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The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study

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THE PUBLIC TRUST DOCTRINE IN THE SHADOW OF STATE ENVIRONMENTAL RIGHTS LAWS: A CASE STUDY

BY

ALEXANDRA B. KLASS*

This Article looks at the relationship between state environmental rights statutes and the common law public trust doctrine. In addressing this issue, it focuses on the state of Minnesota, where, in the early 1970s, the state legislature enacted a far-reaching environmental rights statute, the Minnesota Environmental Rights Act (MERA), that served to codify many public trust principles. Beginning in the early 1970s and for the next forty years, litigants in Minnesota that might otherwise have brought common law public trust doctrine claims for environmental protection purposes instead channeled that litigation through MERA. As a result, Minnesota courts have rarely been asked to interpret or use the common law public trust doctrine at all in the context of environmental protection. And, more importantly, they did not have an opportunity to use and develop the doctrine during the time the environmental protection movement was at its height in the 1970s and early 1980s. Instead, the lyrical language many courts used in public trust doctrine cases in other states during that era to protect natural resources and expand the scope of the doctrine is found, in Minnesota, in MERA cases, not in public trust doctrine cases. This Article explores the implications of the underuse of the common law public trust doctrine in Minnesota by focusing on a 2012 case, White Bear Lake Restoration Association v. Department of Natural Resources, which is the first case to begin a new conversation on the common law public trust doctrine in the state—one that never took place in the 1970s. This case involves traditional public trust resources—a lake and a lakebed—as well as efforts by private citizens to compel the state to protect those resources for present and future generations, thus coming squarely within the purview of MERA and even the most narrow reading of the public trust doctrine. The state argued in part that MERA had replaced the common law public trust doctrine in Minnesota

* Distinguished McKnight University Professor, University of Minnesota Law School. I received very helpful comments on earlier versions of this Article from Robin Craig, John Echeverria, Robert Glicksman, Richard Lazarus, Nathaniel Moore, Kevin Reuther, Melissa Scanlan, Byron Starns, and Matthew Seltzer. Professor Klass was a consultant to the attorneys for the plaintiff White Bear Lake Homeowners' Association in *White Bear Lake Restoration Association v. Minnesota Department of Natural Resources*. The views expressed in this Article are those solely of Professor Klass and not of White Bear Lake Homeowners' Association or their attorneys.

and that the doctrine on its own could not be used for environmental protection purposes, citing the lack of any relevant public trust doctrine cases. While the district court rejected these contentions, the arguments of the parties and the court's analysis sheds light on the important relationship between the common law and state legislation in the context of public trust resources and environmental protection.

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I. INTRODUCTION

The 1970s and early 1980s were heady times for environmental law and its supporters. Congress enacted the most sweeping federal protections for natural resources, human health, and the environment ever seen then or since in the form of the Clean Air Act,¹ the Clean Water Act,² and a host of other federal statutes. President Nixon created the U.S. Environmental Protection Agency (EPA).³ There was a national conversation about the need to preserve natural resources and protect human health, even if it placed new and significant limits on industrial activities as well as commercial and residential development. At the same time, a similar conversation and related legal developments were taking place in state legislatures. In the late 1970s and early 1980s many states enacted new laws to protect air, water, and open space that built on the new federal environmental laws and created new state agencies to administer them.⁴

But there was another, related conversation occurring in academia and, ultimately, in the state courts over a different approach to protecting natural resources—the use of the public trust doctrine. The public trust doctrine is an ancient Roman law doctrine which provides that states must hold certain natural resources, particularly submerged lands under tidal and navigable

¹ 42 U.S.C. §§ 7401–7671q (2012).

² Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

³ 5 U.S.C. app. § 1 (2012).

⁴ See, e.g., Richard Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 578–85 (2001) (describing state environmental protection legislation from the pre-1970 era through the 1990s).

waters, in trust for the use and benefit of the public and future generations.⁵ Prior to 1970, U.S. courts limited application of the doctrine primarily to cases involving efforts to preserve public access to water resources for commerce, recreation, transportation, and fishing.⁶ In 1970, however, Joseph Sax argued in an influential law review article that the public trust doctrine could be an alternative and complementary means of forcing state agency officials to protect natural resources even when strong environmental protection legislation did not require such action or provide standing to those who wished to protect natural resources.⁷ Environmental groups and individuals took up the call to arms and convinced courts in many states to adopt a more expansive use of the public trust doctrine to protect a broad range of natural resources. Excellent legal scholarship has catalogued the number and range of cases over the years and serves to emphasize just how important a role the common law public trust doctrine has become in the past several decades.⁸

The rise of environmental protection statutes coupled with the increasing use of the public trust doctrine led to yet another strand of legal developments that combined the legislative and common law advances. First, several states amended their constitutions in the 1970s and included provisions declaring that the citizens of the state have the right to clean air, pure water, and the preservation of natural resources; these provisions also declare that the government has an obligation to protect those resources for its citizens and future generations.⁹ Second, Professor Sax worked with the Michigan legislature to create an environmental rights statute, the Michigan Environmental Protection Act,¹⁰ that grants private citizens the right to sue the government and other private parties to ensure the protection of natural resources even where other substantive environmental protection statutes did not provide such a right of action.¹¹ A few other states followed suit, most notably Minnesota, which in 1971 enacted the Minnesota Environmental Rights Act (MERA).¹² Modeled after the Michigan statute, MERA grants any private party, state, or local government the right to sue for declaratory or injunctive relief to protect air, water, land, or other natural

⁵ See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970) (summarizing the history of the public trust doctrine).

⁶ See, e.g., *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (stating that the scope of the public trust doctrine was traditionally defined in terms of navigation, commerce, and fisheries but also noting that the doctrine is sufficiently flexible “to encompass changing needs”).

⁷ Sax, *supra* note 5.

⁸ MICHAEL C. BLUMM & MARY CHRISTINA WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* xxi-xxx (2013) (table of secondary sources listing approximately 200 scholarly articles on the public trust doctrine).

⁹ See Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 714-15 (2006).

¹⁰ Thomas J. Anderson, *Gordon Rockwell Environmental Protection Act of 1970*, 1970 Mich. Pub. Act 127, repealed by 1994 Mich. Pub. Acts 451. Today the Michigan Environmental Protection Act is codified at Mich. Comp. Laws Ann. §§ 324.1701-1706 (West 2012).

¹¹ See Klass, *supra* note 9, at 721.

¹² MINN. STAT. §§ 116B.01-13 (2014).

resources from pollution, impairment, or destruction.¹³ Even more than the Michigan statute, litigants in Minnesota have successfully used MERA to protect a broad range of natural resources, and to enjoin or limit a significant number of industrial, commercial, and residential development activities that would adversely impact protected natural resources.¹⁴ While other states enacted environmental rights statutes in the 1970s, very few have resulted in any significant case law and none as extensive as that in Minnesota.¹⁵

The question for this Article is one that, to my knowledge, has not been addressed in the extensive literature on the public trust doctrine. The question is whether environmental rights statutes can *stunt* the growth of the common law public trust doctrine and how this can be avoided if, in fact, it should be avoided. While there may not be easy answers to this question, a recent case in Minnesota provides some helpful insights into what happens to the common law public trust doctrine when forty years of environmental litigation that would otherwise rely on the public trust doctrine is instead channeled into a fairly robust environmental rights statute. At least in Minnesota, the courts were not asked to interpret or use the public trust doctrine at all in the context of environmental protection.¹⁶ And, more importantly, they were not asked to use and develop the doctrine during the time the environmental protection movement was at its height—in the 1970s and early 1980s.¹⁷ During this era, courts in other states used the public trust doctrine to protect natural resources and gradually expanded the scope of that doctrine, while Minnesota courts used MERA to increase protection for environmental resources instead of strengthening the public trust doctrine. In fact, there are very few public trust doctrine cases involving environmental protection to be found in the state after 1970—an oddity considering the state's history of strong environmental protection in other areas such as its enactment of MERA, the courts' early expansive interpretation of that law, and the enactment of other 1970s-era environmental protection laws.

However, in 2012, a Minnesota case, *White Bear Lake Restoration Association v. Department of Natural Resources* (*White Bear Lake Restoration Association*),¹⁸ began a new conversation on the public trust doctrine in the state—one that never took place in the 1970s. This case involves traditional public trust resources—a lake and a lakebed—as well as efforts by private citizens to compel the state to protect those resources for present and future generations, thus coming squarely within the purview of

¹³ *Id.* § 116B.01.

¹⁴ See Klass, *supra* note 9, at 722–24 (comparing case law in Minnesota and Michigan).

¹⁵ See *id.* at 725 (summarizing the law in states with similar statutes).

¹⁶ *Id.* at 713.

¹⁷ *Id.* at 706–07.

¹⁸ Settlement Agreement, *White Bear Lake Restoration Ass'n v. Minn. Dep't of Natural Res.*, No. 62-CV-13-2414 (Minn. Dist. Ct. Dec. 16, 2014).

MERA and even the most narrow reading of the public trust doctrine.¹⁹ The state argued in part that MERA had replaced the common law public trust doctrine in Minnesota and that the doctrine on its own could not be used for environmental protection purposes, citing the lack of any relevant public trust doctrine cases.²⁰ While the district court rejected these contentions,²¹ the arguments of the parties and the court's analysis sheds light on the important relationship between the common law and state legislation in the context of public trust resources and environmental protection more generally.

Part II of this Article provides a brief history of the common law public trust doctrine, its expansion to more broadly protect natural resources in the 1970s, and its role in creating the constitutional and statutory environmental rights provisions that exist in some states, including Minnesota, today. Part III explores MERA and the *White Bear Lake Restoration Association* case in detail to show how the channeling of environmental protection litigation toward MERA for forty years created a situation where there is very little public trust doctrine case law to rely on in the state.

Part IV considers the implications of this lack of case law surrounding the public trust doctrine in Minnesota. Even if MERA does not displace the common law public trust doctrine in Minnesota, is it an adequate substitute? If a statute exists, is there a need for the common law doctrine? This Part contends that the common law public trust doctrine remains important despite the existence of MERA. First, the public trust doctrine has an important role in natural resource protection in the state because of various exemptions and affirmative defenses in the statute. Second, the public trust doctrine provides an important defense to regulatory takings claims when governmental entities act to protect natural resources in a manner that conflicts with private property rights. MERA cannot provide this support for state action and the public trust doctrine has a long history of playing just such a role. Third, and perhaps most important, the public trust doctrine remains important as an ultimate check on legislative and executive branch authority in the context of natural resources protection. Legislatures can amend statutes to provide less protection for natural resources. And courts must give deference under administrative law principles to agencies interpreting statutes and regulations, and that deference may result in

¹⁹ See Complaint at 6, *White Bear Lake Restoration Ass'n*, No. 62-CV-13-2414 (Apr. 10, 2013). See also *infra* notes 26–33 and accompanying text (describing scope of the traditional public trust doctrine); *infra* notes 61–79 (describing scope of MERA).

