

Putting The Public Trust Doctrine To Work

SECOND EDITION

The Application of the Public Trust Doctrine
To the Management of
Lands, Waters and Living Resources
Of the Coastal States

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PUTTING THE PUBLIC TRUST DOCTRINE TO WORK

SECOND EDITION

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PREFACE

The Public Trust Doctrine

*A Legal Legacy From Emperors and Kings to the American Public —
The Right to Use and Enjoy America's Trust Lands and Waters*

“But look! here come more crowds, pacing straight for the water, and seemingly bound for a dive. Strange! Nothing will content them but the extremist limit of land. ... No. They must get just as nigh the water as they possibly can without falling in. And there they stand — miles of them — leagues! Inlanders all, they come from lanes and alleys, streets and avenues — north, east, south, and west. Yet here they all unite! Tell me, does the magnetic virtue of the needles of the compasses of all these ships attract them thither?”

Herman Melville, *Moby Dick*

Melville's leagues of inlanders rushing to the shore, as if drawn by magnets, are but the ancestors of the millions of Americans who today turn to “the extremist limit of land” — the beaches and shores of America's waterways. Nor do they stop there, but continue onwards out to the open waters. For unlike in Melville's day, when only great ships sailed the high seas, today's citizens often own sailing craft to carry them beyond the shores and out to the open waters.

These lands and waters, historically used for commerce, navigation and fishing, are now the major residential and recreational areas of the Nation. Beaches, resorts, marinas, harbors and the general lure of the waters bring people to the coasts in droves to fish, surf, bathe, sunbathe, sail, build, stroll and live their time-honored “pursuit of happiness.”

As more and more answer the call of the coast, the public will face increasing difficulty to enjoy and use the very shores and waters they seek. This seemingly endless demand, increasing every day, to enjoy and use the shorelands and waters places great pressures upon those charged with managing these resources. Fortunately, coastal managers have a variety of legal “tools” to utilize in their effort to fairly allocate these finite coastal resources among the ever growing number of people. Interestingly, one of these tools arises from an ancient body of law — over 1,500 years old — known today as the Public Trust Doctrine.

The Public Trust Doctrine has been called “one of the most important and far-reaching doctrines of American property law.” Nonetheless, over the centuries

since the United States was founded, the doctrine fell into disuse and neglect. Recent United States Supreme Court cases, particularly the 1988 case *Phillips Petroleum v. Mississippi*, have reaffirmed and reinvigorated the application and importance of the Public Trust Doctrine to coastal resource management.

Due to this new recognition, and the complexity of this field of law, 29 coastal States joined together to study the application and use of the Public Trust Doctrine, and to demonstrate that the doctrine can be a useful tool for anyone charged with managing coastal resources. In 1990 the Coastal States Organization published *Putting the Public Trust Doctrine to Work*, a product of research conducted by legal counsel from all of these States. The book provided for the first time a complete compilation of how this traditional doctrine of land and water law came to the United States centuries ago, and how it was being applied in today's modern world.

Over history the Public Trust Doctrine has eddied back and forth as if tugged by the ebb and flow of the tide. Yet, over this great expanse of time a relatively clear and constant core of public trust rights in navigable waters, the lands beneath and the living resources therein, has survived. At the same time, the States vary greatly in their application of the doctrine. As the U.S. Supreme Court stated in the 1894 *Shively v. Bowlby* case:

“There is no universal and uniform law on the subject; ... Each State applies the doctrine to the lands under the tide waters within its borders according to its own views of justice and policy. ... Great caution, therefore, is necessary in applying the precedents in one State to cases arising in another.”

Since 1990 much has happened in the field of Public Trust law. Indeed, the first edition of *Putting the Public Trust Doctrine To Work* was probably responsible for a substantial re-emergence of the recognition and use of the doctrine in coastal resource management. This second edition, like the first, is a product of research by many legal practitioners in the various coastal States. It is the hope that this second edition will to serve to improve the stewardship of the State trustees over these lands, waters and living resources therein for the current and future generations. As eloquently put by the Arizona Supreme Court in *Arizona Center for Law in the Public Interest v. Hassell*, a 1991 Public Trust Doctrine case:

“That generations of trustees have slept on public rights does not foreclose their successors from awakening.”

GLOSSARY

NOTE: Terms and definitions used herein are for purposes of this volume only. Identical terms within the footnotes of this volume have the meanings and definitions attached to them in accordance with that State's law. The meaning and use of the following terms may differ under the various State and Federal laws. Practitioners are advised to always refer to the appropriate State or Federal definitions.

Accretion: The gradual and imperceptible accumulation of alluvion (soil) by natural causes. This may result from a deposit of alluvion upon the shore, or by a recession of the water from the shore. Accretion is the act, while alluvion is the deposit itself.

Avulsion: The loss of lands bordering on the seashore by sudden or violent action of the elements, perceptible while in progress; a sudden and rapid change in the course and channel of a boundary river.

Bottom lands: Land below navigable freshwater bodies.

Dry sand beach: Sandy area between the mean high tide line and the vegetation line.

Erosion: The gradual and imperceptible washing away of the land by natural causes.

Foreshore: The strip of land between the ordinary high and low water marks that is alternately covered and uncovered by the flow of the tide. Often used synonymously with "wet sand beach."

Freshwaters: Waters that do not ebb and flow with the tide. The determinative factor is that the water body does not ebb and flow with the tide, not the salt content of the water.

Jus privatum: The proprietary rights in the use and possession of land beneath tidal waters and navigable freshwaters. The *jus privatum* interest is often held by the State in tandem with the *jus publicum* interest, but may be conveyed in the form of title ownership or lessor freehold to a private individual or entity.

Jus publicum: The collective rights of the public to fully use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes. A State cannot convey the *jus publicum* interest into private ownership, nor can it abdicate its trust responsibilities.

Littoral: Associated with or appurtenant to shorelands of tidal waters. As used herein, the term "littoral" is included in the term "riparian." These two terms are often used synonymously.

Mean high tide: The mean average of all the high tides (high high tides and low high tides) occurring over a certain period of time, usually 18.6 years (one lunar epoch).

Mean low tide: The mean average of all the low tides (high low tides and low low tides) occurring over a certain period of time, usually 18.6 years (one lunar epoch).

Ordinary high water mark: The line to which high water normally reaches under natural conditions, but not including floods, storms, or severe meteorological conditions.

Ordinary low water mark: The line to which low water normally reaches under natural conditions, but not including droughts or severe meteorological conditions.

Prima facie public trust lands: Lands that appear to be subject to the Public Trust Doctrine in that they lay beneath tidal or navigable-in-fact waters below the ordinary high water mark.

Public trust servitude: The bundle of rights held by the public to use and enjoy privately held trust lands for certain public purposes. The burden on the subordinate *jus privatum* owner by the dominant *jus publicum* interest of the public.

Riparian: Associated with or appurtenant to shorelands of non-tidal waters. As used herein, the term "riparian" includes the term "littoral." These two terms are often used synonymously.

Riparian rights: The rights of an owner of land contiguous to a navigable body of water, including principally the right of access to the water, the right to accretion and reliction, and the right to other improvements.

Shorelands: General term including tidelands and navigable freshwater shores below the ordinary high water mark.

Submerged land: Land lying below tidal waters, seaward of the ordinary low water mark, including bays, inlets and other arms of the sea, out to the seaward boundary of the State.

Tideland: Land that is covered and uncovered by the daily rise and fall of the ordinary tides; the zone between the "ordinary high water mark" and the "ordinary low water mark."

Tidewaters: Waters that markedly and regularly ebb and flow in response to the gravitational forces of the moon and sun.

Upland: Land lying above the "ordinary high water mark."

Wet sand beach: Area between the ordinary high tide and the ordinary low tide lines.

CHAPTER I

ORIGINS, HISTORY AND IMPORTANCE OF THE PUBLIC TRUST DOCTRINE

Summary

The Public Trust Doctrine provides that public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all of the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses. The doctrine also sets limitations on the States, the public, and private owners, as well as establishing the responsibilities of the States when managing these public trust assets.

In general, public trust waters are the “navigable waters” in a State, and public trust lands are the lands beneath these waters, up to the ordinary high water mark. The living resources (*e.g.* the fish and aquatic plant and animal life) inhabiting these lands and waters are also subject to the Public Trust Doctrine.

The Public Trust Doctrine dates back to the sixth century Institutes and Digest of Justinian, which collectively formed Roman civil law. The Institutes, however, were based upon the second century Institutes and Journal of Gaius. The Institutes of Justinian remain the touchstone of today’s Public Trust Doctrine. The Institutes assured the citizens of Rome that “By the law of nature these things are common to all mankind — the air, running water, the sea, and consequently the shore of the sea. No one, therefore is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.”

Public trust lands are special in nature. They are generally unsuitable for commercial agriculture or permanent structures. Because of the “public” nature of trust lands, the title to them is not a singular title in the manner of most other real estate titles. Rather, public trust land is vested with two titles: the *jus publicum*, the public’s right to use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes, and the *jus privatum*, or the private proprietary rights in the use and possession of trust lands.

Whenever a State exercises its public trust authority, it does so immediately adjacent to some of the most expensive real estate in America — waterfront property. Given the strong property (riparian) interests of private upland owners, coupled with the confusion over riparian “rights” and how the Public Trust Doctrine applies, coastal managers need to be keenly aware that their actions under the doctrine may be met with strong resistance.

CHAPTER I

A. The Public Trust Doctrine: Why is it Important?

In 1820, a New Jersey man was collecting oysters along the shores when he was challenged as a trespasser by the upland property owner. The dispute reached the New Jersey Supreme Court, where a justice expressed surprise that the taking of:

“a few bushels of oysters should involve in it questions, so momentous in their nature, as well as in their magnitude; ... affecting the rights of all our citizens, and embracing ... the laws of Nations and of England, the relative rights of sovereign and subjects, as well as the municipal regulations of our own country.”¹

If the taking of a few oysters raises such fundamental questions affecting the rights of all citizens, then clearly the building of private docks, industrial wharves, marinas, or the dredging of ship channels, among the countless other activities within the purview of coastal managers, merit close attention. In each instance, from oysters to ports, the Public Trust Doctrine applies. Whenever a State exercises its authority under the Public Trust Doctrine, the rights of all citizens are involved.

Generally speaking, all navigable waters and the lands beneath these waters are subject to the Public Trust Doctrine. *See* Ch. II, § 1. In the United States, there are 79,481 square miles of inland navigable waters, 74,364 square miles of coastal waters, and an estimated 37,500 square miles of ocean waters within the jurisdiction of the coastal States. This totals to approximately 191,000 square miles of navigable waters within the boundaries of the States — roughly equal in size to Maryland, Virginia, North Carolina, South Carolina and Georgia combined — most of which is subject to the Public Trust Doctrine. Further, there are 88,633 miles of tidelands and 10,031 miles of Great Lakes shoreline, for a total of 98,664 miles of trust shoreland. Along this tremendous length of shoreline, over 90 percent of the adjacent uplands are privately owned, raising difficulties for the public to access the trust shorelands below the ordinary high water mark.

The Public Trust Doctrine is a very important part of the body of law that applies to this tremendous and special area of lands and waters. To effectively manage the countless activities that take place within these 191,000 square miles of navigable waters, including the lands beneath and the living resources inhabiting them, a coastal manager must be familiar with the Public Trust Doctrine.

B. The Public Trust Doctrine: What Is It?

The Public Trust Doctrine provides that public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all of the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses. The Public Trust Doctrine is applicable whenever navigable waters or the lands beneath are altered, developed, conveyed, or otherwise managed or preserved. It applies whether the trust lands are publicly or privately owned. The doctrine articulates not only the public rights in these lands and waters. It also sets limitations on the States, the public, and private owners, as well as establishing duties and responsibilities of the States when managing these public trust assets. *See* Ch. VI. The Public Trust Doctrine has been recognized and affirmed by the United States Supreme Court, the lower federal courts and State courts from the beginning days of this country to the present.

The "trust" referred to is a real trust in the legal sense of the word. There are trust assets, generally in the form of navigable waters, the lands beneath these waters, the living resources therein, and the public property interests in these trust assets. The trust has a clear and definite beneficiary: the public, which includes "not just present generations but those to come."² There are trustees: the State legislatures, which often delegate their trust powers and duties to State coastal commissions, land commissions, or similar State agencies, as well as municipalities. These trustees have a duty to protect the trust. There is a clear purpose for the trust: to preserve and continuously assure the public's ability to fully use and enjoy public trust lands, waters and resources for certain public uses.³

In the United States, each State has the authority and responsibility for applying the Public Trust Doctrine to trust lands and waters "within its borders according to its own views of justice and policy."⁴ As a result, there is really no single "Public Trust Doctrine." Rather, there are over fifty different applications of the doctrine, one for each State, Territory or Commonwealth, as well as the federal government. Nonetheless, a common core of principles remains, forming the foundation for how the Doctrine is applied in each State, Commonwealth or Territory. *See* Ch. II, § 1.A.1 and 2.

C. Origins of the Public Trust Doctrine

It is often stated that the Public Trust Doctrine dates back to the sixth century Institutes of Justinian and the accompanying Digest, which collectively formed

CHAPTER I

Roman civil law, codified under the reign of the Roman Emperor Justinian between 529 and 534 A.D. The sixth century Institutes of Justinian, however, were based, often verbatim,⁵ upon the second century Institutes and Journal of Gaius,⁶ an eminent Roman jurist, who codified the natural law of Greek philosophers. The sixth century Romans who wrote the Institutes must have regarded the Institutes of Justinian as the re-codification of ancient law.

Ancient in their own right, as well as a recodification of even more ancient law, the Institutes of Justinian remain the touchstone of today's Public Trust Doctrine. The public's right to full use of the seashore emanates from a commonly quoted section of Book II of the Institutes that described the public nature of rivers, ports, and the seashore:

“By the law of nature these things are common to all mankind — the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations.”⁷

Specific public rights in the use of the seashore were delineated in the Institutes and the Digest, such as:

- “Any person is at liberty to place on it a cottage, to which he may retreat, or to dry his nets there, and haul them from the sea.”⁸
- “The right of fishing in the sea from the shore belongs to all men.”⁹
- “Everyone has a right to build on the shore, or, by piles, upon the sea, and retain the ownership of the construction so long as it lasts, but when it falls into ruins, the soil reverts to its former status as *res communis*.”¹⁰
- “The public use of the banks of a river is part of the law of nations, just as is that of the river itself. All persons, therefore, are as much at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and to place any part of their cargo there, as to navigate the river itself. But the banks of a river are the property of those whose land they adjoin; and consequently the trees growing on them are also the property of the same persons.”¹¹

Roman civil law eventually influenced the jurisprudence of all Western European nations. Most important to American jurisprudence, Roman civil law was adopted in substance (with modifications) by English common law after the Magna Charta.

English common law in turn recognized the special nature of the tidelands and waters, giving them protection in the king's name for all English subjects. From England to the American colonies, through the American Revolution to the Thirteen Original States, tempered by the United States Constitution and the evolution of modern society, the Public Trust Doctrine survives in the United States as "one of the most important and far-reaching doctrines of American property law."¹²

D. The Special Nature of Public Trust Lands

Public trust lands, generally speaking, are those lands below navigable waters, with the upper boundary being the ordinary high water mark. Tidelands, shorelands of navigable lakes and rivers, as well as the land beneath the oceans, lakes and rivers, are usually considered public trust lands. *See* Chapter II, § 1.

The Romans recognized the special status of the seashore: "The shores are not understood to be property of any man, but are compared to the sea itself, and to the sand or ground which is under the sea."¹³ English common law viewed these shorelands as useless for cultivation or other improvement and considered their natural and primary uses — navigation, commerce and fishing — to be public in nature.

Under American law, the public nature of shorelands is well recognized. Tidelands, as well as the shorelands of navigable freshwaters, are generally unsuitable for commercial agriculture. The action of the wind, waves, tide and salt make any type of commercial farming impossible. Navigable waters have long been recognized as the equivalent of highways, being vast corridors for water-borne commerce.¹⁴ In the early days of the country, the immediate shores of these waters were needed in order to conduct that commerce. Sailors tied their boats to trees for the night. Fishermen hoisted their skiffs far up the beach for the night, and dried or repaired their nets on the beach. In short, the uses to which these lands were put were public in nature. The Public Trust Doctrine "is founded upon the necessity of preserving to the public the use of navigable waters free from private interruption and encroachment."¹⁵

The public character of trust lands has been noted by the United States Supreme Court as well as several State supreme courts. For example, the United States Supreme Court noted that tidelands are "unfit for cultivation, the growth of grasses or other uses to which upland is applied."¹⁶ State courts have similar descriptions of trust shorelands. "Throughout history, the shores of the sea have been

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recognized as a special form of property of unusual value; and therefore subject to different rules from those which apply to inland property.”¹⁷ “Beaches are a unique resource and are irreplaceable.”¹⁸ “Oceanfront property is uniquely suitable for boating and other recreational activities. Because it is unique and highly in demand, there is growing concern about the reduced ‘availability to the public of its priceless beach areas.’”¹⁹ For these reasons, the title to public trust land is:

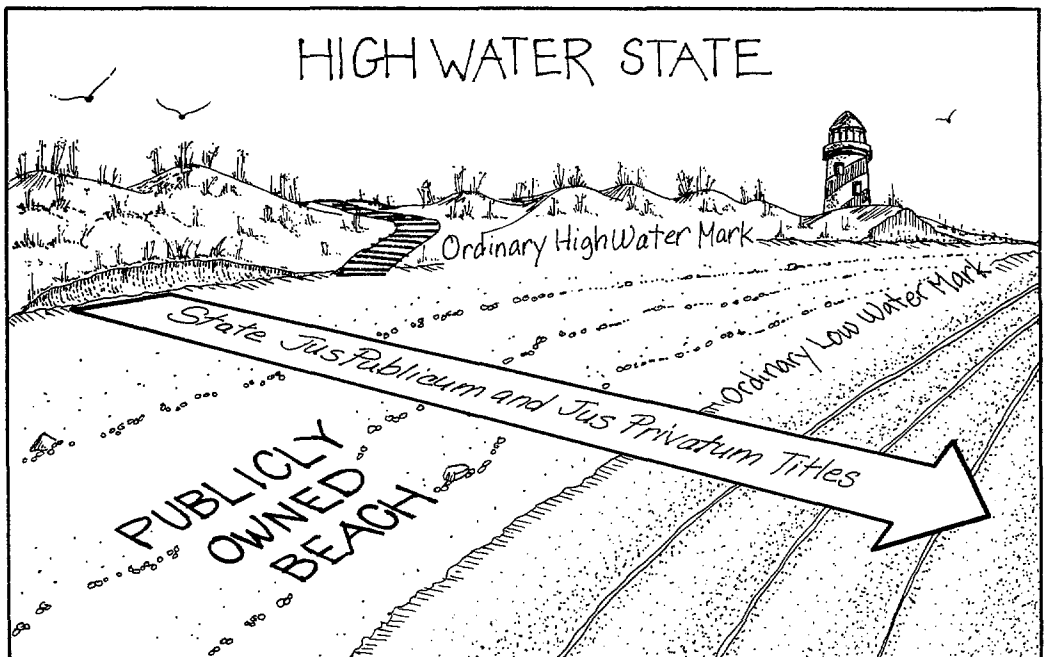
“a title different in character from that which the state holds in lands intended for sale. It is different from the title the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”²⁰

While trust lands have long been considered suitable for public purposes, this does not mean that a State is powerless to convey any interest in trust land to private ownership. To the contrary, States do have this power, and several of them have conveyed tremendous amounts of acreage of trust lands into private ownership. But because of the special nature of trust lands for public uses, conveyance from the State to private ownership does not by itself terminate the public’s right to continue to use those lands for certain purposes. In order to convey trust lands, while preserving the public’s rights to use them, the law resorts to a legal fiction of splitting the title to trust lands in two: a proprietary title, the *jus privatum*, and the public’s equitable title, held by the State in trust, the *jus publicum*.

E. The Jus Privatum and Jus Publicum in Public Trust Land

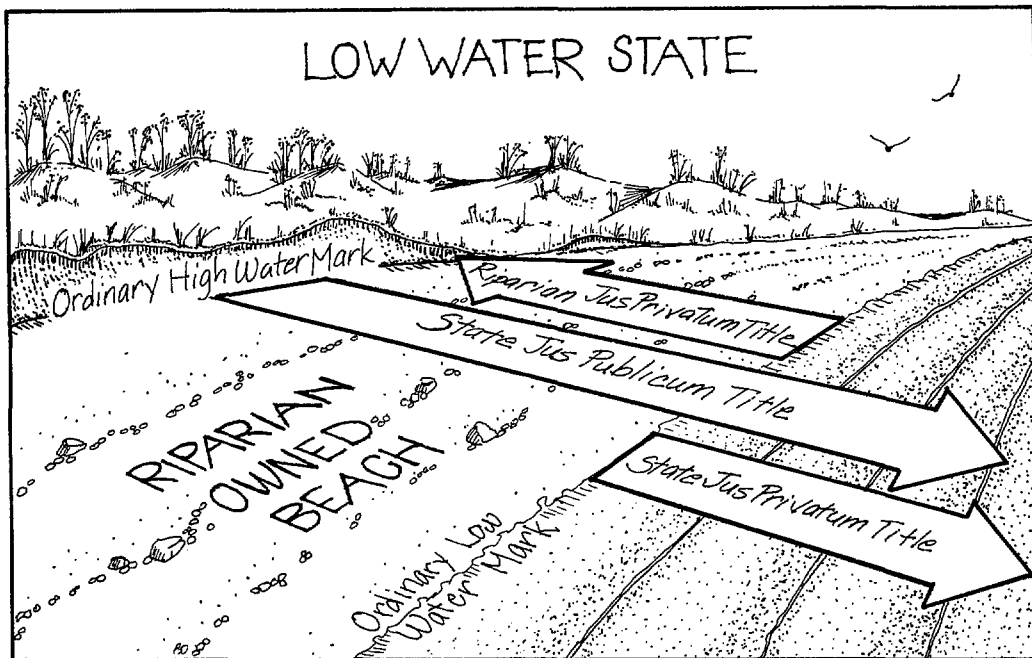
Because of their special and public nature, the title to public trust lands is not a singular title in the manner of most other real estate titles. Rather, public trust land is vested with two titles, one dominant and the other subservient, a concept necessary to understand in order to apply the Public Trust Doctrine. The dominant title is the *jus publicum*, simply described as the bundle of trust rights of the public to fully use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes. The subservient title is the *jus privatum*, or the private proprietary rights in the use and possession of trust lands. The distinction between the two titles is often cited by the courts when they define a State’s authority to convey public trust land to private ownership, and when describing the rights of the public remaining in public trust land that has been so conveyed.

In most States, the upland owner's boundary is the "ordinary high water mark." See Ch. II, §2. In these "high water" States, the State is the "fee simple absolute" owner of public trust land, owning both interests — the private (*jus privatum*) and public (*jus publicum*) titles.²¹ The State has the proprietary rights of a private landowner, which include the right to possess and convey the property, under its *jus privatum* interests. At the same time, the State holds the separate *jus publicum* title, the "trust" title, derived from its basic sovereign obligation to act in the best interests of its citizens. From this obligation derives the State's power to govern, manage and protect the public's trust rights in lands and water subject to the Public Trust Doctrine.²²



In "high water" States, the State holds both *jus publicum* (trust) and *jus privatum* (proprietary) titles.

In several States, the upland owner's boundary is the "ordinary low water mark" or some other line seaward of the ordinary high water mark. See Ch. II, §2. In these "low water" States, the upland owner holds the *jus privatum* title in the tidelands, while the State retains the *jus publicum* title. Thus, even though the upland owner "owns" the beach or submerged lands, that ownership is still subject to several paramount rights of the public to use those trust lands for public trust purposes. See Ch. V, B.



In "low water" States, the State continues to hold the *jus publicum* (trust) even though the *jus privatum* (proprietary) title is privately held.

Both the *jus publicum* and the *jus privatum* are property interests. Although both procedural and substantive limitations exist, a State can convey the *jus privatum* interest into private ownership. On the other hand, a State cannot convey the *jus publicum* interest into private ownership, nor can it abdicate its trust responsibilities. In certain limited situations, a State can terminate the *jus publicum* in small parcels of trust lands. See Ch. V.

F. Takings, Expectations, Taxes and the Public Trust Doctrine

A central strength of using the Public Trust Doctrine as a management tool for coastal resources is that the State holds a continuing property interest, the *jus publicum*, in the trust lands, waters and living resources, regardless of whether the *jus privatum* is held by the State or private owner. This allows the State to manage these resources as a property owner without having to exercise either its regulatory police powers or its powers of eminent domain.

At the same time, whenever a State exercises its public trust authority, it does so immediately adjacent to some of the most expensive real estate in America — waterfront property. Waterfront (riparian) property owners justifiably can harbor strong opinions about their riparian property interests, especially if they also own the *jus privatum* rights in the adjacent public trust land.

Usually a private *jus privatum* owner of public trust land pays property taxes on the trust lands, lending a certain credence to the private owner's perception that she has sole possession and control of the property, exclusive of the public. Adding to the confusion, boundary descriptions in deeds and property titles of waterfront property often are silent as to any *jus publicum* retained by the State, giving the landowner the further expectation that she has exclusive rights of possession and use of the land. Boundary descriptions may simply state that the property extends "to the water" or even to the "low water mark," or some similar phrase. Waterfront property owners commonly regard their property as extending to where the water level is, or to the low water mark, unaware that the State has a reserved *jus publicum* interest up to the "ordinary high water mark" — a boundary line that presents difficult factual determination problems. It is also very common for a commercial upland owner, such as a resort or marina owner, to have a strong economic interest in the use of adjacent publicly owned trust lands and waters.

Given the strong property interests of private upland owners, coupled with the confusion over riparian "rights" as well as the distinction of the *jus publicum* and *jus privatum* in trust lands and how the Public Trust Doctrine applies, coastal managers need to be keenly aware that their actions under the doctrine may be met with strong resistance. Claims of private property "takings" and charges of governmental interference in private property rights can, and should, be expected.

When acting under the authority of the Public Trust Doctrine, however, the State and State agencies are in a strong position to defend against "takings" claims. Public trust land has been held by the State in trust for the benefit of the public since Statehood. *See* Ch. II, §1.A.2. Therefore, public trust land that has been conveyed to private ownership has always been burdened by the public's trust rights. Given this, a State's management of the public's trust assets should be less vulnerable to, although not totally immune from, takings challenges. Because the owner received the trust land already burdened by the public's trust rights, a private owner's argument that she had unfettered investment-backed expectations is far more tenuous. *See* Ch. X.C.

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Notes

1. *Arnold v. Mundy*, 6 N.J.L. 1, 95 (1821)(Rossell, J., concurring opinion).
2. AZ: *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 169 (Ariz.App.Div. 1 1991).
3. ID: *Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District*, 733 P.2d 733, 738, 112 Idaho 512 (1987)(“The public trust doctrine is based upon common law equitable principles. That is, the administration of land subject to the public trust is governed by the same principles applicable to the administration of trusts in general.”)(citing Bogert & Bogert, *Law of Trusts*, §6 (1973)).

NJ: *Slocum v. Borough of Belmar*, 569 A.2d 312, 316-17, 238 N.J.Super. 179 (1989)(The Borough of Belmar, as a municipality chartered by the State, is trustee over the public trust resources within its jurisdiction. As trustee, it has a duty of “loyalty,” “disclosure,” and “to keep clear and adequate records of accounts.” ... “When the trustee fails to keep proper accounts, all doubts are resolved against him”).
4. *Shively v. Bowlby*, 152 U.S. 1, 26 (1894).
5. “Over one-half of the Institutes of Justinian is borrowed bodily from the text of Gaius.” Sherman, C. *Roman Law in the Modern World*, 3rd. Ed. Vol. I., at 121, 122.
6. Sandars, T., *The Institutes of Justinian*, 4th Ed. 1867, at 73, translating the Institutes, Proemium, § 4, 5, 6.
7. Institutes 2.1.1, as translated by T. Sandars, *supra* note 6.
8. Institutes 2.1.5, as translated by T. Sandars, *supra* note 6.
9. Digest of the Institutes of Justinian, D.1,8,4, as translated in Hunter, W., *Roman Law* by J. Cross, 4th Ed. at 310 (1903).
10. Digest of the Institutes of Justinian, D.1,8,6, as translated in Hunter, W., *Roman Law* by J. Cross, 4th Ed. at 310 (1903).
11. Institutes 2.1.4, as translated by T. Sandars, *supra* note 6.
12. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water*, 3 FLA. STATE UNIVERSITY L. REV. 511 (1975).

13. Institutes of Justinian 2.1.5., as translated by T. Sandars, *supra* note 6.
14. US: *Packer v. Bird*, 137 U.S. 661, 667 (1891) (“It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon [navigable waterways.]”).
15. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 436 (1892). See also *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 488 (1988)(Justice O’Connor dissenting).
16. *San Francisco v. Le Roy*, 138 U.S. 656, 672 (1890). See also *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 122-123 (1981) (“For centuries, land below the low water mark has been recognized as having a peculiar nature, subject to varying degrees of public demand for rights of navigation, passage, portage, commerce, fishing, recreation, conservation and aesthetics. Historically, no developed western civilization has recognized absolute rights of private ownership in such land as a means of allocating this scarce and precious resource among the competing public demands. Though private ownership was permitted in the Dark Ages, neither Roman Law nor the English common law as it developed after the signing of the Magna Charta would permit it.”); *Kaiser Aetna v. United States*, 444 U.S. 164, 183 (1979)(The “geographical, chemical and environmental” qualities makes lands beneath tidal waters unique)(Blackmun, J., dissenting); *Shively v. Bowlby*, 152 U.S. 1, 57 (1894) (“Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark.”).
17. *Boston Waterfront Development Co. v. Commonwealth*, 378 Mass. 629, 631 (1979).
18. *Matthews v. Bay Head Improvement Ass’n.*, 471 A. 2d. 355, 364 (N.J. 1984).
19. *Lusardi v. Curtis Point Property Owners Ass’n.*, 86 N.J. 217, 227-228 (1981), quoting from *Van Ness v. Borough of Deal*, 78 N.J. 174, 180 (1978).
20. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

NY: *Coxe v. State*, 144 N.Y. 396, 405-406 (1895) (“The title of the state to the seacoast and shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has been frequently said that a trust is engrafted upon this title for the benefit of the public of which the state is powerless to divest itself.”).

MA: *Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629, 631, 393 N.E.2d 356, 358 (1979)(Different legal rules apply to public trust lands beneath navigable waters as compared to state-held title in other land).

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- VT: *State of Vermont and City of Burlington v. Central Vermont Railway, Inc.*, 153 Vt. 337, 571 A.2d 1128 (1989) (“The character of this title is distinctive as compared to state-held title in other lands ... and different legal rules therefore apply.”).
21. WA: *Orion Corporation v. State*, 109 Wn.2d 621, 639, 747 P.2d 1062, 1072 (1987) (“State ownership of [trust] property has two aspects, the private property interest, which reflects the State’s title to the property, and the public authority interest, which reflects the State’s sovereignty and dominion.”) *cert. denied* 108 S.Ct. 1996 (1988); *Caminiti v. Boyle*, 732 P.2d 989, 992 (1987) (“it is clear that the state’s ownership of tidelands and shore lands is not limited to the ordinary incidents of legal title, but is comprised of two distinct aspects.”).
- US: *United Staes v. 1.58 Acres of Land*, 523 F.Supp 120, 124 (1981) (“When the federal government takes such property by eminent domain ... [it] obtains the fullest fee that may be had in land of this peculiar nature; the *jus privatum* and the *jus publicum*.”).
22. CT: *Lane v. Harbor Commission*, 70 Conn. 685, 694 (1898) (“The State has the *jus publicum*, or right of governing its shores and navigable waters for the protection of public rights.”).
- VT: *State of Vermont and City of Burlington v. Central Vermont Railway*, 153 Vt. 337, 571 A.2d 1128 (1989) (Comparing the 1874 and 1827 Acts, court concludes that legislature meant to convey only the “legal title” while recognizing that the beneficial title to the public trust lands at issue was vested in the public).

CHAPTER II

LANDS, WATERS AND LIVING RESOURCES SUBJECT TO THE PUBLIC TRUST DOCTRINE

Section 1: Lands, Waters and Living Resources Generally Recognized as Subject to the Public Trust Doctrine

Summary

In general, public trust waters are the “navigable waters” in a State, and public trust lands are the lands beneath these waters, up to the ordinary high water mark. The living resources, *e.g.* the fish and aquatic plant and animal life, inhabiting these lands and waters are also subject to the Public Trust Doctrine.

To determine what lands, waters and living resources are subject to the Public Trust Doctrine in any specific State, however, one must understand the historical underpinnings of the doctrine, the process of the doctrine’s perpetuation from the Thirteen Original States to the 37 new States, and the evolution of the keystone term “navigable waters” as defined under Federal and State law.

English common law recognized public rights in all tidewaters and the lands beneath. In England, the term “tidewaters” and “navigable waters” were synonymous. The presumption was that tidelands were owned by the king, although a grant of the *jus privatum* interest could be conveyed into private hands. In such a case, the *jus publicum* interest remained dominant to the *jus privatum* interest.

English common law became the law of the thirteen colonies, and then of the Thirteen Original States. Each of the Thirteen Original States held, and continues to hold, a public trust interest in its tidelands up to the ordinary high water mark. Each also had, and continues to have, the authority to define the boundaries of the lands held in public trust as well as the authority to recognize private rights in its trust lands, and thus diminish the public’s rights therein as they see fit.

As the Thirteen Original States held their lands beneath navigable waters in trust, so did the 37 new States receive them on an equal footing with the Thirteen Original States. The

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question of what lands each of the 37 new States, in contrast to the Thirteen Original States, received in trust upon entering the Union is a Federal question. Because the term 'navigable waters' has evolved and changed over time, one must look to the Federal law at the time the State entered the Union to determine what trust lands passed to the State upon statehood.

Living resources are also being recognized as trust assets. Thus, not only is fishing a traditionally recognized public trust use (*see* Ch. III.A.2) but fish and all other aquatic wildlife form a part of the trust's assets.

After statehood, State law (if not in conflict with Federal law) applies to determine ownership of the lands beneath navigable waters, as well as the public rights in those waters. As a result, as the definition of navigable waters has changed and evolved on both the Federal and State level, so too has the area of lands and waters subject to the Public Trust Doctrine.

English common law has evolved into the American Public Trust Doctrine from colonial times to the present. A fundamental characteristic of the Public Trust Doctrine is its dynamic nature. Because the doctrine establishes public rights to fully enjoy and use public trust lands and waters — uses that change over time — the doctrine will continue to evolve as the needs and mores of society change, particularly in the face of the increasing pressures and demands placed on coastal resources.

To apply the Public Trust Doctrine to specific lands, waters or living resources, it must first be determined whether the lands or waters in question are indeed within the geographic scope of the doctrine. If the lands or waters lie within the scope of the doctrine, then the State can govern and manage the public's trust rights as a property owner, in contrast to regulating privately owned property through the State's police powers.

A. Public Trust Lands and Waters: A Dynamic and Evolving Concept

The legal description of lands and waters subject to the Public Trust Doctrine has changed with the continuously evolving Federal and State definitions of the term “navigable waters” as well as with the social growth and commercial development of the country. As a result, determining which lands and waters are subject to the Public Trust Doctrine in today’s world requires an understanding of the historical underpinnings of the doctrine, the process of the doctrine’s perpetuation from the Thirteen Original States to the 37 new States, and the evolution of the keystone term “navigable waters” as defined under Federal and State law.

1. Roman Civil Law, English Common Law and the Thirteen Original States

a. Roman Civil and English Common Law

Under Roman civil law, the sea, its branches and arms, the shores and rivers were considered “common to all.”

“And truly by natural right, these be common to all; the air, running water, and the sea, and hence the shores of the sea. Also all rivers and ports are public, so that the right of fishing in a port and in rivers is common to all. And by the law of nations the use of the shore is also public, and in the same manner as the sea itself”¹

These principles of Roman civil law were preserved, generally speaking, by English common law after the Magna Charta. However, two fundamental changes occurred in the transition. First, under English common law, only tidal waters were considered “navigable.” Thus, in England, the common law limited the public’s trust rights to tidal waters and the lands beneath. Second, unlike Roman civil law, wherein the waters and shores were considered incapable of being owned (*res nullius*), English common law “assign[ed] to everything capable of occupancy and susceptible of ownership a legal and certain proprietor, [and] to make those things which from their nature cannot be exclusively occupied and enjoyed, the property of the sovereign.”²

By operation of English common law, all tidal waters and the lands beneath were divided into two interests of ownership: the public’s rights of use (*jus publicum*) held by the sovereign embodied by the Parliament, and private rights of possession and exclusive use (*jus privatum*), presumptively held by the king unless

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demonstrated that a royal grant had conveyed it to a private proprietor. See Chapter I.E for a discussion of the *jus publicum*, *jus privatum*, and Chapter V.A, for the conveyance of public trust lands.

b. Adoption and Adaptation of English Common Law by the Thirteen Original States

As the United States Supreme Court stated nearly 100 years ago, "The common law of England ... at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several Colonies and States, or by the Constitution and the laws of the United States."³ Hence, "upon the American Revolution, all the rights of the Crown and Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States."⁴ However, "since the revolution, no part of the common law has been adopted except that which was proper for our country."⁵ In short, English common law continued to change and evolve during colonial times, the post-Revolution period, and after the ratification of the United States Constitution. Thus, because it provided the foundation for colonial law but was subject to change by the States after the Revolution, the English common law is of central, but not controlling, importance.

In the 1935 case *Borax Consolidated, Ltd. v. Los Angeles*, the United States Supreme Court was faced with the question of the upper boundary of tidelands, and carefully reviewed the English common law of the tidelands. The Court looked specifically at the "extent of the right of the Crown to the seashore."⁶ Discussing the leading English case of *Attorney General v. Chambers*, decided in 1789,⁷ the Supreme Court noted that the English court held that "the medium high tide between the springs and the neaps" must be treated "as bounding the right of the Crown."⁸

Note that the *Chambers* case was decided less than two years after the U.S. Constitution was ratified by the Thirteen Original States. This strongly suggests that the thirteen colonies, and then the thirteen confederated States, held sovereign control over their seashores up to the "medium high tide line between the springs and the neaps." As noted, however, after the Revolution each colony was free to modify the common law as necessary with respect to the uses and physical character of her own shorelands. Thus, "it has been long-established that the individual States have the authority to define the limits of the lands held in public trust"⁹ In fact, each of the Thirteen Original States, based on its own law, determined the extent of their public trust shorelands. That is, each individually

defined, either legislatively or judicially, what the term “ordinary high water mark” meant. Most of the Thirteen Original States determined this term to the “mean high tide line,” in accordance with the 1789 English *Chambers* case. Others, such as Georgia, based on her laws, geography and usage, determined that her trust shorelands extend to the upper limit of the salt marsh, a boundary co-extensive with the upper reach of the regular ebb and flow of the tide that extends above the elevation of mean high water.¹⁰ See Ch. II, § 2 for discussion of the upper boundary of public trust lands.

Further, “it has been long-established that the individual States have the authority to ... recognize private rights in such lands as they see fit.”¹¹ As a result, “some of the original States, for example, did recognize more private interests in tidelands than did others of the 13 — more private interests than were recognized at common law, or in the dictates of our public trust cases.”¹²

The United States Supreme Court, in a seminal American public trust decision, *Shively v. Bowlby*, reviewed and summarized the laws of the Thirteen Original States. After this summary the Court stated that “there 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.”¹³ Therefore, the Supreme Court went on to say, “Great caution ... is necessary in applying precedents in one State to cases arising in another.”¹⁴

Nonetheless, several core principles were common to all thirteen of the original States when the Constitution was ratified. These core principles, discussed and developed individually by both State and Federal courts, were passed on to the 37 ‘new’ states that have since joined the Union. Generally, each State, through its legislature:

- Has public trust interests, rights and responsibilities in its navigable waters, the lands beneath these waters, and the living resources therein;
- Has the authority to define the boundary limits of the lands and waters held in public trust;
- Has the authority to recognize and convey private proprietary rights (the *jus privatum*) in its trust lands, and thus diminish the public’s rights therein, with the corollary responsibility not to substantially impair the public’s use and enjoyment of the remaining trust lands, waters and living resources;

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- Has a trustee's duty and responsibility to preserve and continuously assure the public's ability to fully use and enjoy public trust lands and waters for certain trust uses; and
- Does not have the power to abdicate its role of trustee of the public's *jus publicum* rights, although in certain limited cases the State can terminate the *jus publicum* in small parcels of trust land.

In terms of applying public trust law in the Thirteen Original States, however, it is important to note that they differ from the 37 subsequent States in two significant ways. First, they received sovereignty, dominion, ownership and control over their tidelands and waters through military conquest upon the defeat of the British forces in the American Revolution; they were not admitted into the Union, they formed the Union.

Second, the Thirteen Original States, under the Articles of Confederation, did not cede their tidelands to the new Federal government as they did their western lands when they adopted the Articles of Confederation, or when the Confederated Congress enacted the Northwest Ordinance of 1787 (discussed below). Nor did this change when the first Congress reenacted the Northwest Ordinance on August 7, 1789.¹⁵ Thus, at the time of the adoption of the Constitution, the Thirteen Original States reserved full sovereignty, dominion, ownership and control over their tidelands, "subject only to the rights surrendered by the Constitution of the United States."¹⁶

Because the Federal government never had original jurisdiction over the trust lands and waters of the Thirteen Original States, it never conveyed these lands to any of them. Thus, no Federal question arises as to what lands were held in trust by any of the original States when they formed the Union. This is in contrast to the situation of the 37 new states, as discussed below.

Nonetheless, as this public trust was "funded" and controlled by the Thirteen Original States at the time of adoption of the Constitution, so has it been perpetuated by the Equal Footing Doctrine to the 37 "new" States that have since joined the Union.¹⁷

2. The Equal Footing Doctrine and the 37 "New" States

Just prior to the ratification of the U.S. Constitution in 1788, the Confederation Congress adopted the "Ordinance of 1787: The Northwest Territorial Government," known simply as the Northwest Ordinance. In general, the

Northwest Ordinance established guidelines for the government of the northwest territory and for the admission of new States, formed from the territory, into the Union. Specifically, it also provided that any State joining the Union “shall be admitted ... on an equal footing with the original States, in all respects whatever ...”¹⁸ This provision became the model for the enabling legislation of all of the 37 new States entering the Union, albeit the actual terminology is often different. This practice of admitting new States as equals to the original 13 has long been referred to as the Equal Footing Doctrine.

In applying the Equal Footing Doctrine the United States Supreme Court has consistently found that “the new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the *tide waters*, and in the lands under them, within their respective jurisdictions.”¹⁹ Alternatively put, “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.”²⁰ These rights, sovereignty, and jurisdiction of the states were “subject only to the rights surrendered by the Constitution of the United States.”²¹ As can be seen by the word usage in the quotes above, these rights have been variously described as pertaining to lands beneath either “tidewaters” or “navigable waters,” a dichotomy of definitions that would trouble and confuse courts for two centuries.

The Equal Footing Doctrine has served to perpetuate the Public Trust Doctrine from the Thirteen Original States to each of the 37 new States. As each new State entered the Union she received in trust those lands beneath “tidewaters” or “navigable waters,” and the waters themselves, in trust for the citizens of the new State. What lands and waters were received by each of the 37 new States, in contrast to the Thirteen Original States, from the Federal Government upon Statehood is singularly a Federal question.²² Thus, the Federal definition of “navigable waters” is of primary importance in determining what lands and waters were received in trust by each new State upon entering the Union.

But unfortunately, the confusion surrounding the term ‘navigable waters’ — whether it means only tidewaters regardless of the navigability of those waters, or all waters that are actually navigable regardless of the tide — has troubled courts from the founding of the country up to recent times. The 1988 United States Supreme Court case *Phillips Petroleum v. Mississippi* pivoted around whether Mississippi received in trust all lands beneath tidewaters, regardless of navigability of those tidewaters, when she entered the Union in 1817, or whether she received in trust only those lands beneath waters that were navigable-in-fact at the time of statehood. The Court ruled that all lands beneath tidewaters, regardless of

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navigability of those tidewaters, were received by the State when she entered the Union.

Early on, however, English common law was strictly adhered to, and only tidal waters were considered navigable. But this legal definition defied reality in the United States with our large inland rivers and lakes. Courts recognized the problem, and grappled with the legal, commercial and practical ramifications of the confusion generated by the term 'navigable waters.' As a result, from the entry of Vermont into the Union as the fourteenth State on March 4, 1791, to the entry of Hawaii as the fiftieth State on August 21, 1959, the definition of the term 'navigable waters' has continued to evolve and change, both at the Federal and State level. Because of this evolving meaning, the Federal test of 'navigable waters' for title purposes is "determined as of the time of admission of the State to the United States."²³

3. Evolution of the Term 'Navigable Waters'

The definition of the term 'navigable waters' is of critical importance; upon its interpretation rests the title claims and property interests of governments and private entities, and the application of the Public Trust Doctrine to lands, waters and living resources. It has been said that "The division of waters into navigable and nonnavigable is but a way of dividing them into public and private waters."²⁴ Confusion over the meaning of the term 'navigable waters' has resulted in a well-spring of contentious litigation nationwide over the ownership of bottomlands and submerged lands, and claims of exclusive use of the waters and living resources therein.

Precisely what is meant by the term 'navigable waters' depends upon whether the Federal or State government is inquiring, and for what purpose. There are Federal definitions of 'navigable waters' for title purposes, for admiralty court jurisdiction, and for constitutionally enumerated powers and authorities. In addition, there are State definitions of 'navigable waters' for title purposes, as well as defining those waters wherein the public has trust rights.

For title purposes, the Federal definition of 'navigable waters' is of primary interest, although State definitions have an important bearing on the matter. The situation is confounded, however, due to the changing and evolving Federal definition of 'navigable waters.' To discuss the evolution of the meaning of this term, it is best to start with English common law.

a. English Common Law Definition of 'Navigable Waters'

"[In England], no waters are navigable in fact, or, at least, to any considerable extent, which are not subject to the tide; and from this circumstance tide water and navigable water there signify substantially the same thing."²⁵ Under English common law, the terms "navigable waters" and "tidal waters" were synonymous,²⁶ simply because no rivers above the ebb and flow of the tide were significant with respect to navigation. The tremendous difference in topography between England and the American continent, however, presented the Federal and State courts with great difficulties in reconciling this English common law term with the geographical realities of the United States.

b. Federal Definitions of 'Navigable Waters'

In 1851, the United States Supreme Court described the origin and history of the term 'navigable waters' under Federal law.

"At the time the Constitution of the United States was adopted, ...the definition [of navigable waters] which had been adopted in England was only proper here. In the old thirteen States the far greater part of the navigable waters are tide-waters. And in the States which were at that period in any degree commercial ... every public river was tide-water to the head of navigation."²⁷

Thus, it was only natural for Federal courts to adhere to the tidal test for determining public waters. The tidal test:

"became, after a time, the familiar mode of describing a public river, and was repeated, as cases occurred, without particularly examining whether it was as universally applicable in this country as it was in England. ... And as the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of. ... The description of a public river was substituted in the place of the thing intended to be described."²⁸

This victory of procedure and form over substance and reason was finally reversed in 1845, when Congress passed "An Act extending the jurisdiction of the district courts to certain cases, upon the lakes and navigable waters, connecting the same,"²⁹ commonly known as the Act of 1845. This law extended the jurisdiction of Federal district courts, sitting in admiralty, to cases involving vessels of twenty

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tons or more, employed in commerce between ports in different States and territories, operating on the navigable lakes and rivers within the United States.

Nothing is to be found concerning the legislative history of this Act, but it can be surmised that mishaps between vessels operating in commerce on non-tidal waters, such as the 1843 collision of the steamers *Luda* and *DeSoto*³⁰ on the Mississippi River in Louisiana, induced Senator Henry Johnson of Louisiana to introduce the bill in 1845 that became this law.³¹ The *Luda* and *DeSoto* collided in a part of the river where "there was much doubt whether the tide flowed so high."³² This case "showed the unreasonableness of giving a construction to the Constitution which would measure the jurisdiction of the admiralty by the tide."³³ The result would be "purely artificial and arbitrary as well as unjust" by giving admiralty court jurisdiction to one part of the large river, but "deny it to another part equally public and but a few yards distant."³⁴ Thus Congress ended this arbitrary rule by extending federal district courts' admiralty jurisdiction beyond only tidewaters to include non-tidal but navigable-in-fact lakes and rivers.

This was the state of the law when, near midnight on a starlit night in 1847, forty miles out on Lake Ontario, the steamship the *Genessee Chief* bore down upon the sailing sloop *Cuba* at eight miles per hour. "The wind was light, moving the *Cuba*, which was heavily laden [with 5,955 bushels of wheat], not more than 2 or 3 miles an hour. The lake was smooth."³⁵ It was proven that only the helmsman was on deck of the *Genessee Chief*, and alleged that "he was incapacitated by liquor ..."³⁶ The ensuing collision sank the *Cuba* (though without loss of life) and ignited the litigation that was to set to rest the tidality test of navigability in Federal admiralty law.

The owners of the *Cuba* sued the owners of the *Genessee Chief* for damages, and the case went all the way to the United States Supreme Court. Doomed by the facts, the *Genessee Chief* owners defended themselves by arguing that the Act of 1845 was unconstitutional. They raised the entire line of Supreme Court cases where the Court held that admiralty jurisdiction was limited only to tidewaters³⁷ and argued that Congress did not have the constitutional authority to extend the jurisdiction of Federal district courts beyond the limits as established by the Supreme Court. To rule otherwise would require the Court to overrule a complete body of judicial case law. In terms of a legal argument, it seemed invincible.

In *The Propeller Genessee Chief*, however, the United States Supreme Court finally recognized that procedure and form had overtaken substance and reason, and that the "tidal" test of navigability was inadequate when applied to the rivers and lakes of this country. The fact that this continent contained "thousands of miles of public navigable water, including lakes and rivers in which there is no tide"³⁸ could no

longer be ignored. The Court finally recognized that while the common law rule may be adequate for a country where the rivers are small and rarely navigable above the tidal ebb and flow, "beyond the coast, the English standard of navigability does not fit the American continent with its great rivers and lakes."³⁹ As a result, the Court held that the Act of 1845 was constitutional, and thus the term "navigable waters," for purposes of admiralty court jurisdiction, included not only tidal waters, but also all waters "navigable-in-fact."

For another 25 years, however, in terms of title ownership, in contrast to admiralty court jurisdiction, the Federal law remained in confusion as to whether land beneath 'navigable waters' meant land beneath tidewaters only, or land beneath waters that were actually navigable. As noted by the United States Supreme Court in the 1877 case *Barney v. Keokuk*:

"The confusion of navigable with tide water, found in the monuments of common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy."⁴⁰

The Court went on to hold that "all waters are deemed navigable which are really so."⁴¹ Recognizing the clear logic in holding non-tidal waters to be navigable if they "are really so," the Court went on to find that "there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty."⁴²

Having found that non-tidal waters may be "navigable" for Federal admiralty court jurisdiction, as well as for bottomland title purposes, the Supreme Court took the final step 15 years later, in the 1892 case of *Illinois Central Railroad v. Illinois*, and held that the bottomlands beneath the Great Lakes are subject to "the same doctrine as to the dominion and sovereignty over and ownership of" lands beneath tidal waters,⁴³ and that "the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations."⁴⁴

In the 1988 case of *Phillips Petroleum v. Mississippi*, the United States Supreme Court presented a modern perspective on the question. The Court stated that "it came to be recognized as the 'settled law of this country' that the lands under navigable freshwater lakes and rivers were within the public trust given the new States upon their entry into the Union."⁴⁵

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Thus, after 1876, for title purposes, lands beneath navigable waters, *i.e.* all tidal waters and 'navigable-in-fact' freshwaters, passed to the new States as they entered the Union on an equal footing with the Thirteen Original States. Today, the term 'navigable waters,' for title purposes, is defined under Federal law as follows:

“[Waters] which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had — whether by steamboats, sailing vessels or flatboats — nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the [water] in its natural and ordinary condition affords a channel for useful commerce.”⁴⁶

c. State Definitions of 'Navigable Waters'

As the Federal courts were wrestling with the meaning of the term 'navigable waters' so too were State courts. From the States' perspective, the definition of 'navigable waters' is important for two reasons: (1) title ownership of the lands beneath these waters, and (2) the division of waters into public and private.

Although it is a Federal question as to what lands and waters were received in trust by a State upon entering the Union,⁴⁷ “it has been long 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.”⁴⁸ For bottomland title purposes, States may apply their own definition of 'navigable waters' as long as there is no conflict with Federal law.⁴⁹ For purposes of public use of the navigable waters, without regard to ownership of the bed, the State may adopt different (and less stringent) tests of 'navigable waters,'⁵⁰ tests that need not be evaluated as of the time of Statehood, but afterwards.⁵¹

Thus, for questions concerning title ownership of land beneath navigable water, once title has vested in one of the 37 new States through the Equal Footing Doctrine, State law controls whether the title (1) remains in the State, (2) can be granted to private ownership, or (3) originally vests in the riparian owner upon Statehood in accordance with the English common law.

“We hold the true principle to be this, that whenever the question in any Court, state or Federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by

the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.”⁵²

In other words, the Federal definition of ‘navigable waters’ for title purposes is controlling when determining what lands and waters passed to each new State at the time of her admission to the Union, but subsequent State definitions, if not inconsistent with the Federal definition, are controlling for determining ownership after the date of statehood.⁵³

Generally, State courts were quick to reject the English common law ebb-and-flow test of navigability in favor of the navigation-in-fact test. For example, Pennsylvania, one of the Thirteen Original States, discarded the English common law years before Congress passed the Act of 1845. In 1803, a farmer on the shores of the Susquehanna River asserted exclusive rights of fishing in the river adjacent to his land. This assertion led to “force and arms” against a fellow townsman who insisted that he, as a member of the public, had an equal right to seine for shad as did the riparian farmer. The disagreement, which raised the complex legal issues of bottomland ownership, was fought all the way to the Pennsylvania Supreme Court. In 1810, the court stated:

“This [ebb-and-flow] definition may be very proper in England, where there is no river of considerable importance as to navigation, which has not a flow of the tide; but it would be highly unreasonable when applied to our large rivers such as the Ohio, Allegheny, Delaware, Schuylkill, or Susquehanna and its branches.”⁵⁴

Nonetheless, two of the Thirteen Original States, New Jersey and Massachusetts, continue to limit the definition of navigable waters, for title purposes, to only those waters which are subject to the ebb and flow of the tide.⁵⁵ Mississippi, which joined the Union in 1817, does likewise.⁵⁶

For purposes of establishing public rights in navigable waters, regardless of the ownership of the lands beneath, each State has established its own definition, either judicially or statutorily, of the term “navigable waters.”⁵⁷

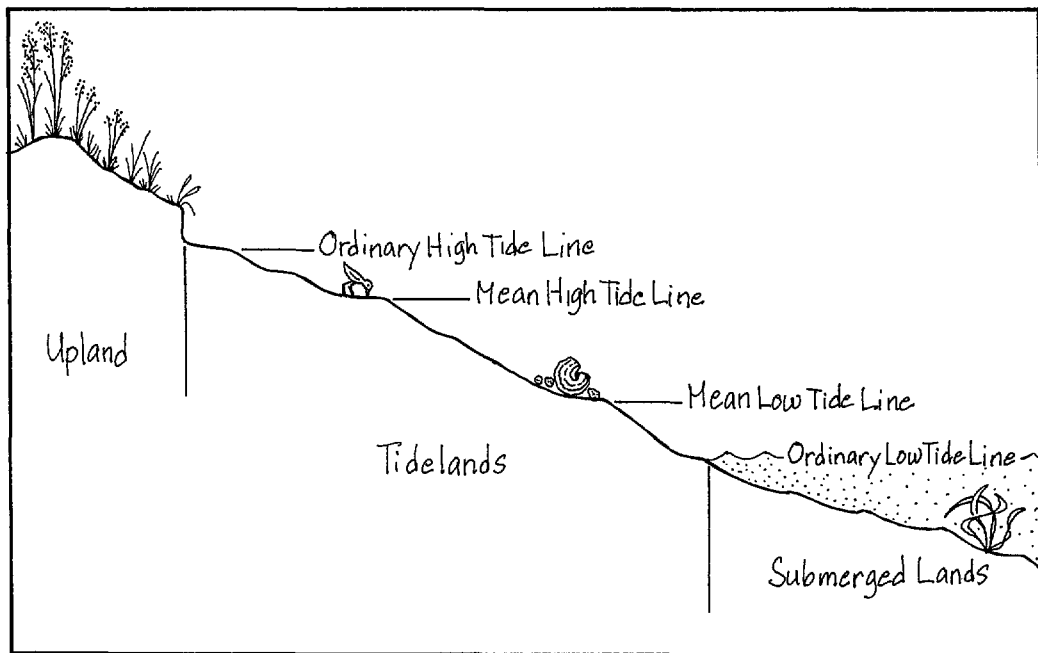
B. Lands Within the Public Trust

1. Lands Beneath Waters Subject to the Ebb and Flow of the Tide

a. Tidelands

“At [English] common law, the title and dominion in lands flowed by the tide water were in the king for the benefit of the nation Upon the American Revolution, these rights, charged with a like trust, were vested in the Thirteen Original States within their respective borders, subject to the rights surrendered by the Constitution of the United States. * * * The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions.”⁵⁸

All States with tidal shorelands follow, to varying degrees, the English common law and apply the Public Trust Doctrine to lands subject to the ebb and flow of the tide within their borders.⁵⁹ Nonetheless, English common law was adapted by the States



Lands subject to the ebb and flow of the tides are public trust lands.

to meet their needs. As eloquently stated by the United States Supreme Court in 1861:

“Our ancestors, when they immigrated here, undoubtedly brought the common law with them, as part of their inheritance; but they soon found it indispensable, in order to secure [the conveniences of building wharves, quays, piers and landing places, for the loading and unloading of vessels], to sanction the appropriation of the soil between high and low water mark to the accomplishment of these objects.”⁶⁰

Thus, under American public trust law, tidelands may be publicly or privately owned. However, in the five Atlantic states where private ownership of tidelands may extend to the “ordinary low water line,” or further seaward,⁶¹ the public retains public trust rights of use of the tidelands up to the “ordinary high water mark.”⁶² That is, even though proprietary title to trust lands (*jus privatum*) to the low water mark, or further, may be privately held, the public’s trust rights (*jus publicum*) are not extinguished. See Chapter V.

The fact that lands are subject to the ebb and flow of the tide, not whether the tidal waters are navigable-in-fact, determines if the lands are subject to the Public Trust Doctrine. As the United States Supreme Court stated in *Phillips Petroleum v. Mississippi*, “We are unwilling, after its lengthy history at common law, in this Court, and in many state courts, to abandon the ebb and flow rule” and replace it with the navigability-in-fact rule as *Phillips Petroleum* argued.⁶³ Thus, if the lands in question are swept by the ebb and flow of the tide, regardless of whether the tidewaters are navigable or not, the lands are tidelands within the scope of the Public Trust Doctrine.

Not only did the Supreme Court in the *Phillips Petroleum v. Mississippi* case reject navigability as the test for trust tidelands, but it went on to note that “the States have interests in lands beneath tidal waters which have nothing to do with navigation,”⁶⁴ such as “bathing, swimming, recreation, fishing and mineral development.”⁶⁵ In regard to the many uses of trust tidelands that have nothing to do with navigation, the Court recognized that “It would be odd to acknowledge such diverse uses of public trust tidelands, and then suggest that the sole measure of the expanse of such lands is the navigability of the waters over them.”⁶⁶

b. Submerged Lands

Roman civil law did not recognize any public rights in submerged lands, i.e. lands beneath ocean waters seaward of the ordinary low water mark. The ordinary low water mark formed the seaward boundary of the public’s trust lands under the

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Roman civil law. To the contrary, English common law clearly recognized public rights in the lands beneath tidal waters, including those beneath "rivers, bays and arms of the sea."⁶⁷ It is unclear how far seaward the common law recognized the king's dominion of the submerged lands, but it is clear that the claim did extend further than the ordinary low water mark.

