REGIONAL OCEAN GOVERNANCE: THE ROLE OF THE PUBLIC TRUST DOCTRINE

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I. INTRODUCTION

In the two years since the Pew Ocean Commission and U.S. Ocean Commission recommendations, policymakers and ocean managers have begun considering regional ocean governance ("ROG") as a tool to better manage ocean and coastal resources and move toward ecosystem-based management of the oceans and coasts. A ROG mechanism would not start from scratch; to the contrary, regional (or in some circumstances "multi-state") efforts have existed for decades. The elevation of ROG to the position of a structural foundation for state, regional, and national marine resource management requires consideration of the historical underpinnings of ocean and coastal management, namely the Public Trust Doctrine ("PTD" or "Doctrine") and its role in moving governance structures toward effective ecosystem-based management.

The PTD is relevant not only in the establishment of ROG, but also in its implementation. This article presents background and emerging questions for the role of the PTD, at state, regional, and national landscapes. First, from the state perspective, the PTD is an existing tool for management of marine public trust resources. Does the existence of the Doctrine negate the need for a state to participate in ROG and, if not, will conflicts that exist between states in their application of the Doctrine affect ROG? Second, from the regional perspective, does ROG create an underlying public trust responsibility on a regional level through an interest based on conservation or on use? Third, from a national perspective, given the emergence of ROG

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and the inherent role of states, will the Doctrine evolve into a multi-jurisdictional approach for the furtherance of ecosystem-based management? This article addresses these elements from the perspective of the Northeast region,[1] within the context of two ROG related events in 2005: the establishment of the Northeast Regional Ocean Council and the ocean governance resolutions adopted by leaders in the region.

II. THE EVOLUTION OF OCEAN GOVERNANCE

A. *The Public Trust Doctrine in its Historical Context*

At the state level, uses and management of marine resources have evolved within the context of the PTD,[2] the origins of which date to the Roman Empire.[3] The Doctrine provides that public trust lands, waters, and living resources are held by a state in trust for benefit of its people, and that they may use these resources for navigation, fishing, commerce, and (in more recent years) recreation.[4]

The original Roman Public Trust principles influenced the laws of the English, Spanish, French, and Dutch, and their respective colonies. In the United States, the original thirteen colonies, and states that joined the United States following the American Revolution, followed the English common law as to sovereign ownership of tidelands with some variation. Under the constitutional principle of the Equal Footing Doctrine, state ownership of tidelands was extended to all

1. Depending on which definition of "region" is used, some view the Northeast (typically thought of as New York to Maine) as a subregion of the larger Northeastern Continental Shelf Ecosystem. *See* BILIANA CICIN-SAIN, WORKSHOP PROCEEDINGS OF IMPROVING REGIONAL OCEAN GOVERNANCE IN THE UNITED STATES, AN OVERVIEW OF POLICY ISSUES AND OPTIONS FOR IMPROVED REGIONAL OCEAN GOVERNANCE 4 (Dec. 9, 2002), *available at* http://www.udel.edu/CMS/csmp/pdf/RegionalProceedings.pdf (citing Ken Sherman, *Sustainability, Biomass Yields, and Health of Coastal Ecosystems: An Ecological Perspective*, 112 MARINE ECOLOGY PROGRESS SERIES 277, 277-301 (1994).

2. For purposes of this article, the discussion of the PTD is limited to the scope of discussion of ROG. A wealth of background and critical analysis exists in legal journals, including Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970); Joseph L. Sax, *Liberating the Public Trust Doctrine From Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989); and Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351 (1998).

3. DAVID C. SLADE, R. KERRY KEHOE & JANE K. STAHL, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 15 (2d ed. 1997).

4. *Id.* at 3.

new states.[5] In its sovereign capacity, each state has defined the PTD through its courts and legislatures depending on societal needs through the decades.

As a result, the Doctrine differs state by state and may still be dynamic in its application. In the 1894 case of *Shively v. Bowlby*,[6] the U.S. Supreme Court stated that:

> [T]here is no universal and uniform law upon the subject, but that each State has dealt with the lands under the tidewaters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public.[7]

Furthermore, the Court noted that "[g]reat caution . . . is necessary in applying precedents in one State to cases arising in another."[8]

The case of *Phillips Petroleum Co. v. Mississippi*[9] evidences the dynamic nature of the Doctrine given that a potential tideland leaseholder and the state disputed its application to submerged lands affected by the tide but were not navigable in fact.[10] The U.S. Supreme Court again clarified the independent nature of the Doctrine by relying on precedent that "it has long been established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[11] Ultimately, Mississippi won its claim of title to the tidally influenced submerged lands even though the lands were not navigable in fact and Mississippi had collected property taxes for decades from private owners of those lands.[12]

The public's rights to public trust resources vary by state but are based on the Doctrine's original three rights of fishing, navigation,[13]

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5. Pollard v. Hagan, 44 U.S. 212, 222, 228-29 (1845) (finding that the new U.S. states joined the Union on an equal footing with the original thirteen states).