²⁰ See Minn. Dep't of Natural Res. Reply Memorandum in Support of Its Motion for Summary Judgment at 17, *White Bear Lake Restoration Ass'n*, No. 62-CV-13-2414 (May 1, 2014); Minn. Dep't of Natural Res. Memorandum in Support of Its Motion for Summary Judgment at 23–24, *White Bear Lake Restoration Ass'n*, No. 62-CV-13-2414 (Apr. 7, 2014).

²¹ See Summary Judgment Order Memorandum at 17, *White Bear Lake Restoration Ass'n*, No. 62-CV-13-2414 (Aug. 29, 2014) (rejecting the state's arguments and granting summary judgment to Homeowners' Association regarding whether the public trust doctrine affords a common law cause of action).

reduced protection for natural resources.²² But the public trust doctrine is a vehicle for the courts to ensure that the state fulfills its common law obligation to protect natural resources even if legislative and executive branch sentiments are otherwise.²³

Notably, in focusing on the relationship between MERA and the common law public trust doctrine in Minnesota, the goal of this Article is not at all to criticize MERA or to argue that litigants should ignore it in favor of bringing common law public trust doctrine claims. To the contrary, the Minnesota legislature in 1971 enacted powerful, far-reaching, and thoughtful legislation that has played a major role in protecting natural resources in the state since that time. The legislature also included a strong savings clause to ensure that MERA did not replace existing legal rights and remedies, including common law rights and remedies then in existence or that might develop in the future.²⁴ Instead, the goal in this Article is to explore how the case law has developed in Minnesota and to *encourage* litigants in future cases to use the common law in efforts to protect the environment so a more robust common law jurisprudence can develop alongside judicial decisions interpreting MERA.

In a 1986 article on the public trust doctrine, Professor Richard Lazarus warned environmental protection advocates and scholars not to place too much emphasis on the common law public trust doctrine lest it undermine efforts to create new natural resource protection frameworks through legislative and regulatory action.²⁵ This was good advice at the time, when federal and state agencies and courts were in the process of creating a massive body of new regulations and case law interpreting and expanding the new environmental protection statutes enacted in the 1970s. And it may well remain good advice today. But the problem also exists in reverse. Too much emphasis on statutes can cause the common law to stagnate, and this can be particularly problematic if it happens at a critical time in history, when courts are in the process of developing a new rhetoric surrounding the protection of natural resources and the relationship between humans and the environment. As shown below, this appears to be what happened in Minnesota, particularly in the 1970s and early 1980s. Thus, the Minnesota experience with the public trust doctrine is in some ways a cautionary tale. But, as the *White Bear Lake Restoration Association* litigation illustrates, the

²² See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”); see also Mark A. Latham, *(Un)Restoring the Chemical, Physical, and Biological Integrity of Our Nation’s Waters: The Emerging Clean Water Act Jurisprudence of the Roberts Court*, 28 VA. ENVTL. L.J. 411, 447 (2010) (arguing that the modern Supreme Court has used the concept of administrative deference “as a sword to limit environmental protection”).

²³ See, e.g., Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View into the Trustees’ World*, 39 ECOLOGY L.Q. 123, 131 (2012) (discussing states’ obligations under the public trust doctrine).

²⁴ Minnesota Environmental Rights Act, MINN. STAT. ANN. § 116B.12 (West 2014).

²⁵ Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 674–76 (1986).

problem can be partially if not completely remedied through good lawyering and courts recognizing that statutes can inform but do not replace common law doctrine when it comes to natural resource protection.

II. THE MODERN PUBLIC TRUST DOCTRINE AND ITS IMPACT ON STATE CONSTITUTIONS AND STATUTES

The public trust doctrine is an ancient Roman law doctrine that provides that states must hold certain natural resources, most notably submerged lands under tidal and navigable waters, in trust for the use and benefit of the public and future generations.²⁶ Along those lines, the U.S. Supreme Court first articulated the parameters of the public trust doctrine in 1892, in *Illinois Central Railroad Company v. Illinois (Illinois Central)*.²⁷ In that case, the Court held that the Illinois legislature did not possess the authority to sell over 1,000 acres underlying Lake Michigan in the Chicago Harbor to the Illinois Central Railroad because these submerged lands were owned under a “title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”²⁸ Although the state could allow some private economic use of such lands, the uses must be ones that “do not substantially impair the public interest in the lands and waters remaining.”²⁹ The Court stressed that the title to these lands was “different in character” from other state lands which could be sold into private ownership and also different than “the title which the United States holds in the public lands which are open to preemption and sale.”³⁰

U.S. courts generally limited application of the public trust doctrine to submerged lands under navigable waters for the decades that followed, but that began to change in the 1970s. In a very influential law review article written in 1970, Joseph Sax, at that time a Professor at the University of Michigan Law School, argued that the public trust doctrine could be a vehicle to compel state and local governments to protect water and other natural resources from development and other threats.³¹ Since that time, many state courts such as those in California, Hawaii, New York, and Louisiana have developed a robust common law public trust doctrine for a broad range of environmental protection purposes,³² while most other states have at least used the doctrine as a check on government or private action

²⁶ Sax, *supra* note 5, at 475.

²⁷ 146 U.S. 387, 435 (1892).

²⁸ *Id.* at 452.

²⁹ *Id.*

³⁰ *Id.*

³¹ Sax, *supra* note 5, at 473–74.

³² Klass, *supra* note 9, at 735 (discussing broad application of the public trust doctrine in Hawaii); *see infra* notes 34–39 and accompanying text (describing public trust doctrine cases in California, Louisiana, and New York).

that would limit public access to shoreline, fishing, or other commercial or recreational water-based resources.³³

For instance, the California courts have found that the common law public trust doctrine requires government regulators to take into account the impacts of surface water withdrawals that harm lakes; wind turbines that may kill raptors such as eagles, hawks, and falcons; and groundwater withdrawals that adversely impact connected surface waters.³⁴ In Louisiana, courts have used the doctrine to limit the construction and operation of a hazardous waste disposal facility in addition to using it to protect more traditional public trust resources such as oyster beds.³⁵ In New York, courts have held that the doctrine protects parkland in addition to traditional water-based resources.³⁶ With regard to water-based resources, in the face of rapidly depleting surface and groundwater resources in many parts of the country, litigants have used the public trust doctrine successfully to place limits on state agencies that would otherwise continue to grant water appropriation permits to private developers and local governments.³⁷ While the California Supreme Court's famous Mono Lake case in 1983 may be the most well-known use of the public trust doctrine for this purpose,³⁸ there

³³ See generally Robin K. Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENV. L. REV. 1 (2007) [hereinafter *Eastern Comparative Guide*]; Robin K. Craig, *A Comparative Guide to the Western Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 37 ECOLOGY L.Q. 53 (2010) [hereinafter *Western Comparative Guide*].

³⁴ See *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 711–12 (Cal. 1983); *Ctr. for Biological Diversity v. FPL Group*, 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008); Holly Doremus, *Groundwater and the Public Trust Doctrine, California Style*, LEGAL PLANET, July 21, 2014, <http://legal-planet.org/2014/07/21/groundwater-and-the-public-trust-doctrine-california-style/> (reporting on California trial court decision in July 2014 holding that groundwater pumping that affects flows in a navigable stream are subject to the public trust doctrine).

³⁵ See *Save Ourselves, Inc. v. La. Envtl. Control Comm'n*, 452 So. 2d 1152, 1159–60 (La. 1984) (recognizing that the public trust doctrine imposes a duty on state actors to provide meaningful review of the impact of their decisions on natural resources and the environment); Ryan M. Seidemann, *The Public Trust Doctrine and Surface Water Management and Conservation: A View from Louisiana*, 40th Annual Conference on Environmental Law, American Bar Association—Section of Environment, Energy, and Resources (Mar. 18, 2011). (discussing potential impacts of public trust doctrine on development of shale resources in Louisiana).

³⁶ See, e.g., *Matter of Raritan Baykeeper, Inc. v. City of New York*, No. 31145/056 (Dec. 20, 2013) (granting plaintiffs' motion for summary judgment and holding that development of a composting facility in a park violates the common law public trust doctrine and citing earlier similar cases).

³⁷ See Doremus, *supra* note 34 (detailing the California trial court decision that groundwater removals affecting flows in a navigable stream are subject to the public trust doctrine); see also *Lake Beulah Mgmt. Dist. v. Dept. of Natural Res.*, 799 N.W.2d 73, 92 (Wis. 2011) (holding that the state Department of Natural Resources was required to consider environmental impact of a proposed high-capacity well under the public trust doctrine when presented with sufficient potential harm to waters of the state).

³⁸ See generally *Nat'l Audubon Soc'y*, 658 P.2d 709, 732 (Cal. 1983) (“The public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state to protect public trust uses . . .”).

have been high-profile cases decided in more recent years in California, Wisconsin, and other states.³⁹

Excellent journal articles and books in recent years have detailed the use and expansion of the public trust doctrine for environmental protection purposes in all fifty states.⁴⁰ This writing illustrates how litigants have now used the public trust doctrine for over four decades in efforts to protect traditional water-based resources as well as, in some states, public lands, parks, shoreland and beaches, the atmosphere, animals, and plant species.⁴¹ However, it is important to keep in mind that in the majority of states, the public trust doctrine remains limited to navigable waters and submerged lands and has not been extended beyond access to and use of those resources.⁴²

Notably, the modern public trust doctrine does more than simply place limits on governmental action or inaction with regard to protected public trust resources. Instead, courts in many states have also relied on the public trust doctrine to support government actions to protect the environment by refusing to grant a permit or enacting new regulations to limit development that will harm natural resources.⁴³ In this category of cases, instead of a plaintiff suing the government for violation of the public trust doctrine, a private party is suing the government for a “taking” of private property without just compensation or for acting in an arbitrary and capricious manner, and the governmental entity argues, often successfully, that the property in question is subject to and thus limited by the public trust doctrine.⁴⁴

The expansion and use of the common law public trust doctrine has influenced more than just common law doctrine. Also in the 1970s, many states amended their constitutions, adding public trust language. For instance, in 1971, Pennsylvania amended its state constitution to provide:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the

³⁹ See Scanlan, *supra* note 23, at 139 (detailing the Wisconsin Supreme Court’s decision in *Lake Beulah Mgmt. Dist.*); BLUMM & WOOD, *supra* note 8, at 165–77; see also *Lake Beulah Mgmt. Dist.*, 799 N.W.2d at 92.

⁴⁰ See BLUMM & WOOD, *supra* note 8, at xxi–xxx (table of secondary sources listing approximately 200 scholarly articles on the public trust doctrine).

