COMMENT

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The Great Lakes Compact and the Public Trust Doctrine: Beyond Michigan and Wisconsin Common Law

I. The Great Lakes Compact 461
A. Michigan's Great Lakes Compact Legislation 466
B. Wisconsin's Great Lakes Compact Legislation 468
II. The Traditional Public Trust Doctrine 470
A. The Public Trust Doctrine in Michigan 471
1. The Scope of Michigan's Public Trust Doctrine 472
2. State Trustee Obligations 474
3. Citizen Standing to Enforce Michigan's Public Trust Doctrine 476
B. The Public Trust Doctrine in Wisconsin 477
1. The Scope of Wisconsin's Public Trust Doctrine 478
2. State Trustee Obligations 479
3. Citizen Standing to Enforce Wisconsin's Public Trust Doctrine 483
III. The Compact Trust as Distinct from the Traditional Public Trust Doctrine 485
A. State Law and the Compact Trust 487
B. The Compact Trust in Michigan 489
C. The Compact Trust in Wisconsin 491
IV. Recognizing the Compact Trust 493

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The Great Lakes have long been a jealously guarded resource. Large-scale diversions of Great Lakes water drew passionate responses in the region as early as 1900, when Illinois reversed the Chicago River, withdrawing 5.4 billion gallons a day of Lake Michigan water and prompting a multistate lawsuit.[1] In 1998, a proposal by an Ontario-based company to ship tankers of Lake Superior water to distribute in Asia induced the Great Lakes states to begin negotiations on an interstate compact to strengthen regional Great Lakes management.[2] The resulting Great Lakes–St. Lawrence River Basin Water Resources Compact[3] (Compact or the Great Lakes Compact), signed into law in October of 2008, produced the most ambitious and comprehensive effort of the Great Lakes states to protect and manage the world's largest freshwater resource.[4]

Calling for cooperative management of the Great Lakes aquatic ecosystem among all eight states that border the lakes,[5] the Compact focuses on conserving the Great Lakes ecosystem "in the common

1 Wisconsin v. Illinois, 278 U.S. 367, 403 (1929) (discussing the facts found by the Supreme Court appointed special master). Wisconsin, Michigan, Minnesota, Ohio, Pennsylvania, and New York all sued to enjoin the diversion. *Id.* at 399. Missouri, Kentucky, Tennessee, Louisiana, Mississippi, and Arkansas joined Illinois as intervening defendants. *Id.* at 400–01. The suit resulted in a consent decree limiting Chicago's withdrawal to 3200 cubic feet of water per second, Wisconsin v. Illinois, 388 U.S. 426 (1967), *amended by* Wisconsin v. Illinois, 449 U.S. 48 (1980), less than a quarter of its engineered capacity of 14,000 cubic feet per second. C. ARCH WILLIAMS, THE SANITARY DISTRICT OF CHICAGO: HISTORY OF ITS GROWTH AND DEVELOPMENT AS SHOWN BY DECISIONS OF THE COURTS AND WORK OF ITS LAW DEPARTMENT 196 (1919).

2 *Morning Edition: States Approve Compact to Protect Great Lakes* (Nat'l Pub. Radio broadcast July 8, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=92297955. For a report on current diversions of basin water, see UNIVERSITY OF WISCONSIN, MILWAUKEE & GREAT LAKES WATER INSTITUTE, OUR WATERS: DIVERSIONS OF GREAT LAKES WATER 4 (2008), *available at* http://www.glwi.uwm.edu/ourwaters/documents/DiversionsCWeb.pdf.

3 Great Lakes–St. Lawrence River Basin Compact, Pub. L. No. 110-342, 122 Stat. 3739 (2008) [hereinafter *Compact*] (expressing the consent and approval of Congress to an interstate compact regarding water resources in the Great Lakes–St. Lawrence River Basin).

4 *See* Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 414–35 (2006) (providing a comprehensive review of the history of agreements and compacts between the Great Lakes states).

5 Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin are the eight states that border the Great Lakes, and are parties to the Compact.

interests of the people of the region,"[6] largely by regulating "diversions"[7] of water from a Great Lake watershed and high-volume "withdrawals"[8] for water use within the originating watershed. This Comment uses "diversions and withdrawals" to refer to Compact-governed uses of Great Lakes water, although the volume of Compact-governed withdrawals may vary by state.[9] The Compact bans all new or increased diversions,[10] with three exceptions, including intrabasin transfers between Great Lakes watersheds,[11] and it requires state approval consistent with Compact provisions for all new or increased withdrawals.[12]

The Compact adopted a public trust doctrine in Great Lakes Basin waters that party states cannot ignore,[13] proclaiming that "the [w]aters of the [b]asin are precious public natural resources shared and held in trust by the [s]tates,"[14] and defining "waters of the basin" to include the Great Lakes themselves, all connecting water bodies, and tributary groundwater.[15] Further, the Compact recognized a duty in all of the

6 *Compact*, *supra* note 3, § 3.1. *See also id.* § 1.3(2)(a)–(h) (stating the purposes of the Compact, including the parties' duty to protect and conserve the basin waters for future generations).

7 *Id.* § 1.2 ("Diversion means a transfer of [w]ater from the [b]asin into another watershed, or from the watershed of one of the Great Lakes into that of another by any means of transfer . . . but does not apply to [w]ater that is used in the [b]asin or a Great Lake watershed to manufacture or produce a Product that is then transferred out of the [b]asin or watershed.").

8 *Id.* ("Withdrawal means the taking of water from surface water or groundwater.").

9 *Id.* § 4.10 (requiring each state to set a threshold level for regulation of withdrawals).

10 *Id.* § 4.8.

11 *Id.* § 4.9 (exempting diversions to communities that lie partially within the basin, diversions to counties that lie partially outside the basin, and transfers of water between Great Lakes watersheds). *See infra* text accompanying notes 63–65 (discussing the three exceptions).

12 *Id.* § 4.10(1) (requiring each state to ensure that "[w]ithdrawals overall will not result in significant impacts to the [w]aters and [w]ater [d]ependent [n]atural [r]esources of the [b]asin . . . and that all other objectives of the Compact are achieved"). Section 4.11 contains the "decision-making standard," which includes specific criteria that all regulated withdrawals must satisfy before state approval. *Id.* § 4.11.

13 *Id.* § 9.3 ("Each provision of this Compact is considered material to the entire Compact, and failure to implement or adhere to any provision may be considered a material breach.").

14 *Id.* § 1.3(1)(a).

15 *Id.* § 1.2. The term "tributary groundwater" can be interpreted to mean all groundwater within the boundaries of the Great Lakes Basin as drawn on the surface. *Id.* § 4.12(5). *Cf.* Memorandum from Douglas Cherkauer and Timothy Grundl, Professors of Geosciences, Univ. of Wisconsin–Milwaukee, to Members of the Special Comm. on Great Lakes Water Res. Compact (Dec. 4, 2006) (discussing the use and definition of the term

states to manage and protect "the renewable but finite [w]aters of the [b]asin for the use, benefit and enjoyment of all their citizens, including generations yet to come."[16] These provisions burden the Compact states with trustee obligations in their management of the Great Lakes Basin waters.[17]

The Compact aside, all of the signatory states are trustees under the public trust doctrine, which requires the states to hold navigable waters in trust for the public.[18] All of the Compact states recognize the public trust doctrine, which passed to the American colonies and states through the reception of English common law,[19] and this doctrine appears in their common law, statutes, or constitutions.[20] Due to their particular common law, statutes, and constitutions, states have different conceptions of which waters qualify as navigable for trust purposes.[21] Until the Compact, no state identified groundwater as a trust resource.[22] In fact, all Compact states exclude non-navigable surface water from the trust.[23]

In addition to adopting a Compact public trust for all Great Lakes Basin waters, the Compact preserved the states' common laws regarding water rights, asserting that nothing in the Compact "shall be

tributary groundwater), *available at* http://legis.state.wi.us/lc/committees/study/2006/GLAKE/files/sugcherkauer3.pdf.

16 *Compact, supra* note 3, § 1.3(1)(f).

17 *Id.*

18 *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892) ("The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."). *See also* Crystal S. Chase, *The* Illinois Central *Public Trust Doctrine and Federal Common Law: An Unconventional View*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y (forthcoming 2009) (discussing the applicability of a federal public trust doctrine to all states).

19 *See, e.g.*, Glass v. Goeckel, 703 N.W.2d 58, 64–66 (Mich. 2005) (describing the history of the public trust doctrine).

20 *See* Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1 (2007) (summarizing the current public trust doctrines in states east of the Mississippi River, including all of the Compact party states).

21 *Id.* at 44–50, 68–73, 83–87, 90–94, 110–13 (summarizing the Compact states' public trust doctrines).

22 Bertram C. Frey & Andrew Mutz, *The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States*, 40 U. MICH. J.L. REFORM 907, 910 (2007) ("In general, public trust waters are the 'navigable waters' of the state, and public trust lands comprise the lands beneath these waters.") (citing Shively v. Bowlby, 152 U.S. 1, 26 (1894); *Ill. Cent. R.R. Co.*, 146 U.S. at 460)).

23 *See* Craig, *supra* note 20, at 44–50, 68–73, 83–87, 90–94, 110–13.

construed as affecting or intending to affect or in any way to interfere with the law of the respective [p]arties relating to common law [w]ater rights."[24] However, the Compact's trust provision expressly reaches diversions and withdrawals of non-navigable surface water and groundwater, previously excluded from the Compact states' public trust doctrines. State courts will have to reconcile this apparent conflict between the Compact's public trust doctrine and the Compact's express preservation of common law.

Michigan and Wisconsin are two of the most important states for comparative analysis of the public trust doctrine and Compact implementation because the Compact will have the greatest effect in these two states. Each state has more miles of Great Lakes shoreline than any other state,[25] as well as the highest consumption rates of basin water in the region.[26] Also, one-third of Wisconsin is within the basin, and the state's fastest growing communities lie partially outside of the basin,[27] making the areas with the fastest growing water demands potentially eligible to divert basin water under the exceptions to the Compact's diversion prohibition.[28] Michigan is the only state located entirely within the basin,[29] so while it will have veto

24 *Compact*, *supra* note 3, § 8.1(2).

25 U.S. Envtl. Prot. Agency, *Total Miles of Great Lakes Shoreline in the Nation*, *in* NATIONAL WATER QUALITY INVENTORY: 1998 REPORT TO CONGRESS app. F, app. F (1998), *available at* http://www.epa.gov/305b/98report/appendf.pdf. Michigan has 3250 miles of Great Lakes shoreline, Wisconsin has 1017 miles, and New York has the third longest Great Lakes shoreline with 577 miles. *Id.*

26 THE NORTHEAST-MIDWEST COALITION GREAT LAKES TASK FORCE, MEETING NOTES: WATER DIVERSIONS WORKSHOP 2 (1999), *available at* http://www.nemw.org/images/stories/documents/waterdivert.pdf. Behind only Ontario, which consumes 29% of the total basin use, Michigan and Wisconsin consume 22 and 21%, respectively. *Id.* Indiana uses 7%; New York, Quebec, and Ohio each use 6%; Minnesota uses 2%; and Pennsylvania and Illinois use less than 1% each. *Id.*

27 GREAT LAKES WATER RES. COMPACT COMM., STATUS REPORT OF THE SPECIAL COMMITTEE ON GREAT LAKES WATER RESOURCES COMPACT 4 (2007), *available at* http://www.legis.state.wi.us/lc/committees/study/2006/GLAKE/files/status report.pdf.

28 *Compact*, *supra* note 3, § 4.9(1), (3) (exempting "straddling communities" and "straddling counties").

29 GREAT LAKES WATER RES. COMPACT COMM., *supra* note 27, at 4. About 32% of Wisconsin is within the basin, compared to 7% of Minnesota, 0.2% of Illinois, and 3% of Indiana. *Id.* Ohio lies 29% within the basin. *Id.* New York lies 40% within the basin. DEPT. OF ENVTL. CONSERVATION, N.Y. STATE, GREAT LAKES, http://www.dec.ny.gov/lands/25562.html (last visited Jan. 20, 2010).

power over some diversions in other states,[30] it will never be subject to such a veto itself.[31] Thus, although Wisconsin's geography will likely require Compact interpretation and application earlier in that state than in many others,[32] Michigan will have a powerful voice in determining the outcome of Wisconsin's decision-making process.