6. 152 U.S. 1 (1894).

7. *Id.* at 26.

8. *Id.*

9. 484 U.S. 469 (1988).

10. *Id.* at 472.

11. *Id.* at 475 (citing *Shively*, 152 U.S. at 26).

12. *Id.* at 490. For a full account of the *Phillips Petroleum Co.* decision and its aftermath in Mississippi, see John A. Duff & Kristen M. Fletcher, *Augmenting the Public Trust: The Secretary of State's Efforts to Create a Public Trust Ecosystem Regime in Mississippi*, 67 MISS. L.J. 645 (1998).

13. However, "navigation" can vary between states; *see* Adams v. Pease, 2 Conn. 481, 483 (1818); Cobb v. Davenport, 32 N.J.L. 369, 378 (1867); West v. Slick, 326 S.E. 2d 601, 617 (N.C. 1985).

and commerce. In many states, the public's use of the waterways has evolved into an additional public trust right of recreation[14] and modern uses that are "related to the natural uses peculiar to that resource."[15] In determining public access to California tidelands, the Supreme Court of California noted:

> [a] growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[16]

Despite these differences in interpretation or application, the alienation of trust resources is subject to a standard established in the case of *Illinois Central Railroad v. Illinois*[17] in which the United States Supreme Court found that the state of Illinois had abdicated its responsibility to preserve the waters for the use of the public by ceding control of a harbor to a private interest.[18] Case law throughout the nation has followed *Illinois Central*, firmly establishing that a sale of public trust lands must be clear and unequivocal, serve a public purpose, and not substantially impair trust resources and their use.[19]

At the state level, the PTD is often the oldest submerged lands authority and it has been codified by many states and included in their Constitutions.[20] Thus, while the Doctrine is applied differently state by state, it is consistently an integral part of ocean and coastal management for balancing uses, conserving living marine resources, and managing the shoreline.

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14. The U.S. Supreme Court has noted that the traditional public rights included the right to bathe. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 414 (1842). Additionally, recreational activities have been deemed to include "whatever is needed for the complete and innocent enjoyment" of trust lands. Tr. of the Freeholders & Commonalty of Brookhaven v. Smith, 80 N.E. 665, 670 (N.Y. 1907).

15. Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 2, at 477.

16. Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

17. 146 U.S. 387 (1892).

18. *Id.* at 453.

19. *Id.* at 452-53. *See also* Nat'l Audubon Soc'y v. Super. Ct., 658 P.2d 709, 721-22 (Cal. 1983); Nedtweg v. Wallace, 208 N.W. 51, 55 (Mich. 1926).

20. *E.g.*, PA. CONST. art. I, § 27; FLA. CONST. art. X, § 11; HAW. CONST. art. XII, § 4; ALA. CONST. art. I, § 24; MINN. CONST. art. II, § 2; S.C. CONST. art. 14, §§ 1, 4; WIS. CONST. art. IX, § 1.

B. *The Progression of Regional Ocean Governance*

While the PTD provides a mechanism to manage ocean and coastal resources within a state's jurisdiction, the challenge of inter-jurisdictional management remains. Political boundaries, often delineated without attention to ecosystems, create inherent hurdles for natural resource management. Not surprisingly, this fact was noted by two recent documents related to U.S. ocean policy. *America's Living Oceans*, a report by the Pew Ocean Commission, stated that "[n]ot a system at all, U.S. ocean policy is a hodgepodge of individual laws that has grown by accretion over the years, often in response to crisis."[21] Similarly, the U.S. Commission on Ocean Policy, in its report entitled *An Ocean Blueprint for the 21st Century*, noted that to "move toward an ecosystem-based management approach, government should have the institutional capacity to respond to ocean and coastal issues in a coordinated fashion across jurisdictional boundaries."[22]

To solve this jurisdictional dilemma, the U.S. Commission on Ocean Policy proposed the "voluntary establishment of regional ocean councils, developed through a process supported by the National Ocean Council, [that] would facilitate the development of regional goals and priorities and improve responses to regional issues."[23] The Commission believed that the "development and dissemination of regionally significant research and information is imperative to meet the information needs of managers and support ecosystem-based decisions."[24] In response, the President's Ocean Action Plan supported the creation of regional collaborations on oceans, coasts, and Great Lakes policy in partnership with states, local governments, and tribes.[25] Specifically, the Plan calls for additional regional collaboration in the Great Lakes and Gulf of Mexico.[26]

Following the issuance of the Ocean Action Plan, with federal encouragement on several levels, Rhode Island Governor Donald L. Carcieri proposed the creation of the Northeast Regional Ocean

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21. PEW OCEANS COMM'N, AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE 26 (2003), *available at* http://www.pewtrusts.org/pdf/env_pew_oceans_final_report.pdf.

