

Defining Coastal Boundaries: A Comparison Study of the Influences to Shoreline Policy
around Puget Sound of Washington State and the Great Lakes of Michigan

By

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Abstract

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The issue of who can maintain ownership of the shoreline has been an important subject of legal dispute in the United States since the early nineteenth century. A renewed interest in a common law known as the public trust doctrine has prompted state courts to address the issue of increasing public ownership to shorelines during the last 50 years. This study looks at the difference in shoreline access laws on two unique inland water ways that have been essential to the growth and development of their respective regions: the Puget Sound of Washington and the Great Lakes of Michigan. Michigan has recently stated in the courts that the public has the right to pass over and engage in recreation on privately owned land below the high water mark on the Great Lakes. Conversely, Washington has not expressly given the public any such rights on privately owned shoreline land. The research in this thesis explores the historical, geographical and natural influences that have influenced shoreline policy in these two states. Discussion focuses on the court cases and legislative decisions that have had a significant impact on shoreline policy in each state. The analysis extracts the similarities and differences between the two bodies of water and concludes that the resource rich shoreline of Washington has contributed to increased private ownership of its tidelands whereas the multiple natural and anthropogenic shifts in the Great Lake's water level have affected Michigan's more deviated shoreline law-making. Recommendations for future research include more detailed examinations on the early role of Washington's shellfish industry in state government as well as a more detailed focus on specific disputes that arose from changes in Great Lakes water levels.

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Chapter I

Introduction

Natural shorelines have played a significant role in human civilization since early Paleolithic times. Its importance was described by geographer Carl Sauer, “The sea, in particular the tidal shore, presented the best opportunity to eat, settle, increase, and learn. When all the lands will be filled with people and machines, perhaps the last need and observance of man still will be, as it was at his beginning, to come down to experience the sea” (Sauer 45,46).

Since Westerners have colonized the North American continent, laws regarding boundaries between public and private lands on these shorelines have developed in diverse ways among U.S. states. Lawmakers in many coastal states have addressed the subject of increasing public ownership to shorelines during the last 50 years. Michigan has recently stated in the courts that the public has the right to pass over and engage in recreation on privately owned land below the high water mark on the Great Lakes. On the other hand, Washington has not expressly given the public any such rights on privately owned shoreline land. Research in this thesis explores the historical, geographical and natural influences that have influenced shoreline policy in these two states.

Central to this debate is a common law called the public trust doctrine which states that all navigable waterways within a state’s jurisdiction are reserved in the public trust for the purposes of navigation which include the incidental rights of fishing, swimming, boating, and other recreational activities. The doctrine is based off historical precedent dating back to scholarly texts of the Roman Empire. While the doctrine has

been used to justify public shoreline access in some states such as Michigan, other states such as Washington have decided the public trust doctrine does not guarantee any public rights in areas not covered by navigable waters.

This work will consist of a comparison study of certain factors that have played a role in Washington and Michigan's shoreline policy development. Topics examined in this work are the unique geographical features of each area, the reasons for settlement of the shoreline, the development of industries around the coast, and the courts handling of property disputes. The purpose of the comparison is to provide insight into which factors have played a significant role in the understanding of the public trust doctrine. This knowledge will better assist those who are advocating for increased public or private shoreline rights. By showing which geological, historical and geographical features are typical influencers of shoreline policy, advocates can make better decisions on how to confront coastal management issues with an educated approach.

Chapter II will set the tone of the analysis by providing a literature review of cases, books and journals that are relevant to this study. The second part of chapter II will include an introduction to the public trust doctrine's historical basis and the relevant controversy surrounding its implementation. The chapter will end with a more detailed discussion of the methodology used for the analysis.

The third chapter is comprised of the data that is relevant to the shorelines of the Great Lakes of Michigan and the Puget Sound of Washington. It starts with an introduction to Washington's colonization and discusses the significant cases that have resulted from coastal disputes. Research is gathered from historical texts dating back to the territorial days to more recent court cases that have taken place in the last ten years.

The second part of this chapter is comprised of Michigan's shoreline history from the early settlement to the most recent developments in the legislature. It outlines three significant cases that made drastic changes to shoreline rights since the early 1900's. The fourth chapter focuses on the analysis where the two case studies will be compared with each other. A graphical example is provided that shows certain aspects chosen out of the data to be significant for comparison. The concluding chapter will provide a final insight into the analysis as well as offer insight into further relevant research.

This work provides an interdisciplinary basis for the understanding of how landscape changes can affect public rights to shorelines. Much literature, mostly law journals, has been published that advocates or criticizes the public trust doctrine in the context of state or federal policy. This research does not intend to take a side on how shorelines should be managed. The complexity of the shoreline requires an interdisciplinary perspective which includes natural history and cultural identities layered over the discipline of legal studies. By including the perspectives of multiple disciplines, this research will provide a more clear understanding of people's connection to the shoreline and how identity is closely tied with our laws relating to the natural world.

Chapter II

Literature Review

Literature used as data comes from a combination of primary and secondary historical sources, court cases, and relevant academic literature. This variety of sources provides a complex multidisciplinary understanding of each case that adds legitimacy to the analysis. Historical texts give insight into the economic activities that shaped the development in each state and explain why the shorelines were settled and developed. Court cases examine the conflicts that resulted from colonization and the academic literature provides scholarly commentary on the meaning of the decisions.

Arthur Kruckeberg outlines the Puget Sound's importance to early and contemporary settlement in his chapter of the book *Northwest Lands, Northwest Peoples*. Addressing Puget Sound's characteristics from a natural history perspective, he explores how the Sound's prehistory is connected and disconnected with human settlement.

Other historical texts worth noting are *History of Washington* from 1909 which gives insight into the corporate interests and culture during the early days of Washington State. The perspective in the book provides first hand insight into what spurred coastline conflict after Washington's admittance into the Union. Many years later, historian Robert C. Nesbit wrote the biography of Judge Thomas Burke from the early days of Seattle. Using many quotes from the Judge himself, he compiles a rich personal history of the growth of the Puget Sound economy. Included in this account are journal entries that describe the nature of conflict over tidal waters in Puget Sound.

A large amount of research on Washington shoreline studies is also found in the graduate thesis of Kenan R. Conte in *The Disposition of Tidelands and Shore Lands*

Washington State Policy, 1889-1982. This work includes a well-researched history of the constitutional convention's focus on tideland sales and the road to its eventual discontinuation. It includes interviews from the late William A. Gissberg who was an instrumental part of the ban on tideland sales.

Literature on the early history of the Great Lakes of Michigan relating to this study was found in a historical record from 1883 called *History of the Upper Peninsula of Michigan*. Other texts that were examined were written much more recently such as David Dempsey's chapter called Ruin and Recovery in *The History of Michigan Law*. As the author laments the over-use of Michigan's natural resources, he provides insight into how the deforestation and overfishing of the past have shaped present day attitudes toward the surrounding lakes.

This work also includes the shoreline philosophies of Rachel Carson. Although most of her works are geared toward the ecological aspects of the shoreline, she expresses a vivid sense of place to her audience that illustrates her harmony with the complexities that this boundary entails. Her first chapter in *The Edge of the Sea* expresses many of the reasons that people are attracted to a shoreline environment and what makes it such a multifaceted area of study. She wrote that the best way to understand the beach is to actually stand on it and "sense the long rhythms of earth and sea that sculptured its land forms and produced the rock and sand of which it is composed" (Carson xiii).

Other writers such as Yi-Fu Tuan, author of *Topophilia: A Study of Environmental Perception, Attitudes, and Values* have added unique perspectives to the importance of the coastal zone. Tuan analyzes the zone through the eyes of a geographer

by looking at motives for settling the zone and revealing the adaptations and cultural norms that certain groups of people developed near it. He looks at the seashore, the valley, and the island but theorizes along with his colleague Carl Sauer that the seashore was the ideal environment for early human settlement because of the “diversity and abundance of provisions” that it offers (Sauer 115).

An extensive variety of journal articles written on the topic of the public trust doctrine is not difficult to find. Law schools throughout the country have written countless articles on the extent of the doctrine in coastline management but there are also many that utilize the doctrine in other environmental issues such as hunting and curbing CO2 emissions. Often these cases have very conflicting viewpoints on the practicality of the public trust doctrine and the authors often pick and choose particular court cases to justify their own assertions. This work does not attempt to make sense of the many individual articles on the public trust doctrine but there are a few worthy of mention that relate to Great Lakes and Puget Sound case studies.

A few sources are essential to the understanding of how Michigan has dealt with the public trust doctrine on its shorelines. *God's Terminus: Boundaries, Nature, and Property on the Michigan Shore* by Theodore Steinberg provides research into the early Kavanaugh Cases and *Hilt v. Weber*. The author claims that although “the states in America have a lock on the shore,” Michigan law has been an exception to the rule. He is exposing the public trust doctrine not as a tool to pass an environmental agenda but as a set of evolving principles and precedents that are adapted to the physical landscape and the social infrastructure in a state (Steinberg 71). On the other hand, Carl S. Paganelli dissects the public trust doctrine case by case in *Creative Judicial Misunderstanding:*

Misapplication of the Public Trust Doctrine in Michigan in order to delegitimize the historic ruling of *Glass v. Goeckel*. What makes this criticism unique is that Paganelli dissects the foundation of the public trust doctrine by analyzing the circumstances surrounding the original Roman and English laws. While Paganelli's opinions contradict much of the established literature, they closely mirror the viewpoints of those who oppose expanding public access to beaches in Michigan.

The public trust doctrine has been the focus of discussion in a three major court cases throughout the history of Michigan and these are discussed in depth in the analysis section. The three Kavanaugh cases, *Hilt v. Weber* and *Glass v. Goeckel* were the most historic in terms of setting widespread changes in shoreline management.

In regards to the State of Washington, *The Public Trust Doctrine in Washington State* prepared by Ralph W. Johnson et al. provides a basis for legal research of Washington's coastline. Johnson outlines the public trust doctrine in relation to Washington State specifically and summarizes how it was invoked in a few of the state's significant court cases. Rather than merely educate on the public trust doctrine's effect on Washington's coasts, the publication is more focused on arguing the benefits of the doctrine to its audience, who is the Washington Department of Ecology. Johnson's primary argument is that "when properly invoked, the doctrine can limit private property rights while avoiding claims of unconstitutional taking" (Johnson 1).

Another document worthy of mention in this section is Joe Panesko's article called *The Public Trust Doctrine* which was published as a chapter in Volume 4 of the "Washington Real Property Deskbook Series". Panesko is an assistant attorney general in the State of Washington and gives a lawyer's perspective on the public trust doctrine in

Washington State. His article was published in 2009 specifically for use by practicing attorneys so it offers the most recent cases on the topic and discusses a more practical use of the public trust for professionals.

