public trust may overlap and trump private property rights. The limits imposed on private property by the public trust have been the subject of numerous cases, finding in favor of the State's right to enforce the *jus publicum* without committing a taking.[77] For example, the U.S. District Court for the District of Massachusetts held that when the federal government or the State conveys public trust property to a private individual, that individual takes subject to the terms of the trust—"[t]he trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign."[78] Our analysis here focuses on natural resource damage public trust cases, but it is worth noting that the public trust extends to more than just natural resources.[79]

Part of the public trust doctrine and its protectable interests reveal how society harmonizes private property rights (*jus privatum*) and public property rights (*jus publicum*).[80] Strictly speaking, the public trust arises from the State's duty to its citizens, not traditional property law.[81] The case law clearly provides the states with the common law

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of producing the interference, or with knowledge that interference was substantially certain to occur.

77 Nat'l Ass'n of Home Builders of the U.S. v. State Dep't of Env't Prot., 64 F. Supp. 2d 354 (D.N.J. 1999), that held that (1) formerly submerged and then artificially filled in land is held subject to public right of access to use and enjoy the property, even after it was alienated to private owners, because of *jus publicum*, 64 F. Supp. 2d 354, 357–58 (D.N.J. 1999) (*citing* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984)); (2) conservation easement to use and enjoy property under public trust, *id.* at 361 n.1; (3) right of access thru private property, *id.* at 358–59. *See also* Karam v. State Dep't of Env't Prot., 705 A.2d 1221, 1228 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 723 A.2d 943 (N.J. 1999).

78 United States v. 1.58 Acres of Land, 523 F. Supp. 120, 124 (D. Mass. 1981); *contra* Sierra Club v. Andrus, 487 F. Supp. 443, 449 (D.D.C. 1980) ("To the extent that plaintiff's argument advances the proposition that defendants are charged with 'trust' duties distinguishable from their statutory duties, the Court disagrees. Rather, the Court views the statutory duties previously discussed as comprising all the responsibilities which defendants [National Park Service] must faithfully discharge.").

79 *See, e.g.*, Myers v. Alutiiq Int'l Sols., LLC, 811 F. Supp. 2d 261, 267 (D.D.C. 2011) (the United States Court of Claims has recognized that "[t]ransactions relating to the expenditure of public funds require the highest degree of public trust . . . .").

80 The *res communes* are things like air, water, and light that cannot be owned. The *res nullius* belong to no one because they were unappropriated, such as unoccupied lands or wild animals.

81 *In re* Steuart Transp. Co., 495 F. Supp. 38, 40 (D. Va. 1980) (holding that state may recover for damage to migratory birds. Such right does not derive from ownership of the resources but from a duty owing to the people); State v. Gillette, 621 P.2d 764, 820 (Wash. Ct. App. 1980) (allowing state to recover for loss of fisheries habitat even absent a statutory provision allowing recovery, saying "the state, through the Department, has the fiduciary obligation of any trustee to seek damages for injury to the object of its trust"); Toomer v.

power to protect the public trust. Each state is a trustee of its natural resources.[82] In *Phillip Petrol. Co. v. Mississippi*, the court explained, "[I]t has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[83] What is less often discussed is how to cubbyhole or name the common law theories of liability available to the states. The scope of private property rights is decided by the state, subject to the public trust, and private property is taken subject to that understanding. In *ExxonMobil*, Judge Anzaldi specifically found that public trust extended to Exxon's private property but rejected trespass theory on the "exclusive possession" issue.[84] In *Deull Fuel* Judge Mendez reached the opposite conclusion on trespass that "the public trust doctrine trumps the exclusivity element of a trespass claim":

> This responsibility to protect public lands and natural resources forms the basis of the State to take action consistent with the policy stated by the Legislature. In this court's opinion, the remedy of trespassing as outlined in Count Four of the Complaint is available to the State as it performs its fiduciary obligation to ensure the rights of the public and to prosecute claims to protect the environment. Based on the facts alleged in the Complaint, the Public Trust Doctrine trumps the exclusivity element of a trespass claim. While possessory interests are usually for individual owners themselves to protect, when the harm is as extensive to the State's natural resources as

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Witsell, 334 U.S. 385, 408 (1948) (upholding state's right "to conserve or utilize its resources on behalf of its own citizens").

Likewise, under the doctrine of *parens patriae*, the state acts to protect a quasi-sovereign interest where an individual cause of action would lie. *See, e.g.*, Hawaii v. Standard Oil Co. of Cal., 301 F. Supp. 982 (D. Haw. 1969), *rev'd on other grounds*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972).