22. U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT OF THE U.S. COMMISSION ON OCEAN POLICY 86 (2004), *available at* http://www.oceancommission.gov/documents/full_color_ rpt/000_ocean_full_report.pdf.

23. *Id.*

24. *Id.*

25. COUNCIL ON ENVTL. QUALITY, U.S. OCEAN ACTION PLAN: THE BUSH ADMINISTRATION'S RESPONSE TO THE U.S. COMMISSION ON OCEAN POLICY 10-11 (2004), *available at* http://ocean.ceq.gov/actionplan.pdf [hereinafter U.S. OCEAN ACTION PLAN].

26. *Id.*

Council ("NROC") comprised of stakeholders appointed by the governors of each state.[27] Governor Carcieri contacted the governors of Connecticut, Maine, Massachusetts, New Hampshire, and Vermont noting that "the Northeast region has a significant opportunity to endorse and implement this recommendation [to create a regional ocean information system] by enhancing our regional cooperation."[28] According to Governor Carcieri, the New England states should create the NROC to facilitate the development of more coordinated and collaborative regional goals and priorities and to improve responses to regional issues.[29]

Governor Carcieri is also the Chair of the New England Governors and Eastern Canadian Premieres Conference, a conference of leaders from Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, Maine, New Brunswick, Nova Scotia, Quebec, Prince Edward Island, and Newfoundland & Labrador that addresses "issues of common interest and concern, and enact[s] policy resolutions that call on actions by the state and provincial governments, as well as by the two national governments."[30] At its 2005 meeting, the conference adopted several resolutions indicating priorities for the conference during Governor Carcieri's two-year term as Chair. The Resolutions were Resolution 29-1 on the Security and Prosperity Partnership of North America, Resolution 29-2 on Energy, Resolution 29-3 on the Oceans, and Resolution 29-4 on the Environment.[31]

The Resolution Concerning Oceans created an Oceans Working Committee to:

> foster international cooperation and collaboration on all aspects of marine and ocean related research and development[,] . . . facilitate the exchange of information[,] . . . seek partnerships and synergies to facilitate existing initiatives such as the Gulf of Maine Council on the Marine Environment and encourage new initiatives and partnerships[,] . . . address related environmental issues[,] . . . and pro-

27. Testimony of Governor Donald L. Carcieri to the Comm. on Ocean Policy (Apr. 5, 2005) (on file with author).

28. *E.g.*, Letter from Governor Donald L. Carcieri to Governor M. Jodi Rell (Apr. 4, 2005) (on file with author).

29. *Id.*

30. More information on the Conference of New England Governors and Eastern Canadian Premieres is available at http://www.negc.org/premiers.html (last visited Mar. 6, 2006).

31. Resolutions of the New England Governors Conference are available at http://www.negc.org/documents/Resolutions.pdf (last visited Mar. 6, 2006).

> vide a vehicle for cooperation on all aspects of ocean management.[32]

Also, the committee was tasked to make recommendations to the Governors and Premieres "on all practical means to expand and enhance regional efforts on all ocean related issues."[33]

It is likely more than coincidence that priority issues discussed for ROG include several of the priority issues included in the remaining resolutions, especially environmental and energy concerns.[34] In the Resolution on Energy, the leaders called for information and analysis from committees regarding regional fuel and supply diversity, assessment of undeveloped natural gas resources in the region, energy conservation and efficiency initiatives, and an ongoing discussion between industry and government on challenges and opportunities for the natural gas and related energy sectors.[35] The Resolution on the Environment called for strategies regarding transport issues, mercury reduction, acid rain and air pollution sources, greenhouse gas emissions, and ecosystem-based management approaches.[36]

While these resolutions indicate priority areas for ROG consideration, the resolutions are only as strong as the Governors and Premieres that seek to implement them. On a national scale, discussion regarding implementation of ROG has differed from region to region. Most discussion has focused on the mechanism(s) for ROG and has defined the regions and appropriate issues that should be addressed by each region.[37] However, managers and policymakers consistently

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32. Resolution 29-3, Resolution Concerning Oceans (Aug. 29, 2005), *available at* http://www.negc.org/documents/Resolutions.pdf.