While Panesko does not always agree with some of Johnson's assertions about the legality of the public trust doctrine, both of them agree that certain Washington court cases are essential to a complete understanding of the Public Trust Doctrine in Washington. Starting from the oldest to the most recent, *Martin v. Waddell's Lessee* (1842) and *Illinois Central Rail Co. v. Illinois* (1892) set the precedent for future court decisions across the nation. Specifically in Washington State, both cite *Sequim Bay Canning Co. v. Bugge* (1908), *Wilbour v. Gallagher* (1969) and *Caminiti v. Boyle* (1987). These are not necessarily the only cases worth noting but represent a few that are agreed upon as being significant to the development of the public trust doctrine in Washington.

The Public Trust Doctrine

In United States jurisprudence, navigable waterways have historically been set aside for the common use of the public through a common law often known as the public trust doctrine. This doctrine is said to have established roots in Roman civil law in ancient texts that were codified under the reign of the Emperor Justinian. One of these texts describing the nature of rivers, ports and seashore states, "Thus, the following things are by natural law common to all- the air, running water, the sea, and consequently the sea-shore. No one therefore is forbidden access to the seashore" (Moyle 36). More of this Roman code has also been translated to read:

- “. . . all rivers and harbours are public, so that all persons have a right to fish therein.”
- “. . . every one is free to build a cottage upon [the sea shore] for purposes of retreat as well as to dry his nets and haul them up from the sea.”
- “. . . every one is entitled to bring his vessel to the bank, and fasten cables to the trees growing there, and use it as a resting place for the cargo, as freely as he may navigate the river itself. But the ownership of the bank is in the owner of the adjoining land, and consequently so too is the ownership of the trees which grow upon it” (Moyle 36).

This Roman code is said to have been passed down into British acceptance through the Middle Ages and later adopted as common law by the original thirteen states after the American Revolution. Each of the thirteen states held, as still does hold, a public trust interest in navigable waters up to the high tide mark. Rules and guidelines pertaining to the public trust doctrine have been left up to each state to define. Each has its own definition of what constitutes a navigable waterway and each state has developed its own laws regarding what the public interest means. It is important also to note that each state’s rules are never static. Being common law, the public trust doctrine is up for interpretation and cultural changes, interest groups, and stakeholders have influence on how the law is interpreted. For example, Maine maintains that its coastlines are held in the public trust but has defined limitations on the public’s rights to the shoreline. Recreational public access on private tidelands has only been deemed permissible for the purposes of fishing, fowling and navigation.

The Supreme Court in *Bell v Town of Wells* acknowledged the increased modern demand for beach walking but made clear that the court lacks the authority given to them by the constitution to take private property for changing recreational needs by stating, “Although contemporary public needs for recreation are clearly much broader, the courts and the legislature cannot simply alter these long-established property rights to

accommodate new recreational needs” (Bell 169). Comparing this case to the verdict of *Glass v. Goeckel*, which will be discussed later in this work, shows just how much coastal law can vary from state to state while invoking the same common law principle. Outcomes of these cases and the precedent that has been set in each state is often affected by the values of the judges and the strength of the stakeholders at the time.

Another case that has set early precedent for the public trust doctrine is *Martin v. Waddell* which discusses the privatization of the tidelands. The question in the case was whether or not a grant of 100 acres of tidelands given by the King of England would override the claim under state statute “authorizing the lands to be leased to abutting waterfront owners who could stake off lots for purposes of growing and harvesting oysters” (qtd. in Panesko 6). The Supreme Court of New Jersey decided that it was not in the king’s power to grant exclusive possession of the tidelands when they stated:

Indeed, it could not well have been otherwise; for the men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another, as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell-fish from its bottom, or fasten there a stake, or even bathe in its waters, without becoming a trespasser upon the rights of another (*Martin* 414).

The precedent that was set in this case became commonplace in coastal law across the United States. Almost every journal regarding the public trust doctrine cites the case in one way or another.

The other landmark case commonly cited as evidence that the public trust doctrine is applicable in contemporary coastal law is *Illinois Central Railroad Co. v. Illinois* which intended to determine title of lakefront lands previously given to Illinois Central Railroad

by the state legislature. The court questioned “whether the legislature was competent to this deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters” (Illinois 452). It was finally determined that the Great Lakes were indeed navigable waters and governed by the same public trust principles that had been given to each state based on the Equal-footing doctrine. This is in contrast to the English law which stated that tidal influence was a prerequisite for navigability. Opinion of the court determined 4 votes to 3 that, “It is hardly conceivable that the legislature can divest the state of the control and management of this harbor, and vest it absolutely in a private corporation” (Illinois 454).

While this case is cited in nearly all literature referring to the public trust doctrine, most proponents of public coastal waters ignore the 1902 follow up to the case in which the court agrees that the railroad’s coastline developments “do not extend . . . into the lake beyond the point of practical navigability”(Illinois 1902, 464). The railroad ended up not having to take down the piers and docks for this reason. Joe Panesko, an expert on the case, wrote that this the Illinois case “confirms that the public trust doctrine is not an absolute prohibition against the alienation of publicly owned aquatic lands, but is a scalable limit triggered when such alienation exceeds the scope of public benefit derived from the privatization and development of the aquatic lands” (Paneko 14).

Even though many state courts recognized a form of public ownership on waterways and coastlines, the actual public trust doctrine was not popularized until 1969 when Joseph Sax published an influential article called *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention* which calls the judicial system to action “to promote rational management of our natural resources” by invoking the public

trust doctrine as a “tool” (Sax 565). He presents the public trust doctrine as the only concept known to American law that has “the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems” (Sax 474). Since Sax’s article, many legal and environmental scholars have invoked the public trust doctrine in literature and in the courtroom for a variety of issues.

A few years later with federal funding, David Slade and multiple coauthors published *Putting the Public Trust to Work: The Application of the Public Trust Doctrine to the Management of Lands, Waters and Living Resources of the Coastal States* which follows Sax’s footsteps and takes an advocacy approach to the doctrine. The book accepts the texts of Justinian in full and advocates that this basic doctrine was passed through the Magna Charta to the English and then to American law through the Revolution. These historical texts are mentioned throughout the book as the basis for implementing the public trust doctrine in coastline states. Since these two books have been published, many environmental advocates have tried to use the doctrine as a tool to push an agenda. Many have questioned the doctrine’s application only to navigable waters with the intent of applying it to a variety of natural resources as well.

One hallmark California case highlights the expansion of the public trust doctrine’s application by the Supreme Court. In 1983 the National Audubon Society filed suit against the Superior Court of Alpine County for diverting the water of four of five ecologically beneficial streams to Mono Lake in the Sierra Nevada Mountains to the City of Los Angeles. Effects of the diversion had decreased the surface area of the lake by one-third and exposed the native birds to predators which caused them to leave the

area (National 424). The plaintiffs argued that that “shores, bed and waters of Mono Lake” were protected by a public trust and the courts sided with them.

The Mono Lake case is regarded as a landmark case for two major reasons. First, it changed the scope of the public trust doctrine by including inland streams and lakes into its application. This was a big step by the courts to include smaller waterways in the scope of the doctrine especially because it was previously only focused on waterways which were only navigable in-fact. This case determined that Mono Lake was deemed navigable and even though the streams that supply Mono Lake are not navigable in-fact, they are still protected by the public trust doctrine. Secondly, the doctrine was applied retroactively to water rights that were previously granted to the City of Los Angeles. Environmental groups acting as plaintiffs argued that the original water rights which diverted streams from Mono Lake were unlawful and the defendant argued that “the public trust doctrine as to stream waters has been ‘subsumed into the appropriative water rights system and, absorbed by that body of law, quietly disappeared’”. The court agreed with neither of these claims and instead maintained that the state “retains continuing supervisory control over its navigable waters and the lands beneath those waters” and holds the authority to prevent “any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust” (National 445)

In the Mono Lake case, the state used judicial authority to deem that the public’s best interest was the preservation of ecological nature of the lake. In this situation, the state reserved the right to apply the public trust on an as needed basis. It is a similar philosophy to that which the judges in the Illinois case purported, “[The use of the public trust doctrine] must vary with varying circumstances. The legislation which may be

needed one day for the harbor may be different from the legislation that may be required at another day” (Illinois 460).

The public trust doctrine has not gained notoriety in the last forty years without serious disagreement. These previous case examples all had well stated oppositions and were decided by small margins in the court rooms. Opposition asserts that the doctrine is based on fabled history and that early Roman and English law had little or nothing to do with such rights. James Huffman argues that the English law stating that title to submerged lands was presumed to be owned by the king, “was a sixteenth century fabrication that did not take hold in England until late in the nineteenth century, well after American law had developed on its own” and that “the invented prima facie rule served to feather the nest of the Crown, not to protect the rights of the public” (Huffman 1). Huffman encourages the courts to reevaluate the myths that have long held as precedent and “look to other justifications for a doctrine that threatens the property rights of millions of individuals, while recognizing in the courts expansive powers to invalidate the democratic choices of the elected representatives of the people” (Huffman 2).

The dispute over the public trust doctrine almost always boils down to conflict about property rights. Those who use the doctrine to present a case to the court often present the doctrine as an unchangeable set of rules that the state is bound by. What advocates do not account for is the diversity of the land and the prevailing cultures of the residents.

These are the big issues in the examples of Puget Sound and Lake Huron that will be discussed further in this work. Areas where coastal property below the high water

mark has been sold into private hands have been contested by advocates of the public trust doctrine all over the United States.

Method of Analysis

The Puget Sound and the Great Lakes are unique inland water ways that have been essential to the growth and development of their respective regions. Both have provided important life sustaining resources as well as avenues for transportation and trade. While many similarities exist among the two water ways, the state governments and courts that oversee them have developed very different laws regarding public access to shorelines. In order to fully understand which characteristics have played a role in policy development and courtroom decisions, an in depth examination of each case is laid out. The two cases will be compared and examined more closely against each other. For the purpose of gaining a logical understanding of how both cases are related, the similarities and differences are both identified and discussed.

Chapter III

Data

The Puget Sound of Washington

The dispute over ownership has surrounded the tidelands of Washington State since its territorial days. While the surrounding circumstances have been in a constant state of change, the core debate has remained relatively unchanged. This chapter is split into six sections which outline various stages of the debate. The first section looks at the history in the years before statehood and the issues the early settlers experienced while attempting to reconcile local coastal boundaries. The second section deals with the constitutional convention and why tidal boundaries rose to the forefront of the debate. The third section points out how corporate interests understood the boundaries set by the new State of Washington. The fourth section jumps forward to the modern era and explains how a new way of thinking encouraged the legislature to reevaluate previous tideland policy more geared to public ownership. Lastly, this section will evaluate the court's interpretation of the public trust doctrine's influence on setting coastal boundaries and a recent unpublished case is discussed that shed light on Washington's current policy towards coastal boundary changes.

Geographical Characteristics and Pre-statehood Disputes

The Puget Sound is located in the most northeastern corner of the continental United States in the State of Washington. The sound is only a small portion of what is broadly known as the Salish Sea which stretches north into British Columbia, Canada and

west towards the Pacific Ocean via the Strait of Juan de Fuca. Its geographical location provides access to shipping lanes connecting to Asia, and North and South America.