Each of the Thirteen Original States claimed ownership and control of the submerged lands off their coasts.⁶⁸ Likewise, the new ocean-bordering States that subsequently entered the Union on an equal footing also claimed ownership and control of the submerged lands off of their coasts. However, in 1947, the United States Supreme Court overruled these original State claims, and held that the "Federal Government rather than the State has paramount rights in and power over [the submerged lands within three nautical miles], an incident to which is full dominion over the resources of the soil under that water area."⁶⁹ In 1953, however, Congress affirmed State ownership and control over submerged lands extending from the coastline out three geographic miles⁷⁰ (or three leagues⁷¹ in the case of the Gulf of Mexico boundaries of Florida and Texas), when the 1953 Submerged Lands Act was enacted.⁷² Although the Submerged Lands Act, which applies only to the States of the Union,⁷³ is silent regarding any public trust rights or duties imposed upon an adjacent coastal State, many ocean-bordering States do hold their submerged lands out three miles (or three leagues) in the public trust, either through judicial determination or constitutional or statutory provision.⁷⁴

In contrast to the 1953 Submerged Lands Act, where the conveyance of the submerged lands from the Federal Government to the States is silent regarding any public trust rights or duties, the 1974 conveyance by the Federal Government to the three U.S. territories, the Virgin Islands, Guam and American Samoa, expressly provides that these submerged lands shall "be administered in trust for the benefit of the people thereof."⁷⁵ Thus, those lands "permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coastlines"⁷⁶ were recognized by the Federal Government to be trust lands, and were so conveyed.

2. Freshwater Bottomlands

Under the common law of England, public rights were confined to only those waters and lands subject to the ebb and flow of the tide. Rights in freshwaters were held exclusively by abutting landowners.⁷⁷ In most of the Thirteen Original States, the far greater part of the navigable waters were tidewaters. "And indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters

with an unchanging current resisting the upward passage.”⁷⁸ Thus, State and Federal courts long held that the term “navigable waters” was limited to tidewaters.

In the 1851 case *The Propeller Genessee Chief*, however, the United States Supreme Court recognized that while the common law rule may be adequate for a country whose rivers are small and rarely navigable above the tidal ebb and flow, “beyond the coast, the English standard of navigability does not fit the American continent with its great rivers and lakes.”⁷⁹ As a result, the Court held that the term “navigable waters,” for purposes of Admiralty Court jurisdiction, included not only tidal waters, but also all waters that are “navigable-in-fact.” This set the stage for the U.S. Supreme Court to rule, in the 1876 case *Barney v. Keokuk*, that “all waters are deemed navigable which are really so.”⁸⁰ Finally, “it came to be recognized as the ‘settled law of this country’ that the lands under navigable freshwater lakes and rivers were within the public trust given the new States upon their entry into the Union.”⁸¹

Therefore, generally speaking,⁸² lands beneath navigable freshwaters are “within the public trust” up to the ordinary high water mark.⁸³ As a result, the Great Lakes and America’s vast network of navigable rivers, lakes and streams are subject to the Public Trust Doctrine, whether the lands below these water bodies are publicly or privately owned.

In contrast to lands beneath tidewaters, where the ebb and flow of the tide is the test, navigability of freshwaters is currently the sole measure of the expanse of freshwater bottomlands subject to the Public Trust Doctrine. This is so, even though the United States Supreme Court rejected the logic of this in *Phillips Petroleum v. Mississippi*, recognizing that tidelands are used by the public for many uses “which have nothing to do with navigation,”⁸⁴ such as “bathing, swimming, recreation, fishing and mineral development.”⁸⁵ Thus, the Court recognized that “It would be odd to acknowledge such diverse uses of public trust tidelands, and then suggest that the sole measure of the expanse of such lands is the navigability of the waters over them.”⁸⁶ Freshwaters, whether navigable in fact or not, are used by the public for the same purposes as the public uses tidal waters and tidelands — bathing, swimming, recreation, fishing and mineral development. Why navigability should be the sole measure of the geographic scope of the Public Trust Doctrine for freshwaters, when it has been specifically rejected for tidewaters, remains a paradox of American public trust law.

C. Waters Within the Public Trust

In addition to tidelands, submerged lands and bottom lands, the waters above public trust lands are likewise part and parcel of the trust corpus. "The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters ... within their respective jurisdictions."⁸⁷ Unlike trust lands, however, trust waters can not be privately owned.⁸⁸

1. Tidewaters

English common law did not clearly state whether water that ebbed and flowed with the tide could be considered tidal if it lacked salt.⁸⁹ For the most part, however, it is recognized that "although the water is fresh at full tide, yet the river is still an arm of the sea, if it flows and reflows."⁹⁰ Thus the salt content of the water generally does not determine whether water is tidal. The presence of salt is a factor of tidality, but the lack of salt is not conclusive. Rather, the fluctuation of the water, as shown by its daily rise and fall as a result of the influence of the oceanic tide, characterizes waters as tidal.

2. Navigable Freshwaters

In the 1877 case of *Barney v. Keokuk*, the United States Supreme Court recognized that "waters which were nontidal [could be] nevertheless navigable."⁹¹ Fifteen years later, in *Illinois Central Railroad v. Illinois*, the Supreme Court was confronted with deciding the legitimacy of a State's conveyance, and subsequent revocation of nearly all of Chicago's harbor to the Illinois Central Railroad. In affirming the revocation of the grant, the Court recognized that all lands beneath navigable waters, as well as the water itself, were within the public trust. However, at that time the term "navigable waters" was synonymous with "tidal waters", and the Great Lakes were, of course, not tidal. The Court, however, ruled that the Great Lakes were "navigable-in-fact" and therefore the waters of the Great Lakes, and the lands beneath, are held in trust for the people of the state.⁹² This single United States Supreme Court decision clearly established that the corpus of the Public Trust Doctrine includes not only tidelands and tidewaters, but the tremendous inland network of Great Lakes, rivers and lakes — all freshwaters that are "navigable-in-fact" — as well as the bottomlands beneath such waters.⁹³

In contrast to lands beneath tidewaters, where the ebb and flow of the tide is the test, navigability of freshwaters is currently the sole measure of the expanse of such waters subject to the Public Trust Doctrine. See this section, parts B.1. and B.2.

3. Extent of "Navigable Waters" from Shore-to-Shore

It is sufficient that only some portion of the water body be influenced by tides or navigable-in-fact in order for the entire waterbody to be within the public trust. In other words, "All lands and waters bordering on navigable rivers and lying between ordinary low and high water marks fall within the reach" of the term navigable waters.⁹⁴ Otherwise "areas [that] by no means could be considered navigable, as is always the case near the shore,"⁹⁵ would not be within the trust.⁹⁶ "Where a stretch of river is navigable lengthwise, ... all of the waters between the opposite shores or banks are comprehended within the term 'navigable waters'" whether the water is "one inch or several feet deep."⁹⁷ Thus, "so long as by unbroken watercourse--when the level of the waters is at mean high water--one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat, the waters traversed and the lands beneath them are within the ... trust."⁹⁸

4. Non-navigable Tributaries Flowing into Navigable Freshwaters

Special mention should be made of one California case, *National Audubon Society v. Superior Court of Alpine County*, where the Public Trust Doctrine was applied to non-navigable waters above the "ordinary high water mark" because the diversion of non-navigable tributaries to navigable waters downstream would harm a protected use of the navigable water body.⁹⁹ Thus, the California court held that although the Public Trust Doctrine did not directly apply to non-navigable fresh waters or the land beneath, to the extent that the diversion causes harm to the public's protected uses of navigable freshwaters that are subject to the Public Trust Doctrine, the diversion of these waters could be regulated by the doctrine. In Washington State, however, a 1993 attempt by the Attorney General to apply the Public Trust Doctrine to non-navigable waters and associated groundwaters was, not persuasive to the Supreme Court of Washington, although the court was careful to expressly state that they were not "addressing the scope of the doctrine today."¹⁰⁰

D. Living Resources Within the Public Trust

Several State courts have recently stated that the scope of the Public Trust Doctrine includes the aquatic wildlife living in trust waters,¹⁰¹ most notable of which are fish. Thus, not only is fishing a traditionally recognized public trust use (*see* Ch. III.B.2) but fish and all other aquatic wildlife form a part of the trust's assets.

The State, in its sovereign capacity, holds title to the fish within trust waters in the State for the benefit of the people.¹⁰² At least one State court has held that this trust ownership of the fish creates "a sovereign right primarily and essentially of

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preservation, conservation and regulation for the people of the State”¹⁰³ States, through their legislatures, are empowered to impose such statutory restrictions and limitations on fishing “as may be reasonably necessary for the protection of the public’s rights therein.”¹⁰⁴

To the extent that a State has statutorily regulated fishing, the legislation would supersede any common law trust rights the public may have in the fish. At the same time, fishery legislation often specifically regulates fish that are of commercial or nutritional interest; it generally does not regulate the public’s use of all aquatic life. As a result, a State’s public trust interest in the aquatic life is generally much broader than the fisheries regulated by statute.

It is self-evident that in order to have fish to regulate, there must be a sustaining environment within which they can live. In fact, preservation of the fishery is a public trust responsibility of the State. The inclusion of all aquatic life (upon which all fish depend) within the scope of the Public Trust Doctrine, gives a coastal resource manager the authority, and responsibility, to not only take into account a State’s fishery resource, but to also consider the ecological system sustaining the fishery resource whenever trust lands or waters are managed. In other words, the step from managing trust fisheries to preserving the ecological integrity of trust waters is not such a large one. *See* Ch. III, § B.2.

Notes

1. Institutes of Justinian, Liber 2, Tract 1, Section 1, as reprinted in Angell, J.K., *A Treatise on Tide Waters* (1826), at 16.
2. Angell, J.K., *A Treatise on Tide Waters* (1826), at 17.

DE: *State v. Pennsylvania Railroad Company*, 228 A.2d 587, 598 (1967) (“The preservation of peace and security of society calls for the fixing of lines of demarcation between rights which are public and held in common and others which are private.”).

NJ: *Cobb v. Davenport*, 32 N.J.L. 369, 378 (1867) (“The policy of the common law is to assign to everything capable of ownership a certain and determinate owner, and for the preservation of peace, and the security of society, to mark by certain indicia, not only the boundaries of such separate ownership, but the line of demarcation between rights which are held by the public in common, and private rights.”).
3. *Shively v. Bowlby*, 152 U.S. 1, 14 (1894).

NY: *Fulton Light, Heat & Power Co. v. State of New York*, 200 N.Y. 400, 412-13 (1911) (“In adopting the common law of England, the people of this state took over such of its rules as were applicable to, and consistent with, their conditions and circumstances. It became, and is, the law of the state and the basis of its jurisprudence, except so far as its principles and rules of action have been modified by Constitution, statutes, or usages; or were inapplicable to our situation.”).
4. *Shively v. Bowlby*, 152 U.S. 1, 14, 15 (1894). See also *Martin v. Waddell*, 41 U.S. 367, 410 (1842) (“When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.”).

PA: *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869) (“[B]y the revolution and the acknowledgement of the independence of the colonies by the treaty of peace, all the rights and sovereignty of the crown were transferred to and vested in the several states.”).
5. *Carson v. Blazer*, 2 Binn. 475, 477 (Pa. 1810).
6. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935).
7. *Attorney General v. Chambers*, 4 De G.M. & G. 206 (1789).

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8. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 25 (1935). NOTE: Spring tides are not related to the season, but rather are those tides that occur on the full and new moons, when the gravitational pull of the moon and the sun combined is the greatest. Thus, spring tides have higher highs and lower lows than normal. Neap tides are those that occur at the first and third quarter of the moon, when the gravitational pull of the moon and the sun are at 90 degrees to each other. As a result, neap tides have lower highs and higher lows than normal.
9. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 479 (1988).
10. *See Oemler v. Green*, 134 Ga. 198, 67 S.E. 433 (1910). *See also* Brief Amicus Curiae of the Thirteen Original States to the United States Supreme Court in the case of *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988), at 22 (“in the absence of a specific grant from the Crown or the State, private ownership in Georgia extends only to the upper limit of the salt marsh, which is co-extensive with the upper reach of the regular ebb and flow of the tide. Because of the tidal range averaging seven feet and the gently sloping shore along the coast of Georgia, the upper limit of the salt marsh extends not only above the point of navigability-in-fact, but also above the elevation of mean high water.”).
11. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 475 (1988), citing *Shively v. Bowlby*, 152 U.S. 1, 26 (1894).

OR: *Land Board v. Corvalis Sand & Gravel Co.*, 283 Or. 147, 582 P.2d 1352 (1978) (“A state which has, in its constitution or by statute, adopted the common law in general terms is not precluded by the federal constitution from asserting state ownership of the beds of non-tidal, as well as tidal, navigable waters. [Citation omitted]. It was open to this state to determine, when the question arose, whether it would assert its title to the beds of all navigable rivers or whether, by recognition and adoption of the English rule, it would resign its title over the reach of the tide to the riparian owners.”).

LR: Farnham, W.P., *Water and Waters Rights*, Vol. I, 244 (1904) (“Such states may, by statute or Constitution, adopt whatever rule they please in the first instance. They may retain title in the public, and some states have done so. They may define the limits of the riparian rights and retain as much or as little as seems best for the public. There can be no objection to such a course.”).
12. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 475 (1988).
13. *Shively v. Bowlby*, 152 U.S. 1, 26 (1894).
14. *Shively v. Bowlby*, 152 U.S. 1, 26 (1894).
15. 1 Stat. 50.

16. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894). See also *Knight v. United States Land Association*, 142 U.S. 161, 183 (1891)("[i]t is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States ..."); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845)("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."). See also *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 474 (1988); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867).
 - FL: *State v. Gerbing*, 47 So. 353, 355 (1908)("The original 13 states, that formed the federal Union ..., were distinct and independent sovereignties, and as such severally owned and held in trust for the whole people ... the navigable waters in the states and the lands thereunder, including the shore or land between the high and low water marks. Proprietary rights in the lands of this character within the states were not passed to the United States by the federal constitution ... and no power to dispose of such lands was delegated to the United States. Therefor all proprietary rights in and power to dispose of lands under navigable waters in the states, including the shore between the high and low water marks, were reserved to the states severally or to the people thereof.").
 - MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 517 (1986)("[T]he original states withheld their tidelands and navigable waters from the United States at the time of adoption of the Constitution.").
17. ID: *Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District*, 733 P.2d 733, 112 Idaho 512 (1987)("The equal footing doctrine grants legal title to the state in all lands below the natural high water mark of navigable waters as they existed at the date of admission into statehood. The public trust doctrine, on the other hand, does not grant title of such lands to the state but merely preserves inviolate the public's use of those lands.").
18. Ordinance of 1787: The Northwest Territorial Government, § 14, Art. V, 1 Stat. 50.
19. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)(emphasis added). See also *Pollard's Lessee v. Hagan*, 44 U.S. 212, 223 (1845)("When Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession ..."); *Knight v. United States Land Association*, 142 U.S. 161, 183 (1891)("It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders."); *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988)("Consequently, we reaffirm our long-standing precedents which hold that the

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States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide.”).

AZ: *See Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 161 (Ariz.App.Div. 1 1991)(“Moreover, by the “equal footing” doctrine, announced in *Pollards Lessee v. Hagan* (citation omitted) the Supreme Court attributed watercourse sovereignty to future, as well as then-existent, states.”).

20. *Pollard’s Lessee v. Hagan et al.*, 44 U.S. (3 How.) 212, 230 (1845)(emphasis added). *See also Utah Division of State Lands v. United States*, 482 U.S. 193 (1987)(Title to Utah Lake bottomland passed to Utah under the equal footing doctrine upon Utah’s admission to the Union).

OR: *Johnson v. Department of Revenue*, 639 P.2d 128, 292 Or. 373 (1982)(“Equal footing doctrine” provides that since the original 13 states were vested with title to submerged and submersible lands from the English crown on formation of the union by virtue of their sovereignty, all states subsequently joining the union were to be similarly vested).

21. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894). *See also Martin v. Waddell*, 41 U.S. 367, 409, 410 (1842)(“When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.”); *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall) 57, 65-66 (1873)(“Upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tidewater within her limits passed to the state, ... subject only to the paramount right of navigation over the waters ... the regulation of which was vested in the General Government.”); *McCready v. Virginia*, 94 U.S. 391, 394 (1877)(“[T]he title held [by the States] is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States.”); *Knight v. United States Land Association*, 142 U.S. 161, 183 (1891)(“It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders.”); *Hardin v. Jordan*, 140 U.S. 371, 381 (1891)(“ [Tide] lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce.”); *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 435 (1892)(“It is settled law of this country that ownership of and dominion and sovereignty over lands covered by the waters, within the limits of the several states, belong to the respective states within which they are found, subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce

with foreign nations and among the states.”); *Appleby v. City of New York*, 271 U.S. 364, 381 (1926)(“Upon the American Revolution, all the property rights of the Crown and Parliament in, and all their dominion over, lands under tidewater vested in the several states, subject to the powers surrendered to the National Government by the Constitution of the United States.”).

22. What lands and waters were received by each of the 37 new States, in contrast to the Thirteen Original States, from the Federal Government upon Statehood is singularly a Federal question.

US: *United States v. Oregon*, 295 U.S. 1, 14 (1935)(“The question, whether the waters within the state under which the lands lie are navigable or non-navigable, is a federal, not a local one.”); *Utah v. United States*, 403 U.S. 9, 10 (1971)(“The question of navigability is a federal question.”); *United States v. Holt Bank*, 270 U.S. 46, 55-56 (1926)(“Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts.”).

NV: *State v. Bunkowski*, 88 Nev. 623, 503 P.2d 1231, 1234 (1972)(“so that all States when admitted to the Union have equal standing a uniform federal test to title of watercourse beds must be maintained.”).

23. Because of the evolving meaning of the term “navigable waters,” for title purposes the Federal definition is “determined as of the time of admission of the State to the United States.”

Hitchings v. Del Rio Woods Recreation & Park District, 55 C.A.3d 560, 567, 127 Cal Rptr. 830 (1976).

US: *Utah v. United States*, 403 U.S. 9, 10 (1971)(“Utah’s claim to the original bed of the Great Salt Lake — whether now submerged or exposed — ultimately rests on whether the lake was navigable at the time of Utah’s admission [to the Union.]”); *United States v. Holt Bank*, 270 U.S. 49, 55-56 (1926)(“The State of Minnesota was admitted into the Union in 1858 ... and under the constitutional principal of equality among the several States the title to the bed of Mud Lake was passed to the State, if the lake was navigable, and if the bed had not already been disposed of by the United States”); *Oklahoma v. Texas*, 258 U.S. 574, 583 (1922)(“[U]pon the admission of the State [of Oklahoma] on November 16, 1907, the title to the river bed passed from the United States to the State by virtue of the constitutional rule of equality among the States ...”).

CA: *Bohn v. Albertson*, 107 Cal.App.2d 738, 742 (1951)(“It has been held that navigability is to be determined by the condition [of the water body] at the date of admission of California to the Union.”); *Newcomb v. City of Newport Beach*,

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7 Cal.2d 393, 399 (1936) (“For the purpose of determining whether lands vested in the state by virtue of her sovereignty it is their condition as tidelands at the time of admission of California into the Union in 1850 which is material.”).

24. *Lamprey v. Metcalf*, 52 Minn. 181, 185 (1893). See also *Nelson v. Delong*, 213 Minn. 425, 431, 7 N.W.2d 342, 346 (1942) (“Navigability and nonnavigability mark the distinction between public and private waters.”).

25. Under English common law, the terms “navigable waters” and “tidal waters” were considered as being synonymous.

US: *The Daniel Ball*, 77 U.S. 557 (1871); *Barney v. Keokuk*, 94 U.S. 324, 336 (1876) (“In England, no waters are deemed navigable except those in which the tide ebbs and flows.”); *The Genessee Chief v. Fitzhugh*, 53 U.S. 443, 455 (1851) (“In England, therefore, tide water and navigable water are synonymous terms.”); *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892) (“tide waters and navigable waters ... were synonymous terms in England.”).

CA: *California v. Superior Court (Lyon)*, 29 Cal.3d 210, 218 (1981) (“Only waters where the tide ebbed and flowed were considered to be navigable in England.”).

NH: *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 5, 25 A. 718 (1889) (“[In England], no waters are navigable in fact, or, at least, to any considerable extent, which are not subject to the tide; and from this circumstance tide water and navigable water there signify substantially the same thing.”) quoting *The Daniel Ball*, 77 U.S. 557 (1871).

WI: *Willow River Club v. Wade*, 100 Wis. 86, 76 N.W. 273, 274 (1893) (“In England, as navigable [waters] were tide waters, the rule was often expressed as applicable to tide waters only.”).

26. Some scholars have argued that there was never any equivalence between tidal and waters navigable in fact in England. See R. Clark, *Waters and Water Rights* (1970 ed.). But as the United States Supreme Court has stated, it is unnecessary to “now enter the debate on what the English law was with respect to the land under such waters, for it is perfectly clear how this Court understood the common law of royal ownership, and what the Court considered the rights of the original and the later-entering States to be.” *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 478 (1988).

27. *The Propeller Genessee Chief*, 53 U.S. 443, 455 (1851).

28. *The Propeller Genessee Chief*, 53 U.S. 443, 455 (1851).

29. 5 Stat. 726, Feb. 26, 1845.

30. See *Waring v. Clark*, 46 U.S. 441 (1847).
 31. See CONG. GLOBE, 28th Cong., 2d Sess., 43 (1845).
 32. *The Genessee Chief v. Fitzhugh*, 53 U.S. 443, 456 (1851).
 33. *The Genessee Chief v. Fitzhugh*, 53 U.S. 443, 457 (1851).
 34. *The Genessee Chief v. Fitzhugh*, 53 U.S. 443, 457 (1851).
 35. *The Genessee Chief v. Fitzhugh*, 53 U.S. 443, 460 (1851).
 36. *The Genessee Chief v. Fitzhugh*, 53 U.S. 443, 446 (1851).
 37. The owners of the *Genessee Chief* raised the entire line of Supreme Court cases where the Court held that Admiralty jurisdiction was limited only to tide waters: *The Jefferson*, 23 U.S. (10 Wheat.) 428 (1825); *The Steamboat Orleans v. Phoebus*, 36 U.S. (11 Pet.) 175 (1837); *The United States v. Combs*, 37 U.S. (12 Pet.) 72 (1838); *Waring v. Clarke*, 46 U.S. 441 (1847), along with many State decisions on the issue.
 38. *The Genessee Chief v. Fitzhugh*, 53 U.S. 443, 457 (1851).
 39. *The Genessee Chief v. Fitzhugh*, 53 U.S. 443, 455 (1851).
 40. *Barney v. Keokuk*, 94, U.S. 324, 338 (1876).
 41. *Barney v. Keokuk*, 94, U.S. 324, 336 (1876).
 42. *Barney v. Keokuk*, 94, U.S. 324, 338 (1876).
 43. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 437 (1892).
 44. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 437 (1892).
 45. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988), citing *Barney v. Keokuk*, 94 U.S. 324, 338 (1877) and *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 435-36 (1892).
- CA: *National Audubon Society v. Superior Court*, 33 Cal.3rd 419, 435, 189 Cal.Rptr. 346, 658 P.2d 709 (1983) (“It is well settled in the United States . . . that the Public Trust is not limited to the reach of the tides, but encompasses all navigable lakes and streams.”).

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46. *United States v. Holt Bank*, 270 U.S. 46, 55-56 (1926), citing *The Montello*, 20 Wall. 430, 439; *United States v. Cress*, 243 U.S. 316, 323; *Economy Light and Power Co. v. United States*, 256 U.S. 113, 121; *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86.
47. The question of what lands and waters were received in trust by each of the 37 new States upon entering the Union on an equal footing with the Thirteen Original States is a Federal question.
- US: *United States v. Oregon*, 295 U.S. 1, 14 (1935) (“The question, whether the waters within the state under which the lands lie are navigable or non-navigable, is a federal, not a local one.”); *Utah v. United States*, 403 U.S. 9, 10 (1971) (“The question of navigability is a federal question.”); *United States v. Holt Bank*, 270 U.S. 46, 55-56 (1926) (“Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts.”).
- AZ: *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 161 (Ariz.App.Div. 1 1991) (“The standard of navigability for equal footing claims is established by federal law.”).
- NV: *State v. Bunkowski*, 88 Nev. 623, 503 P.2d 1231, 1233 (1972) (“so that all States when admitted to the Union have equal standing a uniform federal test to title of watercourse beds must be maintained.”).
48. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988), citing *Shively v. Bowlby*, 152 U.S. 1, 26 (1894). See also *United States v. Holt Bank*, 270 U.S. 49, 54 (1926).
49. For bottomland title purposes, States may apply their own definition of ‘navigable waters’ as long as there is no conflict with the Federal law.
- US: *Brewer Oil Co. v. United States*, 260 U.S. 77, 89 (1922) (“It is not for a state, by courts or legislature, in dealing with the general subject of beds of streams, to adopt a retroactive rule for determining navigability which would destroy a title already accrued under Federal law and grant, or would enlarge what actually passed to the state, at the time of her admission, under the constitutional rule of equality here invoked.”).
- CA: *Hitchings v. Del Rio Woods Recreation & Park District*, 55 Cal.App.3d 560, 568, 127 Cal Rptr. 830 (1976) (“Even for bed title questions, where there is no conflict with a federal grant the states need not use a federal definition [of navigability].”).

50. For purposes of public use of the navigable waters, without regard to ownership of the bed, the State may adopt different (and less stringent) tests of 'navigable waters.'

US: *Brewer Oil Co. v. United States*, 260 U.S. 77, 89 (1922) ("Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so [under federal law]. It seems to be a convenient method of preserving their control."). See also *Donnelly v. United States*, 228 U.S. 243, 262 (1913).

CA: *People ex rel. Baker v. Mack*, 19 Cal. App.3d 1040, 97 Cal. Rptr. 448 (1971) ("The federal test of navigation does not preclude a more liberal state test establishing a right of public passage whenever a stream is physically navigable by small craft.").

ID: *Southern Idaho F & G Association v. Picabo Livestock, Inc.*, 96 Idaho 360 (1974) ("The federal test of navigability involving as it does property title questions, does not preclude a less restrictive state test of navigability establishing a right of public passage wherever a stream is physically navigable by small craft.").

51. For purposes of public use of the navigable waters, without regard to ownership of the bed, the State may adopt different (and less stringent) tests of 'navigable waters.' tests to be applied after the time of Statehood.

US: *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940) ("[N]avigability, for the purpose of the regulation of commerce, may later arise."). See also *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690, 699 (1899).

CA: *Bohn v. Alberson*, 107 Cal.App.2d 738, 742 (1951) ("Navigability for the purpose of commerce may arise later."); *Hitchings v. Del Rio Woods Recreation & Park District*, 55 Cal.App.3d 560, 568, 127 Cal Rptr. 830 (1976) ("Moreover, navigability for purposes of public navigational easement need not be evaluated as of the date of statehood, it may later arise.").

52. *Wilcox v. Jackson*, 38 U.S. (13 Peters) 498, 517 (1839). See also *Wear v. Kansas*, 245 U.S. 154 (1917); *Barney v. Keokuk*, 94 U.S. 324, 338 (1876).

OR: *Land Board v. Corvalis Sand & Gravel Co.*, 283 Or. 147, 582 P.2d 1352 (1978) ("A state which has, in its constitution or by statute, adopted the common law in general terms is not precluded by the federal constitution from asserting state ownership of the beds of non-tidal, as well as tidal, navigable waters. (Citation omitted). It was open to this state to determine, when the question arose, whether it would assert its title to the beds of all navigable rivers or whether, by recognition and adoption of the English rule, it would resign its title over the reach of the tide to the riparian owners.").

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- LR: Farnham, W.P., *Water and Waters Rights*, Vol. I, 244 (1904) (“Such states may, by statute or Constitution, adopt whatever rule they please in the first instance. They may retain title in the public, and some states have done so. They may define the limits of the riparian rights and retain as much or as little as seems best for the public. There can be no objection to such a course.”).
53. The Federal definition of ‘navigable waters’ for title purposes is controlling when determining what lands and waters passed to each new State at the time of her admission to the Union, but subsequent State definitions, if not inconsistent with the Federal definition, are controlling for determining ownership after the date of Statehood.
- US: *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 371 (1977) (After admission to the Union, “the role of the Equal Footing Doctrine is ended, and the land is subject to the laws of the State.”); *Brewer Oil Co. v. United States*, 260 U.S. 77, 89 (1922) (“It is not for a state, by courts or legislature, in dealing with the general subject of beds of streams, to adopt a retroactive rule for determining navigability which would destroy a title already accrued under Federal law and grant, or would enlarge what actually passed to the state, at the time of her admission, under the constitutional rule of equality here invoked.”).
- CA: *California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 281 (1982) (“Once the equal-footing doctrine had vested title to the riverbed in Arizona, ‘it did not operate after that date to determine what effect on titles the movement of the river might have.’ State, rather than federal law, should have been applied.”) quoting *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 371 (1977).
- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 513 (1986) (“Federal law recognizes state authority over trust property as plenary; once the trust was funded, so to speak, the federal role was spent.”) *aff’d sub nom. Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988).
54. *Carson v. Blazer*, 4 Am. Dec. 465, 2 Binn. 475 (1810).
- MA: *Commonwealth v. Chapin*, 22 Mass. (5 Pick.) 199 (1827) (The public has an easement for passing in boats, etc., in rivers, which, though not classed with navigable rivers, are in fact navigable above the flow and reflow of the tide).
- MN: *Castner v. Steamboat Dr. Franklin*, 1 Minn. 73 (1852) (The Mississippi River is a navigable stream, and the principles apply in regard to its navigation as to streams navigable at common law).

55. Two of the Thirteen Original States, New Jersey and Massachusetts, continue to limit the definition of navigable waters, for title purposes, to only those waters which are subject to the ebb and flow of the tide.

NJ: *Cobb v. Davenport*, 32 N.J.L. 369, 378 (1867) (“The test by which to determine whether waters are public or private, is the ebb and flow of the tide.”).

MA: *Ingraham v. Wilkinson*, 21 Mass. (4 Pick.) 268, 270-272 (1826) (“With respect to the river now in question ... which is above tide waters ... we think it clear that the common law doctrine applies ...”). See also *Trustees of Hopkins Academy v. Dickinson*, 63 Mass. (9 Cush.) 544, 546-548 (1852).

56. The law of the State of Mississippi distinguishes tidewaters from navigable nontidal freshwaters. See *Morgan and Harrison v. Redding*, 11 Miss. 334 (1844) (“The term ‘navigable river’ has a technical meaning in the common law. A river is navigable in the technical sense, as high up from its mouth as the tide flows.”). The Mississippi Supreme Court reviewed the law surrounding “navigable waters” and the State’s adherence to the English common law in 1938. See *State ex rel. Rice v. Stewart*, 184 Miss. 202 (1938) (“Under the natural influence of precedents and established forms, a definition [of navigable waters] originally correct was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters.”). The Supreme Court of Mississippi recently discussed the “logical incongruity” in the treatment of the bottomlands of navigable freshwaters as compared to tidelands. See *Cinque Bambini Partnership v. State*, 491 So.2d 508, 517 (1986) (“Yet before anyone perceived that the trust extended to navigable fresh waters, Mississippi had already adopted the common law rule that riparian owners hold the bed to such waters to the center of the stream. (Citations omitted). This has placed Mississippi’s trust in an anomalous position: while the lands below tidewaters may not be alienated except for high public purposes and generally only with the consent of the legislature, lands below navigable fresh waters are susceptible of wholly private ownership.”), *aff’d sub nom. Phillips Petroleum v. Mississippi*, 484 U.S. 469, 108 S. Ct. 791 (1988).

57. For purposes of establishing public rights in navigable waters, regardless of the ownership of the lands beneath, each State has established its own definition, either judicially or statutorily, of the term “navigable waters.”

AK: ALASKA STAT. 38.05.965 (12) (“‘navigable water’ means any water of the state ... that is navigable in fact for any useful public purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other recreational purposes.”).

AL: *Sayre v. Dickerson*, 278 Ala. 477, 491, 179 So.2d 57, 70 (1965) (“All tidal streams are, *prima facie*, public and navigable.”); *Walker v. Allen*, 72 Ala. 456, 458 (1882) (“All tidal streams are, *prima facie*, public and navigable ... All streams

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above tide-water, if in the survey of the public lands by the United States they have not been treated as navigable and are *prima facie* private — not navigable.”); *Tallahassee Falls Mfg. Co. v. State*, 13 Ala. App. 623, 68 So. 805, 807 (Ala. Ct. App. 1915) (“It is the declared policy of the state to regard as navigable all rivers reported to be navigable by the United States surveyors.”). *See also Bullock v. Wilson*, 2 Port. 436 (1835).

- CA: CAL. HARB. & NAV. CODE § 100 (“Navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and of such transportation.”). *State of California v. Superior Court (Lyon)*, 29 Cal. 3d 310, 322, 227-228, 172 Cal.Rptr. 696, 625 P.2d 239 (1981)(“any waters which could be used for recreation [are] navigable and [may] be used by the public.”); *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 435, 189 Cal.Rptr. 346, 658 P.2d 709 (1983)(“A waterway usable only for pleasure boating is nevertheless a navigable waterway and protected by the public trust.”); *Bohn v. Albertson*, 238 P.2d 128, 131 (1951)(*See* “What Are Navigable Waters?” and answer supplied).
- CT: *Balf v. Hartford Electric Light Co.*, 106 Conn. 315, 138 A. 122, 125 (1927)(“A river is navigable when it is being used or is susceptible of being used in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”); *Adams v. Pease*, 2 Conn. 481, 484 (1818)(“Every river, where the sea ebbs and flows, is by the common law considered as navigable and all rivers not thus distinguished are not navigable.”); *But see Burrows v. Gallup*, 32 Conn. 493, 501 (1865)(Although “all water where the tide ebbs and flows is *prima facie* navigable” ... “not every ditch in which the tide ebbs and flows through the extensive salt marshes along the coast, and which serves to admit and drain off the salt water from the marshes, can be considered a navigable stream; nor is every small creek in which a fishing skiff or gunning canoe can be made to float deemed navigable; but in order to have this character it must be navigable for some general purpose useful to trade or business.”).
- DE: 7 DEL. CODE § 7202(d)(Defines navigable water as a river, stream, lake, bay, or inlet capable or susceptible of having been or being used for transport of useful commerce). *See also Hagan v. Delaware Anglers’ & Gunners’ Club*, 655 A.2d 292 (Del.Ch. 1995)(Navigability generally means that waters are used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in customary modes of trade and travel on water).
- FL: *Martin v. Busch*, 93 Fla. 535, 563, 112 So. 274, 283, (1927) (“[N]avigable waters include lakes, rivers, bays or harbors, and all waters capable of practicable navigation.”); *Broward v. Mabry*, 50 So. 826 (Fla. 1909)(Lake Jackson held

navigable although periodically lake is totally dry). See also *Clement v. Watson*, 58 So. 25 (Fla. 1912).

- HI: *Kaiser Aetna v. United States.*, 444 U.S. 164 (1979) (“Navigable” in fact test applies even if privately improved waterways).
- ID: *Southern Idaho Fish and Game Association v. Picabo Livestock Co.*, 96 Idaho 360, 362, 528 P.2d 1295, 1297 (1974) (“Any stream which, in its natural state, will float logs or any other commercial or floatable commodity, or is capable of being navigated by oar or motor propelled small craft, for pleasure or commercial purposes, is navigable.”).
- IL: *Dupont v. Miller*, 310 Ill. 140, 145, 141 N.E. 423, 425 (1923) (“Since the case of *The Daniel Ball*, 77 U.S. 557, and *The Montello*, 87 U.S. 430, the test has been whether or not the water in its natural state is used or capable of being used as a highway of commerce, over which trade and travel may be conducted in the customary modes of trade and travel on water ... [W]hether such waters are navigable depends on whether they are sufficient depth to afford a channel for use for commerce.”); *Healy v. Joliet & C.R. Co.*, 2 Ill.App. 435, *rev'd* 94 Ill. 416, *aff'd* 6 S. Ct. 352, 116 U.S. 191, 29 L. Ed. 607 (1878) (“[N]one of the streams or watercourses within this State are navigable in the sense of the common law... Those rivers must be regarded as public navigable in law, which are navigable in fact. And they are navigable in fact when they are used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”) (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557); *Economy Light & Power Co. v. U.S.*, 256 U.S. 113, 122, 41 S. Ct. 409, 412, 65 L. Ed. 847 (1921) (“Navigability ... is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water.”).
- LA: *State v. Aucoin*, 206 La. 787, 855, 20 So.2d 136, 158 (1944) (Navigable waters are those that are either used or “susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” (Fournet, J., dissenting) (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871); *State v. Jefferson Island Salt Mining Co.*, 183 La. 304, 319, 163, So. 145, 150 (1935) (“[A] body of water is navigable in law when it is navigable in fact.”).
- MA: *Attorney General v. Woods*, 108 Mass. 436, 439 (1871) (Rivers are navigable-at-law only if they are within the rise and fall of the tide; tidal influence, not salinity, is the test); *Rowe v. Granite Bridge Corp.*, 38 Mass. (21 Pick.) 344, 345 (1838) (In addition to being subject to tidal influence, to be navigable a waterbody must be navigable-in-fact “for some purpose useful to

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- trade or agriculture.”); *Commonwealth v. Charlestown*, 18 Mass. (1 Pick.) 179 (1822) (A showing that a waterbody is capable of navigation for some purpose useful to trade or agriculture is sufficient to prove navigability; actual use need not be shown).
- ME: *Brown v. Chadbourne*, 31 Me. 9, 21 (1849)(“The true test ... is, whether a stream is inherently and in its nature, capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs.”).
- MD: *Hirsch v. Md. Dept. of Natural Resources*, 288 Md. 95, 99, 416 A2d 10, 12 (1980) (“Navigable water has traditionally been defined in Maryland as water subject to the ebb and flow of the tide.”); *Van Ruymbeke v. Patapsco Indus. Park*, 261 Md. 470, 475, 276 A. 2d 61, 64 (1971)(“In Maryland navigable water is defined as where the tide ebbs and flows.”); *Day v. Day*, 22 Md. 530, 537 (1865) (“Rivers or streams within the ebb and flow of the tide ... are navigable waters”).
- MI: *Bott v. Natural Resources Commission*, 415 Mich. 45 (1982)(The navigability of an inland waterway depends on its potential for commercial use, i.e. useable by commercial shipping or which is capable of floating logs or timber. The court specifically rejected the recreational boating test).
- MN: *Lamprey v. State*, 52 Minn. 181, 200, 53 N.W. 1139, 1144 (1893)(“[S]o long as these lakes are capable of use for boating, even for pleasure, they are navigable ...”).
- MS: MISS. CODE ANN. § 51-1-1 (Definition of “navigable waters” is “[A]ll rivers, creeks, and bayous in this state, twenty-five miles in length, that have sufficient depth and width of water for thirty consecutive days in the year for floating a steamboat with carrying capacity of two hundred bales of cotton are hereby declared to be navigable waters of this state.”).
- NH: *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 21, 25 A. 718, 728 (1889) (“Navigable water’ is held to mean all such waters as are actually navigable whether fresh or salt.”).
- NJ: *Cobb v. Davenport*, 32 N.J.L. 369 (1867). (“Waters in which the tide ebbs and flows--so far only as the sea flows and reflows, are public waters; and those in which there is no ebb and flow of the tide, are private waters.”).
- NY: N.Y. NAV. LAWS § 2(4) (“‘Navigable waters of the state’ shall mean all lakes, rivers, streams and waters ... not privately owned, which are navigable in fact or upon which vessels are operated, except all tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties.”).

- NC: *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674 (1996)(The North Carolina Supreme Court expressly repudiated the English common law ebb and flow of the tides test for public trust ownership of submerged lands. The Court found that the applicable test, premised on the capacity of the water for navigation in fact by "useful vessels" in its natural condition, has been the law of the State since 1715. The court noted that "useful" vessels include pleasure craft. Whether this would include canoes and jet skis, the Court gave no examples.).
- OH: *Mentor Harbor Yacht Club v. Mentor Lagoons*, 170 Ohio St. 193, 195, 163 N.E.2d 373, 374 (1959) ("In determining the navigability of a watercourse ... consideration may be given to the following factors: (1) its capacity for boating in its natural condition, (2) its capacity for boating after the making of reasonable improvements, and (3) its accessibility by public termini."); *The East Bay Sporting Club v. Miller*, 118 Ohio St. 360, 370 161 N.E. 12, 15 (1928) ("A river is regarded as navigable which is capable of floating to market the products of the country through which it passes, or upon which commerce may be conducted; and, from the fact of its being so navigable, it becomes in law a public river or highway."); OHIO REV. CODE § 1506.10 (Definition of "navigable waters" is implicit in the phrase "public rights of navigation, [and] water commerce).
- OR: *State v. Corvalis Sand and Gravel Co.*, 283 Or. 147, 152, 582 P.2d 1352, 1356 (1978)("[T]he state's title included the beds of waters which . . . were actually navigable, whether or not they were affected by the tide.").
- PA: *Conneaut Lake Ice Co. v. Quigley*, 225 Pa. 605, 610, 74 A. 648, 650 (1909) (The test is navigability in fact; "[i]f the body of water is sufficiently large and deep to serve the public in providing transportation to any considerable extent upon its bosom, it is sufficient to give the public an easement therein, for the purpose of transportation and commercial intercourse."); *Flanagan v. Philadelphia*, 42 Pa. 219, 230 (1862)(Navigable waters include those subject to tides as well as rivers capable of being navigated, or "navigable in the common sense of the term."); *Carson v. Blazer*, 2 Binn. 475 (1810)(The term navigable waters includes rivers which are navigable in fact).
- SC: *State ex rel. Medlock v. S.C. Coastal Council*, 289 S.C. 445, 449, 346 S.E.2d 716, 719 (1986) ("True test to be applied [in determining navigability of waters] is whether a stream inherently and by its nature has the capacity for valuable floatage, irrespective of fact of actual use or extent of such uses. Valuable floatage is not necessarily commercial floatage."). Citations omitted.
- TX: TEX. NAT. RES. CODE §21.001(3)("navigable waters" are waters that are navigable-in-fact as well as streams with an average width of at least thirty feet regardless of navigability). *See also Diversion Lake Club v. Heath*, 126 Tex. 129,

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137, 86 S.W.2d 441, 444 (1935)("[S]treams of the average width of thirty feet 'shall be considered' navigable streams, thus placing them by the force of the statute in the same class as streams navigable in fact.").

- VT: *New England Trout and Salmon Club v. Mather*, 68 Vt. 338, 346-347, 35 A. 323, 326 (1895)(navigable waters are those that are "boatable" which in turn means "waters that are of 'common passage' as highways to be used for commerce for a purpose useful to trade or agriculture); *State v. Malmquist*, 114 Vt. 96, 101, 40 A.2d 534, 538 (1944)(waters are boatable, and "capable of use for common passage as a highway," and are thus navigable); *Boutwells v. Champlain Realty Co.*, 89 Vt. 80, 87, 94 A. 108, 111 (1915)("If [a stream is] capable in its natural state of being used for purposes of commerce, carried on in any mode, it is navigable in fact, and therefore, is in our law a public river or highway."); *Cabot v. Thomas*, 147 Vt. 207, 212 (1986)(Waters that are "boatable" are public waters, over which the State has jurisdiction, and wherein the public have the right to fish).
- VA: *Ewell v. Lambert*, 177 Va. 222, 228, 13 S.E.2d 333, 335 (1941) (A water body is navigable if "used or susceptible of being used, in its natural or ordinary condition, as a highway for commerce, on which trade and travel are or may be conducted in the customary modes of trade or travel on water.").
- WA: *Proctor v. Sim*, 134 Wash. 606, 611, 236 P. 2d 114, 116 (1925) ("Navigability is always a question of fact. Whether a body of water is navigable in the true sense of the word depends, among other things, upon its size, depth, location and connection with, or proximity to other navigable waters. It is not navigable simply because it is floatable for logs ... A lake which is chiefly valuable for fishing or pleasure boats of small size is ordinarily not navigable. In order to be navigable it must be capable of being used to a reasonable extent in the carrying of commerce in the usual manner by water."); *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L.R.A. 199 (1901) (Navigable waters mentioned in Art. 17, § 1 of the state constitution include only such waters as are navigable for general commercial purposes); *Wilbour v. Gallagher*, 77 Wn.2d 306, 316, 462 P.2d 232, 40 A.L.R.3d 760 (1969), cert. denied 400 U.S. 878 (1970)("[T]he rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes (are) generally regarded as corollary to the right of navigation and the use of public waters.").
- WI: *Muench v. Public Service Commission*, 261 Wis. 492, 506, 53 N.W.2d 514, 519 (1951)(A navigable waterway is any water "which is capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes."); *Attorney General ex rel. Becker v. Bay Boom W.R. & F. Co.*, 172 Wis. 363, 375, 178 N.W. 569 (1920) (A lake is navigable that is a "shallow, muddy lake or marsh"); *Nekoosa-Edwards Paper Co. v. Railroad Comm.*, 201 Wis. 40, 228 N.W. 144, 229 N.W. 631 (1929/30) (Natural waters that are usable for rowing or

landing, and as such are open to the public for fishing and hunting, are navigable); *State v. Bleck*, 114 Wis.2d 454, 459, 338 N.W.2d 492, 495 (1983) (“We hold that the term ‘navigable waters’ ... for the purpose of establishing the state’s jurisdiction, are waters that are navigable in fact.”). *See also DeBayner & Co. v. DNR*, 70 Wis.2d 936, 945, 236 N.W.2d 217, 221 (1975), quoting *Muench v. Public Service Commission*, 261 Wis. 492, 506, 53 N.W.2d 514, 519 (1951).

58. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894). *See also Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988) (“[W]e reaffirm our long-standing precedents which hold that the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide.”).
59. All states with tidal shorelands follow, to varying degrees, the English common law and apply the Public Trust Doctrine to lands subject to the ebb and flow of the tide within their respective borders.

US: *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988) (“States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide.”). *See also Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 26-27 (1935).

AK: ALASKA STAT. 38.05.965 (21) (“‘tide land’ means land which is periodically covered by tidal water between the elevation of mean high and mean low tide.”).

AL: *City of Mobile v. Eslava*, 9 Port. 577, 603 (1839) (“[T]he ‘navigable waters’ within this State, have been dedicated to the use of the citizens of the United States ... The navigable waters extend not only to low water, but embrace all soil that is within the limits of the high water mark.”).

AS: 48 U.S.C. §1705(a). Conveyance to Guam, Virgin Islands, and American Samoa. (“Subject to valid existing rights, all right, title, and interest of the United States in lands ... periodically covered by tidal waters up to but not above the line of mean high tide ... of the territor[y] of ... American Samoa ... are hereby conveyed to the government of ... American Samoa, ... to be administered in trust for the benefit of the people thereof.”). *See also Tung v. Ah Sam*, 4 A.S.R. 764 (1971) (“Section 1.0101, 3, Code of American Samoa, adopts so much of the common law of England as is suitable to conditions in American Samoa and not inconsistent with the section. In this sense the common law of England means that body of jurisprudence as applied and modified by the courts of the United States at the time the statute was adopted and as since construed.”).

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- CA: *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521; 162 Cal.Rptr. 327, 606 P.2d 362, 365 (1980) (“When California was admitted to statehood in 1850, it succeeded to title in the tidelands within its borders not in its proprietary capacity but as trustee for the public.”)(citing *City of Long Beach v. Mansell*, 3 Cal.3d 462, 482); *People v. Kerber* 152 Cal. 731, 733, 93 P. 878, 879 (1908) (“Tide lands [between the lines of the ordinary high and low tides] vest in and belong to the state by virtue of its sovereignty ... Such land is held in trust for the benefit of the people.”); *Ward v. Mulford*, 32 Cal. 365, 372 (1867) (“The land which the state holds by virtue of her sovereignty ... is such as is covered and uncovered by the flow and ebb of the neap of ordinary tides. Such land is held by the state and for the benefit of the people.”); *Wright v. Seymour*, 69 Cal. 122, 10 P. 323 (1886) (“The lands under water, where the tide ebbs and flows, belong to the state by virtue of her sovereignty.”); *People v. California Fish Co.*, 138 P. 79, 82, 166 Cal. 576 (1913) (“It is a well-established proposition that the lands lying between the lines of ordinary high and low tide ... belong to the state in its sovereign character, and are held in trust for the public.”). *See also* CAL. CIV. CODE, § 670 (West 1872) (“The state is the owner of all land below tide water, and below ordinary high-water mark, bordering upon tide water within the state, of all land below the water of a navigable lake or stream.”).
- CT: *Simons v. French*, 25 Conn. 346, 352 (1856) (“In England, the king is the proprietor of the land covered by navigable waters, where the tide ebbs and flows, to high-water mark. ... In Connecticut, it is now settled that the public, representing the former title to the king, is the owner in fee of such flats up to high water-mark ...”).
- DE: *New Jersey v. Delaware*, 291 U.S. 361, 374 (1934) (“The title to the soil, which was subject to the *jus publicum* while it was vested in the King and his grantees, is subject to the same restriction in the ownership of Delaware.”); *Bickel v. Polk*, 5 De. 325, 326 (1851) (“In all navigable rivers, where the tide ebbs and flows, the people have of common right the privilege of fishing, and of navigation, between the high and low water mark.”).
- FL: *Thiesen v. Gulf, F & A Railway Co.*, 78 So. 491, 500 (1918) (“[T]he title to soil under [waters that ebb and flow] up to the high water mark is in the state of Florida ... the title, however, is held in trust for the people who have the rights of navigating, fishing, bathing and commerce upon and in the waters.”); *Perky Properties v. Fulton*, 113 Fla. 432, 151 So. 892, 895 (1934) (“The tidal and submerged lands of the state and the uses thereof are held in trust for all the people of the state.”)(citing *State v. Gerbing*, 56 Fla. 603, 47 So. 353). *See also* FLA. STAT. 253.03(d).
- GM: 48 U.S.C. §1705(a). Conveyance to Guam, Virgin Islands, and American Samoa “Subject to valid existing rights, all right, title, and interest of the United States

in lands ... periodically covered by tidal waters up to but not above the line of mean high tide ... of the territor[y] of Guam ... are hereby conveyed to the government of Guam ... to be administered in trust for the benefit of the people thereof."

- HI: HAWAII REV. STAT. § 1-1 ("The common law of England ... is declared to be the common law of the State of Hawaii..."); *In Re Ashford*, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968) (Publicly owned shoreline extends up to the high wash of waves as measured by the vegetation line, not mean high tide); *King v. Oahu Railway and Land Co.*, 11 Haw. 717, 725 (1899) ("The people of Hawaii hold the absolute right to all its navigable waters and the soils under them for their own common use.").
- LA: LA. CIV. CODE Art. 450 ("Public things that belong to the State are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea and the seashore."); and Art. 451 (The "'seashore' is the space of land over which the waters of the sea spread in the highest tide during the winter season."); LA. REV. STAT. 49:3 (The state owns, within its boundaries, the waters, beds, and shores of the Gulf of Mexico and the arms of the Gulf).
- MA: MASS. GEN. LAWS ANN., Ch. 91, § 1 ("Definitions... 'Tidelands,' present and former submerged lands and tidal flats lying below the mean high water mark. 'Commonwealth tidelands,' tidelands held by the commonwealth in trust for the benefit of the public or held by another party by license or grant of the commonwealth subject to an express or implied condition subsequent that it be used for a public purpose. 'Private tidelands,' tidelands held by a private party subject to an easement of the public for purposes of navigation and free fowling and of passing freely over and through the water."); *Storer v. Freeman*, 6 Mass. 435, 437 (1810) ("The owner of lands bounded on the sea or salt water shall hold to low water mark, so that he does not hold more than one hundred rods below high water mark; but the rights of others to convenient ways are saved ...").
- MD: *Board of Public Works v. Larmar Corp.*, 262 Md. 24, 47 (1971) ("It is well established that the title of land below the high water, as well as river or streams within the ebb and flow of the tide, belong to the public."); *Day v. Day*, 22 Md. 530, 537 (1865) ("Rivers or streams within the ebb and flow of the tide, to high water mark, belong to the public ... all the land below high water mark, being as much a part of the *jus publicum*, as the stream itself.").
- MS: *Cinque Bambini v. State*, 491 So.2d 508 (Miss. 1986) ("[T]he United States granted to the State of Mississippi in trust all lands ... including their mineral and other subsurface resources, subject to the ebb and flow of the tide below the then mean high water level, regardless of whether the courses were commercially navigable at the time of Mississippi's admission into the Union,

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regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea.”).

- NC: Although *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674 (1996) recently repudiated the English common law ebb and flow of tides test in favor of capacity of the water for navigation in fact by "useful vessels," including small pleasure craft, the Public Trust Doctrine still applies to tidelands along the shore of navigable waters. See *Swan Island Hunt Club v. White*, 114 F. Supp. 95 (E.D.N.C. 1953) (If some part of waterbody is navigable, the waterbody is legally navigable to its margins); *Ward v. Willis*, 51 N.C. 183, 185 (1858) (“It seems thus to be clear that whatever soil is at any time covered by a navigable water in its natural state is deemed to be in the same state as if it were the bed of the water; in other words, that it is all one, whether it be under the channel or be the margin between the high and low water lines.”). But see *Insurance Co. v. Parmele*, 214 N.C. 63 (1938) (Waters covering marsh lands at high tide so that boats drawing up to 20 inches may navigate same, but receding at low tide below the land, are not navigable waters).
- NH: *Concord Mfg. Co. v. Robertson*, 66 N.H. 1, 27; 25 A. 718 (1889) (“[T]he provision of the Massachusetts ordinance relating to the shore of tide-waters has not been adopted and is not in force in this state ... The introduction of any other line than high-water mark as the marine boundary would overturn common-law rights that had been established here, by a usage and traditional understanding of 200 years duration.”); *St. Regis Paper Co. v. New Hampshire Water Resources Bd.*, 92 N.H. 164, 169, 26 A.2d 832, 837 (1942) (“waters, rivers and streams ... belong to the State in full and unrestricted title The State holds them in trust for the public.”); *Dolbeer v. Suncook Water Works Co.*, 72 N.H. 562, 564, 58 A. 504, 505 (1904) (“Tide-waters and large ponds are public waters”) quoting *Concord Mfg. Co. v. Robertson*, 66 N.H. 1, 27; 25 A. 718 (1889).
- NJ: *Cobb v. Davenport*, 32 N.J.L. 369, 378 (Sup. Ct. 1867) (“The test by which to determine whether waters are public or private, is the ebb and flow of the tide. Waters in which the tide ebbs and flows--so far only as the sea flows and reflows, are public waters; and those in which there is no ebb and flow of the tide, are private waters.”).
- NY: *Tiffany v. Town of Oyster Bay*, 234 N.Y. 15, 20 (1922) (“The foreshore or land under the waters of the sea and its arms, between high and low water mark, is subject, first, to the *jus publicum*, the right of navigation, and when the tide is out, the right of access to the water for fishing, bathing and other lawful purposes to which the right of passage over the beach may be a necessary incident”). See also *Barnes v. Midland R.R.T. Co.*, 193 N.Y. 378, 384, 85 N.E. 1093, 1095 (1908) (“[T]he right of the public to use the foreshore upon the margin of our tidewaters for fishing, bathing and boating ... resides in the people in their sovereign capacity.”); *Arnold's Inn, Inc. v. Morgan*, 63 Misc.2d

279, 310 N.Y.S.2d 541, 547, *aff'd in part, reversed in part*, 35 A.D.2d 987, 317 N.Y.S.2d 989 (1970) (“[T]he jus publicum [is] the right shared by all to navigate upon the waters covering the foreshore at high tide and, at low tide, to have access across the foreshore to the waters for fishing bathing and any other lawful purpose.”).

- OR: *Bowlby v. Shivley*, 22 Or. 410, 415, 427 (1892) (“[T]he tidelands--those that are covered and uncovered by the ebb and flow of the sea--belong to the State of Oregon by virtue of its sovereignty.”) *aff'd* 152 U.S. 1. *See also Lewis v. City of Portland*, 25 Or. 133, 159, 35 P. 256, 260 (1893) (“the law is now regarded as settled that the State, by virtue of its sovereignty, is regarded as the owner of lands covered by tide water.”); *Hinman v. Warren*, 6 Or. 408, 411 (1877) (“[T]ide lands — those that are uncovered and covered by the ebb and flow of the sea — belong to the State of Oregon by virtue of its sovereignty.”).
- PA: *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869) (Title of riparian owner extends to low water mark, but is not absolute in tidal streams; it is subject to the public right of passage when the tide is high); *Flanagan v. Philadelphia*, 42 Pa. 219, 230 (1862) (The Schuylkill River, in which the tide “flows and reflows” is open to all citizens for purposes of navigation); *Ball v. Slack*, 2 Whart. 508, 538 (Pa. 1837) (Between low water and high water of the ocean, and wherever the tide ebbs and flows, is part of the common highway, vested in the state).
- RI: R.I. CONST., Art. 1, § 17 (“The people shall continue to enjoy and freely exercise ... the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state ...”); *Folsom v. Freeborn*, 13 R.I. 200, 204-205 (1881) (“In this State, as we have often decided, the fee of the soil under tide-water, and within its ordinary ebb and flow, is in the State.”); *Allen v. Allen*, 19 R.I. 114 (1895) (“The State holds the legal fee of all lands below high water mark as at common law ... This right of the State is held, however, by virtue of its sovereignty and in trust for all the inhabitants, not as a private proprietor.”); *Bailey v. Burges*, 11 R.I. 336 (1876) (“In this state, at common law, the fee of the soil in tide waters below high water-mark is in the state.”); *Gerhard v. Bridge Commissioners*, 15 R.I. 334, 334-335 (1886) (“[T]itle to the soil under tide-water is in the State”).
- SC: *Cape Romain Land and Improvement Company v. Georgia Carolina Canning Company*, 148 S.C. 428, 434, 146 S.E. 435, 436 (1928) (“[I]n the case of a tidal navigable stream ... the portion of land between high and low-water mark remains in the State in trust for the benefit of the public interest.”); *State v. Hardee*, 259 S.C. 535, 541, 193 S.E.2d 497, 503 (1972) (“The title to land below high-water mark on tidal navigable streams, under the well settled rule, is in the State, ... to be held in trust for public purposes.”).

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- TX: *City of Galveston v. Mann*, 135 Tex. 319, 143 S.W.2d 1028, 1033 (1940) (lands included "in lakes, bays, and islands along the Gulf of Mexico within tidewater limits ... are held in trust by the State for the benefit of all the inhabitants of the State."); *Lorino v. Crawford Packing Co.*, 142 Tex. 51, 56, 175 S.W.2d 410, 413 (1943) ("The soil covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater limits belongs to the State, and constitutes public property that is held in trust for the use and benefit of all the people.").
- VA: *Bradford v. Nature Conservancy*, 224 Va. 181, 194 (1982) ("At common law, the shores of the sea [between ordinary high and low water marks] were vested in the Crown as part of its *jus privatum*. However, this land was available to the public for purposes of navigation, fishing and fowling. * * * The common law of England, of course, became the common law of Virginia ..."); *Avery v. Beale*, 195 Va. 690, 697, S.E.2d 584, 588 (1954) (The common law of England became the common law of the Commonwealth).
- VI: 48 U.S.C. §1705(a) Conveyance to Guam, Virgin Islands, and American Samoa ("Subject to valid existing rights, all right, title, and interest of the United States in lands ... periodically covered by tidal waters up to but not above the line of mean high tide ... of the territor[y] of ... the Virgin Islands ... are hereby conveyed to the government of ... the Virgin Islands ... to be administered in trust for the benefit of the people thereof.").
- WA: WASH. CONST. Art. 17, § 1 ("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 ...").
60. *Dutton, et al. v. Strong, et al.*, 66 U.S. 23, 32 (1861).
61. Delaware, Maine, Massachusetts, Pennsylvania, and Virginia, all recognize that an upland grant from the State extends seaward to the low water mark, or, in the case of Massachusetts and Maine, to 100 rods from the high water mark, whichever is less.
- DE: *State ex rel. Buckson v. Pennsylvania Railroad Co.*, 228 A.2d 587, 600 (1967) ("[A] riparian owner ... holds to low water mark and thus its title includes the foreshore.") *Id.* at 601 ("To minimize the effect of celestial conditions, drought and flood ... the low water mark ... is mean low water mark, which is the average daily height of all low water marks over a twenty-three year period beginning January 1, 1942.").
- ME: *See Bell v. Inhabitants of Wells*, 557 A.2d 168, 176 (1989).
- MA: All lands above mean low water mark or more than 100 rods below natural mean high water, whichever is farther landward, may be privately held. *Storer v. Freeman*, 6 Mass. 435, 438 (1810) ("For the purposes of commerce, wharves

erected below high water mark were necessary. But the colony was not able to build them at the public expense. To induce persons to erect them, the common law of England was altered by an ordinance, providing that the proprietor of land adjoining on the sea or salt water, shall hold to low water mark, where the tide does not ebb more than one hundred rods, but not where the tide is a greater distance.”); *Opinion of the Justices*, 365 Mass. 681, 685 (1974) (“In the 1640’s, in order to encourage littoral owners to build wharves, the colonial authorities took the extraordinary step of extending private titles to encompass land as far as mean low water line or 100 rods from the mean high water line...”).