33. *Id.*

34. For a sample of leading issues for regional concern, see CICIN-SAIN, *supra* note 1, at 7. The concerns listed include fishing habitats and stocks, conflicts between protected marine mammals, marine transportation, land development patterns, and implications of development of new uses of the Exclusive Economic Zone ("EEZ"), such as offshore aquaculture and wind farming. *See also* INTEGRATED COASTAL MANAGEMENT, UNCED AGENDA 21 ch. 17.3 (1992), *available at* http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21 chapter17.htm (defining the EEZ as "an important marine area where the States manage the development and conservation of natural resources for the benefit of their people").

35. Resolution 29-2, Resolution Concerning Energy (Aug. 29, 2005), *available at* http://www.negc.org/documents/Resolutions.pdf.

36. Resolution 29-4, Resolution on the Environment (Aug. 29, 2005), *available at* http://www.negc.org/documents/Resolutions.pdf.

37. *See* KIM ENGIE, AN OVERVIEW OF REGIONAL COORDINATION IN THE GREAT LAKES, GULF OF MAINE, AND CHESAPEAKE BAY (2004) *available at* http://courses.washington.edu/oceangov/reference_mtls/USRegOview.pdf.

state that ROG must be part of the solution rather than a "solution looking for a problem."[38]

C. *Functional Regional Governance: Litigation and Compacts*

A regional governance system may offer a variety of functions such as providing coordination and management between states, serving as an information sharing mechanism, or supplying a decision-making structure. The New England Governors and Eastern Canadian Premieres is a hybrid mechanism; it has only a few obligations attached, and its most common function has been information sharing with some management-related activities, depending upon the issue.[39] However, other formal and informal efforts exist, offering lessons for ROG efforts in New England.

Northeastern states (and in some cases, states from other regions) have joined forces to coordinate multi-party litigation, including the tobacco litigation begun in 1994 that led to a national effort by more than forty states to sue tobacco companies.[40] More recently, a lawsuit began by eight states to fight CO_2 emissions as a pollutant, shows that the environment and public health are rising "to the forefront as a cause for the Attorneys General."[41] Columbia Law School held a symposium entitled "The Role of State Attorneys General in National Environmental Policy" in 2004, and the comments of the Attorneys General are instructive lessons for regional efforts, whether based on a short-term, single issue, or a long-term suite of problems.

The number of states involved in any effort defines the lawsuit. More coordination is needed as the number of involved states increases. In addition, the more states, the more resources that will be

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38. John H. Dunnigan, Nat'l Oceanic & Atmospheric Admin. Ecosystem Goal Team, Lecture at the Coastal Zone Conference (July 20, 2005).

39. The Council of Atlantic Premieres describes the relationship of the Conference of New England Governors and Eastern Canadian Premiers as "a unique and highly effective international relationship of states and provinces sharing ideas and building on historic ties. The Conference advances the interests of the eleven jurisdictions through cooperation and encourages collaboration with the private sector." *See* http://www.cap-cpma.ca/default.asp?mn=1.62.4.28 (last visited Jan. 5, 2006).

40. For analysis of the tobacco litigation, see Wendy E. Parmet, *Tobacco, HIV and the Courtroom: The Role of Affirmative Litigation in the Formation of Public Health Policy*, 36 HOUS. L. REV. 1663 (1999); Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 CONN. L. REV. 1143 (2001).

41. *The Role of State Attorneys General in National Environmental Policy: Welcome & Global Warming Panel, Part I*, 30 COLUM. J. ENVTL. L. 335, 347 (2005) (statement of Richard Blumenthal, Attorney General of Connecticut).

available. The importance of the number and characteristics of states in lawsuits is especially evident in CO_2 lawsuits with larger states such as New York and California as parties.[42] As more states commit to the effort, it will become increasingly clear to the public, private sector, and federal government that it is an issue worthy of significant attention and dedication of resources.

Another concern in litigation is the ability to sue in one court rather than several courts. In explaining the relative benefit of the CO_2 litigation, Richard Blumenthal, Attorney General of Connecticut, noted:

> We're also lucky because we're in one court. . . . For tobacco, we were in 50 different states, 50 different courts, so we had to make sure one state wasn't saying something that would hurt another state, so here the coordination problem is better. Iowa demonstrates the stake of the Midwest in this problem and shows that there's not just one coast, but a national problem. So there are ways that additional states can help in this problem.[43]

One reality of multi-state efforts is that benefits might not always be easily shown. Often, more subtle benefits are overlooked. Tom Miller, Attorney General of Iowa, noted that "the underlying point is that trying to do the right thing, and trying to do it together and support each other, is a wonderful intangible [benefit]."[44] Blumenthal explains that the rationale for any multi-party effort may not be clear from the beginning; rather, it may begin as an instinct:

> And in a way, this lawsuit began with a lump in the throat, a gut feeling, emotion, that CO2 pollution and global warming were problems that needed to be addressed. They were urgent and immediate and needed some kind of action, and it wasn't coming from the federal government. And it also began with a lump in the throat. David Hawkins and I were sitting having bagels, brainstorming about what could be done. This was 3 1/2 years ago, and we agreed that we would each think, explore, [and] research about it.[45]

While individual states or a regional council may develop a checklist of qualities concerning issues to be addressed regionally, in the end, the council may be most effective when the leaders share an instinct that the problem must be addressed collectively.