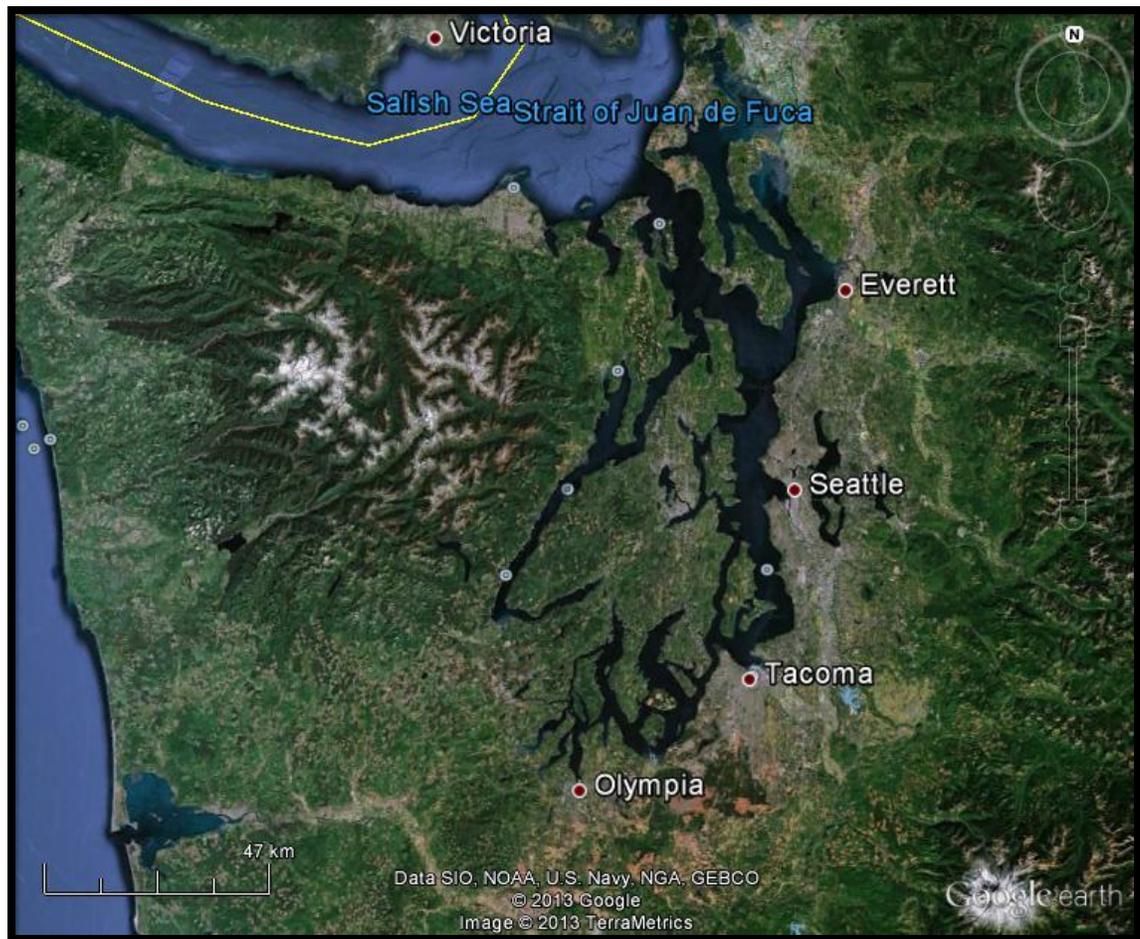


Figure 1 The Puget Sound Basin in the State of Washington

The Puget Sound is an inland waterway that has been carved into a series meandering channels and straits by a combination of receding glaciers, volcanic activity and tectonic shifting. Before European exploration and settlement occurred, it had been the home of many aboriginal peoples for thousands of years. The area which was plentiful in salmon, shellfish, terrestrial wildlife and timber provided the opportunity for a sedentary lifestyle that was unique among many aboriginal people in North America. Puget Sound also remains one of the largest estuaries in the world and has a rich ecosystem dependent on the precise combination of fresh water it receives from

surrounding rivers and streams and the saline influence of the Pacific Ocean which has prompted the Environmental Protection agency to declare it as an Estuary of National Significance. “Its shoreline-nearly 2,000 miles of it—varies from steep bluffs to gently sloping sandy or rocky beaches and numerous tide flats and salt marshes” (Kruckeberg 61). The shores are scattered with shellfish species that are not to be found anywhere else in the world and surrounded with dense forests that were beyond the comprehension of non-natives during the early exploration. After the first European explorers came in contact with the region, the rumors of the richness of the land started to spread.

When Captain George Vancouver was exploring the Puget Sound he described it as such, “Nothing can be more striking than the beauty of these waters without a shoal or a rock or any danger whatever for the whole length of this internal navigation, the finest in the world.” After further praising the beauty of the waterway, he placed his exclamation point on the topic by saying, “I venture nothing in saying that there is no country in the world that possesses waters equal to these.” However, he wasn’t the only one to comment on the beauty of the sound. Early explorer Archibald Menzies described it “as if it had been laid out from the premeditated plan of a judicious designer” (Kruckeberg 410). In his perspective however, this “judicious designer” had a plan entirely different from what the aboriginal people were working with. He continued:

We cannot quit Admiralty Inlet without observing that its beautiful Canals & wandering navigable branches traverse through a low flat country . . . thus diffusing utility & ornament to a rich Country by affording a commodious and ready communication through every part of it, to the termination of the most distant branches. Its short distance from the Ocean . . . & easy access by the streights [sic] of Juan de Fuca is likewise much in its favour, should its fertile banks be hereafter settled by any civilized nation. Its shores are for the most part sandy intermixed with pebbles & a variety of small silicious stones abounding with Iron Ore in

various forms, for we hardly met with a Rock or Stone that was not evidently less or more impregnated with this useful Metal which the benevolent hand of Nature has so liberally dispersed throughout almost every part of the world but perhaps no where so apparently abundant as along the shores of this great Inlet(Kruckeberg 410)

The Puget Sound was truly a unique waterway prime for being taken advantage of by westerners with a desire to capitalize the land. In an 1852 letter from an Olympia resident to a friend in Washington D.C., the Puget Sound country was foretold to be “one of the most important and interesting agricultural and commercial points in all the land shadowed by the Stars and Stripes.” The quantity and availability of resources around the Sound influenced many to colonize and inhabit the shoreline. The richness of these natural resources and the need to consume and trade them set the tone for Washington’s current policy on tideland access and development.

The Washington territory of the 1800’s was experiencing a growth of commerce from the sale of timber, salmon and shellfish and continued to flourish throughout the century. Settlers were flocking to its cities and towns and there was a spirit of competition with one another to gain an upper hand with respect to imports and exports. A workable connection between the port cities and the railroads was essential in order to get an edge by creating an efficient transfer of resources. One author explains, “In the early 1870s the Puget Sound cities, none of which were large, all aspired to become the terminus of the transcontinental Northern Pacific Railroad. The settlers of each town realized that location of the railroad would bring construction and shipping, with their attendant payrolls and increases in real estate values” (Wiggins 16). To encourage the railroads to use a particular city as a shipping terminal, piers and wharfs would be constructed over the tidelands into deep water. This was an obvious result according to

Robert Nesbit, author of *He Built Seattle* (309). Washington territorial law justified this in section one of the April 1854 act called “An Act to Authorize and Regulate the Erection of Wharves.” It states:

Any person owning land adjoining any navigable waters or water course, within or bordering upon this territory, may erect upon his own land any wharf or wharves, and may extend them so far in said waters or water courses as the convenience of shipping may require; and he may charge for wharfage such rates as shall be reasonable: Provided, that he shall at all times leave sufficient room in the channel for the ordinary purposes of navigation (Laws of Washington 1854).

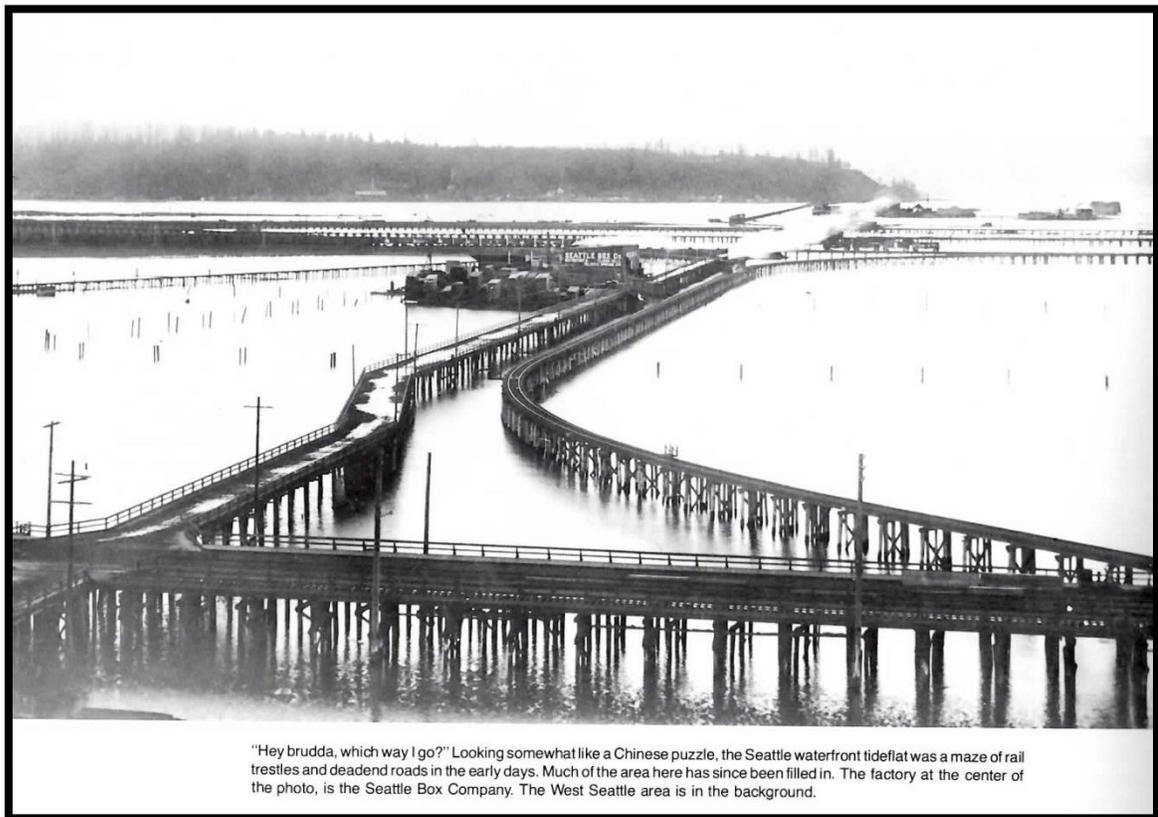


Figure 2 (Gibbs, Williamson, 142)

The pursuit of the Puget Sound’s resources brought a diversity of individuals in a relatively short amount of time and conflict was not unexpected in this situation. Another issue which attracted considerable conflict at the time was land claims. It was common

knowledge in the territorial days that the tidal lands occupied by the squatters and the railroads were owned by the federal government and that title would be transferred to state ownership upon statehood. Tideland occupation and development continued because many hoped that mere possession of the land would convince the government to grant title. However, despite the uncertainty, new land claims increased as the bid for statehood drew nearer.