It should be noted that the reference to the "mean" low water mark in the *Opinion of the Justices*, above, clarifies previous contrary, and much older, rulings on the extent of the low water mark, where the "extreme" low water line was held to be the seaward boundary. Compare *Sparhawk v. Bullard*, 42 Mass. (1 Met.) 95, 108 (1840) (“The object of the ordinance of 1641, from which the right to flats originated, was to give the proprietors of land adjoining on the sea convenient wharf-privileges, to enjoy which, to the best advantage, it is often necessary to extend their wharves to low water mark at such times when the tides ebb the lowest”); *Sewall and Day Cordage Co. v. Boston Water Power Co.*, 147 Mass. 61, 64 (1888) (“[I]t has been settled for fifty years that [the term ‘low water mark’] mean[s] to extreme low water mark.”); and *Iris v. Hingham*, 303 Mass. 401, 403 (1939) (“By virtue of the colony ordinance of 1641-47 [an upland owner’s title] extended to extreme low water or to one hundred rods from the ordinary high water mark, if the low water mark lies beyond that distance.”).

To this day the law is unsettled in Massachusetts as to whether a riparian owner holds private title out to the "mean low water line" or to the "extreme low water line." In *Rockwood v. Snow Inn Corp.*, 409 Mass. 361, 369-70 (1991) the Massachusetts Supreme Court recognized “the confusion engendered by the arguable departure of the *Sparhawk*, *Sewall & Day Cordage Co.*, and *Iris* line of cases from the text of the Colonial Ordinance of 1641-1647 and *Storer v. Freeman*.” The court favorably cited, in dicta, more recent decisions that adopt the mean low water line as opposed to the extreme low water line as the proper interpretation of the Colonial Ordinance. Nonetheless, the question has been expressly left open by the Massachusetts courts. See *Pazolt v. Director of Marine Fisheries*, 417 Mass. 565, 631 N.E.2d 547, 550 n.8 (1994).

PA: *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869) (“Title of a riparian owner, derived by grant from the State, extends to low water mark, not absolutely in deed to tidal streams, but subject to the public right of passage when the tide is high.”); *Ball v. Slack*, 2 Whart. 508, 539 (1837) (“[T]he owner of the fast-land [has] a right between high and low-water mark.”).

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- VA: In Virginia, this applies only to lands which had been used as a Common. VA. CODE ANN. § 62.1-2 (Repl. Vol. 1987)(Subject to the provisions of Section 62.1-1, “the limits or bounds of the several tracts of land lying on such bays, rivers, creeks and shores, and the rights and privileges of the owners of such lands, shall extend to the mean low-water mark, but no farther, unless where a creek or river ... is comprised within the limits of a lawful survey.”); *Bradford v. Nature Conservancy*, 224 Va. 181, 197, 294 S.E.2d 866 (1982) (Any valid grant of shoreland extends to low water mark, “but the shore is subject to the public’s right to fish, fowl, and hunt.”).
62. In the five Atlantic States where private ownership of tidelands may extend to the “ordinary low water line,” or further seaward, the public retains public trust rights of use of the tidelands up to the “ordinary high water mark.”
- DE: *Bickel v. Polk*, 5 De. 325, 326 (1851)(“In all navigable rivers, where the tide ebbs and flows, the people have of common right the privilege of fishing, and of navigation, between the high and low water mark.”).
- ME: *See Bell v. Inhabitants of Wells*, 557 A.2d 168, 170-176 (1989).
- MA: *Opinion of the Justices*, 383 Mass. 895, 902-03, 424 N.E.2d 1092, 1099 (1981)(“[T]he nature of the public’s right in flats, the area between mean high water and mean low water (or 100 rods from mean high water, if lesser) ... are of a limited nature ... [T]he littoral owner owns them subject at least to the reserved public rights of fishing, fowling, and navigation.”)
- PA: *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869)(“Title of a riparian owner, derived by grant from the State, extends to low water mark, not absolutely in deed to tidal streams, but subject to the public right of passage when the tide is high.”); *Ball v. Slack*, 2 Whart. 508, 539 (1837)(“[T]he owner of the fast-land [has] a right between high and low-water mark.”).
- VA: *Bradford v. Nature Conservancy*, 224 Va, 181, 197, 294 S.E.2d 866 (1982) (Any valid grant of shoreland extends to low water mark, “... but the shore is subject to the public’s right to fish, fowl, and hunt.”).
63. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 481 (1988).
64. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 476 (1988).
65. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 482-483 (1988).
66. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 476 (1988).
67. *Martin v. Waddell*, 41 U.S. 366, 416 (1842).

68. See *United States v. Maine*, 420 U.S. 515 (1975) and the accompanying Special Master's Report.
69. *United States v. California*, 332 U.S. 19, 38-39 (1947).
70. A geographic mile, identical to the nautical mile, equals approximately 6,070 feet. The more common statute mile equals 5,280 feet. Thus the three geographic mile breadth of State waters referred to in the Submerged Lands Act equals approximately 3.45 statute miles.
71. A league equals three geographic miles.
72. 43 U.S.C. §1301 *et seq.*
73. 43 U.S.C. §1301(g).
74. Although the Submerged Lands Act is silent regarding any public trust rights or duties imposed upon an adjacent coastal State, many ocean-bordering States do hold their submerged lands out three miles (or three leagues) in the public trust, either through judicial determination, or constitutional or statutory provision.

AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1118 (1988).

HI: HAWAII ADMIN. ACT, § 5(f)(i)(Submerged Lands Act of 1953 Applicable to Hawaii. Such lands held to be public trust lands within meaning of § 5(f)). See HAW. ATT. GEN. OP. June 24, 1982. See also *King v. Oahu Railway & Land Co.*, 11 Haw. 717, 725 (1899) ("The lands under the navigable waters in and around the territory of the Hawaiian Government are held in trust for the public uses of navigation.").

LA: LA. CIV. CODE, Art. 450 (The territorial sea and seashore are public things); LA. REV. STAT. 49:3 (The state owns, within its boundaries, the waters, beds, and shores of the Gulf of Mexico and the arms of the Gulf).

MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 515 (Miss. 1986) *aff'd* 484 U.S. 469 (1988) ("Fee simple title to all areas south of [the mean high tide line of the Gulf of Mexico] was granted to the State in trust.").

NC: *Capune v. Robbins*, 273 N.C. 581 160 S.E.2d 881 (1968) ("[T]he public [has] equal rights to use without unnecessary obstruction the ocean waters seaward from the strip constituting the foreshore.").

NH: N.H. REV. STAT. ANN. § 1:16 (State owns the waters and submerged lands to the outer limits of the United States territorial sea). See also 1990 N.H. Laws

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ch. 150 ("The public waters of New Hampshire are valuable resources held in trust by the State.").

NY: State Law § 7-a. *See also People v. Hudson River Connecting Co.*, 228 N.Y. 203, 219 (1920)(State holds title to submerged lands in trust unless otherwise conveyed or excepted).

OR: *See* 31 OR. REV. STAT. 70 (1951).

SC: *See* S.C. CODE § 48-39-10(B).

TX: *City of Galveston v. Mann*, 135 Tex. 319, 330, 143 S.W.2d 1028, 1033 (1940) ("We therefore repeat that the fundamental principle underlying title and rights of the State in lands under navigable waters, including the land subject to the ordinary ebb and flow of the tides, is held by the State in trust for all the people..."). *See also* TEX. NAT. RES. CODE ANN. § 11.02(c) (Vernon 1978)("The State of Texas owns the water and beds and shores of the Gulf of Mexico and the arms of the Gulf of Mexico within [its] boundaries ..."); TEX. PARKS & WILD. CODE ANN. § 1.011(c) (Vernon 1976)("All the beds and bottoms ... of public rivers, bayous, lagoons, creeks, lakes, bays and inlets in this state and of that part of the Gulf of Mexico within the jurisdiction of this State are the property of this State."); TEX. WATER CODE ANN. § 11.021(a) (Vernon 1988)("The water of the ... Gulf of Mexico ... in the State is property of the State.").

VA: VIRG. CONST. Art. XI, § 1 ("[I]t shall be the Commonwealth's policy to protect its atmosphere, lands and waters from pollution, impairment or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth."); VA. CODE ANN. § 62.1-44.36(i) (1987) ("[E]xisting water rights are to be protected and preserved subject to the principle that all the state waters belong to the public for use by the people for beneficial purposes...").

WA: WASH. CONST. Art. 17, § 1 ("The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state ...").

75. 48 U.S.C. 1705(a).

76. *Id.*

77. Under the common law of England, public rights were confined to only those waters and lands subject to the ebb and flow of the tide. Rights in freshwaters were held exclusively by abutting landowners.
- CL: *The Royal Fishery of the Banne*, Davies Rep. 149 (circa 1604) ("Every navigable river, so high as the sea flows and ebbs in it, is a royal river, and the fishery of it is a royal fishery and belongs to the King by his prerogatives; but in every other river not navigable, and in the fishery of such river the terre [land] tenants on each side have an interest in common."). See also Angell, J.K., *A Treatise on Tide Waters* (1826), at 75.
- NJ: *Cobb v. Davenport*, 32 N.J.L. 369, 378 (Sup. Ct. 1867) ("And all cases in which waters above the ebb and flow of the tide, such as the great inland lakes and the larger rivers of the country, are held to be public ... are confessedly a departure from the common law.").
- WI: *Willow River Club v. Wade*, 100 Wis. 86, 76 N.W. 273, 274 (1893)(The thirteen original states applied the English common law, that held "as a general rule, that beds of tidal rivers belonged to the state, but that the beds of fresh-water rivers belonged to the abutting landowner.").
78. *The Genessee Chief v. Fitzhugh*, 53 U.S. 443, 454 (1851).
79. *The Genessee Chief v. Fitzhugh*, 53 U.S. 443, 455 (1851).
80. *Barney v. Keokuk*, 94 U.S. 324, 336 (1876).
81. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988) citing *Barney v. Keokuk*, 94 U.S. 324, 338 (1877) and *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 435 - 436 (1892)("[I]t 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").
- CA: *National Audubon Society v. Superior Court*, 33 Cal. 3rd 419, 435 (1983)("It is well settled in the United States . . . that the Public Trust is not limited to the reach of the tides, but encompasses all navigable lakes and streams.").
82. IL: *Schulte v. Warren*, 218 Ill. 108, 75 N.E. 783, 784 (1905) ("[I]n the case of a natural lake or bed of water meandered by the government, the grant extends to the water's edge, while the ownership of the bed of the lake is in the state, in trust for all the people for the purpose of fishing, boating and the like.").
- TX: *Diversion Lake Club v. Heath*, 126 Tex. 129, 135, 86 S.W.2d 441, 443 (1935) (the border between the private upland and the state-owned land within the trust exists halfway between the high and low levels of waterflow); *Landry v. Robison*,

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110 Tex. 295, 219 S.W. 819, 820 (1920) (“For our decisions are unanimous in the declaration that by the principles of the civil and common law soil under navigable waters was treated as held by the state or nation in trust for the whole people.”).

83. MI: Great Lakes Submerged Lands Act, 1955 P.A. 247, M.C.L.A. 322.702 (Unpatented bottomlands of the Great Lakes are those “lying below and lakeward of the natural ordinary high-water mark ... For purposes of this act the ordinary high-water mark shall be deemed to be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.4 feet; and Lake Erie, 571.6 feet.”).

84. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 476 (1988).

85. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 482-483 (1988).

86. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 476 (1988).

87. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

ND: *United Plainsmen v. North Dakota State Water Conservation Commission*, 247 N.W.2d 457 (1976)(“Public Trust Doctrine” is not restricted in its application to conveyances of real property; the State holds navigable waters, as well as the lands beneath them, in trust for the public.”).

88. Unlike trust lands, however, trust waters can not be privately owned.

US: *United States v. Twin City Power Co.*, 350 U.S. 222, 226 (1955) (“That the running water in a great navigable stream is capable of private ownership is inconceivable”) quoting *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1912); *Swan Island Club, Inc. v. Yarbrough*, 209 F.2d 698, 701 (4th Cir., 1954)(“Navigable waters are free. They cannot be sold or monopolized. They can belong to no one but the public...”) quoting *State v. Twiford*, 136 N.C. 603, 609, 48 S.E. 586, 588 (1904); *Packer v. Bird*, 137 U.S. 661, 667 (1891)(“It is indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon [navigable waterways], and consequently to the exclusion of private ownership, either of the waters or the soils under them.”).

MS: *State Game and Fish Commission v. Louis Fritz Co.*, 193 So. 9, 11 (1940)(Riparian owner of bed of lake “is not the owner of the water resting for the time being upon its submerged lands or lake bed. In its ordinary or natural state, water is neither land, nor tenement, nor susceptible of absolute

ownership. It is a movable, wandering thing, and admits only of a transient, usufructuary property”.) (Citations omitted).

NY: *People v. New York and Ontario Power Co.*, 219 App. Div. 114, 116, 219 N.Y.S. 497, 501 (1927) (“The waters of the stream are not separately owned by anyone. The stream is a public highway. The State holds, as trustee for the people, the right to control the stream and its bed for commerce and navigation. This is a sovereign right, and generally may not be abdicated ... [T]he legislature may not grant an unconditional title — one not subject to the paramount right of the state — in a public stream or in public waters for private use and purposes.”).

TX: *South Texas Water Co. v. Bieri*, 247 S.W.2d 268, 272 (Tex. Civ. App.-Galveston 1952, writ ref'd n.r.e.) (“An appropriator of water from a public stream does not acquire the ownership or corpus of the water but merely ... the use of the water for the purposes set forth in the permit.”).

89. *See Rex v. Smith*, 2 Douglas 441 (1780), as discussed in Gould, J.M., *Gould on Tidewaters* (1883), at 100.

90. Angell, J.K., *A Treatise on Tide Waters* (1826), at 63. *See also Pomeroy on Water Rights* (1893), at 216; Gould, J.M., *Gould on Waters* (1883), at 100-101; 65 C.J.S. *Navigable Waters* § 1.

LA: *Morgan v. Negodich*, 3 So. 636, 640 (1888) (Water body is not tidal waters because it contains salt water. “The salt water ... in Bayou Cook, is not supplied by” tidal forces, and therefore “the land in question was not common property, but was susceptible of private ownership ...”). *See also Burns v. Crescent Gun & Rod Club*, 116 La. 1038, 1042, 41 So. 249, 251 (1906).

MA: *Attorney General v. Woods*, 108 Mass. 436, 439 (1871) (“It is the rise and fall of the water, and not the proportion of salt water to fresh, that determines whether a particular portion of a stream is within tidewater.”).

NY: *People v. Tibbits*, 19 N.Y. 523, 526 (1859) (“A river is considered an arm of the sea, and as such navigable, so far as the tide rises and falls... A river should be deemed an arm of the sea, so far as the circulation is at all subjected to the influence of the oceanic tides.”); *People v. Abrams*, 372 N.Y.S.2d 138, 140 (1975) (“The word ‘tidewater’ means waters, whether salt or fresh, wherever the ebb and flow of the tides is felt.”).

PA: *Carson v. Blazer*, 2 Binn. 475, 484 (1810) (“The qualities of fresh or salt water cannot amongst us determine whether a river shall be deemed navigable or not.”).

91. *Barney v. Keokuk*, 94 U.S. 324, 338 (1877).

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92. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 437 (1892) (“We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the Common Law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.”).
93. *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892).
94. *Lopex v. Smith*, 109 So.2d 176, 178 (Fla. 1959).
95. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 480 (1988).
96. CA: *Oakland v. Oakland Waterfront Co.*, 50 P. 277 (1897)(Waters navigable at high tide but not at low tide are still navigable).
- FL: *Martin v. Busch*, 93 Fla. 535, 563, 112 So. 276, 283 (1927) (Navigable waters remain navigable “whether the water is navigable or not in all its parts toward the outside lines or elsewhere, or whether the waters are navigable during the entire year or not.”).
- IL: ILL. REV. STAT., Ch. 19, par. 65 (1987) (“[Public waters] mean all open public streams and lakes capable of being navigated by water craft, in whole or in part, ... together with all bayous, sloughs, backwaters, and submerged lands that are open to the main channel or body of water and directly accessible thereto.”).
- MD: *Owen v. Hubbard*, 260 Md. 146, 153, 271 A.2d 672, 676-677 (1970) (“Where [the] shore ends and private ownership normally begins is determined by the mean high water mark, even though the area exposed by low tide might be described as “marshy.”).
- MI: *State v. Lake St. Clair Fishing and Shooting Club*, 127 Mich. 580, 87 N.W. 117 (1901)(Waters of the Great Lakes, regardless of elevation, and waters of navigable inland lakes and streams are within the public trust.) *See also* Great Lakes Submerged Lands Act, MICH. COMP. LAWS. ANN. § 322.701 *et seq.* (1979).
- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 515 (1986) (“In each instance--freshwaters or tidewaters--the central focus is upon navigable waters, but no one has ever suggested that the boundaries of that granted in trust were the contours of the navigable channel. The boundary of each waterway navigable in fact is that point where mean high water mark (variously determined) strikes land. Within that surveyable, territorial boundary (and outside the navigable channel area) will always be some non-navigable areas.

Yet so long as by unbroken watercourse--when the level of the waters is at mean high water mark--one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel area to land, always afloat, the waters traversed and the lands beneath them are within the inland boundaries we consider the United States set for the properties granted the State in trust.”).

- NY: *State v. Bishop*, 46 A.D. 2d 654, 359 N.Y.S. 2d 817, 820 (1934)(“waters though not navigable in fact are deemed navigable in law when they are shallow reaches of navigable bodies.”). *But see Munson v. Hungerford*, 6 Barb. 265 (1849) (“a stream above the ebb and flow of the tide, which is not navigable for boats or vessels or rafts, is not a navigable stream ... though, when swollen by the spring and autumn floods, it might be capable, three or four weeks in the year, of carrying down in its rapid course whatever might have been thrown upon its waters ...”).
- NC: *Swan Island Hunt Club v. White*, 114 F. Supp. 95 (E.D.N.C. 1953) (If some part of waterbody is navigable, the waterbody is legally navigable to its margins); *Ward v. Willis*, 51 N.C. 183, 185 (1858)(“It seems thus to be clear that whatever soil is at any time covered by a navigable water in its natural state is deemed to be in the same state as if it were the bed of the water; in other words, that it is all one, whether it be under the channel or be the margin between the high and low water lines.”). *But see Insurance Co. v. Parmele*, 214 N.C. 63 (1938)(Waters covering marsh lands at high tide so that boats drawing up to 20 inches may navigate same, but receding at low tide below the land, are not navigable waters).
- OH: *The Winous Point Shooting Club v. Slaughterbeck, et al.*, 96 Oh. St. 139 (The public’s right of fishing in the waters of the open navigable public bays of Lake Erie are not limited within such bays, to the particular portions thereof which are navigable).
- WI: *State v. Trudeau*, 139 Wis. 2d 91, 103 - 104, 408 N.W.2d 337, 342 - 343 (1987) *cert. denied*, 108 S.Ct. 701 (1988)(The entirety of navigable waters are within the trust, including areas “heavily vegetated by plants rising far above the water. * * * Lake Superior is navigable and if the non-navigable site is a part of the lake, then the land below [ordinary high water mark] is held in trust for the public.”).
97. *Wagner v. City of Baltimore*, 210 Md. 615, 616 (1956).
98. *Cinque Bambini Partnership v. State of Mississippi*, 491 So.2d 508, 515 (1986) *aff’d sub nom Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988).

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99. See *National Audubon Society v. Superior Court of Alpine County*, 189 Cal.Rptr. 346, 658 P.2d 709 (1983), cert. denied sub nom. *City of Los Angeles Dep't of Water & Power v. National Audubon Society*, 104 S. Ct. 413 (1983). See also *Golden Feather Community Association v. Thermalito Irrigation District*, 199 Cal.App.3d 402, 244 Cal. Rptr. 830 (1988)(The Public Trust Doctrine does not extend or apply to non-navigable waterways absent some impact on the public trust uses of navigable waters fed by the non-navigable waters).
100. *Rettkowski v. Department of Ecology*, 858 P.2d 232, 237, 122 Wash.2d 219 (1993)("First, we have never previously interpreted the doctrine to extend to non-navigable waters or groundwater." Noting in note 5 that "We similarly do not need to address the scope of the doctrine today.").
101. See *W. Rodgers*, ENVIRONMENTAL LAW, 172-73 (1977).
102. The State, in its sovereign capacity, holds title to the fish within trust waters in the State for the benefit of the people.
- US: *Douglas v. Seacoast Products*, 431 U.S. 265, 284-5 (1977)("A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. ... The "ownership" language of such cases must be understood as no more than a Nineteenth Century legal fiction expressing the "importance to its people that a State have power to preserve and regulate the exploitation of an important resource." ... Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and the Constitution." Citations omitted.) This case draws into question the validity of the progeny of cases following *Geer v. Connecticut*, 161 U.S. 519, 529 (1896)(Following the English common law, the court held that "ownership" of fish and game is in the State not in a proprietary sense but in its sovereign capacity, and must be exercised "as a trust for the benefit of the people." Citing *Martin v. Waddell*, 41 U.S. 366, for the proposition that the "ownership is that of the people in their united sovereignty."). *Geer* was also expressly overruled by *Hughes v. Oklahoma*, 441 U.S. 322 (1979).
- CA: *People v. Monterey Fish Products Co.*, 195 Cal. 548, 563 (1925)("The title to the property in the fish within the waters of the State are vested in the State of California and held by it in trust for the people of the state."); *People v. K. Houden Co.*, 215 Cal. 54, 56 (1932)("The property right in the fish of our waters is in the State in trust for the whole people."); *People v. Glenn Colusa Irr. Dist.*, 15 P.2d 549, 552 (1932)("The title to the property in the fish within the waters of the State are vested in the State of California and held by it in trust for the people of the state.").

- FL: *State v. Stoutamire*, 131 Fla. 698 (1936)(The ownership of fish “is in the State, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common.”). *See also Nash v. Vaughn*, 133 Fla. 499 (1938).
- MA: *Commonwealth v. Alger*, 61 Mass. 53, 98 (1851)(Public rights in navigable waters include the right of the public to preserve fishery resources for the benefit of the people). *See also Commonwealth v. Chapin*, 22 Mass. (5 Pick.) 199 (1827).
- NY: *Lawton v. Steele*, 119 N.Y. 226, 234 (1890) *aff'd* 152 U.S. 133 (1892)(“It has become a settled principle of public law that power resides in the several states to regulate and control the right of fishery in public waters within their respective jurisdictions.”); *Sloup v. Town of Islip*, 78 Misc.2d 366, 356 N.Y.S.2d 742, 745 (1974) (“Migratory marine fish are *ferae naturae* and are the property of the state... . Fishing in navigable waters or in ‘arms of the sea is presumptively common to the public.’”).
- NC: *State v. Gallop*, 126 N.C. 979, 983 (1900)(“Wild game within a State belongs to its people in their collective sovereign capacity.”).
- OR: *State v. Hume*, 52 Or. 1, 5, 95 P. 808 (1908) (“It is a generally recognized principle that migratory fish in navigable waters of a state, like game within its borders, are classed as animals *ferae naturae*, the title of which ... is held by the state, in its sovreign capacity for all its citizens.”).
- TX: *Stephenson v. Wood*, 119 Tex. 564, 569, 34 S.W.2d 246 (1931)(“The fish in the streams and coastal waters of Texas are the property of the State, and no person has any vested property right therein.”).
- WA: *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80 (1936) (“[W]hile the state owns the fish in its waters in a proprietary capacity, it nevertheless holds title thereto as trustee for all the people of the State and for the common good ...”).
103. FL: *Nash v. Vaughn*, 133 Fla. 499, 502 (1938) quoting *State v. Stoutamire*, 131 Fla. 698, 733.
104. *Toomer v. Witsell*, 334 U.S. 385 (1948).

CHAPTER II

LANDS, WATERS AND LIVING RESOURCES SUBJECT TO THE PUBLIC TRUST DOCTRINE

Section 2: Upper Boundaries of Public Trust Shorelands

Summary

The upper boundary of public trust shorelands, whether those lands are privately or publicly held, is nearly always described as the "ordinary high water line." For tidal shorelands, this term is generally defined as the mean high tide line, although many exceptions and diverse interpretations exist throughout the country. For freshwater shorelands, this term generally means the line to which high water reaches under normal conditions, not the line reached in floods nor by the great annual rises of a river. In all situations, however, the location and description of the upper boundary of trust shorelands is determined by local law, custom and practice.

A growing number of States recognize some public trust interests in privately owned "dry sand" areas immediately upland of the mean high tide line, usually extending up to the vegetation or debris line. Further, there may be public trust considerations concerning the use of non-navigable freshwater tributaries of navigable waterbodies, and public trust uses therein.

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This section focuses on the legal definitions of the upper boundaries of public trust lands, as distinct from the factual determinations on any parcel of property. Although in theory "the delineation of sovereign and private lands is clear cut, its application in the field creates havoc."¹ The factual determination of these boundaries, and the dilemmas that confront a surveyor (or lawyer) who attempts to determine with accuracy the boundary lines of shorelands is discussed in Chapter II, §4.

A. Roman and English Law

Under Roman civil law, the upper boundary of the public's seashore went "as far as the greatest wave extended itself in the winter."² This description of the common shores was sufficient for Roman times. In the more populous England, however, with private property rights abutting the public tidelands, a more definite and exact boundary was required. Further, because Roman civil law viewed the oceans and shorelands as inherently incapable of ownership by anyone (*res nullius*), property disputes were presumably unheard of.

In contrast, English common law put great emphasis on placing what was capable of private ownership into private hands.

"The policy of the common law is to assign to everything capable of ownership a certain and determinate owner, and for the preservation of peace, and the security of society, to mark, by certain indicia, not only the boundaries of such separate ownership, but the line of demarcation between rights which are held by the public in common, and private rights."³

English common law confined the shore "to the flux and reflux of the sea at ordinary tides,"⁴ implying that the sweep of the greatest wave in winter was not "ordinary." Thus, "When ... the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails."⁵

The meaning of the term 'ordinary high water mark' has been contested for centuries. In the 1854 English case *Attorney General v. Chambers*, the court was presented with the question "What are the lands which for the most part of the year are reached and covered by the tides?"⁶ After extensive review, the English court determined that the line "bounding the right of the Crown" was the "line of the medium high tide between the springs and the neaps."⁷

American common law and jurisprudence has followed English common law. Because of the great interests in property rights, the "line of demarcation between

rights which are held by the public in common, and private rights” becomes very important. One must always resort to local law, custom and practice in order to establish exactly where the “ordinary high water mark” lies, i.e. where the upper boundary of the public trust is located.

B. Tidelands

In this country, the English common law description of the upper boundary being the ‘ordinary high water mark’ has been nearly universally adopted by the tideland States, although interpretations of this term vary significantly State by State. Nonetheless, the term ‘ordinary high water mark’ generally describes the upper boundary of both sovereign-owned tideland and privately held (*jus privatum*) tidelands.⁸

Exactly where the ‘ordinary high water mark’ is located is a question of fact which is generally determined in accordance with local law, unless title to the upland involved traces back to a conveyance of the United States. In such a case, “the question as to the extent of [a] federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question.”⁹ In all other cases, however, “rights and interests in the tideland, which is subject to the sovereignty of [a] State, are matters of local law.”¹⁰

Judicial and legislative interpretations of the term ‘ordinary high water mark’ vary greatly among the States and their political subdivisions. For example, the “high-water line” has been recognized as being “the line of vegetation.”¹¹ The line of vegetation has also been recognized as the “ordinary mean high water” line.¹² One State has defined “high water mark” as the mean high tide line,¹³ which in turn was judicially interpreted to mean the vegetation line.¹⁴ Another State has described the upper boundary as the “upper wash of the waves as measured by the vegetation line, or in its absence, the debris line.”¹⁵ Where both a vegetation and debris line exist, the vegetation line supersedes the debris line as the more permanent evidence of the high wash of the waves.¹⁶

The most common interpretation of the term ‘ordinary high water mark’ is the ‘mean high tide line.’ That is, in many tideland States, the mean high tide line is utilized as the boundary between tidelands subject to the public trust, and upland private land.¹⁷ Various methodologies exist for determining the mean high tide line. The most commonly employed is “the average height of all of the high waters over a period of 18.6 years,”¹⁸ a methodology affirmed by the United States Supreme Court for the boundary of federally granted uplands,¹⁹ and widely adopted

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by many tidewater States. See Ch. II, §4 for further discussion on the factual determination of boundaries.

Five Atlantic States have established the seaward boundary of privately held tideland (*jus privatum*) as the mean low tide line, or further seaward,²⁰ although the privately held tideland up to the mean high tide line is subject to the public's trust rights (*jus publicum*). As a result, the upland extent of the public's trust rights in these States is usually described as the "ordinary high water mark."²¹

A few other States have a tidelands trust boundary above the mean high tide line, even though private ownership of the uplands may extend further seaward. In Texas, for example, grants to private individuals prior to January 20, 1840 are bound by the mean higher high tide.²² Moreover, by statute, Texas has declared that the public "shall have the free and unrestricted right of ingress and egress ... from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico."²³ In Louisiana, the Public Trust Doctrine extends to the "mark of high tide in winter,"²⁴ a description remarkably similar to Roman civil law.²⁵ In New Jersey, the "dry sand" area above the mean high tide line has been recognized as subject to certain public trust rights, although no exact upper boundary has been clearly articulated.²⁶ See Ch. IV.B.1.

C. Navigable Freshwater Bottomlands: Lakes, Rivers & Great Ponds

It is impossible to discuss the upper boundary of a State's Public Trust interest in navigable freshwater bottomlands without directly considering the State's law concerning private ownership of these bottomlands. Many States either assume that bottomland is privately held or broadly allow for its ownership. It is important to bear in mind, however, that private ownership of bottomland beneath navigable waters does not necessarily displace or extinguish a State's Public Trust interest in those same bottomlands.

The lower boundary of an upland owner's land may be the ordinary high water mark, in between the ordinary high and low water lines, the ordinary low water mark, the thread of the stream, or the middle of the navigable channel. In nearly all instances, however, the State retains some public trust interest over these privately held bottomlands up to the ordinary high water line.

A brief discussion of private property rights in freshwater navigable bottomlands is necessary to fully understand the extent of a State's public trust interest in navigable freshwater bottomlands.

1. Private Ownership of Navigable Freshwater Bottomlands

Ownership of lands beneath navigable waters was not recognized by Roman civil law. Such lands were incapable of ownership, being *res nullius*. Nonetheless, Roman civil law did recognize the public right to use privately owned river banks. The Institutes defined the distance landward that this public right extended:

“A bank of a river is defined, after the analogy of the sea-shore, as the furthest reach of the river.²⁷ This, however, is true only so long as the river keeps within its natural course. Occasional floodings do not change the legal extent of the bank, otherwise all Egypt would be a bank of the Nile. But if the increase or abatement is permanent, the bank is regarded as altered.”²⁸

The English common law on the question of ownership of freshwater bottomlands was stated by Lord Hale:

Fresh waters of what kind soever do of common right belong to the owners of the soil adjacent; so that the owners of the one side have of common right the propriety of the soil *usque filum aquae* on their side. And if a man be owner of the land on both sides, in common presumption he is the owner of the whole river according to the extent of his land in length.²⁹

Any analysis of the boundaries between public and private ownership of navigable freshwater bottomlands in this country is quite complex, owing to the derivations and permutations of the English common law employed by the numerous States. Between those States which have fully adopted, or fully rejected, English common law as applied to bottomland ownership are many States which have modified the common law to fit the State's circumstances and history. As evidence of the complexity of this area of the law, at least one State remains today unsettled as to whether navigable freshwater bottomlands in that State can be privately owned.³⁰

When ownership of freshwater bottomlands is in doubt, the presumption is that title to the bottomlands is in the State.³¹ Thus, the burden is upon a private claimant to prove that she has a valid title to the bottomland. Of those States that allow for private bottomland ownership, many have different rules according to whether Great Lakes, inland lakes and rivers or “Great Ponds” are in question.

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a. Land Bordering the Great Lakes

Michigan, by statute, has defined the upper boundary of its public trust shorelands as the "ordinary high water mark," a term which is then defined as a fixed elevation above sea level that does not fluctuate with the water level.³² In Ohio, also by statute, the upper boundary of the public trust lands is defined as the "southerly shore of Lake Erie"³³ a term which has not been defined further either in statute or case law.³⁴ In Illinois, the upper boundary has been judicially defined as being at the water's edge, which fluctuates based on water level, erosion or accretion.³⁵

Like some of the tidewater States, two Great Lakes States, Pennsylvania and Wisconsin, allow for private ownership of shorelands down to the "ordinary low water mark."³⁶ However, the riparian owner has only a qualified title between ordinary low and ordinary high water, with the public retaining trust rights for navigation and fishing.³⁷

b. Land Bordering Navigable Rivers and Inland Lakes

(i) River Bottomlands

"The great size of many of the freshwater rivers of this country, and their capability of navigation, have induced some of the highest courts of several of the States to attach to them the common law consequences of navigability, thereby abrogating the common law distinction between them and those in which the tide ebbs and flows, so that grants bounded on such rivers stop at their margin. ... According to this view, in the case of large fresh water rivers which are navigable in fact, the riparian owners do not take to the middle of the river, but the State is the owner of the subjacent soil, and the public have an easement in the river."³⁸

The majority of States follow English common law, and provide for private ownership of navigable river bottomlands to the center of the stream or river (*usque ad filum*).³⁹ Partial private ownership of river bottomlands also occurs, with private title extending only to the ordinary low water mark, with the balance of the river bed owned by the State.⁴⁰ In the remaining States, the bottomlands are owned exclusively by the State up to the "ordinary high water mark."⁴¹ The "ordinary high water mark" has been defined as the permanent banks of the waterway that confine the waters at their highest level,⁴² but does not include the point reached by "unusual floods".⁴³ A few States expressly prohibit private ownership of bottomlands.⁴⁴ Only in one State, Hawaii, is there no general rule due to the near

total lack of navigable non-tidal waters. As a result, in Hawaii the riparian bottomland boundary must be determined on a deed-by-deed basis.⁴⁵

(ii) Lake and Pond Bottomlands

The majority of States do not allow private bottomland ownership of navigable lakes and ponds,⁴⁶ although a few do.⁴⁷ A few States limit private bottomland ownership down to the ordinary low water mark.⁴⁸ Of those States allowing private ownership of lake and pond bottomlands, at least one describes the bottomland boundaries according to the "pie-cutting" method.⁴⁹

***(iii) Mineral Rights in Privately Held
Navigable Freshwater Bottomlands***

Private ownership of freshwater bottomlands generally includes all mineral rights.⁵⁰ Several States, however, reserve certain mineral rights when a title is transferred into private hands.⁵¹ A handful of States expressly reserve all mineral rights, leaving the riparian owner with only the surface estate in the bottomlands.⁵²

c. "Great Ponds"

In some New England States, the Public Trust Doctrine applies to "Great Ponds."⁵³ In Massachusetts, the upper boundary of State ownership of great pond bottomland is defined as the "natural low water" mark, although State statutory law requires the licensing of activities in great ponds below "natural high water."⁵⁴ Likewise, in Vermont, State-owned bottomlands extend only to the "ordinary low water mark" of a great pond, although the public's common right of passage extends "all the way to normal high water without regard to the ownership of the underlying land."⁵⁵ Further, in Vermont where there is no definite, identified, ordinary low water mark, the term, and hence the boundary, is defined as being at "the water's edge."⁵⁶ In New Hampshire, all submerged lands beneath ponds greater than ten acres in size are subject to the public trust up to the natural or ordinary high water mark.⁵⁷

***2. Upper Boundary of a State's Public Trust Interest Over the
Bottomlands: The Ordinary High Water Mark***

When a State owns the bottomlands, *i.e.* private riparian title is solely above the ordinary high water line, the upper boundary of the State's public trust interest is likewise the ordinary high water line. At the same time, generally speaking, where

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a riparian owner holds title to any bottomland below the ordinary high water mark, the State retains a dominant public trust interest over these bottomlands. This is so whether the bottomlands are of the Great Lakes,⁵⁸ or inland rivers and lakes.⁵⁹

The title to privately held bottomland is variously described as being a partial title,⁶⁰ a naked fee,⁶¹ a title that passes “as shadow follows a substance,”⁶² or as being subject, subordinate or subservient to the State’s dominant public trust interest up to the ordinary high water mark.⁶³ In general, in both cases (public or private title ownership of the bottomlands) the “ordinary high water line” serves as the upper boundary of the State’s public trust interest.

In addition to being a partial title, a few States expressly provide that the title to freshwater bottomlands is revocable.⁶⁴ Nonetheless, even though title to these bottomlands is only partial in nature, burdened by the public’s trust interests, and in some States expressly revocable, such privately held bottomlands are usually fully subject to property taxation.⁶⁵

Notes

1. Porro, A., and Teleky, L.S., *Marshland Title Dilemma: A Tidal Phenomenon*, 3 Seton Hall Law Review 323, 324 (1972). See also Porro, A., *Invisible Boundary--Private and Sovereign Marshland Interests*, 3 Natural Resources Lawyer 512 (1970).
2. Institutes of Justinian, Lib. 2, title 1, section 3, as reprinted in Angell, J.K., *A Treatise on Tide Waters* (1826), at 65.
3. *Cobb v. Davenport*, 32 N.J.L. 369, 378 (Sup. Ct. 1867).

DE: *State v. Pennsylvania Railroad Company*, 228 A.2d 587, 598 (1967) (“The preservation of peace and security of society calls for the fixing of lines of demarcation between rights which are public and held in common and others which are private.”).

LR: Angell, J.K., *A Treatise on Tide Waters* (1826), at 17 (English common law “assign[ed] to everything capable of occupancy and susceptible of ownership a legal and certain proprietor, [and] to make those things which from their nature cannot be exclusively occupied and enjoyed, the property of the sovereign.”).
4. *Borax Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935) quoting *Blundell v. Catterall*, 5 B.& A. 268, 292.
5. *United States v. Pacheco*, 69 U.S. 587, 590 (1864).
6. *Attorney General v. Chambers*, 4 De G.M. & G. 206 (1854), as reported in *Borax Ltd. v. Los Angeles*, 296 U.S. 10, 24, 25 (1935). In *Attorney General v. Chambers*, the English court rejected the argument that either the highest tides (spring tides) or similarly, the lowest tides (neap tides) formed the upper boundary. Instead, the court held that “the medium tides of each quarter of the tidal period” formed the “true (upper) limit of the shore...”.
7. *Attorney General v. Chambers*, 4 DeG.M. & G. 206 (1854). NOTE: Spring tides are not related to the season, but rather are those tides that occur on the full and new moons, when the gravitational pull of the moon and the sun combined is the greatest. Thus, spring tides have higher highs and lower lows than normal. Neap tides are those that occur at the first and third quarter of the moon, when the gravitational pull of the moon and the sun are at 90 degrees to each other. As a result, neap tides have lower highs and higher lows than normal.

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8. The term “ordinary high water mark” generally describes the upper boundary of both sovereign-owned tideland, and privately held tidelands.

AL: *Abbot v. Doe*, 5 Al. 393, 395 (1843)(“The grantee of land from the government lying along navigable water acquires a right of soil to high-water mark.”); *City of Mobile v. Eslava*, 9 Part. 577, 599-600 (1839), *aff’d* 41 U.S. 234 (1842)(“It is ... clear that the ‘navigable waters’ of this State have been dedicated to the common use. ... But ... what extent of soil is embraced by ... dedication? We think it must be so much ground as is covered with water, not only at low, but at high tide.”).

CA: *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 518, n.1, 521, 162 Cal.Rptr. 327, 328, n.1, 329, 606 P.2d 362, 363, n.1, 364 (1980)(Mean high tide is landward limit of State title claim).

CT: *Simons v. French*, 25 Conn. 346, 352 (1856)(“In Connecticut, it is now settled that the public, representing the former title to the king, is the owner in fee of such flats up to high water-mark ...”).

DE: *Bickel v. Polk*, 5 De. 325, 326 (1851)(“In all navigable rivers, where the tide ebbs and flows, the people have of common right the privilege of fishing, and of navigation, between the high and low water mark.”).

FL: *Thiesen v. Gulf, F&A Railway Co.*, 75 Fla. 28, 57, 78 So. 491, 500 (1918)(“[T]he title to soil under [waters that ebb and flow] up to the high water mark is in the state of Florida ...”); *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 608, 47 So. 353, 356 (Fla. 1908)(“The navigable waters in the state and the lands under such waters including the shore or space between ordinary high and low water marks is held by the state in trust for the use of its inhabitants.”).

HI: *In Re Ashford*, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968)(Ordinary high water mark, the “Ma Ke Kai,” is “along the upper reaches of the wash of the waves, usually evidenced by the edge of the vegetation or by the line of debris left by the wash of the waves ...”). *See also State of Hawaii v. Sotomura*, 55 Haw. 176, 182, 517 P.2d 56, 62 (1973); *In Re Sanborn*, 57 Haw. 585, 594, 562 P.2d 771, 777 (1977).

MA: *Opinion of the Justices*, 383 Mass. 895, 902 (1981)(“We discuss first the nature of the public’s rights in [tide] flats, the area between mean high water and mean low water ...”); *Wonson v. Wonson*, 96 Mass. 71, 82 (1867)(“The inner line [of tide flats] is that of high water at ordinary tides.”); *Anderson v. deVries*, 326 Mass. 127 (1950)(“The primary meaning of the word beach is the land between the ordinary high water mark and the low water mark or the space over which the tide ebbs and flows. ... A beach as customarily understood by residents of seashore resorts comprises the land above the ordinary high water mark, ‘more

or less defined by natural boundary, or in the rear by a sea wall ...”). Citations omitted.

- MD: *Day v. Day*, 22 Md. 530, 537 (1865)(“Rivers or streams within the ebb and flow of the tide, to high water mark, belong to the public ... all the land below high water mark, being as much a part of the *jus publicum*, as the stream itself.”).
- NC: *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 302, 177 S.E.2d 513, 516 (1970)(“North Carolina is a high-tide state ...[The] seaward boundary ... is fixed at the high-water mark. The high-water mark is generally computed as a mean or average high-tide, and not as the extreme height of the water.”).
- NH: *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 20, 25 A. 718 (1889)(The water’s edge is the boundary of public and private ownership and is the high-water line in tide-waters).
- NY: *Wismall v. Hall*, 3 Paige Ch. 313, 318 (N.Y. 1832)(“As a general rule, a grant of land bounded on tide waters extends only to ordinary high water mark.”); *Matter of Tidal High-Water Line*, 33 New York State Department Reports 415, 420-421 (1925)(“High water line, as a tidal boundary between privately-owned upland and land washed by tide waters as to which there is a public trust or in which the public have so-called common-law rights, means the line of ordinary, mean high water and not that of the semi-monthly spring tides.”).
- RI: *Allen v. Allen*, 19 R.I. 114, 115, 32 A. 166 (1895)(“The State holds the legal fee of all lands below high water mark as at common law ...”); R.I. CONST., Art. 1, § 17 (“The people shall continue to enjoy and freely exercise ... the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state ...”); *Folsom v. Freeborn*, 13 R.I. 200, 204-205 (1881)(“In this State, as we have often decided, the fee of the soil under tide-water, and within its ordinary ebb and flow, is in the State.”); *Allen v. Allen*, 19 R.I. 114 (1895)(“The State holds the legal fee of all lands below high water mark as at common law ... This right of the State is held, however, by virtue of its sovereignty and in trust for all the inhabitants, not as a private proprietor.”); *Bailey v. Burges*, 11 R.I. 336, (1876)(“In this state, at common law, the fee of the soil in tide waters below high water-mark is in the state.”); *Gerhard v. Bridge Commissioners*, 15 R.I. 334, 334-335 (1886)(“title to the soil under tide-water is in the State.”).
- SC: *South Carolina v. Hardee*, 193 S.E.2d 497, 500 (1972)(Title to land below ordinary high tide line is in the State in trust for all the people).
- TX: *Luttes v. State*, 159 Tex. 550, 324 S.W.2d 167 (1959)(The boundary of tidelands in Texas is “in substance mean high tide.”).

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- VA: *Bradford v. Nature Conservancy*, 224 Va. 181, 194, 196, 294 S.E.2d 866, 872 (1982) (“At common law, the shores of the sea [between ordinary high and low water marks] were vested in the Crown as part of its *jus privatum*. However, this land was available to the public for purposes of navigation, fishing and fowling. ... The common law of England, of course, became the common law of Virginia ...”). By statute of 1819, upland boundaries were extended to ordinary low water mark, with the upland owner to enjoy exclusive rights and privileges of the shore unless the shore had been used as a common). See VA. CODE ANN. § 62.1-2 (Repl. Vol. 1987) (“the limits or bounds of ...land lying on such bays, rivers, creeks, and shores and the rights and privileges of the owners of such lands shall extend to the mean low-water mark.”).
- WA: WASH. CONST. Art. 17, § 1 (“The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state ...”); *Caminiti v. Boyle*, 107 Wn.2d 662, 666-667 (1987) (“As this court has repeatedly held ..., the State of Washington has the power to dispose of, and invest persons with, ownership of tidelands and shorelands subject only to the paramount public right of navigation and the fishery.”).
9. *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935).
10. *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935), citing *Barney v. Keokuk*, 94 U.S. 324, 338; *Shively v. Bowlby*, 152 U.S. 1, 40; *Hardin v. Jordan*, 140 U.S. 371, 382; *Port of Seattle v. Oregon & Washington R. Co.*, 255 U.S. 56, 63.
11. HI: *In Re Ashford*, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968) (Ordinary high water mark, the “Ma Ke Kai,” is “along the upper reaches of the wash of the waves, usually evidenced by the edge of the vegetation or by the line of debris left by the wash of the waves ...”). See also *State of Hawaii v. Sotomura*, 55 Haw. 176, 182, 517 P.2d 56, 62 (1973); *In Re Sanborn*, 57 Haw. 585, 594, 562 P.2d 771, 777 (1977).
- NY: *Dolphin Lane Association, Ltd. v. Town of Southampton*, 37 N.Y.2d 292, 296, 372 N.Y.S.2d 52, 54, 333 N.E.2d 358, 359 (1975) (In determining location of high-water line along bay, the line of vegetation test which had been traditionally used by surveyors was the proper test).
- WA: WASH. REV. CODE 90.58.030 (2)(b) (“‘Ordinary high water mark’ on all lakes, streams, and tidal water is that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on June 1, 1971, as it may naturally change thereafter, or as it may change thereafter in accordance with permits issued by a local government or the department...”).

12. *Matter of Tidal High-Water Line*, 33 New York State Dept. Reports 415, 420-21 (1925). This report states in part:
 1. High water line, as a title boundary between privately-owned upland and land washed by tide waters as to which there is a public trust or in which the public have so-called common-law rights, means the line of ordinary, mean high water and not that of the semi-monthly spring tides.
 2. Such line may be practically located in most instances upon the ground, the test being the point or extent to which upland vegetation survives or would survive excepting for the presence and action of the waters.
13. OR: *See Shively v. Bowlby*, 22 Or. 410, 30 P. 154 (1892), *aff'd Shively v. Bowlby*, 152 U.S. 1 (1894).
14. OR: *See State ex rel. Thornton v. Hay*, 462 P.2d 671, 674 (1969).
15. HI: *In re Ashford*, 50 Haw. 314, 440 P. 2d 76, 77 (1968) (“We are of the opinion that ‘ma ke kai’ is along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves ...”); *In re Sanborn*, 57 Haw. 585, 594, 562 P.2d 771, 777 (1977) (“[T]he true measure of high water mark in this jurisdiction is the upper reaches of the wash of the waves.”).

NC: *Webb v. N.C. Department of Env't, Health & Nat. Resources*, 102 N.C.App. 767, 404 S.E.2d 29 (1991)(Location of mean high water line may be properly determined from presence of natural indicators and observation of actual high tide, rather than survey of mean high water line.)
16. HI: *County of Hawaii v. Sotomura*, 55 Haw. 176, 182, 517 P.2d 57, 62 (1973) (“[W]here the wash of the waves is marked by both a debris line and a vegetation line lying further [landward], the presumption is that the upper reaches of the wash of the waves over the course of the year lies along the line marking the edge of vegetation growth.”).
17. In many tideland states, the mean high tide line is utilized as the boundary between tidelands subject to the public trust, and upland private land.

AS: 48 U.S.C. 1705(a). Conveyance to Guam, Virgin Islands, and American Samoa. (“Subject to valid existing rights, all right, title, and interest of the United States in lands ...periodically covered by tidal waters up to but not above the line of mean high tide ...”). *See also Lago v. Mageo*, 4 A.S.R. 287, 298 (1962).

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- AK: ALASKA STAT. § 38.05.965(21) (“tideland” means land which is periodically covered by tidal water between the elevation of mean high and mean low tide.”).
- CA: *Fogerty v. State of California*, 187 Cal.App.3d 224, 231 Cal. Rptr. 810 (1986) (The upper boundary of state owned lands is the “ordinary high water mark.” In tidal areas, this is the line of mean high water as determined by the mean elevation of all high tides over an 18.6 year period). *See also Borax Ltd. v. Los Angeles*, 296 U.S. 10 (1935). *But see People v. Wm. Kent Estate Co.*, 242 Cal. App. 2d 156, 51 Cal.Rptr. 215 (1966) (concluding that the upper boundary is determined by the mean of all the high neap tides).
- CT: *Mihalczo v. Woodmont*, 175 Conn. 535, 538, 400 A.2d 270 (1978) (“In using the term ‘high water mark’ the line of mean high water mark or ‘ordinary high-water mark’ is always intended.”); *Church v. Meeker*, 34 Conn. 421, 424 (1867) (“The shore is that space of ground which is between ordinary high water and low water mark.”); *Mather v. Chapman*, 40 Conn. 382, 395 (1873) (“It is conceded that by the settled law of Connecticut the title of riparian proprietor terminates at ordinary high-water mark.”).
- GM: 48 U.S.C. §1705(a). Conveyance to Guam, Virgin Islands, and American Samoa (“Subject to valid existing rights, all right, title, and interest of the United States in lands ... periodically covered by tidal waters up to but not above the line of mean high tide ...”).
- MD: *Wicks v. Howard*, 40 Md.App. 135, 136, 388 A.2d 1250, 1251 (1978) (“By common-law rule, title to all navigable waters and to soil below the mean high-water mark of those waters is vested in the state ...”); *Hirsch v. Md. Dept. of Nat. Resources*, 288 Md. 95, 98-99, 416 A.2d 10, 12 (1980) (“[T]itle to the bed of navigable waters defined as land beneath the mean high tide mark of these waters, rests in the State for the benefit of its citizens.”).
- MA: *Opinion of the Justices*, 383 Mass. 895, 902-903, 424 N.E.2d 1092, 1099 (1981) (“[T]he nature of the public’s right in flats, the area between mean high water and mean low water (or 100 rods from mean high water, if lesser) ... are of a limited nature ... [T]he littoral owner owns them subject at least to the reserved public rights of fishing, fowling, and navigation.”).
- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508 (1986) (“the United States granted to the State of Mississippi in trust all lands ... including their mineral and other subsurface resources, subject to the ebb and flow of the tide below the then mean high water level”).

- NJ: *O'Neill v. State Highway Dept.*, 50 N.J. 307, 235 A.2d 1 (1967) (“The ‘high water line or mark’ is the line formed by the intersection of the tidal plane of the mean high tide with the shore.”).
- NC: *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 302, 177 S.E.2d 513, 516 (1970) (“North Carolina is a high-tide state ... [The] seaward boundary ... is fixed at the high-water mark. The high-water mark is generally computed as a mean or average high-tide, and not as the extreme height of the water.”).
- SC: *Cape Romain Land and Improvement Company v. Georgia Carolina Canning Company*, 148 S.C. 428, 146 S.E. 434 (1928) (State ownership of submerged lands and tidelands extends up to the mean high water mark). *See also State v. Hardee*, 259 S.C. 535, 539, 193 S.E.2d 497, 499 (1972) (“[I]n the case of a tidal navigable stream the boundary line is the high water mark.”).
- VI: 48 U.S.C. §1705(a) Conveyance to Guam, Virgin Islands, and American Samoa (“Subject to valid existing rights, all right, title, and interest of the United States in lands ... periodically covered by tidal waters up to but not above the line of mean high tide ...”).
18. *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 27 (1935).
19. *See Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935).
20. Five Atlantic states have established the seaward boundary of privately held tideland as the mean low tide line, or further.
- DE: *State v. Pennsylvania Railroad Company*, 228 A.2d 587, 595 (1967) (“A riparian proprietor or owner of land fronting upon a navigable river holds to the low water mark,” citing *Harlan & Hollingsworth v. Paschall*, 5 Del. Ch. 435, 453 (1882), *State v. Reybold*, 5 Harr. 484 (1854), and *Bickel v. Polk*, 5 Harr. 325 (1851).
- ME: *See Bell v. Inhabitants of Wells*, 557 A.2d 168, 176 (1989).
- MA: All lands above mean low water mark or more than 100 rods below natural mean high water, whichever is farther landward, may be privately held. *Storer v. Freeman*, 6 Mass. 435, 438 (1810) (“For the purposes of commerce, wharves erected below high water mark were necessary. But the colony was not able to build them at the public expense. To induce persons to erect them, the common law of England was altered by an ordinance, providing that the proprietor of land adjoining on the sea or salt water, shall hold to low water mark, where the tide does not ebb more than one hundred rods, but not where the tide is a greater distance.”); *Opinion of the Justices*, 365 Mass. 681, 685 (1974) (“In the

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1640's, in order to encourage littoral owners to build wharves, the colonial authorities took the extraordinary step of extending private titles to encompass land as far as mean low water line or 100 rods from the mean high water line...").

It should be noted that the reference to the "mean" low water mark in the *Opinion of the Justices*, above, clarifies previous contrary, and much older, rulings on the extent of the low water mark, where the "extreme" low water line was held to be the seaward boundary. Compare *Sparhawk v. Bullard*, 42 Mass. (1 Met.) 95, 108 (1840) ("The object of the ordinance of 1641, from which the right to flats originated, was to give the proprietors of land adjoining on the sea convenient wharf-privileges, to enjoy which, to the best advantage, it is often necessary to extend their wharves to low water mark at such times when the tides ebb the lowest"); *Sewall and Day Cordage Co. v. Boston Water Power Co.*, 147 Mass. 61, 64 (1888) ("[I]t has been settled for fifty years that [the term 'low water mark'] mean[s] to extreme low water mark."); and *Iris v. Hingham*, 303 Mass. 401, 403 (1939) ("By virtue of the colony ordinance of 1641-47 [an upland owner's title] extended to extreme low water or to one hundred rods from the ordinary high water mark, if the low water mark lies beyond that distance.").

To this day the law is unsettled in Massachusetts as to whether a riparian owner holds private title out to the "mean low water line" or to the "extreme low water line." In *Rockwood v. Snow Inn Corp.*, 409 Mass. 361, 369-70 (1991) the Massachusetts Supreme Court recognized "the confusion engendered by the arguable departure of the *Sparhawk*, *Sewall & Day Cordage Co.*, and *Iris* line of cases from the text of the Colonial Ordinance of 1641-1647 and *Storer v. Freeman*." The court favorably cited, in dicta, more recent decisions that adopt the mean low water line as opposed to the extreme low water line as the proper interpretation of the Colonial Ordinance. Nonetheless, the question has been expressly left open by the Massachusetts courts. See *Pazolt v. Director of Marine Fisheries*, 417 Mass. 565, 631 N.E.2d 547, 550 n.8 (1994).

PA: *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869) ("The title of a riparian owner extends to low-water mark, not absolutely in tidal streams, but subject to the public right of passage when the tide is high.").

VA: Act of February 16, 1819, Acts of 1818-19, ch. 28. ("That hereafter the limits or bounds of the several tracts of land lying on the Atlantic ocean, the Chesapeake bay, and the rivers and creeks thereof within this Commonwealth, shall extend to the ordinary low water mark; and the owners of said lands shall have, possess and enjoy exclusive rights and privileges to, and along the shores thereof, down to ordinary low water mark: Provided,...that nothing in this section contained shall be construed to prohibit any person or persons from the right of fishing, fowling and hunting on these shores of the Atlantic ocean,

Chesapeake bay and the rivers and creeks thereof, within this Commonwealth, which are now used as a common to all the good people thereof..."). See also VA. CODE ANN. § 62.1-2 (Repl. Vol. 1987)(tracts of "land lying on such bays, rivers, creeks and shores, and the rights and privileges of the owners...shall extend to the mean low water mark...").

21. Of the five Atlantic states that have established the seaward boundary of privately held tideland as the mean low tide line, the privately held tideland up to the mean high tide line remains burdened with a public trust servitude or easement up to the "ordinary high water mark."
 - DE: *Bickel, et al. v. Polk*, 5 Harr. 325, 326 (1851)("The owner of land adjoining tidewater, though his title runs to the low water mark, has not an exclusive right of fishing; the public have the right to take fish below high water mark, though upon soil belonging to the individual ...").
 - MA: *Opinion of the Justices*, 383 Mass. 895, 902-03, 424 N.E.2d 1092, 1099 (1981)("[T]he nature of the public's right in flats, the area between mean high water and mean low water (or 100 rods from mean high water, if lesser)...are of a limited nature...[T]he littoral owner owns them subject at least to the reserved public rights of fishing, fowling, and navigation."
 - ME: See *Bell v. Inhabitants of Wells*, 557 A.2d 168, 176 (1989).
 - PA: *Philadelphia v. Scott*, 81 Pa. 80, 86 (1876)(Owner of land on river has absolute title to line of ordinary high water, but title is qualified by the public right of navigation between ordinary high water line and ordinary low water line); *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869)(Title of riparian owner extends to low water mark, but is not absolute in tidal streams; it is subject to the public right of passage when the tide is high.)
 - VA: *Bradford v. Nature Conservancy*, 224 Va. 181, 194-197, 294 S.E.2d 866, 872-874 (1982)(The upland extent of the public trust servitude in Virginia is generally ordinary low water mark unless the shore has historically been used as a common, wherein public have right up to the ordinary high water mark).
22. Dinkins, Carol E., 1972, *Texas Seashore Boundary Law: The Effect of Natural and Artificial Modifications*, Houston Law Review, Vol. 10, p. 44.
23. TEX. NAT. RES. CODE ANN. § 61.011 (1978).
24. LA: LA. CIV. CODE ANN. Art. 451, La. Code ("Seashore' is the space of land over which the waters of the sea spread in the highest tide during the winter season.").

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25. Under Roman civil law, the upper boundary of the public's seashore went "as far as the greatest wave extended itself in the winter." See Institutes of Justinian, Lib. 2, title 1, section 3; as reprinted in Angell, J.K., *A Treatise on Tide Waters* (1826), at 65.
26. *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (1984) ("Precisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will depend on the circumstances.").
27. Digest 43, 12, 3, 1, as translated by Hunter, W., *Roman Law* (4th Ed. 1903) at 313.
28. Digest 13, 12, 1, 5, as translated by Hunter, W., *Roman Law* (4th Ed. 1903) at 313.
29. Hale, *De Jure Maris*, Ch. 1, as translated by Farnham, H.P., *Water and Water Rights*, Vol. 1, 239 (1904).
30. At least one State remains today unsettled as to whether navigable freshwater bottomlands in that State can be privately owned.