⁴¹ See *id.*; Craig, *Eastern Comparative Guide*, *supra* note 33; Craig, *Western Comparative Guide*, *supra* note 33; see also BLUMM & WOOD, *supra* note 8, at 349–56 (discussing lawsuits urging courts to include the atmosphere as a public trust resource in order to address climate change); see *infra* text accompanying note 100 (discussing Our Children’s Trust lawsuit in Minnesota).

⁴² *Western Comparative Guide*, *supra* note 33, at 56 (explaining the public trust doctrine “outlines public and private rights in water and submerged lands”); *Eastern Comparative Guide*, *supra* note 33, at 4 (same).

⁴³ See Klass, *supra* note 9, at 734–42 (discussing cases in various states where courts upheld state or local regulatory action in the face of takings claims and other challenges based in whole or in part on the public trust doctrine).

⁴⁴ *Id.*

people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.⁴⁵

It was this constitutional provision that the Pennsylvania Supreme Court relied upon in 2013 to strike down a state statute preventing local governments from limiting hydraulic fracturing activities within their jurisdictions.⁴⁶

Likewise, Montana amended its constitution in 1974 and included provisions that granted an “inalienable” right to a “clean and healthful environment” and placed a duty on the state and private parties to “maintain and improve a clean and healthful environment in Montana for present and future generations.”⁴⁷ Montana courts have relied on these constitutional provisions to hold that a nonprofit group could sue the state environmental agency and a mining company to prevent discharge of contaminants to a river that would adversely impact water quality and species, even though the agency’s rules allowed the discharge.⁴⁸

A few state legislatures also enacted new laws beginning in the 1970s reflecting developing common law public trust principles.⁴⁹ In Michigan, Professor Sax worked with the Michigan legislature to draft the Michigan Environmental Protection Act.⁵⁰ According to Sax, the law had three purposes: 1) creating an enforceable legal right held by the public to a “decent environment”; 2) making that right “enforceable by private citizens” suing as members of the public; and 3) setting the groundwork for a “common law of environmental quality” by leaving the terms pollution, environmental quality, and public trust undefined to allow courts to develop a common law approach to the problem and create flexible solutions.⁵¹

In 1971, the Minnesota legislature enacted MERA,⁵² modeled after the Michigan law, which gives any person the right to seek declaratory and injunctive relief in court against any person as necessary to “protect the air, water, land, or other natural resources” in the state whether publicly or privately owned from “pollution, impairment or destruction.”⁵³ “Natural resources” include but are not limited to “all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources” as

⁴⁵ PA. CONST. art. I, § 27.

⁴⁶ Robinson Twp., Washington Cnty. v. Pennsylvania, 83 A.3d 901, 913 (Pa. 2013).

⁴⁷ MONT. CONST. art. II, § 3; *id.* at art. IX, § 1.

⁴⁸ Mont. Env’tl. Info. Ctr. v. Dept. of Env’tl. Quality, 988 P.2d 1236, 1249 (Mont. 1999).

⁴⁹ See Klass, *supra* note 9, at 721–25 (discussing state environmental rights statutes); Susan George et al., *The Public in Action: Using State Citizen Suit Statutes to Protect Biodiversity*, 6 U. BALT. J. ENVTL. L. 1, 14–20 & app. A (1997) (summarizing environmental rights statutes).

⁵⁰ Michigan Environmental Protection Act, MICH. COMP. LAWS ANN. §§ 324.1701–.1706 (West 2012); Klass, *supra* note 9, at 721.

⁵¹ JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A HANDBOOK FOR CITIZEN ACTION 248 (1972).

⁵² Minnesota Environmental Rights Act, MINN. STAT. ANN. §§ 116B.01–.13 (West 2014).

⁵³ *Id.* § 116B.07.

well as state-owned scenic and aesthetic resources.⁵⁴ Minnesota courts have interpreted MERA broadly to protect birds, trees, historic buildings, marsh and wetland areas, quietude in residential areas, drinking water wells, wetlands, and the wilderness experience in forests.⁵⁵ Litigants have used MERA successfully to enjoin actions by the state, local governments, and private parties that would harm the environment and to compel action to protect the environment.⁵⁶

By the late 1990s, approximately fifteen states had distinct environmental rights statutes—as opposed to citizen suit provisions to enforce various state environmental protection laws.⁵⁷ However, only in Minnesota have courts regularly used the statute to protect natural resources beyond what state environmental protection laws already mandate.⁵⁸ Indeed, even the Michigan statute on which MERA was modeled has not had as much success as MERA in creating a statutory vehicle to promote Sax’s vision for developing the common law public trust doctrine.⁵⁹ This is primarily because Michigan courts have been less generous on standing to sue than the Minnesota courts, thus defeating one of Sax’s main goals for the law.⁶⁰

III. THE MINNESOTA ENVIRONMENTAL RIGHTS ACT AND *WHITE BEAR LAKE RESTORATION ASSOCIATION V. MINNESOTA DEPARTMENT OF NATURAL RESOURCES*

This Part explores MERA in more detail to show how it codifies various aspects of the public trust doctrine, expands on particular aspects of the doctrine, but also includes limits and defenses not found in the common law public trust doctrine. This Part then discusses the *White Bear Lake Restoration Association* case to provide a case study of what happens when a court is faced with a public trust doctrine claim to protect a traditional public trust doctrine resource—a lake—but has virtually no case law, positive or negative, to help resolve the claim.

A. MERA and Cases Applying MERA

As discussed in Part I, MERA is the most robust of the state environmental rights statutes enacted in the 1970s to provide a statutory vehicle to advance Professor Sax’s goals for the public trust doctrine. Indeed, the “purpose” section of MERA states:

⁵⁴ *Id.* § 116B.02.

⁵⁵ Klass, *supra* note 9, at 722.

⁵⁶ *Id.* at 722–23.

⁵⁷ Klass, *supra* note 9, at 725.

⁵⁸ See Klass, *supra* note 9, at 722–25 (discussing limited application of state environmental rights statutes by the courts in states other than Minnesota); see also George et al., *supra* note 49, at 16–20 (discussing judicial limitations placed on private rights of action, defendants subject to suit, and remedies in most of the states with environmental rights statutes).

⁵⁹ Klass, *supra* note 9, at 723–25.

⁶⁰ *Id.* at 723.

The legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction.⁶¹

Section 116B.03 provides that any person may maintain a civil action in state district court for declaratory or injunctive relief in the name of the State of Minnesota against any person “for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction.”⁶² MERA defines “natural resources” as including but not limited to “all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources,” as well as any “[s]cenic and esthetic resources . . . when owned by any governmental unit or agency.”⁶³ MERA defines “pollution, impairment, or destruction” as 1) any conduct that “violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit of the state or any instrumentality, agency, or political subdivision thereof”; or 2) any conduct that “materially adversely affects or is likely to materially adversely affect the environment.”⁶⁴ With regard to determining what conduct “materially adversely affects” or “is likely to materially adversely affect” the environment, Minnesota courts apply a five-factor test adapted from a Michigan court interpreting its own environmental rights statute.⁶⁵ The factors are:

⁶¹ Minnesota Environmental Rights Act, MINN. STAT. ANN. § 116B.01 (West 2014).

⁶² *Id.* § 116B.03, subdiv. 1. MERA excludes family farms and family farm corporations from the definition of “persons” who can be sued under MERA. *Id.* § 116B.02, subdiv. 2. *See also* Cnty. of Freeborn v. Bryson, 210 N.W.2d 290, 294–95 (Minn. 1973) for a discussion of the family farm exemption. Within seven days of filing suit, the plaintiff must serve the summons and complaint upon the state attorney general and the Minnesota Pollution Control Agency and, within 21 days of filing the suit, must publish written notice of the suit in a legal newspaper in the county in which the suit is commenced with information on the parties, date of suit, court, the acts complained of, and declaratory and injunctive relief requested. MINN. STAT. ANN. § 116B.03, subdiv. 2. In any MERA suit, the attorney general may intervene as a matter of right, and other interested parties may intervene upon permission of the court. *Id.* § 116B.03, subdiv. 3.

⁶³ MINN. STAT. ANN. § 116B.02, subdiv. 4.

⁶⁴ *Id.* § 116B.02.

⁶⁵ *Id.* at subdiv. 5; *Wacouta Twp. v. Brunkow Hardwood Corp.*, 510 N.W.2d 27, 30 (Minn. Ct. App. 1993) (explicitly incorporating multi-factor test from the Michigan Court of Appeals decision in *City of Portage v. Kalamazoo Cnty. Rd. Comm’n*, 355 N.W.2d 913, 915–16 (Mich. Ct. App. 1984)).

- (1) The quality and severity of any adverse effects of the proposed action on the natural resources affected;
- (2) Whether the natural resources affected are rare, unique, endangered, or have historical significance;
- (3) Whether the proposed action will have long-term adverse effects on natural resources, including whether the affected resources are easily replaceable (for example, by replanting trees or restocking fish);
- (4) Whether the proposed action will have significant consequential effects on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed);
- (5) Whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of the proposed action.⁶⁶

According to Minnesota courts, the factors are nonexclusive and an activity does not have to satisfy every factor to result in a materially adverse effect on the environment.⁶⁷ Instead, the factors are intended as a “flexible guideline” based on the facts of each case.⁶⁸ The courts have stated that use of the factors recognizes the reality that “[a]lmost every human activity has some kind of adverse impact on a natural resource” and that the purpose of MERA was not to prohibit “virtually all human enterprise.”⁶⁹

MERA goes on to provide in its “Burden of Proof” section that in any action alleging violation of an “environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by the Pollution Control Agency, Department of Natural Resources, Department of Health, or Department of Agriculture,” whenever the plaintiff makes a prima facie showing of a violation, the defendant may rebut that showing by the submission of evidence to the contrary.⁷⁰ Likewise, in an action where the plaintiff makes a prima facie showing that the defendant’s conduct is likely to “materially adversely affect the environment,” the defendant may rebut the prima facie showing by the submission of evidence to the contrary.⁷¹ However, in an action relying on a showing of “material adverse effect,” the defendant may also show as an affirmative defense that “there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health,

⁶⁶ *Schaller v. Cnty. of Blue Earth*, 563 N.W.2d 260, 267 (Minn. 1997) (affirming use of Michigan multi-factor test but modifying it for use in MERA cases). *Schaller* was recently reaffirmed by *Friends of the Boundary Waters Wilderness v. AT&T Mobility, LLC*, No. A11-1725, 2012 WL 2202984, at *4 (Minn. Ct. App. June 18, 2012).

⁶⁷ *Schaller*, 563 N.W.2d at 267.