Speculators of waterfront property experienced difficulties in the land rush during the years leading up to statehood. One resident who had purchased property in South Seattle explained, “Here in Seattle the craze for salt water has broken out again with greater violence than ever before. A swarm of salt water lunatics of high and low degree, have alighted, like so many cawing crows on the mud flats in the Southern part of town, and have made the place a veritable sight with piles stuck all over it.” He further laments:

I have more than a passing interest in this subject for some years ago I bought a lot of property in South Seattle, chiefly for its large shore frontage, and I paid my gold coin for it. Now this salt water crew, without so much as saying by your leave, plant themselves on my property, and tell me that inasmuch as it is below the line of ordinary high tide, they have as good a right as I have, and even better, because of presuming to buy it and pay for it, I was flying in the face of the law (Nesbit 310).

This kind of claim jumper activity began occurring in other parts of the Sound as well. Clubs hoping to stake claims on the tidelands descended on the mud flats of Bellingham Bay and many other locations in Seattle. There are reports that some of these jumping gangs would prefabricate houses and float them into a desired location. Nesbit recounts a different time when, “Another gang floated onto a desirable site at two in the morning on rafts loaded with lumber and a crew of carpenters to contest ownership.

Open war was imminent” (Nesbit 311). It was not unusual for armed guards to be posted and for physical fights to occur on the tidelands. For this reason, it is not surprising that this subject played a central role in the constitutional convention.

Conflicting interest at the Constitutional Convention

All navigable waterways in the Washington Territory were transferred to state ownership from the federal government under the Equal Footing Doctrine in 1890. The doctrine is defined in Pollard’s Lessee v. Hagan et al. that “first, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states” (Pollard 230). The transfer of ownership from the federal government to state control was a hotly debated topic as statehood was approaching.

According to Kenan Conte, there were three major parties in this debate. These consisted of the owners of improvements placed on the tidelands, riparian land owners and a group that was opposed to the sale altogether (Conte 11). The owners of the improvements were predominantly represented by railroad companies, land developers and speculators. Intentions were focused on keeping the property they had occupied and developed after statehood. The riparian landowners who had possession of the uplands had different interests in mind. While they did argue for the right to keep their property after statehood similar to those of the first group, they also wanted private access to the tidelands to aid commerce. The shoreline developers often cut off access to navigable waters to the riparian landowners. The third group represented in the debate was

predominately from eastern Washington and “wanted constitutional provisions which would not only assert Washington State’s ownership of tidelands, but would also prohibit any sale of such lands” (Conte 13). This perspective is theorized to have spawned from a distrust of the corporations and monopolies that were taking over the shores. While the topic of tideland ownership was debated as the most important matter of the constitutional convention, the final wording was not agreed upon until the last day.

Article XVII was written as follows:

DECLARATION OF STATE OWNERSHIP. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

The new Washington State had significant resources that it could use to generate funds to support the new government. With land that was rich in timber, fresh water, game and marine life, it was in the best interest to utilize these resources for its own development. The Puget Sound, with its deep channels and relatively calm waters leading to hundreds of bays was an ideal waterway for the transportation of its resources.

Although, the government was not large enough at the time to utilize its resources to the fullest extent, it was able to enlist the help of its residents. Capital from the railroad companies and other corporate entities was needed to develop the transportation systems needed to import and export goods. One of the arguments before statehood was whether Washington should be declared a riparian or non-riparian state. This made a big difference in how land rights were distributed. Courts have cited Article XVII to express declare Washington as a non-riparian state meaning that abutting landowners have no

rights to “build or wharf-out onto the tidelands or shorelands surrounding navigable waters” (Conte 17). The courts upheld this point in *Port of Seattle v. Oregon and Wash. Ry. Co.*. The non-riparian status was significant because it promoted the inherent commercial value of the shorelines and paved the way for tideland sales and subsequent development.

Corporate Interests after Statehood

Shortly after statehood was declared and during the first session of the Washington State Legislature in 1890, a bill called “Tide and Shore Lands; Appraisement And Disposal Of” was passed to organize the sale of state owned tidelands. The sale was to be overlooked by 1)The Board of Appraisers 2)The Commissioner of Public Lands and 3)The Board of Equalization. Tidelands were divided into first class, second class and third class tidelands with different stipulations on how each type would be sold. Those of the first class were located within two miles of city limits. The second class tidelands were located more than 2 miles outside of city limits but had “valuable” improvements and the third class consisted of all others. The original document mentions that “Tidelands of the first class shall be surveyed and appraised as rapidly as practicable, and the state board of equalization shall order such lands surveyed...” Any “person, association or corporation” that was allowed to purchase real estate during that period could file an application and purchase state-owned tidal lands in Washington (Session Laws 432).

This act paved the way for Washington State to generate much needed revenue for state owned navigation facilities and it also paved the way for industry and economic

growth. 75% of the proceeds derived from the state from the sale of tidelands were appropriated for “the construction and maintenance of a system of permanent and substantial improvements in aid of commerce and navigation in and for the harbor of such city or town wherein such tide lands may be sold.” The other 25% was allocated to the general tide land fund of the state (Laws, Rules 31).

While the waterways were preserved in the public trust, only first class tidelands received a mention of public access albeit limited. Section 1 of the 1890 act “Public Ways Across Tide Flats Near Towns” states, “There shall be established one or more public ways across all of the tide flats that are situated within or in front of any incorporated city or town, or within two miles either way from any incorporated city or town within the State of Washington” (Laws, Rules 24). These public ways were required by law to be at least 50 feet across but were limited to a total width of 1000 feet. The main purpose of these public ways was to allow water-craft passage so that the public could access the Puget Sound for navigation as if it were more of a public highway than a place for beach enjoyment and recreation. No part of this section denotes any right to the surrounding tidelands. The boundaries of the passage ways were to be well marked by posts and registered with the Commissioner of Public Lands in order to prevent becoming mismanaged and lost to private enterprise.

The new State of Washington catered to developing corporations. Another example of this is with the log booming companies. The state legislature referenced these log boom companies directly in the first session, “All meandered rivers, meandered sloughs, and navigable waters in this state shall be deemed as public highways, and said corporations shall be declared public corporations for the purpose of this act; and the

improvement of such streams, sloughs, and waters shall be deemed and declared a public use and benefit” (Session Laws 473). These companies were allowed to straighten or “improve” the waterways or build dams on them as long as the navigability of the water was not interfered with. This designation by the legislature that these corporations were in the public’s interest is important because it shows what the lawmakers felt was the most important priority in Washington State at the time. The priority was commerce and generating funds for the growth of the state. The companies that improved waterways and made them navigable for shipping logs were given authorization to charge a toll to other logging companies for the use of the waterway, thus incentivizing corporations to develop streams and rivers for the purposes of navigation. (East Hoquiam Boom & Logging 142). This example shows the importance that courts and lawmakers in



Figure 3 Oyster Farming in the 1890's. Courtesy of Taylor Shellfish Farms; www.taylorshellfishfarms.com

Washington gave to the development of the state.

One characteristic that protected tidelands from being sold away from the state trust was if they were covered in natural oyster beds. Nevertheless, this stipulation only

applied to lands that were located beyond two miles of any incorporated city or town. The cities and towns being the most important locations for harbor areas and commerce. Abuse of this law was rampant due to the large distance from formal law enforcement. Oyster harvesting was acknowledged to play an important role in Washington's economy. For those lands that didn't already contain natural oysters, the state allowed the lease of tidelands for oyster harvesting but it wasn't long before disputes between oyster farmers and other interests arose.

The Supreme Court case *Sequim Bay Canning Co. v. Bugge* confirmed that the shellfish on these leased lands constitutes real property. In the case, the plaintiff company Sequim Bay Cannery, accused an owner of nearby shellfish cannery of trespassing on the property that was leased to him by the state. Bugge and his partner, the defendants in the case, were allegedly hiring Indians to go on Sequim Bay's tidelands and poach shellfish. Sequim Bay Cannery put up no trespassing signs and personally notified Bugge to stop taking clams from his property but Bugge threatened to shoot him and continued to instruct the hired Indians to keep digging on the land. The Supreme Court ruled in favor of the Sequim Bay Cannery and said, "The complaint in this cause says the appellant is the holder of the lands by virtue of a regular lease from the state. It follows that it is entitled to the possession and control of the lands leased, and respondents are trespassing when they go upon them and remove clams without appellant's consent" (Sequim Bay 133). This verdict in this case gives insight into just one of the commercial interests that influenced Washington States tideland policy.

Reexamining Tideland Conflicts

Due to the excitement that the industrial revolution and capitalist principles brought to the region, Washington State continued to sell large amounts of tidelands without much opposition until the 1950's. Attitudes changed quite a bit after that and between the years of 1959 and 1971 a few major occurrences brought about the most significant legislation regarding tideland management since statehood.

The first is the leadership that brought the bill to fruition in the Legislature. The Legislation that ended the sale of tidelands in Washington State is often referred to as the Gissberg Amendment in House Bill 40. It reads, "Notwithstanding any other provision of law, from and after the effective date of this 1971 amendatory act, all tidelands and shoreland . . . owned by the state of Washington shall not be sold except to public entities as may be authorized by law, and shall not be given away" (HB 40). The amendment is named after Senator William Gissberg, a self-proclaimed environmentalist, who made it a personal goal to completely halt all tideland sales. In his oral history, Gissberg recounts his reasons for advocating environmental legislation:

I loved to go fishing in the mountain lakes at a time when there were hardly any trails leading to the lakes. I started doing that when I was a youngster. I loved fishing and I loved the rivers. There's no more beautiful thing in the world than a river. I saw what the Weyerhaeuser pulp mills were doing to the waterways in Snohomish County. They were destroying them. I did everything that I could to cure that kind of problem by strengthening the water-pollution penalties, and giving more authority by creating the Department of Ecology (Boswell 53).

He explained his desire to ban tideland sales started when the farm next to his favorite fishing hole was sold to a new owner who posted "No Trespassing" signs on the river bank. As an attorney he wrote a letter to the new owner informing them that posting the signs was illegal. The new owners simply wrote back to express intentions to buy the

shore land in order to legalize the signage. Later in life after becoming a well-respected senator he garnered a few key supporters for his cause and piggy-backed his amendment onto the already popular HB 40 three days before the final vote where it passed through the House and Senate. Gissberg recalled during his retirement that the passage of this legislation was his most memorable success in his tenure as a Senator, “I was proud of the amendment I put on the Senate floor, without giving anybody any notice that it was coming, prohibiting the sale of shorelines and tidelands by the Department of Natural Resources, which was rapidly divesting the public of the ability to utilize those areas. It happened that I was able to do that just with no notice to anybody, and I think it’s going to last for generations to come” (Boswell 80).