Michigan and Wisconsin also have some of the richest law in the region concerning the public trust doctrine. Both states recognize the doctrine as inherent in their sovereignty,[33] and both continue to develop the doctrine through court decisions and statutes.[34] The effect of the Compact's public trust doctrine is especially pertinent in states with such highly developed traditional public trust doctrines.

Hurdles to the application of the Compact's public trust doctrine exist in both states. The Wisconsin legislation implementing the Compact attempted to freeze the scope of that state's traditional public trust doctrine, asserting that nothing in the Compact "may be interpreted to change the application of the public trust doctrine [in the Wisconsin Constitution] or to create any new public trust rights."[35] This statute directly conflicts with the Compact's version of public trust, which includes a broader range of water bodies than Wisconsin's public trust doctrine.[36] In Michigan, the Compact's public trust doctrine faces judicial, rather than legislative, barriers as

30 *Compact*, *supra* note 3, § 4.9(3)(g) (requiring unanimous approval by the Compact states for diversions to communities outside the basin that are located in counties partially within the basin).

31 *But see Compact*, *supra* note 3, §§ 4.10, 4.9(2) (requiring state permits in accordance with the Compact for new or increased withdrawals and for intrabasin transfers).

32 Melissa Kwaterski Scanlan et al., *Realizing the Promise of the Great Lakes Compact: A Policy Analysis for State Implementation*, 8 VT. J. ENVTL. L. 39, 85–88 (2006) (discussing the city of Waukesha, Wisconsin, as a likely first applicant for a diversion to meet its drinking water needs).

33 *In re* Crawford County Levee & Drainage Dist. No. 1, 196 N.W. 874, 876 (Wis. 1924) ("From our acceptance of the provisions referred to of the Ordinance of 1787, it follows that it is not a question of state policy as to whether or not we shall preserve inviolate our navigable waters. We are by organic law compelled so to do."); Nedtweg v. Wallace, 208 N.W. 51, 52 (Mich. 1926) (describing the public trust as "an inalienable obligation of sovereignty").

34 *See* Craig, *supra* note 20, at 68–71, 110–13 (listing statutes and summarizing case law in Michigan and Wisconsin).

35 WIS. STAT. § 281.343 (2008).

36 Wisconsin's public trust doctrine includes only navigable surface waters. Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 519 (Wis. 1952) (defining navigable waters as "capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes").

the state courts are reluctant to expand the scope of the public trust doctrine, even as public needs and values in trust resources change over time. But state limits on the public trust doctrine cannot frustrate state implementation of the Compact's express provisions, which include a public trust in diversions and withdrawals of non-navigable surface waters and groundwater.[37]

This Comment argues that the Compact adopted a public trust in Great Lakes Basin waters that is distinct from the traditional public trust doctrines in the Compact states. Because of the Compact's strong trust language,[38] it seems clear that the public trust doctrine applies to all state decisions governed by the Compact. If the traditional state public trust doctrines contain limits that are inconsistent with the Compact's public trust doctrine, this Comment maintains that those limits cannot frustrate implementation of the Compact's public trust doctrine to Compact-regulated diversions and withdrawals of basin waters. Thus, courts should differentiate the Compact-created trust doctrine from state common law public trust doctrines.

Part I of this Comment examines the Compact and its effect in Michigan and Wisconsin. Part II provides background on the public trust doctrine and its evolution in Michigan and Wisconsin, including its scope, the obligations of the states as trustees, and the availability of citizen standing to enforce the trust. Part III explains how the Compact's public trust is distinct from the states' traditional public trust doctrines. The Comment concludes that judicial recognition of a distinct Compact trust, defined by the scope and purpose of the Compact itself, will best reconcile the Compact's purposes with traditional state public trust doctrines.

I
THE GREAT LAKES COMPACT

The Great Lakes Compact was the culmination of nearly eight years of collaboration between the governors of the eight Great Lakes

37 *See supra* notes 13–16 and accompanying text.

38 *Compact*, *supra* note 3, § 1.3(1)(a) ("Waters of the [b]asin are precious public natural resources shared and held in trust by the [s]tates"); *id.* § 1.2 (defining "waters of the basin" and "basin water" to include surface and groundwater).

states.[39] After each state passed ratifying legislation throughout 2007 and 2008, and President Bush signed the requisite federal approval on October 3, 2008, the Compact became law.[40]

One of the listed purposes of the Great Lakes Compact is to provide a structure for cooperative regional management to protect and preserve the Great Lakes Basin ecosystem for use by future generations in the region.[41] The Compact seeks to prevent withdrawals from having "significant adverse impacts" on the basin's ecosystem and watershed.[42] Significantly, the Compact declares that all basin waters, including groundwater, are held in trust by the states[43] and requires the parties to protect and manage those waters for the benefit and use of all their citizens.[44] Thus, the Compact recognizes a public trust in all the interconnected waters of the Great Lakes Basin.[45]

The Compact states did not include the public trust doctrine in the Compact without debate,[46] and courts must give full effect to states'

39 Press Release, Council of Great Lakes Governors, *President Bush Signs Great Lakes Compact* (Oct. 3, 2008), *available at* http://www.cglg.org/projects/water/docs/PressReleasePresidentSignsCompact10-3-08.pdf.

40 *Id.*

41 *Compact*, *supra* note 3, § 1.3(2)(a). *See also A Resolution Consenting to and Approving the Great Lakes–St. Lawrence River Basin Water Resources Compact: Hearing on S.J. Res. 45 Before the S. Comm. on the Judiciary*, 110th Cong. 3 (2008) (statement of Sen. Herb Kohl, Member, S. Comm. on the Judiciary) ("Something that important [as the Great Lakes] to our prosperity needs to be conserved so that future generations can benefit, and the compact before us, indeed, does that.").

42 *Compact*, *supra* note 3, § 1.3(2)(f).

43 *Id.* § 1.3(1)(a) (stating that the "[w]aters of the [b]asin are precious public natural resources shared and held in trust by the [s]tates"); *id.* § 1.2 (defining "[w]aters of the [b]asin" and "[b]asin [w]ater" to include surface and groundwater).

44 *Id.* § 1.3(1)(f) ("The [p]arties have a shared duty to protect . . . and manage the . . . [w]aters of the [b]asin for the use, benefit and enjoyment of all their citizens, including generations yet to come.").

45 *Id.* § 1.2 (defining "water" as surface water and groundwater, and "basin water" as "the Great Lakes and all streams, rivers, lakes, connecting channels and other bodies of water, including tributary groundwater, within the [b]asin"). The Compact then states that basin waters are held in trust, *id.* § 1.3(1)(a), indicating a clear intention to include all of the basin waters.

46 *See, e.g.*, Letter from Bart Stupak, U.S. Congressman, Mich., to John Conyers, Chairman, House Judiciary Comm. (Sept. 5, 2008), *available at* http://www.house.gov/list/speech/mi01_stupak/20080905glcompact.html (requesting strengthened public trust language in the House Bill ratifying the Compact); MARY C. ERICSON, UNDERSTANDING THE GREAT LAKES COMPACT 2 (2007), *available at* http://www.theoec.org/PDFs/water/GLC_NWFShortVer.pdf (clarifying common myths regarding the Compact's effect on private water rights); Dana M. Saeger, Comment, *The Great Lakes–St. Lawrence River*

decision to pass the Compact with its public trust assertion. Some commentators have suggested that the Compact's trust language merely acknowledged existing law,[47] without changing water rights because of the Compact's express preservation of state common law.[48] Such attempts to neutralize the Compact's trust provision ignore its drafters' use of the defined term, "waters of the basin,"[49] when they could have used the traditional term, "navigable waters."[50] Michigan and Wisconsin politicians raised concerns regarding the effect of the trust provision before the Compact was passed, but no changes were made.[51] The Senate Hearings before federal passage of the Compact are replete with proclamations about the importance of protecting the Great Lakes for future generations,[52] including a statement from two former Michigan governors that "[w]ithout protecting the public trust in our waters, Michigan's sovereign power to safeguard our vital interests against outside forces will be

Basin Water Resources Compact: Groundwater, Fifth Amendment Takings, and the Public Trust Doctrine, 12 GREAT PLAINS NAT. RESOURCES J. 114, 118–19 (2007) (discussing "outspoken opposition" to the Compact by Ohio State Senator Tim Grendell regarding the Compact's "flat-out un-American" public trust doctrine); Letter from Mary Lazich, Wis. State Sen., to Patricia Birkholz, Mich. State Sen., & Great Lakes Legislators (Aug. 24, 2007), *available at* http://www.legis.state.wi.us/lc/committees/study/2006/GLAKE/files/sept04lazich_memo.pdf (expressing concern over the effect of the Compact's trust language).

47 ERICSON, *supra* note 46, at 5 ("The reality is that the Compact's reference to the States' public trust obligations is simply an acknowledgement of existing law and does not have the effect of changing that law; the Compact expressly states its intent not to change existing rights by stating that the Compact shall not be construed to affect any validly established rights related to water withdrawals or common law water rights.") (emphasis omitted).

48 *Id.*

49 *Compact*, *supra* note 3, §§ 1.2 (defining "waters of the basin"), 1.3(1)(a) (declaring the public trust in "the waters of the basin").

50 *See infra* notes 112–15 and accompanying text (explaining that each state holds "navigable waters" in trust for the public, but may define "navigable" differently).

51 Lazich, *supra* note 46 ("Adopting the Compact raises the specter of extending the [p]ublic [t]rust [d]octrine to all waters in all Great Lakes states, including groundwater. . . . The [p]ublic [t]rust [d]octrine has various meanings in the states, and the Compact may affect each state differently. What will it mean in [s]tate and [f]ederal courts, how will this get resolved?"); *see also* Stupak, *supra* note 46.

52 *A Resolution Consenting to and Approving the Great Lakes–St. Lawrence River Basin Water Resources Compact*, *supra* note 41, at 2, 4, 10, 20, 27, 29, 38, 80 (statements of Sen. Herb Kohl, Member, S. Comm. on the Judiciary; Sen. George V. Voinovich, Ohio; George Heartwell, Mayor, Grand Rapids, Michigan; Sen. Patricia Birkholz, Michigan; Att'y Gen. Mike Cox, Michigan; Cameron Davis, President and Chief Executive Officer, Alliance for the Great Lakes; Governor Jim Doyle, Wisconsin; Sen. Carl Levin, Michigan).

diminished."[53] Thus, the Compact's trust provision was not a casual oversight, and it served a stated purpose of the Compact to protect reasonable state uses against outside interests.[54]

The Compact prohibits all new or increased diversions of Great Lakes water from originating watersheds.[55] There are three major exceptions to this prohibition,[56] discussed below, all of which require state approval.[57] The Compact also requires state approval for new or increased withdrawals of water for in-basin use.[58] Each state must set a triggering volume for Compact regulation of withdrawals.[59] Further, each state must create a permitting scheme controlling proposed diversions and withdrawals in accordance with the Compact's "exception standard" for diversions and its "decision-making standard" for withdrawals.[60] No state may approve a diversion or withdrawal that is inconsistent with the Compact or its standards,[61] but the states are free to apply more stringent criteria than the Compact's standards.[62]

The three major exceptions to the Compact's ban on diversions are: (1) transfers to areas within "straddling communities" that are outside of the basin,[63] (2) diversions to communities located within "straddling counties" that lie in other watersheds,[64] and (3) "intra-

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53 *Id.* at 98 (submission of William G. Millikan and James J. Blanchard, former Governors of Michigan).

54 *Id.* By contrast, the federal legislative history of the Compact contained no discussion of the Compact's Article 8 preservation of state common law water rights.

55 *Compact*, *supra* note 3, §4.8 ("All [n]ew or [i]ncreased [d]iversions are prohibited, except as provided for in this [a]rticle.") Diversion is defined by the Compact as "a transfer of [w]ater from the [b]asin into another watershed, or from the watershed of one of the Great Lakes into that of another by any means of transfer." *Id.* § 1.2.

56 *Id.* § 4.9(1)–(3). There are two other exceptions. The definition of "[d]iversion" excludes water used in the basin "to manufacture or produce a [p]roduct that is then transferred out of the [b]asin or watershed." *Id.* § 1.2. Also, states have discretion to govern water diverted in containers of 5.7 gallons or less. *Id.* § 4.12(10).