82 As per Martin v. Waddell's Lessee, 41 U.S. 367, 419 (1842), the natural resources of the State of New Jersey, and all States, belong to the State. States further gained ownership of the water bottoms of navigable waters upon statehood and held them in trust for the people of the state (i.e., the public trust), which was upheld by, and memorialized in, case law in Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892). PPL Mont., L.L.C. v. Montana, 565 U.S. 576, 603 (2012) reiterated that "the public trust doctrine remains a matter of state law." As such, it is a state's responsibility as a trustee to protect the public trust. While there is considerable discussion around the concept of a federal trustee in the form of federal environmental agencies, there should be no question that the state's duty to protect its natural resources is far more definitive and concrete than that of a purported federal trustee. There are very real questions as to the validity and basis of a federal claim for restoration of state natural resources, despite creative attempts by the federal government to extend their jurisdiction via the commerce clause.

83 Phillips Petrol. Co. v. Mississippi, 484 U.S. 469, 475 (1988).

84 N.J. Dep't of Env't Prot. v. ExxonMobil Corp., 2008 WL 4177038 (N.J. Super. Ct. Law Div. Aug. 29, 2008).

> outlined in the Complaint, the harm is not just to the individual, but to the people of New Jersey as a whole.[85]

The *jus publicum* exists even if "the State [does] not expressly retain its rights as public trustee in the conveying instruments."[86] It follows that

> [t]itle is not synonymous with trusteeship. In *National Ass'n of Home Builders v. New Jersey Dep't of Envt. Prot.*, the court held that:
>
> > title to such 'public trust property' is subject to the public's right to use and enjoy the property, even if such property is alienated to private owners. . . This right of the public to use and enjoy such 'public trust lands' does not disappear simply because the land that was once submerged is filled in.[87]

The reality is that since the State originally holds the property in trust for the people, "[it] cannot convey to their prejudice."[88]

The U.S. Supreme Court first fully delineated the parameters of the environmental public trust doctrine in 1892 in *Illinois Central Railroad v. Illinois*.[89] In that case, the Court was asked to settle the ownership of submerged lands extending out from Chicago under Lake Michigan.[90] In 1869, the Illinois legislature passed an act which gave the Illinois Central Railroad Company the right to use and develop the land.[91] However, in 1873 the state repealed the act.[92] When the railroad company continued to develop the land, the Illinois Attorney General filed suit against it.[93]

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85 N.J. Dep't Env't Prot. v. Deull Fuel, No. ATL-L-1839-18, 7, 9 (N.J. Super. Law Div. Aug. 8, 2019).

86 *ExxonMobil*, 2008 WL 4177038.

87 *Id.* (citing Nat'l Ass'n of Home Builders v. N.J. Dep't Env't Prot., 64 F. Supp. 2d 354, 358 (D.N.J. 1999)).

88 Arnold v. Mundy, 6 N.J.L. 1, 57 (1821).

89 *See generally* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892). The "public trust" language was used in Martin v. Waddell's Lessee, 11 U.S. 367, 369 (1842). Martin spawned a line of similar cases that was incorporated into and expanded upon in the Illinois Central decision, which restricted the government from making corrupt gifts to private interests. *See generally* Pollard v. Hagan, 44 U.S. 212 (1845); *see also* McCready v. Virginia, 94 U.S. 391 (1876); Smith v. Maryland, 59 U.S. 71 (1855).

90 *See Ill. Cent. R.R. Co.*, 146 U.S. at 433.

91 *See id.* at 448–49.

92 *See id.* at 449.

93 *See id.* at 433. For an in-depth look at the background of this complex case, see Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71. U. CHI. L. REV. 799 (2004).

The Court found for the State of Illinois, holding that the rights granted by the statute were revocable.[94] The Court acknowledged that the State of Illinois held the title to the lands under the water of Lake Michigan, and that, in general, title carries with it freedom of alienation.[95] But the title the state holds in public lands is "different in character . . . [because] [i]t is a title 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 the liberty of fishing therein . . . ."[96] The state may grant parcels of the property in this public trust for the construction of "wharves, piers, and docks" to the extent that the structures improve the people's interest in the land.[97] But, the Court observed, this is "a very different doctrine from the one which would sanction the abdication of the general control of the state over lands."[98] It held that "the state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."[99] In other words, the state may grant control of the trust to a private organization in order to improve the land because private organizations may be in a better position than the state to effectuate that improvement.[100] But any such improvements must be for the benefit of the people, who are the beneficiaries of the land.[101] Such grants to private organizations are "necessarily revocable," and "the power to resume the trust whenever the state judges best is . . . incontrovertible."[102] The Supreme Court in *Illinois Central* applied the constitutional reserved powers doctrine to natural resources, which are held in trust and cannot be fully privatized.[103] At issue was control of Chicago's harbor, which the Illinois legislature had privatized. In an explanation that extends beyond submerged lands, the Court explained the rationale of the public trust doctrine:

> The state can no more abdicate its trust over property in which the whole people are interested, *like* navigable waters and soils under them, so as to leave them entirely under the use and control of private

94 *See Ill. Cent. R.R. Co.*, 146 U.S. at 452–53.