The effect of this legislation has been far-reaching. It instantly brought a halt to the sale of tidelands on the Puget Sound and showed Washington’s changing perspective to undeveloped resources, reflecting a more conservative policy in regards to natural resource management. Such changes in resource management philosophy were representative of a growing concern for environmental issues.

Around the time of this legislation, the commentary regarding public access on privately owned shorelines started to appear more and more to the point where the Washington Attorney General issued a statement on the matter. The Attorney General Slade Gorton responded solely that the “public, vis-a-vis the private upland owner, has the right to the free and unhindered use and enjoyment of the wet and dry sands area of the Pacific Ocean beaches, by virtue of a long established customary use of those areas” (AGO 1970 No. 27, 19). His statement may have eased the concerns of many residents

but he did not address the issue of public access on Puget Sound's tidelands to the degree that the question was purposely avoided.

The same attorney general, in response to repeated questions on the matter of public access rights on Puget Sound beaches, issued a second opinion six years later. Although no previous Attorney General had made a statement in this regard, Slade expressed that "there has never been any doubt in our minds as to what the answer would have to be if such an opinion were formally to be requested." He stated it is the opinion of this office that (contrary to the situation which exists on our ocean beaches) members of the public in this state do not ' . . . have the right to use and enjoy the wet and dry sand areas of Puget Sound beaches by virtue of customary use'" (AGLO 1976 No. 41).

Defining Boundaries with the Public Trust Doctrine

1987, Washington state courts explicitly invoked the public trust doctrine for the first time in state history in *Caminiti v. Boyle*. The Supreme Court stated that "although not always clearly labeled or articulated as such," the public trust doctrine has always existed in Washington State (*Caminiti* 670). This case has been regarded as the "modern touchstone for subsequent Public Trust Doctrine litigation in Washington State" (*Panesko* 33). The petitioners, who consisted of public shoreline activist Benella Caminiti and the Committee for Public Shorelines Rights, requested that the Supreme Court of Washington declare state law RCW 79.90.105 (recodified as RCW 79.105.430), enacted 4 years prior, to be unconstitutional. The code states that "The abutting residential owner to state-owned shorelands, tidelands, or related beds of navigable waters other than

harbor areas, may install and maintain without charge a dock on such areas if used exclusively for private recreational uses” (RCW 79.105.430).

Previously the state had rented the right to approximately 370 residential owners to construct docks to landowners abutting state-owned aquatic lands and was receiving \$35,000 a year from the program. The 1987 law was enacted because the administrative costs of the leasing program were a “substantial portion” of the revenues and it didn’t make sense monetarily (Caminiti 664). Caminiti et al. was concerned about the possible damages that could occur in the future to public recreational interests if more docks were being constructed on the Puget Sound. The future effect that RCW 79.90.105 would have on new dock construction was unclear at the time but Caminiti considered that the elimination of lease fees would encourage more shoreline landowners to build docks off shoreline property which would impact interests such as fishing, swimming, navigation, procuring shellfish and observing wildlife.

Two major questions were answered in the Caminiti case: 1) Did the State give up its right of control over the *jus publicum* by discontinuing to charge private dock owners an annual rental fee? And 2) If the first is answered affirmatively, did this promote the interests of the public in the *jus publicum* or did it substantially impair it (670)? The court decided that by enacting RCW 79.90.105, the legislature didn’t give up control over the *jus publicum* and did not convey title to any state-owned tidelands or shorelands and affirmed that the Shoreline Management Act of 1971 (SMA) fully met the requirements of the public trust doctrine. Because the construction of private docks is regulated by the SMA, it fulfills the requirements of the public trust doctrine and does not interfere with the *jus publicum*.

Additionally, the court stated that when properly regulated, “it is practical recognition that one of the many beneficial uses of public tidelands and shorelands abutting private homes is the placement of private docks on such lands so homeowners and their guests may obtain recreational access to navigable waters” (674). The court delineates the classic theory of public trust doctrine’s historical origins very similar to what is stated by Joseph Sax roughly 15 years earlier by asserting that “the public has an overriding interest in navigable waterways and lands under them”, a principle “at least as old as the Code of Justinian, promulgated in Rome in the fifth century A.D” (668).

Sax had advocated the concept in his influential paper *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, by affirming that the sources of the public trust doctrine “received much attention in Roman and English law” (475). While delineating the classic public trust doctrine ideals in this case, it also gives insight to the modern form of the doctrine in two ways. First, private docks were not allowed to block access to public tidelands and shorelands. Second, the courts acknowledged that recreational uses of navigable waterways are naturally included in the limits of the doctrine. This is a principle that had received little attention throughout the early history of coastal law in the United States. The public trust doctrine was often invoked to allow more general public use of coastal resources but the doctrine was stretched to allow abutting landowners to increase their opportunities for recreational use as long as it does not deny others the right of navigation.

Notwithstanding the modern application of the public trust doctrine in *Caminiti v. Boyle*, limits to coastal access are expressly defined. No express permission is noted that would give the public any access on private lands. This concept is naturally rooted

in the prior commentary regarding the sale of state-owned tidelands after statehood. The judicial opinion states that, “Private docks cannot, of course, block public access to public tidelands and shorelands, and the public must be able to get around, under or over them” (Caminiti 674). The language used by the court in this statement does not allocate any rights to the public that did not exist previously. The most significant finding in *Caminiti v. Boyle* is that the public trust doctrine is recognized by the state as a foundational theory for the management of the coastlines.

Recent Avoidance of Conflict

The case for beach-walking has been brought in the Washington high courts at least three times in the last two decades but has been ignored or brushed aside each time. An unpublished case in 2005, *City of Bainbridge Island v. Brennan*, dealt with the issue briefly before disregarding it. During the turn of the twentieth century, a public wharf was built on a private tideland at the end of a county road in Fletcher Bay, Bainbridge Island. A ferry ran from the wharf to the mainland up until the year 1947 before it was discontinued. Over time, the road leading up to the wharf was used less and less and the surrounding land was subdivided and developed and the abutting homeowners attempted to curtail the public passage at the end of the road by fencing and padlocking the area. *City of Bainbridge Island* sued the homeowners in 1999 to quiet title to the road end and tidelands. The case was directed to the Court of Appeals who ruled that the road was still public and that the property owners didn’t have the right to fence off the access area. The court subsequently ordered the neighbors to remove most of their encroachments from the county road all the way to the low tide mark on the sound.

One of the waterfront property owners near the disputed site, whose steep property made beach accessibility difficult, made a case that the public had the “right to pedestrian travel for recreational purposes corollary to navigation and fishing across the tidelands of certain defendants based on our state’s public trust doctrine” (Bainbridge 17). It was the neighboring property owner’s intention to continue using the public road as an access point to their neighbor’s tidelands regardless of ownership status. The court dismissed the claim without offering a clear explanation and ordered the landowners next to the road end to put up no trespassing signs in order to affirm the line of private and public land. The case for recreational passage over public tidelands was quickly denied but the court opinion was not published, thus preventing it from being cited in future cases or used as precedent in the State of Washington. Little attention was given to the beach-walking issue because according to precedent stated in *City of Sunnyside v. Lopez*, the issue was already resolved. The court concluded, “The right to exclude others is an essential stick in the bundle of property rights” (Bainbridge 16).

Although nothing monumental came out of the Bainbridge Island case, it is worthy of note because it represents Washington’s conservative policy towards public access toward private shorelines. Wording in the court opinion suggests that the judges are of the opinion that the beachwalking issue is already resolved and has been for quite some time. Not publishing the case and refusing to set clear precedent on this issue shows that possibly the court feels that future changes might influence a different policy down the road. The following case study on the shorelines of Michigan’s Great Lakes shows how shifts in natural forces can influence dramatic revisions in policy.

The Great Lakes of Michigan

As the earth started to warm again after the last ice age, large glaciers receded into the northern latitudes and left behind large amounts of freshwater which over thousands of years was formed into what we call the Great Lakes. Four out of five of these lakes border the State of Michigan in the upper Midwestern portion of the United States. These lakes consist of Lake Superior which is the most northern and western of them all. It lies on the northern facing beaches of Michigan's Upper Peninsula and creates an effective boundary between the United States and Canada. Lake Michigan touches the west coast of the southern portion of Michigan and the southern coast of the Upper Peninsula. Lake Huron, which lies on the east coast, is hydrologically unified to Lake Michigan by the Strait of Mackinac. Lastly, Lake Erie borders Michigan on its most south eastern corner but represents only a small portion of its total shoreline. Even so, the construction of the Erie Canal in the 1800s provided Michigan with a trade route with the eastern states which allowed growth in the region.



Figure 4 Satellite Projection of the Great Lakes Surrounding Michigan

The public trust doctrine is interpreted differently between every state and in the case of Michigan, it has been interpreted many ways since joining the United States in 1837. Activists have been quite vocal in their opinions on the boundaries of public and private land since the 1920's and the debate has only increased in recent years. This section is divided up into four portions that discuss the boundary disputes over the shoreline of the Great Lakes. First, the settlement patterns and characteristics of Michigan are discussed. This section looks deeper into the prominent resources of early Michigan and how they affected population movements around the state. The second section discusses the famous Kavanaugh cases and includes the follow up case Hilt v Weber. The third section jumps forward to the famous case Glass v. Goeckel in 2004 which once again reevaluated the boundary line of public and private land using the public trust doctrine. The final section discusses the counter response of private land owners to the Glass v Goeckel decision through legislative channels.