57 *Id.* § 4.4.

58 *Id.*

59 *Id.* § 4.10.

60 *Id.* §§ 4.3(3), 4.10(1) (requiring states to permit diversions and withdrawals according to the Compact standards). *See also id.* § 4.9(4) (the exception standard); *id.* § 4.11 (the decision-making standard).

61 *Id.* § 4.3(3).

62 *Id.* § 4.12(1).

63 *Id.* § 4.9(1).

64 *Id.* § 4.9(3).

basin transfers" between Great Lakes watersheds.[65] The state in which a proposed diversion originates must employ criteria at least as strict as the Compact's exception standard.[66] Similarly, each state must approve any new or increased withdrawals over the state-set threshold, according to criteria that are at least as strict as the Compact's decision-making standard.[67]

The exception standard and the withdrawal decision-making standard contain similar criteria. Both require that all water diverted or withdrawn be returned to its source watershed, with an allowance for consumptive use.[68] Also, both require that all proposed diversions and withdrawals have no significant adverse impacts, individually or cumulatively, on the basin waters or the land and living organisms affected by the waters.[69] As explained above,[70] the Compact does not preempt the states from strengthening the Compact's standards.[71]

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65 *Id.* § 4.9(2).

66 *Id.* § 4.9(1)–(4). Diversions to "straddling communities" and intrabasin transfers trigger the exception standard requirements when the proposed withdrawal is at least one hundred thousand gallons per day. *Id.* § 4.9(1)–(2). Diversions to communities within "straddling counties" must always meet the exception standard. *Id.* § 4.9(3)(b). "Straddling county" diversions and intrabasin transfers with a net water loss over five million gallons per day require unanimous approval by the "council" of the eight party state governors before the originating state may issue a permit. *Id.* § 4.9(2)(c)(iv), (3)(g). Council approval occurs after "regional review," which requires the originating state to review the proposed application and provide the regional decision-making body, which includes Ontario and Quebec, with a "technical review." *Id.* § 4.5(4). The regional body then must allow for a public commenting period, *id.* § 4.5(3), before making a "declaration of finding" of whether the proposal meets the applicable compact standard, *id.* § 4.5(5). The Compact requires that "the protection of the integrity" of the basin ecosystem "shall be the overarching principle" of this regional review process. *Id.* § 4.5(1)(d). Finally, the council must consider the regional body's findings before deciding whether to grant its approval of a proposal, which must be unanimous. *Id.* § 4.9(2)(c)(iv). Because the Compact trust, *see* discussion *infra* Part III, burdens each state distinctly from the varying traditional public trust doctrines across the region, this council approval process would be subject to the Compact trust. Further, the Compact's standing provisions extend to any person "aggrieved" by council action, authorizing federal judicial review after a hearing before the council. *Id.* § 7.3(1). Consequently, the implications of the Compact trust discussed throughout this paper are region wide.

67 *Id.* § 4.11.

68 *Id.* §§ 4.9(4)(c) (requiring that no water from outside the basin can be used to satisfy this basin return requirement unless it is combined with basin water and treated to satisfy "water quality discharge standards and to prevent the introduction of invasive species into the [b]asin"), 4.11(1).

69 *Id.* §§ 4.9(4)(d), 4.11(2).

70 *See supra* text accompanying notes 61–62.

71 *Compact*, *supra* note 3, § 4.12(1).

The Compact also contains a citizen suit provision entitling any person "aggrieved by a Party action" to a state administrative hearing.[72] After an aggrieved person exhausts her administrative remedies, the Compact authorizes judicial review of the state's actions.[73] Thus, under state standing law, any "aggrieved" person may enforce faithful state application of the Compact's standards.[74]

The provisions in the Great Lakes Compact are binding on all Compact states.[75] Implementing legislation in each state[76] specifies how the state will manage Compact permitting and explicitly mentions any state changes that strengthen the Compact permitting standards.[77]

A. *Michigan's Great Lakes Compact Legislation*

As the only state entirely within the Great Lakes Basin,[78] Michigan does not have any communities or counties that lie outside of the basin, and thus the only diversion exception relevant in the state is the intrabasin transfer provision.[79] Michigan's implementing legislation references the Compact's approval standards for intrabasin transfers, adopting them without variation.[80] For regulating new or increased

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72 *Id.* § 7.3(1).

73 *Id.*

74 *See infra* text accompanying notes 147–52 (discussing Michigan's standing laws); *see also infra* notes 197–210 and accompanying text (discussing Wisconsin's standing laws).

75 *Compact*, *supra* note 3, § 9.3 ("Each provision of this Compact is considered material to the entire Compact, and failure to implement or adhere to any provision may be considered a material breach.").

76 COUNCIL OF GREAT LAKES GOVERNORS, PROJECTS: GREAT LAKES–ST. LAWRENCE RIVER BASIN WATER RESOURCES COMPACT IMPLEMENTATION, http://www.cglg.org/projects/water/CompactImplementation.asp#State%20Legislative%20Activity (last visited Dec. 30, 2009).

77 Michigan implemented the compact through amendments to the Natural Resources and Environmental Protection Act of July 9, 2008, No. 180, 2008 Mich. Pub. Acts 94 (codified at MICH. COMP. LAWS §§ 324.32702, 324.32703, 324.32705, 324.32706, 324.32723 (2008)). This Comment refers to those amendments jointly as the Compact-implementing statute or legislation. In Wisconsin, the compact can be found at WIS. STAT. § 281.343 (2008). The implementing legislation in Wisconsin appears at WIS. STAT. §§ 281.344–.346.

78 GREAT LAKES WATER RESOURCES COMPACT COMMITTEE, *supra* note 27, at 4.

79 MICH. COMP. LAWS § 324.32703 ("[A] diversion of the waters of the state out of the Great Lakes basin is prohibited.").

80 *Id.* § 324.32723(7) ("The department shall issue a water withdrawal permit under subsection (1)(d) [applying to intra-basin transfers over 100,000 gpd] if the transfer complies with section 4.9 of the [C]ompact.").

withdrawals under the Compact, Michigan set its threshold amount at two million gallons per day.[81] Thus, a withdrawal of this amount or more requires a permit from the Michigan Department of Environmental Quality (department or MDEQ).[82] MDEQ must grant the permit if it determines that the proposed withdrawal satisfies the decision-making standard, containing the minimum criteria for approving in-basin withdrawals in all Compact states.[83]

Michigan changed two of the Compact's decision-making criteria. First, the state replaced the Compact's six-factor reasonableness test[84] with a requirement that the department ensure the proposed use is reasonable under state "common law principles of water law."[85] But because no state may approve a withdrawal that is inconsistent with the Compact's standards,[86] this reference to state water law cannot conflict with the Compact's reasonableness criteria in any case-by-case balancing.[87]

The second change Michigan made to the Compact's decision-making standard similarly references state common law. Before issuing a permit the department must ensure the proposed withdrawal does "not violate public or private rights and limitations imposed by Michigan water law or other Michigan common law duties."[88] The Michigan statute supplied no hint as to how the department should

81 *Id.* § 324.32723(1). Withdrawals from high quality waters, as determined by a site-specific review during the application process, must be approved subject to the compact-implementing standards at 1,000,000 gpd. *Id.* Below these threshold levels, the state requires registration with MDEQ by any person who intends to develop the capacity to withdrawal an average of 100,000 gpd over any thirty-day period or to increase their withdraw capacity by that amount. *See also id.* § 324.32705(1) (requiring registration for new or increased "large quantity withdrawals"); *id.* § 324.32701(aa) (defining "large quantity withdrawal").

82 *Id.* § 324.32723(1).

83 *Compact*, *supra* note 3, § 4.12(1) ("This [s]tandard . . . shall be used as a minimum standard.").

84 *Id.* § 4.11(5).

85 MICH. COMP. LAWS § 324.32723(6)(d). *See also* Jacqueline P. Hand, *Michigan, in* 6 WATERS AND WATER RIGHTS 681, 681–87 (Robert E. Beck ed., 2005) (providing an overview of Michigan's water laws).

86 *Compact*, *supra* note 3, § 4.11 (requiring withdrawals be approved only "when the following criteria are met").

87 Michigan's compact implementing legislation acknowledges this requirement for consistency. MICH. COMP. LAWS § 324.32723(9) ("A proposed use for which a water withdrawal permit is issued under this section shall be considered to satisfy the requirements of . . . the [C]ompact.").

88 *Id.* § 324.32723(6)(f).

interpret these requirements. Common law duties in Michigan clearly include trustee obligations under the public trust doctrine.[89] In fact, the Michigan courts see themselves as trustees under the doctrine, along with the legislative and executive branches of the state government.[90] Consequently, Michigan's legislation requires that decisions on withdrawals comply with trustee obligations under the public trust doctrine.

In the Compact, Michigan recognized a public trust doctrine that includes basin waters regardless of navigability, including tributary groundwater.[91] However, the public trust doctrine in Michigan only includes "navigable" waters,[92] which state courts have defined to exclude groundwater and many inland lakes and streams.[93] The Compact recognizes common law water rights,[94] but limits on Michigan's public trust doctrine cannot prevent implementation of the Compact public trust. State courts will have to determine the scope of the trustee obligations under the Compact's public trust doctrine in light of the Compact's preservation of common law.[95]

B. Wisconsin's Great Lakes Compact Legislation

Wisconsin passed extensive legislation implementing the Compact in April 2008.[96] Like Michigan's delegation of permitting authority to MDEQ, Wisconsin required the Wisconsin Department of Natural Resources (department or WDNR) to control new or increased diversions and withdrawals from Great Lakes waters through a permit system.[97] By listing what the department must include in a permit[98]

89 Obrecht v. Nat'l Gypsum Co., 105 N.W.2d 143, 149 (Mich. 1960) (reiterating Michigan's commitment to the "universally accepted rules of such trusteeship").

90 *Id.* ("This Court, equally with the legislative and executive departments, is one of the sworn guardians of Michigan's duty and responsibility as trustee of the above delineated beds of five Great Lakes.").

91 MICH. COMP. LAWS § 324.34201 (ratifying the Compact); *Compact*, *supra* note 3, § 1.3(1)(a).

92 Bott v. Comm'n of Natural Res. of Mich., 327 N.W.2d 838, 846 (Mich. 1982).

93 *Id.* at 841 ("[T]he public has no right to use waters not accessible by ship or wide or deep enough for log flotation . . . .").

94 *Compact*, *supra* note 3, § 8.1(2).

95 *See infra* notes 233–45 and accompanying text (discussing the relationship between the compact trust and state law).

96 2007 Wis. Act 227 (2008) (codified as amended in scattered sections of Wis. Stat.), *available at* http://www.legis.state.wi.us/2007/ data/acts/07Act227.pdf.

97 WIS. STAT. § 281.346(4) (2008) (prohibiting diversions except as authorized by department approval).

and specifically calling for department rulemaking to implement the permitting process, Wisconsin's legislation provides WDNR with more thorough criteria for applying permitting standards than Michigan's statute.[99] Wisconsin's permitting program is also much more complex, setting staggered triggering amounts for different decision-making standards for in-basin withdrawals and referencing several other state permitting programs.[100] The exception standard for approving diversions is slightly more complex than Michigan's, where diversions out of the basin cannot occur.[101] Likely, the exception standard will be at play frequently in Wisconsin, as most of the state lies outside of the basin and the fastest growing communities lie on the basin lines.[102]

Unlike Michigan's statute, Wisconsin's implementing legislation attempts to freeze the scope of the public trust doctrine as traditionally applied in the state. Both the statute ratifying the Compact[103] and the provision implementing the Compact's standards for withdrawal and diversion permits[104] contain identical language:

98 *Id.* § 281.346(5)(b) (requiring permits to contain: (1) a withdrawal amount; (2) provisions for estimating, monitoring, and reporting "substantial increases in water loss resulting from increases in withdrawal amounts"; (3) "[r]equirements for estimating the amount withdrawn, monitoring . . . if necessary, and reporting the results"; (4) "[r]equirements for water conservation"; (5) "[l]imits on the location and dates or seasons of the withdrawal and on the allowable uses of the water"; (5m) any limit on the withdrawal amount necessary for compliance with the decision-making standard if it applies; (6) "[c]onditions on any diversion . . . made by the person making the withdrawal"; (6m) in certain circumstances, the criteria listed in WIS. STAT. § 281.35(6)(a); and (7) conditions ensuring the "withdrawal does not cause significant adverse environmental impact" if the withdrawal is from a surface water body tributary and would result in a net loss of more than ninety-five percent of the water withdrawn).