⁶⁸ *Id.*

⁶⁹ *Id.* at 265 (alteration in original) (citing *Wacouta Twp. v. Brunkow Hardwood Corp.*, 510 N.W.2d 27, 30 (Minn. Ct. App. 1993)).

⁷⁰ MINN. STAT. ANN. § 116B.04.

⁷¹ *Id.* §§ 116B.02–116B.04.

safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction."⁷² The statute expressly provides that "[e]conomic considerations alone shall not constitute a defense."⁷³ As a remedy in any MERA claim under section 116B.03, the court may grant "declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction."⁷⁴ The statute does not provide for damages and does not include any provision for the court to award attorneys' fees or expert fees to prevailing parties.⁷⁵

A separate provision of MERA, section 116B.10, provides that any person may maintain a civil action in the district court for declaratory or equitable relief against the state where the nature of the action is a challenge to an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit promulgated or issued by the state.⁷⁶ In any such action the plaintiff must prove the existence of material evidence showing that the environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit is inadequate to protect the air, water, land, or other natural resources located within the state from pollution, impairment, or destruction.⁷⁷ If the plaintiff prevails under this section, the court does not issue a declaration or injunction as it does under section 116B.03, but instead remands the matter to the agency to make appropriate findings.⁷⁸

These provisions of MERA, taken together, give all state citizens the ability to challenge: 1) any action that violates or may violate state environmental permits, standards, or rules; 2) any state-issued environmental permits, standards, or rules that are inadequate to protect state natural resources; and 3) any actions that may materially adversely affect the environment where no state environmental standard, rule, or permit specifically prohibits or allows the action. Thus, MERA allows the courts to determine, separate and apart from the legislative branch, whether limits beyond existing environmental laws and standards should be placed on government or private actions that may result in pollution, impairment, or destruction of natural resources.

Significantly, the Minnesota legislature did not intend MERA to preempt or displace any existing statutory or common law rights or remedies. MERA explicitly states that "[t]he rights and remedies provided herein shall be in

⁷² *Id.* § 116B.04.

⁷³ *Id.*

⁷⁴ *Id.* §§ 116B.03, 116B.07.

⁷⁵ *See id.* § 116B.07.

⁷⁶ *Id.* § 116B.10, subdiv. 1.

⁷⁷ *Id.* § 116B.10, subdiv. 2.

⁷⁸ *Id.* § 116B.10, subdiv. 3.

addition to any administrative, regulatory, statutory, or common law rights and remedies now or hereafter available.”⁷⁹

Since MERA’s enactment, courts have used it to protect a variety of natural resources, including birds and the trees they nest in, the view from a state forest and the wilderness experience in visiting the forest, quietude in residential areas, wetlands, drinking water wells, marshes, wildlife areas, and historic buildings.⁸⁰ Courts have enjoined county highway projects, a gravel pit, a shooting range, a radio tower on private land, tree harvesting, and a jail, and have set a minimum lake level with an accompanying injunction for a county to repair a dam to ensure that level is achieved.⁸¹

Notably, the language Minnesota courts used in early MERA cases closely resembles the language courts in other states used in early common law public trust doctrine cases to emphasize the importance of protecting natural resources threatened by development, thus reflecting the impact of the national environmental movement of the 1970s. For instance, in one of the first MERA cases, *County of Freeborn v. Bryson (Bryson)*,⁸² the Minnesota Supreme Court enjoined a county from building a highway through a wetland on private property when the owner of the property challenged the county’s condemnation action.⁸³ In the second of two opinions it issued in the case, the court stated:

Times change. Until [MERA] was passed, the holder of the power of eminent domain had in its hands almost a legislative fiat to construct a highway wherever it wished. In the 1920’s and 1930’s, the state encouraged highway construction to facilitate industrial expansion and transportation of farm products to market. However, a consequence of such construction has been the elimination or impairment of natural resources. Whether for highways or for numerous other reasons, including agriculture, it is a well-known fact that marshes have been drained almost indiscriminately over the past 50 years, greatly reducing their numbers. The remaining resources will not be destroyed so indiscriminately because the law has been drastically changed by [MERA]. Since the legislature has determined that this change is necessary, it is the duty of the courts to support the legislative goal of protecting our environmental resources.

....

To some of our citizens, a swamp or marshland is physically unattractive, an inconvenience to cross by foot and an obstacle to road construction or improvement. However, to an increasing number of our citizens who have become concerned enough about the vanishing wetlands to seek legislative

⁷⁹ *Id.* § 116B.12.

⁸⁰ Klass, *supra* note 9, at 722 (summarizing cases).

⁸¹ *Id.* at 722–23. See also *Swan Lake Area Wildlife Ass’n v. Nicollet Cnty. Bd. of Cnty. Comm’rs*, 771 N.W.2d 529, 538 (Minn. Ct. App. 2009) (finding that the county violated MERA by allowing two wetlands to drain by failing to maintain a dam and stating that district court had jurisdiction to set a crest elevation for the dam to remedy the impairment of natural resources).

⁸² 243 N.W.2d 316 (Minn. 1976).

⁸³ *Id.* at 317.

relief, a swamp or marsh is a thing of beauty. To one who is willing to risk wet feet to walk through it, a marsh frequently contains a springy soft moss, vegetation of many varieties, and wildlife not normally seen on higher ground. It is quiet and peaceful—the most ancient of cathedrals—antedating the oldest of manmade structures. More than that, it acts as nature's sponge, holding heavy moisture to prevent flooding during heavy rainfalls and slowly releasing the moisture and maintaining the water tables during dry cycles. In short, marshes and swamps are something to protect and preserve.⁸⁴

The court then quoted Aldo Leopold's *Sand County Almanac* for the concept of a "land ethic"—that the individual is a member of a community with interdependent parts and that community includes soils, water, plants, animals, and collectively, the land.⁸⁵ The court concluded by stating that in *MEIRA*, "our state legislature has given this land ethic the force of law. Our construction of the Act gives effect to this broad remedial purpose."⁸⁶

The tone and language of the Minnesota Supreme Court's opinion in *Bryson* closely resembles some of the first modern public trust cases in the 1970s from other parts of the country. For instance, in 1972, the Wisconsin Supreme Court decided *Just v. Marinette County*,⁸⁷ holding that a shoreland zoning ordinance that prohibited a landowner from filling wetlands connected to navigable waters was not a taking that required compensation.⁸⁸ The court found that the state's "active public trust duty" required the state to not only promote navigation but also preserve and protect wetlands and related water resources for fishing, recreation, and scenic beauty.⁸⁹ The court stated:

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

⁸⁴ *Id.* at 321–22. *See also* *Cnty. of Freeborn v. Bryson*, 210 N.W.2d 290 (Minn. 1973).

⁸⁵ *Bryson*, 243 N.W.2d at 322 (internal quotation marks omitted) (citing ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 203 (1949)).

⁸⁶ *Id.*

⁸⁷ 201 N.W.2d 761 (Wis. 1972).

⁸⁸ *Id.* at 769.

⁸⁹ *Id.* at 768.

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. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature.

Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes? The great forests of our state were stripped on the theory man's ownership was unlimited. But in forestry, the land at least was used naturally, only the natural fruit of the land (the trees) were taken. The despoliation was in the failure to look to the future and provide for the reforestation of the land. 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 natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.⁹⁰

Other public trust cases in the early 1970s in California, Illinois, and elsewhere expressed similar ideas, reflecting the growing awareness of the need to protect natural resources, and the importance of maintaining the connection between humans and the natural world, even if that might stand in the way of economic development.⁹¹

The sentiments of the Minnesota Supreme Court in *Bryson* continued through the decades, albeit with somewhat less urgency, and in more recent cases applying MERA, in a similar manner to other states applying the public trust doctrine. However, because of the early success by plaintiffs in MERA cases, there was no real need in Minnesota to develop a modern common law public trust doctrine. MERA provides a clear statute, with an expansive definition of natural resources, and a direct path to injunctive relief. Indeed, in contrast to the sixty-eight MERA decisions issued by Minnesota appellate courts since the law's enactment in 1971, there are only two appellate decisions since 1970 where plaintiffs attempted to use the public trust doctrine to protect natural resources, and the Minnesota Supreme Court did not review either case.⁹² In each case, the plaintiff attempted to expand the

⁹⁰ *Id.* at 767–68. *See also supra* note 37 (discussing a more recent public trust doctrine case in Wisconsin).

⁹¹ *See, e.g.,* Marks v. Whitney, 491 P.2d 374, 378, 380 (Cal. 1971) (holding that the public trust doctrine prevented a landowner from filling tidelands, and citing increasing development pressures on natural resources, the flexibility of the public trust doctrine to encompass changing public needs, and a growing recognition that one of the more important uses of tidelands is “preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life”); Scott v. Chicago Park Dist., 360 N.E.2d 773, 775, 780–81. (Ill. 1977) (invalidating state senate bill conveying 200 acres under Lake Michigan to a steel company based on the public trust doctrine and stating that “there has developed a strong, though belated, interest in conserving natural resources and in protecting and improving our physical environment”).

⁹² Larson v. Sando, 508 N.W.2d 782 (Minn. Ct. App. 1993); Aronow v. State, No. A12–0585, 2012 WL 4476642 (Minn. Ct. App. Oct. 1, 2012). A Westlaw search reveals two other Minnesota cases where the term “public trust doctrine” is used, but these did not involve efforts to protect

public trust doctrine beyond traditional water-based resources without any compelling legal authority supporting the claim and the Minnesota courts rejected the efforts.

In the first case, *Larson v. Sando (Larson)*,⁹³ the Minnesota Department of Corrections transferred three parcels of property to the Minnesota Department of Natural Resources (DNR), which designated the land as a state wildlife management area.⁹⁴ Some time later, DNR proposed to sell the land to a window manufacturing company nearby in connection with the company's expansion of its facility.⁹⁵ Neighboring landowners challenged the sale, which the state legislature had approved, on grounds that it violated the public trust doctrine.⁹⁶ In affirming the trial court's dismissal of the case, the Minnesota Court of Appeals held in 1993 that the public trust doctrine applies to state-owned waterways, not land. Citing earlier case law,⁹⁷ the court reasoned "[t]he state owns navigable waters and the lands under them for public use, as trustee for the public, and not as a proprietor with right of alienation."⁹⁸ It contrasted this public trust obligation over navigable waters and submerged lands with other lands owned by the state, noting, "if the doctrine applied to land, it would prohibit any sale of any state land" and it found no support in the law for such a prohibition.⁹⁹

The second case, *Aronow v. State (Aronow)*,¹⁰⁰ was one of the lawsuits that Our Children's Trust, an Oregon-based nonprofit, filed on behalf of children against environmental protection agencies in all fifty states and several federal agencies in 2011 alleging that these governmental entities had violated the common law public trust doctrine by failing to limit greenhouse gas emissions that contribute to climate change.¹⁰¹ In the Minnesota case, the trial court granted the state's motion to dismiss and the plaintiff appealed.¹⁰² In affirming the dismissal, the Minnesota Court of Appeals held in an unpublished opinion that as an intermediate appellate court, it was an error-correcting court and thus was without authority to change the law.¹⁰³ It reasoned that the plaintiff had provided no legal support for the argument that the scope of the public trust doctrine should be expanded to protect the atmosphere and the court on its own could find no supporting case law.¹⁰⁴

or preserve natural resources. As discussed in Part III.B., *infra*, there are also several Minnesota cases prior to 1970 that involve disputes over lakebed ownership where the courts reference the public trust doctrine.