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42. *Id.* at 346 (statement of Richard Blumenthal).
43. *Id.*
44. *Id.* at 349.
45. *Id.* at 339.

Interstate compacts represent a more formal approach for states to join together on common issues and have served a major role in governing natural resources.[46] The basis for negotiating interstate compacts is found in the U.S. Constitution, which states that "no state shall, without the consent of Congress, enter into any agreement or compact with another state or with a foreign power."[47] This compact clause implicitly recognizes state power to negotiate and enter into agreements subject to congressional consent. Formation of an interstate compact typically has three stages: (1) Congress authorizes negotiation of the compact, usually with a federal representative as part of the negotiations, (2) states enter into compact negotiations, and (3) Congress consents to the negotiated compact.[48]

The resulting interstate compact is a legal instrument that binds states to formal cooperation. There is no limit to the number of states which may be involved in an interstate compact. Interstate compacts are useful in that they can address regional problems of concern to particular states which are transboundary but too localized to be a national issue. A key example is the Atlantic States Marine Fisheries Compact.[49]

In 1942, Congress approved an interstate compact and created the Atlantic States Marine Fisheries Commission ("ASMFC"), which served as an advisory board with the power to make legislative recommendations regarding common fish species in the state waters of 15 coastal Atlantic States.[50] In 1993, Congress enacted the Atlantic

46. For more information on interstate compacts for natural resource management, see Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1 (1997); Jeffrey Uhlman Beaverstock, *Learning to Get Along: Alabama, Georgia, Florida and the Chattahoochee River Compact*, 49 ALA. L. REV. 993 (1998); Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern States at the Opening of the 21st Century*, 25 U. ARK. LITTLE ROCK L. REV. 9 (2002); Jonathan I. Charney, *The Delimitation of Lateral Seaward Boundaries Between States in a Domestic Context*, 75 AM. J. INT'L L. 28 (1981); Marlissa S. Briggett, *State Supremacy in the Federal Realm: The Interstate Compact*, 18 B.C. ENVTL. AFF. L. REV. 751 (1991).

47. U.S. CONST. art. I, § 10, cl. 3.

48. *See* FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 25 (1976), *available at* http://www.csg.org/NR/rdonlyres/edgtwasgvq22amg5ba3zsqreagu4cjodzjidnhzfy45t3l6j3tg6xlpief7tm2ktxj4cu7ydmm2h4tuwm7gn5ka74dd/The+Law+and+Use+of+Interstate+Compacts%3B+Zimmermann+&+Wendell%3B+CSG,+1976.pdf.

49. 77 Pub. L. 539, 56 Stat. 267 (1942) (codified at 16 U.S.C. §§ 5101 - 5108 (2000)).

50. The states are: Florida (Atlantic coast only), Georgia, South Carolina, North Carolina, Virginia, Maryland, Delaware, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, and Maine. Elizabeth C. Scott, *Managing the Maine Lobster Fishery: An Evaluation of Alternatives*, 20 VA. ENVTL. L. J. 573, 583 (2001).

Coastal Fisheries Cooperative Management Act expanding the Commission's authority to include the creation of coastal management plans and findings of state noncompliance.[51] The Atlantic States were to use the ASMFC as a vehicle for joint management of important coastal fisheries with other member states, rather than continuing to promulgate varying state-by-state regulations.[52]

The Commission views the rebound of the striped bass population as one of its greatest successes but notes that the success was based on common values implemented among the member states. [53] These values include respect of state sovereignty, transparency in programs and actions, and flexibility within conservation parameters.[54] The rationale for member states is to provide collective, cooperative management and to make decisions that are "good for all versus best for one."[55] With fifteen member states, members can pool their scientific resources and, in some cases, streamline data collection. Ultimately, the Commission hopes to provide states with incentives to act but has access to action forcing mechanisms.[56]

The benefits of an interstate compact include greater efficiency than a federal regulatory response because states in a region are generally more familiar with a problem and can be more responsive to local and regional needs.[57] Unlike informal interstate cooperation, a compact is binding to the citizens of the member states and provides a formal mechanism for states to reduce jurisdictional hurdles associated with transboundary problems.[58] The process of political adjustment required to negotiate a compact allows the parties to specify decisionmaking procedures and standards.