99 *E.g.*, *id.* § 281.346(5)(d)(2), (9)(b)(1)–(2). *See also* Memorandum from the Wisconsin Legislative Council on Great Lakes Compact Law (2007 Wisconsin Act 227): DNR Rule-Making, 3–6, IM-2008-08, *available at* http://www.legis.state.wi.us/lc/publications/im/im_2008_08.pdf (last visited Jan. 25, 2010) (providing a chart that lists rulemaking the department may or must do under the Compact) (on file with author).

100 *E.g.*, WIS. STAT. § 281.346(5)(e)(1) (requiring a WDNR permit according to the "state decision-making standard" for new or increased withdrawals over 1,000,000 gpd but less than 10,000,000 gpd, and for existing withdrawals of that volume not covered by one of two listed general permits under different statutory sections unless the withdrawal is for a public water supply to serve a population of at least 10,000, which must comply instead with a "water supply service area plan" under a different statutory section); *see also id.* § 281.346(5)(e)(2), (d)(3).

101 *See supra* notes 79–80 and accompanying text.

102 *See supra* notes 28–29, 32 and accompanying text.

103 WIS. STAT. § 281.343.

104 *Id.* § 281.346.

"Nothing in this section may be interpreted to change the application of the public trust doctrine under article IX, section 1, of the Wisconsin Constitution or to create any new public trust rights." This apparent savings clause raises the question of whether the state has the authority to freeze the public trust doctrine under the Compact, which applies to a broader scope of waters than traditionally recognized under Wisconsin's public trust doctrine. As a signatory to the Compact, Wisconsin cannot legislate in contradiction to its provisions.[105] Thus, a frozen public trust doctrine in Wisconsin that cannot reach diversions and withdrawals regulated by the Great Lakes Compact seems forbidden by the Compact itself.

As discussed below,[106] the traditional public trust doctrines in Michigan and Wisconsin have a more limited scope than the Compact. Because the Compact both embraces an expansive public trust doctrine and preserves state common law water rights, the trustee obligations created by the scope of the Compact's public trust doctrine must be reconciled with the common law traditions in Michigan and Wisconsin.

II
THE TRADITIONAL PUBLIC TRUST DOCTRINE

The public trust doctrine provides that states hold navigable waters in trust for the public.[107] The Northwest Ordinance, passed in 1787 to establish a territorial government and provide for eventual admission to the union of states formed from the Northwest Territory,[108] preserved public ownership of all navigable waterways, announcing that "navigable [w]aters leading into the Mississippi and St. Lawrence, and the carrying places between the same shall be common

105 *See, e.g.*, Bi-State Dev. Agency of Mo.-Ill. Metro. Dist. v. Dir. of Revenue, 781 S.W.2d 80, 82 (Mo. 1989) ("[I]t is within the competency of a State, which is a party to a compact with another State, to legislate in respect of matters covered by the compact *so long as such legislative action is in approbation and not in reprobation of the compact*.") (citations omitted) (emphasis added); *see also Compact*, *supra* note 3, § 9.3 ("Each provision of this Compact is considered material to the entire Compact, and failure to implement or adhere to any provision may be considered a material breach.").

106 *See infra* notes 123–33 and accompanying text (discussing the scope of Michigan's public trust doctrine). *See also infra* notes 161–71 and accompanying text (discussing the scope of Wisconsin's public trust doctrine).

107 Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 456 (1892) (quoting Martin v. Wadell's Lessee, 41 U.S. 367, 410 (1842)).

108 1 MELVIN I. UROFSKY & PAUL FINKELMAN, DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 88 (Oxford University Press 3d ed. 2008).

highways, and forever free."[109] Wisconsin and Michigan were both originally part of the Northwest Territory and are bound by the terms of the Northwest Ordinance, making adoption of the public trust doctrine inherent in their statehood status.[110]

Michigan and Wisconsin have adopted the doctrine as a settled matter of law.[111] Wisconsin's constitution contains language directly from the Northwest Ordinance.[112] Michigan's common law applied the public trust doctrine as early as 1843.[113] Litigants have used the public trust doctrine in each state to protect the public's rights of free navigation, fishing, hunting, and recreation on navigable waters.[114] Courts have defined navigable waters broadly in Wisconsin, less so in Michigan.[115] In both states the public has always unquestionably owned the beds and waters of the Great Lakes themselves.[116]

The public trust doctrine differs in many respects between Michigan and Wisconsin. The law in both states, but especially in Wisconsin, is dense and the product both of common law and statutes. This section examines the scope of the doctrine, including trustee management obligations and citizen standing rules, in both Michigan and Wisconsin.

A. The Public Trust Doctrine in Michigan

Because Michigan was formed out of the Northwest Territory, Michigan courts have cited the Northwest Ordinance as making the

109 *An Ordinance for the Territory of the United States North West of the Ohio River*, *in* NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS AND LEGACY 126 (Frederick D. Williams ed. 1989).

110 *See supra* note 33 and accompanying text.

111 *See, e.g.*, Glass v. Goeckel, 703 N.W.2d 58, 64 (Mich. 2005) (citing Nedtweg v. Wallace, 208 N.W. 51 (Mich. 1926)); R.W. Docks & Slips v. State Dep't of Natural Res., 628 N.W.2d 781, 788 (Wis. 2001) (citing Franzini v. Layland, 97 N.W. 499 (Wis. 1903)).

112 WIS. CONST. art. IX, § 1.

113 People v. Silberwood, 67 N.W. 1087, 1088 (Mich. 1896) (citing La Plaisance Bay Harbor Co. v. City of Monroe, Walk. Ch. 155 (Mich. Ch. 1843)).

114 *See infra* notes 123–33 and accompanying text (discussing the scope of Michigan's public trust doctrine). *See infra* notes 161–71 and accompanying text (discussing the scope of Wisconsin's public trust doctrine).

115 *See infra* notes 123–33 and accompanying text (discussing the scope of Michigan's public trust doctrine). *See infra* notes 161–71 and accompanying text (discussing the scope of Wisconsin's public trust doctrine).

116 *Glass*, 703 N.W.2d at 64 (citing *Silberwood*, 67 N.W. at 1089); *R.W. Docks & Slips*, 628 N.W.2d at 787; City of Milwaukee v. State, 214 N.W. 820, 826 (Wis. 1927) (citing McLennan v. Prentice, 55 N.W. 764, 770 (Wis. 1893)).

public trust doctrine "an inalienable obligation of sovereignty."[117] Michigan courts have also based the public trust doctrine in the state's common law tradition,[118] beginning with the Michigan Supreme Court's 1896 adoption[119] of the seminal U.S. Supreme Court case, *Illinois Central Railroad Co. v. Illinois*.[120] In 1970, Michigan included statutory protection of the public trust in "air, water, and other natural resources" from "pollution, impairment, or destruction" in the Michigan Environmental Protection Act (MEPA),[121] but state courts have interpreted MEPA and other statutory public trust provisions to have no effect on Michigan's common law public trust doctrine.[122]

1. The Scope of Michigan's Public Trust Doctrine

Michigan courts have applied the public trust doctrine only to navigable waters,[123] continuing to use the most traditional tests for defining which waters are navigable.[124] Although Michigan's inland lakes and streams, wetlands, and groundwater all lie within the Great Lakes Basin, and thus are covered by the Compact's diversion and withdrawal regulations, Michigan courts have not always found these waters to be within the scope of the public trust.

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117 Nedtweg v. Wallace, 208 N.W. 51, 52 (Mich. 1926); *see also* Moore v. Sanborne, 2 Mich. 519, 525 (Mich. 1853) ("The Ordinance of 1787, would supersede this doctrine of the necessity of usage or custom, to establish a public right over our rivers, even were such the established rule of the common law."); State v. Lake St. Clair Fishing & Shooting Club, 87 N.W. 117, 125 (Mich. 1901) ("The federal government had only a title in trust for future states, with certain powers in relation to navigation. On the admission of Michigan, all of said submerged land covered by this lake, to high-water mark, passed to the state in its sovereign right . . . in trust for the public, according to the original cession from Virginia and the ordinance of 1787."); *Glass*, 703 N.W.2d at 74 (citing the Northwest Ordinance as requiring the court to "protect the Great Lakes as 'common highways'").

118 *Glass*, 703 N.W.2d at 62 (citing Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892); *Nedtweg*, 208 N.W. at 52).

119 *Silberwood*, 67 N.W. at 1089 ("It seems to me the reasoning of this case [*Illinois Central*] is without flaw, and that the law enunciated therein ought to stand as the law of this state.").

120 146 U.S. 387.

121 MICH. COMP. LAWS § 324.1701(1) (2008).

122 *See* Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc. (*Nestle I*), 709 N.W.2d 174, 221 (Mich. Ct. App. 2005), *aff'd in part*, *rev'd in part*, 737 N.W.2d 447 (Mich. 2007) (limiting its discussion to the standing issue and passing on the merits of the other issues appealed); *see also Glass*, 703 N.W.2d at 66–67 (discussing the Great Lakes Submerged Lands Act).

123 Bott v. Comm'n of Natural Res. of Mich., 327 N.W.2d 838, 846 (Mich. 1982).

124 *Nestle I*, 709 N.W.2d at 217–18.

The most recent Michigan court to discuss the public trust doctrine's applicability to inland waters was the Michigan Court of Appeals in *Michigan Citizens for Water Conservation v. Nestle Waters North America, Inc*. (*Nestle I*).[125] In 2005, the *Nestle I* court upheld a trial court's injunctive relief against a water bottling company that was pumping 400 gallons of water per minute from an MDEQ-permitted well.[126] The plaintiffs claimed, among other things, a violation of the public trust doctrine.[127] The court of appeals expressly refused to apply the public trust doctrine to waters that were not navigable under a log-flotation test.[128]

Michigan courts developed the log-flotation test in the nineteenth century to determine navigability according to commercial use of waters.[129] Navigability under this test requires a showing that a water body is, or was at some earlier time, capable of floating "large mill logs" twenty to forty feet long.[130] Because the Michigan Supreme Court's rationale for the public trust doctrine is to protect navigable waters "for use as highways of commerce," that court in 1982, in *Bott v. Commission of Natural Resources*,[131] upheld a court of appeals' decision that the trust did "not attach to lakes unconnected to other waterways or to lakes with only one inlet or outlet."[132] In *Nestle I*, the court of appeals relied on *Bott* in refusing to consider the more modern recreational test for determining navigability.[133]

This narrow scope prevents Michigan's public trust doctrine from protecting groundwater, non-navigable tributaries, or most wetlands. This limit is inconsistent with the Compact, modern understandings of interconnected water systems, and the social and economic worth of

125 *Id.* (limiting its discussion to standing and avoiding the merits).

126 *Id.* at 207–08 (granting a partial injunction).

127 *See id.* at 184–85.

128 *Id.* at 217–18. Under the log-flotation test, navigability requires evidence that the stream was historically used to float logs, a demonstration that the stream can currently float logs, or a comparison with streams already determined navigable by either of those two methods. *Id.* at 219. Seasonal capability of log-flotation is sufficient to prove navigability. *Id.* at 218.

129 Moore v. Sanborne, 2 Mich. 519, 525 (Mich. 1853) ("[I]n a region where the principal business is lumbering, or the pursuit of any particular branch of manufacturing or trade, the public claim to a right of passage along its streams must depend upon their capacity for the use to which they can be made subservient.").

130 *Nestle I*, 709 N.W.2d at 218–19 (citing *Moore*, 2 Mich. at 526).

131 327 N.W.2d 838, 846 (Mich. 1982).

132 *Id.* at 845–46.

133 *Nestle I*, 709 N.W.2d at 218.

waterways incapable of supporting nineteenth century logging practices.