⁹³ 508 N.W.2d at 782.

⁹⁴ *Id.* at 783.

⁹⁵ *Id.* at 784.

⁹⁶ *Id.* at 784, 787.

⁹⁷ See *Pratt v. Dep't of Natural Res.*, 309 N.W.2d 767, 771 (Minn. 1981); *Nelson v. De Long*, 7 N.W.2d 342, 346 (Minn. 1942).

⁹⁸ *Larson*, 508 N.W.2d at 787.

⁹⁹ *Id.*

¹⁰⁰ No. A12-0585, 2012 WL 4476642, at *1 (Minn. Ct. App. Oct. 1, 2012).

¹⁰¹ *Id.*; Our Children's Trust, *Legal Action*, <http://ourchildrenstrust.org/Legal> (last visited Apr. 17, 2015).

¹⁰² *Aronow*, 2012 WL 4476642, at *1.

¹⁰³ *Id.* at *2-3.

¹⁰⁴ *Id.* at *2.

Thus, the court found no legal basis to expand the public trust doctrine beyond its application to navigable waters and submerged lands.¹⁰⁵

Notably, because each of these cases was an attempt to expand the scope of the public trust doctrine beyond the resources it traditionally protects, one wonders why the plaintiffs in each case did not bring a MERA claim rather than a public trust claim. Although each plaintiff likely would have had other difficulties establishing liability under MERA, both the land and the air are statutorily defined “natural resources” subject to protection under the statute, thus providing a much more straightforward vehicle for relief than the common law public trust doctrine.¹⁰⁶ However, in the case attempting to apply the public trust doctrine to the atmosphere, the goal of the litigation was to develop the common law doctrine on a nationwide basis as a means of supporting efforts to limit greenhouse gas emissions.¹⁰⁷ A similar effort using MERA in Minnesota would not necessarily aid that nationwide endeavor.

B. White Bear Lake Restoration Association v. Minnesota Department of Natural Resources

As illustrated above, Minnesota courts have developed a significant body of case law interpreting MERA and virtually no post-1971 case law interpreting the scope or application of the public trust doctrine in the state apart from the two decisions by Minnesota intermediate appellate courts declining to extend the doctrine beyond water-based resources without Minnesota Supreme Court case law to support it. Thus, there are few appellate decisions in Minnesota addressing how the public trust doctrine can be used to protect traditional, water-based resources or balance development against natural resource protection.¹⁰⁸ Instead, disputes over balancing economic development and natural resource protection in the context of both water-based resources and other natural resources have all been channeled into MERA claims. There are no published cases where a plaintiff asserted claims under both MERA and the public trust doctrine, and thus no Minnesota decision addressing the interplay between the state’s environmental rights statute and the common law public trust doctrine.

¹⁰⁵ *Id.*

¹⁰⁶ Minnesota Environmental Rights Act, MINN. STAT. ANN. 116B.02 (West 2014); *cf.* Herman & MacLean v. Huddleston, 459 U.S. 375, 389 (1983) (noting that, in another statutory context, statutory schemes can “rectify perceived deficiencies in the available common-law protections”).

¹⁰⁷ See Complaint for Declaratory and Injunctive Relief ¶ 54, Aronow v. State, 2012 WL 4476642 (Minn. Ct. App. Oct. 1, 2015) (No. A12-0585) (“Together with the State’s common law duty under the Public Trust Doctrine, MERA compels the State of Minnesota . . . to safeguard the atmosphere for the future enjoyment of Minnesotans . . .”).

¹⁰⁸ See *Eastern Comparative Guide*, *supra* note 33, at 71–73 (summarizing Minnesota case law); Sherry A. Enzler et al., *Finding a Path to Sustainable Water Management: Where We’ve Been, Where We Need to Go*, 39 WM. MITCHELL L. REV. 842, 854–56 (2013) (discussing public trust doctrine cases in Minnesota).

However, in 2012, in *White Bear Lake Restoration Association*, two plaintiff groups representing businesses and homeowners along the shores of White Bear Lake in Ramsey County, Minnesota, approximately ten miles northeast of St. Paul, sued the Minnesota DNR asserting claims under both MERA and the public trust doctrine for failure to take action to prevent declines of water levels in the 2,400-acre lake—one of the largest and deepest lakes in the Minneapolis–St. Paul metropolitan area.¹⁰⁹ The White Bear Lake Restoration Association (Restoration Association) represented businesses that used and were dependent on the lake.¹¹⁰ The White Bear Lake Homeowners' Association (Homeowners' Association) represented residents who lived in the area of the lake.¹¹¹ The Restoration Association was the original plaintiff and brought solely MERA claims.¹¹² The Homeowners' Association subsequently intervened in the case supporting the existing MERA claims and included a new claim under the common law public trust doctrine.¹¹³

The lake supported swimming, boating, waterskiing, fishing, wildlife habitat, and various recreational businesses.¹¹⁴ The lake had a small watershed, which means there was a limited surface area around the lake from which precipitation runoff flowed into the lake.¹¹⁵ The only other water source that recharged the lake was groundwater from the underlying Prairie du Chien-Jordan aquifer.¹¹⁶ While Minneapolis, St. Paul, and other surrounding communities received surface water from the Mississippi River to meet their municipal water needs,¹¹⁷ many other municipalities in the

¹⁰⁹ Settlement Agreement, *supra* note 18, 1–2. See Minn. Dep't of Natural Res., *Fisheries Lake Survey, White Bear Lake*, <http://www.dnr.state.mn.us/lakefind/showreport.html?downum=82016700> (last visited Apr. 17, 2015) (providing a description of White Bear Lake); Dana Thiede, KARE, *Settlement Announced in White Bear Lake Lawsuit*, <http://www.kare11.com/story/news/local/2014/12/01/settlement-announced-in-white-bear-lake-lawsuit/19737955/> (last visited Apr. 17, 2015) (noting that White Bear Lake is one of the largest and deepest lakes in the Twin Cities metropolitan area).

¹¹⁰ Complaint, *supra* note 19, ¶ 25.

¹¹¹ Complaint in Intervention of White Bear Lake Homeowners' Ass'n ¶5, *White Bear Lake Restoration Ass'n*, No. 62-CV-13-2414 (May 2, 2013).

¹¹² Settlement Agreement, *supra* note 18, at 1–2.

¹¹³ *Id.* at 2.

¹¹⁴ Summary Judgment Order Memorandum, *supra* note 21, at 8; Complaint in Intervention, *supra* note 111, at 7–8; Intervenor/Plaintiff White Bear Lake Homeowners' Ass'n, Inc.'s Memorandum in Support of Its Motion for Summary Judgment at 9, *White Bear Lake Restoration Ass'n*, No. 62-CV-13-2414 (April 7, 2014).

¹¹⁵ Summary Judgment Order Memorandum, *supra* note 21, at 3; Complaint in Intervention, *supra* note 111, at 3.

¹¹⁶ Summary Judgment Order Memorandum, *supra* note 21, at 3; Complaint in Intervention, *supra* note 111, at 3–4.

¹¹⁷ See City of St. Paul, Minn., *Water Service Facts*, <http://www.stpaul.gov/index.aspx?NID=502> (last visited Apr. 17, 2015) (noting that St. Paul has the capacity to pump 90 million gallons per day from the Mississippi River); City of Minneapolis, *Minneapolis Water Facts*, http://www.minneapolismn.gov/publicworks/water/water_waterfacts (last visited Apr. 17, 2015) (listing the Mississippi River as the “sole source” of Minneapolis water); Metro. Council, *St. Paul and White Bear Lake: A Strong Water Supply Match*, <http://www.metrocouncil.org/News-Events/Wastewater-Water/Newsletters/St-Paul-and-White-Bear-Lake-a-strong-water-supply.aspx> (last visited Apr. 17, 2015).

region obtained their water through high-capacity municipal wells drawing water from the aquifer pursuant to permits issued by DNR.¹¹⁸ Between 2003 and 2011, precipitation in the White Bear Lake area was at or near a thirty-year average, while during that same time period water levels in White Bear Lake dropped, as much as five feet, to their lowest recorded level.¹¹⁹

In 2011, the U.S. Geological Survey conducted a study on the relationship between groundwater and surface water near White Bear Lake and focused on pumping by ten municipalities in the area of White Bear Lake.¹²⁰ This report found a more than five-foot decline in the water levels of White Bear Lake between 2003 and 2010 and concluded that significantly increased municipal groundwater withdrawals from the area around the lake through high-capacity wells was a significant factor in the decline of water levels.¹²¹ Despite these reports as well as concerns voiced by residents and government agencies over the lake's continued decline, at the time the plaintiffs filed their complaints, DNR had not considered the cumulative impact of the groundwater withdrawals on the lake in making decisions regarding individual groundwater withdrawal permits, had not set a protected elevation for the lake, and had not implemented any other procedures to prevent drawdown of the aquifer or otherwise protect the lake.¹²²

In their complaints, the plaintiffs alleged that significant increases in water appropriations by high-capacity wells, including high-capacity municipal wells, had caused the decrease in lake levels rather than any changes in precipitation.¹²³ The plaintiffs also alleged that there were feasible and prudent alternatives to continuing to allow increased groundwater pumping including: 1) augmenting public water supplies with surface water from the St. Paul Regional Water Service and reducing high-capacity water appropriations to pre-2000 levels; 2) substantially limiting groundwater withdrawals from targeted wells that have the greatest impact on the lake; 3) enacting and enforcing heightened water conservation practices in the affected area; or 4) augmenting lake levels with water from the Mississippi River.¹²⁴

Both plaintiffs brought claims under section 116B.03 of MERA, alleging that DNR: 1) violated state environmental quality standards by issuing new groundwater withdrawal permits, and failing to terminate or modify existing permits in the area surrounding the lake; and, 2) engaged in conduct that resulted in a material adverse effect on the lake in violation of MERA separate and apart from any violation of an environmental quality

¹¹⁸ Summary Judgment Order, *supra* note 21, at 3–4; Complaint in Intervention, *supra* note 105, at 4–5.