However, in reality, states may not always cooperate intensively or continuously. For political purposes, states' chief executives may insist upon negotiation between Governors, resulting in intermittent progress. A lack of intensive cooperation may lead to protracted negotiation and disagreement, exacerbating delay. Rather than repre-

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51. 16 U.S.C. § 5101.

52. Scott, *supra* note 48, at 583-84.

53. Statement of Vince O'Shea, Executive Dir., Atl. States Marine Fisheries Comm'n (Jan. 13, 2006) (on file with author).

54. *Id.*

55. *Id.*

56. *Id.*

57. Stephen David Galowitz, *Interstate Metro-Regional Responses to Exclusionary Zoning*, 27 REAL PROP. PROB. & TR. J. 49, 118-23 (1992).

58. *Id.* at 45.

senting the interests of the region, members of these interstate bodies typically represent the interests of their respective jurisdictions.

Finally, states may not unilaterally amend the compact without the consent of all signatory states.[59] While this is a sign of respect for sovereignty (noted above as a strength in the context of the ASMFC), it also may cause delays and makes adaptive management a challenge.

Even with action forcing mechanisms at the disposal of the ASMFC, consensus is the key mechanism of action. Voting rules notwithstanding, many commissions have often found it necessary to proceed by consensus. This suggests that "political considerations cannot be sidestepped by granting a regional organization more formal authority[;] . . . decisions are going to be made by a process of negotiation and consent-building, not by the fiat of a regional agency."[60] Perhaps because of the political costs to create and maintain them and their mixed record of success, "very few of [the recently emerging organizational arrangements for watersheds] have sought to transfer powers and authorities from existing agencies to a watershed authority" and have focused instead on less formal collaborative institutions.[61]

A final notable challenge to the creation of a compact appears at the legislative level. Interstate compacts require agreement by all state legislatures. Each legislature must adopt necessary legislation to become a member state and may need to amend existing laws to do so.[62] In the context of ROG, state leaders will need to account for conflicts of laws that might prevent the state from becoming part of a larger body or participating fully in a body that specifically addresses ocean issues.

With these lessons in mind, federal structures also provide similar guidance for the advancement of transboundary management. One commentator notes that the affirmative stewardship responsibil-

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59. *Id.* at 46.

60. Jon Cannon, *Choices and Institutions in Watershed Management*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 379, 392 (2000) (citing Helen M. Ingram, *The Political Economy of Regional Watershed Institutions*, 55 AM. J. AGRIC. ECON. 10, 17 (1973)).

61. *Id.* at 392 (citing NAT'L RESEARCH COUNCIL, NEW STRATEGIES FOR AMERICA'S WATERSHEDS 186 (1999)).

62. For a review of the role of federal and state consent in interstate compacts, see Marlissa S. Briggett, *State Supremacy in the Federal Realm: The Interstate Compact*, 18 B.C. ENVTL. AFF. L. REV. 751, 757-67 (1991). For a review of challenges of interstate compacts, see Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1 (1997).

ity for managers of the National Wildlife Refuge System "provides a statutory basis for application of the Public Trust Doctrine."[63] Thus, the presence of an affirmative stewardship duty may "finally generate a body of public trust case law and practices for the federal public lands"[64] and serve "as a basis for the [Fish and Wildlife] Service to defend more assertive protection of the refuges, especially when dealing with external threats."[65] This attempt to address pressures from outside the refuges' boundaries represents a federal approach to regional management and reaffirms the role of the PTD and incentives for the states to act as resource trustees.

III. THE ROLE OF THE PUBLIC TRUST DOCTRINE

In considering ROG, the role of the PTD is often overlooked. Indeed, the Doctrine itself may be overlooked as a tool for transboundary resource management. With its historic and current role in marine resource management, its codification into state law, and its flexibility in implementation, the PTD can act as a vehicle to advance ROG rather than as a hindrance. Even though it is applied differently from state to state, the fundamental elements of the Doctrine can tie the efforts of each state together.

Of course, the PTD has its critics, including those that posit the Doctrine is out of step with modern environmental laws that seek to allow adaptive management for resources or as a tool used to avoid making difficult political decisions.[66] While some critics point to its basis in property law and trust management as limiting,[67] it is this trust relationship that allows for transboundary management of trust lands and waters. The role of the state as a trustee over resources should not be undervalued, especially in the context of multi-state efforts to manage or conserve marine resources.