95 *See id.* at 452.

96 *Id.*

97 *Id.* at 452.

98 *Id.*

99 *Id.* at 453.

100 *See id.* at 455.

101 *See id.*

102 *Id.*

103 *Id.* at 453–55.

> parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace. . . . Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time. . . . The trust with which they are held, therefore, is *governmental*, and cannot be alienated . . . .[104]

Illinois Central made clear that alienating or destroying essential resources would amount to relinquishing sovereign powers in violation of the constitution's reserved powers doctrine.[105] Land must remain with the sovereign in perpetuity.[106] Legislatures cannot be assumed to intend to "casually dispose of irreplaceable public assets" through an act designed to merely simplify land title transactions. "[W]e cannot ascribe to the legislature an intention that [sovereign lands] be permitted to be lost by default."[107] Sovereign lands are not subject to alienability to the same degree as other lands held by the state.[108]

The public trust creates the freedom to enjoy clean air and water, to recreate, and to otherwise enjoy and benefit from nature without regard to the self-interest of private parties who may have disproportionate influence over government. The public trust makes us all equal, and no amount of wealth or political influence can make one more equal or entitled than the whole of us.[109] As Professor Wood has written, the public trust ensures that the government serves the common good, not itself or private individuals pursuing their own interests.[110] Quoting *Geer v. Connecticut*,

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104 *Id.* (emphasis added).

105 *See* MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 72, 234 (2013); WOOD, *supra* note 14, at 131; *see also* Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?*, 35 COLUM. J. ENV'T L. 287, 311 (2010).

106 *See Ill. Cent. R.R. Co.*, 146 U.S. at 452–53; *see also* Nat'l Audubon Soc'y v. Superior Ct., 658 P.2d 709, 724 (Cal. 1983) ("[The public trust] is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.").

107 State v. Sorensen, 436 N.W.2d 358, 362 (Iowa 1989); *see also* Coastal Petroleum Co. v. Am. Cyanamid Co., 492 So. 2d 339, 344 (Fla. 1986).

108 *Ill. Cent. R.R. Co.*, 146 U.S. at 452 (holding that title to public trust lands is "different in character from that which the state holds in lands intended for sale"). Accordingly, a state's marketable title act may not divest the people of their sovereign lands "by default." Legislatures can't be assumed to intend to "casually dispose of irreplaceable public assets" through an act designed to merely simplify land title transactions. *Coastal Petroleum Co.*, 492 So. 2d at 344; *see Sorensen*, 436 N.W.2d at 362 ("[W]e cannot ascribe to the legislature an intention that [sovereign lands] be permitted to be lost by default.").

109 *See, e.g.*, *Ill. Cent. R.R. Co.*, 146 U.S. 387.

110 WOOD, *supra* note 14, at 127.

> the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.[111]

The public interest evolves. "The industrial revolution has given way to the environmental revolution."[112] The state administers the public trust and retains the continuing power that "extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust."[113]

For example, New Jersey has recognized the broad nature of the public trust doctrine, and as such, application of the public trust doctrine has expanded over time.[114] "[I]t has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[115] For example, the Court in *Arnold v. Mundy* held that the public trust included land between the high and low tidewater level, dispelling the notion that the Doctrine might apply just to tidal waters.[116] This evolved to include neighboring land and reasonable access, even if that access involved crossing private property.[117] Still more, the public trust doctrine has been applied not only to the resources themselves, such as marshes and upland forests, but also to the public's right to recreational uses, for example, in the tidal lands, including bathing, swimming, and other shore activities.[118]

New Jersey law describes the important role of natural resources to this State:

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111 Geer v. Connecticut, 161 U.S. 519, 529 (1896).

112 Coeur d'Alene Tribe v. Asarco, 280 F. Supp. 2d 1094, 1101 (D. Idaho 2003).

113 Nat'l Audubon Soc'y v. Superior Ct. of Alpine Cnty., 658 P.2d 709, 723 (Cal. 1983); State v. Cent. Vt. Ry., 571 A.2d 1128, 1136 (Vt. 1989).

114 Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 493 (1988).

115 *Id.* at 475. "[T]he public trust doctrine remains a matter of state law . . . ." PPL Mont., LLC v. Montana, 565 U.S. 576, 603 (2012). "[E]ach state has dealt with the lands . . . within its borders according to its own views of justice and policy . . . ." Shively v. Bowlby, 152 U.S. 1, 26 (1894).

116 *See* Arnold v. Mundy, 6 N.J.L. 1, 8 (1821).