¹¹⁹ Summary Judgment Order, *supra* note 21, at 6–8; Complaint in Intervention, *supra* note 111, at 5.

¹²⁰ Summary Judgment Order, *supra* note 21, at 4.

¹²¹ *Id.* at 6–8.

¹²² *Id.* at 8.

¹²³ Complaint in Intervention, *supra* note 111, at 5.

¹²⁴ Complaint in Intervention, *supra* note 111, at 8–9.

standard.¹²⁵ The Homeowners' Association also brought a separate public trust doctrine claim, alleging that the state and DNR were trustees of the state's public water resources—including the lake, the water, and the lakebed—and that DNR's actions and inactions had caused the impairment and destruction of the lake in breach of their obligations under the public trust doctrine.¹²⁶

Before the case settled in December 2014, on terms discussed below, DNR brought a motion to dismiss the claims and, when the court denied that motion, all parties brought motions for summary judgment on various claims.¹²⁷ These motions resulted in two decisions by the Ramsey County District Court.¹²⁸ Because the focus of this Article is on the public trust doctrine, the parties' arguments and the court's decisions on the MERA claims will not be discussed except as they relate to the public trust doctrine claim.

In its motion to dismiss the public trust doctrine claim, DNR argued first that the Homeowners' Association was attempting to expand the doctrine to cover groundwater and cited the *Larson* and *Aronow* cases to show that Minnesota courts had rejected efforts to expand the doctrine to include additional resources beyond navigable waterways and their beds.¹²⁹ DNR then argued that the Homeowners' Association could not bring a public trust doctrine claim to protect the lake when the challenged action was providing domestic water, which is a public use also protected by the public trust doctrine.¹³⁰ In other words, so long as public trust assets are used for a public good—here domestic consumption—there cannot be a public trust doctrine violation.¹³¹ DNR relied on a 1947 Minnesota case, *State v. Longyear Holding Co. (Longyear)*,¹³² where the state sought to establish its rights of ownership to the ore below the low water mark of a lake and to establish that riparian owners had no interest in those minerals so the state could drain the lake and mine the ore.¹³³ The court in *Longyear* held that the state owned the bed of the lake, the temporary draining did not operate to transfer title to the riparian owners, and mining the ore was in the interest of

¹²⁵ Order Denying Motion to Dismiss at 2, *White Bear Lake Restoration Ass'n*, No. 62-CV-13-2414 (Minn. Dist. Ct. Sept. 11, 2013).

¹²⁶ Order Denying Motion to Dismiss, *supra* note 125, at 11–13.

¹²⁷ *Id.*; Memorandum of Law in Support of Plaintiff White Bear Lake Restoration Ass'n, *ex rel.* State of Minn.'s Motion for Summary Judgment, *White Bear Lake Restoration Ass'n*, No. 62-CV-13-2414 (Minn. Dist. Ct. Apr. 7, 2014); Defendants' Memorandum in Support of their Motions to Dismiss, *White Bear Lake Restoration Ass'n*, No. 62-CV-13-2414 (Minn. Dist. Ct. June 18, 2013).

¹²⁸ Motion to Dismiss Order, *White Bear Lake Restoration Ass'n*, No. 62-CV-13-2414 (Minn. Dist. Ct. June 18, 2013); Motion to Dismiss Order, *White Bear Lake Restoration Ass'n*, No. 62-CV-13-2414 (Minn. Dist. Ct. Aug. 18, 2013).

¹²⁹ Defendants' Memorandum in Support of their Motions to Dismiss, *supra* note 127, at 28–29.

¹³⁰ *Id.* at 29.

¹³¹ *Id.* at 29–30.

¹³² *Id.* at 30; 29 N.W.2d 657 (Minn. 1947).

¹³³ *Longyear*, 29 N.W.2d at 661, 662.

the public and did not violate the public trust doctrine.¹³⁴ Thus, according to DNR, the public trust doctrine operated solely as “a real estate doctrine” that limits the state’s ability to transfer or dispose of beds of navigable waters.¹³⁵ DNR bolstered its arguments with reference to Minnesota water statutes, which stated that domestic consumption is a high priority use of water but did not specify any priority of maintaining lake elevations.¹³⁶ Thus, these legislative declarations displaced any common law public trust doctrine protections.¹³⁷

In response, the Homeowners’ Association argued that the public trust doctrine was an independent check on legislative priorities for public trust resources.¹³⁸ The Homeowners’ Association also relied on modern environmental protection statutes in Minnesota and the development of the public trust doctrine in other states to argue that the public trust doctrine in Minnesota was not frozen in time in 1947, but instead had expanded to include modern environmental protection priorities reflected in state statutes as well as public trust doctrine developments elsewhere in the country.¹³⁹ It further contended that statutes in Minnesota as well as environmental science undermined DNR’s efforts to deny the connection between surface water and groundwater, and that DNR’s actions with regard to groundwater withdrawals were what was causing the destruction of the lake itself—a protected public trust resource—resulting in a breach of the state’s duty to protect that resource under the doctrine.¹⁴⁰

The district court denied DNR’s motion to dismiss the public trust doctrine claim.¹⁴¹ It found that the “relationship between lake levels and the aquifer are inexorably entwined” and thus the public trust doctrine claim easily encompassed established public trust resources including the lake, its use as a navigable waterway, and the impacts of the depletion of the lake on fish and wildlife.¹⁴² The court also found, citing *Illinois Central*, that the public trust doctrine “serves as a check upon legislative and regulatory actions involving assets held in public trust.”¹⁴³ Finally, the court, citing to MERA’s savings clause, stated that MERA and other environmental protection legislation have “reinforced the public trust concept, but have not supplanted it.”¹⁴⁴ The court also rejected DNR’s argument that there could be no public trust violation if the water was used for domestic, and thus public, purposes and found that the complaint properly alleged that DNR had failed

¹³⁴ *Id.* at 665, 667, 670.

¹³⁵ Defendants’ Reply Memorandum in Support of their Motions to Dismiss at 14, *White Bear Lake Restoration Ass’n*, No. 62-CV-13-2414 (Minn. Dist. Ct. July 11, 2013).

¹³⁶ Defendants’ Memorandum in Support of their Motions to Dismiss, *supra* note 127, at 30.

¹³⁷ *Id.* at 30–31.

¹³⁸ Intervenor’s Memorandum in Opposition to Defendants’ Motion to Dismiss at 4, *White Bear Lake Restoration Ass’n*, No. 62-CV-13-2414 (Minn. Dist. Ct. July 3, 2013).

¹³⁹ *Id.* at 11–13.

¹⁴⁰ *Id.* at 10–11, 14–16.

¹⁴¹ Order Denying Motion to Dismiss, *supra* note 125, at 2.

¹⁴² *Id.* at 11.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 12.

in its duty as trustee of a public asset—the lake—in granting excessive water withdrawal permits and could pursue that claim.¹⁴⁵

After significant discovery, all parties moved for summary judgment on various aspects of the MERA and public trust doctrine claims.¹⁴⁶ On the public trust doctrine claim, DNR argued first that there was no evidence the lake was used for commerce or was otherwise navigable at the time of statehood in 1858 and thus it was not owned by the state or protected under the public trust doctrine.¹⁴⁷ DNR also argued that the public trust doctrine did not provide an affirmative cause of action in Minnesota and that “[n]o Minnesota court has held that an affirmative cause of action is implied in the public trust doctrine.”¹⁴⁸ DNR argued that the Homeowners’ Association could not rely on both MERA and the public trust doctrine and that “if the Homeowners’ Association is relying on MERA for jurisdiction, its public trust doctrine ‘claim’ must be dismissed.”¹⁴⁹ It argued, in addition, that courts in Minnesota had not expanded the doctrine to include groundwater and Minnesota courts “have repeatedly declined to expand the public trust doctrine,” citing *Aronow*, *Larson*, and *Longyear*.¹⁵⁰ Finally, DNR argued that even if it owned the bed of the lake, Minnesota’s public trust doctrine did not impose any obligation on the state to manage navigable waters over the lakebed to protect public trust uses.¹⁵¹ Instead, the doctrine only protects trust uses by imposing a “limitation on the State’s ability to transfer or dispose of the beds of navigable waters.”¹⁵² Throughout its briefs, DNR stated again and again that there was no Minnesota case law to support even the

¹⁴⁵ See *id.* at 12–13 (“[The claim] addresses the public interest in protecting White Bear lake as well as the association members’ riparian rights . . .”).

¹⁴⁶ Summary Judgment Order Memorandum, *supra* note 21, at 2.

¹⁴⁷ See Minn. Dep’t of Natural Res. Reply Memorandum in Support of Its Motion for Summary Judgment, *supra* note 20, at 22–23 (arguing that the intervenors needed to show that the “lake was used, or was susceptible of being used . . . as a highway for commerce”).

¹⁴⁸ *Id.* at 23.

¹⁴⁹ Minn. Dep’t of Natural Res. Reply Memorandum in Support of Its Motion for Summary Judgment, *supra* note 20, at 17.

¹⁵⁰ Minn. Dep’t of Natural Res. Reply Memorandum in Support of Its Motion for Summary Judgment, *supra* note 20, at 24–25 (citing *Aronow v. State*, A12-0585, 2012 WL 4476642, at *2 (Minn. Ct. App. Oct. 1, 2012); *Larson v. Sando*, 508 N.W.2d 782, 787 (Minn. Ct. App. 1993)); Minn. Dep’t of Natural Res. Reply Memorandum in Support of Its Motion for Summary Judgment, *supra* note 20, at 19–20 (citing *State v. Longyear Holding Co.*, 29 N.W.2d 657, 663 (Minn. 1947); *Larson*, 508 N.W.2d at 787); Minn. Dep’t of Natural Res. Memorandum Opposing White Bear Lake Homeowners’ Ass’n, Inc.’s Motion for Summary Judgment at 3–6, *White Bear Lake Restoration Ass’n*, No. 62-CV-13-2414 (Minn. Dist. Ct. Apr. 25, 2014) (citing *Longyear*, 29 N.W.2d at 669 and *Larson*, 508 N.W.2d at 787).

¹⁵¹ See Minn. Dep’t of Natural Res. Reply Memorandum in Support of Its Motion for Summary Judgment, *supra* note 20, at 18–19, 24 (explaining that regardless of DNR’s limited authority in comparison to a landowner, the Minnesota “public trust doctrine is essentially a real estate doctrine that operates as a limitation on the State’s ability to transfer or dispose of the beds of navigable waters”).

