

How We Can Protect the Great Lakes

Did you know that the waters of the Great Lakes are owned by you, the public? These waters, like beaches and parks, are shared and owned by the public according to the ancient principle of the public trust.

The public trust doctrine protects the public's right to use common shared resources. The public trust dated back to the Roman times, and still applies today, worldwide. It is the legal foundation for protecting and maintaining beaches, navigable waterways and harbors, wetlands and wildlife, tributary streams, and even groundwater.

These resources protected by the public trust are known as the commons, because they are accessible to, and shared by, everyone. The idea of the commons inherently makes sense. Certain resources like air and water simply cannot be divided into private ownership.

The public trust does not only protect these common resources; it also concerns protected uses of the commons. Protected public uses of water include: navigation, commerce, fishing, drinking water, swimming, and recreational boating.

Making Sense of the Public Trust Doctrine

How exactly does this public trust doctrine work in action? Think of it this way: the government acts like the trustee of a bank. The trustee serves to maintain the bank's trust for the long-term interests of its beneficiaries. In this way, the government serves to preserve and maintain the commons for the benefit of the public. This is the essence of the public trust.

According to the public trust, it is the responsibility of the government to protect common resources and protected uses on

behalf of the public. No user of the commons—private, corporate, or public—can take priority and harm our shared waters. Citizens legally can demand that governments fulfill this responsibility when they recognize a violation to their protected public waters.

What is unique about the public trust is its ability to regulate both water quality *and* quantity. For example, the public trust can be applied to prevent pollution or reduced water flow in the Great Lakes Basin. Why? Because the effects of water pollution or low water levels interferes with protected public uses of the water, like swimming, fishing, drinking water.

Under the public trust, the commons cannot be controlled by or transferred to private interests for private gains; the government is obligated to ensure that the commons are preserved and maintained for current and future generations. However, some governments choose to ignore and violate these public trust principles. This is why it is FLOW's mission to advance public trust solutions and incorporate them into the laws governing the Great Lakes.

Historical Roots of the Public Trust

In the U.S., the Great Lakes were first placed in public trust under the Northwest Territories Treaty of 1787. Then, in 1892, the U.S. Supreme Court expressly affirmed this public trust. The court ruled against the sale of one-square-mile of Lake Michigan from the State of Illinois to a railroad company, on the basis that the sale was a violation of the public's right in the Great Lakes.

Since then, the scope of the public trust's application has extended to the shores of the Great Lakes, navigable inland lakes, and streams through various court rulings, common law, statutes, and even constitutional law of

some Great Lakes States and Provinces. Some states, like Hawaii and Vermont, have recently expanded the public trust to protect groundwater and aquifers, recognizing that the water cycle connects surface *and* ground water.

Protected uses under the public trust have also expanded. In addition to the traditional protected uses, the public trust has come to encompass protected uses like: boating, ecological values, wildlife habitat, swimming, beach walking, hunting, and fowling.

The public trust concept tells us what we all know intuitively: water is part of our common heritage of belonging to Earth, and it must be shared with other species and preserved for future generations.

Our Majestic Great Lakes

The Great Lakes are a unique national treasure, spanning over 750 miles from west to east along the United States and Canadian border, carving some 10,900 miles of coastline. This vast inland freshwater sea provides clean drinking water to more than 35 million people in eight states in the U.S. and two provinces in Canada.

The natural values of these five lakes continue to shape the physical and cultural heritage of the First Peoples and American Indians, as well as the surrounding communities and region at large.

The Great Lakes serve as the backbone to the region's \$14 billion economy, according to economists at the National Oceanic and Atmospheric Administration (NOAA).

As the largest natural freshwater system on the planet, other than the polar ice caps, the Great Lakes remain a fragile ecosystem whose overall health is in the balance. Threats to our waters include over-extraction of resources, invasive species, toxic pollution, nutrient runoff, "dead zones," water diversions, wetland destruction, mining, oil and gas exploration, and climate change.

Given these challenges, the Great Lakes are calling out for a new narrative, and the public trust is that narrative. It sets forth a legal and ethical code of governance, and defines limits and thresholds to preserve the integrity of the water, ecosystem, and protected public uses of the Great Lakes for present and future generations.

The public trust helps answer basic questions to guide the protection of the Great Lakes. Do the proposed uses harm the waters? Is the government fulfilling its duty to protect the Lakes? It is that simple.

Applying the Public Trust to the Lakes

How can the public trust be applied to help the Great Lakes today? Under the public trust, it is a government's affirmative duty, or responsibility to take a positive action, to protect the commons. All eight states on the Great Lakes are mandated by a combination of statutes, state constitutions, and common law to ensure that any actions do not materially impair public trust waters and protected uses.

Citizens play an important role in applying the public trust to the Great Lakes. Citizens can make public comments and remind state natural resource agencies to review individual and cumulative effects on public trust properties like navigable waters, as well as parks and state lands.

Additionally, citizens can take direct action, or file a lawsuit if necessary, to demand that government and others take action to restore or prevent loss or harm of the waters and ecosystem of the Great Lakes.

FLOW works with citizens, business leaders, and governments at the local, state, federal, and international level to highlight the value and application of the public trust to protect the waters of the Great Lakes. Coalitions work to advocate and propose public trust language to be incorporated into existing and new laws.