A key to understanding the role of the Doctrine in ROG is that "it is the nature of this specific land, not who manages the land, which

63. *See* Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 ECOLOGY L.Q. 457, 581 (2002).

64. *Id.*

65. *Id*. at 582.

66. *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 687-90 (1986); James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 556 (1989); James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson*, 63 DENV. U. L. REV. 565, 582-84 (1986).

67. *See* Rose, *supra* note 2, at 356.

makes it subject to the Public Trust."[68] Thus, the similarities between the states' public trust resources are more significant than the subtle (and sometimes not so subtle) differences between state doctrines.

The fact that states have codified the PTD in their constitutions and statutes is evidenced by the role it has in marine resource management, especially concerning the harvest of living marine resources, as well as in evolving public interest in enjoying the coasts. The Rhode Island Constitution provides that people of the state "shall continue to enjoy and freely exercise all the rights of the fishery, and privileges of the shore, to which they have been heretofore entitled under the charter and usages of the state."[69] The Constitution provides that privileges of the shore include "fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea, and passage along the shore."[70] The Commonwealth of Massachusetts has codified public trust principles in Chapter 91 authorizing the Department of Environmental Protection to protect the public interest in "tidelands, Great Ponds, and non-tidal rivers and streams in accordance with the PTD as established by common law and codified in the Colonial Ordinances of 1641-47 and subsequent statutes and case law of Massachusetts."[71]

These codifications show the inherently common nature of resources, and though they may differ in specific language or prioritization of uses, the fundamental rationale for their protection is the same. In the context of interstate resource use and protection, states have the right to protect their natural resources, even in the face of discriminatory effect on interstate commerce. In *Maine v. Taylor*,[72] a case in which "[o]nce again, a little fish has caused a commotion,"[73] the Supreme Court held that the state "retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources" as long as the methods do not represent "an arbitrary discrimination against interstate commerce" or could not adequately be served by nondiscriminatory alternatives.[74] This deci-

68. *See* Kelly McGrath, *The Feasibility of Using Zoning to Reduce Conflicts in the Exclusive Economic Zone*, 11 BUFF. ENVTL. L.J. 183, 191 (2004).

69. R.I. CONST. art. I, § 17.

70. *Id.*

71. 310 MASS. CODE REGS. 9.01(2)(a) (1987).

72. 477 U.S. 131 (1986).

73. *Id.* at 132.

74. *Id*. at 151 (holding that states retain broad regulatory authority to protect the health and safety of citizens and the integrity of natural resources).

sion bolstered the security of the PTD as a tool for states to protect resources and citizens' rights to use those resources.

Though this decision clarifies the use of the Doctrine in the context of out-of-state use of a trust resource, a remaining challenge to the PTD as a basis for ROG is the application of the Doctrine for competing in-state interests. Many of the PTD's protected uses conflict, and the Doctrine "creates no specific hierarchy in the uses."[75] Thus, state legislatures and agencies must balance the suitability of uses to the marine environment.[76] Courts have begun to weigh in on this undeveloped aspect of the Doctrine. In *Weden v. San Juan County*,[77] the Washington Supreme Court determined that a county ordinance prohibiting navigation and recreational use by personal watercraft is consistent with the state's PTD because "it would be an odd use of the PTD to sanction an activity that actually harms and damages the waters and wildlife of this state."[78]

Other courts have begun to see the evolution of the PTD from a use doctrine to one that includes resource protection. In the 1983 case of *National Audubon Society v. Superior Court*,[79] the California Supreme Court applied the PTD to the appropriation of water, finding that a two-step public trust review was warranted.[80] First, the court called for "a 'responsible body' [to] balance the appropriator's needs with the watershed's needs to determine whether 'the benefit gained is worth the price.'"[81] Second, the court called for this body to determine "whether some lesser taking would better balance the diverse interests."[82]

Prior to *National Audubon Society*, courts had not applied the PTD in this way.[83] Thus, the decision "potentially allowed the state to reallocate water from private consumptive uses to public instream uses."[84] While the decision did not yield subsequent PTD pronounce-

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75. Donna R. Christie, *Marine Reserves, the Public Trust Doctrine and Intergenerational Equity*, 19 J. LAND USE & ENVTL. L. 427, 432 (2004).

76. *Id.*

77. 958 P.2d 273 (Wash. 1998).

78. *Id.* at 284.

79. 658 P.2d 709 (Cal. 1983).

80. *See id.* at 728.

81. Gregory S. Weber, *Articulating the Public Trust: Text, Near-Text and Context*, 27 ARIZ. ST. L.J. 1155, 1162 (1995) (citing *Nat'l Audubon Soc'y*, 658 P.2d at 728).