¹⁵² *Id.* at 24.

most basic application of the public trust doctrine to protect any water resources or limit DNR's actions with regard to those water resources.¹⁵³

In its own motion for summary judgment, the Homeowners' Association provided evidence establishing that the lake was navigable at the time of statehood because it was susceptible for use in travel and commercial navigation at and before that time.¹⁵⁴ Original surveys of the lake showed it as a meandered lake approximately the same size as existed when steamboats began to be used on the lake in the late 1800s and a tourist industry developed around the lake.¹⁵⁵ The Homeowners' Association argued that DNR had an affirmative duty to consider and balance any negative impact of its actions on the lake under the public trust doctrine even though Minnesota courts had not directly addressed the issue.¹⁵⁶ It also argued that the facts were undisputed that DNR's actions had impacted lake levels, threatened the public trust interests in the lake, and thus violated the public trust doctrine.¹⁵⁷

In its order on summary judgment in 2014, the court denied the bulk of the parties' motions on MERA and the public trust doctrine on grounds that there were material facts in dispute regarding the impact of groundwater pumping on lake levels; pollution, impairment, or destruction of natural resources associated with the lake; the diligence of DNR in protecting those resources; whether DNR violated environmental standards in issuing the groundwater appropriation permits; and the appropriate remedy.¹⁵⁸ However, the court did grant in part the Homeowners' Association motion for summary judgment on the public trust doctrine.¹⁵⁹ The court found there was sufficient evidence to establish that the lake was navigable-in-fact at the time of statehood and that the public trust doctrine imposed an obligation on DNR to protect and preserve not only the bed of the lake but also its surface waters.¹⁶⁰ Thus, the court granted summary judgment for the Homeowners' Association on "the question of whether the public trust doctrine affords a common law cause of action to protect the public's use rights to the water and lakebed of White Bear Lake."¹⁶¹ Nevertheless, the court denied summary judgment based on disputes of fact regarding whether DNR's management of

¹⁵³ See *id.*; Minn. Dep't of Natural Res. Reply Memorandum in Support of Its Motion for Summary Judgment, *supra* note 20, at 19–20; Minn. Dep't of Natural Res. Memorandum Opposing White Bear Lake Homeowners' Ass'n, Inc.'s Motion for Summary Judgment, *supra* note 150 at 3–6.

¹⁵⁴ Intervenor/Plaintiff White Bear Lake Homeowners' Ass'n, Inc.'s Memorandum in Support of Its Motion for Summary Judgment, *supra* note 114, at 9, 21.

¹⁵⁵ *Id.* at 21–22.

¹⁵⁶ *Id.* at 25.

¹⁵⁷ Intervenor/Plaintiff White Bear Lake Homeowners' Ass'n, Inc.'s Reply Memorandum in Support of Its Motion for Summary Judgment at 10, *White Bear Lake Restoration Ass'n*, No. 62-CV-13-2414 (Minn. Dist. Ct. May 1, 2014).

¹⁵⁸ Summary Judgment Order Memorandum, *supra* note 21, at 6–12.

¹⁵⁹ *Id.* at 12.

¹⁶⁰ *Id.* at 13–15.

¹⁶¹ *Id.* at 16.

the resource and management of groundwater appropriation permits in fact violated its fiduciary duty under the public trust doctrine.¹⁶²

Then, in December 2014, the parties reached a settlement that would stay the litigation for three years while they attempted to develop an area-wide solution to water management.¹⁶³ Under the agreement, DNR and the city of White Bear Lake would support a plan to develop a surface water supply for cities around the lake.¹⁶⁴ During the first phase, six municipalities would receive surface water at a cost of \$155 million to \$230 million.¹⁶⁵ “The DNR would support legislation to fund feasibility and design considerations by August 2016, with the target for full construction funding in 2017.”¹⁶⁶ In a second phase, seven other municipalities would move to using surface water.¹⁶⁷ “The DNR would determine and set a ‘protective elevation’ for White Bear Lake by November 1, 2016.”¹⁶⁸ This elevation would not be required until the first phase of the water-supply project was complete, at which time it could be used to regulate new groundwater permits.¹⁶⁹ DNR and the two plaintiff groups would work to persuade residents to reduce water use with an overall goal of a 17% reduction.¹⁷⁰ As part of the agreement, DNR did not admit that the primary cause of the drop in the lake’s water level was associated with groundwater pumping.¹⁷¹

IV. THE DEVELOPMENT OF COMMON LAW IN THE SHADOW OF STATUTES

The question in this Part is whether there are any broad lessons to be learned from the public trust doctrine experience in Minnesota. On the one hand, Professor Sax’s vision for the public trust doctrine created the momentum to enact a unique and powerful environmental rights statute in Minnesota. Plaintiffs have used the statute effectively and very successfully for forty years to protect natural resources and create a substantive role for the courts in reviewing both public and private development projects that

¹⁶² *Id.*

¹⁶³ See Stipulation for Stay, *White Bear Lake Restoration Ass’n*, No. 62-CV-13-2414 (Minn. Dist. Ct. Dec. 16, 2014).

¹⁶⁴ Jim Anderson, *White Bear Lake Settlement Pushes Plan to Divert Water from Mississippi*, STAR TRIBUNE, Dec. 1, 2014, <http://www.startribune.com/local/east/284350031.html> (last visited Apr. 17, 2015); Debra O’Connor, *White Bear Lake Agreement Would Pump Mississippi Water to 13 Suburbs*, PIONEER PRESS, Dec. 1, 2014, http://www.twincities.com/localnews/ci_27043916/white-bear-lake-groups-settle-dnr-over-water (last visited Apr. 17, 2015); Elizabeth Dunbar, *White Bear Lake Settlement Hinges on Legislature*, MPR NEWS, Dec. 1, 2014, <http://www.mprnews.org/story/2014/12/01/wbl-water-levels> (last visited Apr. 17, 2015); Mark Wolski, *Minnesota, White Bear Lake Settle Lawsuit Over Lake’s Decreasing Water Levels*, 232 DAILY ENVT. REP. Dec. 3, 2014, http://news.bna.com/deln/DELNWB/split_display.adp?fedfid=59855728&vname=dennotallissues&jd=a0f9u1p7y3&split=0 (last visited Apr. 17, 2015).

¹⁶⁵ O’Connor, *supra* note 164.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

would impact natural resources well beyond what could be accomplished solely with environmental review laws such as the National Environmental Policy Act¹⁷² or, Minnesota's version, the Minnesota Environmental Policy Act,¹⁷³ which provide only procedural and not substantive remedies. Moreover, MERA's broad definition of "natural resources" means plaintiffs do not need to convince courts to expand the resources protected by the public trust doctrine beyond traditional navigable waters and submerged lands. The statute clearly encompasses a broad range of natural resources including land, air, animals, wildlife habitat, historic buildings, and aesthetic resources.

Nevertheless, has Minnesota lost anything because litigants in the state have channeled all their natural resource protection litigation through MERA, essentially leaving the public trust doctrine in its pre-1971 condition? There are good arguments that it has. Indeed, in many areas of environmental law, common law and statutes can work and have worked together cooperatively in a manner that allows one to enhance the other for environmental protection purposes.¹⁷⁴ For instance, there is strong evidence that courts began to more frequently apply common law strict liability to actions causing environmental harm on land after Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).¹⁷⁵ One explanation for this shift is that courts had become comfortable applying the statutory strict liability provisions in CERCLA to environmental contamination cases. Thus, it was only a small step to apply strict liability to environmental contamination cases that involved common law claims as well as CERCLA claims and find that activities resulting in environmental contamination were "abnormally dangerous," justifying common law strict liability.¹⁷⁶ These cases, moreover, were decided at a time when courts were otherwise refusing to expand the boundaries of activities considered "abnormally dangerous" under strict liability to new activities, choosing instead to require plaintiffs to prove negligence.¹⁷⁷

However, CERCLA was able to impact the development of common law because litigants continue to need the common law to obtain monetary

¹⁷² National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

¹⁷³ Minnesota Environmental Policy Act of 1973, Minn. Stat. Ann. §§ 116D.01–.07 (West 2014).

¹⁷⁴ See Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 961–62 (2004) [hereinafter Klass, *From Reservoirs to Remediation*] (suggesting that courts have expanded application of common law strict liability in environmental contamination cases based on the policies, principles, and legislative history of statutes like CERCLA that apply strict liability in similar factual circumstances); Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 547 (2007) [hereinafter Klass, *Common Law and Federalism*].

¹⁷⁵ 42 U.S.C. §§ 9601–9675 (2012).

¹⁷⁶ Klass, *From Reservoirs to Remediation*, *supra* note 174, at 957–58, 961.

¹⁷⁷ *Id.* at 934–35, 961.

damages in contamination cases along with equitable CERCLA relief.¹⁷⁸ In other words, plaintiffs could not rely just on CERCLA if they sought to recover diminution in value to property, lost profits, or punitive damages in addition to the cleanup costs they could recover under CERCLA. As a result, plaintiffs frequently brought the two sets of claims together,¹⁷⁹ thus allowing common law doctrine to develop alongside CERCLA.

The same is true with the relationship between nuisance lawsuits and the Clean Air Act and Clean Water Act. Certainly, after the enactment of these powerful statutes in the 1970s, plaintiffs filed fewer nuisance lawsuits to resolve air and water pollution cases.¹⁸⁰ Nevertheless, there were still cases where plaintiffs sought to recover monetary damages associated with such pollution, and thus courts were in a position to consider these common law claims against the backdrop of Congress's new policy pronouncements on clean air and clean water.¹⁸¹ And, of course, when concerns about climate change rose to prominence after 2000, private plaintiffs once again looked to nuisance law as a major legal tool because the existing federal environmental statutes were not readily available for private litigation even if they were able to serve as a basis for EPA regulation.¹⁸²

In contrast to other areas of environmental law where statutes and common law can work together to provide complementary remedies and where common law can fill in the holes in the statutes, with MERA, why ever bring a public trust doctrine case? Only injunctive relief is available under either the common law or MERA, so common law in this instance doesn't provide any additional remedy.¹⁸³ Looking back with a perspective of forty years, this reliance on MERA means that the common law never developed in Minnesota. Notably, unlike nuisance law, which has a long history of being used for environmental protection purposes, the public trust doctrine has been used for environmental protection purposes across the country only since the time MERA was enacted in 1970,¹⁸⁴ so there was no earlier case law to draw on like the situation with nuisance in the air and water context or nuisance, trespass, and strict liability in the land contamination context.

Does it matter? It does. As powerful as it is, MERA does have limitations not found in the public trust doctrine. MERA suits cannot be brought against private parties or local governments acting under a state permit.¹⁸⁵ There are statutory affirmative defenses that may not exist in the

¹⁷⁸ *Id.* at 905.

¹⁷⁹ *See id.* at 905, 946 ("Thus, claims for common law strict liability remain a crucial element of a plaintiff's case, even if a statutory cause of action exists under state law, federal law, or both.").

¹⁸⁰ *See, e.g.,* Klass, *Common Law and Federalism*, *supra* note 174, at 574 (describing the decline of the use of state common law claims to recover for environmental harm in favor of greater reliance on the new federal statutes enacted in the 1970s and 1980s).