117 Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 879 A.2d 112, 121–22 (N.J. 2005).

118 Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54 (N.J. 1972). This broad interpretation of the public trust doctrine has also been adopted by other states, including California, though perhaps not as broadly as New Jersey has. *See, e.g.*, Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

> New Jersey's lands and waters constitute a unique and delicately balanced resource; [] the protection and preservation of these lands and waters promotes the health, safety and welfare of the people of this State; [] the tourist and recreation industry dependent on clean waters and beaches is vital to the economy of this State; [and] the discharge of petroleum products and other hazardous substances within or outside the jurisdiction of this State constitutes a threat to the economy and environment of this State . . . .[119]

The Spill Act's broad definition of natural resources arguably constitutes an effort to strengthen the public trust doctrine, especially as it relates to remedies.

C. Unreasonable Interference

Unreasonable interference, especially in the natural resource context, can occur in a number of ways, and traditional tort concepts may illuminate whether an interference is unreasonable.[120] *Illinois Central* is clearly a public trust case, which restrains the trustee from alienating the public trust, arguably the most extreme form of interference:

> The harbor of Chicago is of immense value to the people of the State of Illinois, . . . and the idea that its legislature can deprive the State of control over its bed and waters, and place the same in the hands of a private corporation, created for a different purpose,—one limited to transportation of passengers and freight between distant points and the city,—is a proposition that cannot be defended.[121]

Interference may also include destroying natural resources, which is another extreme form of interference. In *State of Ohio v. City of Bowling Green*, the Ohio Supreme Court allowed money damages to the State for a fish kill that resulted from a mishap at the municipality's sewage treatment plant.[122] The court noted that "the state holds. . . such

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119 N.J. STAT. ANN. § 58:10-23.11(a) (West 2020).

120 *See* Am. Metal Co. v. Fluid Chem. Co., 296 A.2d 348, 350 (N.J. Super. Ct. Law Div. 1972) (noting that some courts recognize trespass as an action to recover damages for interference with an easement, that the more common approach is to regard interference with an easement as trespass on the case but that the distinction is academic and the action sounds in tort). *See also* Dep't of Transp. v. PSC Res., Inc., 419 A.2d 1151, 1157 (N.J. Super. Ct. Law Div.1980) ("Torts against the environment find their origin in the law of nuisance and trespass.") The common law cause of action is nuisance, under which "the State has the right to obtain damages for an injury to public resources or the environment." Ohaus v. Cont'l Cas. Ins. Co., 679 A.2d 179, 183 (N.J. Super. Ct. App. Div. 1996) (citing Lansco, Inc. v. Dep't of Env't Prot., 350 A.2d 520 (N.J. Super. Ct. Ch. Div. 1975), *aff'd*, 368 A.2d 363 (N.J. Super. Ct. App. Div. 1976)).

121 Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 454 (1892).

122 State v. City of Bowling Green, 313 N.E.2d 409, 412 (Ohio 1974).

wildlife as a trustee for all citizens."[123] "An action against those whose conduct damages or destroys such property, which is a natural resource of the public, must be considered an essential part of a trust doctrine, the vitality of which must be extended to meet the changing societal needs."[124]

In *State of Maryland, Dept. of Natural Resources v. Amerada Hess*, the court allowed an action for money damages for an oil spill in State waters that damaged the waters, fish, and birds.[125] The Court found the Crown's Charter to Lord Baltimore to be broad enough to cover these resources and to find an unreasonable and actionable interference.[126]

In *Attorney General, State of Michigan v. Hermes* the Court also allowed the state as trustee to bring a civil action for money damages to protect its fisheries.[127] It followed other cases, including *Bowling Green* and *Amerada Hess*.

Public nuisance claims protect against a broader array of interferences.[128] The Restatement definition nevertheless provides an initial standard for assessing whether the parties have stated a claim for common law interference. The Restatement definition of public nuisance set out in § 821B(a) has two elements: an *unreasonable interference* and *a right common to the general public*.[129] Section 821B(2) further explains:

> Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent and long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.[130]

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123 *Id.* at 411.

124 *Id.* at 283.

125 Maryland v. Hess, 350 F. Supp. 1060 (D. Md. 1972).

126 *Id.* at 1066.

127 Att'y Gen. v. Hermes, 339 N.W.2d 545, 550 (Mich. Ct. App. 1983).

128 *See generally* Dep't of Env't Prot. v. Harris, 518 A.2d 743 (N.J. Super. Ct. App. Div. 1986).

129 RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

130 *Id.* § 821B(2).

This is helpful but not sufficient if the public trust is at issue. For example, interference is unreasonable when it (a) significantly interferes with the (changing) public interest, and (b) a significant interference exists when a conflict arises between the *jus publicum* and *jus privatum*, say, when a developer wants to build on wetlands, though both acts and omissions by the private landowner may give risk to that conflict.