VA: *James River and Kanawha Power Company v. Old Dominion Iron and Steel Corp. Etc.*, 138 Va. 461, 122 S.E. 344 (1924) (the court, after stating that the authorities were nearly evenly divided, declined to decide which theory prevailed in Virginia).

31. When ownership of freshwater bottomlands is in doubt, the presumption is that title to the bottomlands is in the State.

US: *Massachusetts v. New York*, 271 U.S. 65, 89 (1926) ("[T]itle to the soil under navigable waters is in the sovereign ... The rule is applied both to the territory of the United States and to land within the confines of the States." (citations omitted)); *United States v. Holt State Bank*, 270 U.S. 49, 54 (1926) (Lands underlying navigable waters within a state belong to the state in its sovereign capacity."); *Fox River Co. v. Railroad Commission*, 274 U.S. 651, 655 (1926) ("[T]itle to the soil under navigable waters within the state is in the state.").

NY: *Moyer v. State*, 56 Misc.2d 549, 551, 289 N.Y.S.2d 114, 116 (1968) ("Regarding the title to these lands there is a presumption under the law that lands under navigable waters are the property of state and the burden is upon the one claiming to the contrary.").

32. Great Lakes Submerged Lands Act, 1955, PA 247; MCLA 324.32502 ("For purposes of this act the ordinary high water mark shall be deemed to be at the following elevations above sea level, International Great Lakes Datum of 1955; Lake Superior, 601.5 feet; Lake Michigan and Lake Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet").

33. OHIO REV. CODE, § 123.03.
34. In practice, application of this term in Ohio varies from the lake level on any particular day, to high water datum, to the long-term average, to historical shorelines, to low water datum, to low water line, depending on the project.
35. IL: *Schulte v. Warren*, 218 Ill. 108, 117, 75 N.E. 783, 784 (1905)("[I]n the case of a natural lake or bed of water meandered by the government, the grant extends to the water's edge, while the ownership of the bed of the lake is in the state, in trust for all the people for the purpose of fishing, boating and the like.").
36. PA: *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 539, 47 A. 745, 746 (1901)("Though the title of a riparian owner to the soil extends to low watermark, it is absolute only to high, and qualified as to what intervenes. Between high and low water he can use the land for his own private purposes, provided that, in such use of it, he does not interfere with the public rights of navigation, fishery and improvement of the stream.").
- WI: *Doemel v. Jantz*, 180 Wis. 225, 226, 193 N.W. 393, 397 (1923)("[S]o that during periods of high water the riparian ownership represents a qualified title, subject to an easement, while during periods of low water it ripens into an absolute ownership as against all the world with the exception of the public rights of navigation. *** [F]ishing, recreation, boating, bathing, hunting, etc., are denominated incidents to the right of navigation.")(Note however, that later cases put title in lakes in the State up to the ordinary high water mark.); *State v. Trudeau*, 139 Wis.2d 91, 408 N.W.2d 337 (1987), *cert. denied*, 108 S. Ct. 701 (1988).
37. Riparian owners on the Great Lakes in Pennsylvania and Wisconsin have only a qualified title between ordinary low and ordinary high water, with the public retaining trust rights for navigation and fishing.
- PA: *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 539, 47 A. 745, 746 (1901)("Though the title of a riparian owner to the soil extends to low watermark, it is absolute only to high, and qualified as to what intervenes. Between high and low water he can use the land for his own private purposes, provided that, in such use of it, he does not interfere with the public right of navigation, fishery and improvement of the stream.").
- WI: *Doemel v. Jantz*, 180 Wis. 225, 226, 193 N.W. 393, 397 (1923)("[S]o that during periods of high water the riparian ownership represents a qualified title, subject to an easement, while during periods of low water it ripens into an absolute ownership as against all the world with the exception of the public rights of navigation. *** [F]ishing, recreation, boating, bathing, hunting, etc., are denominated incidents to the right of navigation.")(Note however, that later

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cases put title in lakes in the State up to the ordinary high water mark.); *State v. Trudeau*, 139 Wis.2d 91, 408 N.W.2d 337 (1987), *cert. denied*, 108 S. Ct. 701 (1988).

38. 27 Ruling Case Law, section 270 (1926), as quoted in *James River and Kanawha Power Co. v. Old Dominion Iron and Steel Corp. Etc.*, 138 Va. 461, 466, 122 S.E. 344, 345 (1924).
39. The majority of States follow the English common law, and provide for private ownership of navigable riverine bottomlands to the center of the stream or river (*usque ad filum*).
- CT: *Adams v. Pease*, 2 Conn. 481, 484 (1818) (“If a river runs contiguously between the land of two persons, each of them is owner of that part of the river, which is next to his land, of common right”) (quoting *Rex v. Wharton*, 12 Mod. 510). *See also Town of Middletown v. Sage*, 8 Conn. 221 (1830) (The rule that, where lands are described in a deed as bounded on a stream, they extend to its center, does not apply where land is bounded by tidal waters).
- HI: *Wailuku Sugar Co. v. Hawaiian Commercial and Sugar Co.*, 13 Haw. 583 (1901) (*Prima facie* presumption that a grant of land bounded by a stream conveyed to the thread of the stream, but rebutted in this case).
- IL: *City of Chicago v. Van Ingen*, 152 Ill. 624, 38 N.E. 894 (1894) (A riparian proprietor upon a river owns to the center thereof, subject to the easement of the public over the navigable portion of the stream.) *But see Wilton v. VanHessen*, 249 Ill. 182, 188, 94 N.E. 134, 136 (1911) (“[B]y its admission to the Union the State of Illinois became vested with the title to the beds of all the navigable lakes and bodies of water within its borders...”).
- MA: *Knight v. Wilder*, 56 Mass. 199, 208 (1848) (“[U]pon a river not navigable (i.e. not tidal), the riparian proprietor has a fee in the soil .. to the thread of the stream, whether expressed in the grant or conveyance ... or not”); *Trustees of Hopkins Academy v. Dickenson*, 63 Mass. (9 Cush.) 544, 546 (1852) (“On rivers not navigable, the right of the proprietors of the land on each side extends to the thread of the river, or middle line of the stream.”).
- MD: *Linthicum v. Shipley*, 140 Md. App. 96, 100, 116 A. 871, 873 (1922) (“The *prima facie* presumption is that riparian proprietors of non-navigable (non-tidal) streams own the soil covered by such rivers *ad filum medium aquae*.”); *Browne v. Kennedy*, 5 Har. & J. 195 (1821) (“It is conceded that a grant, by the owner of the bed of a non-tidal stream, of land bounding thereon, conveys ownership to the middle of the stream.”).

- ME: *Wilson and Son v. Harrisburg*, 107 Me. 207, 211 77A. 787, 789 (1910) (“[I]t is the settled law of this State that [a riparian proprietor] owns the bed of the river to the middle of the stream and all but the public right of passage.”).
- MI: *Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115, 117 (1926) (“[T]he adjoining proprietor [of navigable inland lakes and streams] owns to the survey lines extended or to the thread of the stream. [This rule] applies even to the connecting waters of the Great Lakes; Detroit River, St. Clair River, and St. Mary’s River.” Citations omitted). NOTE: this case applies only to navigable waters other than the Great Lakes.
- MS: *Cinque Bambini Partnership v. State*, 491 So. 2d 508 (Miss. 1986) (“lands below navigable freshwater are susceptible of wholly private ownership”), *aff’d sub nom. Phillips Petroleum v. Mississippi*, 484 U.S. 469, (1988); *Archer v. Greenville Sand & Gravel Co.*, 233 U.S. 60, 63-64 (1914) (“[H]e who owns the bank, owns to the middle of the river, subject to the easement of navigation. *** [T]he bed of the river ... between the bank of the stream and the thread of the river ... under the laws of Mississippi are ... the lands of the [riparian owner], her right and title extending to the lands under the river to the thread of the stream.”); *Morgan and Harrison v. Reading*, 11 Miss. 366, 406 (1844) (“on rivers not navigable, the riparian proprietor, by construction of the Common Law, owns to the thread of the stream.”); *The Steamboat Magnolia v. Marshall*, 39 Miss. 109, 117 (1860) (“When the citizen derives his title to land bounded on a river, not navigable, (that is, not on tide-water,) by grant from the State, such grant extends to the middle of the river--‘*usque filum aque*.’”).
- NH: *Sheldon v. Sevigny*, 110 N.H. 419, 272 A.2d 134 (1970) (A deed describing a line as running by the bank of a stream conveys title to the thread of the stream); *Batchelder v. Kenison*, 51 N.H. 496, 499 (1872) (“[T]he [littoral owners] owned the soil constituting the bed of the river, in front of their lands, to its thread.”) NOTE: this case does not apply to Great Ponds.
- NJ: *Kanouse v. Slockbower*, 48 N.J.Eq. 42 (1891) (A grant or conveyance of land bounded by a river, above tide water, extends to the thread thereof unless the terms used in the writing clearly denote the intention to stop short of that line); *Cobb v. Davenport*, 32 N.J.L. 369, 384 (1867) (“Title to the soil under [non-tidal navigable waters is] in the proprietors, and not in the State.”); *Arnold v. Mundy*, 6 N.J.L. 1, 81 (1821) (“A grant of land bounded upon a fresh water stream or river, where the tide neither ebbs nor flows, extends *ad filum aquae*.”).
- OH: *Gavit v. Chambers*, 3 Ohio 496, 498 (1828) (“He who owns the lands upon both banks [of a navigable river] owns the entire river, subject only to the easement of navigation, and he who owns the land upon one bank only, owns to the middle of the river, subject to the same easement.”); *State ex rel. Brown v. Newport Concrete Co.*, 44 Ohio App. 2d 121, 123, 336 N.E.2d 453, 455

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(1975) (“The title of lands bordering on a navigable stream extends to the middle of the stream.”). NOTE: these cases apply only to water bodies other than the Great Lakes.

SC: *State ex rel. McLeod v. Sloan Construction Co.*, 284 S.C. 491, 328 S.E.2d 84, 87 (1984) (Riparian ownership generally goes to the center of the freshwater stream or river unless some plat or other description in the deed itself limits such right).

WI: *Willow River Club v. Wade*, 100 Wis. 86, 95, 76 N.W. 273, 274 (1898) (“[O]wners of the bank of a navigable stream by purchase from the United States, even when meandered, were presumed to be such owners to the middle of stream in front of such purchase.”); *Delaplaine v. C. & N.W. R. Co.*, 42 Wis. 214 (1877) (“The proprietor of lands on navigable streams takes *usque ad filum aquae*, as the boundary of his estate.”). *But see Priewe v. Wis. State L.&I. Co.*, 93 Wis. 534, 546, 67 N.W. 918, 920 (1896) (“[R]iparian proprietor upon navigable lakes and ponds takes the land only to the water’s edge.”).

40. Partial private ownership of river bottomlands also occurs, with the qualified private title extending only to the ordinary low water mark, with the balance of the river bed owned by the State.

AL: *Tallahassee Falls Mfg. Co. v. State*, 13 Ala. App. 623, 68 So. 805, 806 (1915) (“[O]ur decisions limit his right to the low-water mark.”); *Webb v. City of Demopolis*, 95 Ala. 116, 129 13 So. 289, 293 (1891) (“The rule which this state has adopted and declared through this court is that a grant by the United States to land bordering on a navigable river...extends to the water line thereof at low water.”); *Bullock v. Wilson*, 2 Port. 436, 448 (1835) (“No individual can assert any private right of soil in the bed beyond the low water mark.”).

CA: *State v. Superior Court*, 29 Cal.3d 210, 222-232, 625 P.2d 239, 246-252, 172 Cal. Rptr. 696, 703-709 (1981) (Lands lying between the low and high watermarks of lake are owned by littoral property owners subject to a “trust” interest held by the State for the benefit of the public for purposes of commerce, navigation, fishing, recreation, and preservation of the land in its natural state); *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, 222-232, 172 Cal. Rptr. 696, 625 P.2d 239 (1981) (Unless the deed indicates to the contrary, riparian owners on navigable, non-tidal lakes and streams own down to the low water mark); CAL. CIV. CODE § 670 (West, 1872) (“The state is the owner of all land ... below the water of a navigable lake or stream.”); CAL. CIV. CODE § 830 (West, 1872) (“when [the upland] borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark.”); CAL. CODE CIV. PROC. § 2077 (West, 1872) (“When a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low-water mark are included in the conveyance.”).

- LA: LA. CIV. CODE Art. 450 (The bottoms [beds below the low water mark] of navigable rivers and streams are public things not susceptible of private ownership); LA. CIV. CODE Art. 456 (West 1979) (“The bank of a navigable river or stream is the land lying between the ordinary low and ordinary high stage of the water. The banks of navigable rivers or streams are private things that are subject to public use.”); LA. CONST. Art. IX, § 3 (“The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion.”).
- MN: *Miller v. Mendenhall*, 43 Minn. 95, 96, 44 N.W. 1141 (1890) (“The State holds the title to low-water mark in its sovereign capacity.”).
- PA: *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 538, 47 A. 745, 746 (1901) (“[I]t has been held in many cases that a survey, returned as bounded by a large navigable river, vests in the owner the right of soil to ordinary low watermark of the stream, subject to the public right of passage for navigation, fishing, etc., in the stream, between ordinary high and ordinary low watermark.”).
- TX: *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W. 2d 441 (1935) (The border between the private upland and the State-owned land within the trust exists halfway between the high and low levels of waterflows); *State v. Bradford*, 121 Tex. 515, 549, 50 S.W.2d 1065, 1078 (1932) (“The decisions of this state announce the rule that the state can grant soil beneath navigable public waters.”).
41. Many States exclusively own their bottomlands, setting the boundary of the upland owner at the “ordinary high water mark.”
- US: *United States v. Willow River Power Co.*, 324 U.S. 499, 507 (1945) (“[A]n owner has no private rights in the stream or body of water which are appurtenant to his land.”); *Silas Mason Co. v. Tax Comm. of Washington*, 302 U.S. 186, 198 (1937) (“Title to the riverbed ... [is] in the state.”); *James v. Dravo Contracting Co.*, 302 U.S. 134, 140 (1937) (“The title to the beds of ... rivers [is] in the state.”).
- AK: ALASKA STAT. 38.05.965(18) (“[S]horeland means land belonging to the state which is covered by nontidal water that is navigable under the laws of the United States up to the ordinary high water mark as modified by accretion, erosion or reliction.”).
- FL: *Martin v. Busch*, 93 Fla. 535, 563, 112 So. 276 (1927) (“Upon the admission of Florida into the Union, ... the state, by virtue of its sovereignty, became the owner of all lands under the navigable waters within the state, including the

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shores or spaces, if any, between ordinary low-water mark and ordinary high-water mark”); *Caples v. Taliaferro*, 144 Fla. 1, 5, 197 So. 861, 862 (1940)(“It may be regarded as settled that title to all submerged lands whether tide or fresh is held by the states in trust for all the people of the respective states”); *Ferry Pass Inspectors & Shippers Ass’n v. White’s River Inspectors & Shipping Ass’n*, 57 Fla. 399, 48 So. 643, 644 (1909)(“The State by virtue of its sovereignty holds in trust ... the title to the lands under the navigable waters within the State.”).

- ID: *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 625, 671 P.2d 1085, 1088 (1983)(“The State of Idaho holds title to the beds of all navigable bodies of water below the natural high water mark for the use and benefit of the public.”).
- IL: ILL. REV. STAT. Ch. 19, par. 71 (1987)(“Title to the bed of Lake Michigan and all other meandered lakes in Illinois ... is held in trust for the benefit of the People...”); ILL. REV. STAT. Ch. 19, par. 150 (1987)(“The State of Illinois for the benefit of the People of the State and in pursuance of the trust wherein the State holds certain lands for the People, hereby elects and determines to assert and reclaim the title to lands of the State of Illinois now submerged and lands that were formerly submerged...”); *Wilton v. VanHessen*, 249 Ill. 182, 188, 94 N.E. 134, 136 (1911)(“[B]y its admission to the Union the State of Illinois became vested with the title to the beds of all the navigable lakes and bodies of water within its borders...”); *Schulte v. Warren*, 218 Ill. 108, 117, 75 N.E. 783, 784 (1905)(“[I]n the case of a natural lake or bed of water meandered by the government, the grant extends to the water’s edge, while the ownership of the bed of the lake is in the state, in trust for all the people for the purpose of fishing, boating and the like.”). *But see City of Chicago v. Van Ingen*, 152 Ill. 624, 635, 38 N.E. 894, 897 (1894)(“[The riparian owner is] owner in fee simple to the center of the stream, and, as a riparian proprietor, had the right ... to build the proposed dock so as to have the benefit of the navigable channel of the stream.”).
- NC: *Lewis and Jackson v. Keeling*, 46 N.C. 299, 306 (1854)(The boundary of riparian land on a navigable river “stops at the high water mark, leaving the water and the beach, between high and low water mark, for a public highway.”).
- NH: *Hartford v. Gilmanton*, 101 N.H. 424, 146 A.2d 851 (1958)(The State’s public trust interests in all cases extends to the natural mean high water mark); *State v. Sunapee Dam Co.*, 70 N.H. 458, 461, 50 A. 108, 109 (1900)(“[In Great Ponds] there is no private ownership in the soil below ordinary high-water mark.”); *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 4, 25 A. 718, 719 (1889)(“In respect to title, the law divides natural fresh-waterponds into two classes,—the small which pass by an ordinary grant of land, like brooks and rivers, from which as conveyable property are not distinguished,—and the large, which are

exempted from the operations of such a grant for reasons that stop private ownership at the water's edge of the sea and its estuaries." (citing *State v. Gilmanton*, 9 N.H. 461 (1838)). NOTE: this case applies only to Great Ponds. All other non-tidal waterways are subject to private ownership.

- OH: OHIO REV. CODE ANN. § 1506.10 ("It is hereby declared that the waters of Lake Erie ... together with the soil beneath and their contents, do now belong and have always since the organization of the State of Ohio belonged to the state as proprietor in trust for the people of the state."). All other inland water bodies are subject to private ownership.
- OR: *Winston Brothers v. State Tax Commission*, 156 Or. 505, 510, 62 P.2d 7, 9 (1937)("It is well settled that, upon admission of this state to the Union, the state acquired title in its proprietary capacity to ... all lands lying under navigable waters of the state."); *State v. Portland General Electric Co.*, 52 Or. 502, 519, 95 P. 722, 728 (1908)("The upland owner bordering upon a navigable stream owns only to the high-water line. The river, and its banks and bed belong to the State: [citing] *Montgomery v. Shaver*, 40 Or. 244 (66 Pac. 923); *Wilson v. Welch*, 12 Or. 353, 358, 7 P. 341, 344 (1885)("The state does own the channel of the navigable rivers within its boundaries, and the shore of its bays, harbors and inlets between high and low water."); *Johnson v. Knott*, 13 Or. 308, 310, 10 P. 418, 419-420 (1886)("The shores of navigable waters, and the soil under them ... were reserved to the States respectively. ... The same rule applies to fresh-water streams that were navigable.").
- PA: *Warren Sand & Gravel Co. v. Commonwealth*, 20 Pa. 186, 194, 341 A.2d 556, 560 (1975)("It has long been held that the land under navigable streams belongs to the Commonwealth."); *Paasch v. Wright*, 317 Pa. 454, 456, 177 A. 795, 796 (1935)(Land which underlay navigable waters are owned in trust by the Commonwealth, and any grant of such land would convey "only a revocable grant ... ").
- TX: *Diversion Lake Club v. Heath*, 126 Tex. 129, 141, 86 S.W.2d 441, 443 (1935)("The boundary line is a gradient of the flowing water in the river. It is located midway between the lower level of the flowing water that just reaches the cut bank, and the higher level of it that just does not overtop the cut bank.").
- VI: 12 V.I.C. § 309(a)("Subject to the provisions of federal laws pertaining to the proprietary rights of the Government of the United States, all beds and bottoms of navigable rivers, streams, lagoons, lakes, sounds, inlets, bays, roadsteads, harbors, oceans, seas or other bodies of water within the jurisdiction of the territory except such as may be held under some grant or alienation heretofore made. No grant, sale lease or other conveyance of any water bottom shall hereafter be made by the territory or any official thereof."). See also *Alexander Hamilton Ins. v. Government of the Virgin Islands*, 20 V.I. 333, 343 (D.C.V.I.,

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1983)(“The Government of the Virgin Islands is the owner of the submerged lands ... by reason of the transfer from the United States in 48 U.S.C. § 1705 (a).”).

- WA: WASH. CONST. Art. 17, § 1 (“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 water within the banks of navigable rivers and lakes ...”).
- WI: *Baker v. Voss*, 217 Wis. 415, 417, 259 N.W. 413, 414 (1935)(“[T]he title to the bed of every lake that is navigable is in the state.”). *But see Willow River Club v. Wade*, 100 Wis. 86, 95, 76 N.W. 273, 274 (1898)(“[O]wners of the bank of a navigable stream by purchase from the United States, even when meandered, were presumed to be such owners to the middle of stream in front of such purchase.” However, in Wisconsin, “the riparian proprietor upon navigable lakes and ponds takes the land only to the water’s edge.”).
42. CA: *Mammoth Gold Dredging Co. v. Forbes*, 39 Cal. App. 2d 739, 751, 104 P.2d 131 bed of a navigable river must be deemed to be bounded by the permanent banks which confine the waters in their course at their highest level.”).
43. US: *Oklahoma v. Texas*, 260 U.S. 606, 631 (1923)(Boundary between Oklahoma and Texas along the Red River “is on and along the bank at the average or mean level attained by the waters in the periods when they reach and wash the bank without overflowing it.”).
- CA: *Fogerty v. State of California*, 187 Cal. App. 3d 224, 240 (1986)(“the high watermark should be ‘ordinary’ and should not represent the level reached by water in unusual floods.”); *Mammoth Gold Dredging Co. v. Forbes*, 39 Cal.App.2d 739, 104 P.2d 131, 137 (1940)(the average level of the water retained by a river in its annual seasonal flow establishes its “high water mark”).
- IA: *State v. Sorenson*, 271 N.W. 234, 236 (1937)(“[T]he term ‘ordinary high water mark’ ... is not the line reached by unusual floods, but it is the line which high water ordinarily reaches.”).
- LA: LA. CIV. COD ANN. Art 450 (“The bank of a navigable river or stream is the land lying between the ordinary low and ordinary high stage of the water.”). *See also Seibert v. Conservation Commission of Louisiana*, 159 So. 375, 377 (1935)(River bank is “the land between the ordinary high-water mark and the ordinary low water mark.”).
- WI: *State v. Trudeau*, 139 Wis.2d 91, 408 N.W.2d 337 (1987) *cert denied* 108 S. Ct. 701 (1988)(Title to the beds of all lakes, ponds, and navigable-in-fact rivers, up

to the line of ordinary high-water mark, became vested in the State at its admission into the Union, to hold the same so as to preserve to the people forever the enjoyment of such lakes, ponds and rivers).

44. A few States expressly prohibit private ownership of bottomlands.

LA: LA. CONST. Art. IX, § 3 (1974) (“The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body ...”) and LA. CIVIL CODE Article 450 (West 1978) (“Public things that belong to the State are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.”) prohibit private title ownership of the beds of natural navigable water bodies.

Exceptions exist, however, due to the federal grant of swamp and over flowed areas under Swamplands Grants Acts of 1849 (9 Stat. 352) and 1850 (9 Stat. 519) to the State. The State in turn sold much of this poorly surveyed land, much of which unknowingly included navigable waters, into private ownership, under Louisiana Act 247 of 1855 and Act 124 of 1862. Nothing in the sales or patents specifically reserved title for the State to these bottomlands. Subsequent legislation was enacted that prohibited alienation by the State of navigable water bottomlands. These grants were then challenged, whereupon the legislature attempted to cure the private titles by enacting Act 62 of 1912, which limited the time in which the State could revoke land patents to six years from the date of the issuance of the patent. The Louisiana Supreme Court, in *California v. Price*, 225 La. 706, 74 So.2d (La. 1954), held that Act 62 did include the sale of navigable water bottoms. This ruling was later reversed in *Gulf Oil v. State Mineral Board*, 317 So.2d 576 (La. 1975), although the result of the *California* case was not overturned. Since the Louisiana Constitution of 1921, it has been unconstitutional for the State to alienate any navigable water bottoms. As a result, some public trust bottomlands are privately owned. However, these titles may be revocable under statutory and case law, except for the bottomlands actually litigated in *California v. Price*.

VA: The question of the ownership of the beds under navigable non-tidal streams which were granted before the prohibition of such grants was enacted (1792 in the eastern part of the Commonwealth (1 Shep. 65), and 1802 in the western part (2 Shep. 317)) has not been decided. See *James River and Kanawha Power Company v. Old Dominion Iron and Steel Corporation*, 138 Va. 461, 122 S.E. 344 (1924).

WA: WASH. CONST. Art. 17, § 1 (“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 water within the banks of all navigable rivers and lakes.”). See also WASH. REV. CODE 79.94.210 (“[T]he department of natural resources may sell second class shorelands on navigable lakes to

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abutting owners ... where ... these sales would not be contrary to the public interest.” Note that “shorelands” extend from the ordinary high water mark to the line of navigability).

- WI: *State v. Trudeau*, 139 Wis.2d 91, 408 N.W.2d 337 (1987) *cert denied* 108 S. Ct. 701 (1988)(Title to the beds of all lakes, ponds, and navigable-in-fact rivers, up to the line of ordinary high-water mark, became vested in the State at its admission into the Union, to hold the same so as to preserve to the people forever the enjoyment of such lakes, ponds and rivers).
45. HI: There are very few navigable fresh water bodies in Hawaii. Title to small lakes and bottom land have generally gone to the riparian owners. *See Wailuku Sugar Co. v. Hawaiian Commercial and Sugar Co.*, 13 Haw. 583 (1901)(*Prima facie* presumption that a grantor of land bounded by a stream conveyed to the thread of the stream, but rebutted in this case). Nonetheless, because of the scarcity of navigable freshwater, in Hawaii the question must be answered deed-by-deed.
46. A few states do not allow private ownership of navigable lake bottomlands.
- FL: *Martin v. Busch*, 93 Fla. 535, 563, 112 So. 276 (1927)(“Upon the admission of Florida into the Union, ... the state, by virtue of its sovereignty, became the owner of all lands under the navigable waters within the state, including the shores or spaces, if any, between ordinary low-water mark and ordinary high-water mark”); *Caples v. Taliaferro*, 144 Fla. 1, 5, 197 So. 861, 862 (1940)(“It may be regarded as settled that title to all submerged lands whether tide or fresh is held by the states in trust for all the people of the respective states.”); *Ferry Pass Inspectors & Shippers Ass’n v. White’s River Inspectors & Shipping Ass’n*, 57 Fla. 399, 48 So. 643, 644 (1909)(“The State by virtue of its sovereignty holds in trust ... the title to the lands under the navigable waters within the State.”).
- ID: *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 625, 671 P.2d 1085, 1088 (1983)(“The State of Idaho holds title to the beds of all navigable bodies of water below the natural high water mark for the use and benefit of the public.”).
- IL: *Wilton v. VanHessen*, 249 Ill. 182, 188, 94 N.E. 134, 136 (1911)(“[B]y its admission to the Union the State of Illinois became vested with the title to the beds of all the navigable lakes and bodies of water within its borders..”); *Schulte v. Warren*, 218 Ill. 108, 117, 75 N.E. 783, 784 (1905)(“[I]n the case of a natural lake or bed of water meandered by the government, the grant extends to the water’s edge, while the ownership of the bed of the lake is in the state, in trust for all the people for the purpose of fishing, boating and the like.”).

- LA: LA. CONST. Art. IX, § 3 (1974) (“The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body ...”) and LA. CIVIL CODE Art. 450 (West 1978) (“Public things that belong to the State are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.”) prohibit private title ownership of the beds of natural navigable water bodies.

Exceptions exist, however, due to the federal grant of swamp and over flowed areas under the Swamplands Grants Acts of 1849 (9 Stat. 352) and 1850 (9 Stat. 519) to the State. The State in turn sold much of this poorly surveyed land, much of which unknowingly included navigable waters, into private ownership, under Louisiana Act 247 of 1855 and Act 124 of 1862. Nothing in the sales or patents specifically reserved title for the State to these bottomlands. Subsequent legislation was enacted that prohibited alienation by the State of navigable water bottomlands. These grants were then challenged, whereupon the legislature attempted to cure the private titles by enacting Act 62 of 1912, which limited the time in which the State could revoke land patents to six years from the date of the issuance of the patent. The Louisiana Supreme Court, in *California v. Price*, 225 La. 706, 74 So.2d (La. 1954), held that Act 62 did include the sale of navigable water bottoms. This ruling was later reversed in *Gulf Oil v. State Mineral Board*, 317 So.2d 576 (La. 1975), although the result of the *California* case was not overturned. Since the Louisiana Constitution of 1921, it has been unconstitutional for the State to alienate any navigable water bottoms. As a result, some public trust bottomlands are privately owned. However, these titles may be revocable under statutory and case law, except for the bottomlands actually litigated in *California v. Price*.

Another exception exists in Louisiana. When a navigable river changes course, landowners who lose upland property at the location of the new bed take ownership of the abandoned bed in proportion to the amount of land lost. The abandoned bed often forms an oxbow lake. Thus, the bottom land of many oxbow lakes in Louisiana is privately owned.

- NH: *Hartford v. Gilmanton*, 101 N.H. 424, 146 A.2d 851 (1958) (The State’s public trust interests in all cases extends to the natural mean high water mark); *State v. Sunapee Dam Co.*, 70 N.H. 458, 461, 50 A. 108, 109 (1900) (“[In Great Ponds] there is no private ownership in the soil below ordinary high-water mark.”); *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 4, 25 A. 718, 719 (1889) (“In respect to title, the law divides natural fresh-waterponds into two classes,—the small which pass by an ordinary grant of land, like brooks and rivers, from which as conveyable property are not distinguished,—and the large, which are exempted from the operations of such a grant for reasons that stop private ownership at the water’s edge of the sea and its estuaries.” (citing *State v. Gilmanton*, 9 N.H. 461 (1838))). NOTE: this case applies only to Great Ponds. All other non-tidal waterways are subject to private ownership.

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- PA: *Conneaut Lake Ice Co. v. Quigley*, 225 Pa. 605, 74 A. 648 (1909)(Where a lake is navigable in fact its waters and bed belong to the State in its sovereign capacity, and the riparian patentee takes a fee to the waters edge only).
- VI: 12 V.I.C. § 309(a)(“Subject to the provisions of federal laws pertaining to the proprietary rights of the Government of the United States, all beds and bottoms of navigable rivers, streams, lagoons, lakes, sounds, inlets, bays, roadsteads, harbors, oceans, seas or other bodies of water within the jurisdiction of the territory except such as may be held under some grant or alienation heretofore made. No grant, sale lease or other conveyance of any water bottom shall hereafter be made by the territory or any official thereof.”). *See also, Alexander Hamilton Ins. v. Government of the Virgin Islands*, 20 V.I. 333, 343 (D.C.V.I., 1983)(“The Government of the Virgin Islands is the owner of the submerged lands ... by reason of the transfer from the United States in 48 U.S.C. § 1705 (a).”).
- WA: WASH. CONST. Art. 17, § 1, provides that the beds and shores of navigable fresh waters are owned by the state, since statehood. There is no statutory authority for the State of Washington to sell the beds of navigable waters.
- WI: *State v. Trudeau*, 139 Wis.2d 91, 104, 408 N.W.2d 337, 343 (1987), *cert. denied*, 108 S.Ct. 701 (1988)(“Lake Superior is navigable and if the non-navigable site is a part of the lake, then the land below [ordinary high water mark] is held in trust for the public.”); *Zinn v. State*, 112 Wis.2d. 417, 334 N.W.2d. 67 (1983)(“All land within ordinary high water mark of a navigable lake is titled in state in trust for public ...”); *Priewe v. Wis. State L.&I. Co.*, 93 Wis. 534, 546, 67 N.W. 918, 920 (1896)(“riparian proprietor upon navigable lakes and ponds takes the land only to the water’s edge.”).
47. A few states allow private bottomland ownership of navigable lakes and ponds.
- MI: *Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115, 117 (1926)(“[T]he adjoining proprietor [of navigable inland lakes and streams] owns to the survey lines extended or to the thread of the stream. [This rule] applies even to the connecting waters of the Great Lakes; Detroit River, St. Clair River, and St. Mary’s River.”)(Citations omitted). NOTE: this case applies only to navigable waters other than the Great Lakes.
- NY: *Stewart v. Turney*, 237 N.Y. 117, 121, 142 N.E. 437, 438 (1923)(“In deeds from an individual ... of land said to be bounded by a [non-tidal] stream or lake ... the grantee takes title to ... the thread of the stream or lake.”). *See also* 63 *New York Jurisprudence* (Rev.), Waters and Water Courses, § 209.

- WI: *Priewe v. Wis. State L.&I. Co.*, 93 Wis. 534, 546, 67 N.W. 918, 920 (1896) (“riparian proprietor upon navigable lakes and ponds takes the land only to the water’s edge.”).
48. A few states limit private bottomland ownership down to the ordinary low water mark.
- CA: Unless the deed indicates to the contrary, riparian owners on navigable, non-tidal lakes and streams own down to the low water mark. *See State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, 172 Cal.Rptr. 696, 625 P.2d 239 (1981); CAL. CIV. CODE §§ 670, 830; CAL. CODE CIV. PROC. § 2077. The State retains fee title waterward of the low water mark.
- NY: *Ransom v. Shaeffer*, 153 Misc. 199, 274 N.Y.S. 570 (1934) (Grants of land bounded by inland lakes where no tide rises or falls carry legal title to low-water line in medium and large sized lakes, where the State holds title to the beds. *See* 63 *N.Y. Jurisprudence* (Rev.) Waters and Watercourses, § 209). *But see Gouverneur v. National Ice Co.*, 134 N.Y. 355, 359, 31 N.E. 865 (1892) (private ownership is the general rule for small lakes and ponds).
- PA: *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 539, 47 A. 745 (1901) (“Though the title of a riparian owner to the soil extends to low watermark, it is absolute only to high, and qualified as to what intervenes. Between high and low water he can use the land for his own private purposes, provided that, in such use of it, he does not interfere with the public right of navigation, fishery and improvement of the stream.”).
- WI: *Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393, 397 (1923) (“so that during periods of high water the riparian ownership represents a qualified title, subject to an easement, while during periods of low water it ripens into an absolute ownership as against all the world with the exception of the public rights of navigation. *** [F]ishing, recreation, boating, bathing, hunting, etc., are denominated incidents to the right of navigation.”) (Note however, that later cases put title in lakes in the State up to the ordinary high water mark.); *State v. Trudeau*, 139 Wis.2d 91, 408 N.W.2d 337 (1987) *cert denied* 108 S. Ct. 701 (1988) (Title to the beds of all lakes, ponds, and navigable-in-fact rivers, up to the line of ordinary high-water mark, became vested in the State at its admission into the Union, to hold the same so as to preserve to the people forever the enjoyment of such lakes, ponds and rivers).
- VT: *McBurney et al. v. Young*, 67 Vt. 574, 576, 32 A. 492 (1895) (Riparian land bordering Lake Champlain does not extend beyond low water mark).

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49. At least one State describes the bottomland boundaries of lakes according to the "pie-cutting" method.

MD: See *Linthicum v. Shipley*, 140 Md. App.96, 116 A. 871 (1922); *Anne Arundel Co. v. Litz*, 45 Md. App. 186, 412 A.2d 1256 (1979).

50. Private ownership of freshwater bottomlands generally includes all mineral rights.

CA: For non-tidal, navigable water bottomlands the point has not been expressly decided, but such title for tidelands has been treated as including minerals. See *People v. California Fish Co.*, 166 Cal. 576, 598, 138 P. 79, 88 (1913)(patentee of tideland has "naked title to the soil" down to the ordinary low water mark, subject only to the "public easements"). Implication of this case is that the only limitation on the title is that of the public easement, which does not include public rights to the minerals within the bottomlands.

IL: ILL. REV. STAT. (1987) ch. 19, par. 65a and par. 65b (permits the Department of Transportation to issue permits to any person, firm or corporation to take minerals from or below the bed of any public waters in the State).

MD: MD. NAT. RES. CODE ANN. § 8-803 (1985)(A riparian owner on non-tidal stream or river may utilize shoreline sand and gravel, subject to reasonable regulation).

MS: Riparian owner owns to the thread of the stream in fee simple, which includes rights to the minerals under the bottomlands. *Archer v. Greenville Sand & Gravel*, 233 U.S. 60, 67 (1914)("The soil is granted to the riparian proprietor, subject to [a] public easement [of navigation].").

NH: Riparian owners on non-tidal rivers and on lakes less than 10 acres in size possess fee simple ownership of the bottomlands which includes mineral extraction rights. See *New Hampshire Water Resources Board v. Lebanon Sand & Gravel Co.*, 108 N.H. 254, 233 A.2d 828 (1967).

OR: OR. REV. STAT. 273.780 provides that only the surface estate is granted if title from the State to private ownership is transferred after 1974. Clear implication is that title to bottomlands transferred prior to 1974 did include mineral rights.

TX: See *State v. Bradford*, 121 Tex. 515, 50 S.W.2d 1065 (1932); *State v. Aransas Dock and Channel Co.*, 365 S.W.2d 220 (Tex. Civ. App.-San Antonio 1963, writ ref'd).

VA: VA. CODE ANN. § 62.1-190 *et seq.* have the effect of extending such rights even into publicly owned beds.

- WI: WIS. STAT. § 30.20 (Title to bottomlands includes all mineral rights, but subject to this section).
51. Several states reserve certain mineral rights when title is transferred into private hands.
- FL: FLA. STAT. § 270.11 (Bottomland title ownership includes the surface estate plus an undivided 1/4 interest in mineral rights and an undivided 1/2 interest in petroleum rights, while the Trustees of the Internal Improvement Trust Fund retain an undivided 3/4 interest in mineral rights and an undivided 1/2 interest in petroleum rights).
- NY: § 75 of the Public Lands Law (Where a grant of underwater lands pursuant to section 75 of the Public Lands Law is in fee, the grantee receives all mineral rights, except those reserved to the State in section 81). Section 81 provides that "all deposits of gold and silver in or upon private lands and lands belonging to the State heretofore or hereafter discovered within the state" are the "property of the people of the State of New York in their right of sovereignty."
52. A handful of states expressly reserve all mineral rights, leaving the riparian owner with only the surface estate in the bottomlands.
- HI: HAWAII REV. STAT. § 182-2 ("All minerals in, on, or under the State lands or which hereafter become State lands are reserved to the State. ... Such minerals are reserved from sale or lease. ... A purchaser or lessee of any such lands shall acquire no right, title or interest in or to the minerals.").
- OR: OR. REV. STAT. 273.780 (Only the surface estate is granted if title from the State to private ownership is transferred after 1974).
- WA: WASH. REV. CODE 79.01.312 (All state lands, including tidelands and shorelands, sold in Washington State since 1911 have been subject to an express reservation by the state of all mineral rights).
53. In some New England states, the Public Trust law applies to "Great Ponds."
- MA: *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 557, 18 N.E. 465, 472 (1888)("[T]he state owns the great ponds as public property held in trust for public uses."); *Potter v. Howe*, 141 Mass. 357, 359 (1886)("[G]reat ponds are held for the common and public use of all, and the littoral owners upon them have no private property in the waters of the pond, or in the soil under them, below the natural low water mark."); *West Roxbury v. Stoddard*, 89 Mass. 158, 171 (1863)("Great ponds, containing more than ten acres, which were not before the year 1647 appropriated to private persons, were by the colony ordinance made public, to lie in common for public use."); *Paine v. Woods*, 108

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Mass. 160, 169 (1871) (“But the law of Massachusetts, from a period reaching back almost to the first settlement of the colony, has treated great ponds as a character nearly resembling tidewaters, the enjoyment of which for fishing and fowling and other uses was common to all, and the title in which and the lands under them was not the subject of private property, unless by special grant from the legislature.”).

NH: *State v. Strafford*, 99 N.H. 92, 99, 105 A.2d 569, 573 (1954) (“[L]akes and great ponds in New Hampshire belong to the public and are held in trust by the state for public use.”); *Concord Manuf’g Co. v. Robertson*, 66 N.H. 1, 4, 25 A. 718, 719 (1889) (“[L]arge ponds are public waters.”).

54. MASS. GEN. LAW. ch.91, § 13.

55. *Cabot v. Thomas*, 147 Vt. 207, 208-210, 514 A.2d 1034, 1036-1037 (1986).

56. *State v. Cain*, 126 Vt. 463, 468 (1867) (“[G]rants of land bounding upon [public waters] pass title only to the water’s edge, or to low-water mark if there be a definite low-water line.”); *Haven v. Perkins*, 92 Vt. 414, 419, 105 A. 249, 251 (1918) (“[G]rants of land bounding upon [public waters] pass title only to the water’s edge, or to low-water mark if there be a definite low-water line.”).

57. NH: *Concord Manuf’g Co. v. Robertson*, 66 N.H. 1, 27, 4 25 A. 718, 719 (1889) (“[T]he of the [1647 Massachusetts Ordinance], except the clause defining a ‘great pond’ as one ‘containing more than 10 acres of land,’ may leave little ground for the claims that this definition has become a part of our law. ... However, .. [a] standard of size seems to be indispensable, and if a more satisfactory measure is not found, ponds of more than 10 acres may properly be classed [as public ponds.]”). See also *State v. Strafford*, 99 N.H. 92, 99, 105 A.2d 569, 573 (1954); *State v. Sunapee Dam*, 70 N.H. 458, 461 (1900).

58. Generally speaking, where a riparian owner holds title to any bottomland below the ordinary high water mark on the Great Lakes, the State retains a dominant public trust interest over these bottomlands.

PA: *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 539, 47 A. 745, 746 (1901) (“Though the title of a riparian owner to the soil extends to low watermark, it is absolute only to high, and qualified as to what intervenes. Between high and low water he can use the land for his own private purposes, provided that, in such use of it, he does not interfere with the public right of navigation, fishery and improvement of the stream.”).

WI: *Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393, 397 (1923) (“[S]o that during periods of high water the riparian ownership represents a qualified title, subject to an easement, while during periods of low water it ripens into an absolute

ownership as against all the world with the exception of the public rights of navigation. *** [F]ishing, recreation, boating, bathing, hunting, etc., are denominated incidents to the right of navigation.”)(Note however, that later cases put title in lakes in the State up to the ordinary high water mark.); *Zinn v. State*, 112 Wis.2d 417, 334 N.W.2d 67 (1983) and *State v. Trudeau*, 139 Wis.2d 91, 408 N.W.2d 337 (1987), *cert. denied*, 108 S. Ct. 701 (1988).

59. Generally speaking, where a riparian owner holds title to any bottomland below the ordinary high water mark on inland rivers and lakes, the State retains a dominant Public Trust interest over these bottomlands.

CA: *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, 222-32, 172 Cal.Rptr. 696, 625 P.2d 239 (1981)(lands lying between the low and high watermarks of lake are owned by littoral property owners subject to a “trust” interest held by the State for the benefit of the public for purposes of commerce, navigation, fishing, recreation, and preservation of the land in its natural state);(Unless the deed indicates to the contrary, riparian owners on navigable, non-tidal lakes and streams own down to the low water mark); CAL. CIV. CODE §§ 670, 830; CAL. CODE CIV. PROC. § 2077. The State retains fee title waterward of the low water mark. Although there are no cases directly on point, in *People v. California Fish Co.*, 166 Cal. 576, 598, 138 P. 79, 88 (1913)(Patentee of tideland has “naked title to the soil” down to the ordinary low water mark, subject only to the “public easements”) court expressly stated that title is only a partial title burdened by the public’s trust rights. Presumed that this holding for tidelands would be the same for freshwater bottomlands.

FL: *Caples v. Taliaferro*, 144 Fla. 1, 5, 197 So. 861, 862 (1940)(“It may be regarded as settled that title to all submerged lands whether tide or fresh is held by the states in trust for all the people of the respective states.”).

IL: *City of Chicago v. Van Ingen*, 152 Ill. 624, 38 N.E. 894 (1894)(A riparian proprietor upon a river owns to the center thereof, subject to the easement of the public over the navigable portion of the stream.); *West Chicago Street Railroad v. People*, 214 Ill. 9, 20, 73 N.E. 393, 397 (1905)(“In a navigable stream the public right is paramount, and the owner of the soil under the bed of such a stream can only use and enjoy it in so far as is consistent with the public right, which must be free and unobstructed.”). *See also* ILL. REV. STAT. 1987, ch. 19, pars. 52 et seq., 150-51.

LA: La. Civ. Code, Art. 456 (West 1979)(“The bank of a navigable river or stream is the land lying between the ordinary low and ordinary high stage of the water. The banks of navigable rivers or streams are private things that are subject to public use.”).

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- MD: Although there are no cases directly on point, see *Browne v. Kennedy*, 5 Har. & J. 195, 202 (1821) (“The [public] has, [held in common by the law], an interest in a navigable stream ... which cannot be abridged or restrained by any charter or grant of the soil or fishery since the Magna Charta at least. But the property in the soil may be transferred by grant--subject, however, to the *jus publicum*” which cannot be prejudiced by the “*jus privatum*” acquired under the grant.”). Although this case involved a tidal stream, its common law rule most likely applies to navigable freshwaters.
- ME: *Wilson and Son v. Harrisburg*, 107 Me. 207, 211, 77 A. 787, 789 (1910) (“[I]t is the settled law of this State that [a riparian proprietor] owns the bed of the river to the middle of the stream and all but the public right of passage.”).
- MS: *Archer v. Greenville Sand & Gravel Co.*, 233 U.S. 60, 66, 58 L. Ed. 850, 34 S. Ct. 567, 569 (1913) (“[H]e who owns the bank, owns to the middle of the river, subject to the easement of navigation.”).
- NH: *N.H. Water Resource Board v. Lebanon Sand and Gravel Co.*, 108 N.H. 254, 259, 233 A.2d 828, 831 (1967) (“The [riparian owner’s] right is to use the river and its bed without an invasion of the public easement.”); *Connecticut River Co. v. Olcott Falls Co.*, 65 N.H. 290, 377-378, 21 A 1090, (1889) (“Any person owning the land upon both sides of ...a river can maintain a ferry or bridge or dam for his own use, provided he does it so not to interfere with the public easement...”).
- NY: *Fulton Light, Heat and Power Company v. State of New York*, 200 N.Y. 400, 415, 94 N.E. 199, 202 (1911) (Riparian owner on non-tidal river “was subject to the common-law right of riparian ownership to the center, which was subordinate, only, to the servitude of the public, for the purposes of navigation and commerce ...”). *Adirondack League Club v. Sierra Club*, 3 Dept., 615 N.Y.S.2D 788, 201 A.D.2D 225 (A.D.3 Dept. 1994) (“Pursuant to the public trust doctrine, the public right of navigation in navigable waters supersedes plaintiff’s private right in the land under the water.”).
- NC: *Burke County v. Catawba Lumber Co.*, 116 N.C. 731, 21 S.E. 941 (1895) (Streams that are “floatable” only on a seasonal basis are subject to an easement in the public for the purpose of transportation).
- OH: *Mentor Harbor Yacht Club v. Mentor Lagoons*, 170 Ohio St. 193, 195, 163 N.E.2d 373, 375 (1959) (Title to fresh water bottomlands is only partial title, and certain rights remain with the public); *Gavit v. Chambers*, 3 Ohio 496, 498 (1828) (“He who owns the lands upon both banks [of a navigable river] owns the entire river, subject only to the easement of navigation, and he who owns the land

upon one bank only, owns to the middle of the river, subject to the same easement.”).

PA: *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 538, 47 A. 745, 746 (1901)(“[I]t has been held in many cases that a survey, returned as bounded by a large navigable river, vests in the owner the right of soil to ordinary low water mark of the stream, subject to the public right of passage for navigation, fishing, etc, in the stream, between ordinary high and ordinary low water mark.”); *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869)(In Pennsylvania, riparian owner has title to the “ordinary low water mark,” but title is qualified by the public’s rights for navigation and fishing).

WA: *Wilbour v. Gallagher*, 77 Wash.2d 306, 462 P.2d 232, 238 (1969)(“The law is quite clear that where the level of a navigable body of water fluctuates due to natural causes so that a riparian owner’s property is submerged part of the year, the public has the right to use all of the waters of the navigable lake or stream, whether it be at the high water line, the low water line, or in between.”); *Caminiti v. Boyle*, 107 Wash.2d 662, 666, 732 P.2d 989 (1987)(While the State has authority to convey title to tidelands and shorelands, “the Legislature has never had the authority ... to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands.”).

WI: *Ashwaubenon v. Public Service Comm.*, 22 Wis. 2d 38, 49, 125 N.W.2d 647, 653 (1963)(“[R]iparian owners have only a qualified title to the bed of the waters. The title of the State is paramount and the rights of the others are subject to revocation at the pleasure of the legislature.”).

60. Title to privately held bottomland is sometimes described as being a partial title up to the “ordinary high water mark.”

OH: *Mentor Harbor Yacht Club v. Mentor Lagoons*, 170 Ohio St. 193, 195, 163 N.E.2d 373, 375 (1959)(Title to fresh water bottomlands is only partial title, and certain rights remain with the public).

61. Title to privately held bottomland is sometimes described as being a naked fee up to the “ordinary high water mark.”

CA: *People v. California Fish Co.*, 166 Cal. 576, 598, 138 P. 79 (1913)(Patentee of tideland has “naked title to the soil” down to the ordinary low water mark, subject only to the “public easements”).

62. *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913).

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63. Title to privately held bottomland is sometimes described as being subject, subordinate or subservient to the State's dominant Public Trust interest up to the "ordinary high water mark."

FL: *Ferry Pass Inspectors & Shippers Assn. v. White's River Inspectors & Shippers Assn.*, 57 Fla. 399, 403, 48 So. 643, 645 (1909) (The rights of the riparian owner are "[s]ubject to the superior rights of the public as to navigation and commerce, and to the concurrent rights of the public as to fishing and bathing and the like.").

IL: *City of Chicago v. Van Ingen*, 152 Ill. 624, 38 N.E. 894 (1894) (A riparian proprietor upon a river owns to the center thereof, subject to the easement of the public over the navigable portion of the stream).

MD: Although there are no cases directly on point, see *Browne v. Kennedy*, 5 Har. & J. 195, 202 (1821) ("The [public] has, [held in common by the law], an interest in a navigable stream ... which cannot be abridged or restrained by any charter or grant of the soil or fishery since the Magna Charta at least. But the property in the soil may be transferred by grant--subject, however, to the jus publicum" which cannot be prejudiced by the "jus privatum" acquired under the grant."). Although this case involved a tidal stream, its common law rule most likely applies to navigable freshwaters.

MS: *Archer v. Greenville Sand & Gravel Co.*, 233 U.S. 60, 66 (1913) ("[H]e who owns the bank, owns to the middle of the river, subject to the easement of navigation.").

OH: *Mentor Harbor Yacht Club v. Mentor Lagoons*, 170 Ohio St. 193, 195, 163 N.E.2d 373, 375 (1959) (Title to fresh water bottomlands is only partial title, and certain rights remain with the public); *Gavit v. Chambers*, 3 Ohio 496, 498 (1828) ("He who owns the lands upon both banks [of a navigable river] owns the entire river, subject only to the easement of navigation, and he who owns the land upon one bank only, owns to the middle of the river, subject to the same easement.").

PA: *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 539, 47 A. 745, 746 (1901) ("[I]t has been held in many cases that a survey, returned as bounded by a large navigable river, vests in the owner the right of soil to ordinary low water mark of the stream, subject to the public right of passage for navigation, fishing, etc. in the stream, between ordinary high and ordinary low water mark."); *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869) (In Pennsylvania, riparian owner has title to the "ordinary low water mark," but title is qualified by the public's rights for navigation and fishing).

- WA: *Wilbour v. Gallagher*, 77 Wash.2d 306, 462 P.2d 232, 238 (1969)(A riparian owner's title to land between the high and low water line "is qualified by the public right of navigation and the state may prevent any use of it that interferes with that right.").
64. A few states expressly provide that the title to freshwater bottomlands is revocable.
- US: *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 453-454 (1892)(Any grant that substantially impairs the public interest in the lands and waters remaining, "is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time.").
- IL: *People v. Chicago Park District*, 66 Ill.2d 65, 360 N.E.2d 773 (1976)(Disallows a sale of trust property), reversing *Droste v. Kerner*, 34 Ill.2d 495, 217 N.E.2d 73 (1966).
- LA: *Gulf Oil v. State Mineral Board*, 317 So.2d 576 (1975)(Patents purporting to convey navigable water bottoms to private parties were null and could not be ratified. The State, therefore, may revoke any such patents).
- PA: *Paasch v. Wright*, 317 Pa. 454, 456, 177 A. 795, 796 (1935)(Land which underlay navigable waters are owned in trust by the Commonwealth, and any grant of such land would convey "only a revocable grant ... "). PA. STAT. ANN. Tit. 32, § 675 (Purdon 1937)(" Any grant ... given by ... Pennsylvania in the bed of navigable waters ... is declared void, whenever the same becomes or is deemed derogatory or inimical to the public interest."); PA. STAT. ANN. Title 32 § 676 (Purdon 1937)("If...the department of Forests and Waters, the Water and Power Resources Board or the State Park and Harbor Commission shall find and determine that any [sale of land beneath navigable water] is derogatory or inimical to the public interest...such [sale] shall be deemed to be revoked.").
- WI: *Ashwaubenon v. Public Service Commission*, 22 Wis.2d 38, 49, 125 N.W.2d 647, 653 (1963)("It cannot be denied that the riparian owners have only a qualified title to the bed of the waters. The title of the state is paramount and the rights of the others are subject to revocation at the pleasure of the legislature.").
65. Even though title to privately held bottomlands is often only partial in nature, burdened by the public's trust interests, and in some states expressly revocable, without exception such privately held bottomlands are fully subject to property taxation.
- CA: See *Newcomb v. City of Newport Beach*, 12 Cal.2d 235, 83 P.2d 21 (1938).
- HI: See *In Re Taxes, C.W. Booth*, 15 Haw. 516 (1904).

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- MD: *Susquehanna Power Co. v. State Tax Commission of Maryland*, 159 Md. 334, 349, 151 A. 29, 35 (1930), *aff'd* 283 U.S. 291 (1931)(The bottomland is subject to taxation because it "can be considered as a thing separate and distinct from the water over it, just as a bowl containing milk may be considered as separate and distinct from its contents, and both the bowl and the milk may be separately owned ...").
- NY: R.P.T.L. §§ 102, 400, 404 (Privately owned underwater lands may be subject to assessment and taxation by a local assessing unit within whose boundaries the property is located). *See also* 6 Op. Counsel SBEA No. 100 (1979).
- OH: OHIO REV. CODE § 1506.11 (Privately held bottomland is subject to taxation).
- OR: OR. REV. STAT. 307.030; 307.010(1)(All real property is subject to taxation unless specifically exempted; real property includes land above or under water). NOTE: bottomlands leased from the State are exempt from taxation. *See* OR. REV. STAT. 307.168.
- TX: OP. TEX. ATTY. GEN. JM-1049 (1989)(Privately-held interest in submerged lands subject to taxation under TEX. TAX CODE ANN.).
- VA: VA. CODE ANN. § 58.1-3201 (Cum. Supp. 1988)("All real estate, except that exempted by law, shall be subject to such annual taxation as may be prescribed by law.").
- WA: WASH. REV. CODE 90.58.290 (Although public trust lands in private ownership are subject to property taxation in Washington, the county assessor is required by law to consider the restrictions imposed by the Shoreline Management Act in establishing the property's fair market value).
- WI: WIS. STAT. Ch. 70 (Privately owned bottomland is subject to property taxation). *See also* *Bradley v. Rock Falls*, 166 Wis. 9, 163 N.W. 168 (1917)("All real property not expressly exempt from taxation shall be entered upon the assessment roll in the assessment district where it lies.").

CHAPTER II

LANDS, WATERS AND LIVING RESOURCES SUBJECT TO THE PUBLIC TRUST DOCTRINE

Section 3: Boundaries, and the Additions and Losses of Public Trust Land and Waters Due to Natural and Man-Induced Changes

Summary

In general, natural, gradual and imperceptible changes in the shoreline (such as erosion, accretion and reliction) act to change the boundaries of both the privately owned uplands and the public trust lands. Natural, sudden changes in the shoreline (avulsion) such as those caused by severe storms or earthquakes do not act to change boundary lines.

Man-induced changes (other than filling) or other modifications of the shoreline by the upland owner, normally do not act to change boundary lines unless a clear legislative grant provides otherwise. Some States do provide, however, that accretion or erosion resulting from artificial changes to the shoreline, such as groins and jetties, will change the upland boundary line, especially if the upland owner is a "stranger" to the man-induced change.

The effect on shoreline boundaries from the filling of trust lands can only be determined on a case by case basis. In general, unlawful filling affects no change of boundary, and the filled land belongs to the State in trust. Lawful filling may be that which is either expressly or impliedly sanctioned by the State. The effect on the shoreline boundary of expressly lawful filling (that done under the authority of, and in accordance with, a legislative grant, or permit, easement or license) is governed by the authorizing instrument. The effect on the shoreline boundary of impliedly lawful filling (such as filling out to a harbor line when no other express authority to fill exists) varies from State to State.

The public's trust rights in "new" shoreland resulting from natural, gradual and imperceptible forces remain unchanged. The public's trust rights to use shoreland within the boundaries of the upland owner due to avulsion, however, remain unclear. The public's trust rights to use filled trust land also is unclear, with significant variation between State court rulings on the point.

A. Natural Changes in the Shoreline

1. Gradual and Imperceptible Changes: "A Moveable Freehold"

"All maritime nations, recognizing the vagaries of the sea, beyond human control and anticipation, have evolved systems of law, founded upon rational perceptions of common justice, to adjust and compensate its effects. The most ordinary effect of a large body of water is to change the shore line by deposits or erosion gradually and imperceptibly. In such cases it is the general, possibly universal rule ... that the title of the riparian owner follows the shoreline under what has been graphically called "a moveable freehold."¹

Roman civil law recognized the common effect of "a large body of water" and addressed its impact on the rights of upland owners: "What the river adds to your estate, becomes yours by the law of nations. Alluvion is a latent increase. That seems to be added by alluvion which is so added by degree, that you cannot know how much in each moment of time."² This ancient rule was incorporated into the Code Napoleon, and the law of Spain.³ Likewise, the Roman civil law on natural changes of the shoreline was adopted nearly word for word by English common law.⁴ American law on this subject reflects quite closely Roman civil law. If the addition to shoreland, caused by accretion or reliction, or the loss of shoreland caused by erosion, is the result of slow, imperceptible⁵ natural forces, the upland boundary follows the gradual and imperceptible changes in the shoreline. Thus, with some exceptions,⁶ the property law in most States provides that land added to a shoreline by accretion or reliction vests in the upland owner, while shoreland and submerged land resulting from the loss of upland due to erosion, vests in the State.⁷

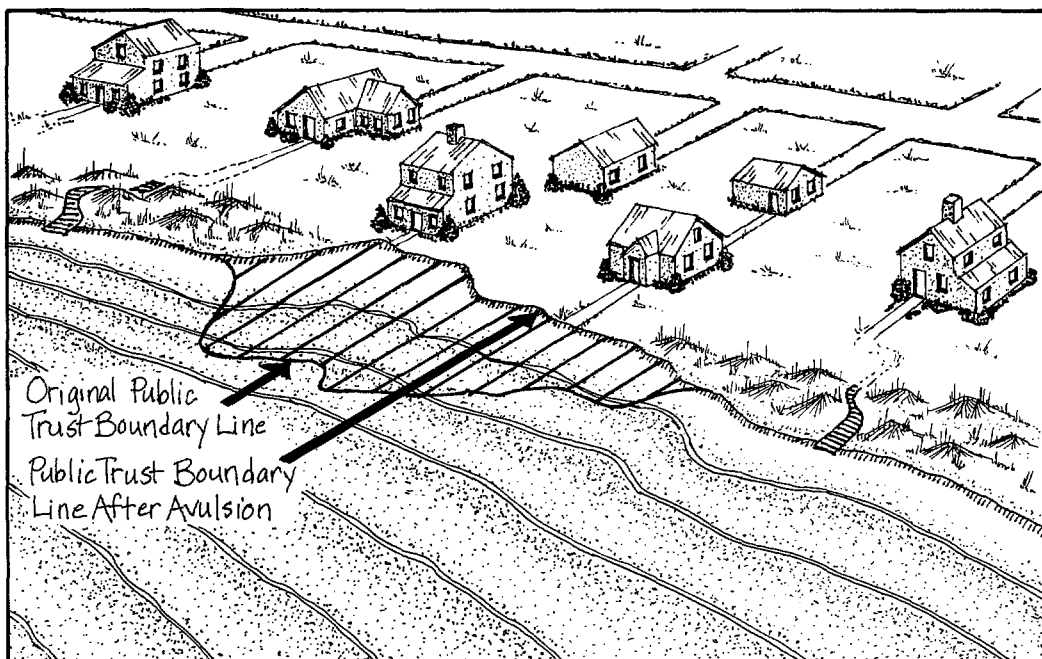
States following this general rule of natural, gradual boundary changes apply the Public Trust Doctrine in an ambulatory fashion. As the upland owner's seaward boundary slowly changes in response to gradual changes in the shoreline due to natural forces, the new shoreland is subject to the public trust law of that State.