82. *Id.*

83. *Id*. at 1155.

84. *Id.*

ments,[85] the California State Water Resources Control Board "has begun to articulate the trust's meaning and its legal place in the western water allocation system . . . [culminating] in two recent State Water Board decisions that have finally fulfilled National Audubon Society's promise to reallocate water from existing appropriations to public trust-protected uses."[86] These decisions reallocated water, both among trust uses and between trust and consumptive uses, based on the PTD.

National Audubon Society shows the use of the PTD in complex natural resource management decisions, especially those addressing shared or migratory resources such as freshwater. In the context of multi-jurisdictional issues, water as a shared resource is especially instructive. In arguing the common property status of the waters of the Great Lakes Basin, one commentator noted that because water is a resource:

> It would seem, then, that the riparian doctrine's reasonable use requirement and the public trust doctrine both place significant limitations on the use of the Great Lakes and their tributary waters. . . . If one treats the public resource under such a public trust-type doctrine, it would presuppose an existing servitude on the resource and would not allow for private taking.[87]

The public trust guiding principles are woven into the Final Report to the Governments of Canada and the United States issued by the International Joint Commission in 2000,[88] which balances domestic and foreign extractive uses based on doctrines of sustainable development, equitable use, public trust, and unilateral declaration. The Great Lakes example shows that states have not only the right, but also the duty, to regulate resource consumption, including trust resources, with the effects on current and future generations in mind.[89]

The water management decisions in California and the Great Lakes Basin show that working on a regional scale can actually assist Northeastern states in meeting their PTD responsibility. The ASMFC

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85. Weber notes that "[f]or the first dozen years after its announcement, the decision had not spawned a single reallocation of water from a consumptive to an instream use. In short, the Doctrine's promise remained largely inchoate and its message largely inarticulate." *Id.* at 1156.

86. *Id*. at 1156-57.

87. Leticia M. Diaz & Barry Hart Dubner, *The Necessity of Preventing Unilateral Responses to Water Scarcity – The Next Major Threat against Mankind this Century*, 9 CARDOZO J. INT'L & COMP. L. 1, 38 (2001).

88. INT'L JOINT COMM'N, PROTECTION OF THE WATERS OF THE GREAT LAKES, FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES (2000).

89. Diaz & Dubner, *supra* note 82, at 39.

is also instructive: Considering that fishing is one of the Doctrine's original three protected uses, it is easy to see the connection between the Northeastern states PTD responsibilities and their agreement to manage shared resources through the ASMFC. A principle goal of the ASMFC is to provide better coordination between states for conservation of shared stocks.[90] Underlying this rationale is the fact that citizens of each state have the right to fish and will harvest marine resources. A body such as the ASMFC works to advance PTD responsibilities and principles.

Multi-state litigation also provides a basis for viewing the PTD as an advancement of regional governance principles. Even without a formal mechanism, multi-state litigation is based on the states' police powers (those responsibilities that are inherent in a state to meet the needs of its citizens). In the two examples given above, public health served as the incentive for multi-state litigation. Given the nature of Long Island Sound, the Gulf of Maine, or the air-shed above the public waters of the Northeast, the health of these shared public resources can serve as motivation for seeking a multi-state solution to a damaging actor or factor.

From the perspective of the emerging NROC, the PTD remains a shared principle for the states to rely upon, providing common linkages of public access, management, and conservation of marine resources. At the August 2005 meeting, the New England Governors and Eastern Canadian Premieres prioritized energy defense and ecosystem management for a regional approach.[91] Add to this the more specific problems such as energy facility siting, water quality, or management of transboundary living resources, and the PTD serves as an important tool in the suite of state and federal statutory and common law principles to advance a regional approach to marine resource management.

IV. CONCLUSION

A primary challenge for the NROC or any ROG effort in the United States is finding incentives, either in the shape of an action forcing mechanism such as the ASMFC or long-term shared problems and negotiated solutions as seen in the Great Lakes. To move toward ecosystem-based management, a multi-jurisdictional effort is essen-

90. 77 Pub. L. 539, 56 Stat. 267; 16 U.S.C. §§ 5101-5108 (2000).

91. Resolution 29-2, Resolution Concerning Energy (Aug. 29, 2005), *available at* http://www.negc.org/documents/Resolutions.pdf.

tial, but the incentives to expend the resources to work in a regional fashion are still vague.

The PTD not only provides states with a mechanism to manage marine resources, but also provides a common basis for managing their own and shared marine resources. Furthermore, the Doctrine calls for states to act as trustees, a principle codified in state constitutions and statutes. It is this trust principle that should guide the evolution of ROG in the Northeast and across the country.