A defendant's interference is unreasonable relative to the *jus publicum*. A public nuisance then is "an unreasonable interference with a right common to the general public" or the interest of the public at large.[131] Under common law, the destruction and alteration of natural resources is generally without justification. Unjustified interference may also arise from engaging in abnormally dangerous activities, including the discharge of hazardous substances.[132] Those who "introduce extraordinary risk of harm into the community for their own benefit" are strictly liable.[133] Even manufacturers may be held liable by the state for trespass.[134] Conduct may also be considered wrongful if the defendant interfered with the public trust for the sake of appropriating its benefits. Additionally, conduct may be wrongful if the defendant acted for the purpose of producing the interference, or with knowledge that interference was substantially certain to occur.[135] Conduct may also be wrongful if it is an independently wrongful act, culpable apart from its effect on the public trust.

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131 James v. Arms Tech., Inc., 820 A.2d 27, 51 (N.J. Super. Ct. App. Div. 2003); RESTATEMENT (SECOND) OF TORTS § 821B cmt. g. (AM. L. INST. 1979).

132 Dep't of Env't Prot. v. Ventron, 468 A.2d 150, 158 (N.J. 1983); Dep't of Env't Prot. v. ExxonMobil Corp., 22 A.3d 1, 2 (N.J. Super. Ct. App. Div. 2011).

133 Biniek v. ExxonMobil Corp., 898 A.2d 330, 336 (N.J. Super. Ct. Law Div. 2002) (citing T & E Indus. v. Safety Light Corp., 587 A.2d 1249 (N.J. 1991)).

134 *In re* MTBE, 725 F.3d 65, 120 (2nd Cir. 2013) (upholding jury verdict on trespass in New York case).

135 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (AM. L. INST. 2010).

Nuisance,[136] trespass,[137] strict liability,[138] conversion,[139] products liability[140] and negligence teach us a great deal about interference. However, these legal cubbyholes often obscure the boundaries between *jus publicum* and *jus privatum*.[141] Thinking and talking in terms of tortious interferences with the public trust provides a more illuminating way of analyzing this boundary under a specific set of circumstances.[142] In the end, courts will decide if there is a duty on the basis of the evolving standards of the community. Practical rules and not formalistic quibbling should determine duties. As Justice Holmes said, "it is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV."[143] In general it should not matter if the label "tortious interference with public trust" hardly appears in the case law.[144]

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136 Nuisance remedies include abatement, loss of use, and, if nuisance is permanent, money damages for permanent nuisance. Md., Dep't. of Nat. Res. v. Amerada Hess Corp., 350 F. Supp. 1060, 1068 (D. Md. 1972) held that the State may "seek damages for the cost of abating such nuisance" but not under the facts of that case; *see also* San Jose v. Monsanto, 231 F. Supp. 3d 357 (N.D. Cal. 2017) (PCBs); *In re* MTBE Products Liability Litigation, 725 F.3d 65, 91 (2d Cir. 2013) (theories of trespass, public nuisance, negligence and failure to warn).

137 *Id.*; Rhode Island v. Atlantic Richfield, 357 F. Supp. 3d 129 (D.R.I. 2018); State v. Monsanto, No. 18-cv-00540 ("It is true that the State of Oregon must allow some use of public trust lands and waterways" but statutes foreboding certain specific invasions show that "the State enjoys the right . . . to bring actions to recover for trespasses" by PCBs); Att'y Gen. v. Hermes, 339 N.W.2d 545, 550 (Mich. Ct. App. 1983); N.J. Dep't of Envtl. Prot. v. Deull Fuel Co., No. ATL-L-1839-18 (N.J. Super. Law Div. Aug. 8, 2019).

138 *Id.*; *In re* MTBE Prods. Liab. Litig., 725 F.3d at 91.

139 *See Hermes*, 339 N.W.2d at 550 (state may sue to protect state waters and wildlife, including suit for conversion of fish).

140 *Id.*

141 Separate and apart from the *jus publicum*, the state's police power "routinely exercises a great deal of regulatory authority over privately owned land." Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489–502 (1970).

142 *Cf.* WILLIAM L. PROSSER, LAW OF TORTS 927–69 (4th ed. 1971) (tortious interference to protect society is interest in commercial stability and contractual integrity in business relations or prospective economic advantage); RESTATEMENT (SECOND) TORTS §§ 762–774B (AM. L. INST. 1979).