2. Sudden Changes: Fixed Boundaries

Sudden changes in the shoreline, known as avulsions, due to storms, tsunamis, earthquakes, volcanoes, land slides and other events generally do not act to change the seaward boundary of upland owners.⁸ Thus, the law in nearly all States, with some exceptions,⁹ is that the addition or loss of upland due to avulsion or other

natural catastrophic or sudden phenomenon does not affect the seaward boundary of the upland owner.¹⁰

In all but one State the question remains open: would tideland or submerged land resulting from avulsion — land clearly within the boundaries of the upland owner — be burdened with public trust rights? For example, if the shoreline were quickly washed back 50 feet due to an avulsive event, leaving the upland owner's boundary line unaffected, and now underwater, could the public pass and repass, fish, bathe, or do any other protected public trust use on the "new" shoreline within the upland owner's boundaries, even if the public remained below the ordinary high water mark?



The affect of avulsion on the public trust boundary.

New York is one State with a judicial answer to this question. It held that avulsion will not defeat the public's right to the resulting shoreline between ordinary high and low water. "Although, where the shore recedes as the result of avulsion, the boundary of the littoral proprietor may not change, the public has the same right of passage over the new foreshore as it had over the old—else an avulsion might cut off the public right of passage altogether."¹¹

B. Man-Induced (Artificial) Changes to the Shoreline

Generally speaking, man-induced changes (other than filling, discussed below) in the shoreline do not result in boundary changes.¹² However, whether the upland owner's title attaches to artificially reclaimed bottomlands or submerged lands "is a question which each State decides for itself."¹³ Each case must be determined according to its own factual circumstances, and courts will often pay great attention to the involvement of the upland owner who would stand to benefit from a new boundary line. Thus, an upland owner who caused an accretion to occur will not be vested with title in the new shoreland. To hold otherwise "would be to hold that a riparian owner could by artificial means acquire title to the bed of a lake far below the shore which belonged to the State."¹⁴ On the other hand, when the upland owner is a "stranger" to the cause of the man-induced accretion, several State courts have ruled that title will vest in the upland owner,¹⁵ giving the same result as if the accretion had been natural.

1. Natural or Artificial Accretion?

The determination as to what is a "natural" or "artificial" change in the shoreline due to accretion can be perplexing. Nearly every area of public trust shoreline in the country has been modified to some degree, by groins, jetties, dams, seawalls, wharfs, piers, docks, hydraulic mining, beach nourishment, dredging and other actions. Thus, in cases involving accretion today, a central question could well be: when is accretion "artificial" and when is it "natural"?

The California Supreme Court wrestled with this question in a 1995 case involving 12 acres of accreted land. The court first reaffirmed California's "artificial accretion" rule (accretion along navigable waterways resulting from artificial causes does not change the upland/public trust lands boundary), finding this rule "consistent with the public trust doctrine and the inalienability of trust lands."¹⁶ The court recognized that, to some extent, the accretion was caused by hydraulic gold mining, and thus was caused by man's, not nature's, activities. Nonetheless, the court concluded that because the hydraulic mining took place many miles upstream and over 100 years ago, it was too far away in both distance and time to be the "direct" cause of the accretion. The court then limited California's "artificial accretion" rule to those cases "directly caused by human activities."¹⁷ The court went on to note that:

"The dividing line between what is and is not in the immediate vicinity will have to be decided on a case-by-case basis, keeping in mind that the

artificial activity must have been the *direct* cause of the accretion before it can be deemed artificial. The larger the structure or the scope of human activity such as dredging or dumping, the farther away it can be and still be a direct cause of the accretion, although it must always be in the general location of the accreted property to come within the artificial accretion rule."¹⁸

2. Docks and Piers on Pilings

Building a dock or pier on pilings, where the water can still ebb-and-flow or run (in contrast to a wharf made by filling in), to reach a navigable depth of water normally does not result in boundary changes.¹⁹ Alluvion that is deposited around such a pier by accretion, even when gradual and imperceptible, generally vests in the State.²⁰

3. The Filling of Public Trust Lands

From the early colonial days, and in some States up to the 1960s, riparian owners in the United States were often encouraged, either expressly or implicitly, to develop the shoreline in order to improve the shipment of passengers, goods and produce by navigation. Before the days of railroads, the principal, sometimes only, means of transportation and shipment was by sailing vessel or other watercraft. Individual businesses were often totally reliant upon having sufficient wharfs; a business could live or die depending upon its ability to service commercial vessels. The local economy demanded the best port facilities possible.²¹

In the days prior to the industrial revolution, access out to "navigable" waters was predominantly by wooden wharf or pier, constructed on pilings which allowed the water to ebb and flow beneath. These were strong enough to support the horse and carts that were used to load and off-load the ships. But, with the advent of the steam engine to power ships, and railroads to transfer passengers and cargo, wooden wharfs were not strong enough to support the needed machinery. The need to have the rail line extend right up to the vessel required solid land beneath. Wooden wharfs made way for filled-in wharfs. As a result, large areas of most U.S. coastal cities (e.g. New York, Chicago, Galveston, Seattle, San Francisco and Providence, R.I.) are built on filled-in lands.

The Federal Government, relying upon its navigational servitude, drew harbor lines in many of the larger ports, in order to protect the navigational interests of the United States. States, towns and ports followed suit. Once a harbor line was drawn, a common result was that the riparian owners would fill out to the harbor

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line. Again, in the early days of the country, this was encouraged, or at least passively tolerated by the States.

Today, this past "coastal land rush" raises many serious questions over ownership of the filled land, what ownership or control still vests in the State, and what rights (if any) does the public have in the filled land?

The filling of public trust lands, whether done lawfully or unlawfully, always merits close attention because it affects the adaptability of trust lands and waters to trust uses and should be regarded as a possible first step towards a partial or total loss of public trust rights.

a. Lawful Filling

Unlike the past, today most States require a permit, lease or easement in order for a person to lawfully fill trust lands.²² Depending upon where the filling is intended, for example if it is in navigable waters that are also in a conservation district, more than one permit may be required.²³ If the fill of publicly owned lands is lawfully done in accordance with all required permits, easements or other regulatory or property authorizations, some States then vest title to the upland owner,²⁴ while others do not.²⁵

Lawful filling of tidelands may diminish or extinguish the public's trust rights to that land.²⁶ The case law varies greatly among States on this point. In Connecticut, title to filled lands for wharf construction prior to the State's regulation of filling submerged lands is "in the hands of the proprietor . . . although the state *prima facie* is owner of the shore on the seacoast."²⁷ In Massachusetts public rights in landlocked, heavily developed, filled tidelands have been extinguished *en masse*, in order to quiet title.²⁸

In Vermont, lawfully filled land on Lake Champlain was recently held to be owned by the riparian owner in the nature of a fee simple subject to a condition subsequent that the filled lands be used for the public purposes for which they were originally conveyed. In this case, the Vermont Central Railroad, originally acting under authority of an 1827 statute granting littoral owners the right to erect wharves by filling in Lake Champlain, filled in "a substantial area" of the lake. The filling continued until 1972, with the railroad line being extended right up to the waterfront, where vessels could berth and directly offload onto the rail cars. In the late 1970s, commercial navigation on Lake Champlain declined to such an extent that the Central Vermont Railroad (successor to the Vermont Central Railroad) wanted to sell the 1.1 mile strip of filled land, which now was centrally located waterfront of Burlington and thus highly valuable, to a real estate developer. The

State and the City of Burlington objected. The Vermont Supreme Court held that the railroad "has a fee simple in the filled lands subject to the condition subsequent that the lands be used for railroad, wharf, or storage purposes, and the State has the right of reentry in the event that the condition is breached by the railroad."²⁹

In a few States, lands which are filled remain State owned lands up to the mean high tide line as it existed before the filling.³⁰

North Carolina by statute recognizes private title to filled public trust lands: 1) when the filling is to reclaim land previously lost by natural causes, 2) when the land was raised under an easement to fill issued by the State, or 3) when the land is raised as a result of the deposit of spoil from State or federal navigation projects on privately owned lands.³¹ Further, the owner of lands filled pursuant to an easement issued by the State may obtain a quitclaim deed to the filled area.³² Along the ocean front, title to lands raised above the mean high tide line by publicly funded beach nourishment projects vests in the State, and remains subject to all of the public's trust rights.³³

The High Court of American Samoa has held that filled tidelands adjacent to upland owned by the Government of American Samoa (which owns down to the high water mark) were held in trust by the U.S. government. The filling did not operate to remove those lands from ownership in trust by the U.S. government.³⁴ Accordingly, if the landowner secures the necessary permits,³⁵ the owner of littoral property may fill in public trust land adjacent to her property. She may even build upon it,³⁶ although the title remains in the government.³⁷

In the Virgin Islands, the boundary line is in keeping with the vegetation line. If the shoreline is extended by filling, the boundary remains at the line of vegetation as previously established and the Government of the Virgin Islands retains property rights to the filled land.³⁸

The same general rules which govern title to shorelands raised by filling also control ownership of islands created by fill placed in navigable waters.³⁹ Many islands have been built up by the deposit of dredge spoil from navigational improvement projects, such as the creation of the Atlantic Intracoastal Waterway by the U.S. Army Corps of Engineers. These so-called "spoil islands," which often provide prime nesting habitat for waterfowl as well as popular sites for public recreation, may also be valuable real estate sought by developers. If historical evidence indicates that an island was raised above the mean high water line by the deposition of dredge spoil, title may have vested in the State as the owner of the underlying bed.⁴⁰ Some States have enacted special statutes which determine title of the raised islands. For example, in North Carolina, title to islands formed in

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navigable waters by "any process of nature or by act of man" is vested in the State by statute.⁴¹

b. Unlawful Filling

Today most States require a permit, lease or easement in order for a person to lawfully fill trust lands, in addition to any federal permit that may be required if the fill would affect any waters of the United States. Filling done without any authorization (e.g. a permit, license or easement) or done in violation of the conditions of the authorization, does not extinguish the rights of the public in those lands.⁴² Unlawful fill of public trust lands and waters is described as a public nuisance⁴³, or in older cases, as a purpresture⁴⁴, and the filler can be ordered to remove the fill, even at great cost.⁴⁵ Further, filling without the required State authorization can be subject to fines and penalties.⁴⁶

Normally, the "burden of proof" that filled land is privately held is on the private landowner claiming the land, and any terms in the conveying instrument are construed most favorably for the State. See Ch. V.A.4. In at least one State, however, the burden of proof as to whether the fill was lawfully done shifts from the landowner to the State if the encroachment exists unchallenged by the State for more than a year.⁴⁷

c. Affect of Harbor Lines

Much filling of the public trust land occurred prior to State regulatory or legislative restrictions. In many instances, questions surrounding the ownership of waterfront property today will pertain to land filled in the early days of the State, or prior to Statehood. This is especially so on the east and Gulf coasts of the United States. Commonly, harbor lines were involved.

Harbor lines are charted boundaries in a bay or port beyond which encroachments, such as docks and wharves, are not allowed. Harbor lines serve to ensure that the waters of ports and harbors remain uncluttered and free of encroachments, thus assuring vessels sufficient open water space within which to maneuver, berth, anchor and be repaired. Harbor lines are not property boundaries. Rather, they are akin to set-back lines.

If harbor lines are involved, the first question is: Who drew the harbor line, the Federal Government or the State (or a State agency, municipality or port authority authorized by State legislation)? The Federal Government, through the Secretary

of the Army, may establish harbor lines for "the preservation and protection of harbors".⁴⁸ If the Federal Government does establish harbor lines, "no piers, wharves, bulkheads, or other works shall be extended or deposits made" beyond the harbor line.⁴⁹ However, the establishment of a federal harbor line does not create any riparian right to wharf or fill. The federal harbor line is a prohibition against a riparian owner from wharfing or filling beyond the line, but it does not convey any right to the riparian owner.⁵⁰

States may also establish harbor lines in order to protect commerce and navigation. A State harbor line, however, may not be inconsistent with the federal line, and the State line remains subject to the federal power to either establish a harbor line, or modify an existing one.⁵¹

The affect of a State established harbor line on a riparian owner's rights varies from State to State. In Massachusetts, harbor lines have neither a legal effect on jurisdiction nor do they imply an ability by a riparian owner to fill out to the line. They are analogous to a building restriction line.⁵² Likewise, Oregon does not recognize harbor lines as a grant to fill out and the Oregon courts have protected the public right of navigation from construction both inside and outside of the harbor lines.⁵³

Other States, however, have viewed the establishment of a State harbor line as an "invitation," "license" or "privilege" of the riparian owner to fill out to the harbor line, but only when there is no State legislation or agency regulation to the contrary.⁵⁴ In 1995 the Rhode Island Supreme Court held that two riparian occupants of land that was filled in 1857, 1886 and 1911 (well before any State legislative or regulatory restrictions or prohibitions against filling) had "fee-simple absolute title to the ownership rights of the land reclaimed from the sea by the placing of fill below mean high tide."⁵⁵ This ruling was based in part upon two much earlier cases (1875 and 1895) where the Supreme Court, in *dicta*, stated that the filling of land to a harbor line "excluded" or "extinguished" the public trust rights in such property. Likewise, in a 1920 Connecticut case (19 years prior to any regulatory control over the filling of State waters) the court held that once a riparian owner fills out to a harbor line, the public's interests are extinguished *pro tanto* by the exclusive occupation of the submerged lands.⁵⁶

C. Ownership Inquiry for Filled Lands

When a situation arises involving the ownership of filled lands, or the existence and extent of any remaining public rights in the land, the following checklist of questions should offer useful guidance.

1. When did the filling of the land beneath navigable waters take place?
2. What laws and regulations were in existence at the time?
3. Does the upland owner possess an express grant, easement, permit or license authorizing her to fill in the navigable waters? Note: the burden is on the claimant of the filled land to produce evidence of any express authorization, including when necessary a chain-of-title search.
 - If "yes" was the filling done in full accordance with all conditions and limitations of all express authorizations? To the extent that the filling exceeds that allowed by the conditions and limitations, that portion of the fill should be held unlawful.
 - If "no" go to (4).
4. What was the purpose for the original fill? Is the current use consistent with this original purpose?
5. Has a harbor line been drawn affecting the area of fill involved?
 - If "yes" is the harbor line a federal or State harbor line?
 - A. If the only harbor line is a federal line, no express or implied right is conveyed to the upland owner to fill or wharf out.
 - B. If a State harbor line has been drawn (either with or without a federal line), an "invitation" or "privilege" may have existed for the upland owner to fill out to the State harbor line. In such an event, there is great variation between the States on the affect on the shoreline boundary (i.e. who owns the filled land?).
 - (i) Some States hold that the filled land is held by the State as public trust land.⁵⁷

- (ii) Some States hold that the filled land is privately held, but the bottomland upon which it rests remains State owned public trust land, and thus the filled land is subject to a lease.⁵⁸
- (iii) Some States hold that the filled land is held by the upland owner in fee simple, subject to a condition subsequent that the land be used for the public purposes for which it was granted. Upon a change of use, the State may re-enter the land.⁵⁹
- (iv) One State holds that the filled land is held by the upland owner in fee simple absolute.⁶⁰

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Notes

1. *Hilt v. Weber*, 252 Mich. 198, 219, 233 N.W. 159, 165, 166 (1930), quoting 28 Halsbury, *Laws of England*, 361.

2. Institutes of Justinian, Lib. 2, Title 1, § 20, as reprinted in Angell, J.K., *A Treatise on Tide Waters* (1826), at 69.

US: See *County of St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46, 66, 23 L.Ed. 59 (1874).

3. See *County of St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46, 66-67, 23 L.Ed. 59 (1874) ("The Code Napoleon declares: "Accumulations and increase of mud formed successively and imperceptibly on the soil bordering on a river or other stream is denominated "alluvion." Alluvion is for the benefit of the proprietor of the shore, whether in respect of a river, a navigable stream, or one admitting floats or not; on the condition, in the first place, of leaving a landing-place or towing path conformably to regulations." Such was the law of France before the Code Napoleon was adopted. And such was the law of Spain.").

4. Roman civil law on natural changes of the shoreline was adopted nearly word for word by English common law.

LR: See Angell, J.K., *A Treatise on Tide Waters* (1826), at 69.

5. US: *St. Claire County v. Lovington*, 90 U.S. 46, 68 (1874) ("The test as to what is gradual and imperceptible in the sense of the rule is, that though witnesses may see from time to time that progress has been made, they could not perceive it while the progress was going on.").

AL: *Hagen v. Campbell*, 8 Port. 9, 26 (1838) ("If the increase was occasioned by a process so slow and secret, as renders it impossible to discover how much is added in each moment of time, it belongs to the proprietor of the land to which the addition is made."); *Abbot v. Doe*, 5 Ala. 393, 395 (1843) ("Accretions from natural causes become the soil of the riparian proprietor, that his limits extend, or diminish, according as the water may recede or trench upon his land.").

AR: *Crow v. Johnston*, 209 Ark. 1053, 194 S.W.2d 193, 196 (1946) ("the true test as to what is gradual and imperceptible .. is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the progress was going on.").

NY: *Trustees of the Freeholders and Commonality of Southampton v. Heilener*, 84 Misc. 318, 375 N.Y.S.2d 761, 772 (1975) ("Accretion is the addition to the

upland by a change so gradual as not to be perceived in any one moment of time.”); *Halsey v. McCormick*, 18 N.Y. 147 (1858).

- PA: *Freeland v. Pennsylvania R.R. Co.*, 197 Pa. 529, 540, 47 A. 745, 747 (1901)(An imperceptible increase is one that “cannot be perceived how much is added in each moment of time.”).
- SC: *Speigner v. Cooner*, 42 S.C.L. 301 (1855)(Accretion is “where the change is so gradual as not to be perceived in any one moment of time ...”).
- TX: *Denny v. Cotton*, 22 S.W. 122, 124, 3 Tex. Civ. App. 634, 639 (1893, writ ref’d) (“Accretion by alluvion, or the addition and gains to the soil by a recession of the water and the channel of the river, must be by a process that is gradual and imperceptible.”).
6. AK: *De Boer v. United States*, 653 F.2d 1313 (9th Cir. 1981)(“[T]he meander line will be treated as the boundary of the grant if, between the time of survey and the time of entry, a substantial amount of land was formed by accretion. ... In determining whether the substantial accretion exemption is to be applied, the initial question is whether the accretion is quantitatively considerable.”).
- CT: *Chapman v. Kimball*, 9 Day 38,41(1831)(Reliction does not operate to change the boundary in Connecticut).
- LA: LA. CIV. CODE, Art. 500 (“There is no right of [accretion] or [reliction] on the shore of the sea or of lakes.”) Thus, while Louisiana follows most other states in its law regarding shoreline changes on navigable rivers and streams, the law regarding the seashore and navigable lakes is very different. The effect is that any change in the shoreline of the sea or navigable lakes increases state ownership when there is private ownership of the shore. The State gains either navigable water bottom [erosion] or upland [accretion]. See *State v. Placid Oil Co.*, 300 So.2d 154, 173 (La. 1974)(“the principle of accretion ... is inapplicable to lakes. As to lakes, the adjacent landowners have no alluvial rights.”); *Miami Corporation v. State*, 186 La. 784, 810, 173 So. 315, 323 (1936)(the rule is that when submersion occurs, the submerged portion becomes a part of the bed or bottom of the navigable body of water in fact, and therefore the property of the State, by virtue of its inherent sovereignty.”).
- MS: In Mississippi, the effect of reliction on public trust lands is not resolved, although some cases suggest that the properties within the public trust may be alienated only by legislation consistent with the public purposes of the trust. See *Cinque Bambini Partnership v. State*, 491 So.2d 508, 519 (Miss. 1986).
- OR: OR. REV. STAT. 277.440 (1921)(“There are no vested rights in or to any future accretion or reliction to the lands of any upland or riparian owner on

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any meandered lake. No person shall acquire any right, title or interest in or to the submerged or submersible lands on any such lakes, or any part thereof by reliction, accretion or otherwise, or by reason of the lowering or drainage of the waters of such lakes, except as provided by statute.”).

- SC: South Carolina has reversed the common law of accretion by statute. *See* S.C. CODE ANN. § 48-39-120(B)(1976)(Property lines remain unchanged due to accretion).
- VI: The Virgin Islands have statutory exceptions to this general rule. The addition of fastland by reliction and accretion becomes the property of the Virgin Islands. *See* 48 U.S.C. § 1705(a). Any land added by accretion or reliction is considered submerged lands and will belong to the Government of the Virgin Islands. 12 V.I.CODE ANN. TIT. 12., § 309(a).
- WA: WASH. REV. CODE 79.94.310 (Any accretions that may be added to any tract or tracts of tide or shore lands of the first or second class heretofore sold, or that may hereafter be sold, by the state, shall belong to the state...); *Hudson House, Inc. v. Rozman*, 82 Wash.2d 178, 184, 509 P.2d 992, 995 (1973)(“In ... case where a substantial accretion is built up in front of property, even if separated by a stream or other natural barrier, the accretion will belong to the upland property. ... In such cases the fundamental consideration of preserving frontage on the water will override the usual rule by which accretions belong to the land which they adjoin.”).
7. The property law in nearly all states provides that land added to a shoreline by accretion or reliction vests in the upland owner, while shoreland and submerged land resulting from the loss of fast land due to erosion, vests in the State.
- US: *Barney v. Keokuk*, 94 U.S. 324, 337 (1876)(“It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes.”); *Shively v. Bowlby*, 152 U.S. 1, 35 (1894)(“The rule, everywhere admitted, that where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters ...”). *See also California ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1981)(The federal rule is “that accretions, regardless of cause, accrue to the upland owner.”). *See also* 33 C.F.R. §328.5.
- AK: *Honsinger v. State of Alaska*, 642 P.2d 1352, 1354 (1982)(“Accretion and reliction, although physically quite different processes, are subject to the same rule regarding title; i.e. the benefit inures to the shoreline owner.”); ALASKA STAT. 38.05.965(18) defines “shoreland” as “land belonging to the State which is covered by nontidal water that is navigable under the laws of the United

States up to ordinary high water mark as modified by accretion, erosion, or reliction.”).

- AL: *Hagen v. Campbell*, 8 Port. 9, 26 (1838)(“If the increase was occasioned by a process so slow and secret, as renders it impossible to discover how much is added in each moment of time, it belongs to the proprietor of the land to which the addition is made.”); *Abbot v. Doe*, 5 Ala. 393, 395 (1843)(“Accretions from natural causes become the soil of the riparian proprietor, that his limits extend, or diminish, according as the water may recede or trench upon his land.”).
- AS: *Lago v. Mageo*, 4 A.S.R. 287, 297 (1962)(“The rules of accretion, reliction, erosion, and avulsion as determining boundaries apply to public as well as to private property and rights. Thus, the government, if the owner of riparian land, is entitled to additions thereto by accretion the same as if the land were owned by an individual.” Quoting 56 Am.Jur. 902, and citing *Missouri v. Nebraska*, 195 U.S. 23; and *Shively v. Bowlby*, 152 U.S. 1 (1894)).
- CA: *Taylor v. Underhill*, 40 Cal. 471, 473 (1871)(“[A] riparian owner ... has ... a right to accretions to his land.”); *City of Los Angeles v. Anderson*, 206 Cal. 662, 666-68, 275 P. 789, 791-792 (1929)(Erosion, accretion and reliction that do not derive directly or indirectly from the acts of man result in a change of the state-private boundary along navigable waterways); *Strand Improvement Co. v. Long Beach*, 173 Cal. 765, 773, 161 P. 975, 978 (1916)(“Our conclusion is that the right of the upland owner to additions to his land by alluvion or accretions exists where the land abuts upon the ocean.”). See also *City of Oakland v. Buteau*, 180 Cal. 83, 179 P. 170 (1919); CAL. CIV. CODE § 1014.
- CT: *Chapman v. Kimball*, 9 Day 38, 41 (1831)(“If the increase be gradual, then the accretion belongs to the adjoining proprietor”); *Lockwood v. New York & New Haven Railroad Co.*, 37 Conn. 387, 391 (1879)(“By means of such reclamations the line of high water mark is changed and carried into the harbor, and the owner’s lands have gained the reclaimed shore by accretion.”).
- FL: *Ford v. Turner*, 142 So. 2d 335, 340 (Fla. 1962)(“The boundary line of land ... extends or restricts as that margin gradually changes or shifts by reason of accretion or erosion.”).
- HI: *Halstead v. Gay*, 7 Haw. 587, 588 (1889)(When accretion is found, the owner of the contiguous land takes title to the accreted land). See also *State v. Zimring*, 58 Haw. 106, 119, 566 P.2d 725 (1977).
- ID: *Smith v. Long*, 73 Id. 309, 311, 251 P.2d 206, 207 (1952)(Accretion acts “so as to extend the shoreline thereof and owners title extends over and covers the accreted land.”).

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- IL: *Schulte v. Warren*, 218 Ill. 108, 118-119, 75 N.E. 783, 785 (1905)(“As appellant took title to the water’s edge he also acquired title to any land which might be added by accretions, and if the waters of the lake, by gradual and imperceptible process, encroach upon the surrounding land, he would lose the title to the lands so encroached upon.”).
- LA: LA. CIV. CODE Art. 499 (Along the banks of rivers and streams, land formed by accretion or reliction belongs to the riparian land owner. On the other hand, when riparian land is eroded away and becomes navigable water bottom, the state becomes owner). *See also Miami Corporation v. State*, 173 So. 315 (1936). A very different rule applies, however, to the sea and navigable lakes. *See* LA. CIV. CODE Art. 500.
- MA: *Michaelson v. Silver Beach Improvement Assoc., Inc.*, 342 Mass. 251, 173 N.E.2d 273, 279 (1961)(citing *Burke v. Commonwealth*, 283 Mass. 63, 68, 186 N.E. 277, 279 for the general rule that the littoral proprietor is entitled to a proportionate share of natural accretions, and applying the same to find title to accreted beach created by Commonwealth dredging project not in furtherance of navigation to be property of the littoral owner). *See also Lorusso v. Acapesket Improvement Assoc., Inc.*, 408 Mass. 772 (1990)(applying rule of equitable division of accretions to apportion marsh barrier beach); *East Boston Co. v. Commonwealth*, 203 Mass. 68, 75, 89 N.E. 236, 238 (1909)(“Upon the doctrines applying to accretion and erosion and to the elevation and subsidence of land affecting the water line along the shore of the sea ..., the line of ownership follows the changing water line.”).
- MD: MD. NAT. RES. CODE ANN. § 9-201(a)(1983)(“A person who is the owner of land bounding on navigable water is entitled to any natural accretion to his land...”); *Hirsch v. Md. Dept. of Nat. Resources*, 288 Md. 95, 99, 416 A.2d 10, 12 (1980)(“[T]he owner of land bordering navigable water [is] entitled to any gain or increase in his land by tidal action.”); *Dept. of Nat. Resources v. Mayor of Ocean City*, 274 Md. 1, 14, 332 A.2d 630, 638 (1975)(“Land inundated by mean high water reverts to state ownership. [This] is applicable when, as a result of gradual erosion, fast land becomes submerged.”).
- MI: *Hilt v. Weber*, 252 Mich. 198, 202, 233 N.W. 159, 164 (1930)(“[W]here private property is permanently encroached upon by open waters, the proprietor loses his title and it passes to the State as part of the bed ...”). Legal boundary between upland owner and state fluctuates as a result of erosion, accretion and reliction. *See also* Great Lakes Submerged Lands Act, 1955 P.A. 247, MCLA 324.32502.
- MN: *State v. Longyear Holding Co.*, 224 Minn. 451, 467, 29 N.W.2d 657, 667 (1947)(“[U]nder the doctrine of accretions and relictions ... it is universally held

that riparian owners gain a vested right in property added to their riparian lands as a result of deposits from the waters or because of their recession.”).

- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508 (1986)(Where the forces of nature have operated to expand or enlarge the inland reach of the ebb and flow of the tide, the new tidelands vest in the trust) *aff'd sub. nom Phillips Petroleum v Mississippi*, 484 U.S. 469 (1988); *International Paper Co. v. Mississippi State Highway Dept.*, 271 So.2d 395 (1973)(“property owners adjacent to tidelands were entitled to the accretionary buildup thereto ...”).
- MT: *Montana Department of State Lands v. Armstrong*, 251 Mont. 235, 824 P.2d 255 (1992)(Riparian owner can lose title to land when erosion causes gradual washing away of land bordering navigable river).
- NH: *Martin v. Prescott*, 122 N.H. 353, 444 A.2d 556 (1982)(Any property interest created by natural and gradual buildup of alluvial deposits, that exceed in elevation the natural mean high water mark, vests in the abutting littoral landowner); *State v. Stafford*, 99 N.H. 92, 105 A.2d 569 (1954). *State v. Stafford*, 99 N.H. 92, 105 A.2d 569 (1954)(Natural and gradual removal by water action of tidal land or Great Ponds divests the littoral owner of any property interest in the area removed, and the new boundary conforms to natural mean high water mark); *Batchelder v. Keniston*, 51 N.H. 496, 12 A.R. 143 (1872)(Natural and gradual removal of land abutting a river, stream or small pond changes the boundary line at the thread of the water, divesting the riparian owner of land in the bed in proportion to that lost on the shoreline). *See also Concord Mfg. Co. v. Robertson*, 66 N.H. 1, 25 A. 718 (1889).
- NJ: *Harz v. Board of Commerce and Navigation*, 126 N.J. Eq. 9, 7 A.2d 803 (1939)(“An owner of land on tidewaters is subject to loss of riparian rights by erosion, and, if what was once his fast land is entirely submerged at high water, title to the submerged land is in the State during continuance of the submergence.”); *Borough of Wildwood Crest v. Masciarella*, 51 N.J. 352, 240 A.2d 665 (1968)(State gains title to lands subject to natural erosion or accretion); *Dickenson v. Fund for the Support of Free Public Schools*, 95 N.J. 65, 469 A.2d 1 (1983)(Lands become upland by natural reliction belong to the upland owner); *Garrett v. State*, 118 N.J. Super. 594, 600, 289 A.2d 542, 545 (1972)(“At common law the artificial exclusion of water from a tidal stream does not as a matter of law divest the sovereign of its ownership of the bed of the stream. ... But title to such lands may be divested by the State where there is a gradual and imperceptible accretion and erosion along tidal streams.”); *Ocean City Ass'n v. Shrives*, 64 N.J.L. 550, 46 A. 690 (1900)(The riparian owner is entitled to all alluvial increases).
- NY: *Trustees of the Freeholders and Commonality of Southhampton v. Heilener*, 84 Misc. 318, 375 N.Y.S.2d 761, 772 (1975)(“Accretion is the addition to the

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upland by a change so gradual as not to be perceived in any one moment of time. The riparian owner increases title by that amount, at the cost of the diminution of title of the owner of the land previously under water ... but now covered by accretion.”); *Mulroy v. Norton*, 100 N.Y. 424, 434 (1885)(“When portions of the mainland have been gradually encroached upon by the ocean so that navigable channels have been extended thereover, the people, by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners.”).

- NC: *Carolina Beach Fishing Pier v. Town of Carolina Beach*, 277 N.C. 297, 177 S.E.2d 513 (1970)(If erosion results in submersion of the littoral landowner’s property, title to the land covered by the ebb and flow of the tide vests in the State); *State v. Johnson*, 278 N.C. 126, 179 S.E.2d 371 (1971)(Where forces of accretion gradually add to a tract of land, the riparian owner is entitled to the increase); *Murray v. Sermon*, 8 N.C. 56 (1820)(Where the waters recede “gradually and invisibly” the riparian owner gains title to the land). *See also* N.C. GEN. STAT. 146-6(a)(title to land raised as a result of natural forces vests in the littoral property owner).
- OH: *State ex rel. Duffy, Atty. Genl., v. Lakefront East Fifty-Fifth Street Corp.*, 137 Ohio St. 8 (1940)(Title by accretion vests in the littoral owner on the shores of Lake Erie as to all lands formed gradually and imperceptibly in the extension of the shoreline through the action of the waters of the lake); *Baumhart v. McClure*, 21 Ohio App. 491, 493, 153 N.E. 211, 212 (1926)(Riparian owner may gain land by accretion or reliction, or lose it by slow erosion but not by sudden avulsion as result of storm; land lost by submergence may be returned by accretion, whereupon ownership temporarily lost may be restored).
- OR: *Wilson v. Shively*, 11 Or. 215, 217-218, 4 P. 324, 325 (1884)(“When land is submerged by the gradual advance of the sea, the sovereign acquires the title to the part thereby covered with water.”); *Armstrong v. Pincus*, 81 Or. 156, 162, 158 P. 662, 664 (1916)(“[A]ccretion is the right of one owning the land on the border of a stream to the additions imperceptibly made to his land by the action of the water.”); *Guber v. Town and Stoutenburg*, 202 Or. 55, 72, 273 P.2d 430, 438 (1954)(“One of the valuable rights which a riparian owner possesses is the right to all additions to his land which are effected by accretion.”). *But see* OR. REV. STAT. 277.440 (“There are no vested rights in or to any future accretion or reliction to the lands of any upland or riparian owner on any meandered lake. No person shall acquire any right, title or interest in or to the submerged or submersible lands on any such lakes, or any part thereof by

reliction, accretion or otherwise, or by reason of the lowering or drainage of the waters of such lakes, except as provided by statute.”).

- PA: *Black v. American International Corp.*, 264 Pa. 260, 262, 107 A. 737, 738 (1919)(Riparian owner becomes owner of natural accretions to his land); *Houseman v. International Navigation Co.*, 214 Pa. 552, 566, 64 A. 379, 384 (1906)(Accretions or gradual and imperceptible additions to an island become part of original land and title to accretions vests in owner of the island); *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 540, 47 A. 745, 747 (1901)(Ownership of alluvion is in the owner of the land increased).
- SC: *Horry County v. Tilghman*, 283 S.C. 475, 479, 322 S.E.2d 831, 833 (1984)(Legal boundary between private upland and adjoining tidal-flowed lands is subject to fluctuations as a result of accretion and erosion); *State v. Beach Co.*, 271 S.C. 425, 429, 248 S.E.2d 115, 117 (1978)(“Accretion by natural alluvial action to lands on a navigable stream become the property of the owner of the land accreted or increased.”); *Speigner v. Cooner*, 42 S.C.L. 301 (1855)(“in the case of mere alluvion, where the change is so gradual as not to be perceived in any one moment of time, the proprietor, whose bank on the river is increased, is entitled to the addition.”). *See also Horry County v. Woodward*, 282 S.C. 366, 318 S.E.2d 584, 586 (1984); *Hill v. Beach Co.*, 306 S.E.2d 604 (1983).
- TX: *Matcha v. Mattox*, 722 S.W.2d 95, 99 (Tex. App.-Austin 1986, Writ ref'd n.r.e), *cert denied* 481 U.S. 1024 (1986)(“It is established that the line of mean high tide marks the boundary between private beachfront property and the State’s submerged property. Furthermore, this boundary line may move landward or seaward as the beach moves, and the property lines move accordingly.”); *Feinman v. State*, 717 S.W.2d 106 (Tex. App.-Houston [1st Dist.] 1986, writ ref’d n.r.e)(Public beach easement, which is located between waters and natural vegetation line, shifts automatically as vegetation line moves). *See also Lutes v. State*, 159 Tex. 550, 324 S.W.2d 167 (1959); *Lorino v. Crawford Packing Co.*, 142 Tex. 51, 175 S.W.2d 410 (1943); *Seaway Company, Inc. v. Attorney General*, 375 S.W.2d 923 (1964); TEX. NAT. RES. CODE ANN. § 11.012(c)(Vernon’s 1978).
- VA: *Chesapeake & O. Ry. Co. v. Walker*, 100 Va. 69, 83, 40 S.E. 633, 638, *reh’g denied*, 40 S.E. 914 (1902)(“There is no distinction between soil gained by accretion and that uncovered by reliction.” Such land belongs to the upland contiguous owner).
- WA: *Ghione v. State*, 26 Wash.2d 635, 644, 175 P.2d 955, 961 (1946)(“[W]hen a boundary line is the center, the low-water mark, the high-water mark, or any other water line of any watercourse, any shifting of that line by gradual and imperceptible change, whether it be by gradual recession of the water (reliction), or by the gradual extension of the land by the deposit of alluvial soil

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(accretion), results in a corresponding shift in the boundary line.”); *Spinning v. Pugh*, 65 Wash. 490, 118 P. 635 (1911)(Accretions added by the alluvion of a stream belong to the owner of the contiguous bank of the stream).

- WI: *Heise v. Village of Pewaukee*, 92 Wis.2d 333, 343-344, 285 N.W.2d 859, 864 (1979), cert. denied, 449 U.S. 992 (1980)(Riparian rights include “...the right of the riparian owner to accretions formed by slow and imperceptible degrees upon or against his land, and to those portions of the bed of the lake or pond adjoining his land uncovered in the same manner by the dereliction of the water therefrom.”); *Doemel v. Jantz*, 180 Wis. 225, 231, 193 N.W. 393, 396 (1923)(“Riparian owner is entitled to the land formed by gradual accretions and as a result of relictions.”); *Boorman v. Sunnuchs*, 42 Wis. 233, 242 (1877)(Riparian rights include “the right of the riparian owner to accretions formed by slow and imperceptible degrees upon or against his land ...”).
8. HI: *State by Kobayashi v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977)(“We hold that lava extensions vest when created in the people of Hawaii, held in public trust by the government for the benefit, use and enjoyment of all the people.”).
- IL: *Wall v. Chicago Park District*, 378 Ill. 81, 97, 37 N.E. 2d 752, 760 (1941)(“An avulsion, it is settled, does not change the boundary line.”); *Schulte v. Warren*, 218 Ill. 108, 118-119, 75 N.E. 783, 785 (1905)(“Where there is a sudden or marked change in the shore line and the lands of the adjoining owner are flooded or the course of a stream change, the adjoining owner is not divested of his title.”).
- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 520 (1986)(“By way of contrast to our law regarding accretion and reliction, boundaries and titles are not affected by avulsion.”) *aff’d sub nom. Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988).
- TN: *State v. West Tennessee Land Co.*, 127 Tenn. 575, 158 S.W. 746 (1913)(Owners of land submerged by the creation of a navigable lake by an earthquake did not lose title to their tracts as long as they can be reasonably identified).
9. A few states apply an exception to the general rule of avulsion and provide that the addition or loss of fast land due to avulsion or other natural catastrophic or sudden phenomenon does affect the seaward boundary of the upland owner.
- TX: *Feinman v. State*, 717 S.W.2d 106 (Tex. App.-Houston [1st Dist.] 1986, writ ref’d n.r.e)(Erosion or avulsion immaterial as to landward movement of natural vegetation line that constitutes boundary of public easement on beach.); *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 643 (Tex. App.—Austin 1981, writ ref’d n.r.e)(“This court has not discovered any Texas authority holding that the

doctrine of avulsion is applicable to tidal lands.”); *State v. Balli*, 144 Tex. 195, 190 S.W.2d 71 (Tex. 1945)(Whenever the line of mean high tide moves landward, the upland owner loses title to the State to the land newly included within the area below mean high tide).

- VI: The addition of submerged land by avulsion becomes the property of the Virgin Islands. *See* 48 U.S.C. § 1705(a).
- WI: *Muench v. Public Service Commission*, 261 Wis. 492, 53 N.W. 2d 514, 518 (1952)(“[I]f the course of the stream is changed so that such land no longer is part of the river bed, it ceases to be impressed with the public trust.”).
10. The law in nearly all states is that the addition or loss of fast land due to avulsion or other natural catastrophic or sudden phenomenon does not affect the seaward boundary of the upland owner.
- US: *State of Nebraska v. State of Iowa*, 143 U.S. 359 (1892)(When a boundary stream suddenly abandons its old bed and seeks a new course by avulsion, the boundary between the two states remains unchanged).
- AL: *Hagen v. Campbell*, 8 Port. 9, 26 (1838)(“[I]f by the instantaneous casting up of sand or other substances made to the land, the sovereign may claim the accession, upon the ground that it was but a part of the bed of the river or sea, of which he was the proprietor.”).
- AS: *Lago v. Mageo*, 4 A.S.R. 287, 297 (1962)(“The rules of accretion, reliction, erosion, and avulsion as determining boundaries apply to public as well as to private property and rights. Thus, the government, if the owner of riparian land, is entitled to additions thereto by accretion the same as if the land were owned by an individual.” Quoting 56 Am.Jur. 902, and citing *Missouri v. Nebraska*, 195 U.S. 23; and *Shively v. Bowlby*, 152 U.S. 1 (1894)).
- CA: *People v. Ward Redwood Co.*, 225 Cal. App.2d 385, 37 Cal. Rptr. 397 (1964)(Natural avulsive changes do not result in boundary changes).
- CT: *Roche v. Fairfield*, 186 Conn. 490, 496, 442 A.2d 911, 915 (1982)(“When a change occurs suddenly and perceptibly by avulsion, however, boundaries and title to land are not affected.”).
- FL: *Municipal Liquidators, Inc. v. Trench*, 153 So. 2d 728, 730 (Fla. 1963)(“[W]here the loss occurs through avulsion, which is defined as the sudden or violent action of the elements, and the effect and extent of which is perceptible, the boundaries do not change.”); *Id.* at 731 (“And there is a presumption of accretion or erosion as against avulsion.”).

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- HI: *State by Kobayashi v. Zimring*, 58 Haw. 106, 120, 566 P.2d 725, 735 (1977) (“Likewise, in cases where there have been rapid, easily perceived and sometimes violent shifts of land (avulsion) ... preexisting legal boundaries are retained ...”).
- LA: LA. CIV. CODE, Arts. 502-505 (The sudden action of water of a river or stream that separates a piece of one owner’s land and unites it with that of another does not change its ownership. The same is true for an island formed by splitting of a river channel but not for an island formed by accretion in a navigable river or stream that belongs to the state. When a river changes course, the new bed becomes state property [if the river is navigable], but the private owner who suffers the loss takes ownership of the abandoned bed).
- MD: *Department of Natural Resources v. Mayor of Ocean City*, 274 Md. 1, 15, 332 A.2d 630, 638 (1975) (“The rule applicable to gradual erosion is not applicable to an avulsion, defined as a sudden or violent change, which does not generally affect land boundaries.”); *Windsor Resort, Inc. v. Mayor and City Council of Ocean City*, 71 Md.App. 476, 526 A.2d 102 (1987) (General principle that land inundated by mean high water reverted to state ownership did not apply where shoreline was altered by storm, rather than gradual erosion).
- MI: *Klais v. Danowski*, 373 Mich. 262, 129 N.W.2d 414 (1964) (Boundaries to patent on Great Lakes not altered by avulsion).
- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 520 (1986) (“By way of contrast to our law regarding accretion and reliction, boundaries and titles are not affected by avulsion.”) *aff’d sub nom Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988).
- NY: *Town of Hempstead v. Little*, 22 N.Y.2d 432, 437, 293 N.Y.S.2d 88, 91 (1968) (“[T]he boundaries do not change, one way or the other, where the physical alteration is due to ‘sudden or violent action of the elements’ which is perceptible while in progress.”). *See also Schwartzstein v. B.B. Bathing Park*, 203 App. Div. 700, 197 N.Y.S. 490, 492 (1922).
- NC: *State v. Johnson*, 278 N.C. 126, 146, 179 S.E.2d 371, 384 (1971) (“Avulsion, unlike accretion, works no change in legal title.”).
- OH: *United States v. 461.42 Acres of Land*, 222 F. Supp. 55, 25 O. Ops.2d 365 (1963) (Where the submergence of a marsh area resulted from a dike and sand beach being suddenly and violently breached and destroyed by a storm, the title to such land did not vest in the state of Ohio as soil under the waters of Lake Erie, but remained vested in the title owner).

- OR: *Purvine v. Hathaway*, 393 P.2d 181, 183, 238 Or. 60, 62-3 (1964)(Under the principle of avulsion, "it is held that when a boundary stream suddenly changes its course the boundary is not marked by the new course of the stream but remains as it existed prior to the sudden change.").
- TX: *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 644 (Tex. Civ. App.-Austin 1981, writ ref'd n.r.e.)(“The sudden removal of land by ... avulsion” does not pass title).
- VA: *Woody v. Abrams*, 160 Va. 683, 692, 169 S.E. 915, 918 (1933)(Where there is avulsion or sudden change in shoreline from any cause, the boundary remains where it was before the change).
- WA: *Harper v. Holston*, 119 Wash. 436, 205 P. 1062, 1064 (1922)(“[W]hen a stream which is a boundary, from any cause suddenly abandons its old channel and creates a new one, or suddenly washes from one of its banks a considerable of land and deposits it on the opposite bank, the boundary does not change ...”).
- WI: *Boorman v. Sunnuchs*, 42 Wis. 233, 245 (1877)(For water that recedes “too suddenly and sensibly,” title is not revested).
11. *People v. Steeplechase Park Co.*, 82 Misc. 247, 255-256, 143 N.Y.S. 503, 509, *aff'd* 165 App. Div. 231, 151 N.Y.S. 157 (2d Dept.) *mod. on other grounds* 218 N.Y. 459 (1916).
12. Man-induced changes in the shoreline generally do not result in boundary changes.
- US: *But see California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 285 (1982)(“[A]ccretions, regardless of cause, accrue to the upland owner ...”); *County of St. Claire v. Lovington*, 90 U.S. 46, 68 (1874)(“Whether [accretion] is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same.”).
- CA: *Patton v. Los Angeles*, 169 Cal. 521, 525-526, 147 P. 141, 142 (1915)(“[N]o artificial embankment, made by third persons, ... nor any accretion to the adjacent upland caused thereby, could operate to divest the State of its title to the tideland so reserved.”); *Carpenter v. City of Santa Monica*, 63 Cal. App. 2d 772, 789-794, 147 P.2d 964, 972-975 (1944)(“That accretions formed gradually and imperceptibly, but caused entirely by artificial means ... belong to the state or its grantee, and do not belong to the upland owner.”); *Los Angeles Athletic Club v. Santa Monica*, 63 Cal. App. 2d 795, 147 P.2d 976 (1944)(Accretions formed along seashore by artificial means do not belong to upland owners, but belong to the State); *City of Los Angeles v. Anderson*, 206 Cal. 662, 275 P. 789 (1929)(Erosion, accretion and reliction that do not derive directly or indirectly from the acts of man result in a change of the state-private boundary along navigable waterways). *See also* CAL. CIV. CODE § 1014.

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- FL: *Martin v. Busch*, 93 Fla. 535, 574, 112 So. 274, 287 (Fla. 1929) (“The doctrine of reliction is applicable where from natural causes water recedes by imperceptible degrees, and does not apply where land is reclaimed” by man induced changes).
- HI: HAWAII REV. STAT. § 505-33 (Land Court: accretion must be natural.); HAWAII REV. STAT. § 669-1 (Regular land title: accretion must be natural). See also *King v. Oahu Railway and Land Co.*, 11 Haw. 717, 725 (1899).
- MA: See *Commonwealth v. Roxbury*, 75 Mass. (9 Gray) 451 (1857); *Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629 (1979).
- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 520 (Miss. 1986) (“Boundaries and titles are not affected by avulsion. ... We perceive no reason on principle for exclusion from this notion of a change of water course boundary artificially induced by the dredging process.”). But see *International Paper Co. v. Mississippi State Highway Dept.*, 271 So.2d 395, 398 (1973) (“[P]roperty owners adjacent to tidelands were entitled to the accretionary buildup thereto whether it resulted from man-made or natural accretion.”).
- NH: *State v. Strafford Co.*, 99 N.H. 92, 99 (1954) (“We know of no decision which allows a littoral owner to acquire fee simple title to fill deposited in a lake and thus accomplish its transfer from the public ownership to private ownership by grading and improving the filled land.”).
- OH: *Thomas v. Sanders*, 65 Ohio App.2d 5, 413 N.E.2d 1224 (1979) (Land which was reclaimed from waters of Sandusky Bay for use by littoral owner in aid of navigation was still part of trust estate and title to such land could not thereafter be held by private persons to exclusion of beneficiaries of trust estate, nor could city or state abdicate trust so as to leave reclaimed soil in control of private persons.); *State v. Cleveland and Pittsburgh Railway Co.*, 94 Ohio St. 61, 113 N.E. 677, 682 (1916) (“Whatever [the riparian owner] does ... is with the knowledge on his part that the title to the subaqueous soil [created by man made structures] is held by the State as trustee for the public.”).
- PA: *Black v. American International Corp.*, 264 Pa. 260, 262-263, 107 A. 737, 738 (1919) (Principle of natural accretions “does not apply where land has been made by human agency by depositing material on a river bottom.”).
- TX: *Lorino v. Crawford Packing Co.*, 142 Tex. 51, 57, 175 S.W. 2d 410, 414 (1943) (“Accretions along the shores of the Gulf of Mexico and bays which have been added by artificial means do not belong to the upland owners, but remain the property of the State.”).

- VA: *Lambert's Point Co. v. Norfolk & Western Railway*, 113 Va. 270, 74 S.E. 156 (1912)(In ascertaining the shorelines of the adjacent riparian owners in order to apportion the water front property, where there is filled area and wharfing, the front should be ascertained as if the filling-in had not been done).
- VI: 12 V.I. CODE ANN. TIT. 12 § 402(b)(“Whenever the shore is extended into the sea by filling or dredging, the boundary of the shorelines shall remain at the line of vegetation as previously established.”).
- WA: WASH. REV. CODE. 90.58.030(2)(b)(Only those changes in location of the ordinary high water mark that are the result of naturally occurring forces or are authorized by government permits are recognized).
- WI: *Menominee River Lumber Co. v. Seidl*, 149 Wis. 316, 320, 135 N.W. 854, 856 (1912)(“One cannot by building land or erecting structures in a lake, the title to the bed of which is in the state, thereby extend his possession into the lake and acquire the state’s title.”).
13. *Barney v. Keokuk*, 94 U.S. 324, 337 (1876).
14. *Menominee River Lumber Co. v. Seidl*, 149 Wis.2d 316,320, 135 N.W. 854, 856 (1912).
15. Several State courts have ruled that if the upland owner is a “stranger” to the cause of the man-induced accretion, title will vest in the upland owner, giving the same result as if the accretion had been natural.
- US: *See Nordale v. Waxberg*, 84 F.Supp. 1004 (D.C. Alaska 1949) *aff’d* 182 F.2d 1022 (9th Cir. 1950).
- AL: *State v. Gill*, 259 Ala. 177, 66 So.2d 141 (1953)(Man-made accretion not caused by the hand of the riparian owner will be deemed to be property of the riparian owner); *Reid v. State*, 373 So.2d 1071, 1074 (1979)([N]either [the upland owners] nor any or their predecessors in title had made, caused to be made, or consented to or participated in the making of the artificially accreted lands ... [As] between the State and the upland owner, the man made land becomes the property of the riparian or littoral owner.”).
- AK: *State Dept. of Natural Resources v. Pankratz*, 538 P.2d 984, 989 (Alaska, 1975)(“It is likewise settled that accretion may result from artificial causes, provided that the party claiming the benefit did not himself cause the artificial accumulation.”); *Schafer v. Schnabel*, 494 P.2d 802, 807 (Alaska, 1972)(“It is generally held that it is immaterial whether the deposits derived from natural causes or had an artificial impetus so long as the deposits were gradual.”).

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- IL: *Lovington v. St. Clair County*, 64 Ill. 56 (1872)(A riparian owner is entitled to accretions caused by the actions of others). *See also Brundage v. Knox*, 279 Ill. 450, 117 N.E. 123 (1917).
- MA: *See Allen v. Wood*, 256 Mass. 343, 152 N.E. 617 (1926); *Burke v. Commonwealth*, 283 Mass. 63, 186 N.E. 277 (1933); *Michaelson v. Silver Beach Improvement Ass'n*, 342 Mass. 251, 173 N.E.2d 273 (1961). *But see Sewall and Day Cordage v. Boston Water Power Co.*, 147 Mass. 61, 16 N.E. 782 (1888). Note that there are special problems in cases where the change in the riparian owners land results from a public project to benefit navigation. *See Home for Aged Women v. Commonwealth*, 202 Mass. 422, 89 N.E. 124 (1909); *Crocker v. Champlin*, 202 Mass. 437, 89 N.E. 129 (1909).
- MS: *H.K. Porter Co., Inc. v. Board of Supervisors of Jackson County*, 324 So.2d 746, 750 (Miss. 1975)(“[W]hen artificial accretions are cast upon the land of a landowner by either the Corps of Engineers or some stranger without the intervention of the upland owner, such artificial accretion inures to the title of the upland owner.”); *Moore v. Kuljis*, 207 So.2d 604, 610-611 (Miss. 1967) citing *Harrison County v. Guice*, 244 Miss. 95, 140 So.2d 838, 842 (1962)(“The filled area, added to the land of the upland owner by artificial accretion made by a stranger, accrued to the upland owner.”); *Harrison County v. Guice*, 244 Miss. 95, 140 So.2d 838 (1962)(“Where the owner of the upland had no part in creating the artificial addition or accretion, such owner acquires title in fee to such additional land.”).
- NB: *Frank v. Smith*, 138 Neb. 382, 293 N.W. 329 (1940)(The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title to the accretion).
- NH: *State v. 6.0 Acres of Land*, 101 N.H. 228, 139 A.2d 75, 77 (1958)(State built jetty that promoted the accumulation of alluvial deposits did not effect the littoral landowner’s right of acquisition in the area created by the accretion).
- NJ: *Borough of Wildwood Crest v. Masciarella*, 51 N.J. 352, 240 A.2d 665, 668-669 (1968)(Where accretion to tideland resulted from both natural and artificial causes, but not that of the upland owner, the alluvion vests with the upland owner).
- NY: *In re Hutchinson River Parkway Extension in City of New York*, 14 N.Y.S.2d 692 (1939)(Accretion caused by artificial means of City of New York vests in riparian owner); *Steers v. City of Brooklyn*, 101 N.Y. 51, 4 N.E. 7 (1885)(Artificial accretion results in gain to riparian proprietor provided he is not responsible).

- OH: *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.*, 137 Ohio 8, 17, 27 N.E.2d 485 (1940)(“Action by third persons in which the owner does not participate does not impair the latter’s littoral rights.”).
- OR: *State By and Through McKay v. Sause*, 217 Or. 52, 99, 342 P.2d 803, 826 (1959)(“[G]radual artificial accretions go to the upland owner when caused by the acts of third persons.”).
- WI: *Desimone v. Kramer*, 77 Wis.2d 188, 252 N.W.2d 653, 657 (1977)(“[T]he causing or hastening of gradual deposits by artificial constructions, made by persons other than the benefitted and claiming owner, does not prevent the doctrine of accretion from applying.”)(citing 7 Powell on Real Property, § 983, p. 614). *See also Menominee River Lumber Co. v. Seidl*, 149 Wis. 316, 135 N.W. 854 (1912).
16. *State v. Superior Court (Lovelace)*, 44 Cal.Rptr.2d 399, 412 (Cal. 1995). *See pages 407-13 generally.*
17. *State v. Superior Court (Lovelace)*, 44 Cal.Rptr.2d 399, 417 (Cal. 1995).
18. *Id.*
19. Building a wharf to reach a navigable depth of water does not result in boundary changes in most states.
- US: *City of Mobile v. Sullivan Timber Co.*, 129 F. 298, 303 (5th Cir. 1904)(“The alleged immemorial custom of persons to erect wharves ... can have no legal effect against the assertion by the State of its right to control the wharf lines of its navigable streams. ... The rights of the public cannot be divested in such manner.”).
- AL: *See City of Mobile v. Sullivan Timber Co.*, 129 F. 298, 303 (5th Cir. 1904).
- AS: *Lago v. Mageo*, 4 A.S.R. 287 (1962). *See also* 26.0211 A.S.A.C.
- HI: HAWAII REV. STAT. § 171-36(a)(9)(No lease of State submerged land to construct pier unless sign on pier advising that public may use it); HAWAII REV. STAT. § 171-53 (submerged land may only be reclaimed or leased with State approval).
- LA: LA. CONST., Art. IX, § 3 (1974)(The alienation of navigable water bottoms is prohibited, except to reclaim land lost through erosion); LA. REV. STAT. 41:1712(B)(No permits or leases, including those for wharves and piers, “shall be construed to divest the state of any right title interest or power in or over any state lands except [to reclaim land lost through erosion]).

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- MA: *Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629, 641-644, 393 N.E.2d 356 (1979) (“Having the right to build a wharf over tidal land does not necessarily mean having title to that land.”).
- MI: *Obrecht v. National Gypsum Co.*, 361 Mich. 399, 105 N.W.2d 143 (1960) (State public title supreme to riparian right to wharf out).
- NY: *Hinkley v. State*, 234 N.Y. 309, 319 (1922) (Where an adjacent owner erects piers or wharves on State owned bottomlands, he “cannot acquire title to land under water by filling it up.”).
- OH: *Thomas v. Sanders*, 65 Ohio App.2d 5, 413 N.E.2d 1224 (1979) (Littoral owner of property bordering navigable lakes had an intangible right to make use of those navigable waters by building wharfs in aid of navigation and commerce, but for no other purpose, and provided exercise of such right does not interfere with public rights).
- OR: *Brusco Towboat Co. v. State ex rel. State Land Board*, 284 Or. 627, 637, 589 P. 2d 712 (1978) (Affirms state’s authority to require leases for structures on state’s submerged and submersible lands.); *State Land Board v. Sause*, 217 Or. 52, 102, 342 P. 2d 803 (1959) (Title to lands below high water mark cannot be acquired as a result of dredging operations by which surface is raised above ordinary high water).
- PA: *But see Black v. American International Corp.*, 264 Pa. 260, 262-163, 107 A. 737 (1919).
- VA: *Lambert’s Point Co. v. Norfolk & W. Ry.*, 113 Va. 270, 74 S.E. 156 (1912) (In ascertaining the shorelines of adjacent riparian owners in order to apportion the water front property, where there is filled area and wharfing, the front should be ascertained as if the filling-in had not been done).
- WA: *Caminiti v. Boyle*, 107 Wash.2d 662, 668 (1987) (In allowing private recreational docks to be built over public trust lands, “the State has not ... conveyed title to the land, but ... has given a revocable license only.”). In addition to other permit requirements, a lease from the State is generally required for construction on or over State-owned aquatic lands. *See also* WASH. REV. CODE 79.90.100 and 79.90.105.
20. CA: *Patton v. Los Angeles*, 169 Cal. 521, 525-526, 147 P. 141, 142 (1915) (“[N]o artificial embankment, made by third persons, ... nor any accretion to the adjacent upland caused thereby, could operate to divest the State of its title to the tideland so reserved.”). *City of Los Angeles v. Anderson*, 206 Cal. 662, 667, 275 P. 789, 791 (1929) (“Where ... the accretions have resulted, not from natural causes, but from artificial means, such as the erection of a structure below the

line of ordinary high water, ... the deposit of alluvion caused by such structure does not inure to the benefit of the littoral or upland owner, but the right to recover possession thereof is in the State ..."); *Carpenter v. City of Santa Monica*, 63 Cal.App.2d 772, 789-794, 147 P.2d 964, 975 (1944)("accretions formed gradually and imperceptibly, but caused by entirely artificial means — that is by the works of man, such as wharves, groins, piers, etc. belong to the state ..."); *Los Angeles Athletic Club v. Santa Monica*, 63 Cal. App.2d 795, 147 P.2d 976 (1944)(Accretions formed along seashore by construction of piers do not belong to upland owner, but belong to the State). *But see California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 283 (1982)(Federal law "excepts accretions to federal land from the grant or confirmation of submerged lands to the states; that exception does not affect disputes concerning the rights of other riparian or littoral owners."); *accord Cal. ex rel. State Lands Comm'n v. United States*, 805 F.2d 857, 863 (9th Cir. 1986).