But the trust provisions in the Compact clearly do reach non-navigable waters and groundwater, and Michigan cannot ignore its trustee obligations under the Compact.[134] Thus, when regulating diversions and withdrawals, MDEQ must consider the statewide public interest as paramount.[135] Approved diversions and withdrawals of groundwater must not only comply with the specific criteria in the Compact,[136] but Michigan must also ensure that such uses do not significantly impair the public's interest under the public trust doctrine.[137]

Common law water rights in Michigan permit reasonable groundwater use that does not interfere with a neighbor's reasonable use of water below the neighbor's land.[138] Because Michigan's public trust doctrine does not apply to groundwater, these common law use rights do not require congruity with the interests of the public in general. The Compact, however, protects the public interest in diversions and withdrawals of Great Lakes water, regardless of navigability, and obligates MDEQ, as a trustee of public waters, where Michigan's traditional public trust doctrine may not. Therefore, the consequence of the Compact's extension of the public trust doctrine to diversions and withdrawals of groundwater is to require consideration of a broader class of interests affected by use of the water, and to require that consideration be made by the state before the use occurs.

2. *State Trustee Obligations*

Under the public trust doctrine, the state must make a reasoned determination that any devotion of trust resources to private use serves the public interest.[139] The state may alienate trust resources

134 *See supra* notes 13–16 and accompanying text.

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

136 *Compact*, *supra* note 3, § 4.3(3).

137 *Ill. Cent. R.R. Co.,* 146 U.S. at 435.

138 *See* Hand, *supra* note 85.

139 Obrecht v. Nat'l Gypsum Co., 105 N.W.2d 143, 149 (Mich. 1960). *See also Ill. Cent. R.R. Co.*, 146 U.S. at 435 (asserting that sovereign conveyance of trust resources is permitted only "when that can be done without substantial impairment of the interest of the public in the waters.").

only if the alienation is in the public interest.[140] Also, because the state *always* has owned trust property, regardless of any title that may have passed to a private individual,[141] takings claims cannot succeed against the state for regulating the use of trust property.[142]

The public trust doctrine has often been invoked in Michigan as a defense to trespass claims[143] and as a basis for quieting title to certain lands.[144] When the state claims to be furthering the trust, either through alienation or regulation of trust property, Michigan courts almost universally uphold the state's position as lawful.[145] But no examples exist of cases where a Michigan court employed the public trust doctrine as a "hard look doctrine" in order to require further consideration of the public interest by the state. The number of Michigan cases involving citizen challenges to state regulation of trust resources is equally scant;[146] it is uncertain whether the court's

140 People v. Silberwood, 67 N.W. 1087, 1089 (Mich. 1896) (upholding legislative authority to convey submerged lands in Lake Erie for public shooting grounds); Nedtweg v. Wallace, 208 N.W. 51, 54 (Mich. 1926) (upholding legislative authority to grant ninety-nine-year leases of relicted lakebed because the land could never be sold—the leases remained subject to public rights of navigation, hunting, and fishing, and the legislature had the power to determine that such leases were in the public's best interest). Also, claims of adverse possession cannot succeed on lands claimed by the state under the public trust doctrine, regardless of private development on the land. State v. Lake St. Clair Fishing & Shooting Club, 87 N.W. 117, 125 (Mich. 1901).

141 *Lake St. Clair Fishing & Shooting Club*, 87 N.W. at 125; *see also* State v. Venice of Am. Land Co., 125 N.W. 770, 774 (Mich. 1910) (holding that title claimed by a grant from the British crown does not extend to land submerged at the time of statehood).

142 *Lake St. Clair Fishing & Shooting Club*, 87 N.W. at 125.

143 Glass v. Goeckel, 703 N.W.2d 58, 63 (Mich. 2005); Collins v. Gerhardt, 211 N.W. 115, 116 (Mich. 1926).

144 *Lake St. Clair Fishing & Shooting Club*, 87 N.W. at 119; *Venice of America Land Co*., 125 N.W. at 771; *Nedtweg*, 208 N.W. at 52 (issuing a writ of mandamus to the state Commission of Conservation to grant a lease in accordance with a statute leasing trust land); Hilt v. Weber, 233 N.W. 159, 160 (Mich. 1930).

145 *See* Obrecht v. Nat'l Gypsum Co., 105 N.W. 2d 143, 149–50 (requiring state permission for alienation of trust land); People ex rel. MacMullan v. Babcock, 196 N.W.2d 489, 497 (Mich. Ct. App. 1972) (granting the state an injunction against property owners seeking to place a land fill in Lake St. Clair). *But see* Peterman v. State Dept. of Natural Res., 521 N.W.2d 499, 511–12 (Mich. 1994) (awarding compensation to riparian owners for property above the high water mark under the general rule that "loss of fast lands must be compensated," and awarding compensation for property below the high water mark because "[t]he taking of the property served no public interest" because the state could have improved navigation without destroying plaintiff's beach).

146 *Contra* Bertram C. Frey & Andrew Mutz, *The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States*, 40 U. MICH. J.L. REFORM 907, 985 (2007) (citing *Obrecht* as an example of a private party suing under the public trust doctrine). However, in *Obrecht*, riparian homeowners sued a mining company for private

apparent unwillingness to review agency public trust decisions with skepticism is a reflection of especially convincing state decision making or merely judicial deference.

3. Citizen Standing to Enforce Michigan's Public Trust Doctrine

There was no Michigan decision in which a citizen filed suit to enforce the public trust doctrine against private parties before MEPA's 1970 citizen suit provision.[147] In 2005, in *Nestle I*, the Michigan Court of Appeals upheld standing for a citizen group representing the interests of riparian property owners "in the vicinity of" Nestle's wells to pursue its public trust doctrine claim against Nestle's groundwater pumping activities because of the hydrological link between the streams, lakes, and wetlands in the area at issue.[148] However, the state supreme court reversed,[149] determining that the citizen group lacked standing because it could not show it used or had any "substantial interest . . . distinct from the interest of the general public."[150] Thus, in Michigan, citizen standing to bring public trust doctrine claims requires a showing of particularized injury to the plaintiff, not the environment, regardless of any statutory grant that might imply otherwise.[151]

and public nuisance, and the state attorney general intervened, contending that the public trust doctrine required state approval for the defendant's actions. 105 N.W.2d at 148. The homeowners never raised the public trust doctrine claim, and the court differentiated between the two. *Id.*

147 *See supra* note 146 and accompanying text.

148 *Nestle I*, 709 N.W.2d 174, 184, 225 (Mich. Ct. App. 2005).

149 Mich. Citizens for Water Conservation v. Nestle Waters of N. Am., Inc. (*Nestle II*), 737 N.W.2d 447, 456–57 (Mich. 2007) ("Were the 'ecosystem nexus' approach consistent with the operant doctrine of standing, it would justify the standing of anyone but a Martian to contest water withdrawals occurring in Michigan. Traditional standing principles would be obliterated.").

150 *Id.* at 456.

151 *Id.* at 459 ("Nothing in the language of this [constitutional] provision indicates that the paramount public concern for the conservation and development of Michigan's natural resources and the [l]egislature's responsibility to protect these resources compromises the principles of standing and renders them inapplicable to environmental plaintiffs."); *id.* ("[P]laintiff's belief that MEPA authorizes citizen suits does not change the calculus. . . . [C]itizen suits historically have conferred on the litigant a concrete private interest in the outcome of the suit, and therefore involved only those who have suffered either a direct or assigned injury in fact.").

B. The Public Trust Doctrine in Wisconsin

The roots of Wisconsin's public trust doctrine lie in the Northwest Ordinance of 1787[152] and the state constitution,[153] which contains language directly from the Ordinance.[154] The state supreme court dated legislative codification of the common law of the public trust doctrine to a 1915 law delegating management and protection of the trust resources to state agencies.[155] Consequently, much public trust case law in recent decades has relied as much on state administrative procedure as on common law principles of the trust doctrine.

Litigants have employed Wisconsin's public trust doctrine as a state defense against takings claims,[156] as a citizen tool for ensuring proper administrative procedure,[157] and as a restraint on the alienation of trust property.[158] The scope of the Wisconsin public trust doctrine extends to all navigable-in-fact waters, and it protects the public's interest in navigation, recreation, fishing, hunting, and aesthetic

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152 Ill. Steel Co. v. Bilot, 84 N.W. 855, 856 (Wis. 1901) ("The United States never had title, in the Northwest Territory, out of which this state was carved, to the beds of lakes, ponds and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must there continue forever, so far as necessary to the enjoyment thereof by the people . . . .").

153 Diana Shooting Club v. Husting, 145 N.W. 816, 818 (Wis. 1914) (citing both the Northwest Ordinance and the state constitution); City of Milwaukee v. State, 214 N.W. 820, 822 (Wis. 1927) (citing both the Northwest Ordinance and the state constitution); Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 516 (Wis. 1952) (citing both the Northwest Ordinance and the state constitution); R.W. Docks & Slips v. State Dep't of Natural Res., 628 N.W.2d 781, 787 (Wis. 2001) ("The public trust doctrine originated in the Northwest Ordinance of 1787 and the Wisconsin Constitution . . . .") (citing Gillen v. City of Neenah, 580 N.W.2d 628 (1998)).

154 WIS. CONST. art. IX, § 1 ("[T]he river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free.").

155 *Muench*, 53 N.W.2d at 520 (outlining the history of the Water Power Law, which since 1915 required a state agency to permit any dam construction on a navigable stream on the condition that the proposed dam did not "materially obstruct existing navigation or violate other public rights") (emphasis omitted).

156 *See, e.g.*, *R.W. Docks & Slips*, 628 N.W.2d at 787 (stating that there can be no regulatory taking where the state denied plaintiff's permit to develop the final seventy-one of 201 boat slips at a marina because riparian rights "are subject to and limited by the public trust doctrine").

157 *Muench*, 53 N.W.2d at 522 (accepting that citizen plaintiff was aggrieved and directly affected by the state action for standing purposes, based on his right as a state citizen to enjoy the navigable streams for recreational purposes).

158 ABKA Ltd. P'ship v. Wis. Dep't of Natural Res., 648 N.W.2d 854, 857 (Wis. 2002) (finding riparian owner's attempt to transfer riparian rights independently from the land they attached to was a violation of the public trust doctrine).

enjoyment.[159] Wisconsin courts also recognize citizen standing to enforce the public trust doctrine.[160]

1. The Scope of Wisconsin's Public Trust Doctrine

The state of Wisconsin holds navigable water bodies in trust for the public, defining "navigable" to mean capable of floating the shallowest boats used for recreation.[161] The result of this recreation test for navigability is that the state holds a broad range of water bodies in the public trust, and courts define the trust corpus in terms of current public values rather than historic commercial viability.[162] According to the state supreme court, a water body need only be navigable-in-fact at regularly recurring times or "of a duration . . . to make it conducive to recreational uses."[163] Further, the court explained that the public trust doctrine in Wisconsin protects public rights to navigation, hunting, fishing, recreation, and aesthetic enjoyment of navigable-in-fact waters.[164]

In 1972, the Wisconsin Supreme Court held that the public trust doctrine not only obligates the state to "protect and preserve" navigable waters "for fishing, recreation, and scenic beauty" but the public trust doctrine may also burden development rights on privately owned lands.[165] In *Just v. Marinette County*,[166] the court upheld a shore-land zoning ordinance that required landowners to obtain state permits before changing "the natural character of . . . land within 1,000 feet of a navigable lake [or] 300 feet of a navigable river."[167] *Just* denied the plaintiff's regulatory takings claim, concluding that the developer had no "unlimited right" to an unnatural use of his land.[168] The Wisconsin Supreme Court found the zoning ordinance

159 *Muench*, 53 N.W.2d at 525.

160 *See infra* notes 198–211 and accompanying text (discussing Wisconsin's citizen standing rules to uphold the public trust doctrine).

161 *Muench*, 53 N.W.2d at 519.

162 *Id.* at 522.

163 DeGayner & Co. v. Dep't of Natural Res., 236 N.W.2d 217, 222 (Wis. 1975).

164 *Muench*, 53 N.W.2d at 519–22 (explaining that public trust rights should not be "'limited or curtailed by narrow construction'") (quoting Diana Shooting Club v. Husting, 145 N.W. 816, 820 (Wis. 1914)).

165 Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972).

166 201 N.W.2d 761 (Wis. 1972).