143 Oliver Wendell Homes, *The Path of Law*, 10 HARV. L. REV. 485, 469 (1897).

144 J. Smith, *Tort Without Particular Names*, 69 U. PENN. L. REV. 91 (January 1921).

> The title of Book III, Bishop on Non-Contract Law, is—"Wrongs with Particular Names." The first twelve chapters of Book III [] are "each devoted to a wrong to which the law has given a name []." Then follows Chapter XXV, on "Wrongs not Named"; wherein the author says "If a wrongful act whereby one injures another has received no name, the consequence does not follow that it will be without redress." And he further says: ". . . the fact that we can find in our books no name for a wrong is not to any degree evidence that it is not actionable."

D. Nexus

There must also be a nexus between that wrongful interference and the loss to the protected interest. This requires proof that defendant's act or omission directly or indirectly led or contributed to the harm, regardless of other causes. That is, the wrongful act damaged the public trust. Damages or remedies within the nexus of harm must be determined. Harm often refers to the disruption of the ecosystem:

> Biological integrity . . . refers to the capacity to support and maintain a balanced, integrated adaptive biological system having the full range of elements (genes, species, and assemblages) and processes (mutation, demography, biotic interactions, nutrient and energy dynamics, and metapopulation processes) expected in the natural habitat of a region.[145]

A nexus exists even if there is only a de minimis impact. "Application of [the de minimis] doctrine…may involve making it equally so elsewhere. In total consequence, the State's trust interests . . . could be affected . . . considerably more than a trifling matter."[146] Cumulative impacts matter.[147]

Nexus is different from proximate cause.[148] The trustee must be able to identify an articulable nexus between the business transacted by the defendant and the resulting claim being sued upon.[149] The nexus can be based on geography, market share, waste streams or other case-by-case and site-specific factors. In public nuisance cases, the plaintiff is generally required to prove causation—that "the defendant created or assisted in the creation of the nuisance,"[150] which is more than a nexus requirement. However, if that role cannot be traced, courts may rely on

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See also William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1938–39).

145 JAMES R. KARR & ELLEN W. CHU, PERSPECTIVES ON ECOLOGICAL INTEGRITY 34–48 (Laura Westra & John Lemons eds., 1995). Note ecological integrity is broader, including biological, chemical and physical integrity. JAMES R. KARR, ENGINEERING WITHIN ECOLOGICAL CONSTRAINTS 97–109 (Peter C. Schulze, ed., 1996).

146 People v. Broedell, 112 N.W.2d 518, 518–19 (Mich. 1961).

147 *In re* Water Use Permit Applications (Waiahole II), 9 P.3d 409, 451 (Haw. 2000) (requiring long-term planning to protect the public trust); *see also* Kelly v. Oceanside Partners, 140 P.3d 985, 1002–03 (Haw. 2006).

148 N.J. Dept. of Env't. Prot. v. Dimant, 51 A.3d 816, 830 (N.J. 2012).

149 *Cf.* Dedham Water Co. v. Cumberland Farms, 889 F.2d 1146, 1154 (1st Cir. 1989) (minimal connection required under CERCLA).

150 *See, e.g.*, Modesto Redevelopment Agency v. Superior Ct. of S.F. County, 119 Cal. App. 4th 28, 38 (2004).

circumstantial evidence of causation.[151] Nevertheless, the added burdens and delays in a public nuisance case are other reasons to proceed under a public trust theory.

IV
COMMON LAW IS ALWAYS EVOLVING

"Continuity and change are essential attributes of a legal system."[152] Public trust law enjoys these attributes and is no different from other common law doctrines: "[t]he public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."[153] Public trust law dates back to the Romans[154] and continues to evolve at common law[155] to meet the contemporary challenges of pollution and limited resources. The advent of public law enactments is not a reason to halt the evolution of the public trust, or to eliminate it entirely, but rather to allow it to develop in that new legal context in light of the changing societal values driving those enactments[156]:

> [T]he law should be based on current concepts of what is right and just and the judiciary should be alert to the never ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and intend to discredit the law should be readily rejected.[157]

As the *Matthews* court said, "Archaic judicial responses are not an answer to a modern social problem."[158] For example, New Jersey's natural resource restoration program is grounded in the public trust

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151 *See In re* MTBE Prods. Liab. Litig., 725 F.3d 65, 116 (2d Cir. 2013) (market share evidence); *see also* Rhode Island v. Atlantic Richfield Co., 357 F. Supp. 3d 129, 140 (D.R.I. 2018) (national trend away from traceability and toward market share evidence).

152 GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 3 (1982).

153 Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54 (N.J. 1972).

154 J.B. Ruhll & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?* 47 ECOLOGY L. Q. 117, 117 (2020).

155 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, 62 (Fall 2005).

156 *See* Allan Kanner, *Future Trends in Toxic Tort Ligation*, 20 RUTGERS L.J. 669, 690–91 (1989).

157 McDonald v. Mianeck, 398 A.2d 1283, 1291 (N.J. 1979) (quoting Schipper v. Levitt & Sons, 207 A.2d 314, 325 (N.J. 1965)).