TX: *Lorino v. Crawford Packing Co., et al.*, 142 Tex. 51, 175 S.W.2d 410 (1943)("[W]ooden pier or wharf connecting oysterhouse with shore" caused current to build up sand bank; title held to be in state).

21. MN: *Miller v. Mendenhall*, 44 N.W. 1141, 1142-43 (1890)("The court will take notice of the extensive commerce and great shipping interests which must be accommodated in the Duluth harbor, and which will require corresponding facilities in the way of local improvements, which must be made in great measure by private enterprise.").

22. AL: CODE OF ALABAMA §33-7-53.

CA: Generally, if the land is owned by the State, an individual must obtain a lease or permit from the State. CAL. PUB. RES. CODE § 6321 (groins, jetties, seawalls, breakwaters and bulkheads) and 6501-6509 (ground leases generally). If the person owns the *jus privatum*, he may proceed to fill unless the State Lands Commission determines that the fill would be inconsistent with the public trust. *See People v. California Fish Co.*, 166 Cal. 576, 599, 138 P. 79 (1913). Other State agencies may also have jurisdiction concerning any filling. *See* CAL. GOV. CODE § 66400-66661; CAL PUB. RES. CODE § 29500, 29505 and § 30000 *et seq.*

CT: The placement of fill in tidal, coastal or navigable waters waterward of the high tide line requires a permit. CONN. GEN. STAT. § 22a-361. If the fill would be placed in tidal wetlands, a permit would be required under CONN. GEN. STAT. § 22a-32.

DE: Any filling requires a permit from the Delaware Department of Natural Resources and Environmental Control. DEL. CODE Title 7, § 6604.

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- FL: A dredge and fill permit must be obtained to fill in waters of the State. FLA. STAT. § 403.918. If the filling will occur on sovereign lands, a lease or easement must be obtained from the Board of Internal Improvement Trustees. FLA. STAT. ch. 253.
- HI: A State Conservation District Use Permit is required to fill tidelands or navigable fresh water shorelands. HAWAII REV. STAT. § 183-41. If the land is within a special management area, a County CZM Special Management Area Permit is also required. HAWAII REV. STAT. § 205A-28.
- IL: Private individuals are not authorized to fill for the purpose of making land. Permits may be issued for minor fills associated with shore protection, bulkhead construction, dockwall construction, etc. ILL. REV. STAT. ch. 19, § 65 (1987).
- LA: A permit is required to fill State owned lands. LA. REV. STAT. ANN. § 41:1702. If the area to be filled is within the statutorily devined coastal zone, the applicant may also have to obtain a Coastal Use Permit. LA. REV. STAT. ANN. § 49:214.25 and 214.30.
- MA: All filling of tidelands requires a waterways license. MASS. GEN. LAWS ch. 91, § 14 and 18. Filling a wetland (defined at MASS. GEN. LAWS ch. 131, § 40) requires a permit under the Wetlands Protection Act, MASS. GEN. LAWS ch. 131, § 40, administered by individual towns or the State Department of Environmental Protection.
- MD: For the filling of tidal wetlands, a permit must be received to fill in State owned lands in accordance with MD. NAT. RES. CODE § 9-202, and for privately owned tidal wetlands, in accordance with MD. NAT. RES. CODE § 9-302 to 309. For the filling of non-tidal streams, a permit must be obtained. *See* MD. NAT. RES. CODE § 8-803.
- ME: 33 M.R.S.A. §§413 AND 414.
- MI: M.C.L.A. §324.32503.
- NH: A permit must be obtained from the New Hampshire Wetlands Board. *See* N.H. REV. STAT. ANN. § 483-A:1,I and III. For Great Ponds, a permit must be obtained to place fill below the mean high water level. *See* N.H. REV. STAT. ANN. § 482:41-e and f.
- NJ: N.J.S.A. §12:3-3.
- NY: N.Y. ENVIR. CONSERV. LAW § 15-0505 (No person shall, without a permit "excavate or place fill below the mean high water level in any of the navigable waters of the State [except for Nassau and Suffolk counties] or in marshes,

estuaries, tidal marshes, and wetlands" adjacent to navigable waters that are inundated at mean high water level or tide).

- NC: Permits are required to place fill in coastal wetlands, estuarine waters and other public trust waters within the twenty coastal counties. N.C. GEN. STAT. §§ 113-229 and 113A-100 *et seq.* Filling in navigable waters may also require an easement from the State Property Office. N.C. GEN. STAT. § 146-6.
- OH: To lawfully fill navigable freshwater shorelands in Ohio, a private individual must acquire a State submerged lands lease, OHIO REV. CODE § 1506.11(C), and a "water quality certification" from the Ohio Environmental Protection Agency, OHIO REV. CODE ch. 6111.
- OR: The filling of any waters of the State, whether the underlying lands are publicly or privately owned, requires a permit in accordance with OR. REV. STAT. sec 541.060 to 541.695 (now 196.905).
- PA: An encroachment/water obstruction permit and a submerged land license agreement must be obtained. PA. CONS. STAT. title 32, § 693.6 and 693.15.
- SC: A permit is required from the South Carolina Coastal Council for tideland filling, and a permit from the State Budget and Control Board is required for any other areas below mean high water. S.C. CODE § 10-9-10, and 48-39-130.
- TX: TEX. NAT. RES. CODE ANN. § 33.111 (Vernon Supp. 1996).
- VA: Filling tidelands requires a permit from a local wetlands board. VA. CODE ANN. § 62.1-13.1 *et seq.* (Repl. Vol. 1988).
- VI: VIRGIN IS. CODE § 910(a) ("...any person wishing to perform or undertake any development in the first tier of the coastal zone ... shall obtain a coastal zone permit in addition to obtaining any other permits ... which are required by other agencies.").
- WA: A permit is required for any person to fill below the ordinary high water mark in and tidal or freshwater of the State. WASH. REV. CODE ch. 90.58. *See also* WASH. REV. CODE § 75.20.100 (hydraulics approval from State Department of Fisheries or Wildlife) and WASH. REV. CODE § 86.16 (local flood hazard permit).
- WI: *See* WIS. STAT. § 30.12.
23. CA: Generally, if the land is owned by the State, an individual must obtain a lease or permit from the State. CAL. PUB. RES. CODE § 6321 (groins, jetties, seawalls, breakwaters and bulkheads) and 6501-6509 (ground leases generally).

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If the person owns the *jus privatum*, he may proceed to fill unless the State Lands Commission determines that the fill would be inconsistent with the public trust. *See People v. California Fish Co.*, 166 Cal. 576, 599, 138 P. 79 (1913). Other State agencies may also have jurisdiction concerning any filling. *See* CAL. GOV. CODE § 66400-66661; CAL PUB. RES. CODE § 29500, 29505 and § 30000 *et seq.*

- CT: The placement of fill in tidal, coastal or navigable waters waterward of the high tide line requires a permit. CONN. GEN. STAT. § 22a-361. If the fill would be placed in tidal wetlands, a permit would be required under CONN. GEN. STAT. § 22a-32.
- FL: A dredge and fill permit must be obtained to fill in waters of the State. FLA. STAT. § 403.918. If the filling will occur on sovereign lands, a lease or easement must be obtained from the Board of Internal Improvement Trustees. FLA. STAT. ch. 253.
- HI: A State Conservation District Use Permit is required to fill tidelands or navigable fresh water shorelands. HAWAII REV. STAT. § 183-41. If the land is within a special management area, a County CZM Special Management Area Permit is also required. HAWAII REV. STAT. § 205A-28.
- LA: A permit is required to fill State owned lands. LA. REV. STAT. ANN. § 41:1702. If the area to be filled is within the statutorily devined coastal zone, the applicant may also have to obtain a Coastal Use Permit. LA. REV. STAT. ANN. § 49:214.25 and 214.30.
- MA: All filling of tidelands requires a waterways license. MASS. GEN. LAWS ch. 91, § 14 and 18. Filling a wetland (defined at MASS. GEN. LAWS ch. 131, § 40) requires a permit under the Wetlands Protection Act, MASS. GEN. LAWS ch. 131, § 40, administered by individual towns or the State Department of Environmental Protection.
- NC: Permits are required to place fill in coastal wetlands, estuarine waters and other public trust waters within the twenty coastal counties. N.C. GEN. STAT. §§ 113-229 and 113A-100 *et seq.* Filling in navigable waters may also require an easement from the State Property Office. N.C. GEN. STAT. § 146-6.
- OH: To lawfully fill navigable freshwater shorelands in Ohio, a private individual must acquire a State submerged lands lease, OHIO REV. CODE § 1506.11(C), and a "water quality certification" from the Ohio Environmental Protection Agency, OHIO REV. CODE ch. 6111.
- PA: An encroachment/water obstruction permit and a submerged land license agreement must be obtained. PA. CONS. STAT. title 32, § 693.6 and 693.15.

- WA: A permit is required for any person to fill below the ordinary high water mark in and tidal or freshwater of the State. WASH. REV. CODE ch. 90.58. *See also* WASH. REV. CODE § 75.20.100 (hydraulics approval from State Department of Fisheries or Wildlife) and WASH. REV. CODE § 86.16 (local flood hazard permit).
- WI: *See* WIS. STAT. § 30.12(3).
24. LA: *See City of New Orleans v. New Orleans M & C R.R. Co.*, 27 La. Ann. 414 (1875).
- MD: Title to lawfully reclaimed tidelands, once the filling is completed, vests in the upland owner. *See Giraud v. Hughes*, 1 G. & J. 249 (1829); *Casey v. Inloes*, 1 Gill 430 (1844); *Hess v. Muir*, 65 Md. 586 (1886); *Western Maryland Tidewater Railroad Co. v. Mayor and City Council of Baltimore*, 106 Md. 561 (1907). *See also Board of Public Works v. Larmer*, 262 Md. 24 (1971)(Property owner has no interest in the submerged land until the filling and improvement is completed). *See also* MD. CODE ANN. NR-9-201(a), amended 1987 (1988 Cum. Supp.) (“[A] person may make improvements into the water in front of land to preserve that person’s access to navigable water or protect the shore of that person against erosion. After an improvement has been constructed, it is the property of the owner of the land to which it is attached.”).
- NH: Where the filling of a Great Pond is lawful, title to the reclaimed land vests with the upland owner. N.H. REV. STAT. ANN. § 482:41-f. Generally, fill placed in a freshwater river belongs to the adjoining riparian owner who owns the submerged land. *See Poire v. Serra*, 99 N.H. 154, 106 A.2d 391 (1959); *cf. Watson v. Horne*, 64 N.H. 416 (1848)(fill divided among adjacent riparian owners to ensure that water frontage remains proportionate to pre-fill status).
- NC: N.C. GEN. STAT. § 146-6(b). Title to lands lawfully filled in navigable waters by a private property owner vests in the property owner.
25. CA: Filling of state-owned land does not transfer ownership, nor does it remove the public trust in privately-owned land in which the State has retained public trust interests. *See Marks v. Whitney*, 6 Cal.3d 251, 491 P.2d 374, 98 Cal.Rptr. 790 (1971)(“Reclamation with or without prior authorization from the state does not *ipso facto* terminate the public trust ...”)(quoting *Newcomb v. City of Newport Beach*, 7 Cal.2d 393, 402 (1936)). *See also Atwood v. Hammond*, 4 Cal.2d 31, 40-41 (1935).
- HI: If the filled land was publicly owned, it remains publicly owned until the private individual purchases it in accordance with HAWAII REV. STA. § 171-53.

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- NY: *O'Neil v. Murray*, 120 Misc. Rep. 151, 198 N.Y.S. 705 (Sup. Ct., Albany Co., 1922)(When filling is lawful and authorized, the general rule is that the title to the filled land remains in the owner of the land formerly underwater).
- OH: If the filling is lawful, title to the "reclaimed" submerged land remains with the State, but the fill is considered personal property. OHIO REV. CODE § 1506.10. *See also Thomas v. Sanders*, 65 Ohio App.2d 5, 413 N.E.2d 1224 (1979).
- OR: Title to new land created by filling State owned land remains with the State. The party making the fill may purchase the new land unless the State has reserved the land from sale, etc. OR. REV. STAT. § 274.937 and 274.940.
- TX: Title to lawfully filled lands remains in the State, unless the legislature makes a statutory grant. TEX. NAT. RES. CODE ANN. § 33.113 (Vernon Supp. 1996).
- VI: 12 VIRGIN IS. CODE ANN., TIT. 12, § 402(b)("Whenever the shore is extended into the sea by filling ..., the boundary of the shorelines shall remain at the line of vegetation as previously established.").
- WI: *Menominee River Lumber Co. v. Seidl*, 149 Wis. 316, 135 N.W. 854 (1912)(Title to reclaimed land remains in the State).
26. US: *City of Alameda v. Todd Shipyards Corp.*, 632 F. Supp. 333, 340 (N.D.Cal. 1986)("The California courts have expressly held that filling the land alone does not ease the trust restrictions.").
- AK: *Hayes v. A.J. Associates, Inc.*, 846 P.2d 131, 133 ("... we recognize that the filling of tidelands alone may not ease all public trust restrictions ...").
- CA: *Atwood v. Hammond*, 4 Cal.2d 31, 48 P.2d 20, 25 (1935)(Lawful filling of trust lands does not *ipso facto* terminate the trust, although State may terminate the trust "when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.") citing *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892); *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 162 Cal.Rptr. 327, 339 n. 19, 606 P.2d 362, 374 n. 19 (1980)("[T]he reclamation of tidelands subject to the public trust doctrine does not, without more, terminate the trust.").
- MD: *Culley v. Hollis*, 180 Md. 372, 25 A. 2d 196 (1942)(When the right to make improvements into navigable waters has been exercised, previous uses of the soil covered by the water as are not subversive to the land must yield to the paramount right of making improvements). *See also Hess v. Muir*, 65 Md. 586,

- 5 A. 540, 6 A. 673 (1886); *Hodson v. Nelson*, 122 Md. 330, 89 A. 934 (1914); *Culley v. Hollis*, 180 Md. 372, 25 A. 2d 196 (1942).
- NH: N.H. REV. STAT. ANN. 4:40(a)-(d); N.H. REV. STAT. ANN. ch. 482-A:16 and 482-A:17.
- NY: *Matter of City of New York (12th Ave.)*, 295 N.Y. 415, 429 (1946) (“It has been recognized that land under water may lose its ‘character of foreshore’ at least for some purposes, with consequent changes in rights and legal relations, where the filling is pursuant to permission or grant.”). *See also Haraway Improvement Co. v. Partridge*, 203 App. Div. 174, 197 N.Y.S. 116 (2d Dept.) aff’d 236 N.Y. 563 (1923).
- OR: OR. REV. STAT. 196.880 (“If the director issues a permit to fill pursuant to ORS 196.600 to 196.665 and 196.800 to 196.900, it shall be presumed that such fill does not infringe upon the public rights of navigation, fishery or recreation, and the public rights to land created by the fill shall be considered extinguished.”).
- RI: *Allen v. Allen*, 19 R.I. 114, 115, 32 A. 166 (1895) (“The public rights secured by this trust are the rights of passage, of navigation, and of fishery, and these rights extend ... to all land below high water mark unless it has been so used, built upon or occupied, as to prevent the passage of boats and the natural ebb and flow of the tide.”) citing *Weston v. Sampson*, 62 Mass. (8 Cush.) 347 (1851); *Moulton v. Libbey*, 37 Me. 472; *Packard v. Ryder*, 144 Mass. 440 (1887).
27. *Nichols v. Lewis*, 15 Conn. 137, 143 (1842). *See also: Lockwood v. New York & New Haven Railroad Co.*, 37 Conn. 388, 391 (1870). Placement of fill in tidal, coastal and navigable waters of Connecticut has been regulated since 1939; all licenses, certificates and permits authorizing “lawful” fill specify that title is not being transferred nor any property rights being conveyed or conferred.
28. *Opinion of the Justices*, 383 Mass. 895, 424 N.E.2d 1092 (1981) (Opinion concludes that the transfer or relinquishment of all of the Commonwealth’s and public’s rights to tidelands is not constitutionally beyond the power of the state legislature. Important limitations exist on this power, however. The legislative conveyance “must be for a valid public purpose and, where there may be benefits to private parties, those private benefits must not be primary but merely incidental to the achievement of the public purpose ...”).
29. VT: *State of Vermont v. Central Vermont Railway*, 153 Vt. 337, 571 A.2d 1128 (Vt. 1989). *Cert. denied* 495 U.S. 931.
30. NJ: *O’Neill v. State Highway Dept.* 50 N.J. 307, 235 A.2d 1 (1967) (Lands below mean high water that are artificially appropriated remain the property of the State).

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- SC: *Epps v. Freeman*, 261 S.C. 375, 200 S.E.2d 235 (1973)(Where landowners fill public trust lands, they do not acquire title).
31. N.C. GEN. STAT. 146-6.
32. N.C. GEN. STAT. 146-6(c).
33. N.C. GEN. STAT. §146-6(f).
34. *Lago v. Mageo*, 4 A.S.R. 287, 301 (1962).
35. See 26.0211 A.S.A.C.
36. See 26.0211 A.S.A.C.
37. See *Lago v. Mageo*, 4 A.S.R. 287, 302 (1962).
38. V.I. CODE ANN. TIT. 12, § 402(b)(“It is hereby declared and affirmed that the public, individually and collectively, has and shall continue to have the right to use and enjoy the shorelines of the Virgin Islands as ‘Virgin Islands’ is defined in section 2(a) of the Revised Organic Act of the Virgin Islands.”).
39. See Annotation, Applicability of Rules of Accretion and Reliction So As to Confer Upon Owner of Island or Bar in Navigable Stream Title to Additions, 54 A.L.R.2d 643, 645 (1957); 78 Am.Jur.2d, Waters, §437 (1975).
40. FL: *Brickell v. Trammel*, 77 Fla. 544, 82 So. 221 (1919)(As owner of the submerged lands, State becomes the owner of islands formed as the result of dredging and filling operations); *MacNamara v. Kissimmee River Valley Sportsman’s Ass’n*, 648 So.2d 155 (Fla. Dist. Ct. App. 1994)(Under Florida Constitution, article X, §11 and Florida STAT. ANN. 253.12, spoil islands are public lands belonging to the State).
- MO: *Conran v. Girvin*, 341 S.W.2d 75, 81 (1960)(Title to an island belongs to the owner of the land on which it forms, under theory of “vertical accretion.”).
- MS: *International Paper Co. v. Mississippi State Highway Dep’t*, 271 So.2d 395 (1972)(Title to islands raised by deposits of silt, soil, etc. in bay where State owns the bed is vested in State).
41. NC: N.C. GEN. STAT. 146-6(b)(“If an island is, by any process of nature or act of man, formed in any navigable water, title to such island shall vest in the State ...”).

42. US: *United States v. Turner*, 175 F.2d 644, 647 (1949)(“[T]he right of a riparian owner on navigable waters to obtain access thereto does not give the owner any title to the lands by which he obtains this access.”).
- CA: *Marks v. Whitney*, 6 Cal.3d 251, 261, 88 Cal.Rptr. 790, 797, 491 P.2d 374, 381 (1971)(Reclamation of tidelands does not in and of itself terminate the public trust). *See also City of Longbeach*, 3 Cal.3d 462, 483, 91 Cal.Rptr. 23, 476 P.2d 423 (1970); *Atwood v. Hammond*, 4 Cal.2d 31, 40, 48 P.2d 20 (1935).
- HI: *See generally* HAWAII REV. STAT. § 171-53, Reclamation and disposition of submerged or reclaimed public land.
- IL: 615 ILCS 5/24 (Unlawful filling of Chicago River, Lake Michigan or meandered lakes is class A misdemeanor).
- LA: LA. REV. STAT. 41:1714 (In the case of unlawful encroachments on state lands [including unpermitted filling of state water bottoms], the state may either require the removal of the encroachment or require that a permit or lease for encroachment be obtained from the state. In either case, the state’s title to the land is maintained. The state may assert its rights to land where unlawful encroachments have occurred whenever it discovers them.); LA. CONST. of 1974, Art. IX, § 4(B)(Acquisitive prescription against the state prohibited.); LA. CODE CIV. PROC. Art. 3651 (Practically, however, any encroachment that has existed unchallenged for a year or more shifts the burden to the state to prove that the filled area was once a state water bottom. Such proof could be difficult given the extensiveness and physical characteristics of Louisiana’s wetlands and water bodies).
- MA: *See Attorney General v. Baldwin*, 361 Mass. 199 (1972)(Fill placed in “violation of the terms of the license” constitutes a public nuisance; Massachusetts Legislature authorized the Department of Public Works, upon request to the Attorney General, to have such fill removed).
- MD: MD. CODE ANN. NR 9-601(d)(1983 Repl. Vol.)(“Any person who *knowingly* violates any provision of [the Wetlands Act of 1970] is liable to the State for restoration of the affected wetland to its condition prior to the violation if possible.”).
- MI: *See* Great Lakes Submerged Lands Act, 1955 P.A. 247, MCLA 324.32502, and cases cited therein.
- MS: *See Harrison Co. v. Guice*, 244 Miss. 95, 140 So.2d 838 (1962)(“We have held either directly or by necessary inference that the owner of uplands bordering tidewater may not extend his lands by artificially reclaiming the state owned bottoms.” Citing *Biles v. City of Biloxi*, 237 Miss. 65, 112 So.2d 815.

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- NH: *State v. Strafford*, 99 N.H. 92, 105 A.2d 569 (1954)(Littoral owner may not dredge or fill public trust waters in an effort to change its character, function or legal status without a grant of right issued by the State).
- NY: *Saunders v. New York Cent. & H.R.R.R.*, 144 N.Y. 75, 38 N.E. 992 (1885)(Upland owner will not obtain ownership of bottomland which he has wrongfully filled).
- OH: *Thomas v. Sanders*, 65 Ohio App.2d 5, 413 N.E.2d 1224 (1979)(Land which was reclaimed...was still part of trust estate and title to such land could not thereafter be held by private persons to exclusion of beneficiaries of trust estate, nor could city or state abdicate trust so as to leave reclaimed in control of private persons). *See also* OHIO REV. CODE § 1506.10.
- OR: OR. REV. STAT. 196.855 (Filling without a permit, or contrary to the conditions of a permit, constitutes a public nuisance). *But see* OR. REV. STAT. 196.880 (Filling with a permit presumed not to infringe on public rights of navigation, fishery or recreation, and the public rights on land created by the fill shall be considered extinguished).
- RI: *See Great Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1043 (R.I. 1995) discussing *Hall v. Nascimento*, 594 A.2d 874 (R.I. 1991)(The filling of public trust land, although a permit existed, was held to remain public. "*Hall* involved filling in an area with no harbor line and no legislative authorization. Although there was a permit ... the actual filling was more than five times as extensive as that authorized by the permit.").
- TX: *Lorino v. Crawford Packing Co., et al.*, 142 Tex. 51, 175 S.W.2d 410, 414 (1943)("No one should have an exclusive right to the enjoyment of [lands covered by tidal waters], unless and until the legislature has granted such right.").
- VA: *Marine Resources Comm'n v. Forbes*, 214 Va. 109, 112, 197 S.E.2d 195, 197 (1973)(At common law riparian owners had no express right to deposit fill on the beds adjoining their highlands).
- VI: *Alexander Hamilton Life Ins. Co. v. Government of the Virgin Islands*, 20 D.C.V.I. 333, 343 (1983)(Unauthorized filling of submerged lands does not extinguish ownership of these lands by the Government, nor any of the Government's rights incident to ownership). *See also*, 12 V.I.CODE ANN. TIT. 12, § 403 ("No person, firm, corporation, association or other legal entity shall create, erect, maintain, or construct any obstruction or barrier, or restraint of any nature whatsoever upon, across or within the shorelines of the Virgin Islands as defined in this section, which would interfere with the right of the public individually and collectively, to use and enjoy any shoreline.").

- WA: WASH. REV. CODE 90.58.030(2)(b)(Washington State's Shoreline Management Act recognizes only those changes in location of the ordinary high water mark (the line that forms the public trust lands boundary) that occur naturally or are authorized by government permits).
- WI: *Diedrich v. The N.W.U. Ry. Co.*, 42, Wis. 248, 3 N.W. 749 (1877)(Except for a wharf, "[a]ny other extension or intrusion into the water, beyond the natural shore,...is a purpresture, vesting no title in him who made it.").
43. MA: *See Attorney General v. Baldwin*, 361 Mass. 199 (1972)(Fill placed in "violation of the terms of the license" constitutes a public nuisance; Massachusetts Legislature authorized the Department of Public Works, upon request to the Attorney General, to have such fill removed).
- OR: OR. REV. STAT. 196.855 (Filling without a permit, or contrary to the conditions of a permit, constitutes a public nuisance).
44. WI: *Diedrich v. The N.W.U. Ry. Co.*, 42, Wis. 248, 3 N.W. 749 (1877)(Except for a wharf, "[a]ny other extension or intrusion into the water, beyond the natural shore,...is a purpresture, vesting no title in him who made it.").
45. MA: *See Attorney General v. Baldwin*, 361 Mass. 199 (1972)(Fill placed in "violation of the terms of the license" constitutes a public nuisance, and can be ordered removed even at great cost to landowner).
46. IL: 615 ILCS 5/24 (Unlawful filling of Chicago River, Lake Michigan or meandered lakes is class A misdemeanor).
47. LA: LA. CODE CIV. PROC. Art. 3651 (Any encroachment that has existed unchallenged for a year or more shifts the burden to the state to prove that the filled area was once a state water bottom. Such proof could be difficult given the extensiveness and physical characteristics of Louisiana's wetlands and water bodies).
48. 33 U.S.C. §404 (*Rivers and Harbors Act*).
49. *Id.*
50. *See Port of Seattle v. Oregon & W.R. Co.*, 255 U.S. 56, 41 S. Ct. 237 (1921)("So far as the pierhead lines are concerned, the [defendant] Railroad concedes that their establishment by the United States did not create as against the State a right to wharf out. They merely fixed the line beyond which piers might not extend."). *See also Montgomery v. Portland*, 190 U.S. 89, 23 S. Ct. 735 (1903).

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51. *See Philadelphia Co. v. Stimson, Secretary of War*, 223 U.S. 605, 32 S. Ct. 340 (1912)(Authority given by Congress to the Secretary of War to establish harbor lines is not exhausted in laying the lines once; the Secretary may change them at subsequent times in order to protect navigation from obstruction”).
52. *See MASS. GEN. LAWS c. 91 §§ 14 and 34. See also Boston Waterfront Development Corporation v. Commonwealth*, 378 Mass. 629 (1979).
53. *See Port of Portland v. Reeder*, 203 Or. 369, 386, 400-01, 280 P.2d 324 (1955); *City of Portland v. Montgomery*, 38 Or. 215, 62 P. 755 (1900).
54. FL: The Butler Act of 1921 authorized the upland landowner to obtain a Trustees' quitclaim deed to submerged land that was "bulkheaded or filled in or permanently improved." Ch. 8537, Laws of Florida (1921). The Butler Act was expressly repealed in 1957 by the Bulkhead Act, but title to lands previously filled or developed in accordance with the Butler Act was confirmed in the upland owner. Ch. 57-362, Laws of Florida (1957). *See State Board of Trustees of the Internal Improvement Trust Fund v. Key West Conch Harbor*, 683 So.2d 144 (Fla. 1996)(Court affirmed fee simple title in filled lands to upland owner in reliance on Bulkhead Act).

MN: *See Miller v. Mendenhall*, 44 N.W. 1141 (1890).
55. *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1045 (R.I. 1995).
56. *See Orange v. Resnick*, 94 Conn. 573, 578; 109 A. 864 (1920).
57. MA: *See M.G.L. c. 91 §§14 and 34. See also Boston Waterfront Development Corporation v. Commonwealth*, 378 Mass. 629 (1979).

OR: *See Port of Portland v. Reeder*, 203 Or 369, 386, 400-01, 280 P.2d 324 (1955); *City of Portland v. Montgomery*, 38 Or 215, 62 P 755 (1900).
58. OH: If the filling is lawful, title to the "reclaimed" submerged land remains with the State, but the fill is considered personal property, and is subject to a lease. OHIO REV. CODE § 1506.10. *See also Thomas v. Sanders*, 65 Ohio App.2d 5, 413 N.E.2d 1224 (1979).
59. NC: *Atlantic & N.C. R.R. v. Way*, 172 N.C.774, 90 S.E. 937 (1916)(Grant of easement for wharfage purposes was extinguished and reverted to State when filled submerged lands no longer were suitable for use as wharf).

VT: *State of Vermont v. Central Vermont Railway*, 153 Vt. 337, 571 A.2d 1128 (Vt. 1989), *cert. denied* 495 U.S. 931.
60. RI: *Great Providence Chamber of Commerce v. State*, 657 A.2d 1038 (R.I. 1995).

CHAPTER II

LANDS, WATERS AND LIVING RESOURCES SUBJECT TO THE PUBLIC TRUST DOCTRINE

Section 4: Factual Determination of Public Trust Waters and Riparian Boundaries

Summary

The *legal* description of the boundary between privately held upland and a State's public trust tidelands in most States is the "mean high tide line," and in a few States is the "mean low tide line." Likewise, the *legal* description of the boundary is often the "ordinary high water mark" for freshwaters. But how does the practitioner take these *legal* descriptions and find the actual boundary line on any parcel of property?

The "mean" or "ordinary" high water marks are concepts used to fix the water line at a particular point at a particular moment in time within a dynamic hydrological system. The boundary between private riparian land and Public Trust land has, for centuries, been described as a "moveable freehold" or an "ambulatory" boundary. *See* Ch. II, § 3.A. Determining tidal influence and navigability-in-fact at present and historically each come in to play.

The U.S. Coastal and Geodetic Survey (USCGS) within the National Oceanic and Atmospheric Administration (NOAA) administers and maintains records of tidal datum for hundreds of tide gauges located throughout the nation, compiling datum planes for mean sea level, mean high water, mean low water, mean lower low water, and mean higher high tide. Because tidal flux varies from place to place due to local influences, a system of extrapolation has been developed that makes it possible to obtain a reasonable degree of precision to about one month.

Determining the boundary in areas where the shoreline has been filled can be quite vexing. In these cases, it is important to ascertain whether the fill was placed legally, and in accordance with the terms and conditions of all authorizations. It may be necessary to review the chain-of-title and history of the property. Aerial photographs taken prior to the filling can be invaluable at determining where the boundary is today.

In addition to the U.S. Coastal and Geodetic Survey, the Army Corps of Engineers, many State agencies, museums, libraries and Universities are sources of data and records of importance to the boundary determination process, and its factual substantiation in litigation.

A. Determining Public Trust Waters

As discussed in section 1 of this Chapter, navigable waters, and hence those subject to the Public Trust Doctrine, are *legally* defined as those waters that "ebb and flow with the tide," or those freshwaters that are "navigable-in-fact." But when it's unclear whether certain waters actually do ebb and flow in response to the lunar tides, or actually are suitable for navigation, how does the practitioner go about *factually* demonstrating the tidal or navigable nature of water?

1. Tidewaters: Do they "Ebb and Flow"?

In nearly all States,¹ if waters ebb and flow in response to the lunar tides, they are "navigable in law." See Ch. II, §1.C. Whether waters do ebb and flow is usually fairly obvious. Sometimes, however, the waters in question are far from the oceans. Such was the case in the *Phillips Petroleum v. Mississippi* case, where the area in question was about 50 miles from the Gulf of Mexico, the tidal flux was minimal, and the high and low tide rhythm was hours off from the tide rhythm of the Gulf. In these situations, how can the actual tidal characteristic be factually presented?

Salinity of the water is a consideration, but the lack of salinity is not conclusive. Waters may be totally fresh, but still ebb and flow in response to the oceanic tides, and thus be "tidal" in character. The tidal nature of water is determined by its hydrography, that is, whether it can measurably be demonstrated to rise and fall in direct response to the oceanic tides. See Ch. II, §1.C.1.

In certain cases, the "head of the tide," that is, the upper reach of the tidal influences in a river or arm of the sea, may be a distinct geological feature, such as a falls. The head of tide can often be found on U.S. Coast and Geodetic charts and maps.

When the ebb and flow of the tide cannot be so easily seen, however, hydrographs should be checked. Hydrographs (which show the water elevation and flow at a particular place) may show whether the waterbody has previously been determined to be tidal or non-tidal. The reliability of hydrographs, however, may be complicated by flooding, rainfall, runoff and evaporation. Such influences may create the mistaken appearance that the reach of tide has been extended. Such effects must be accounted for before tidal influence can be determined. Another option, and perhaps the best, is to actually place a tide gauge in the waters in question. A tidal elevation survey extrapolating from an established tidal station may also be conducted.

2. Freshwaters: Are they "Navigable-in-fact"?

The Army Corps of Engineers maintains a list of waterbodies which have been deemed navigable or non-navigable for federal purposes. Each listing is accompanied by specific findings which may provide information relevant to whether the waterbody is navigable for Public Trust purposes.² The local District Office of the Army Corps of Engineers should be consulted.

Several State agencies also maintain a list of waterbodies which have been deemed navigable or non-navigable for State purposes. These agencies should also be consulted. Where such State agencies don't exist, or if a State has not adopted a specific test for determining navigability, the inquiry used by the Corps of Engineers in determining navigable waters is instructive as to relevant questions which should be answered.³

State courts have also employed a variety of other considerations in determining whether a waterbody is navigable-in-fact, such as whether the water:⁴

- Is fit for valuable floatage, such as logs or lumber;
- Can be navigated in its natural condition by small craft used for pleasure;⁵
- Has sufficient capacity as measured by flow;⁶
- Must be dredged to maintain navigability;⁷
- Has been previously used for navigation, and for how long;
- Will probably be used in the future by the public;
- Will be used by only a few individuals; or
- Was meandered on government surveys.

Likewise, the Army Corps of Engineers employs a checklist of considerations when it makes a determination if certain waters are "navigable" for certain federal purposes:⁸

- What is the waterbody a tributary to?
- What are the physical characteristics of the waterbody:
 - Type (river, bay, slough, estuary);
 - Length;
 - Discharge volumes (maximum, minimum, mean);
 - Fall per mile;
 - Extent of tidal influence;
 - Range between ordinary high and low water;
 - Improvements to navigation;

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- Nature and location of obstructions to navigation in portions of waterbody used or potentially capable of use for interstate commerce;
- Authorized projects on the waterbody;
 - Nature, condition and location of any improvements;
 - Authorized projects yet to be constructed;
 - Surveys and reports describing the waterbody;
- Past or present interstate commerce;
- Potential use for interstate commerce;
 - In natural condition;
 - If improved;
- Nature of jurisdiction exercised by other federal agencies on the waterbody, if any; and
- State or federal court decisions relating to the waterbody.

B. Determining Waterfront Property Boundaries

As discussed in Chapter II, § 2, the *legal* description of the boundary between privately held upland and a State's public trust tidelands in most States is the "mean high tide line," and in some States is the "mean low tide line." Likewise, the *legal* description of the boundary is often the "ordinary high water mark" in freshwater areas. A comprehensive technical guide to factual determinations of a public trust / private property boundary is beyond the scope of this document. For further technical assistance, several authorities are available.⁹

1. Finding the Invisible Boundary: Inherent Uncertainty

Although in theory "the delineation of sovereign and private lands is clear cut, its application in the field creates havoc."¹⁰ It is important to understand that the "mean" or "ordinary" high water marks are concepts used to fix the water line at a particular point at a particular moment in time within a dynamic hydrological system. While each repetition of hydrological cycles may be similar, they are never identical. Where water meets land is a highly dynamic area, and the demarcation of any boundary is, at best, a temporary best educated estimate that can be made at the time, given the tools at hand and the nature of the waterbody, shorelands and weather. It is for this very reason that the boundary between private riparian land and Public Trust land has, for centuries, been described as a "moveable freehold" or an "ambulatory" boundary. *See* Ch. II, § 3.A.

The key to making the factual determination of the location of the boundary is to base it on the *best evidence* possible, even though fixing the location may be

arbitrary, tainted with uncertainties and inconsistent with other evidence. What constitutes the *best evidence* will vary with the typography and hydrography of the site, stability of the site, the type, amount and purpose of the data and other records, and state of the art and science of surveying at the time the measurement was made.

2. Tidewater Boundaries: Mean High and Low Tide Lines

The moon is the principal factor generating the tides. The moon's planes of rotation (around the earth) and revolution (around the sun) are such that the moon makes one complete cycle, known as the lunar epoch, every 18.6 years. In the 1936 case of *Borax, Ltd. v. City of Los Angeles*,¹¹ the U.S. Supreme Court affirmed the use of the 18.6 year lunar epoch when determining the mean high tide line. The law in many States has followed the adoption of this federal rule.¹²

Establishing boundaries on the basis of the 18.6 year tidal epoch has two advantages. First, the astronomical influences of the entire lunar cycle are taken into account. Second, meteorological influences on the tides, such as wind and barometric pressure are insubstantial when compared to long-term astronomical influences and can be assumed to cancel each other out over the epoch period.

The mean high tide line is the average of all of the high tides over an 18.6 year period. Thus, over time half of all of the high tides wash up above the line, while the other half remain below the line. Unlike the *ordinary high water mark*, which is usually signified by a physical feature such as a line of seaweed or debris, there are usually no visible features to easily ascertain where the mean high tide line lies.

Evidence that land is periodically covered at high tide will not necessarily suffice to prove it is Public Trust tideland.¹³ The means of determining the boundary, and the precision in doing so, will vary with the type of shoreline. On beaches, where the processes of erosion and accretion are constantly at work, the mean high tide line is very ambulatory, both in the short and long term. Determining its location represents but a temporary position of the property boundary.

Determining the mean high tide line in marshlands, which are typically dissected by numerous meandering watercourses, can be very difficult. On topographic surveys, lines denoting the inner edge of a marsh merely indicate the dividing line between the marsh and fastland, and do not represent any particular tidal elevation.¹⁴ Where the actual shoreline is obscured by marsh grass, mangrove, cypress, or other vegetation, the shoreline is delineated as an *apparent shoreline*.¹⁵ However, the field notes which accompany surveys may provide information, such

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as depth of the water at high tide, which is helpful in ascertaining the mean high tide line.¹⁶

In several States, the mean low tide line delineates the proprietary interest of the riparian owner.¹⁷ The mean low tide line is one of the most uncertain and difficult boundaries to delineate.¹⁸ On topographic surveys, the mean low tide line must necessarily be an approximation.¹⁹ In many places, such as along muddy shoals, the character of the substrate is unsuitable for the use of conventional surveying to determine where the mean low tide line is.

a. Determining the Tidal Plane

The U.S. Coastal and Geodetic Survey (USCGS) within the National Oceanic and Atmospheric Administration (NOAA) administers and maintains records of tidal datum for hundreds of tide gauges located throughout the nation, compiling datum planes for mean sea level, mean high water, mean low water, mean lower low water, and mean higher high tide.

It is well established that the tidal flux varies from place to place due to local influences. Obviously, waiting 18.6 years for the completion of the lunar cycle for determining the mean high tide line for a particular location would be impractical. A system of extrapolation reduces the time necessary to obtain a reasonable degree of precision to about one month. Tidal data is gathered by a tidal gauge on or near the property in question, and the data compared with data generated simultaneously with a long-term reference tide station in the region. This method yields an equivalent 18.6-year tidal datum line for the tidal epoch in use. The mean high tide line is then determined using conventional surveying procedures which create a contour line by following level points along the shore; staking the water line; or employing aerial photography when the tide reaches the desired tidal plane.²⁰

Again, it is important to remember that while the tidal datum plane may be regarded as a constant, the mean high tide line (where the tidal plane intersects the shore) is not. The natural forces of erosion, avulsion and accretion all may affect the shoreline, thus geographically changing the line. Artificial influences, such as attached and offshore breakwaters, man-made islands, groins, jetties, entrance-channel dredging, sand nourishment, land fills, logging, dams, river channelization, levee construction, and land subsidence due to ground water, oil or gas removal, can all affect the shoreline morphology.

3. Freshwater Boundaries: Ordinary High and Low Watermarks

The term "ordinary high water mark" (OHWM) describes the lateral extent of a waterbody, but does not include the point reached by unusual floods. *See* Ch. II, § 2.C. In theory, the ordinary high water mark is just that, a mark upon the soil,²¹ such as stratified surface deposits, changes in soil composition or grain size, an escarpment, or signified by particular plant species.²² In practice, biological, geological and geomorphic indicators are often ambiguous, and mathematical evidence of average water levels is increasingly becoming accepted.²³

4. Filled Land Boundaries

Where the shoreline is in its natural condition, there is usually no need to determine the original Public Trust boundary as the boundary moves with the natural processes of erosion and accretion. However, where the boundary has been encroached upon, as is often the case when the boundary is at issue, the former location must be ascertained.

It is important to ascertain whether the fill was placed legally, and in accordance with the terms and conditions of all authorizations (*e.g.* grants, permits). The instrument of authorization will generally rule whether the boundary was altered by the legal filling.

In other cases, it is necessary to review the chain of title and history concerning the property. Filling, draining, and dredging may have destroyed the original tideline. Adjudicating tidelands claims may require the testimony of experts from a number of disciplines: engineering, surveying, cartography, botany, geology, hydrology, real estate appraisal, and local history. Evidence may be deduced from examining past efforts to hold back the sea, such as old foundations, bulkheads and seawalls. The presence of debris, different soil or grain size may also be indicative of filling. Such evidence may be derived from excavation or records thereof, and core sampling. Aerial photographs taken prior to the filling can be invaluable at determining where the boundary is today.

5. Sources of Data and Records

a. National Oceanic and Atmospheric Administration (NOAA)

In many areas the mean high tide line may already be delineated on the topographic surveys conducted by the U.S. Coast & Geodetic Service, administered by the National Oceanic and Atmospheric Administration, U.S. Department of

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Commerce. These surveys are a comprehensive record of shoreline conditions as they existed at particular dates and of the changes that have occurred from natural and anthropomorphic causes. They are frequently used in courts where original land titles are in dispute.²⁴

For surveys after 1887 (and some as far back as 1863) descriptive reports accompany each survey as part of the official record. The descriptive reports are prepared by the field engineer to supplement the survey with information that cannot be shown graphically and direct attention to pertinent details and information. The reports outline the conditions under which the survey was made and sometimes provides insights on the interpretation of features of the survey.²⁵ In addition, log books accompany surveys and may provide information on the sequence of changes to the shoreline.

Tide tables from which tidal elevations at specific locations can be determined are regularly published by NOAA's National Ocean Service, and should be consulted for accurate and reliable tidal data.

b. The Army Corps of Engineers

Whenever a question arises regarding whether a certain waterbody is navigable under federal law (*i.e.* within the navigable waters of the United States) the District Office for the Army Corps of Engineers should be consulted. There is a formal process for submitting a question concerning the navigability of a waterbody to the Corps.²⁶ A "final" agency determination as to the navigability of a waterbody is not made until the division engineer issues an opinion.²⁷ Even then, this is not the final and conclusive determination, for any final agency determination by the Corps is ultimately reviewable by a federal court.²⁸

Some caution should be exercised, however, in relying upon the Corps' navigability determination for boundary determinations. The Corps is not in the business of determining public/private boundaries; it is in the business of maintaining navigability of shipping channels, generally by dredging and constructing jetties. To determine the mean high tide mark, the Corps could extrapolate from a tidal gauge up to a hundred miles away for the purpose of channel dredging, even though errors of up to 12 inches could result. Clearly, when the task is one of determining the public/private boundary in areas where a fraction of an inch can mean the difference in many acres, increased accuracy will be required.

Right-of-way surveys made by the Army Corps (*e.g.* those made in conjunction with excavation of the Atlantic Intracoastal Waterway, and other navigational improvements) may be useful in establishing the natural condition of waterbodies

prior to their "improvement." These can be obtained from the Army Corps District Offices.

The Corps is often required by Congress to determine whether certain waterways are suitable for navigational improvement, and report their findings to Congress. These reports may be found in various Congressional documents, sometimes in bound volumes at various Corps District Offices. These reports document a broad range of factors, including tidal range, water depth, and navigational activity of the waterbody in its natural condition.

c. State Agencies

A wide variety of State agencies may be of assistance when a question arises regarding the navigability of a waterbody under State law. When developing a factual record, a researcher should contact any State office that oversees waters, such as a water board or bureau, the Coastal Zone Management program, the State geodetic office, records of State shellfish commissions, any State or private maritime museums, records of State mosquito control commissions, and State underwater archeology programs.

d. Other Sources

For the Atlantic and Gulf Coast States, records of Civil War naval activity have proven helpful in establishing historical data on inland and coastal navigation.²⁹ Charts from the colonial era can provide the early names of watercourses and landforms, and may indicate water depths, anchorages, and the types of vessels suitable for particular waterbodies.³⁰ Various federal agencies, including NOAA, the Federal Archives and U.S. Department of Agriculture, have archives of aerial photographs, that can be valuable in portraying the shoreline at various historical times.

Notes

1. See *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674 (1996)(The North Carolina Supreme Court expressly repudiated the English common law ebb and flow of the tides test for public trust ownership of submerged lands. The Court found that the applicable test, premised on the capacity of the water for navigation in fact by "useful vessels" in its natural condition, has been the law of the State since 1715. The court noted that "useful" vessels include pleasure craft.).
2. See, 33 CFR §329.14 (b).
3. See, 33 CFR §329 in general.
4. See COURTNEY, J.P., III, AND ALLEN E. GRAHAM, "*Tide Waters and Navigable Waters - Determination, Boundaries, and Effects Upon Title*," at 18, The Cambridge Institute (1994).
5. *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674 (1996).
6. (Miss. Code Ann. § 1-3-31 (1972)(public has right of "free transportation ... to fish and engage in water sports" on "all natural flowing streams ... having a mean annual flow of not less than one hundred cubic feet per second." Miss. Code Ann. §51-1-4 (Supp. 1989)).
7. *Black v. Williams*, 417 So. 2d 911, 912 (Miss. 1982).
8. See 33 C.F.R. §329.14(c).
9. See Cole, WATER BOUNDARIES, Landmark Press (1983); COURTNEY, J.P., III, AND ALLEN E. GRAHAM, "*Tide Waters and Navigable Waters - Determination, Boundaries, and Effects Upon Title*," The Cambridge Institute (1994); Shalowitz, A.L., SHORE AND SEA BOUNDARIES, Vol. 2, at 181 (1962).
10. Porro, A., and Teleky, L.S., *Marshland Title Dilemma: A Tidal Phenomenon*, 3 Seton Hall Law Review 323, 324 (1972). See also Porro, A., *Invisible Boundary--Private and Sovereign Marshland Interests*, 3 Natural Resources Lawyer 512 (1970).
11. 296 U.S. 10 (1935).
12. The *Borax* standard for establishing the "mean high tide line" in tidal waters is followed in at least seventeen states and territories: Alabama, Alaska, California, Commonwealth of the Northern Mariana Islands, Connecticut, Florida, Georgia, Maryland, Mississippi, New Jersey, New York, North Carolina, Oregon, Rhode Island, South Carolina, Texas and Washington. Maine has adopted the metronic cycle for

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determining the State's boundary at the mean low water line. Maine Dept. of Conservation Rules, ch.3, sec. 1.3. (J).

13. *O'Neill v. State Highway Dept.*, 50 N.J. 307, 235 A.2d 1, 9 (1967).
14. Shalowitz, A.L., SHORE AND SEA BOUNDARIES, Vol. 2, at 181 (1962).
15. Shalowitz, A.L., SHORE AND SEA BOUNDARIES, Vol. 2, at 177, citing, Swanson, Topographic Manual (Part II) 338-341, Special Publication No. 249, U.S. Coast and Geodetic Survey (1949).
16. *See generally* Shalowitz, A.L., SHORE AND SEA BOUNDARIES, Vol. 2, at 178.
17. Five Atlantic States (DE, ME, MA, PA, VA) have established the seaward boundary of privately held tideland as the mean low tide line, or further. *See* Ch. II, §2.B.
18. Shalowitz, A.L., SHORE AND SEA BOUNDARIES, Vol. 2, at 183.
19. Shalowitz, A.L., SHORE AND SEA BOUNDARIES, Vol. 2, at 187.
20. Cole, WATER BOUNDARIES, Landmark Press (1983) at 21.

OR: *See Belmont v. Umpqua Sand & Gravel, Inc.*, 273 Or. 581, 590 n. 12, 542 P.2d 884 (1975)(recognizing high water line as distinct mark caused by erosion, the vegetation line or by other recognizable characteristics along the shore or bank). *See also* ORS 274.015 (1995).
21. FL: *See Tilden v. Smith*, 113 So. 708 (Fla. 1927).

OR: *See Belmont v. Umpqua Sand & Gravel, Inc.*, 273 Or. 581, 590, n. 12, 542 P.2d 884, 890 (Or. 1975).
22. COLE, WATER BOUNDARIES at 30-33.
23. *See United States v. Cameron*, 466 F. Supp. 1099 (M.D. Fla. 1978).
24. Shalowitz, A.L., SHORE AND SEA BOUNDARIES, Vol. 2, at 51-52.
25. Shalowitz, A.L., SHORE AND SEA BOUNDARIES, Vol. 2, at 86.
26. *See* 33 C.F.R. §329.15 and 16.
27. *See* 33 C.F.R. §329.15.
28. *See* 33 C.F.R. §329.3.

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29. See OFFICIAL RECORDS OF THE WAR OF THE UNION AND CONFEDERATE NAVIES IN THE WAR OF THE REBELLION.
30. For example, a map of North Carolina prepared in 1733 by the English cartographer James Wimble contained the legend "A Passage for a Petiaugo" across a coastal sound, indicating that it was navigable for a shallow-draft colonial trading vessel known as a "petiaugo" or "perriauger."

CHAPTER II

LANDS, WATERS AND LIVING RESOURCES SUBJECT TO THE PUBLIC TRUST DOCTRINE

Section 5: Exceptions to the Public Trust Doctrine

Summary

Normally, all lands beneath tidal and navigable fresh waters, are presumptively (*prima facie*) subject to the Public Trust Doctrine. In fact, many States apply the Public Trust Doctrine to all tide waters, navigable fresh waters and the lands below these waters within their respective jurisdictions without exception.¹ Exceptions do exist, although their occurrence is infrequent and usually strictly limited. Nonetheless, these exceptions are important, for if *prima facie* public trust lands are found to fall within one or more of these exceptions, the Public Trust Doctrine does not apply. Exceptions include conveyances of shorelands prior to Statehood, conveyances in accordance with international obligations, federal condemnation of State public trust land, Indian treaties, artificially created shorelands, and other minor exceptions.

Note that when *prima facie* public trust land falls within one of these exceptions, such land was either never subject to the Public Trust Doctrine, *e.g.* a conveyance prior to Statehood, or the land is temporarily not subject to the State doctrine, as in the case of federal condemnation of State public trust land. This is in contrast with *prima facie* public trust land wherein the public's trust rights have been terminated, as discussed in Chapter V.

A. Conveyance Prior to Statehood

Conveyances of trust lands from pre-Statehood sovereigns, including the Federal Government, to a private title holder, can bar the application of the Public Trust Doctrine to the lands in the grant.² If such a conveyance included possession and use rights to the exclusion of the public, the Public Trust Doctrine does not apply to that parcel of tidal or submerged land. For example, in Massachusetts, Great Ponds appropriated to private owners prior to the enactment of the 1647 Colony Ordinance (for the Bay Colony) and 1692 (for the rest of Massachusetts) are private property.³

In order for this exception to occur, however, two conditions must exist. First, it is obvious that chain-of-title must clearly be shown to extend back prior to Statehood. Second, the conveyance must grant exclusive rights of ownership and control in clear, unequivocal words.⁴ See Ch. V.A.3.a. Because the public trust interest of the State is “of such substantial magnitude,”⁵ being an aspect of its sovereignty, the grant or conveyance will be interpreted against the grantee. See Ch. V.A.4. The burden of proof of pre-Statehood title as well as the conveyance being interpreted against the grantee poses significant hurdles to a private landholder arguing this exception. Nonetheless, although unusual and few in number, this exception is recognized in at least one State’s constitution,⁶ and numerous federal and State court decisions.⁷

B. Conveyances in Accordance with International Obligations

The United States Supreme Court has held that “Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations”⁸ In such a case, certain *prima facie* trust lands could be exempt from the Public Trust Doctrine due to the terms of an international agreement with the United States. For example, a private corporation argued that its pre-Statehood grant from Mexico passed exclusive title to it, and the 1848 Treaty of Guadalupe Hidalgo, bringing peace between Mexico and the United States, preserved in full the property rights of pre-treaty Mexican landowners, with the result that tidelands within the pre-Statehood grant were not subject to California’s Public Trust Doctrine.⁹ The corporation was successful in avoiding the application of the Public Trust Doctrine, although its success was not based on this argument. Nonetheless, various references are made to this possible exception in the case law.¹⁰ Given the vast amount of land area subject to international treaties,

and the number of pre-Statehood conveyances of *prima facie* trust land into private hands, one should be aware of this possible argument.

C. Federal Acquisition of State Public Trust Land

By cession, condemnation or purchase, the Federal Government can and has obtained public trust land, often for military purposes. In the case where trust lands have been conveyed by agreement between the State and Federal Governments, the language in the conveyance should control the effect of the conveyance on the public's trust interests in the land. When the Federal Government exercises its power of eminent domain and condemns State trust lands, the federal district court case law is split on the question of the impact on the public's trust rights.

Two federal district courts, one in Massachusetts and the other in California, have addressed the effect of federal condemnation of trust land on the public's trust interests. The Massachusetts federal district court held that "the Federal Government is as restricted [as the States] in its ability to abdicate to private individuals its sovereign *jus publicum* in the land. So restricted, neither the [State's] nor the federal government's trust responsibilities are destroyed ... since neither government has the power to destroy the trust" ¹¹ The trust land remained subject to the Public Trust Doctrine, although the federal, not the State, government is the trustee and holder of the *jus publicum*. The federal district court for the northern district of California held that because the land was subject to the tides at the time of condemnation, it remained burdened with the public trust, and the Federal Government could not convey the trust land to a private party. ¹²

In another case, however, the same California federal district court came to the opposite conclusion. The Federal Government had condemned trust land held by a California city, which had received it in trust from the State. Because the State had conveyed the trust lands to the city in trust, the land was still subject to the Public Trust Doctrine, even though much of the land had been filled. ¹³ But the court found that "the United States' power of eminent domain is supreme to the State's power to maintain tidal lands for the public trust" ¹⁴ As a result, the court concluded "that the United States' condemnation of these lands extinguishes the State's public trust easement." ¹⁵

D. Artificially Created Shore and Bottom Lands

There is no clear agreement among the States as to whether the Public Trust Doctrine applies to artificially created tidelands, shorelands, bottomlands or submerged lands. A few State courts have held that if land was exposed to tidal or navigable waters by artificial means, then as a necessary result the land or waters are not subject to the Public Trust Doctrine.¹⁶ At least one other State court has come to the opposite conclusion, finding that if the waters were naturally navigable, then an artificial extension of the channel brought the extended waters within the scope of the Public Trust Doctrine.¹⁷

E. Other Exceptions

In Hawaii, some ancient fish ponds seaward of the mean high tide line, including the rock seawall forming the pond, were granted by the government and thereby became private property.¹⁸ Thus, the tidelands, submerged lands and tide waters within these ancient fish ponds are not subject to the Hawaiian Public Trust Doctrine.

In North Carolina, the General Assembly may convey, by special legislative grant, title to lands lying beneath navigable waters free of the public's trust rights, but "only if the special grant does so in the clearest and most express terms."¹⁹ Nonetheless, because the language of a legislative grant of swamplands to the State Board of Education, which included marshlands subject to the ebb and flow of the tide, lacked the necessary clear and express language, the Board's title to marshlands covered by navigable waters was found by the court as still subject to the public trust.²⁰

Notes

1. Texas, Illinois, South Carolina, Alaska and Pennsylvania report that no *prima facie* public trust lands in their respective states are exempt from the application of the Public Trust Doctrine.
2. *Knight v. U.S. Land Association*, 142 U.S. 161, 183 (1891)(The Public Trust Doctrine “does not apply to lands that had been previously granted to other parties by the former government ...”).
3. *Watuppa Reservoir Co. v. Fall River*, 154 Mass. 305, 28 N.E. 257 (1891)(Great ponds subject to private ownership prior to 1692 cannot be appropriated to private use without compensation to the owners); *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158, 171 (1863)(Great ponds appropriated to private persons prior to 1647 do not “lie in common for public use.”); *Lynnfield v. Peabody*, 219 Mass. 322, 328-329, 106 N.E. 977, 979-980 (1914)(Prior to the 1647 ordinance, “Great ponds were not at first reserved as public property, or lying in common.” Therefore, “[o]rdinarily a grant of a pond as a piece of real estate would include the entire area within its borders.”).
4. One of two conditions that must be met for a pre-Statehood grant of *prima facie* trust land to be outside of the trust is that the grant must convey exclusive rights of ownership and control in clear, unequivocal words.
 - US: *United States v. Holt Bank*, 270 U.S. 49, 54, (1926)(“[D]isposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.”); *Martin v. Waddell*, 16 U.S. 367, 411 (1842)(A grant of an exclusive fishery will not be presumed “unless clear and especial words are used to denote it.”).
 - AK: *State Dep’t of Natural Resources v. City of Haines*, 627 P.2d 1047, 1052 (1986)(Statute conveying tidelands to municipality found to be “clear and unambiguous,” and thus conveyance valid).
 - CT: *East Haven v. Hemingway*, 7 Conn. 186, 199 (1828)(“A right so important as this is to the public, cannot be considered as parted with, except by words so unequivocal, as to leave no reasonable doubt concerning the meaning.”).
 - LA: *Gulf Oil Corporation v. State Mineral Board*, 317 So.2d 576, 589 (1975)(“[A]ny alienation or grant of the title to navigable waters by the legislature must be express and specific and is never implied or presumed from general language in a grant or statute.”)(quoting *California Co. v. Price*, 74 So.2d at 21).

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- MD: *Browne v. Kennedy*, 5 H.&J. 195, 203 (1821) (“wherever grants have been held not to pass the soil [beneath navigable waters] it was not because the King had not the capacity or right to grant it, but because there were not apt words in the grant to effect this purpose ...”).
- MI: *Klais v. Donowski*, 373 Mich. 262, 275, 129 N.W.2d 414, 420-421 (1964) (Conveyances of public trust land “are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.”) (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)).
- NY: *Appleby v. City of New York*, 271 U.S. 364, 383-384 (1925) (Trust land can be conveyed by State to private hands “only ... upon clear evidence of [the legislature’s] intention and of the public interest in promotion of which it acted.”).
- OR: *Hume v. Rogue River Packing Co.*, 51 Or. 237, 83 P. 391 (1908) (“[A]n intention to part with any portion of such public right will not be presumed unless clear and special words are used to denote” the conveyance).
5. *Summa Corp. v. California ex rel. Lands Commission*, 466 U.S. 198, 209 (1984).
6. WA: WASH. CONST. Art. 17, § 1 (Limits state ownership of tidelands as against all parties asserting chain of title back prior to statehood); *Stockwell v. Gibbons*, 58 Wash.2d 391, 398, 363 P.2d 111, 115 (1961) (“Under Article 17, section 1 of the Washington State Constitution, all tidelands not patented to private ownership prior to statehood vested in the State.”).
7. The pre-Statehood grant exception is recognized in numerous federal and State court decisions.
- US: *United States v. Coronado Beach Co.*, 255 U.S. 472, 487 (1921) (“But the title of the State [of California] to tidelands was subject to prior Mexican grants.”); *San Francisco v. LeRoy*, 138 U.S. 656 (1890) (“California tidelands acquired by United States from Mexico are generally subject to the Public Trust Doctrine. But, ”that doctrine cannot apply to such lands as had been previously granted to other parties by the former government”).
- CT: *Chapman v. Kimball*, 9 Day 38, 41 (1831) (“[T]here may be an individual right to a navigable river; but it must [have been] acquired from the King or sovereign authority ...”); *East Haven v. Hemingway*, 7 Conn. 186, 199 (1828) (A pre-Statehood grant could convey public rights into private hands, but only with “words so unequivocal, as to leave no reasonable doubt concerning the meaning.”).