¹⁸¹ Klass, *Common Law and Federalism*, *supra* note 174, at 583–84.

¹⁸² *Id.*

¹⁸³ *See supra* notes 74–75 and accompanying text.

¹⁸⁴ *See supra* notes 31–33 and accompanying text.

¹⁸⁵ *See supra* note 32 and accompanying text.

common law.¹⁸⁶ Moreover, state legislatures can and do amend statutes to make them less protective of natural resources and the environment. There is no guarantee that the Minnesota legislature will not at some point amend MERA to limit its ability to protect natural resources. The same is true for executive branch administrative agencies. Courts must give deference under administrative law principles to agencies interpreting statutes and regulations¹⁸⁷ and that deference may result in reduced protection for natural resources. But the public trust doctrine is a vehicle for the courts to ensure that the state fulfills its common law obligation to protect natural resources even if legislative and executive branch sentiments are otherwise.

Most important, MERA can only be used offensively to stop private or government action that may adversely impact natural resources.¹⁸⁸ MERA cannot be used to defend government action to *protect* the environment in the face of private party challenges such as regulatory takings claims. The public trust doctrine, however, can be used and has frequently been used defensively by the government to support its efforts to protect the environment. There are numerous examples in states including Louisiana, Hawaii, California, Washington, Virginia, Wisconsin, New York, and Ohio where state courts upheld state actions to protect or preserve wetlands, lakes, groundwater, coastal areas, and other protected public trust resources from claims by developers and private landowners that the state action was arbitrary and capricious or resulted in a taking of private property without just compensation.¹⁸⁹ In each case, the court, using the public trust doctrine on its own or in combination with state environmental protection statutes, upheld the state action on grounds that the state was required to or at least permitted to take such action to preserve public trust resources.¹⁹⁰

¹⁸⁶ See, e.g., Minnesota Environmental Rights Act, MINN. STAT. ANN. § 116B.02, subdiv. 2 (West 2014) (excluding family farms and family farm corporations from entities subject to suit under MERA); *id.* § 116B.03, subdiv. 1 (excluding MERA actions against people acting pursuant to a permit or license issued by specified state agencies); *id.* § 116B.04 (stating that a defendant may rebut plaintiff's prima facie case by showing no feasible or prudent alternative to the proposed conduct).

¹⁸⁷ See generally *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

¹⁸⁸ See Minn. Stat. Ann. § 116B.03 (providing for a civil action to protect natural resources from pollution, impairment, or destruction, but providing no mechanism for governments to use the statute as a defense when their efforts to preserve natural resources interfere with private property rights).

¹⁸⁹ Klass, *supra* note 9, at 734–42 (discussing cases where courts found state or local action to deny a permit or to take action was either not a taking or not arbitrary and capricious). See also Melissa K. Scanlan, *Shifting Sands: A Meta-Theory for Public Access and Private Property Along the Coast*, 65 S.C. L. REV. 295, 350–53 (2013) (discussing role of the public trust doctrine in takings claims); see generally Robin Kundis Craig, *What the Public Trust Doctrine Can Teach Us About the Police Power, Penn Central, and the Public Interest in Natural Resource Regulation* (forthcoming 2015) (discussing role of the public trust doctrine in regulatory takings cases).

¹⁹⁰ See generally Klass, *supra* note 9, at 734–37, 741 (discussing cases upholding government actions to prevent private development that would adversely impact protected resources and rejecting arguments by plaintiffs that such government actions were arbitrary and capricious or constituted a taking).

It is this role for the public trust doctrine that makes DNR's position in the *White Bear Lake Restoration Association* case so troubling. Certainly, in that case, a broad reading of the public trust doctrine was against DNR's short-term interests in retaining maximum flexibility to make water allocation decisions. However, by arguing for an extremely narrow view of the public trust doctrine, DNR was potentially harming its long-term interests to the extent it might wish in the future to protect a wetland, natural area, lake, or other natural resources from private development or appropriation. DNR's arguments that the public trust doctrine is merely a "real estate doctrine" that has no role in natural resources protection may not be helpful in future cases where it denies a development permit to preserve a wetland or undertakes comprehensive regulation of the state's resources in a manner that impacts private property rights.

DNR was indeed correct in its briefs in the litigation that there was no Minnesota case law declaring citizens can sue under the public trust doctrine to protect natural resources, that groundwater is protected, or for any other aspect of the public trust doctrine that supported the plaintiffs' claims in the case.¹⁹¹ That is because there is very little Minnesota case law on the topic at all. The Ramsey County District Court decisions are a good start, and the strong savings clause in MERA itself is extremely helpful,¹⁹² but if the case settlement remains in effect, there will continue to be no controlling authority in the state on the ability to use the public trust doctrine to protect natural resources as opposed to it being merely a real estate doctrine.

In a 1986 article on the public trust doctrine, Professor Richard Lazarus warned environmental protection advocates and scholars not to place too much emphasis on the public trust doctrine lest it undermine efforts to create new natural resource protection frameworks through legislative and regulatory action.¹⁹³ But this warning is also valid in reverse. Statutes are great. Except when they're not. There are affirmative defenses in MERA.¹⁹⁴ It cannot be used for actions on agricultural lands.¹⁹⁵ MERA litigation is

¹⁹¹ See Defendants' Memorandum in Support of Their Motions to Dismiss, *supra* note 127, at 28–31; Defendants' Reply Memorandum in Support of Their Motions to Dismiss, *supra* note 135, at 10–11, 14; Minn. Dep't of Natural Res. Memorandum Opposing White Bear Lake Homeowners' Ass'n, Inc.'s Motion for Summary Judgment, *supra* note 150, at 3–6; Minn. Dep't of Natural Res. Reply Memorandum in Support of Its Motion for Summary Judgment, *supra* note 20, at 16, 19.

¹⁹² See Minnesota Environmental Rights Act, MINN. STAT. ANN. § 116B.12 (West 2014) ("No existing civil or criminal remedy for any wrongful action shall be excluded or impaired by sections 116B.01 to 116B.13. The rights and remedies provided herein shall be in addition to any administrative, regulatory, statutory, or common law rights and remedies now or hereafter available.").

¹⁹³ Lazarus, *supra* note 25, at 657–58, 692.

¹⁹⁴ See, e.g., MINN. STAT. ANN. § 116B.02, subdiv. 2 (excluding family farms and family farm corporations from entities subject to suit under MERA); *id.* § 116B.03, subdiv. 1 (excluding MERA actions against persons acting pursuant to a permit or license issued by specified state agencies); *id.* § 116B.04 (stating that a defendant may rebut a plaintiff's prima facie case by showing no feasible or prudent alternative to the proposed conduct).

¹⁹⁵ *Id.* § 116B.03.

expensive.¹⁹⁶ It does not allow for recovery of attorneys' fees and plaintiffs will almost always need expensive experts to withstand summary judgment and prevail at trial.¹⁹⁷ More important, however, there are few reasons to be optimistic about legislative sources of environmental protection in today's current political climate. At least at the federal level, the legislative scene looks quite different today in 2014 than it did in 1986 when Professor Lazarus wrote his article. In the late 1980s and even through much of the 1990s, many environmental protection issues were bipartisan in nature.¹⁹⁸ Congress enacted significant amendments to the Clean Air Act and CERCLA,¹⁹⁹ and climate change had not yet become the politically polarizing issue it is today. Likewise, many state legislatures continued to enact significant environmental protection legislation,²⁰⁰ renewable portfolio standards,²⁰¹ and energy efficiency legislation²⁰² even up until a few years ago. At the present moment, however, much of that legislative effort is stalled²⁰³ and a vibrant common law, even an old doctrine like the public trust doctrine, may be of use, at least for a time.

V. CONCLUSION

This Article explores the relationship between state environmental rights statutes and the common law public trust doctrine to consider whether there remains a role for the common law to protect natural resources even in states where strong environmental rights statutes exist. Environmental rights statutes and the common law public trust doctrine can and should work together to protect natural resources. The Minnesota

¹⁹⁶ Michael Wietzecki, *True Access to the Courts for Citizens Working to Protect Natural Resources: Incorporating Attorney's Fees into the Minnesota Environmental Rights Act*, 14 MO. ENVTL. L. & POL'Y REV. 147, 149 (2006) (asserting that the cost of litigation is prohibitive due to the absence of a provision allowing plaintiffs to recover attorneys' fees).

¹⁹⁷ *Id.* at 148.

¹⁹⁸ Richard J. Lazarus, *Environmental Law at the Crossroads: Looking Back 25, Looking Forward 25*, 2 MICH. J. ENVTL. & ADMIN. L. 267, 268 (2013).

¹⁹⁹ *Id.* at 270–72.

²⁰⁰ See, e.g., Revesz, *supra* note 4, at 583 (summarizing state environmental legislation in the 1980s and 1990s).

²⁰¹ Lincoln L. Davies, *State Renewable Portfolio Standards: Is There a "Race" and Is it to the "Top"?*, 3 SAN DIEGO J. OF CLIMATE & ENERGY L. 3 (2011–12) (discussing rapid enactment of state renewable portfolio standard); see also Database of State Incentives for Renewables and Efficiency, Renewable Portfolio Standard Policies, available at http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2015/01/RPS_map.pdf (map showing renewable portfolio standards in the states).

²⁰² See Database of State Incentives for Renewables and Efficiency, Energy Efficiency Resource Standards, <http://programs.dsireusa.org/system/program/maps> (interactive map showing energy efficiency resource standards in the states).

²⁰³ See, e.g., Shi-Ling Hsu, *Introduction: Environmental Law Without Congress*, 46 J. LAND USE & ENV'TL L. 1 (Sept./Oct. 2014) (describing Congress's failure to address current environmental problems); THOMAS O. MCGARITY, *FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL* (Yale U. Press 2013) (describing recent attacks on environmental and public health laws).

example of MERA illustrates that MERA is a powerful statute that has played an important role in natural resources protection in the state for over forty years. Hopefully MERA will continue to play that role long into the future. But during those same forty years, litigants in Minnesota have ignored the public trust doctrine in a way that is harmful to environmental protection in the state. Because of the lack of developed public trust doctrine case law, there are potentially fewer tools available to protect natural resources, even traditional public trust resources like navigable waters. This is particularly true in cases where MERA's application may be limited or where the state wishes to protect such resources and can use the common law public trust doctrine as a shield against regulatory takings claims. The *White Bear Lake Restoration Association* case provides a good example of how litigants can use the public trust doctrine in conjunction with MERA to protect natural resources. Hopefully future plaintiffs will encourage courts in Minnesota and elsewhere to develop a more robust common law public trust doctrine to support existing environmental protection statutes and regulations.