158 Matthews v. Bay Head Improvement, 471 A.2d 355, 365 (1984) (quoting *Borough of Avon-By-The-Sea*, 294 A.2d at 54.).

doctrine, which originates from a body of common law[159] providing that "public lands, waters and living resources are held in trust by the government for the benefit of its citizens,"[160] and has been enhanced by statute:[161] the New Jersey Spill Act.[162] The Spill Act identifies the Department of Environmental Protection (DEP) as the trustee of the State's natural resources.[163] Natural resources are broadly defined to include "all land, fish, shellfish, wildlife, biota, air, waters and other such resources owned, managed, held in trust or otherwise controlled by the State."[164]

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159 When passing the Spill Act, the Legislature specifically, and for good reasons, reserved the common law as part of the State's authority to protect the environment. N.J. STAT. ANN. § 58:10-23.11v (West 2020). The common law public trust Doctrine evolves "to meet changing conditions and needs of the public it was created to benefit." *Borough of Avon-By-The-Sea*, 294 A.2d. at 54. *Accord McDonald*, 398 A.2d. at 1291. It also serves as a gap filler when statutes come up short. N.J. Dep't of Env't Prot. v. ExxonMobil, 22 A.2d 56, 58 (N.J. Super. Ct. App. Div. 2011).

160 N.J. ADMIN. CODE § 7:36-2.1 (2021); *see also* Dep't of Env't. Prot. v. Jersey Cent. Power & Light Co., 336 A.2d 750, 759 (N.J. Super. Ct. App. Div. 1975), *rev'd on other grounds*, 351 A.2d 337 (N.J. 1976); *Matthews*, 471 A.2d at 358.

161 Spill Compensation and Control Act ("Spill Act"), N.J. STAT. ANN. § 58:10-23.11 (West 2020); Water Pollution Control Act ("WPCA"), N.J. STAT. ANN. § 58:10A-1 to -20 (West 2020). Other states recognize the public trust as sufficient in that legislation to protect the public trust. State v. Gillette, 621 P.2d 764, 820 (Wash. Ct. App. 1980) (allowing state to recover for loss of fisheries habitat even absent a statutory provision allowing recovery, saying "the state, through the Department, has the fiduciary obligation of any trustee to seek damages for injury to the object of its trust.").

162 The Spill Act provides that one who is "in any way responsible for any hazardous substance" is strictly liable, upon its discharge, for "all cleanup and removal costs no matter by whom incurred." N.J. STAT. ANN. § 58:10-23.11g(c)(1) (West 2020). Legislative history on the Spill Act phrase "in any way responsible" reveals that the Legislature added it in 1979 when it amended the strict-liability provision to provide for joint and several liability under the Act. *See* N.J. STAT. ANN. § 58:10-23.11g(5) (West 2020). No longer was liability limited to those who were active participants in the discharge of hazardous substances. *See* Marsh v. N.J. Dep't of Env't Prot., 703 A.2d 927, 931 (N.J. 1997) (finding legislative intent to expand scope of Spill Act liability through 1979 amendments that hold strictly liable any owner or operator who was "in any way responsible" for discharge and citing, in support, N.K. Dep't of Env't. Prot. v. Ventron Corp., 468 A.2d 150, 160 (N.J. 1983) (noting that while subsequent acquisition of property on which spill had occurred is insufficient to impose responsibility, one who owns or controls property at time of discharge is responsible party for Spill Act purposes)). N.J. Dep't of Env't. Prot. v. Dimant, 51 A.3d 816, 830 (N.J. 2012).

163 N.J. STAT. ANN. § 58:10-23.11a (West 2020).

164 N.J. STAT. ANN. § 58:10-23.11b (West 2020).

V
SUING TO ENFORCE

The public trust is not self-executing, and the state must sue to enforce.[165] "[I]f the health and comfort of the inhabitant of a state are threatened, the state is the proper party to represent and defend them";[166] since natural resources are part of the common public trust,[167] the state as trustee should sue for tortious interference. Public trust natural resources enjoy at least the same protections as private resources. Tort law, like the Spill Act, requires interpretations that deter misconduct and spur restorative actions.[168] The Supreme Court has repeatedly affirmed that the state is the trustee of environmental resources, which are held in trust for the benefit of the public.[169] Though governmental agencies routinely grant environmental management contracts to private organizations, the public beneficiary does not change nor does the government's fiduciary duty.[170] Understandably, most public trust cases focus on the responsibilities of the state as a trustee for its people.[171] The U.S. District Court for the

165 Some state constitutions or statutes conferring standing on citizens allow private enforcement actions to protect the public trust or actions against state officials to compel them to enforce the public trust. Both topics are beyond the scope of this article.