Exceptions to the Public Trust Doctrine

- FL: *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 609, 47 So. 353, 355 (1908) (“By Treaty of February 22, 1819 ... Spain ceded to the United States ... all the territories of [Florida] with an expressed provision that all the grants of land made by Spain before January 24, 1818 in [the territories of East and West Florida] shall be ratified and confirmed in said persons.”); *Trustees v. Root*, 63 Fla. 666, 682, 58 So. 371, 376 (1912) (“[A]ll the grants of land by Spain before January 24, 1818 in [the territories of East and West Florida] shall be ratified and confirmed in said persons.”).
- LA: If submerged lands were transferred into private ownership and out of the trust prior to 1921 and adjudicated under the 1954 case *California v. Price*, 225 La. 706, 74 So.2d 1 (1954), then the transfer is valid. Otherwise, all such conveyances are invalid as *void ab initio*. See *Gulf Oil Corp. v. State Mining Board*, 317 So.2d 576 (1975).
- MI: *Klais v. Danowski*, 373 Mich. 262, 273, 129 N.W.2d 414, 420 (1964) (The rights of private individuals to land, granted them by the U.S. government prior to statehood, “whether above or beneath water, were not cut off by the subsequent creation of the State.”).
- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 518 (Miss. 1986) (“If, at the time of acquisition by the United States in the sovereign capacity, property was already privately owned, it follows on reason that the title was never in the United States and therefore could not have been held by the United States in trust nor thereafter at statehood granted to the state.”).
- NY: Before the American Revolution, colonial English governors granted some of New York’s tidelands to towns on Long Island, to certain individuals, and to New York City by colonial charters or patent. *People v. N.Y. & S.I. Ferry Co.*, 68 N.Y. 71, 77-78 (1877). Except for those lands, New York, upon attaining Statehood, acquired title, in trust to the navigable waters and all unappropriated tidelands within its borders. *People v. Steeplechase Park Co.*, 218 N.Y. 459, 113 N.E. 521 (1916). See also Public Lands Law § 4. The towns also hold the foreshore in trust for the use of the public. *Tiffany v. Town of Oyster Bay*, 234 N.Y. 15, 136 N.E. 224 (1922). Colonial grants to individuals usually did not extend beyond the high water mark and thus did not affect public trust lands. *Delancey v. Piegras*, 138 N.Y. 26, 36, 33 N.E. 822 (1893).
- OH: *Hogg v. Beerman*, 41 Ohio St. 81 (1884) (The court declared that the areas known as East Harbor and West Harbor had been granted to private individuals by the United States Government before Ohio became a state; therefore the acknowledged conveyance was held to take precedence over state law for this specific portion of Lake Erie only. Ohio implicitly accepted the “private” status of East Harbor when it acquired 1,100 acres for a state park in

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1945. Public trust rights of navigation, recreation, fishery, etc. are not prejudiced by the "private" nature of West Harbor.

8. *Shively v. Bowlby*, 152 U.S. 1, 48 (1894).
9. *See Summa Corp. v. California ex rel. Lands Commission*, 466 U.S. 198, 205 (1984).
10. Various references are made in the case law to the exemption of trust land from the Public Trust Doctrine due to a conveyances made in accordance with international obligations.

US: *Shively v. Bowlby*, 152 U.S. 1, 48 (1894)("Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations ... "); *Summa Corp. v. California ex rel. Lands Commission*, 466 U.S. 198, 205 (1984)("Patents confirmed under the authority of the [Act of March 3, 1851 fulfilling obligations of Treaty of Guadalupe Hidalgo] were issued 'pursuant to the authority reserved to the United States to enable it to discharge its international duty with respect to land which, although tideland, had not passed to the State.'"); *San Francisco v. LeRoy*, 138 U.S. 656 (1890)("California tidelands acquired by United States from Mexico are generally subject to the Public Trust Doctrine. But, "that doctrine cannot apply to such lands as had been previously granted to other parties by the former government" The United States has a duty "in the execution of its treaty obligations to protect the claims of all persons ..."); *United States v. Holt Bank*, 270 U.S. 49, 54 (1926)("[T]he United States, after acquiring the territory and before the creation of the State, [may grant] rights in such lands by way of performing international obligations ..."); *West Indian Co. v. Virgin Islands*, 643 F. Supp. 869 (D. Virgin Islands 1986)("Governments may recognize title in private individuals to trust property pursuant to an international duty, even though the original alienation of submerged lands may conflict with the public use doctrine."). *See also Knight v. U.S. Land Association*, 142 U.S. 161 (1891).

CA: *City of Los Angeles v. Venice Peninsula Properties*, 182 Cal.Rptr. 599, 644 P.2d 792, 31 Cal.3d 288 (1982).

MI: *Klais v. Danowski*, 373 Mich. 262, 272-273, 129 N.W.2d 414, 419-420 (1964)("[L]ands underlying navigable waters within a State belong to the State ... subject to paramount power of Congress to control such waters for the purposes of navigation in commerce among the States and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the State, has granted rights in such lands by way of performing international obligations.").

Exceptions to the Public Trust Doctrine

- FL: *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353 (1908) (“By Treaty of February 22, 1819 ... Spain ceded to the United States ... all the territories of [Florida] with an expressed provision that all the grants of land made by Spain before January 24, 1818 in [the territories of East and West Florida] shall be ratified and confirmed in said persons.”); *Trustees v. Root*, 66 Fla. 666, 58 So. 371 (1912) (“[A]ll the grants of land by Spain before January 24, 1818 in [the territories of East and West Florida] shall be ratified and confirmed in said persons.”).
11. *United States v. 1.58 Acres*, 523 F. Supp. 120, 124 (D. Mass., 1981). *See also Alameda v. Todd Shipyards*, 635 F. Supp. 1447, 1450 (N.D. Cal., 1986) (“The United States may not abdicate the role of trustee for the public when it acquires land by condemnation. ... Since the State and the City held the land subject to the public trust, the United States could take the land only subject to the public trust.”).
 12. *Alameda v. Todd Shipyards*, 635 F. Supp. 1447, 1450 (N.D. Cal. 1986).
 13. *See United States v. 11.037 Acres of Land*, 685 F. Supp. 214 (N.D. Cal. 1988). *See also Marks v. Whitney*, 6 Cal.3d 251, 261, 98 Cal. Rptr. 790, 491 P.2d 374 (1971).
 14. *United States v. 11.037 Acres*, 685 F. Supp. 214, 216 (N.D. Cal. 1988).
 15. *United States v. 11.037 Acres*, 685 F. Supp. 214, 216 (N.D. Cal. 1988).
 16. A few State and federal courts have held that because land was exposed to tidal or navigable waters by artificial means, then as a necessary result the land or waters are not subject to the Public Trust Doctrine.
- US: *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (Private lagoons in Hawaii, dredged from fast land, and open to the sea, are exempt).
- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 520 (1986) (“[U]nder the laws of this state neither artificially created water courses, inlets, slips, marinas and the like, nor physical improvements or alterations made thereto, become a part of the public trust, even though they may become tidally affected.”).
- NY: *Fairchild v. Kraemer*, 11 A.D.2d 232, 236, 204 N.Y.S.2d 823, 826 (1960) (“[T]he basin, having been artificially created out of the private lands of the plaintiff ... and having been made navigable by artificial means, would remain private property, and the waters thereof would not be subject to any public right or easement thereon.”); *See also Thornhill v. Skidmore*, 32 Misc.2d 320, 227 N.Y.S.2d 793 (1961).

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- NJ: *O'Neill v. State Highway Dept.*, 50 N.J. 307, 235 A.2d 10 (1967)(“The State cannot acquire interior land by such artificial works as ditching which enables the tide to ebb and flow on lands otherwise beyond it.”).
- TX: *Diversion Lake Club v. Heath*, 126 Tex. 129, 139, 86 S.W.2d 441, 445-446 (1935)(Lands beneath public waters that are artificially flooded by a dam remain private land even though bottomland of natural navigable rivers are publicly owned).
- WI: *Haase v. Kingston Co-operative Creamery Ass'n*, 212 Wis. 585, 589, 250 N.W. 444, 445 (1933)(“Where the owner of land creates an artificial body of water upon his own premises ...” the State does not acquire title to the land under such water).
17. At least one State court has come to the conclusion that if the waters were naturally navigable, then an artificial extension of the channel brought the extended waters within the scope of the Public Trust Doctrine.
- OH: *Mentor Harbor Yacht Club v. Mentor Lagoons*, 170 Ohio St. 193, 199, 163 N.E. 2d 373, 377 (1959)(“[L]agoons, which are artificial extensions of the natural navigable channel, became a part thereof and are public waters.”).
18. In Hawaii, some ancient fish ponds seaward of the mean high tide line, including the rock seawall forming the pond, were granted by the government and thereby became private property.
- HI: *In re Kamakana*, 58 Haw. 632, 574 P.2d 1346 (1978)(Original Land Commission Award includes fish pond as part of ahupuaa.); *In re the Boundaries of Paunau*, 24 Haw. 546 (1918)(Grant which transferred unsurveyed ahupuaa [valley] by name was meant to convey all within ahupuaa according to its ancient boundaries).
19. NC: *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674 (1996).
20. *Id.*

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PROTECTED USES OF THE PUBLIC TRUST DOCTRINE

Summary

Historically, the common law rights of the public in trust lands and waters were directly related to navigation, commerce and fishing. As society and technology have evolved, however, the public's use of trust lands and waters has necessarily changed. Over the centuries the Public Trust Doctrine has kept pace with the changing times, assuring the public's continued use and enjoyment of these lands and waters. This dynamic nature, fundamental to the application of the doctrine, has enabled it to persist for over 1,500 years. Strip away the inherent flexibility of the doctrine, and it would slowly whither as an effective tool for coastal management.

As stated by the New Jersey Supreme Court, "The original purpose of the doctrine was to preserve for the use of all the public natural water resources for navigation and commerce, waterways being the principal transportation arteries of early days, and for fishing, an important source of food."¹ But State and Federal courts have recognized that when "administering the trust the State is not burdened with an outmoded classification favoring one mode of utilization over another."² This "dynamic common-law principle" supports the current recognition of uses protected by the Public Trust Doctrine to include recreation, environmental protection, and preservation of scenic beauty.

Over the last 1,500 years, the Public Trust Doctrine has evolved from preserving the public's right to use trust lands and waters for commerce, navigation and fishing, to protecting these traditional uses plus today's modern uses that are "related to the natural uses peculiar to that resource."³

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A. Traditional Public Uses of Trust Lands and Waters

The traditional uses of public trust lands and waters are often stated as the simple trilogy of commerce, navigation and fishing. Nonetheless, this often-stated trilogy is an oversimplification. Many uses, not necessarily related to any of these three terms, of trust lands and waters have long been recognized. For example, the Massachusetts Supreme Court stated in 1863 that "It would scarcely be necessary to mention bathing, or the use of the waters for washing, or watering cattle, preparation of flax, or other agricultural uses, to all which uses a large body of water, devoted to the public enjoyment, would usually be applied."⁴

1. Navigation and Commerce

Navigable waters and the shorelands have traditionally served as highways for navigation and commerce. The ancient public trust rights, navigation and commerce, date back to pre-Roman days. The tremendous importance of preserving the public's unfettered use of the Nation's navigable waters was recognized in the beginning days of the United States in the Northwest Ordinance of 1787:

"The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor."⁵

Both navigation and commerce are recognized as protected uses in nearly all coastal States.⁶

In many States, travelers used beaches to traverse the length of the coast. Passing and repassing was one of the original uses protected by the Public Trust Doctrine during the founding years of the Nation.⁷ Often, the presence of lagoons and marshes behind the primary dunes of the coast made road construction difficult. In contrast, the compact sand between the shore and the line of vegetation easily supported the weight of a stagecoach or a mule-drawn wagon, and has historically been used for such purposes.⁸

The meaning of the term "navigation" changes from State to State. The majority rule is that both commercial and recreational purposes are included,⁹ as well as other uses of the water for transport, such as the flotation of logs.¹⁰ Some States, however, limit "navigation" to only commercial activities.¹¹

The scope of the term "commerce" has likewise expanded and evolved in both Federal and State law. At least one State court has noted that commerce is not limited to activities for economic gain, but also includes activities for pleasure and recreation.¹² The Supreme Court of Alaska has held that mining, on filled lands still subject to the public trust doctrine, is not a "public use" protected by the doctrine.¹³

2. Fishing

Fishing is a natural incident of the public right to use public trust lands and waters,¹⁴ as well as incidental uses such as fowling¹⁵, and shellfishing.¹⁶ The public right of fishing has been closely related by the courts to the public right of navigation.¹⁷ Numerous claims of exclusive fishing rights of upland owners owning the bottomlands of navigable lakes and rivers have been defeated on public trust grounds.¹⁸

The fish inhabiting navigable waters are not owned by the riparian owners, even if the bottomland is privately held. "Fish in the stream [are] not the property of the [riparian owner] any more than the birds that [fly] over its land."¹⁹ Rather, the State, in its sovereign capacity, holds title to the fish within trust waters in the State for the benefit of the people.²⁰ See Ch. II, §1.D "The state holds the propriety of this [bottomland] for conservation of public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of that fishery. In other words, it may forbid all such acts as would render the public right less valuable or destroy it altogether."²¹

Some States do provide for exclusive fishing rights in private parties, generally for shellfish beds or aquaculture. In some States, such privately held rights (e.g. a license or lease) to a fishery may revert back to the public if these rights are not continuously exercised,²² or if the license or lease is unlawfully registered.²³

3. Other Traditional Uses

From the early days of the United States, the public's trust interests recognized by the courts have been much broader than merely commerce, navigation and fishing. For example, in the 1821 New Jersey case *Arnold v. Mundy*, the State Supreme Court recognized "fishing, fowling, sustenance and all other uses of the water and its products"²⁴ were rights assured to the public.

Many other traditional uses of the nation's public trust lands and waters have been noted by the courts. Among these are boating, hunting, bathing, swimming, nude

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bathing, skating, cutting sedge, cutting ice, pushing a baby carriage, washing, watering cattle, preparation of flax, and sustenance, as well as other uses of the trust land and waters that are public in nature and water dependent.²⁵ The gathering of seaweed is recognized as a natural incident of the public right to use trust lands and waters in at least one State,²⁶ while being expressly rejected in another.²⁷

One of the products of trust waters is ice. Ice cutting was a traditional public trust use of frozen navigable waters, although it may be dying out as an activity of modern times.²⁸ In some States the right to cut and remove ice may belong only to the owner of the bottomland.²⁹

B. The Public Trust Doctrine: A "Dynamic Common-Law Principle"

English common law recognized the inherent dynamic nature of the Public Trust Doctrine. The English public's rights of "egress and regress, for fishing, trading, and other uses claimed or used by [the King's] subjects ... are variously modified, promoted or restrained by the common law."³⁰ The need for the Public Trust Doctrine to evolve as the needs of society change has been recognized in State and Federal jurisprudence.

"Traditionally, the doctrine has functioned as a constraint on states' ability to alienate public trust lands and as a limitation on uses that interfere with trust purposes. More recently, courts and commentators have found in the doctrine a dynamic common-law principle flexible enough to meet diverse modern needs. The doctrine has been expanded to protect additional water-related uses such as swimming and similar recreation, aesthetic enjoyment of rivers and lakes, and preservation of flora and fauna indigenous to public trust lands."³¹

Likewise, several States recognize that the Public Trust Doctrine must remain sufficiently flexible to address changing public needs, so that application of the trust does not hinder the State by continuing to favor outdated uses over more modern ones.³² Early case law recognized that the list of uses would increase with "the growth of the community and its progress in the arts."³³

Not only do the needs of society change over time, but one legislature cannot terminate or dissolve the authority of a successor legislature because "[t]he legislation which may be needed one day ... may be different from the legislation

that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it."³⁴

On the other hand, some State courts have been reluctant to extend protection to "new" public uses of trust lands and waters if it would impair any of the traditional rights of commerce, navigation or fishing.³⁵ Courts often have resorted to whether the public use is really a "new" use, or rather merely an "incidental" use of commerce, navigation or fishing.³⁶ Other courts have applied a "related-to-the-resource" test to determine whether a public use is protected by the doctrine. For example, preservation of trust land in its natural condition has been upheld in two States as a valid public use because preservation is clearly related to the resource's value of providing food, wildlife habitat and scientific study.³⁷

1. Recreational Uses

Arguably, there is nothing new about using trust lands and waters for recreation. Certainly the Romans must have used the tidelands for purely recreational purposes. Several older American cases have recognized the public's traditional use of the shorelands and waters for uses that are non-commercial in nature.³⁸ Nonetheless, recognition of a public right to use trust lands and waters for recreation is not universal. At least one State, Maine, has expressly excluded recreation as a recognized public trust right.³⁹ However, the right of the public to use trust lands and waters for recreational purposes has come to be specifically established in most States.⁴⁰ Recreational fishing, bathing, nude bathing, surfing, swimming, even pushing a baby carriage along the public trust shores, have been recognized as public recreational rights in lands and waters subject to the public trust.⁴¹ Even more generally, some States have broadened the rights of the public by establishing public rights in "recreational uses,"⁴² tourism,⁴³ or most broadly, "whatever is needed for the complete and innocent enjoyment" of trust lands.⁴⁴

2. Environmental Protection

Several States have interpreted public trust rights to include restrictions for the prevention of environmental harm and preservation of trust lands and waters. "[O]ne of the most important public uses of the tidelands ... 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."⁴⁵ In Hawaii, the State constitution creates an environmental right for the protection of public trust lands and provides for a private cause of action.⁴⁶ A

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Washington State court recently cited the Public Trust Doctrine to support damage claims for the killing of waterfowl as a result of an oil spill, to protect ecological values, to preserve tidelands in their natural state for the benefit of wildlife, and to preserve public lands with special importance for public health, safety, and welfare.⁴⁷ In New York, one court has broadly stated that the “entire ecological system supporting the waterways” is within the purview of the trust.⁴⁸

3. Preservation of Scenic Beauty

A more liberal judicial recognition of a protected public use is that the public has a right to the preservation of scenic views and aesthetics in trust lands and waters. At least three State courts and one federal court have recognized the right of the public to preserve trust lands and waters so as to preserve the scenic beauty of the area.⁴⁹ One of these State courts described the right to preservation of scenic beauty as “an incident of navigation.”⁵⁰

C. Uses of Trust Lands as Determining Geographic Scope of Public Trust Doctrine

The United States Supreme Court, in *Phillips Petroleum v. Mississippi*, recognized that “the States have interests in lands beneath tidal waters which have nothing to do with navigation,”⁵¹ such as “bathing, swimming, recreation, fishing and mineral development.”⁵² In regard to the many uses of trust tidelands that have nothing to do with navigation, the Court recognized that “It would be odd to acknowledge such diverse uses of public trust tidelands, and then suggest that the sole measure of the expanse of such lands is the navigability of the waters over them.”⁵³ As a result, the Court rejected navigability as the sole measure of the geographic scope of the Public Trust Doctrine over tide waters and the lands beneath, and affirmed that the proper test is the ebb and flow of the tide.

In contrast to lands beneath tide waters, navigability of freshwaters is currently the sole measure of the expanse of such lands subject to the Public Trust Doctrine. This is so, even though the United States Supreme Court rejected the logic of this in *Phillips Petroleum v. Mississippi*. But freshwater bodies, whether navigable in fact or not, are used by the public for the same purposes as the public uses tidal waters and tidelands — bathing, swimming, recreation, and fishing, to name a few. Why navigability should be the sole measure of the geographic scope of the Public Trust Doctrine for freshwaters, when it has been specifically rejected for tidewaters, remains a paradox of American public trust law.

Nonetheless, the many and various uses that the public makes of tidelands and waters was the basis for rejecting navigability as the sole measure of the scope of trust tidelands. This same logic is available to argue that the geographic scope of freshwaters subject to the Public Trust Doctrine should also not be delimited by any sole criterium, such as navigability, but should be sufficiently expansive so as to include all freshwaters that are capable of being used by the public for the many recognized public trust uses.

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Notes

1. *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 304, 294 A.2d 47 (1972).
2. *Marks v. Whitney*, 6 Cal.3d 251, 259-60, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).
US: *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984)("[C]ourts and commentators have found in the doctrine a dynamic common law principle flexible enough to meet diverse modern needs.").
3. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH.L. REV. 474, 477 (1970).
US: *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984)("More recently ... [t]he doctrine has been expanded to protect additional water-related uses such as swimming and similar recreation, aesthetic enjoyment of rivers and lakes, and preservation of flora and fauna indigenous to public trust lands.").
4. *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158, 167 (1863).
5. 1 Stat. 51 (1787).
6. Both navigation and commerce are recognized as protected uses in nearly all coastal states.
US: *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 413 (1842)("[T]he shores and the rivers, and bays, and arms of the sea, and the land under them...held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery."); *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 453 (1892)("It is a title held in trust for the people of the State that they may enjoy the navigation of the waters [and] commerce over them.").
AK: 1982 OP. ATTY GEN. No. 3 at 11 (June 10, 1982)(Federal definition of navigability adopted by relying on *United States v. Utah*, 403 U.S. 9, 10 (1971), "And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted..."). See also *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1118 (1988).
AL: *Tennessee & Coosa R.R. Co. v. Danforth & Armstrong*, 112 Ala. 80, 96, 20 So. 502, 506 (1895)("The public is entitled to free, uninterrupted and unobstructed use of every part of a navigable river..."); *Bullock v. Wilson*, 2 Port. 436, 448 (1835)("[I]f [the river] be of sufficient width and depth, and suited to the

ordinary purposes of navigation...the stream is hereby constituted a public highway.”).

- CA: *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521; 606 P.2d 362, 162 Cal Rptr. 327 (1980)(“Although early cases expressed the scope of the public’s rights in tidelands as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader.”); *State of California v. Superior Court (Lyon)* 29 Cal.3d 210, 229, 625 P.2d 239, 172 Cal. Rptr. 696 (1981)(“Lands lying between the ordinary low and high watermarks of lake are owned by littoral property owners subject to a “trust” interest held by the State for the benefit of the public for purposes of commerce [and] navigation.”).
- FL: *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 612, 42 So. 353 (1908)(“The title to land under navigable waters, including the shores or space between ordinary high and low water marks, is held by the state by virtue of its sovereignty, in trust for the people of the state for navigation and other useful purposes...”).
- HI: *King v. Oahu Railway and Land Co.*, 11 Haw. 717, 725 (1899)(“The lands under the navigable waters in and around the territory of the Hawaiian Government are held in trust for the public uses of navigation.”).
- IL: *Dupont v. Miller*, 310 Ill. 140, 145, 141 N.E. 423 (1923)(“The rule in this State is that the public have an easement for purpose of navigation in waters which are navigable in fact.”).
- LA: LA. CIV. CODE ANN. Art. 452 (West 1980)(“Public things are subject to public use in accordance with applicable laws and regulations. Everyone has the right to fish in the rivers, ports, roadsteads and harbors, and the right to land on the seashore, to fish, to shelter himself, to moor ships, to dry nets, and the like, provided that he does not cause injury to the property of adjoining owners.”).
- MA: *Opinion of the Justices*, 383 Mass. 895, 902-03, 424 N.E.2d. 1092 (1981)(“[U]ntil there has been a lawful filling of flats, the littoral owner owns them subject at least to the reserved rights of fishing, fowling, and navigation.”).
- MD: *Delmarva Power & Light Co. of Md. v. Eberhard*, 247 Md. 273, 276-77, 230 A.2d 644 (1967)(“There are...public rights which can be classed as public easements, such as the right in the general public of navigation on the waters of a stream or lake, whether the bed is privately or publicly owned, the similar right of fishing and hunting over navigable waters (sometimes restricted to waters publicly owned.”); *City of Baltimore v. Baltimore & Philadelphia Steamboat Co.*, 104 Md. 485, 494, 65 A. 353 (1906)(“[A]lthough the State is said to be the owner of the navigable waters within its boundaries, it holds them, not absolutely, but as a *quasi trustee* for the public benefit and to support the rights

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of navigation and fishery to which the entire public are entitled therein, and, although the State can make a grant of privileges or interests in or over those waters, such grants are subject to the public rights of navigation and fishery.”).

- MI: *Nedtweg v. Wallace*, 237 Mich. 14, 16-17, 208 N.W. 51, 52 (1926)(“The beds of navigable waters ... may pass to individuals; but the sovereign power retains, because inalienable, all public rights of navigation therein or thereover.”), *aff’d* 237 Mich. 37, 211 N.W. 647 (1926).
- MS: *Rouse v. Saucier’s Heirs*, 166 Miss. 704, 713, 146 So. 291 (1933)(“Upon the admission of the state into the Union, there became invested in the state, as trustee, the title to all the land under tidewater, including the spaces between ordinary high and low water marks; this title of the state being held for public purposes, chief among which purposes, is that of commerce and navigation...”); *State ex rel. Rice v. Stewart*, 184 Miss. 202, 222, 184 So. 44, (1938)(“[T]he state holds the title to the land beneath tidewaters, as trustee for the people, subject only to the paramount right of the United States to control commerce and navigation.”).
- NH: *Connecticut River Lumber Co. v. Olcott Falls Co.*, 65 N.H. 290, 389-90, 21 A. 1090 (1889)(“A sale by the state of all its ungranted land could not be construed as a relinquishment and abolition of the public rights of navigation.”).
- NJ: *Cobb v. Davenport*, 32 N.J.L. 369, 378 (1867)(“The title of the sovereign being in trust for the benefit of the public — the use, which includes the right of ... navigation, is common.”); *Arnold v. Mundy*, 6 N.J.L. 1, 12 (1821)(“[T]he navigable rivers, where the tide ebbs and flows, the ports, the bays, the coasts of the sea ... for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water...are common to all people...”); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 304, 294 A.2d 47 (1972)(“The original purpose of the doctrine was to preserve for the use of all the public natural resources for navigation and commerce...”); *Matthews v. Bay Head Improvement Ass’n*, 95 N.J. 306, 312, 471 A.2d 355 (1984)(“The public’s right to use the tidal lands and water encompasses navigation, fishing and other recreational uses, including bathing, swimming, and other shore activities.”).
- NY: *Smith v. City of Rochester*, 92 N.Y. 463, 482 (1883)(“[T]he sovereign right grew out of and was based upon the public benefits in promoting trade and commerce, supposed to be derived from keeping open navigable bodies of water as public highways for the common use of the people.”).
- NC: *Tatum v. Sawyer*, 9 N.C. (2 Hawks) 226, 229 (1822)(“Lands covered by navigable waters are not subject to entry, ... being necessary for public purposes as common highways for the convenience of all...”). *See also* N.C. GEN. STAT.

§1-45.1 (Public trust rights “include, but are not limited to, the right to navigate, swim, fish, hunt, and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State’s ocean and estuarine beaches and public access to the beaches.”).

- OH: OHIO REV. CODE ANN. § 1506.10 (Page Supp.1988)(“It is hereby declared that the waters of Lake Erie ..., together with the soil beneath and their contents, do now belong and always have ... belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adopted ... to the public rights of navigation, water commerce, and fishery...”).
- OR: *Lewis v. City of Portland*, 25 Or. 133, 159, 35 P. 256 (1893)(“On the admission of Oregon into the Union the tidelands and the submerged lands lying between the upland and navigable waters on freshwater rivers of the state, became its property ... the state has the right to use or dispose of its title in any manner it may choose, ... subject always to the paramount right of navigation, and the uses of commerce.”).
- PA: *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 539, 47 A. 745 (1901)(Area between ordinary high and low water marks is subject to the public rights of navigation, fishery and improvement of the stream).
- SC: 1970 OP. ATTY GEN. 329, 334 (December 10, 1970)(“The position of the State of South Carolina is that these tidelands, submerged lands and navigable waters are trust property,...to be held by the State for the benefit of the public at large for the development of fishing, recreation, navigation and other public purposes.”).
- TX: *Carrithers v. Terramar Beach Community Improvement Assoc. Inc.*, 645 S.W.2d 772, 774 (Tex. 1983)(*cert. denied* 464 U.S. 981)(“The waters of public navigable streams are held by the State in trust for the public, primarily for navigation purposes.”); *Moil v. Boyd*, 116 Tex. 82, 111, 286 S.W. 458 (1926); TEX. NAT. RES. CODE ANN. § 33.001(d)(Vernon 1978)(“The public interest in navigation in the intracoastal water shall be protected.”).
- VA: *Commonwealth v. Newport News*, 158 Va. 521, 543, 164 S.E. 689 (1932)(The historical uses of navigation and commerce are protected in the jurisdiction of the Commonwealth).
- WA: *Caminiti v. Boyle*, 107 Wash.2d 662, 669, 732 P.2d 989 (1987)(“This *jus publicum* interest as expressed in the English common law and in the common law of this State from earliest statehood, is composed of the right of navigation and the fishery.”).

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- WI: *State v. Bleck*, 114 Wis.2d 454, 465, 338 N.W.2d 492 (1983)(The Public Trust Doctrine “was originally designed to protect commercial navigation...”).
7. Passing and repassing was one of the original uses protected by the Public Trust Doctrine during the founding years of the Nation.
- CT: *Adams v. Pease*, 2 Conn. 481, 483 (1818)(“[T]he public have a right or easement in such rivers, as common highways, for passing and repassing with vessels, boats or any watercraft.”); *Orange v. Resnick*, 94 Conn. 573, 578, 109 A. 864 (1920)(“Public rights [include] fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge and of passing and repassing...”).
- NJ: *Cobb v. Davenport*, 32 N.J.L. 369, 378 (1867)(“The title of the sovereign being in trust for the benefit of the public — the use, which includes the right of ... passing and repassing, ... is common.”); *Arnold v. Mundy*, 6 N.J.L 1, 12 (1821)(“[T]he navigable rivers, where the tide ebbs and flows, the ports, the bays, the coasts of the sea ... for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water...are common to all people ...”).
- NY: *Tucci v. Salzhauer*, 40 A.D.2d 712, 336 N.Y.S.2d 721, 723 (2d Dept.) *aff’d* 33 N.Y.2d 854, 352 N.Y.S.2d 198 (1973)(“[W]hen the tide is out, [the public] may pass and repass over the foreshore as a means of access to reach the water ...”).
- NC: *West v. Slick*, 313 N.C. 33, 60, 326 S.E.2d 601 (1985)(“The longstanding right of the public to pass over and along the strip of land lying between the high-water mark and the low-water mark ... is well established beyond need of citation.”).
8. The compact sand between the shore and the line of vegetation easily supported the weight of a stagecoach or a mule-drawn wagon, and has historically been used for such purposes.
- TX: *Feinman v. State*, 717 S.W.2d 106, 111 (Tex.App.-Houston [1st Dist.] 1986 writ *ref’d n.r.e.*)(“By 1851, the use of the beach between San Luis Pass and Galveston was of such magnitude that the beach was designated a road on an official map of Texas that year...By 1858, the Texas Almanac reported that the beach ... afford[ed] such room at ordinary tides for six or eight carriages to drive abreast.”).
- VA: *Bradford v. Nature Conservancy*, 224 Va. 181, 189, 294 S.E.2d 866 (1982)(Despite the presence of a road, “the preferred route of travel between the ends of the island was along the beach, which is suitable for use by vehicles during low tide.”).

WA: *State v. Wright*, 84 Wash.2d 645, 650-651, 529 P.2d 453 (1974) (“Conceivably, in the early years of our state, ocean beaches provided residents ... (with) a necessary and convenient route of travel and transportation ...”).

9. The majority rule is that both commercial and recreational purposes are included in the term “navigation.”

US: The United States Supreme Court, in the past, emphasized whether the water body was navigable for purposes related to trade or commerce; recreational use was not considered. See *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870) (“And they constitute navigable waters of the United States...when the form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried...”); *United States v. Holt Bank*, 270 U.S. 49, 56 (1925) (“The rule long since approved by this Court ... is that streams or lakes ... are navigable in fact when they are used, or susceptible of being used, in the natural and ordinary condition, as highways for commerce...”). Under the Federal Power Act, evidence of recreational boating, including use by canoeists, can demonstrate a stream’s availability for commercial navigation. See 16 U.S.C.A. §8792 et seq. See *State of New York ex rel. New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission*, 954 F.2d 56, 61-62 (2nd Cir. 1992).

AK: ALASKA STAT. §38.05.965(12) (“‘navigable water’ means any water of the state ... suitable for ... public boating ... or other recreational purposes.”).

AL: *Alabama Power Co. v. Smith*, 229 Ala. 105, 110, 155 So. 601 (1934) (“[T]he right to the use of [navigable streams] as highways has been held analogous to the use of highways on land and governed by like principles.”); *Harold v. Jones*, 86 Ala. 274, 277, 5 So. 438, 439 (1889) (“Any and all of the public have an equal right to the reasonable use of a highway. ... No precise definition of what constitutes a reasonable use, adapted to all cases, can be laid down. Whether or not any particular use is reasonable depends on the character of the highway, its location, and purposes, and the necessity, extent, and duration of the use, under all attendant circumstances. ... It must not be incompatible with reasonable free use of others, who may have occasion to travel or transport over it. ... The same principles are applicable, and regulate the uses of waterways as highways.”).

CA: *People ex rel. Younger v. County of El Dorado*, 96 Cal. App. 3d 403, 157 Cal. Rptr. 815 (1979) (County ordinance banning swimming and travel, *inter alia*, invalid because it amounted to an excessive intrusion of public trust rights.); *Hitchings v. Del Rio Woods Recreation & Park District*, 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1976) (Relying on *People ex rel. Baker v. Mack*, court holds that recreational use for only nine months a year still sufficient to support a finding of navigability.); *People v. Mack*, 19 Cal. App. 3d 1040, 1045, 97 Cal. Rptr. 448

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(1971)(“It hardly needs citation of authorities that the rule is that a navigable stream may be used by the public for boating, swimming, fishing, hunting and all recreational purposes.”).

HI: *See State v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977).

MA: *Attorney General v. Woods*, 108 Mass. 436, 440 (1871)(“If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purposes of trade or agriculture.”).

MI: *See Bott v. Natural Resources Commission*, 415 Mich. 45 (1982).

MN: *Nelson v. DeLong*, 213 Minn. 425, 431, 7 N.W.2d 342 (1942)(“Public use comprehends not only navigation by water craft for commercial purposes, but the use also for the ordinary purposes of life, such as boating, fowling, skating, bathing, taking water for domestic and agricultural purposes, and cutting ice.”).

MT: *Montana Coalition for Stream Access v. Curran*, 210 Mont. 38, 44, 682 P.2d 163 (1984)(“[T]he true test of navigability of a stream does not depend on the mode by which commerce is, or may be, conducted. ... The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river...”)(quoting *The Montello*, 87 U.S. (20 Wall.) 430, 441-42 (1874)); *Montana Coalition for Stream Access v. Hildreth*, 211 Mont. 29, 684 P.2d 1088 (1984)(Navigability determined by pleasure-boat and commercial tests).

NH: *State v. Sunapee Dam Co.*, 70 N.H. 458, 460, 50 A. 108 (1900)(“[I]n this state lakes, large natural ponds, and navigable rivers are owned by the people, and held in trust by the state in its sovereign capacity for their use and benefit, such use and benefit are not limited to navigation and fishery, but include all useful and lawful purposes[.]”); *Hartford v. Gilmanton*, 101 N.H. 424, 426, 146 A.2d 851 (1958)(“Any member of the public may exercise a common law right to boat, bathe, fish, fowl, skate and cut ice in and on its public waters.”) quoting *Whitcher v. State*, 87 N.H. 405, 409, 181 A. 549 (1935).

NY: *Trustees of Freeholders & Commonalty of Southampton v. Heilner*, 84 Misc.2d 318, 328, 375 N.Y.S.2d 761 (1975)(The fact that a tidal bay was not very deep and was not adapted to commercial ships does not preclude a finding that the bay, which was used constantly for navigation by shoal-draft pleasure craft and other pleasure boats, is navigable.); *Granger v. City of Canandaigua*, 257 N.Y. 126, 131, 177 N.E. 394 (1931)(“To hold that the sovereignty had dedicated the bed of such a lake to private uses, subject to the rights of navigation only, would be not only to deprive the public of access to the water for recreation and enjoyment but also to deprive the riparian owners of their customary privileges.”); *Adirondack League Club v. Sierra Club*, 615 N.Y.S.2d 788, 791

- (A.D. 3 Dept. 1994)(“we are of the view that the recreational uses of a stream should be considered as relevant evidence of the stream’s navigability and capacity for commercial use”).
- NC: *State v. Baum*, 128 N.C. 442, 446, 40 S.E. 113 (1901)(“[T]he public have the right to the unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are in their natural condition capable of such use.”).
- OH: *Mentor Harbor Yacht Club v. Mentor Lagoons*, 170 Ohio St. 193, 199-200, 163 N.E.2d 373 (1959)(Navigation for pleasure and recreation is as important in the eyes of the law as navigation for a commercial purpose); OHIO REV. CODE ANN. § 1506.10 (Page Supp. 1988)(Waters of Lake Erie and land beneath held by State in trust for citizens for “public use” generally).
- OR: *Guilliams v. Beaver Lake Club*, 90 Or. 13, 27, 175 P. 437 (1918)(“The vessel carrying a load of passengers to a picnic is in law just as much engaged in commerce as the one carrying grain or other merchandise.”).
- WA: *Caminiti v. Boyle*, 107 Wash.2d 662, 669, 732 P.2d 98-9(1987)(*Jus publicum* includes the right of “navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.”)(quoting *Wilbour v. Gallagher*, 77 Wash.2d 306, 316, 462 P.2d 232 (1969), *cert. denied* 400 U.S. 878 (1970)).
- WI: *Nekoosa-Edwards Paper Co. v. Railroad Commission*, 201 Wis. 40, 46, 228 N.W. 144 (1929)(“Being navigable, the public may use it for the public rights incidental thereto of hunting, fishing, or pleasure boating.”); *Doemel v. Jantz*, 180 Wis. 225, 234, 193 N.W. 393 (1923)(“fishing, recreation, boating, bathing, etc., are denominated incident to the right of navigation. Therefore the use of these waters for the various purposes enumerated and referred to is open to the public when exercising the right of navigation.”).
10. The term “navigation” in some states includes uses of the water for the flotation of logs.
- US: *Oregon v. Riverfront Protector*, 672 F.2d 792, 793 (9th Cir. 1982)(Log floating rule used and river held navigable despite fact it was only passable three months of the year).
- AK: ALASKA STAT. § 38.05.965(12)(1988)(“‘navigable water’ means any water of the state ... suitable for ...floating of logs ...”).

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- ID: IDAHO CODE § 36-1601 (1977) (“Any stream which, in its natural state, during normal high water, will float cut timber” is navigable).
- ME: *Veazie v. Dwinel*, 50 Me. 479, 484 (1862) (“All streams in this State of sufficient capacity, in their natural condition, to float boats, rafts or logs, are deemed public highways, and as such, subject to the use of the public.”).
- MS: *Smith v. Fonda*, 64 Miss. 551, 554, 1 So. 757 (1887) (“If, for a considerable period of the year, its usual and habitual condition is such that the public may rely upon it as a safe and convenient means of transporting over it the logs which are cut from the forest on its banks; if this condition recurs with the season of our usual rains, and continues through it, even though occasionally interrupted by a decline of its waters, —it is a navigable stream.”).
- NH: *Collins v. Howard*, 65 N.H. 190, 191, 18 A. 794 (1889) (“A public easement for floating logs exists in a stream which is capable of being so used. The easement is not founded upon usage, custom, or prescription, nor is it derived from previous enjoyment, but it depends upon the capacity of the stream for trade or business. It exists when the stream is capable of being generally and commonly used for the purposes of commerce, for the floating of vessels, boats, rafts, or logs.”).
- NC: *Burke County v. Catawba Lumber Co.*, 116 N.C. 420, 21 S.E. 941 (1895) (Public trust easement for floating logs exists even on streams that are “floatable” by logs only on a seasonal basis).
- OR: *Weise v. Smith*, 3 Or. 445, 449 (1869) (“A stream, which, in its natural condition, is capable of being commonly and generally useful for floating ... logs ... and not strictly navigable, is subject to the public use as a passage way.”); *Kanin v. Normand*, 50 Or. 9, 91 P. 448 (“[A] stream capable in its natural state of floating saw logs to market successfully is navigable for that purpose.”). *See also Shaw v. Oswego Iron*, 10 Or. 371 (1882); *Haines v. Welch*, 14 Or. 319, 12 P. 502 (1886); *Nutter v. Gallagher*, 19 Or. 375, 24 P. 250 (1890).
- TX: *Welder v. State*, 196 S.W. 868, 873 (Tex. Civ. App.-Austin 1917, writ ref’d) (“floating logs has frequently been held to be navigation.”).
- WI: *Olson v. Merrill*, 42 Wis. 203, 212 (1877) (“It is settled in this court, that streams of sufficient capacity to float logs to market are navigable.”).
11. Some states limit “navigation” to only commercial activities.
- IL: ILL. ANN. STAT. ch. 19, § 65 (1972) (“Public waters’ means all open public streams and lakes capable of being navigated by water craft, in whole or in part, for commercial uses and purposes ...”).

- VA: *Boerner v. McCallister*, 197 Va. 169, 175, 89 S.E.2d 23 (1955)(The test for navigation "...is whether the stream is used or susceptible of being used in its natural and ordinary condition 'as a highway for commerce on which trade and travel are or may be conducted in the customary modes of trade and travel on water'.")).
12. At least one State court has noted that commerce is not limited to activities for economic gain, but also includes activities for pleasure and recreation.
- OR: *Guilliams v. Beaver Lake Club*, 90 Or. 13, 27, 175 P. 437 (1918)("The vessel carrying a load of passengers to a picnic is in law just as much engaged in commerce as the one carrying grain or other merchandise.").
13. AK: *Hayes v. A.J. Associates, Inc.*, 846 P.2d 131, 133 ("... we reject [the] contention that mining is a public trust purpose. *** We believe that even the most expansive interpretation of the scope of public trust easements would not include private mining enterprises.").
14. Fishing is a natural incident of the public right to use public trust lands and waters.
- CL: Under English common law, the right of fishery was an exclusive royal right based on the dominion of the king over the seas. The king possessed this right in all tidal waters. In non-tidal waters riparian owners had a right of exclusive fishery. See *The Royal Fishery of the River Banne*, Davis 55, 80 Eng. Rep. 540 (K.B. 1610)("There are two kinds of rivers; navigable and not navigable. Every navigable river, so high as the sea flows and ebbs in it, is a royal river, and the fishery in it is a royal fishery, and belongs to the king by his prerogative; but in every other river not navigable, and in the fishery of such river, the tertendants on each side have an interest of common right.").
- US: *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 453 (1892)("It is a title held in trust for the people of the State that they may...have liberty of fishing.").
- AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1118 (1988)(Public trust encompasses "continuing public trust 'easements' for purposes of navigation, commerce, and fishing.").
- CA: *People v. California Fish Co.*, 166 Cal. 576, 584, 138 P. 79 (1913)("It is a well-established proposition that the lands lying between the lines of ordinary high and low tide, as well as that within a bay or harbor, and permanently covered by its waters, belong to the state in its sovereign character, and are held in trust for public purposes of navigation and fishery."); *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521, 606 P.2d 362, 12 Cal. Rptr. 327 (1980)("[E]arly cases expressed the scope of the public's rights in tidelands as encompassing ... fishing"); *State of California v. Superior Court (Lyon)*, 29 Cal.3d

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210, 229, 625 P.2d 239, 172 Cal. Rptr. 696 (1981)(Lands lying between the low and high watermarks of lake are owned by littoral property owners subject to a "trust" interest held by the State for the benefit of the public for purposes such as fishing).

CT: *Peck v. Lockwood*, 5 Day 22, 28 (1811)("[T]he right of fishing on the soil of another, when overflowed with the tide from the sea, or arm of the sea, is a common right.").

DE: *Bickel v. Polk*, 5 Del. (5 Harr.) 325, 326 (1851)("The right of fishing in all public streams where the tide ebbs and flows, is a common right, and the owner of land adjoining tide water, though his title runs to low water mark, has not an exclusive right of fishing.").

FL: *Ex Parte Powell*, 70 Fla. 363, 376, 70 So. 392 (1915)("Under the laws of this state, the public waters and fish therein are held by the state for the benefit of the people of the state...").

MA: *Packard v. Ryder*, 144 Mass. 440, 11 N.E. 578 (1887); *Weston v. Sampson*, 62 Mass. (8 Cush.) 347 (1851).

MD: *Delmarva Power & Light Co. of Md. v. Eberhard*, 247 Md. 273, 276-77, 230 A.2d 644 (1967)("There are...public rights which can be classed as public easements, such as the right in the general public of navigation on the waters of a stream or lake, whether the bed is privately or publicly owned, the similar right of fishing and hunting over navigable waters (sometimes restricted to waters publicly owned.);"); *City of Baltimore v. Baltimore & Philadelphia Steamboat Co.*, 104 Md. 485, 494, 65 A. 353 (1906)("[A]lthough the State is said to be the owner of the navigable waters within its boundaries, it holds them, not absolutely, but as a *quasi trustee* for the public benefit and to support the rights of navigation and fishery to which the entire public are entitled therein, and, although the State can make a grant of privileges or interests in or over those waters, such grants are subject to the public rights of navigation and fishery.").

MI: MCLA § 324.32502 (West 1984)(Impairment of fishing rights, *inter alia*, by filling-in is prohibited as a violation of the public trust.); *Nedtweg v. Wallace*, 237 Mich. 14, 20, 208 N.W. 51, 54 (1926)("The state is sovereign of the navigable waters within its boundaries, bound, however, in trust, to do nothing in hindrance of the public right of navigation, hunting, and fishing."), *aff'd* 237 Mich. 37, 211 N.W. 647 (1926)

MS: *State ex rel. Rice v. Stewart*, 184 Miss. 202, 230-31, 184 So. 44 (1938)("[W]e hold the State...to be the absolute owner of the title of the soil...wherever the tide ebbs and flows, as trustee...with the right of free fishing by the public generally.").

- NH: *See Hartford v. Gilmanton*, 101 N.H. 424, 146 A.2d 851 (1958); *Whitcher v. State*, 87 N.H. 405, 181 A. 549 (1935).
- NJ: *Cobb v. Davenport*, 33 N.J.L. 369, 378 (1867)(“The title of the sovereign being in trust for the benefit of the public—the use, which includes the right of fishing ...”).
- NY: *People v. Johnson*, 7 Misc.2d 385, 388, 166 N.Y.S.2d 732, 735 (1957)(“At common law, the public ordinarily had the right to hunt and fish in waters subject to the public right of navigation.”).
- NC: *Collins v. Benbury*, 25 N.C. (3 Ired.) 277 (1842)(“To such an action it is a good plea, that being a navigable water, every citizen of the state of right has liberty and privilege of fishing.”); *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527, 369 S.E.2d 825 (1988)(State permit for shellfishing required, although “benefit and enjoyment of North Carolina’s submerged lands is available to all its citizens, subject to reasonable legislative regulation, for ... fishing and commerce.”). *See also* N.C. GEN. STAT. § 1-45.1 (Supp. 1989)(Land subject to public trust rights, including fishing, may not be obtained through adverse possession).
- PA: *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 47 A. 745 (1901)(Public rights of fishing, among others, override individual rights in use of private land for private purposes).
- SC: OP. ATTY GEN. 329, 334 (Dec. 10, 1970)(“The position of the State of South Carolina is that these tidelands, submerged lands and navigable waters are trust property,...to be held by the State for the benefit of the public at large for the development of fishing, recreation, navigation and other public purposes.”).
15. Fowling is a natural incident of the public right to use trust lands and waters.
- MA: *Opinion of the Justices*, 383 Mass. 895, 902-03, 424 N.E.2d. 1092 (1981)(“[U]ntil there has been a lawful filling of flats, the littoral owner owns them subject at least to the reserved rights of fishing, fowling, and navigation.”). *See also West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158, 165 (1863).
- MD: *Delmarva Power & Light Co. of Md. v. Eberhard*, 247 Md. 273, 276-77, 230 A.2d 644 (1967)(“There are...public rights which can be classed as public easements, such as the right in the general public of navigation on the waters of a stream or lake, whether the bed is privately or publicly owned, the similar right of fishing and hunting over navigable waters (sometimes restricted to waters publicly owned).”).

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- ME: *Bell v. Town of Wells*, 557 A.2d 168 (1989)(Public easements granted by Colonial Ordinance over intertidal land otherwise privately held limited to fishing, fowling and navigation).
- NH: *Hartford v. Gilmanton*, 101 N.H. 424, 146 A.2d 851 (1958)(Public may exercise common law right to ... fowl ... in and on the public waters for the state); *Whitcher v. State*, 87 N.H. 405, 181 A. 549 (1935)(Public rights of fishing, fowling, ... cannot be taken by prescription.)
- NC: *Swan Island Club v. White*, 114 F.Supp. 95 (E.D.N.C. 1953)(*aff'd sub nom Swan Island Club. v. Yarbrough*, 209 F.2d 698 (4th Cir. 1954)(Hunting is included among protected public trust uses); N.C. GEN. STAT. §1-45.1 (Public trust rights defined as those established by common law, including "the right to navigate, swim, hunt, fish and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches.").
16. Shellfishing is a natural incident of the public right to use trust lands and waters.
- CT: *Peck v. Lockwood*, 5 Day 22, 27 (1811)("The right of [shell]fishing in such a place where there is flux and reflux of the sea, is a right common to every citizen, although the soil be the estate of a particular person.").
- FL: *State ex rel Ellis v. Gerbing*, 56 Fla. 603, 613, 47 So. 353 (1908)("The statute provides that ... natural or maternal oyster beds shall remain free for the use of citizens of this state.").
- MA: *Weston v. Sampson*, 62 Mass. (8 Cush.) 347 (1851)(digging for clams is an exercise of the reserved public right of fishing).
- VA: VA. CONST. Art. XI, § 3 ("The natural oyster beds, rocks and shoals in the waters of the Commonwealth shall not be leased, rented or sold, but shall be held in trust for the benefit of the people of the Commonwealth.").
17. The public right of fishing has been closely related by the courts to the public right of navigation.
- CA: *Bohn v. Albertson*, 107 Cal. App.2d 738, 752, 238 P.2d 128 (1951)(Private land covered by flood waters held subject to public's right of navigation and fishing, provided public obtains access to flooded area without trespassing on private land).
- ID: *Southern Idaho Fish and Game Ass'n v. Picabo Livestock Co.*, 96 Idaho 360, 361, 528 P.2d 1295 (1974)(Fishing recognized as incident of navigation).

- NY: *People v. Johnson*, 7 Misc.2d 385, 388, 166 N.Y.S.2d 732 (1957)(“At common law, the public ordinarily had the right to hunt and fish in waters subject to the public right of navigation.”).
- OR: *Cook v. Dabney*, 70 Or. 529, 532, 139 P. 721 (1914)(“It is true that upon admission of the state into the Union it was vested with the title to the lands under the navigable waters, subject, however, at all times to the rights of navigation and fishery.”).
18. Numerous claims of exclusive fishing rights of upland owners owning the bottomlands of navigable lakes and rivers have been defeated on public trust grounds.
- AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1121 (1988)(“[Tideland patentees] are entitled to make use of the fisheries at [the patent site], but they are prohibited [on public trust grounds] from excluding other members of the public who seek to do the same.”).
- CA: *Bohn v. Albertson*, 107 Cal. App.2d 738, 752, 238 P.2d 128 (1951)(Private land covered by flood waters held subject to public’s right of navigation and fishing, provided public obtains access to flooded area without trespassing on private land).
- DE: *Bickel v. Polk*, 5 Del. 325, 326 (1851)(“The public have the right to take fish below high water mark, though upon soil belonging to the individual, and would not be trespassers in so doing.”).
- ID: *Southern Idaho Fish and Game Ass’n v. Picabo Livestock Co.*, 96 Idaho 360, 361, 528 P.2d 1295 (1974)(“Silver Creek was a public highway up to the highwater mark and ... members of the public have the right to use the waters of Silver Creek and the beds, channels and banks there of ... up or downstream ... to exercise the incidents of navigation- ... fishing.”).
- MI: *Attorney General ex rel. Director of Conservation v. Taggart*, 306 Mich. 432, 443, 11 N.W.2d 193 (1943)(“This stream being navigable, defendants’ ownership of the bed is subject to public right of fishing therein.”).
- NC: *State v. Glen*, 52 N.C. 321 (1859)(The right to harvest fish in waters where the bed is privately owned belongs exclusively to the owner of the bed). By statute, however, the public now has a right to fish in all natural waters of the State’s streams and rivers. See N.C. GEN. STAT. § 113-129(11), (17) and 113-131(a)(1989)(“The marine and estuarine and wildlife resources of the State belong to the people of the State as a whole.”). This expanded public trust jurisdiction was judicially recognized in *Springer v. Joseph Schlitz Brewing Co.*, 510 F. 2d 468 (4th Cir. 1975).

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PA: *Carson v. Blazer*, 2 Binn. 475 (1810)(“The cases cited on the argument abundantly show, that every man may of common right fish with lawful nets in a navigable river; that the proprietors of the land on each side have not the exclusive right of fishery therein, but that the fishery is common and public.”).

WI: *Willow River Club v. Wade*, 100 Wis. 86, 102-03, 76 N.W. 273 (1898)(“Fish in the stream were not the property of the [riparian owner] any more than the birds that flew over its land.” Thus, although the riparian owner owned the bottomland of a navigable stream, “defendant was not guilty of trespass by going upon [the stream], as he did, catching the fish in question.”).

19. *Willow River Club v. Wade*, 100 Wis. 86, 102-103, 76 N.W. 273 (1898).

20. The State, in its sovereign capacity, holds title to the fish within trust waters in the State for the benefit of the people.

US: *Douglas v. Seacoast Products*, 431 U.S. 265, 284-5 (1977)(“A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of “owning” wild fish, birds or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. ... The “ownership” language of such cases must be understood as no more than a Nineteenth Century legal fiction expressing the “importance to its people that a State have power to preserve and regulate the exploitation of an important resource.” ... Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and the Constitution.” Citations omitted.) This case draws into question the validity of the progeny of cases following *Geer v. Connecticut*, 161 U.S. 519, 529 (1896)(Following the English common law, the court held that “ownership” of fish and game is in the State not in a proprietary sense but in its sovereign capacity, and must be exercised “as a trust for the benefit of the people.” Citing *Martin v. Waddell*, 41 U.S. 366, for the proposition that the “ownership is that of the people in their united sovereignty.”). *Geer* was also expressly overruled by *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

CA: *People v. Monterey Fish Products Co.*, 195 Cal. 548, 563 (1925)(“The title to the property in the fish within the waters of the State are vested in the State of California and held by it in trust for the people of the state.”); *People v. K. Houden Co.*, 215 Cal. 54, 56 (1932)(“The property right in the fish of our waters is in the State in trust for the whole people.”); *People v. Glenn Colusa Irr. Dist.*, 15 P.2d 549, 552 (1932)(“The title to the property in the fish within the waters of the State are vested in the State of California and held by it in trust for the people of the state.”).

- FL: *State v. Stoutamire*, 131 Fla. 698 (1936)(The ownership of fish “is in the State, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common.”). See also *Nash v. Vaughn*, 133 Fla. 499 (1938).
- MA: *Commonwealth v. Algier*, 61 Mass. 53, 98 (1851)(Public rights in navigable waters include the right of the public to preserve fishery resources for the benefit of the people). See also *Commonwealth v. Chapin*, 22 Mass. (5 Pick.) 199 (1827).
- NY: *Lawton v. Steele*, 119 N.Y. 226, 234 (1890) *aff'd* 152 U.S. 133 (1894)(“It has become a settled principle of public law that power resides in the several states to regulate and control the right of fishery in public waters within their respective jurisdictions.”); *Sloup v. Town of Islip*, 78 Misc.2d 366, 356 N.Y.S.2d 742, 745 (1974)(“Migratory marine fish are *ferae naturae* and are the property of the state... . Fishing in navigable waters or in ‘arms of the sea is presumptively common to the public.”).
- NC: *State v. Gallop*, 126 N.C. 979, 983 (1900)(“Wild game within a State belongs to its people in their collective sovereign capacity.”).
- OR: *State v. Hume*, 52 Or. 1, 5, 95 P. 808 (1908)(“It is a generally recognized principle that migratory fish in navigable waters of a state, like game within its borders, are classed as animals *ferae naturae*, the title of which ... is held by the state, in its sovereign capacity for all its citizens[.]”).
- TX: *Stephenson v. Wood* 119 Tex. 564, 569, 34 S.W.2d 246 (1931)(“The fish in the streams and coastal waters of Texas are the property of the State, and no person has any vested property right therein.”); *Dodgen v. Depuglio*, 146 Tex. 538, 209 S.W.2d 588 (1948)(State owns fish within its jurisdiction in its sovereign capacity and no person owns any vested property right in fish).
- WA: *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80 (1936)(“[W]hile the state owns the fish in its waters in a proprietary capacity, it nevertheless holds title thereto as trustee for all the people of the State and for the common good ...”).
- WI: *Willow River Club v. Wade*, 100 Wis. 86, 102-103, 76 N.W. 273 (1898)(“Fish in the stream were not the property of the [riparian owner] any more than the birds that flew over its land.” Thus, although the riparian owner owned the bottomland of a navigable stream, “defendant was not guilty of trespass by going upon [the stream], as he did, catching the fish in question.”).
21. *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1855).

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OR: *Monroe v. Withycombe*, 84 Or. 328, 335, 165 P. 227 (1917) (“In the exercise of its police power and for the welfare of all its citizens, the state can regulate or even prohibit the catching of fish.”).

22. Privately held rights (e.g. a license or lease) to a fishery may revert back to the public if these rights are not continuously exercised.

HI: See HAWAII REV. STAT. § 187A-23.

LA: LA. REV. STAT. ANN. § 56:430 (West 1987) (One condition of an oyster lease is that the lessee place one tenth of the leased area under cultivation each year. Failure to do so is cause for cancellation of the lease. Otherwise, there is no requirement that the lease be worked).

MD: MD. NAT. RES. CODE ANN. § 4-11A-07(c)(3) (Supp. 1988) (“[I]f a leaseholder fails to actively utilize leased bottom in accordance with regulations ... the leasehold shall revert to the state and may be leased again.”).

MS: MISS. CODE ANN. § 49-15-27(6) (1972) (The Commission on Wildlife Conservation is authorized to lease waterbottoms for oyster cultivation for a term of one year with a right to renew “so long as lessee actively cultivates and gathers oysters.”).

NY: N.Y. ENVTL. CONSERV. LAW § 13-0311 (consol. 1984) (In the marine and coastal district, the State is authorized to issue permits for off-bottom and on-bottom cultures of marine life, which expire on December 31 of the year of issue).

TX: TEX. PARKS & WILD. CODE ANN. § 76.018 (Vernon 1976) (“If oysters from the location are not sold or marketed within five years from the date of establishment of the location, the lease is void.”).

VA: VA. CODE § 28.1-109(16)(17) (Supp. 1988) (Where subaqueous bottom is leased for oyster grounds, the ground becomes vacant and open to assignment when annual rent is not paid).

WA: WASH. REV. CODE 79.96.060 (“[I]f at any time after the granting of said lease, the lands described therein shall cease to be used for the purpose of oyster beds, clam beds, or other edible shellfish beds, they shall thereupon revert to ... the state ...”).