167 *Id.* at 768.

168 *Id.* ("An owner of land has no absolute and unlimited right to change the essential natural character of his land so as [to] use it for a purpose for which it was unsuited in its

constitutional[169] because "the interrelationship" between the regulated land and the public waters triggered the state's duty under the public trust doctrine to protect those waters.[170] Thus, the state's duty to protect navigable waters includes a duty to regulate private wetland fills affecting navigable waters.[171] As public values changed, the scope of Wisconsin's public trust doctrine changed as well.

2. State Trustee Obligations

The Wisconsin legislature fulfills its obligation to protect trust resources largely through a series of statutes regulating private use of navigable waters and delegating management and enforcement powers to the WDNR.[172] Chapter 30 of Wisconsin's statutes requires

natural state and which injures the rights of others . . . . [W]e think it is not an unreasonable exercise of that [police] power [in zoning] to prevent harm to public rights by limiting the use of private property to its natural uses."); *see also* Zealy v. City of Waukesha, 548 N.W.2d 528, 534 (Wis. 1996) ("While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling."). The court in *Zealy* denied the plaintiff's regulatory takings claim, which was based on a rezoning of part of plaintiff's land as a wetland conservancy district, prohibiting residential development on 8.2 acres of a 10.4 acre parcel, because the land could still be used for farming, its historical use. *Id.* at 533–34.

169 *Just*, 201 N.W.2d at 768 (affirming a modified judgment of the lower court, which improperly dismissed the plaintiff's claim despite holding the zoning ordinance to be constitutional).

170 *Id.* at 768 ("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 . . . . 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.").

171 *Id.* ("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 balance of nature[,] and are essential to the purity of the water in our lakes and streams.").

172 WIS. STAT. §§ 30.12–13, 30.18–19, 31.02 (2008) (requiring WDNR to regulate: the construction of structures on and the deposit of materials in navigable water; the placing of wharves, piers, and swimming rafts in navigable waters; diversion of water from navigable lakes and streams; enlargements of navigable waterways; and the construction of dams on navigable waterways). *See also* ABKA Ltd. P'ship v. Wis. Dep't of Natural Res., 648 N.W.2d 854, 858–59 (Wis. 2002) ("Chapter 30 embodies a system of regulation of Wisconsin's navigable waters pursuant to the public trust doctrine. . . . The legislature has delegated to the DNR broad authority to regulate under the public trust doctrine and to administer ch. 30.") (citations omitted); State v. Trudeau, 408 N.W.2d 337, 341 (Wis. 1987) ("[C]h. 30, Stats., generally codif[ies] a number of common law doctrines regarding the ownership of the beds of navigable waters.").

WDNR permits for activities affecting navigable waters,[173] and permit issuance requires an agency finding that the activity will not harm the public's rights.[174] The statutes also authorize the WDNR to pursue any violators of the public trust doctrine and to seek administrative or judicial relief.[175] Because of this broad delegation of trust management powers and the detailed statutory articulation of the public's interest in navigable waters,[176] the public trust doctrine in Wisconsin is often reliant on state administrative processes. Wisconsin courts generally defer to state decisions that further the public interest,[177] and they seldom require further state action in protection of trust resources.[178]

173 *See, e.g.*, WIS. STAT. § 30.12(3m)(c)(2) (authorizing WDNR to permit the placement of a structure on the bed of a navigable water if it will not be "detrimental to the public interest").

174 *See, e.g.*, *id.* §§ 30.12(3m)(c)(1)–(3) (authorizing WDNR to issue a permit for a structure or deposit on the bed of a navigable water body if the department finds that it will not materially obstruct navigation, be detrimental to the public interest, or materially reduce the stream's flow capacity); 30.18(5)(a)(1) (authorizing WDNR to issue a permit for a withdrawal from a stream if it finds the withdrawal will not injure any public rights in navigable waters).

175 WIS. STAT. § 30.03(4); *see ABKA Ltd. P'ship*, 648 N.W.2d at 859 (upholding broad DNR authority under the statute).

176 *See supra* note 173 and accompanying text. Beyond merely requiring permits for activities affecting navigable waters, chapter 30 carves out exemptions to its permit requirements, defining limits of the public's interest. For example, section 30.12 lists twelve exceptions to its requirement of a WDNR permit for placing structures on the bed of navigable waters, WIS. STAT. § 30.12 (1g)(a)–(km), including "[a]n intake or outfall structure that is less than [six] feet from the water side of the ordinary high-water mark and that is less than [twenty-five] percent of the width of the channel in which it is placed." *Id.*

177 *See* Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972); Zealy v. City of Waukesha, 548 N.W.2d 528, 534 (Wis. 1996); Hixon v. Pub. Serv. Comm'n, 146 N.W.2d 577, 589 (Wis. 1967) (upholding an agency denial of a permit and refusing to require agency to further explain its conclusory statement that the action was not in the public's interest); Village of Menomonee Falls v. Dep't of Natural Res., 412 N.W.2d 505, 511–12 (Wis. Ct. App. 1987) (upholding a WDNR finding of navigability, even though against the great weight of the evidence); R.W. Docks & Slips v. State, 628 N.W.2d 781, 788 (Wis. 2001) (upholding a WDNR denial of a final permit for completion of boat slip construction, based on the department's decision to protect emergent weed bed, and denying the plaintiff's taking claim because riparian rights were always subordinate to public rights); *ABKA Ltd. P'ship*, 648 N.W.2d at 854 (upholding WDNR's authority under section 30.03(4) of the Wisconsin Code to bring an enforcement action "when it learns of a 'possible violation' of the public trust doctrine"); Baer v. Wis. Dep't of Natural Res., 724 N.W.2d 638, 644 (Wis. Ct. App. 2006) (agreeing with the WDNR that it had a statutory duty to proceed against a person it believed to be acting contrary to the public rights in a navigable lake). *But see* Town of Ashwaubenon v. Pub. Serv. Comm'n, 125 N.W.2d 647, 654 (Wis. 1963) (finding no substantial evidence for commission's permit denial but

A rare case of judicial overturning of administrative decision making was *ABKA Ltd. Partnership v. Department of Natural Resources*,[179] where in 2002 the Wisconsin Supreme Court concluded that a WDNR-permitted plan to convert marina property to over 400 condominiums violated the public trust doctrine[180] because it was inconsistent with a statutory prohibition of transferring riparian water rights separately from riparian land.[181] A concurring opinion agreed with the court of appeals[182] that the conversion was a public trust doctrine violation simply because it transferred public waters to private ownership.[183]

Although the Wisconsin Supreme Court did not defer to the department's decision to permit the conveyance, it did defer to the statutory restriction on riparian water rights as defining the scope of the public's interest in navigable waters.[184] The court identified several possible ways the conveyance could violate the public trust

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remanding for the agency to build the record if it could). The dissent in *Ashwaubenon* argued for greater deference to the agency, *id.* at 655–56, and the author of that dissent wrote the opinion in *Hixon*, *supra*, a year later.

178 *But see* Gillen v. City of Neenah, 580 N.W. 2d 628, 638 (Wis. 1998) (remanding to the circuit court for factual determinations regarding a possible violation of the public trust despite the defendants having state approval for their actions); Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 524 (Wis. 1952) (finding a state statute unconstitutional because it delegated trust management, of state-wide interest, to local authorities); Priewe v. Wis. State Land & Improvement Co., 67 N.W. 918, 922 (Wis. 1896) (invalidating a legislative decision to drain a lake "under the guise of legislating for the public health . . . and thereby create a nuisance").

179 648 N.W.2d 854 (Wis. 2002).

180 *Id.* at 857.

181 *Id.* (finding a violation of Wis. Stat. § 30.133). ABKA claimed compliance with the statute by declaring the condominium unit to be a "four-by-five-by-six inch 'lock box'" located on land with waterfront real estate and riparian use rights as an appurtenance. *Id.* The court concluded that because any proposal that the lock boxes were intended for independent use was a "sham," the conveyance of the riparian rights violated section 30.133. *Id.* at 865.

182 *Id.* at 870 (Bablitch, J., concurring).

183 *Id.* ("[A]llowing one riparian owner to divide the owner's riparian zone and separately convey legal interest in the resulting 'lots' will have significant detrimental effect on the public waters of this state. . . . One can easily imagine the damage to the aesthetic appeal of our public waters if this concept is allowed.").

184 *Id.* at 862. In discussing WDNR's jurisdiction in the case, the court listed three possible public trust doctrine violations: "ABKA's dockominium project may have been exceeding its reasonable use of the [s]tate's navigable waters, may have been detrimental to the public interest as that concept is used in ch. 30, or, as illustrated by the arguments before the ALJ, may have run afoul of § 30.133." *Id.* at 860.

doctrine, including unreasonable use of navigable waters,[185] but it determined only that the conveyance violated "the public trust doctrine as embodied in ch[apter] 30."[186] It refrained from discussing specifically how or why such a conveyance would harm the public interest. By resolving this public trust doctrine claim solely through statutory interpretation focused on definitions of condominium units[187] the court apparently denied any trustee obligations in the state judiciary.[188] Moreover, the court left unanswered the question of whether the public trust doctrine required the state to prohibit such transfers of riparian rights or only empowered the state to do so.

This reluctance to impose judicial limits on legislative determinations of the public trust doctrine's scope in Wisconsin may prove to be a hurdle to anyone seeking enforcement of state trustee obligations under the Compact because Wisconsin's implementing legislation requires any Compact interpretation by the state to not affect Wisconsin's public trust doctrine.[189] However, judicial deference to legislative definitions regarding the public trust doctrine cannot frustrate implementation of express Compact provisions.[190]

The Compact recognizes a public trust in basin waters regardless of navigability, even groundwater.[191] Wisconsin's public trust doctrine does not reach non-navigable surface waters or groundwater, but state courts must enforce the Compact's trust provision by protecting the public's interest in Great Lakes water used for diversions and withdrawals. The Compact's public trust only reaches basin water when its use is regulated under the Compact. By thus differentiating

185 *Id.*

186 *Id.* at 859 (defining the grounds for WDNR jurisdiction); *id.* at 857 ("We agree with the court of appeals that the ALJ erred and that ABKA's conversion of its marina to a condominium form of ownership violated the public trust doctrine. However, we determine that the reason ABKA violated the public trust doctrine was because it attempted to convey condominium property contrary to Wis. Stat. § 30.133 (1995–96), which prohibits certain transfers of riparian rights.").

187 *Id.* at 862.

188 *Id.* at 858 ("Regulation and enforcement of this public trust rests with both the legislature and the DNR."). By contrast, Michigan courts see themselves as trustees. *See supra* note 90 and accompanying text.

189 *See supra* notes 103–04 and accompanying text.

190 *Compact*, *supra* note 3, § 9.3 ("Each provision of this Compact is considered material to the entire Compact, and failure to implement or adhere to any provision may be considered a material breach.").

191 *Id.* §§ 1.2 (defining "[w]aters of the [b]asin" to include groundwater), 1.3(1)(a) ("The [w]aters of the [b]asin are precious public natural resources shared and held in trust by the [s]tates.").

the Compact trust from the traditional public trust, state courts will uphold both the Compact and the Compact-implementing legislation in Wisconsin.

The Compact preserves common law rights[192] in Wisconsin to use groundwater for a "beneficial purpose" that does not lower the water table, reduce artesian pressure, or substantially affect a watercourse or lake.[193] But these rights are more accurately described as limits on tort liability, which serve as defenses to a neighboring landowner's challenge of a person's use.[194] The Compact's public trust doctrine requires the state to ensure diversions and withdrawals of groundwater are consistent with the protected statewide interest in the use of the Great Lakes Basin waters for generations to come.[195] Applying the Compact's public trust doctrine to groundwater will thus shift the court's focus from remedying neighborly harm after the fact to preventing public harm before diversions and withdrawals take place. As an additional requirement beyond Compact permitting standards, the state's public trust doctrine ensures the protection of the public interest as paramount and explicitly requires a state showing that any private alienation is in the general public's best interest.[196]

3. *Citizen Standing to Enforce Wisconsin's Public Trust Doctrine*

The public trust doctrine allows Wisconsin citizens to bring suits to protect public rights in navigable waters under two conditions. First, the Wisconsin Supreme Court ruled in 1974, in *State v. Deetz*,[197] that the public trust doctrine does not create an independent cause of action.[198] Thus, a plaintiff, whether the state or a private citizen, must assert a violation of an existing statute or common law in order to obtain judicial relief for injury under the public trust doctrine.[199]

192 *Id.* § 8.1(2).