Geographical Characteristics and Pre-statehood Industry

Washington State wasn't the first area in the United States to be labeled as the Great Northwest. In 1837 the state of Michigan joined the Union as the most northwestern state in the USA. Beyond its boundaries was the Wisconsin territory which includes modern day Wisconsin and Minnesota. For many years, Michigan was the official frontier of the United States of America and settlers were not unlike those that settled in Washington State. The people were attracted to the resources that the Great Lakes provided including those that provided sufficient means to aid survival on the frontier such as fish, game, fertile land and timber. One early visitor in 1688 commented

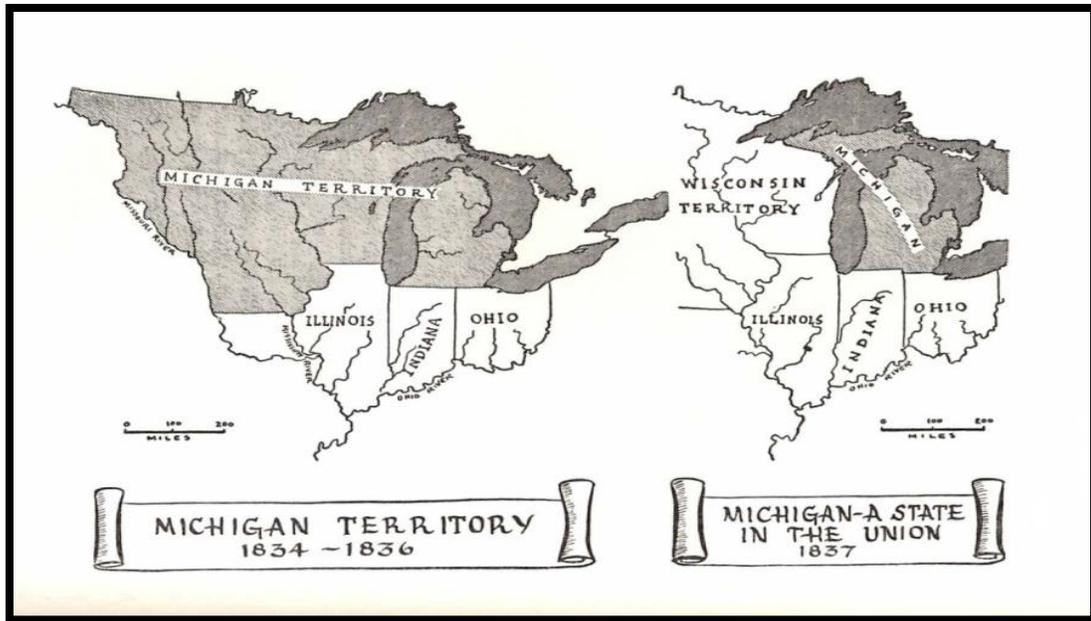


Figure 5 (Bald 186)

that it is difficult to imagine a more delightful prospect, than is presented by this straight...” (Dempsey 149). Through his perspective, the fruitful landscape was understood in the context of economic utility rather than appreciated for its wild beauty. It didn’t take many years before the corporate interests started to take advantage of the area surrounding the Great Lakes. Commercial fishing entered the state in 1833 and by 1840 the total catch reached an astounding 7 million pounds. Twenty years later in the beginning of the civil war the catch reached over 17 million pounds per year (Dempsey 150).

Rather than settle the coastline however, the majority of new residents moved inland and northward in order to take advantage of the fertile soils (Bald 284). “The choicest spots in Michigan and those which were quickly purchased were the prairies. Scattered especially through the southwestern part of Michigan, these treeless areas were attractive because of natural beauty, fertility, and comparative ease of cultivation. They

were covered with prairie grasses which grew “four or five feet high which was excellent pasturage for horses and cattle” (Bald 155). Much of the shorelines in the Southern region of Michigan were covered by dunes and not conducive to farmland. The migration inland was demonstrative of a Lockean notion that property was only truly owned by ones own labors on it. Newcomers to Michigan knew that “the wealth of the state was largely in the farms and their products” (Bald 250).

Logging was the other profitable sector that settlers were moving inland to take advantage of. One resident of Saginaw County in 1854 estimated that 61 water powered sawmills were producing 108 million feet of lumber annually. By 1872, that number had increased substantially with over 1,500 sawmills which employed over 20,000 workers. The estimated annual combined output was just over 2.8 billion feet of lumber. At this time Michigan’s Upper Peninsula had not even been exploited yet, but logging companies were acutely aware of the wealth that was available in the area. The Great Lakes played a fundamental part of this logging boom and one account writes that the waters “...have been and are of inestimable value to many interests, but to none more than those of the lumberman. They have borne myriads of logs from the forests along their banks to the booms of mills located at convenient shipping points, and this economical transportation has added millions to the profits of the business and greatly aided its remarkable development” (History of the Upper Peninsula 155).

Michigan’s logging industry hit its peak during the late nineteenth century and hit a speedy decline as the supply of lumber became exhausted. This brought greater attention to the tourist industry which had been growing steadily for over a hundred years. The wealthy businessman that had been coming to Michigan during the summers



Figure 6 US 2 along Lake Michigan's Shore (Titus 120)

to inspect mining, and logging operations were bringing their families to the shores for the summers. When the logging operations began to dwindle, people began to see the Great Lakes as the

“single greatest recreational asset”

(Sommers 137). Residents looking for economic opportunity migrated to the shoreline to accommodate an increasing number of tourists spending their summers on the sandy beaches. The industry gained real legitimacy in 1917 when The West Michigan Tourist and Resort Association formed and also in 1929 when the legislature appropriated \$100,000 to advertise the state abroad. By the year 1936, income from tourists was estimated to exceed \$300,000,000 (Titus 88).

Conflicting decisions in Michigan's Supreme Court

By the 1920's, much of the shoreline forest had been logged and which paved the way for increased development. The water level in the lakes was also receding and exposing new land available for construction (see Figure 7).

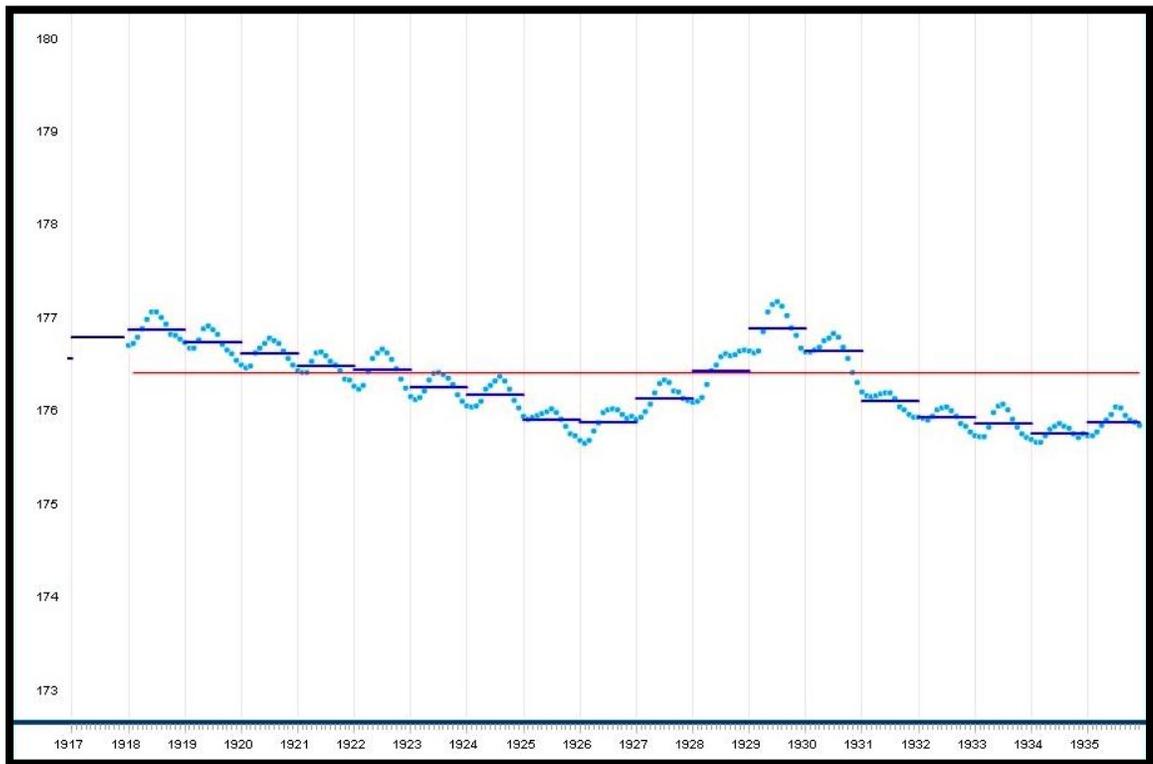


Figure 7 Surface water elevation in Lake Huron by year measured in meters; courtesy of NOAA

Residents began building houses, vacation homes and beach cottages on this newly cleared land all over Michigan's lakes. What happened next became a turning point in shoreline property rights during a series of Supreme Court cases commonly known as the Kavanaugh cases. *Kavanaugh v. Rabior* (1923) and *Kavanaugh v. Baird* (1928) were part of a decade long battle which concerned a dispute regarding the meander line. "A meander line is a traverse line run along the margin of a stream or a lake used to incorporate lakes and streams into the grid. All navigable waters and many non-navigable were meandered but meander lines were not intended to be used as coastal

boundaries. “They were approximations that helped federal officials compute how much land was available for sale (Steinberg 72). According to the U.S. Supreme Court in 1891, meander lines were used to ascertain “the exact quantity of the upland to be charged for, and not for the purpose of limiting the title...” (Hardin 380). Often times these meander lines corresponded to a certain degree with the natural water lines of the Michigan lakes but there were many differences in other areas.

Such was the case in a parcel of ocean front property in Saginaw Bay owned by William Kavanaugh. A considerable distance existed between the meander line and the actual shoreline, which for a variety of reasons was getting larger every year. Expanding beach front property might seem like a benefit to some but it turned out to be burden on Kavanaugh. John Rabior discovered that this recently created land had not been properly surveyed which made it invisible to the state tax code. As a fisherman he saw an unused opportunity for free beachfront property so he “just squatted on the land” (Records and Briefs 1923). Kavanaugh wasn’t pleased with a new home on his beachfront and filed suit to have him removed. His case won in the circuit court but was appealed all the way to the Michigan Supreme Court who overturned his case. He filed again a second time to recover the property by settling the title and won in the circuit courts but the case was appealed and later denied in the Supreme Court. The Kavanaugh court interpreted the land below the meander line to be state owned land, subject to the public trust doctrine.

This decision converted hundreds of miles of lake shore from private to state ownership and opened up a plethora of new issues. Landlords were suddenly unauthorized to collect rent on land which had been transferred to public hands and

renters immediately stopped paying rent. This prompted shorefront land owners to organize as the Shore Owners Equity Association and state their strict opposition:

This is a move on the part of ambitious politicians acting for the state of Michigan, to confiscate farmers' and resorters' property without paying a cent for it. . . . It is a blow at the development of Bay City and the surrounding territory, as substantial summer homes will not be built on land which is open to trespass by everybody, irrespective as to race, color or character (Steinberg 78)

Unwilling to lose this battle, Kavanaugh took his case to the court a third time.

He filed suit in 1923 against John Baird who was the representative of the Department of Conservation with the intent to invalidate the Kavanaugh based on a portion of the opinion where the judges distinguished between accretion or reliction based growth of the beachfront property. Part of the earlier decisions in the previous cases mentioned that only relict land was brought into state ownership so he brought forth evidence to suggest that his waterfront property below the meander line had accreted over time. His evidence was convincing but the Judge Houghton did not find interest in it and concluded that there was no need for property owners to be digging through layers of sand in order to prove whether their property increased by accretion instead of reliction. Houghton was primarily concerned with setting the property line at the meander line and closing out the issue (Steinberg 80). Kavanaugh lost for the third and last time but the people weren't willing to let the issue pass. It was only a few years before the issue returned again to the Supreme Court. Three years later Senator Orville Atwood brought forth a bill to change the boundary back to the shoreline. The bill went all the way to the governor but was vetoed.