166 Missouri v. Illinois, 180 U.S. 208, 241 (1901).

167 *See* McCready v. Virginia, 94 U.S. 391 (1876).

168 N.J. Dep't Env't. Prot. v. ExxonMobil Corp., 923 A.2d 345, 402 (N.J. Super. Ct. App. Div. 2007).

169 *See* Geer v. Connecticut, 161 U.S. 519, 521 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892); *McCready*, 94 U.S. at 391; Smith v. Maryland, 59 U.S. 71 (1855); Martin v. Waddell's Lessee, 41 U.S. 367 (1842).

170 *See, e.g*., Town of Fallsburg v. United States, 22 Cl. Ct. 633 (1991).

171 The duties owed by a public trustee do not differ from those of a private trustee. Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 846 A.2d 659, 667 (N.J. Super. Ct. App. Div. 2004), *aff'd as modified sub nom*., Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 874 A.2d 1064 (N.J. 2005). New Jersey courts have adopted § 174 of the Restatement (Second) of Trusts, which states that "[t]he fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care." RESTATEMENT (SECOND) OF TRUSTS § 174 (AM. L. INST. 1959); *see also* F.G. v. MacDonell, 696 A.2d 697, 704 (N.J. 1997); McKelvey v. Pierce, 800 A.2d 840, 859 (N.J. 2002). The comments to § 174 of the Restatement of Trusts clarify that if the trustees were selected because they have specialized knowledge or training, they will be held to that standard of skill and care: "[I]f the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill." RESTATEMENT (SECOND) OF TRUSTS § 174 (AM. L. INST. 1959). In this instance, the Legislature, consistent with the established public trust doctrine, has entrusted the public trust resources to the Plaintiffs based on their expertise. The Legislature also instructed Plaintiffs to liberally construe the Spill Act to affect its purposes

Eastern District of Virginia reaffirmed that "under the public trust doctrine, the [states] and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people."[172] Obviously, the state's trustee's fiduciary duties include the right to sue for injury to the public trust.[173] The specific common law tools available to the trustee to discharge its fiduciary duty to preserve and protect the public trust are less often discussed.

VI
REMEDIES

Trustees investigate natural resource injuries and determine appropriate remedies. This subject generally is beyond the scope of this article. However, it is worth noting public trustees may also recover for the defendant's unjust enrichment.[174] For example:

> In *Wyandotte Transport Co. v. United States*, the Supreme Court held that restitution was an allowable remedy for government, even though statutory penalties already applied. In *Wyandotte*, the government sued for the negligent sinking of a ship in a navigable river. The case can be considered a toxic tort because the sunken vessel contained chlorine. The court allowed the government to be reimbursed for the expenses of raising the ship and any cleanup involved, because statutory fines were "hardly a satisfactory remedy for the pecuniary injury which the negligent shipowner may inflict upon the sovereign. The court further added, "[d]enial of such a remedy . . . would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim."[175]

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of protecting the general health, safety, and welfare of the people of this State. N.J. STAT. ANN. § 58:10-23.11x (West 2020). Plaintiffs, as trustees, therefore, have the authority to carry out the purpose of the public trust doctrine, i.e., to protect the State's natural resources for the benefit of its citizens.

172 *In re* Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980); *see also* Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENV'T. L. 723, 730 (1989).

173 State v. City of Bowling Green, 313 N.E.2d 409, 411 (Ohio 1974) (Municipality liable for fish kill caused by its negligent discharge of sewage, saying liability is "an essential part of a [public trust] doctrine, the vitality of which must be extended *to meet the changing societal needs*.") (emphasis added).

174 *See, e.g.*, Ohio v. Monsanto Co., No. A 1801237 (Hamilton Cnty., Ct. Com. Pl. Mar. 5, 2018).

175 Allan Kanner, *Unjust Enrichment in Environmental Litigation*, 20 J. ENV'T L. & LITIG. 111, 151–52 (2005) (citations omitted).

CONCLUSION

The common law public trust doctrine is a dynamic and evolving doctrine. It is a "background principle" of property law.[176] Historically, courts have cubbyholed such state claims to protect the public trust as a *parens patriae* action or public trust action for "public nuisance," "trespass," or "strict liability," or ignored identifying the operative legal theory being used to enforce the public trust. In many ways, this jurisprudence invokes a formalism unsuited to the evolving public trust. The governing jurisprudence could be vastly improved by recognizing and evolving over time the cause of action for tortious interference with the public trust. The public trust provides a framework, integrated with applicable science and policy, to preserve, protect and help us restore our ecosystems.[177]

176 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

177 *See, e.g.*, Robin K. Craig, *Adapting to Climate Change: The Potential Role of State Common Law Public Trust Doctrines*, 34 VT. L. REV. 781, 781 (2009).