193 *See* Michael J. Cain, *Wisconsin*, *in* 6 WATERS AND WATER RIGHTS 1185, 1186 (Robert E. Beck ed. 2005).

194 *See id.* (quoting Restatement (Second) of Torts).

195 *Compact*, *supra* note 3, § 1.3(1)(f). *See also supra* note 41 and accompanying text (quoting from the legislative history of the Compact).

196 Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 455–56 (1892).

197 224 N.W.2d 407, 412 (Wis. 1974).

198 *Id.* at 412–13 (denying the attorney general standing to bring a public trust doctrine claim because there was no public nuisance and the public trust doctrine "merely gives the state standing as trustee to vindicate any rights that are infringed upon by existing law").

199 *Id.* at 413.

Because chapter 30 of Wisconsin's statutes contains an extensive codification of the public trust doctrine,[200] and also provides a public nuisance cause of action against any violation of the chapter,[201] plaintiffs usually have little difficulty meeting the *Deetz* requirement.[202]

The second standing requirement is that a public trust doctrine claim must allege some injury to navigable waters.[203] In *Wisconsin Environmental Decade v. Public Service Commission* (*WED*),[204] a case involving a public trust claim relating to natural gas regulation, without mention of navigable waters, the Wisconsin Supreme Court proved "unwilling to adopt a rule that any allegation of harm to the environment raises, by implication, an allegation of harm to navigable waterways."[205] Although the court would not *imply* harm to navigable waters, it stopped short of requiring direct harm to navigable waters.[206] The wetland cases discussed above[207] demonstrated a judicial willingness to recognize trust interests in resources that affect the navigable waters. Further, as the *WED* court stated, "the law of standing in Wisconsin should not be construed narrowly or restrictively."[208] Thus, because state standing rules govern citizen claims under the Compact,[209] Wisconsin's standing rules would likely permit citizens to challenge state trustee obligations under the Compact.

200 *See supra* notes 172, 176, and accompanying text.

201 WIS. STAT. § 30.294 (2008) ("Every violation of this chapter is declared to be a public nuisance and may be prohibited by injunction and may be abated by legal action brought by any person.").

202 *But see* Borsellino v. Wis. Dep't of Natural Res., 606 N.W.2d 255, 261 (Wis. Ct. App. 1999) (finding no cause of action based "on a general allegation of a violation of the public trust doctrine").

203 Wis. Envtl. Decade, Inc. v. Pub. Serv. Comm'n, 230 N.W.2d 243, 250 (Wis. 1975).

204 *Id.*

205 *Id.*

206 *Id.* ("[T]he allegations of the petition, even as amended and liberally construed, fail to assert an interest with regard to the preservation or protection of navigable waters *or any related interest which has been previously recognized by this court.*") (emphasis added).

207 Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972). *See supra* note 168 and accompanying text.

208 *Wis. Envtl. Decade, Inc.*, 230 N.W.2d at 249.

209 *Compact*, *supra* note 3, § 7.3(1).

III
THE COMPACT TRUST AS DISTINCT FROM THE TRADITIONAL PUBLIC TRUST DOCTRINE

The Compact proclaims that Great Lakes Basin waters are "precious public natural resources shared and *held in trust* by the [s]tates"[210] and defines basin waters to include surface water, groundwater, connecting channels, "and other bodies of water."[211] It also charges the Compact states with "a shared duty to protect, conserve, restore, improve and manage" the basin waters "for the use, benefit and enjoyment of all their citizens."[212] With these provisions, the Compact adopted a public trust doctrine that encompasses all surface and groundwater in the Great Lakes Basin, burdening the Compact states with trustee obligations to protect those waters.

As discussed above,[213] the public trust doctrine in Michigan currently applies only to waters that are navigable according to a log-flotation test.[214] Consequently, the state public trust doctrine does not include groundwater[215] or surface water incapable of floating a log twenty to forty feet long.[216] In Wisconsin, on the other hand, the legislature and courts recognize the public trust doctrine extends to waters that are navigable "for any purpose."[217] Although the result is a broader scope of trust waters in Wisconsin than in Michigan, Wisconsin's public trust doctrine does not reach groundwater.[218] In fact, no state court has interpreted the public trust doctrine to include groundwater.[219] Consequently, the Compact expressly adopts a public

210 *Id.* § 1.3(1)(a) (emphasis added).

211 *Id.* § 1.2.

212 *Id.* § 1.3(1)(f).

213 *See supra* notes 128–33 and accompanying text.

214 *Nestle I*, 709 N.W.2d 174, 219 (Mich. Ct. App. 2005).

215 *Id.*

216 *Id.*

217 WIS. STAT. § 30.10 (2008) (defining navigable lakes and streams and declaring all navigable water, lakes, and streams to be public).

218 *See supra* note 22 and accompanying text.

219 *See supra* note 22 and accompanying text. *But see* Rettkowski v. Dep't of Ecology, 858 P.2d 232, 243–45 (Wash. 1993) (Guy, J., dissenting) (advocating for the extension of the public trust doctrine to groundwater). *See also* Erik Swenson, Comment, *Public Trust Doctrine and Groundwater Rights*, 53 U. MIAMI L. REV. 363 (1999) (arguing that state courts should interpret the public trust doctrine to reach groundwater, with a focus on Florida's law).

trust that is broader in scope than the traditional public trust doctrines in Michigan, Wisconsin, or any other Compact state.[220]

Although the Compact expressly adopts a public trust doctrine that embraces all basin water, regardless of navigability,[221] it also preserves state common law water rights,[222] declaring: "Nothing contained in this Compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective [p]arties relating to common law [w]ater rights."[223] When a state holds a water body in trust for the public, the trust restricts use rights to those that do not harm the protected public interests in the water.[224] For example, Wisconsin protects the public's interest in aesthetic enjoyment to public trust waters, so water rights to those waters cannot harm that public interest.[225] Because the Compact regulates diversions and withdrawals of water not governed by state public trust doctrines in Michigan and Wisconsin, the Compact trust provision limits common law water use rights by requiring use to not only be reasonable and without harm to neighboring users,[226] but also to be consistent with the general public's interest in protecting the Great Lakes waters for future generations.[227] A distinct Compact trust in diversions and withdrawals of basin water gives effect to both the Compact's express adoption of the public trust doctrine and its disclaimer of effect on common law water rights.

A distinct Compact trust also reconciles the Compact's trust provision with the implementing legislation in Wisconsin, which asserts that the Compact may not "be interpreted to change the application of the public trust doctrine . . . or to create any new public

220 *Compact*, *supra* note 3, § 1.3(1)(a).

221 *Id.*

222 *Id.* § 8.1(2).

223 *Id.*

224 Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892) (asserting that use of trust resources must be "without substantial impairment of the interest of the public in the waters").

225 Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 525 (Wis. 1952) (remanding to the Public Service Commission to determine whether the construction of a dam would violate public rights in navigable waters).

226 *Cf.* Hand, *supra* note 85, at 681–85 (discussing common law water rights in Michigan); *Nestle I*, 709 N.W.2d 174, 194–204 (2005) (discussing common law water rights in Michigan); Cain, *supra* note 193, at 1185–92 (discussing common law water rights in Wisconsin); State v. Michels Pipeline Constr., Inc., 217 N.W.2d 339, 350–51 (1974) (discussing common law water rights in Wisconsin).

227 *Compact*, *supra* note 3, § 1.3(1)(f).

trust rights."[228] Since Wisconsin cannot legislate inconsistently with the express provisions of the Compact,[229] and the Compact plainly (1) recognizes a public trust in all Great Lakes Basin waters[230] and (2) requires the states to make Compact permitting decisions consistent with that trust,[231] the Compact trust must be distinct from Wisconsin's public trust doctrine. Moreover, applying the Compact trust to diversions and withdrawals of basin waters does not affect how Wisconsin applies its traditional public trust doctrine.

This Part distinguishes the Compact trust from traditional state public trust doctrines by emphasizing the purposes and structure of the Compact. The Part then considers the application of the Compact trust in Michigan, in light of judicial reluctance to expand the scope of the traditional public trust doctrine there, and in Wisconsin, in light of that state's Compact-implementing legislation.

A. State Law and the Compact Trust

Because the Compact expressly establishes a separate public trust doctrine governing diversions and withdrawals, traditional state public trust doctrines do not define the limits of the Compact trust. Instead, the Compact itself defines the Compact trust's scope. Where the Compact leaves water use management decisions to state discretion, the Compact's provisions no longer govern, and the Compact trust is inapplicable. For example, the Compact authorizes individual state authorities to determine the scope and threshold of Compact regulation over new or increased withdrawals for in-basin use.[232] Compact permitting requirements will not apply to withdrawals of basin water in amounts below these state-specific levels, and therefore those withdrawals do not trigger Compact trustee obligations either.

The Compact requires anyone proposing to divert or withdraw basin waters under the Compact to obtain a state permit.[233] Since

228 WIS. STAT. §§ 281.343(1), 281.346(2)(g) (2008).

229 *See supra* note 105 and accompanying text.

230 *Compact*, *supra* note 3, § 1.3(1)(a); *see also supra* notes 43–45 and accompanying text.

231 *Id.* § 1.3(1)(f) ("The Parties have a shared duty to protect, conserve, restore, improve and manage the renewable but finite [w]aters of the [b]asin *for the use, benefit, and enjoyment of all their citizens*, including generations yet to come.") (emphasis added).

232 *Id.* § 4.10(1).

233 *Id.* § 4.8.

Compact provisions govern state decision-making processes in granting or denying applicable diversion or withdrawal permits,[234] state decisions under the Compact must satisfy the Compact-imposed public trust doctrine.[235] But beyond the Compact's reach, basin water use remains governed by any relevant state law, including the state public trust doctrines. Where the Compact and the traditional public trust doctrine both apply, the Compact trust preempts the state public trust doctrines.[236] The result is two separate public trust doctrines in Compact states, and thus two different sets of rules governing water use.

Traditional state public trust doctrines are rooted in historically recognized public rights to waterways, which may be traced in both Michigan and Wisconsin to the Northwest Ordinance.[237] Consequently, both states limit the scope of their public trust doctrines in terms of navigability, in Michigan using a log-flotation test based on nineteenth-century navigation needs,[238] and in Wisconsin using a recreation test based on the water's capacity for recreational use.[239] The Compact trust, in contrast, is rooted in the purposes of the Compact, a modern recognition of public rights to preserve the Great Lakes Basin for the region and its future citizens.[240] The Compact claims state ownership of Great Lakes Basin water in the context of its purpose: to facilitate cooperative, regional, science-based efforts to "protect, conserve, restore, improve and effectively manage" the basin waters and ecosystem.[241]

The Compact trust is consistent with the Compact's regional management structure, which aims to strike a balance between facilitating "consistent approaches to [w]ater management" among

234 *Id.* § 4.3(3).

235 *Id.* § 1.3(1)(f).

236 *Id.* § 9.1 (repealing all acts or parts of acts inconsistent with the Compact); *see also id.* § 9.3 (stating that "failure to implement or adhere to any provision" of the Compact "may be considered a material breach").

237 *See supra* note 33 and accompanying text.

238 *See supra* notes 129–30 and accompanying text.

239 *See supra* notes 161–64 and accompanying text.

240 *Compact*, *supra* note 3, § 1.3(1)(f) ("The Parties have a shared duty to protect, conserve, restore, improve and manage the renewable but finite [w]aters of the [b]asin for the use, benefit and enjoyment of all their citizens, including generations yet to come."); *id.* § 1.3(1)(e) ("Continued sustainable, accessible and adequate [w]ater supplies for the people and economy of the Basin are of vital importance[.]").

241 *Id.* § 1.3(2)(a).

party states and "retaining [s]tate management authority over [w]ater management decisions within the [b]asin."[242] The Compact seeks to further use of "unified and cooperative principles" for managing Great Lakes waters by all compact states.[243] For example, the Compact requires unanimous state approval for large diversions.[244] The Compact's criteria and the Compact trust ensure some regional consistency in state decision making, but most permitting decisions remain with the individual states.