The meander line as a property line was new and confusing to many people and legal and social disputes continued to grow. The most famous dispute between John Hilt

and Herman Weber escalated all the way to the Supreme Court. The case involved a plot of land on the shore of Lake Michigan in which the meander line was 277 feet from the water's edge and raised up 44 feet above the 1929 level of the lake. Weber purchased the property from Hilt's agent with the knowledge that a wooden stake 100 feet from the shore marked the boundary. When Weber later found that the meander line was actually the border of his newly purchased property he stopped paying his payments. Hilt sued to foreclose on the land contract and Weber countersued for fraud dealing with the sale of the land. Weber argued that the western boundary of his property was sold to him with misrepresented disclosures. The court had filled three new positions since the first Kavanaugh hearing and examined deeply the wisdom and legality of using the meander line as a boundary. The opinion of the court declared:

On its admission to the Union, the state, as a sovereign, took title only to such land on the Great Lakes as was then submerged and was, in fact, lake bed. Except as to parcels covered by special grant, of no application here, the state never has acquired title to land which was then upland and has continuously remained dry even though, by reason of a mistake of a surveyor, there was such land between the meander line and the shore when the survey was made (Hilt 163).

The majority of the court discredited the Kavanaugh decisions and entirely reversed the notion that the meander line represented a boundary between private and state land. Six judges out of the eight declared that the previous shoreline boundaries were based on false precedent from the case *Ainsworth v. Hunting & Fishing Club* (1909) which states, "It is the established law of this state that riparian owners along the Great Lakes own only to the meander line, and that outside this meander line, subject to the rights of navigation, is held in trust by the state for the use of its citizens. Among these is the common right to fish and hunt" (Ainsworth 64). At that time of this case and

in the area of controversy, the meander line and the water's edge were one and the same. It was expressed by the Hilt v. Weber court that State v. Fishing never touched on the issue of boundaries and that the opinion is solely Mr. Justice Hooker's. By reversing this decision the courts reopened hundreds of miles of shoreline for private ownership and the realty community was relieved.

The Hilt v. Weber decision was legally upheld as the basis for shoreline management decisions throughout the rest of the 20th century. The Attorney General of Michigan reiterated his interpretation of the Hilt v. Weber in a 1978 stating:

1. A riparian at all times owns the upland to the ordinary high water mark, and may exercise control thereto, by virtue of rights stemming from the Federal patent.
2. The ordinary high water mark is set for all the Great Lakes . . . and when the water recedes below the ordinary high water mark, the riparian owner has control over the exposed area, but may not place any permanent structures, or do any dredging or filling on this land without a permit from the Department of Natural Resources.
3. The public may not use the beach whether it extends to the ordinary high water mark or to the low water mark. The public, however, has the right of passage in any area adjacent to riparian land covered by water (AGO 1978 No. 5327).

Using the Public Trust Doctrine to Change Shoreline Boundaries

The issue of shoreline property rights remained relatively quiet for the remainder of the 20th century until another drop in water levels coincided with a minor dispute over a property easement (see figure 5). It started as a property dispute but evolved into a

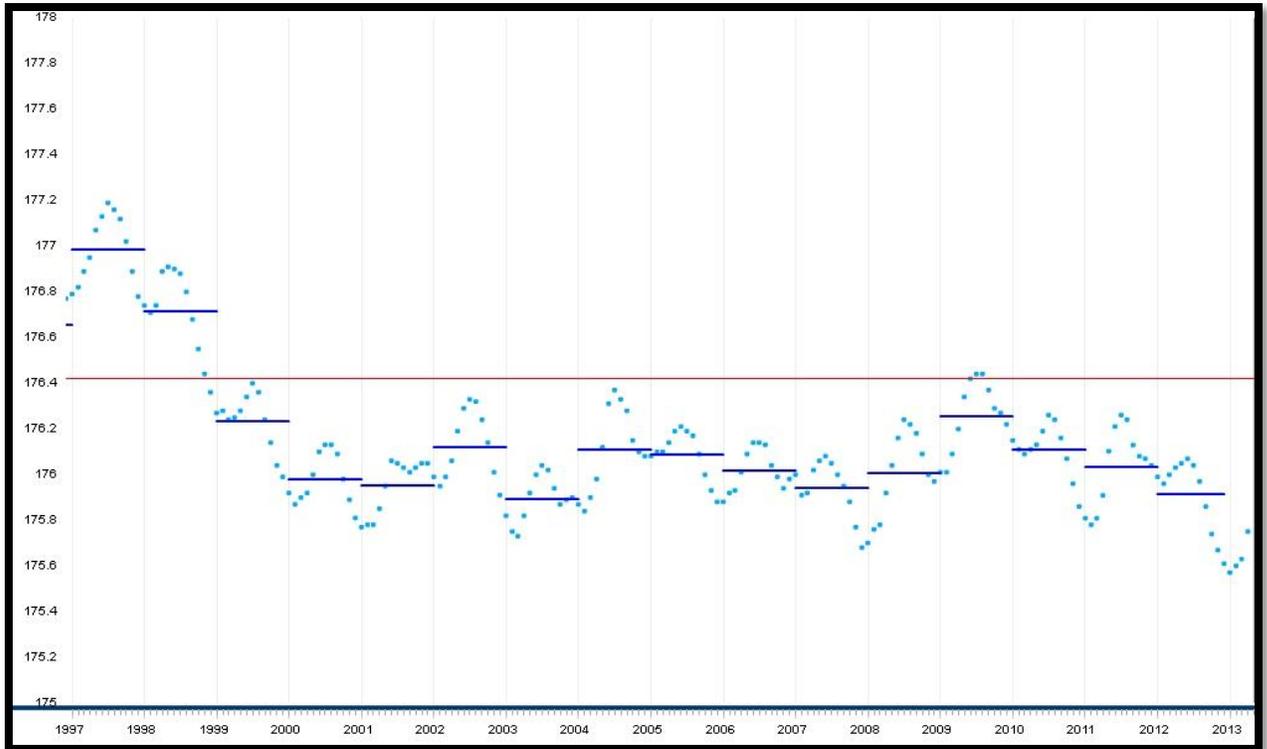


Figure 8 Surface water elevation in Lake Huron by year measured in meters; courtesy of NOAA

discussion regarding the public's rights on the shoreline. Joan Glass was entitled by deed to an easement across Richard and Kathleen Goeckel's property in order to access Lake Huron. The Goeckels disputed the easement so Glass sued to enforce the terms. This matter was resolved one year after the case was brought forward, but the one issue that remained unsettled was whether or not Glass was able to walk on the Goeckel's beach property without issue. The Supreme Court specifically laid out plans for the case:

The issue presented in this case is whether the public has a right to walk along the shores of the Great Lakes where a private landowner ostensibly holds title to the water's edge. To resolve this issue we must consider two component questions: (1) how the public trust doctrine affects private littoral title; and (2) whether the public trust encompasses walking among the public rights protected by the public trust doctrine (Glass 62).

Unlike the state of Washington, the Michigan Supreme Court addressed the issue of walking on the beach without ambiguity. The court was very clear about the objective of the case and what questions need to be asked in order to arrive at an answer. Leading up to the supreme court decision however, the case had been settled in different ways. The initial trial court has granted summary disposition to Glass on the basis stated in the Great Lake Submerged Lands Act that she had the right to “use the shore of Lake Huron lying below and lakewards of the natural ordinary high water mark for pedestrian travel” (Glass-Appeals 2). The issue was raised in 2004 in the Michigan Court of Appeals who reversed the trial court's decision and found the Submerged Lands Act inapplicable in the decision. It was decided in a published opinion that “the state of Michigan holds in trust the submerged lands beneath the Great Lakes within its border for the free and uninterrupted navigation of the public. . . .” (Glass-Appeals 8). This set the precedent for property owners to prohibit the public from walking on their privately owned beaches. When the case was appealed to the Supreme Court, the Goeckel team argued to the Supreme Court that “as a matter of law, plaintiff could not walk on defendants' property between the ordinary high water mark and the lake without defendants' permission” (Glass 6).

In *Glass v. Goeckel*, the Supreme Court analyzed the limits of the public trust doctrine in the State of Michigan rather than title on shorelines which had already been established in *Hilt v. Weber* (Glass 25). It was established again that the law of the sea

applies to the Great Lakes as well, even though they aren't subject to the same tidal influences. Thus different verbiage was established to identify the boundaries of the public trust land. The court embraced "ordinary high water mark as the line which would determine the boundary of public trust application. The definition of the high water mark was defined by their "sister state" Wisconsin as:

the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. And where the bank or shore at any particular place is of such a character that is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark (Glass 27).

The court asserted that "although the state retains the authority to convey lakefront property to private parties, it necessarily conveys such property subject to the public trust" (Glass 11) "Because walking along the lakeshore is inherent in the exercise of traditionally protected public rights of fishing, hunting, and navigation, our public trust doctrine permits pedestrian use of our Great Lakes, up to and including the land below the ordinary high water mark" (Glass 5). The court even goes as far to deem the state a "trustee" with the obligation to "preserve specific rights below the ordinary high water mark and permit only those private uses that do not interfere with these traditional notions of the public trust" (Glass 31). Judges went as far back as The Northwest Ordinance of 1787, one of the oldest documents from the region, to explain their decision, "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free. . . "(Northwest Ordinance). The courtroom drastically changed once again the status of

littoral property ownership on Michigan shorelines. What was once deemed to be private property became property which required the owner to allow public passing and repassing.

Strong opposition formed to fight back against the court's decision. The opposition put their money skills behind Save our Shoreline, a non-profit organization founded in 2001 that advocates strict littoral proprietary rights and continues to argue that the decision is an unconstitutional taking and inconsistent with prior Michigan law. An amicus brief written by Save Our Shoreline states that allowing the public the right to walk on privately owned shorelines is a violation of the 5th amendment to the constitution and a taking without just compensation. According to Save Our Shoreline, this is "abundantly clear" because of the fact that the Glass court "had to create such a definition 167 years after the state's admission to the union" (Amicus 15).

Save Our Shoreline also argued that the decision violates the precedent found in *Hilt v. Weber* giving the riparian land-owners concomitant right of exclusive use to the water's edge (Hilt 176). In order to illustrate their point, the groups reiterates a passage of the *Hilt v. Weber* opinion which states, "And it has been held that the public has no right of passage over dry land between low and high water mark but the exclusive use in the riparian owner, although the title is in the state" (Hilt 174). The last part of this quote ". . . although the title is in the state." is responsible for the majority of the confusion regarding the issue of beach-walking in Michigan. The fact that the state gives "exclusive use" of its beaches to littoral landowners but reserves title for itself (or for the public trust) is an interesting concept. It is no wonder why radically opposed perspectives can generate from the same cases. The President of Save our Shoreline

expresses his disapproval, “If the government can confiscate my beach in this way, then what’s to stop them from taking the rest of my property? When they take our property, they are taking away our liberty, and people should be very concerned about that” (Press Release 2009).

Conflicting rulings on the issue of shoreline property rights are not out of the ordinary in Michigan. However, new issues have arisen as the environment has changed. One common issue is if title remains with the property owner in full, who is required by law to allow public access on land below the high water mark, who is actually



Figure 9 Phragmites- Photo ©2006 Susan Vincent, Accessed-
<http://www.fs.fed.us/database/feis/plants/graminoid/phraus/all.html>

responsible for the area below the high water mark? The lake has been receding in recent years and an invasive species called Phragmites has been growing on the beaches. Phragmites grow 10-15 tall and

crowd out native vegetation. When they chopped up or mowed over a new infestation grows where each piece lands. Catherine Ballard, chief of the Michigan Coastal Management Program, which is part of the Environmental Science and Services Division of the state's Department of Environmental Quality says, “Basically there has been regulatory conflict for the past four years” regarding this invasive vegetation. Residents

were concerned about which practices of vegetation grooming were legally permissible. If the public trust doctrine was powerful enough in the eyes of the court to take away a right to prohibit public access on private property, was it powerful enough to restrict homeowners from managing invasive species on private property? Goeckel's attorney who is also the vice president of Save Our Shorelines (SOS) said, "Phragmites is growing on beaches; we go talk to DEQ [Department of Environmental Quality] about it, and it's going to take years for something to get done. Government departments are just not nimble. Shoreline owners could take care of it in a week or a day." He went on to say, "The position of SOS, and the reason we got involved, is that we did not want the public trust to be established to the high water mark" (Coastal Services 6).

Refining Boundary Lines in the Legislature

Rather than continue to directly oppose the decision made by the Supreme Court to allow public access below the high water mark, Save our Shoreline has worked to assure the continuity of existing private property rights by organizing a bill which eventually turned into law in 2012 giving the following rights to shoreline property owners: "1) Leveling of sand, removal of vegetation, grooming of soil, or removal of debris, in an area of unconsolidated material predominantly composed of sand, rock, or pebbles, located between the ordinary high-water mark and the water's edge. 2) Mowing of vegetation between the ordinary high-water mark and the water's edge" (SB 1052 7). Opinions on the effect of this legislation were split. Environmental groups argue that cutting beach vegetation disrupts the chemical makeup of the lakes which further disrupts fish populations. Homeowners argue that a permit from the government should not be

necessary in order to landscape private property. Whichever position one takes, it is based off the original argument about who really should have authority over shorefront property. Some see an expansive public trust doctrine as a way to preserve the Great Lakes for future generations. One source leaning in this direction establishes a ten point plan for intergenerational protection of the Great Lakes. Three of these points are:

- 1) The waters of the Great Lakes are a human right and must be equitably and justly shared.
- 2) Private interests of those with claims to the Great Lakes are subordinate to public rights.
- 3) Governments have an affirmative obligation to manage and protect the water of the Great Lakes as a Commons (Barlow 31)

This viewpoint bears a striking contrast to the goal of Save our Shoreline stated previously. The current status of the shoreline conflict in Michigan revolves around two groups which include those who advocate for more exclusive property rights on the shoreline and those who advocate for more public access.

This debate isn't looking like it will disappear in the short term future. The public trust doctrine that was passed to United States law from the British was primarily intended only for tidal waters and lands. Although it is suitable for the public trust doctrine to apply to the Great Lakes because of their classification as seas, many of the disputes and frustrations over the application of the doctrine are due to the fact that they are non-tidal waters. The doctrine was originally intended for application in areas with very little variation in water levels and small amounts of salt-water dependent vegetation. Time will tell what policy adaptations will need to occur in order to conform to the guidelines of the public trust doctrine.

Chapter IV

Analysis

The previous chapter exposed many similarities and differences between the Great Lakes of Michigan and the Puget Sound of Washington. In this chapter these aspects are addressed more closely with the intent of answering the question of which factors have had the largest influence on public ownership laws in the two states. Examining the distinctive characteristics of each location will provide greater insight into the development of each states application of the public trust doctrine and their justification for public beach access laws. Upon closer inspection of the data, two main factors were uncovered that led to disagreeing state policies. Economic resources and shifts in water levels are the main factors that will be compared more closely in this section.

Both Michigan and Washington were frontier lands and both were recognized as the northwestern United States at different points in U.S. history. The first accounts from early settlers seem to be equally filled with examples of awe and fascination. However, the great appreciation for the beauty of each area was often focused on the wealth and economic utility that the resources could provide. The economic goals between the settlers were representative of the geographical landscapes in which they inhabited.

The early residents of Western Washington were drawn to the coastline for the resources that the tidelands provided. Residents of Michigan however, followed the state's resources inland to the fertile land and the forests. As more and more people came to homestead in the state, settlements moved farther north and inland. Shore front properties were owned mainly for vacation and recreation purposes by those that had

disposable income. The rest of the population was concerned about finding work and providing for themselves and their families. Farming and timber harvesting were the dominant areas of sustaining employment at the time. It wasn't until the 20th century when the logging industry was declining that a large amount of people saw tourism as a legitimate source of income as well. The allure of Michigan as a vacation destination or a place to own a beach house allowed for new types of employment away from the state's interior.

The result was that each state was compelled to address coastal property management law in different ways. These differences are noticed clearly in each state's constitutions. It was examined in Chapter II that Washington attributed an entire section of its original constitution to the management of the tidelands. This inclusion was critical to the organization of the early state because of the issues that were being faced with squatters, claim jumpers and clam diggers interested in making quick money off Puget Sound resources. Washington asserted its authority of the land up to the high tide mark early on out of necessity to keep order in the new state. The wording in the original constitution set a significant precedent especially in the cases discussed in the previous chapter. The *Caminiti* case cited Article 17 as sufficient precedent to justify the state's authority to lease tidelands. *Bainbridge Island v. Brennan* suggests that the public trust doctrine was expressed by the Washington legislature through the constitution.

On the other hand, there is no mention of shoreline law in Michigan's state constitution. The same type of attitude towards Michigan's shoreline wasn't prevalent during the territorial days. The Great Lakes were very important to the State of Michigan

but no shore line territorial disputes had a large enough impact to garner the attention of the legislature or the highest courts until the 20th century.

Another reason why early conflict appeared less on the shoreline of Michigan was because of the lack of economic resources that could be derived from it. Main historical accounts make no mention of the Michigan shoreline being able to provide a natural resource that can create economic profit. The most important resource based economic activities were fishing and logging and although fishing was plentiful, the profitable portion of it was performed mostly using boats. The loggers viewed the shore as merely an inventory storage place between the land and the sea.

The tidelands of Puget Sound however, were a resource to be claimed. The availability of naturally occurring shellfish or the prospect of claiming area to cultivate shellfish brought the people down to the shore for economic gain and profitability. Disputes arose early in the territorial days over who had the rights to the shellfish on the tidelands and escalated to become the main topic of contention during the constitutional convention. Soon after, the state leased the tide lands to prospective shellfish farmers as a revenue stream. This encouraged residents to move to the water's edge for economic reasons. Shoreline law was pressured to develop much earlier and in a much more definite way in Washington than in Michigan. *Sequim Bay Cannery Co. v. Bugge* was a prime example of a dispute that forced the courts to address ownership issues even after the constitutional debate. The case shows that coastal resources were an important resource worth protecting and that often the courts were needed to resolve the dispute early in the days of statehood.

Ownership conflicts came much later in Michigan but are attributed to the natural and anthropogenic forces that affect the water level. The waters of Puget Sound are tidally connected with the Pacific Ocean where water levels rise and fall only by tidal influences. Consequently, large fluctuations in water levels have not been a topic of dispute in any cases dealing with Puget Sound's tidelands. Conversely, the water level on the Great Lakes is affected by factors such as water diversion for human use and changes in precipitation. Often water levels change considerably with a combination of those two factors. Earlier in this work, Figure 7 showed the water levels decreasing around the same time that the Kavanaugh cases were being heard in the Supreme Court. In fact, a sudden increase in available land during the early 1900's was specifically cited as the foundation of the conflict over shore line property ownership. Figure 8 showed a significant drop in water level around the time of the Glass v. Goeckel disputes. This water level drop of the late nineties put Lake Huron at the lowest level since the sixties and the lake level has been below the 1918-2013 mean level ever since. While not specifically stated, it could be hypothesized that the drop in water level added a certain tension between shoreline property owners and the public.

The way each state measures the water level is also an important difference in this analysis. Washington has always measured the changes in Puget Sound water level by using the tide lines: high tide, mean tide, and low tide. However, Michigan is much more complex in this aspect because of the unpredictable variances of the water level over the years. Debate over how to define shoreline boundaries amidst changing water levels was central to all three major Michigan cases described in Chapter 3.

In conclusion, this comparative analysis has shown that natural factors play a large part in the development of coastal policy. This is significant because it shows that shoreline policies might be less tied to political influences than previously thought and more closely connected with people's adaptation to the forces of nature. Overall however, it is essential to understand that a multidisciplinary approach is necessary when interpreting any coastal decision because of the complexity of the coastline.

Chapter V

Conclusion

Although Michigan and Washington both assert ownership over all navigable waters and shorelines, each has approached shoreline policy in different ways. Washington asserted ownership early on in the history of its statehood and its policies have remained relatively unchanged since. Michigan waited for a significant dispute before it resolved the issue and was then subject to the decisions of a Supreme Court unaccustomed to the intricacies of shoreline boundaries. The present boundaries between public and private land have evolved on a case by case basis as lawmakers attempt to make sense of the Great Lake's changing environment. Exploring the historical, geographical and natural influences surrounding the laws and policies of each coastline has revealed key reasons why Michigan and Washington approach coastline management in different ways.

The key principle in the understanding of this study and the foundation of the debate surrounding the shoreline is based off the public trust doctrine which has received considerable attention in recent years due to the writings of Joseph Sax. He advocated using the doctrine as a tool for increasing public ownership of resources but his theory is not as effective as he hoped it to be. Michigan was able to allow public beach walking on private shorelines based on the doctrine but Washington has used the same doctrine to sell tidelands to private ownership under its authority. Each state's application of the public trust doctrine is different and the ability to use the doctrine as a tool depends much on each state's unique characteristics and precedents.

Future research in this area can investigate the role that current environmental issues such as global climate change will have on each state's policy toward the issue of public and private shorefront lands. For example, Lake Huron is experiencing very low water levels during the last 15 years due to a combination of anthropogenic and natural forces and scientists are not hopeful that levels will rise in the short term. Climate change and increasing demand for water to supply a growing population could force lake level even lower which under current laws would merely increase abutting shoreline owners' property. New shoreline land created from reliction will likely cause disputes as property lines begin to cross. Research into where these disputes are most likely to occur would be beneficial to law makers and those involved in real estate.

In closing, this research mirrors the words of Rachel Carson who passionately wrote, "The shore has a dual nature, changing with the swing of the tides, belonging now to the land, now to the sea." She went on to describe it as a "strange and beautiful place" and a "place of compromise, conflict and eternal change" (xiii, 1-2). The coastlines are always changing and laws and policies will continue to change along with them but understanding the nature of current and past laws will allow people to efficiently manage the coastlines of the future.

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