B. The Compact Trust in Michigan

Because Michigan lies entirely within the Great Lakes Basin,[245] the Compact's public trust doctrine reaches all of Michigan's waters, regardless of navigability, when the Compact controls their use. In Michigan, the Compact governs intrabasin transfers of over one hundred thousand gallons per day and any withdrawals of over two million gallons per day,[246] requiring a permit from the state.[247] The Compact requires the state, as trustee of the basin waters, to grant or deny such permits consistently with the public trust it established.[248]

Although the Compact provisions extend the public trust to diversions and withdrawals of basin waters regardless of navigability, in *Nestle I* the Michigan Court of Appeals rejected the argument that the state holds all waters, including groundwater, in trust for the public.[249] The court held that the Great Lakes Preservation Act (GLPA), which states that the waters of Michigan are "valuable natural resource[s] held in trust" and defines "waters" to include groundwater,[250] did "not attempt to claim ownership of water," and therefore did not extend Michigan's public trust doctrine beyond

242 *Id.* § 1.3(2)(d).

243 *Id.* § 1.3(1)(f).

244 *Id.* § 4.9(2)(c)(iv), (3)(g) (requiring unanimous regional approval for only intrabasin transfers resulting in a net loss of five million gallons per day average or greater over any ninety-day period and for all diversions to communities outside of the basin but inside a county that is partially within in the basin).

245 GREAT LAKES WATER RES. COMPACT COMM., *supra* note 27, at 4.

246 MICH. COMP. LAWS § 324.32723(1) (2008).

247 *Id.*

248 *See Compact*, *supra* note 3, § 1.3(1)(f).

249 *Nestle I*, 709 N.W.2d 174, 221 (Mich. Ct. App. 2005).

250 *Id.* at 221 n.74. Plaintiffs also cited the state constitution, MEPA, the Great Lakes Submerged Lands Act, and the Inland Lakes and Streams Acts. *Id.*

navigable surface waters.[251] Although the Compact's trust provision is nearly identical to that in the GLPA,[252] the court's decision in *Nestle I* should not frustrate the Compact trust because the Compact does not extend Michigan's public trust doctrine. Instead, the Compact claims state ownership of basin waters by adopting a distinct trust that governs Compact decision making. Unlike the GLPA, the Compact does more than "merely recognize the importance of natural resources, including water."[253] As discussed above,[254] Compact states included the public trust provision in the Compact with full knowledge of its implications[255] and in furtherance of the Compact's purpose of protecting the Great Lakes waters from interests outside the region.[256] Accordingly, state courts cannot read the public trust doctrine out of the Compact.

Interpreted in the context of the Compact's purposes, the distinct nature of the Compact trust is clear.[257] The Compact's commitment to scientifically based decision making[258] and its recognition of the Great Lakes Basin as an interconnected hydrologic ecosystem[259] that requires comprehensive protection and cooperative management[260] stands in sharp contrast to the Michigan Supreme Court's interpretation of the purpose of the traditional public trust doctrine as providing public access to waters "for use as highways of commerce."[261] The Compact's forward-looking intentions are distinct

251 *Nestle I*, 709 N.W.2d at 221.

252 MICH. COMP. LAWS § 324.32702(c) (stating that the "waters of the state are valuable public resources held in trust"). The GLPA defines "waters" to mean "all streams, rivers, lakes, connecting channels, and other bodies of water, including groundwater, within the Great Lakes basin." *Id.* § 324.32701. The Compact states: "The [w]aters of the [b]asin are precious public natural resources shared and held in trust by the [s]tates." *Compact*, *supra* note 3, § 1.3(1)(a). The Compact defines "[b]asin [w]ater" to mean "the Great Lakes and all streams, rivers, lakes, connecting channels and other bodies of water, including tributary groundwater, within the [b]asin." *Id.* § 1.2.

253 *Nestle I*, 709 N.W.2d at 221.

254 *See supra* notes 46–54 and accompanying text (quoting the legislative history of the Compact and the controversy regarding the Compact's trust language).

255 *See supra* notes 49–50 and accompanying text.

256 *See supra* notes 51–52 and accompanying text.

257 *See supra* notes 240–43 and accompanying text.

258 *Compact*, *supra* note 3, § 1.4(1).

259 *Id.* § 1.3(1)(b) ("The [w]aters of the [b]asin are interconnected and part of a single hydrologic system[.]").

260 *Id.* §§ 1.3(1)(f), 1.3(2).

261 Bott v. Comm'n of Natural Res. of Mich., 327 N.W.2d 838, 845 (Mich. 1982) (declining to adopt a recreational boating navigation test); *see also Nestle I*, 709 N.W.2d

from the traditional, commercial purpose of Michigan's public trust doctrine.[262] Judicial recognition that the Compact trust serves different purposes than the traditional public trust doctrine will reconcile Compact regulation and Michigan's common law.

Michigan courts need not reverse earlier decisions limiting the scope of the traditional public trust doctrine in order to uphold the Compact trust. Applying the Compact trust only to Compact regulatory decisions leaves Michigan's traditional public trust doctrine intact, applicable in all disputes outside of the Compact's scope. The limited scope of Michigan's public trust doctrine cannot prevent state implementation of the Compact's express provisions, which extend regulation to diversions and withdrawals of non-navigable surface waters and groundwater. State courts must apply the Compact trust to all diversions and withdrawals of Great Lakes Basin waters, including groundwater and regardless of navigability.

C. The Compact Trust in Wisconsin

In Wisconsin, the Compact requires a state permit for (1) out-of-basin diversions of Great Lakes water, (2) withdrawals of ten million gallons per day or more for in-basin use, or (3) intrabasin transfers of one hundred thousand gallons per day or more of basin water between Great Lakes watersheds.[263] The Compact trust applies to regulation of these activities, even if they use waters the state does not traditionally hold in trust, such as groundwater and non-navigable streams.[264] Yet Wisconsin's implementing legislation maintains that nothing in the Compact "may be interpreted to change the application of the public trust doctrine . . . or to create any new public trust rights."[265] No state can legislate in contradiction to the Compact.[266] Accordingly, either the public trust doctrine clause in Wisconsin's

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174, 220 (Mich. Ct. App. 2005) ("Plaintiffs also contend that . . . . the rule of navigability for streams is flexible and evolves with the needs of the public at large and, therefore, that this Court is free to modify the test for navigability. We disagree.").

262 *See Nestle I*, 709 N.W.2d at 220 (declining to adopt a modern test for defining the scope of the public trust doctrine).

263 *See supra* note 100 and accompanying text.

264 Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 519 (Wis. 1952) (defining Wisconsin's public trust doctrine by stating, "'[I]n Wisconsin when it is said that a water is navigable, it is merely a different way of saying that it is public.'") (quoting Adolph Kanneberg, *Wisconsin Law of Waters*, 1946 WIS. L. REV. 345, 349 (1946)).

265 WIS. STAT. §§ 281.343(1), 281.346(2)(g) (2008).

266 *See supra* note 105 and accompanying text.

implementing legislation is an ineffective unilateral attempt to amend the Compact,[267] or the state courts will have to interpret the clause consistently with the Compact. This conflict is pressing in Wisconsin, where some of the fastest growing communities lie partially outside of the basin[268] and are currently preparing diversion proposals under the "straddling county" exception.[269]

The Compact regulates any diversion of Great Lakes Basin water to a community partially outside of the basin.[270] Once a diversion request triggers Compact regulation, all of the Compact's provisions apply,[271] and the state has an obligation to manage the water consistently with the Compact trust "for the use, benefit and enjoyment of all [its] citizens."[272] The state cannot ignore its Compact trustee obligations if the water is not navigable, and therefore not within the scope of Wisconsin's traditional public trust doctrine. Judicial recognition of a distinct Compact trust resolves this problem by avoiding any change in the state's traditional public trust doctrine.

The distinction between the Compact trust and the state's traditional public trust doctrine is not merely semantic. As discussed above,[273] the Compact trust is based in the Compact's purposes and is not shackled to the historical navigation nexus that defines Wisconsin's public trust doctrine.[274] The Compact trust protects public interest in basin waters, defined by the twin aims of the Compact: (1) preventing use of Great Lakes water from having

267 *Compact*, *supra* note 3, § 9.3 ("Unless otherwise noted in this Compact, any change or amendment made to the Compact by any [p]arty in its implementing legislation . . . is not considered effective unless concurred in by all [p]arties.").

268 GREAT LAKES WATER RES. COMPACT COMM., *supra* note 27, at 4.

269 *See* Don Behm, *Waukesha Can Move Forward With Bid for Lake Water, State Tells Barrett*, JS ONLINE, Oct. 22, 2009, http://www.jsonline.com/news/waukesha/65620842.html; *see also* Barbara Miner, '*Water is Worth Fighting Over': Hurrying to Give Water to Waukesha Ignores Key Questions*, JS ONLINE, Feb. 14, 2009, http://www.jsonline.com/news/opinion/39586067.html.

270 *Compact*, *supra* note 3, § 4.9(1), (3).

271 *Id.* §§ 9.3 ("[F]ailure to implement or adhere to any provision [in this Compact] may be considered a material breach."), 4.3 ("No [p]arty may approve a [p]roposal if the [p]arty determines that the [p]roposal is inconsistent with this Compact or . . . any implementing rules or regulations promulgated thereunder.").

272 *Id.* § 1.3(1)(f).

273 *See supra* notes 240–43 and accompanying text.

274 *See supra* note 264 and accompanying text.

"significant adverse impacts" on the basin ecosystems[275] and (2) protecting the basin for current and future citizens' needs through cooperative management under science-based principles.[276] The traditional public trust doctrine remains applicable in Wisconsin's navigable waters, governing activities not controlled by the Compact's limits on diversions and withdrawals.[277] Wisconsin may of course expand its public trust according to changing public needs.[278]

The Compact defines a separate trust to serve its purposes, and Wisconsin cannot subvert those purposes.[279] Applying the Compact trust distinctly from the state's traditional public trust doctrine upholds the Compact trust provision, as required by the Compact,[280] without altering the state's traditional public trust doctrine, as required if state courts want to give effect to Wisconsin's implementing legislation.[281]

IV
RECOGNIZING THE COMPACT TRUST

Michigan and Wisconsin courts recognize the public trust doctrine to require the states to protect the public's paramount interest in navigable waters.[282] Although the Great Lakes themselves are undisputedly navigable, neither state's public trust doctrine encompasses groundwater nor any non-navigable surface waters.[283] In contrast, the Great Lakes Compact recognizes a public trust doctrine in all the waters of the Great Lakes Basin, including groundwater and surface water.[284] This distinct public trust, governing applicable diversions and withdrawals within the geographic scope of the Compact, is defined by the Compact's

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275 *Compact*, *supra* note 3, § 1.3(2)(f).

276 *Id.* § 1.3(2)(a), (c), (e).

277 *See supra* notes 233–36 and accompanying text.

278 *See* Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 520–21 (Wis. 1952) (discussing the evolution of the public trust doctrine in Wisconsin).

279 *Compact*, *supra* note 3, § 9.3 (requiring state implementation of and adherence to all compact provisions).

280 *Id.*

281 *See supra* notes 103–06 and accompanying text.

282 *See supra* note 33 and accompanying text.

283 *See* Craig, *supra* note 20, at 68–71, 110–13 (summarizing each state's public trust doctrine).

284 *See supra* notes 15–17 and accompanying text.

purposes and provisions and obligates Michigan and Wisconsin to act as trustees for the public when managing Compact water use.

By interpreting the Great Lakes Compact to create a distinct public trust in all Great Lakes Basin waters, Michigan and Wisconsin courts can reconcile the Compact's protection of those waters from regionally unsustainable use[285] with its preservation of state common law,[286] harmonize Wisconsin's implementing legislation with the Compact itself,[287] and fulfill the Compact's purpose of preserving the integrity of the Great Lakes watersheds and ecosystems for the enjoyment of future generations.[288]

285 *Compact*, *supra* note 3, § 1.3(1)(e), (2)(f).

286 *Id.* § 8.1(2).

287 *See supra* notes 43–45 and accompanying text.

288 *Compact*, *supra* note 3, § 1.3(1)(f).