23. Privately held rights (e.g. a license or lease) to a fishery may revert back to the public if the license or lease is unlawfully registered.
- HI: *Bishop v. Mahiko*, 35 Haw. 608 (1940)(Reversion of fishing ground for failure to adjudicate title when Hawaii became territory of United States does not amount to an impermissible taking).
- TX: TEX. PARKS & WILD. CODE ANN. § 76.017(d) (Vernon 1976)("The failure to pay any rental when due terminates the [oyster] lease.").
24. *Arnold v. Mundy*, 6 N.J.L. 1, 12 (1821). Emphasis added.
- CA: *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521; 606 P.2d 362, 162 Cal. Rptr. 327 (1980)("Although early cases expressed the scope of the public's rights in tidelands as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader.").
- MN: *Lamprey v. Metcalf*, 52 Minn. 181, 200, 53 N.W. 1139 (1893)(Public uses of trust waters are allowed "when suitable for use by a group of people having a common interest:... purposes which cannot be enumerated or anticipated.").
25. CL: English common law did not regard bathing as a public right. See *Blundell v. Catteral*, 5 B. & Ald. 26, 106 Eng. Rep. 1190 (1821).
- CA: *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521; 606 P.2d 362, 162 Cal. Rptr. 327 (1980)("Although early cases expressed the scope of the public's rights in tidelands as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader").
- CT: *Orange v. Resnick*, 94 Conn. 573, 578, 109 A. 864 (1920)("Public rights [include] fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge and of passing and repassing...").
- ID: *Southern Idaho Fish & Game Ass'n v. Picabo Livestock Co.*, 96 Idaho 360, 362, 528 P.2d 1295 (1974)(Protected public rights include not only statutory incidents of fishing, but also "boating, swimming, hunting and all recreational purposes.").
- MA: *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158, 167 (1863)("It would scarcely be necessary to mention bathing, or the use of the waters for washing, or watering cattle, preparation of flax, or other agricultural uses, to all which uses a large body of water, devoted to the public enjoyment, would usually be applied.").

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- NH: *Hartford v. Gilmanton*, 101 N.H. 424, 426, 146 A.2d 851 (1958) (“Any member of the public may exercise a common law right to boat, bathe, fish, fowl, skate and cut ice in and on its public waters.”)(quoting *Whitcher v. State*, 87 N.H. 405, 409, 181 A. 549 (1935)).
- NJ: *Matthews v. Bay Head Improvement Ass’n*, 95 N.J. 306, 312, 471 A.2d 355 (1984) (“The public’s right to use the tidal lands and water encompasses navigation, fishing and other recreational uses, including bathing, swimming, and other shore activities.”); *Arnold v. Mundy*, 6 N.J.L 1, 12 (1821) (“[T]he navigable rivers, where the tide ebbs and flows, the ports, the bays, the coasts of the sea ... for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water...are common to all people...”).
- NY: *Tucci v. Salzhauer*, 40 A.D.2d 712, 713, 336 N.Y.S.2d 721 (1972) (“When the tide is in [the public] may use the water covering the foreshore for boating, bathing, fishing and other lawful purposes; and when the tide is out, they may pass and repass over the foreshore as a means of access to reach the water for the same purposes and to lounge and recline thereon.” These rights specifically include pushing a baby stroller along the foreshore), *aff’d* 33 N.Y.2d 854, 307 N.E.2d 256, 352 N.Y.S.2d 198 (1973).
- NC: N.C. GEN. STAT. §1-45.1 (Public trust rights “include, but are not limited to, the right to navigate, swim, fish, hunt, and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State’s ocean and estuarine beaches and public access to the beaches.”).
- RI: *New England Naturist Ass’n v. Larsen*, 692 F. Supp. 75 (D.R.I.) 1988 (While [Art. I, §17 of the Rhode Island Constitution] confers upon nude bathers the right to use a beach area, that right extends only to the area below the mean high-tide line and recognized points of access thereto).
26. The gathering of seaweed is recognized as a natural incident of the public right to use trust lands and waters in at least one State.
- CT: *Mather v. Chapman*, 40 Conn. 382, 401 (1873) (“Seaweed cast and left upon the shore, that is, between ordinary high water and low water mark, belongs to the public, and may lawfully be appropriated by the first occupant.”); *Church v. Meeker*, 34 Conn. 421, 433 (1867)(If cast by the sea below high water mark, “[sea]weed ... belongs to no one, and the owner may justly as well as equitably be deemed the first occupant.”); *Chapman v. Kimball*, 9 Day 38, 42 (1831) (“Seaweed below low water mark held to be public property and not that of owner of abutting land.”).

27. The gathering of seaweed has been expressly rejected in one State as a natural incident of the public right to use trust lands and waters.
- NY: *People v. Brennan*, 142 Misc. 225, 228, 255 N.Y.S. 331, 335 (1931) (“It has long been settled law that the public cannot gather seaweed from the foreshore.”).
28. Ice cutting can be viewed as an outdated, though traditional public trust use of frozen navigable waters.
- MA: *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. 158, (7 Allen) 171 (1863) (“The cutting of ice is but one of the uses to which the water of the pond may be lawfully applied ... [is] lawful and free upon these ponds, to all persons who own land adjoining them, or can obtain access to them without trespass, so long as they do not interfere with the reasonable use of the ponds by others...”); *Cummings v. Barret*, 64 Mass. (10 Cush.) 186, 188 (1852) (“[A]ll great ponds are declared public ...” and are thereby subject to public rights for reasonable uses including supplying ice houses and delivery to neighbors).
- NH: *Hartford v. Gilmanton*, 101 N.H. 424, 146 A.2d 851 (1958) (Public trust uses include “to ... skate and cut ice.”); *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 30 (1889) (Riparian owner’s right to take ice is not exclusive of the public, although a riparian owner may be in a better position to exercise the public right of cutting and gathering ice).
29. ME: *Wilson & Son et al. v. Harrisburg*, 107 Maine 207, 215 (1910) (“The right to take ice ... results from and grows out of the title to the bed of the stream. ... The plaintiff therefor has the sole right to take ice from the water resting on his land.” *Stevens v. Kelley*, 78 Maine 445. This is the settled doctrine of this State.”).
- WI: *Reysen v. Roate*, 92 Wis. 543, 544, 66 N.W. 599 (1896) (“Ice which forms on streams or ponds the bed of which is subject to private ownership belongs to the owner of such bed...”); *Gadow v. Hunholz*, 160 Wis. 293, 296, 151 N.W. 810 (1915) (“It is recognized that the title to ice formed on streams and ponds and which is subject to private ownership belongs to the owner of the bed.”). The public has the right to cut and remove ice from navigable lakes. *See also Rossmiller v. State*, 114 Wis. 169, 89 N.W. 839 (1902); *Abbot v. Cremer*, 118 Wis. 377, 95 N.W. 387 (1903).
30. Sax, *The Public Trust Doctrine and Natural Resource Law*, 68 Mich. L. Rev. 471, 476 (1970) (quoting R. Hall, *Essay on the Rights of the Crown and the Privileges of the Subject in the Seashores of the Realm* (2d Ed. 1875) at 106.
31. *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077 (D.C. Cir. 1984). *See also Shively v. Bowlby*, 152 U.S. 1, 26 (1894) (The public trust doctrine is not fixed in its

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form among the various states as “there is no universal and uniform law upon the subject.”).

32. Several states recognize that the Public Trust Doctrine must remain sufficiently flexible to address changing public needs, so that application of the trust does not hinder the state by continuing to favor outdated uses over more modern ones.

CA: *Marks v. Whitney*, 6 Cal.3d 251, 259-260, 491 P.2d 374, 380, 98 Cal. Rptr.790, 796 (1971)(“The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs.”); *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521, 162 Cal. Rptr. 327, 606 P.2d 362 (1980)(“Although early cases expressed the scope of the public’s rights in tidelands as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader ...”); *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709, 719, 189 Cal. Rptr. 346, 356 (1983)(“The very purposes of the public trust doctrine have evolved in tandem with the changing public perception of the values and uses of waterways.”).

IL: *People ex rel. Scott v. Chicago Park District*, 66 Ill. 2d 65, 78, 360 N.E.2d. 773 (1976)(“[I]t may be pointed out that in considering what is the public interest, courts are not bound by inflexible standards.”).

MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 512 (Miss. 1986)(“Suffice it to say that the purposes of the trust have evolved with the needs and sensitivities of the people - and the capacity of the trust properties through proper stewardship to serve those needs.”). *See also Ryals v. Pigott*, 580 So.2d 1140, 1150 (Miss. 1990); *Secretary of State v. Wiesenberg*, 633 So.2d 983, 994 (Miss. 1994).

NJ: *Matthews v. Bay Head Improvement Ass’n*, 95 N.J. 306, 326, 471 A.2d 355, 365 (1984)(Doctrine is not “fixed or static” but one to “be molded and extended to meet changing conditions and needs of the public it was created to benefit.”). *See also Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309, 294 A.2d 47, 54 (1972); *Slocum v. Borough of Belmar*, 569 A.2d 312, 316, 238 N.J.Super. 179 (1989).

NC: N.C. GEN. STAT. §1-45.1 (Public trust rights “are established by common law as interpreted by the courts of this State.”).

OH: OHIO REV. CODE ANN. § 1506.10 (Page Supp. 1988)(Public trust lands held “for the public to which they may be adapted.”).

OR: *State ex rel Thornton v. Hay*, 254 Or. 584, 462 P.2d 671, 679 (1969)(“The law regarding the public use of property held in part for the benefit of the public must change as the public need changes.”)(Judge Denecke, concurring).

- VT: *State of Vermont and City of Burlington v. Central Vermont Railway*, 153 Vt. 337, 571 A.2d 1128 (1989) (“Despite its antediluvian nature, however, the public trust doctrine retains an undiminished vitality. The doctrine is not fixed or static, but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit.”)(citations omitted).
- WI: *State v. Bleck*, 338 N.W.2d 492, 497-8, 114 Wis.2d 454 (1983) (“Although the doctrine was originally designed to protect commercial navigation, it has been expanded to safeguard the public’s use of navigable waters for purely recreational and non-pecuniary purposes”)(citing *Muench v. Public Service Commission*, 261 Wis. 492, 53 N.W.2d 514 (1952)).
33. *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158, 167 (1863).
- MA: *Slater v. Gunn*, 170 Mass. 501, 514 (1898) (“The uses which the public might make of [Great Ponds] were not limited to those named in the ordinance or in the Body of Liberties. ... The ponds, like any other property, could be applied to such uses as from time to time they became capable of.”).
- MN: *Lamprey v. Metcalf*, 52 Minn. 181, 200, 53 N.W. 1139 (1893)(Public uses of trust waters are allowed “when suitable for use by a group of people having a common interest:... purposes which cannot be enumerated or anticipated.”).
34. *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 460 (1892).
35. Some State courts have been reluctant to extend protection to “new” public uses of trust lands and waters if it would impair any of the traditional rights of commerce, navigation or fishing.
- FL: *Adams v. Elliott*, 128 Fla. 79, 87, 174 So. 731 (1937)(The beach is held in trust by the State for primary purposes of navigation, commerce, fishing and bathing, but it “is also held for other purposes authorized by law when primary purposes are not excluded or unduly abridged or burdened.”).
- MA: *Opinion of the Justices*, 365 Mass. 681, 687-88, 313 N.E.2d 561 (1974) (“We are unable to find any authority that the rights of the public include a right to walk on the beach ... The rights of the public though strictly protected have also been strictly confined to fishing, fowling, and navigation.”); *Barry v. Grela*, 372 Mass. 278, 361 N.E.2d 1251 (1977)(Right to walk on tideland in order to fish held not to be trespass because this is incidental to traditional right of fishing).

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36. Courts often have resorted to whether the public use is really a new use, or rather merely an "incidental" use of commerce, navigation or fishing.

MI: *Attorney General ex rel. Comm'r v. Taggart*, 306 Mich. 432, 442, 11 N.W.2d 193 (1943)(The stocking of fish at public expense is incidental to use of fishing).

MN: *Lamprey v. Metcalf*, 52 Minn. 181, 199-200, 53 N.W. 1139 (1893)(Because recreational use is, for most intents and purposes, indistinguishable from commercial boating, it is a protected public use in its many forms, even those "which cannot be enumerated or anticipated.").

WA: *Caminiti v. Boyle*, 107 Wash.2d 662, 669, 732 P.2d 989 (1987), *cert. denied* 108 S. Ct. 703 (1988)(Fishing, boating, skiing, swimming and recreational uses are incidental to public right of navigation).

37. Preservation is clearly related to the trust lands and waters resource value of providing food, wildlife habitat and scientific study.

CA: *Marks v. Whitney*, 6 Cal.3d 251, 259, 491 P.2d 374, 98 Cal. Rptr. 790 (1971)("[O]ne of the most important public uses of the tidelands ... is the preservation of these lands in their natural state ...").

WA: *Orion Corporation v. State*, 109 Wash.2d 621, 661, 747 P.2d 1062 (1987)("[T]he public has an intense interest in prohibiting tideland uses that would endanger the ecological environment or threaten the ... commercial fishing industry ...").

38. Several older cases have recognized the public's traditional use of the shorelands and waters for uses that are non-commercial in nature.

MA: *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158, 167 (1863)("It would scarcely be necessary to mention bathing, or the use of water for washing, or watering cattle ... the uses which may be made of the water of ponds in Massachusetts ... have never been judicially determined ... The devotion to public uses is sufficiently broad to include them all as they arise."); *Attorney General v. Woods*, 108 Mass. 436, 440 (1871)("If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purposes of trade or agriculture.").

TX: *Welder v. State*, 196 S.W. 868, 873 (Tex. Civ. App.-Austin 1917, writ ref'd)(Legal navigability of a lake may be established by "pleasure boating").

39. At least one State expressly excludes recreation as a recognized public trust right.

ME: *Bell v. Town of Wells*, 557 A.2d 168, 169 (1989)(Public use permitted "only for fishing, fowling, and navigation (whether for recreation or business)...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.”).

40. The right of the public to use trust lands and waters for recreational purposes has come to be specifically established in many states.

US: *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 414 (1842)(Rights in public trust land carry over from colonial days and “the men who first formed the English settlements [could] even bathe in its waters without becoming a trespasser upon the rights of another.”).

AK: *See* § 1(c), ch. 82, S.L.A. 1985 (Alaska Statutes, Temporary and Special Acts and Resolves 1985).

CA: *State of California v. Superior Court (Lyon)* 29 Cal.3d 210, 229, 625 P.2d 239, 172 Cal. Rptr. 699 (1981)(“[L]ands lying between the low and high watermarks of lake are owned by littoral property owners subject to a “trust” interest held by the State for the benefit of the public for purposes of ... recreation”); *National Audubon Society v. Superior Ct.*, 33 Cal.3d 419, 435, 658 P.2d 709, 189 Cal. Rptr. 49 (1983)(“The principle values the plaintiff seeks to protect, however, are recreational and ecological—the scenic views of the lake and its shore, the purity of the air, and the use of the lake for the nesting and feeding by birds. Under *Marks v. Whitney*, 6 Cal. 3d 251 [491 P.2d 374, 98 Cal. Rptr. 790] (1971), it is clear that protection of these things is among the purposes of the public trust.”).

CT: *Orange v. Resnick*, 94 Conn. 573, 578, 109 A. 864 (1920)(“Public rights [include] fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge and of passing and repassing...”).

HI: HAWAII REV. STAT. § 190D-11(d)(i)(1989)(Applications for submerged land leases to take into account “[t]he extent to which the proposed activity may have a significant adverse effect upon any existing private industry or public activity, including the use of state marine waters for the purposes of navigation, fishing and public recreation[.]”). *See also* HAWAII REV. STAT. Chapter 115.

ID: *Southern Idaho Fish & Game Ass’n v. Picabo Livestock Co.*, 96 Idaho 360, 362, 528 P.2d 1295 (1974)(Protected public rights include not only statutory incidents of fishing, but also “boating, swimming, hunting and all recreational purposes.”).

MA: *Attorney General v. Woods*, 108 Mass. 439, 440 (1871)(“Navigable streams are highways; and a traveller for pleasure is as fully entitled to protection in using a public way...as a traveller for business.”).

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- MD: MD. NAT. RES. CODE ANN. § 9-102 (1983)(Statement of public policy of wetlands protection in order to prevent the elimination of or substantial reduction of “maritime commerce, recreation and aesthetic enjoyment.”).
- MI: Great Lakes Submerged Lands Act, M.C.L.A. 324.32502 (Protected uses include hunting, fishing, swimming, pleasure boating and navigation).
- MS: *Treuting v. Bridge & Park Commission of City of Biloxi*, 199 So.2d 627, 632-33 (1967)(Recreational activities recognized as included within public trust rights).
- NH: *State v. Sunapee Dam Co.*, 70 N.H. 458, 460, 50 A. 108 (1900)(“[I]n this state lakes, large natural ponds, and navigable rivers are owned by the people, and held in trust by the state in its sovereign capacity for their use and benefit, such uses are not limited to navigation and fishery, but include all useful and lawful purposes.”).
- NJ: *Mathews v. Bay Head Improvement Ass’n*, 95 N.J. 306, 312, 471 A.2d 355 (1984)(“The public’s right to use the tidal lands and waters encompasses navigation, fishing, and recreational uses, including bathing, swimming, and other shore activities.”); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309, 294 A.2d 47 (1972)(“We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogative of navigation and fishing...”); *Arnold v. Mundy*, 6 N.J.L 1, 12 (1821)(Public trust lands held in trust for public “passing and repassing, navigation, fishing, fowling, sustenance, and all other uses of the water ... each has a right to use them according to his pleasure.”).
- NY: *Tucci v. Salzhauer*, 40 A.D.2d 712, 713, 336 N.Y.S.2d 721 (1972) *aff’d* 33 N.Y.2d 854, 307 N.E.2d 256, 352 N.Y.S.2d 198 (1973)(“When the tide is in [the public] may use the water covering the foreshore for boating, bathing, fishing and other lawful purposes; and when the tide is out, they may pass and repass over the foreshore as a means of access to reach the water for the same purposes and to lounge and recline thereon.”).
- NC: *Gwathmey v. State of North Carolina*, 342 N.C. 287, 300, 464 S.E.2d 674 (1996)(“If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture.”); *State v. Baum*, 128 N.C. 600, 604, 38 S.E. 900 (1901)(“[T]he public have the right to the unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are in their natural condition capable of such use.”). *See also* N.C. GEN. STAT. §1-45.1 (Public’s trust rights “include, but are not limited to, the right to navigate, swim, fish, hunt and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State’s ocean and estuarine beaches and public access to the beaches.”).

- OH: *Mentor Harbor Yacht Club v. Mentor Lagoons*, 170 Ohio St. 193, 200, 163 N.E.2d 373 (1959) (“We are in accord with the modern view that navigation for pleasure and recreation is as important in the eyes of the law as navigation for a commercial purpose.”); OHIO REV. CODE ANN. § 1506-10 (Page Supp. 1989)(Public trust lands held in trust by state for any of “the public uses to which they may be adapted.”).
- OR: OR REV. STATE. § 196.825(2)(1989)(“[P]roposed fill should not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation.”).
- SC: OP. ATTY GEN. 329, 334 (December 10, 1970)(“The position of the state of South Carolina is that these tidelands, submerged lands and navigable waters are trust property, ... to be held by the State for the benefit of the public at large for the development of fishing, recreation, navigation, and other public purposes.”).
- TX: TEX. NAT. RES. CODE ANN. § 33.001(c)(Vernon 1978)(“Uses which the public at large may enjoy and in which the public at large may participate shall take priority over those uses which are limited to fewer individuals.”); TEX. NAT. RES. CODE ANN. § 66.011 (Vernon 1978)(“It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state owned beaches...”).
- VA: VA. CODE ANN. § 62.1-1 (1987)(“All the beds of the bays, rivers, creeks and the shores of the sea...not conveyed by special grant or compact according to law, shall continue and remain the property of the Commonwealth of Virginia, and may be used as a common by all the people of the State for the purpose of fishing and fowling, and of taking and catching oysters and other shellfish...”); *Boerner v. McCallister*, 197 Va. 169, 174, 89 S.E.2d 23 (1955)(Where the beds are privately owned, “there is persuasive authority to the effect that even though a stream may be floatable, and in some situations navigable, the public interest therein is limited to the right of navigation.”).
- VI: V.I. CODE ANN. tit. 12, § 401 (1975)(“The sea has long dominated the history of the Virgin Islands...It has also been a constant source of food and recreation. The threshold to the sea that surrounds us is the shoreline. The shorelines of the Virgin Islands have in the past been used freely by all residents and visitors alike. The seashore has been a place of recreation, of meditation, of physical therapy and of rest to Virgin Islanders past and present...It is the intent of the Legislature to preserve what has been a tradition and to protect what has become a right of the public.”).

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WA: *Wilbour v. Gallagher*, 77 Wash.2d 306, 316, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970)("[Private submerged] land is subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes ...").

WI: *State v. Bleck*, 114 Wis.2d 454, 465, 338 N.W.2d 484 (1983)(The public trust doctrine "has been expanded to safeguard the public's use of navigable waters for purely recreational and non-pecuniary purposes."); *Nekoosa-Edwards Paper Co. v. Railroad Commission*, 201 Wis. 40, 46, 228 N.W. 144 (1929)(Public may use navigable waters for "hunting, fishing, or pleasure boating."). *See also Village of Menomonee Falls v. Wisconsin Department of Natural Resources*, 412 N.W.2d 505, 140 Wis.2d 579 (1987).

41. Recreational fishing, bathing, nude bathing, surfing, swimming, even pushing a baby carriage along the public trust shores, have been recognized as public recreational rights in lands and waters subject to the public trust.

US: *U.S. v. Kane*, 461 F. Supp. 554, 559 (E.D.N.Y. 1978)(Land held to be in the public trust to ensure "a wide sharing of life's amenities."); *Swan Island Club v. White*, 114 F. Supp. 95 (E.D.N.C. 1953)("If the right to fish exists, the right to hunt exists also" over such waters, even if recreational hunting), *aff'd sub nom. Swan Island Club v. Yarborough*, 209 F.2d 698 (4th Cir. 1954). *See also Martin v. Wadell*, 41 U.S. 367 (1842).

AK: *See* 1982 OP. ATTY GEN. Informal Op. Alaskan Att'y Gen. (April 30, 1984).

CA: *People ex rel Baker v. Mack*, 19 Cal.App.3d 1040, 1045, 97 Cal. Rptr. 448 (1971)("It hardly needs citation of authorities that the rule is that a navigable stream may be used by the public for boating, swimming, fishing, hunting and for all recreational purposes.").

CT: *State v. Brennan*, 3 Conn. Cir. Ct. 413, 416, 216 A.2d 294, 296 (1965)("It is settled in Connecticut that the public has the right to boat, hunt and fish on the navigable waters of the state...").

FL: *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 608-09, 47 So. 353 (1908)("The navigable waters in the States and the lands under such waters including the shore or lands between ordinary high and low water marks, are the property of the States ... for the use of all the people of the States respectively, for purposes of navigation, commerce, fishing, and other useful purposes afforded by the waters in common to and for the people of the States.").

HI: *See* HAWAII REV. STAT. Chapter 115.

- MN: *Nelson v. Delong*, 213 Minn. 425, 431, 7 N.W.2d 342, 346 (1942)(“The State ... as trustee for the people, holds all navigable waters and the lands under them for public use. Public use comprehends not only navigation by water craft for commercial purposes, but the use also for the ordinary purposes of life such as boating, fowling, skating, bathing, taking water for domestic and agricultural purposes, and cutting ice.”).
- NH: *Hartford v. Gilmanton*, 101 N.H. 424, 146 A.2d 851 (1958)(“Any member of the public may exercise a common law right to boat, bathe, fish, fowl, skate and cut ice in and on its public waters.”)(quoting *Whitcher v. State*, 87 N.H. 405, 409, 181 A. 549 (1935)).
- NJ: *Arnold v. Mundy*, 6 N.J.L. 1, 12 (1821)(Navigable waters held “common to all people” for “purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all other uses of the water ...”); *Matthews v. Bay Head Improvement Ass’n*, 95 N.J. 306, 321, 471 A.2d 355 (1984)(“Extension of the public trust doctrine to include bathing, swimming and other shore activities is consonant with and furthers the general welfare. The public’s right to enjoy these privileges must be respected.”); *Van Ness v. Bourrough of Deal*, 139 N.J.Super. 83, 352 A.2d 599 (1975)(Surfing, *inter alia*, held protected under the Public Trust Doctrine).
- NY: *Tucci v. Salzhauer*, 40 A.D.2d 712, 713, 336 N.Y.S.2d 721 (1972)(“When the tide is in [the public] may use the water covering the foreshore for boating, bathing, fishing and other lawful purposes; and when the tide is out, they may pass and repass over the foreshore as a means of access to reach the water for the same purposes and to lounge and recline thereon.” These rights specifically include pushing a baby stroller along the foreshore), *aff’d* 33 N.Y.2d 854, 307 N.E.2d 256, 352 N.Y.S.2d 198 (1973).
- NC: *Gwathmey v. State of North Carolina*, 342 N.C. 287, 300, 464 S.E.2d 674 (1996)(“If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture.”); *State v. Baum*, 128 N.C. 600, 604, 38 S.E. 900 (1901)(“[T]he public have the right to the unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are in their natural condition capable of such use.”). *See also* N.C. GEN. STAT. §1-45.1 (Public’s trust rights “include, but are not limited to, the right to navigate, swim, fish, hunt and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State’s ocean and estuarine beaches and public access to the beaches.”).
- RI: *New England Naturist Ass’n v. Larsen*, 692 F. Supp. 75 (D.R.I.) 1988 (While [Art. I, §17 of the Rhode Island Constitution] confers upon nude bathers the

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right to use a beach area, that right extends only to the area below the mean high-tide line and recognized points of access thereto).

SC: OP. ATTY. GEN. 329, 334 (December 10, 1970)(“The position of the State of South Carolina is that these tidelands, submerged lands and navigable waters are trust property ... to be held by the State for the benefit of the public at large for the development of fishing, recreation and other public purposes.”).

WA: *Wilbour v. Gallagher*, 77 Wash.2d 306, 316, 462 P.2d 873 (1969)(“[Private submerged] land is subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes ...”), *cert. denied* 400 U.S. 878 (1970); *Caminiti v. Boyle*, 107 Wash.2d 662, 669, 732 P.2d 989(1987)(*Jus publicum* includes the right of “navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.”).

WI: *City of Madison v. Tolzman*, 7 Wis.2d 570, 574, 97 N.W.2d 513, 516 (1959)(“[T]his court has long adhered to the rule that public rights on navigable waters are not restricted to navigation in a strict sense but has recognized the rights of both residents and non-residents to the free use of navigable waters for recreational purposes, such as boating, fishing, swimming, skating, and the enjoyment of scenic beauty as being incidents of navigation.”); *Munninghoff v. Wisconsin Conservation Commission*, 255 Wis. 252, 259, 38 N.W.2d 714-716 (1949)(“In general, the rights of the public to the incidents of navigation are boating, bathing, fishing, hunting and recreation.”).

42. Some states have broadened the rights of the public by establishing public rights in “recreational uses.”

MS: *Treuting v. Bridge & Park Commission of City of Biloxi*, 199 So.2d 627 (1967)(Case discusses Mississippi statute which allows lease or sale of public lands only when sales or lease would not adversely affect public’s recreational uses). *See also* MISS. CODE ANN. § 49-27-8 (1989)(“Swimming, hiking, boating, or other recreation” a traditional protected use and permit requirement does not apply).

OR: OR. REV. STAT. § 196.825(2)(1989)(“[Filling must not interfere with the] paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation.”).

SC: 1970 OP. S.C. ATTY. Gen. 329.334 (December 10, 1970)(“The position of the State of South Carolina is that these tidelands, submerged lands and navigable waters are trust property ... to be held by the State for the benefit of the public at large for the development of fishing, recreation and other public purposes.”).

43. At least one state court has broadened the rights of the public by establishing public rights in tourism.
- MS: *Treuting v. Bridge & Park Commission of City of Biloxi*, 199 So.2d 627 (1967)(Sale or lease of land to resort developer approved since it was not inconsistent with public's trust rights).
44. *Town of Brookhaven v. Smith*, 188 N.Y. 74, 87, 80 N.E. 665, 670 (1907).
45. *Marks v. Whitney*, 6 Cal.3d 251, 259-60, 491 P.2d 374, 98 Cal.Rptr. 790 (1971).
- AK: See, 1982 OP. ALASKA ATTY. GEN., Informal Op. Alaska Att'y Gen. (April 30, 1984).
- CA: *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521, 606 P.2d 362, 162 Cal. Rptr. 327 (1980)("Although early cases expressed the scope of the public's rights in tidelands as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader, including the right to ... preserve the tidelands in their natural state as ecological units for scientific study."); *State of California v. Superior Court (Lyon)*(1981) 29 Cal.3d 210 [625 P.2d 239, 172 Cal. Rptr. 696] (Lands lying between the low and high watermarks of lake are owned by littoral property owners subject to a "trust" interest held by the State for the benefit of the public for purposes of preservation of the land in its natural state).
- LA: *Save Ourselves v. Louisiana Environmental Control Commission*, 452 So.2d 1152, 1158 (1984)(The Louisiana environmental "regulatory framework is also based on state constitutional provisions and the public trust concept.").
- MI: MCLA § 324.1704 ("The court may grant temporary and permanent equitable relief, or may impose conditions on the defendant that are required to protect the air, water and other natural resources or the public trust therein, from pollution, impairment or destruction.").
- OR: *Saxon v. Division of State Lands*, 31 Or. App. 511, 570 P.2d 1197 (1979)(Public interest best served by retaining salt marsh in unimproved, natural condition).
- SC: S.C. CODE ANN. § 48-39-30 (Law Co-Op 1976)(State policy includes "to protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations.").
- MS: MISS. CODE ANN. § 49-27-3 (Supp. 1989)("It is declared to be the public policy of this state to favor the preservation of the natural state of the coastal wetlands and their ecosystems and to prevent the despoliation and destruction of them ...").

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- WI: *Just v. Marinette County*, 56 Wis.2d 7, 17, 201 N.W.2d 761 (1972)(Public has a right to preserve wetlands because they “serve a vital role in nature ...”).
46. See HAWAII CONST. Art. XI, § 9.
47. *Orion Corporation v. State*, 109 Wash.2d 621, 641, n. 10, 747 P.2d 1062 (1987).
48. *People of the Town of Smithtown v. Poveromo*, 71 Misc.2d 524, 532, 336 N.Y.S.2d 764 (1972)(“The entire ecological system supporting the waterways is an integral part of them and must necessarily be included within the purview of the trust.”), *aff’d in part and rev’d in part on other grounds* 79 Misc.2d 42, 359 N.Y.S.2d 848 (1973).
- WI: *Just v. Marinette County*, 56 Wis.2d 7, 17, 201 N.W.2d 761 (1972)(“Swamps and wetlands were once considered wasteland...but as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature and are essential to the purity of water in our lakes and streams.”).
49. At least three State courts and one federal court have recognized the right of the public to preserve trust lands and waters so as to preserve the scenic beauty of the area.
- US: *Springer v. Joseph Schlitz Brewing Co.*, 510 F.2d 468 (4th Cir. 1975)(Recognizing the right of a riparian owner to the recreational and scenic use and enjoyment of a stream bordering his property).
- CA: *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 435, 658 P.2d 709, 189 Cal.Rptr. 346, (1983)(“it is clear that the protection of [recreational and ecological] values is among the purposes of the public trust.”).
- ID: *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 632, 671 P.2d 1085 (1983)(The Public Trust Doctrine protects “navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty ...”).
- WI: *State v. Trudeau*, 139 Wis.2d 91, 104, 408 N.W.2d 337 (1987)(“The rights Wisconsin citizens enjoy with respect to bodies of water held in trust by the state include the enjoyment of natural scenic beauty...”); *City of Madison v. State*, 1 Wis.2d 252, 258, 83 N.W.2d 674 (1957)(“Enjoyment of scenic beauty has been recognized as one of the public rights in navigable water.”); *Muench v. Public Service Commission*, 261 Wis. 492, 508, 53 N.W.2d 514 (1952)(“...the enjoyment of scenic beauty is a public right to be considered...in making a finding as to whether a permit...shall be issued.”).
50. WI: *City of Madison v. Tolzman*, 7 Wis.2d 570, 574, 97 N.W.2d 513 (1959)(Public has right to enjoyment of scenic beauty as one of the “incidents of navigation.”).

51. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 476 (1988).
52. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 482-483 (1988).
53. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 476 (1988).

CHAPTER IV

**THE PUBLIC TRUST DOCTRINE
AND
ACCESS TO PUBLIC TRUST LANDS AND WATERS**

Summary

With little exception, the Public Trust Doctrine grants no right or privilege to the public for perpendicular access over privately held land to reach public trust lands or waters.

In nearly all States, the Public Trust Doctrine assures the public the right of lateral access along tidelands between the ordinary high and low water lines. A very limited number of States are finding that the public's full exercise and enjoyment of their public trust rights requires limited access to the "dry sand" beach immediately above the ordinary high water line.

In contrast, the right of public access along freshwater shorelands varies considerably State by State. In some States the public has a trust right to access and use freshwater shorelands between the ordinary high and low water marks, even if the bottomland is privately owned, whereas in other States the public has no right of access above the low water mark. In at least one State the public has no right to pass and repass below the ordinary high water mark even when the bottomland is State-owned.

The doctrine of ancient and customary use, a related legal concept to the Public Trust Doctrine, recognizes that the public has a right to use the dry sand area of the ocean beaches if the public has done so since "time immemorial." Several States recognize the doctrine of customary use, and have applied it to certain portions of their beaches.

Claims of trespass by upland owners against members of the public are becoming more common. Complex factual and legal issues arise whether it is a civil trespass case brought by a landowner against a member of the public, or a criminal trespass case brought by a local government against a member of the public.

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A. Perpendicular Access Across Private Land

The nearly universal rule is that the Public Trust Doctrine does not grant the public any right or privilege of perpendicular access by crossing over private land. "The right to fish in public waters does not carry with it a right to cross or trespass upon privately owned land in order to reach the water."¹ A few limited exceptions to this rule can be found. In Vermont it has been held that a person has a right to cross over private land to reach great ponds, which in Vermont are public trust waters, to fish if the land is uncultivated and no damage is done by crossing the land, while in Maine it has been held that a person has a right to use great ponds for trust purposes as long as they can be reached without trespassing.² In Hawaii, 'ancient trails' across private land that existed in 1892, are recognized as public access to the sea.³ In North Carolina, "public access to the beaches" is statutorily included within the definition of "public trust rights,"⁴ although exactly how this access right would be implemented remains unclear.

Most often public rights of perpendicular access across private land are based on theories of custom, implied dedication, prescription, public easement,⁵ or as a condition for either a shoreland development permit,⁶ or a lease of State trust lands.⁷ Rarely is perpendicular access based on the Public Trust Doctrine. A few States do, however, have constitutional provisions that in effect codify the Public Trust Doctrine and operate to provide the public with certain limited perpendicular access rights over private land.⁸

B. Lateral Access Across Public Trust Lands

1. Tidelands

In nearly all States the Public Trust Doctrine provides the public a right to pass and repass over public trust tidelands.⁹ See Ch. III.B.1. However, the public does not have a right of lateral access along the dry sand area above the "ordinary high water mark." See Ch. II, § 2.A. The New Hampshire Supreme Court ruled that pending State legislation that would have given the public the right to use the dry sand beach for trust purposes would constitute a "taking" of private property of the upland owner in violation of State Constitution's prohibition against takings.¹⁰

Nonetheless, a limited but growing number of States have found that the public's full exercise and enjoyment of their public trust rights requires limited access to the dry sand beach immediately shoreward of the intertidal zone.

Confusion occurs in this area because the most common seaward boundary of privately held uplands, the mean high tide line, is often equated with the upper boundary of public trust lands. These two boundaries, however, are not necessarily coterminous. As noted in Chapter III, the Public Trust Doctrine protects the right of the public to use these shorelands for many diverse uses. Public trust tidelands are also described as those lands subject to the ebb and flow of the tide. But by definition, tidal waters at high tide are above the mean high tide line half of the time. When this occurs, the tide water floods a portion of the privately-held uplands, lands that are clearly subject to the ebb and flow of the tide. The question arises as to whether the public's trust rights are terminated for the time that the tide waters are above the mean high tide line and flooding the seaward portion of the privately held uplands.

In response to these questions, several States now recognize limited public rights to use the seaward edge of privately held uplands; *e.g.* above the mean high tide line commonly called the dry sand beach. The extent of the public's right to use the privately owned dry sand beach may take one of two forms: the right to cross in order to gain access to the trust shorelands below mean high tide line, or the right to sunbathe and generally pursue recreational activities on the dry sand beach.

New Jersey case law has clearly articulated the public trust necessity, though not the right, to use the dry sand area. "To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge, if not effectively eliminate, the rights of the public trust doctrine."¹¹ However, "[T]his does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea."¹²

The privately owned dry sand beach in New Jersey may also be subject to the public's right to sunbathe and generally enjoy recreational activities. "Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed."¹³ Thus, "where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner."¹⁴

Several other States rely upon the Public Trust Doctrine to assure public use and access to the sandy shorelands above the mean high tide line in order for citizens to fully exercise and enjoy all of their public trust rights. In Texas, by statute, all parts of the Gulf of Mexico beach between the line of mean low tide and the vegetation line are subject to the public's trust rights, even though this portion of

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the beach is often in private ownership.¹⁵ In North Carolina, the dry sand beach between the mean high tide line and the vegetation line has traditionally been used by the public. In addition, the State's statutory law implicitly recognizes a public trust easement between the mean high tide line and the vegetation line.¹⁶ According to the Washington State Supreme Court, the Public Trust Doctrine recognizes the necessity of granting a person the right to walk across private upland in order to "get around, under and over private docks or wharves erected upon public trust lands."¹⁷ A Florida decision, although appearing to confuse Public Trust Doctrine with other legal theories, recognized the "right of the public to enjoy the dry sand areas as a recreational adjunct of the wet sand or foreshore area."¹⁸ California's Constitution provides that the public's access to the State's trust lands shall not be destroyed or obstructed.¹⁹ "This provision ... has been construed by the State judiciary to permit passage over private land where necessary to gain access to the tidelands."²⁰

The doctrine of ancient and customary use, a related legal concept to the Public Trust Doctrine, recognizes that the public has a right to use the dry sand area of the ocean beaches if the public has done so since "time immemorial." The Oregon Supreme Court rejuvenated the doctrine of customary use in 1969 to find public trust rights in the dry sand beach.²¹ The U.S. Virgin Islands have endorsed custom as a means to preserve traditional access to the dry sand beach. In that instance, the documented use continued from 1923 to 1974, leading the court to find that the landowner's property had "always been subject to the paramount right of the public to use the said beach as established by firmly, well settled, long standing custom."²² Hawaii, Texas and Florida have also recognized that the doctrine of customary use applies to certain portions of their beaches.²³

2. Shorelands of Navigable Freshwaters

Under Roman civil law, the public's right to use the shorelands and banks of a river included activities such as landing boats, tying ropes to trees, and loading and unloading cargo, even though the shorelands were privately owned:

"The public use of the banks of a river is part of the law of nations, just as is that of the river itself. All persons therefore are as much at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and to place any part of their cargo there, as to navigate the river itself. But the banks of the river are the property of those whose land they adjoin; and consequently the trees growing on them are the property of the same persons."²⁴

English common law followed Roman civil law in regards to ownership of the shorelands, *i.e.* the title of riparian owners abutting non-tidal waters extended to the thread of the stream or center of a lake. However, English common law, unlike Roman law, provided that the riparian owner had exclusive use of those waters and bottomlands.

American jurisprudence is split on this point. In some States the public has a trust right of access and use of freshwater shorelands between the ordinary high and low water marks, even if the bottomland is privately owned.²⁵ In other States the rights of the public above the low water mark do not include the right to pass and repass along these shorelands.²⁶ In at least one State the public has no right to pass and repass below the ordinary high water mark even when the bottomland is State-owned.²⁷ This contrasts with the nearly universal holding in tidewater states that the public has a public trust right of access to tidelands below the ordinary high water mark.

The law of several States holds that the public's trust rights are limited to the use of the water, even if the water rises above the ordinary high water mark.²⁸ Access to the navigable freshwater shorelands is not included in the bundle of trust rights in these States.

C. Access by Navigation to Navigable Waters

In general, the public has the right to navigate all tidal waters, and all freshwaters that are recognized as navigable under State law. This public right is not affected by private ownership of the submerged land or bottomland,²⁹ or whether the navigation is for commercial or recreational purposes.³⁰ The public may also fish in navigable waters flowing over privately held bottomland.³¹ State law is in disagreement, however, whether boaters may land on the shores to use the land above the ordinary high water mark.³²

D. Trespass Cases

On occasion an upland owner may challenge a member of the public and attempt to evict that person on grounds of trespass. In States where the riparian boundary extends to the mean or ordinary high water mark, the question arises as to the location of the public/private boundary. In States where the riparian boundary extends to the mean or ordinary low water mark, the factual question of the location of the boundary is joined by the legal question of the right of the public

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to pass and repass on privately held shorelands. In addition, many local governments have ordinances prohibiting trespass on private property, and providing criminal penalties for violations. Upland owners may petition the local government to enforce these ordinances, presenting the government with a difficult factual and legal case.

1. Civil Trespass

In cases where an upland owner seeks civil remedies (e.g., an injunction, declaratory judgment, or recovery of damages) against a trespasser, the location of the boundary must be made on the factual record. See Ch. II, §4. The court will then make the boundary determination, and rule on the respective rights of the parties. Similarly, where a State or local government seeks to enjoin an upland owner from either filling public trust land, or mining out public trust resources (sand and gravel, gold) a court will determine the location of the boundary line and rule on the rights of the parties accordingly.

In 1975, a beach resort in the U.S. Virgin Islands constructed a nine-foot high chain-link and barbed wire fence from the upland across the beach and out 50 feet into the ocean in order to keep the public from "trespassing" over its "private" beach. The court held that the fence was a "manifest interference with the right of the public to enjoy the shoreline in that area," ordered the resort owner to remove the fence, and permanently enjoined the resort from constructing any similar structure.³³

In trespass cases involving privately-held trust lands (e.g. where the riparian boundary extends to the mean low water mark) the case may raise more legal issues concerning whether the public has the right to pass and repass over privately held shoreland, than factual issues concerning the exact location of either the high or low water lines.

2. Criminal Trespass

In cases where a municipality or State attempts to prosecute an alleged trespasser on criminal grounds, the factual determination of where the public/private boundary is presents an entirely different situation. For example, in 1979 in Rhode Island, a beach clean-up crew of six volunteers was working its way along the shore picking up litter and debris when it was confronted by an upland owner accompanied by a local policeman. The landowner informed the clean-up crew that it could not cross landward of a stake line that he had put up at the mean high tide line. The clean-up crew insisted that it could be on the beach up to the high

water line which was the visible line indicated by drifts and seaweed along the shore. They pressed the point, and were all arrested for criminal trespass, found guilty of violating the town code's trespass provision, and fined \$10.00 each. The case made it all the way up to the Rhode Island Supreme Court.

After a lengthy review of the English common law and the series of federal cases on the subject, the Rhode Island Supreme Court held that the boundary between the public shore and the private upland was the mean high tide line, and not the visible drift and seaweed line higher up the beach.³⁴ Thus, the crew was clearly trespassing on private land. But, in order for the crew to be guilty of *criminal* trespass, the court held, they would have had to know *beyond a reasonable doubt* where the boundary was and that they were intentionally trespassing. The court based its reasoning on due process grounds, stating that "basic due process provides that no man shall be held criminally responsible for conduct that he could not reasonably understand to be proscribed."³⁵ Thus, because the actual mean high tide line is invisible, and changes over time (*see* Ch. II, §3.A. and Ch. II, §4.B.), the clean-up crew had no *actual knowledge* of where the boundary was, and thus *no criminal intent*.

The court concluded by advising the municipalities of Rhode Island that "In the future, any municipality that intends to impose criminal penalties for trespass on waterfront property above the mean-high-tide line must prove beyond reasonable doubt that the defendant knew the location of the boundary line and intentionally trespassed across it."³⁶ Exactly how a municipality was to go about this was left unaddressed by the court.

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Notes

1. *Diversion Lake Club v. Heath*, 126 Tex. 129, 138-39 (1935).
 - CA: *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 90 P. 532 (1907)(Public has no right of access to navigable waters that begin and end wholly within the limits of the same private land).
 - LA: *Pizanic v. Gauthreaux*, 173 La. 737, 138 So. 650 (1932) (There is no right to cross private property to use a wharf on the bank of a navigable bayou).
 - MA: *Slater v. Gunn*, 170 Mass. 509, 515 (1898) (A person has no right to cross, without permission, the land of another for the purpose of gaining access to a great pond in order to cut ice without being deemed guilty of trespass). *But see Barry v. Grela*, 372 Mass. 278 (1977)(finding a public right to walk over private tidal flats to fish from a jetty).
 - MI: *Hilt v. Weber*, 252 Mich. 198, 233 N.W. 159 (1930)(“The riparian owner has the exclusive use of the bank and shore.”). *See also Opinion of the Attorney General 1977-1978*, No. 5327, p. 518 (July 6, 1978).
 - NH: *Hartford v. Gilmanton*, 101 N.H. 424, 146 A.2d 851 (1958)(“as littoral owners of the fee in the beach up to the natural high-water mark of the pond, plaintiffs have certain property rights in the shore ... which may not be invaded or taken from the owner without compensation.”); *Hoban v. Bucklin*, 88 N.H. 73, 88 (1936)(Recognizing the littoral owner’s exclusive right of access to the water over his banks). *See also St. Regis Co. v. Board*, 92 N.H. 164, 171 (1942).
 - NY: *Mackall v. White*, 87 A.D.2d 696, 445 N.Y.S.2d 486 (2d Dept. 1981)(The general public does not have a right of access across privately owned upland to the foreshore).
 - WA: *Kemp v. Putnam*, 47 Wash.2d 530, 537, 288 P.2d 837 (1955)(“The fact that members of the public are entitled to fish the navigable streams in question, of course, does not give them the right to trespass ... in reaching those streams ...”).
2. ME: *Flood v. Earle*, 145 Me. 24, 71 A.2d 55 (1950)(Public has right to use great pond for fishin, fowling and cutting ice, provided they can reach the pond by passing to it on foot without trespassing).
 - VT: *Trout and Salmon Club v. Mather*, 68 Vt. 338, 348 (1895)(“A natural pond of not more than twenty acres, owned by a common owner, is, by statute a ‘private preserve.’ All waters over which the State has jurisdiction, except ‘private preserves’ and ‘posted waters,’ are ‘public waters,’ the crossing of uncultivated

land to reach such for the purpose of taking fish is declared not to be actionable unless actual damage was done.”).

3. HAWAII REV. STAT. §§ 7-1, 264-1; *Kalipi v. Hawaiian Trust*, 66 Haw. 1 (1982) (Ahupuaa tenant has customary access right to gather traditional materials). *See also Akau v. Olohana*, 65 Haw. 383 (1982); *Barba v. Okuna*, 65 Haw. 680 (1982) *aff'd and rem'd* (Public access to ocean affirmed on six different bases).
4. N.C. GEN. STAT. 1-45.1 (1985)(“[Public trust rights] include ... public access to the beaches.”) For comment, see “*Sunbathers versus Property Owners: Public Access to North Carolina Beaches*,” 64 N.C.L.Rev. 159 (1985). *See also Concerned Citizens of Brunswick County Taxpayers Association v. Holden Beach Enterprises, Inc.*, 329 N.C. 37, 53, 404 S.E.2d 677, 687 (1991)(Public may acquire a prescriptive easement over private property to reach the seashore “for fishing, bathing, and other recreational purposes.”).
5. *See* TEX. NAT. RES. CODE ANN. § 61.011 (Vernon Supp. 1996)(“The public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico.”).
6. *See* HAWAII REV. STAT. 46-6.5 (County shall adopt regulations to require developer, “in cases where public access is not already provided, to dedicate land for public access ... to the land below the high-water mark on any coastal shoreline ...”).
7. HAW. REV. STAT. 171-26 (“Prior to the disposition of any public lands ... rights of way from established highways to the public beaches” shall be established).
8. A few states do, however, have constitutional provisions that in effect codify the Public Trust Doctrine and operate to provide the public with certain perpendicular access rights over private land.

AK: ALASKA CONST. Art. VIII, § 14 (“Free access to the navigable or public waters of the State ... can not be denied any citizen of the United States or resident of the State.”). Specific easements or rights of way must be established by the Natural Resources Commission (the state commissioner of natural resources shall “provide for the specific easements or rights-of-way necessary to ensure free access to and along the body of water, unless the commissioner finds that regulating or eliminating access is necessary for other beneficial uses or public purposes.” AS 38.05.127), or public easements must be established when federal lands are conveyed to Alaska Native Corporations. Section 17(b), Alaska Native Claims Settlement Act, 43 U.S.C. § 1616(b). Under this provision, however, linear streamside easements are not authorized. *See also Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664 (D. Alaska 1977).

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- CA: CAL. CONST. Art. X, § 4 (“No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose ... and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall always be attainable for the people thereof.”).
- RI: R.I. CONST. Art. 1, § 17 (“The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore ...”).
9. In nearly all states the Public Trust Doctrine provides the public a right to pass and repass over public trust tidelands.
- CT: *Adams v. Pease*, 2 Conn. 481, 483 (1818)(“[T]he public have a right or easement in such rivers, as common highways, for passing and repassing with vessels, boats or any watercraft.”); *Orange v. Resnick*, 94 Conn. 573, 578, 109 A. 864 (1920)(“Public rights [include] fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge and of passing and repassing...”).
- NJ: *Cobb v. Davenport*, 32 N.J.L. 369, 378 (1867)(“The title of the sovereign being in trust for the benefit of the public — the use, which includes the right of ... passing and repassing, ... is common.”)
- NY: *Tucci v. Salzhauer*, 40 A.D.2d 712, 336 N.Y.S.2d 721, 723 (2d Dept.) *aff’d* 33 N.Y.2d 854, 352 N.Y.S.2d 198 (1973)(“[W]hen the tide is out, [the public] may pass and repass over the foreshore as a means of access to reach the water ...”).
10. *Opinion of the Justices*, 649 A.2d 604 (N.H. 1994)(Legislative recognition of public easement in "dry sand areas" located between high water mark and the intersection of the beach with high ground would constitute a taking of private property of owners of land adjacent to public trust areas, in violation of state takings clause, as "dry sand areas" had not been acquired by state through prescriptive easement).
11. *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 364 (1984).
12. *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 364 (1984).
13. *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (1984).
14. *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (1984).
- MA: *Anderson v. deVries*, 326 Mass. 127 (1950)(“A beach as customarily understood by residents of seashore resorts comprises the land above the ordinary high water mark, ‘more or less defined by natural boundary, or in the rear by a sea

wall ...' Citations omitted. ... The use of the beach by these lot owners included whatever was reasonably necessary for the full enjoyment of the privilege granted.”).

15. TX: TEX. NAT. RES. CODE ANN. § 61.011 (Vernon Supp. 1996)(“The public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation ...”).
16. NC: N.C. GEN. STAT. 146-6(f), read in conjunction with N.C. CONST. Art. XIV, § 5 and N.C. GEN. STAT. 1-45.1. *See also* N.C. GEN. STAT. 113A-134.1. *But see Cooper v. United States*, 779 F.Supp. 833 (E.D.N.C. 1991)(modified and reconsideration denied by unpublished opinion, Feb. 13, 1992)(IRS improperly denied charitable contribution for donations of dry sand beach to municipality on grounds that the beach was already subject to public rights of use. The court found that the issue of public trust rights in dry sand beach was an unsettled question of State law at the time of the donation).
17. WA: *Caminiti v. Boyle*, 732 P.2d 989, 996 (1987)(“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.”). *See also* WASH. CODE ANN. 332-30-144(4)(d).
18. FL: *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974).
19. CAL. CONST. Art. X, § 4 (1879)(“No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose ... and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall always be attainable for the people thereof.”).
20. *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 3157 (1987)(Brennan dissent). NOTE: the *Nollan v. California Coastal Commission* is expressly not a public trust case. “I do not understand the Court’s opinion in this case to implicate in any way the public-trust doctrine.” 483 U.S. 825, 107 S.Ct. 3141, 3162 (Blackmun dissent). *See also Grupe v. California Coastal Commission*, 166 Cal. App. 3d 148, 171-172, 212 Cal.Rptr. 578, 592-593 (1985).
21. *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969). *See also* The English Doctrine of Custom in Oregon Property Law: *State ex rel. Thornton v. Hay*, 4 Env. Law Rev. 383 (1974).
22. *United States v. St. Thomas Beach Resorts, Inc.*, 386 F.Supp. 769, 772 (D.C.V.I. 1974), *aff’d* 529 F.2d 513 (3rd Cir. 1975).

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23. FL: *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73 (1974).
- HI: *In Re Ashford*, 50 Hawaii 314, 440 P.2d 76 (1968). *See also Napeahi v. Paty*, 921 F.2d 897, 902 (9th Cir. 1990).
- TX: *Matcha v. Mattox on Behalf of People*, 711 S.W.2d 95 (1986).
24. Institutes of Justinian 2.1.4., as translated by Sandars, T. *The Institutes of Justinian*, 4th Ed. 1867.
25. In some states the public has a trust right of access and use of freshwater shorelands between the ordinary high and low water marks, even if the bottomland is privately owned.
- LA: *Evans v. Dugan*, 205 La. 398, 17 So.2d 562 (Public access to the shorelands of freshwater bodies up to the ordinary high watermark is allowed so long as the public's access does not interfere with the ingress and egress and reasonable use of the upland property owner).
- MT: *Montana Coalition for Stream Access v. Hildreth*, 211 Mont. 29, 684 P.2d 1088, 1091 (1984) ("The public has the right to use the [navigable] waters and the bed and banks up to the ordinary high water mark.").
- OR: *Lebanon Lumber Co. v. Leonard*, 68 Or. 147, 136 P. 891 (1913)(Public access to shoreland below high water mark implied from ruling that "the public has no right to land anywhere along a navigable fresh water river above the high-water mark.").
- PA: *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 539 (1901) (Riparian's ownership to low water mark is subject to the public right of passage between ordinary high and low water mark for fishing and navigation).
- TX: *Diversion Lake Club v. Heath*, 126 Tex. 129, 141 (1935) ("Because of the state's ownership of the beds of statutory navigable streams and of their banks up to the line [midway between low and high water], the public may use their beds and their banks up to such line for fishing. Beyond that line, unless the rule of the civil law is applied, they have no right to go without the consent of the riparian landowner.").
- WA: *Caminiti v. Boyle*, 107 Wash. 2d 662, 732 P. 2d 989, 996 (1987) ("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."). *See also* WASH. CODE ANN. 332-30-144 (4)(d)("The permission [to construct and maintain docks] is not a grant of exclusive use of public aquatic lands to the dock owner. It does not prohibit public use of any aquatic lands around or under the dock.

Owners of docks located on state-owned tidelands or shorelands must provide a safe, convenient, and clearly available means of pedestrian access over, around, or under the dock at tide levels. However, dock owners are not required to allow public use of their docks or access across private lands to state-owned public aquatic lands.”).

LR: R.E. Clark, *Waters and Water Rights*, Vol. 1, § 36.4(a).

26. In some states the rights of the public above the low water mark do not include the right to pass and repass along these shorelands.

US: *See Hardin v. Jordan*, 11 S. Ct. 808, 838 (1891).

NY: *Stewart v. Turney*, 237 N.Y. 117, 142 N.E. 437, 31 A.L.R. 960 (1923)(Action for trespass may be brought against persons who passed above ordinary low-water mark); *Wheeler v. Spinola*, 54 N.Y. 377 (1873)(Title continues to extend to center of pond which has been converted from freshwater to saltwater by connecting channel to tidewater and action for trespass may be brought for entry thereon).

VT: *McBurney v. Young*, 67 Vt. 574, 32 A. 492 (1895)(Trespass not held against defendant for he was not above low water mark on plaintiff’s property). *See also Fletcher v. Phelps*, 28 Vt. 257 (1891).

WI: *Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393, 31 A.L.R. 969 (1923)(The public has no lawful right to enter and travel that portion of the shore of an inland navigable meandered lake lying between ordinary high and low-water marks; and upon such an entry, the riparian owner may maintain an action for trespass).

LR: R.E. Clark, *Waters and Water Rights*, Vol. 1, § 36.4(a).

27. In at least one State the public has no right to pass and repass below the ordinary high water mark even when the bottomland is State-owned.

MI: *Hilt v. Weber*, 252 Mich. 198, 219 (1930) (“the public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner, although the title is in the state.”). *See also Lincoln v. Davis*, 53 Mich. 375, 19 N.W. 103 (1884).

28. The law of several states holds that the public’s trust rights are limited to the use of the water, even if the water rises above the ordinary high water mark.

CA: *Bohn v. Albertson*, 107 Cal.App.2d 738, 238 P.2d 128 (1951)(Private land covered by flood waters held subject to public’s right of navigation and fishing,

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provided public obtains access to flooded areas without trespassing on private land). *See also People ex rel. Baker v. Mack*, 19 Cal.App.3d 1040, 97 Cal.Rptr. 448 (1971); *Hitchings v. Del Rio Woods Recreation & Park District*, 55 Cal.App.3d 560, 127 Cal.Rptr. 830 (1976); *Pacific Gas & Electric Co. v. Superior Court*, 145 Cal.App.3d 253, 257-259, 193 Cal.Rptr. 336 (1983).

ID: *Burrus v. Edward Rutledge Timber Co.*, 34 Idaho 606, 202 P. 1067 (1921)(Private land covered by navigable waters due to artificial raising of the water level held subject to public's right of use if such use does not "unreasonably obstruct plaintiffs access to the waters.").

MS: *State Game & Fish Commission v. Louis Fritz Co.*, 193 So. 9, 11 (1940)(The owner of the bed of a lake does not own the water or any of the fish in the water. They are owned by the state in its sovereign capacity for the benefit of all its people. Therefore, "it follows that ... each [riparian] owner, their licensees, and every other inhabitant who can gain access thereto without trespass, may use the surface of the whole lake for boating and fishing so far and so long as they do not interfere with the reasonable like use by others similarly entitled to that right."). *See also* MISS. CODE ANN. § 51-1-4.

NY: *People v. Waite*, 103 Misc.2d 204, 425 N.Y.S.2d 462, 464 (1979)("The ownership of a streambed does not itself impart to the riparian owner an exclusive right to the waters flowing over the bed. ... A person boating on the waters is therefore not a trespasser.").

WA: *Wilbour v. Gallagher*, 462 P.2d 232 (1969)("[I]n the situation of a naturally varying water level, the respective rights of the public and the owners of the periodically submerged lands are dependent upon the level of the water. As the level rises, the rights of the public to use the water increases; correspondingly, the rights of the landowners decrease since they cannot use their property in such a manner as to interfere with the expanded public rights.").

29. In general, the public has the right to navigate all tidal waters, and all navigable freshwaters regardless of whether the submerged land or bottomland is privately owned.

AK: § 1(c), ch. 82, S.L.A. 1985 (Alaska Statutes, Temporary and Special Acts and Resolves 1985)("Ownership of land bordering navigable or public waters does not grant an exclusive right to the use of the water and any rights of title to the land below the ordinary high water mark are subject to the rights of the people of the State to use and have access to the water for recreational purposes or any other public purpose for which the water is used or capable of being used consistent with the public interest.").

- CA: *Bohn v. Albertson*, 107 Cal.App.2d 738, 238 P.2d 128 (1951)(Private land covered by flood waters held subject to public's right of navigation and fishing, provided public exercises these rights without trespassing on private land). *See also People ex rel. Baker v. Mack*, 19 Cal.App.3d 1040, 97 Cal.Rptr. 448 (1971); *Hitchings v. Del Rio Woods Recreation and Parks District*, 55 Cal.App.3d 560, 127 Cal. Rptr. 830 (1976).
- MA: *Knight v. Wilder*, 56 Mass. (2 Cush.) 199, 208 (1848) (“[U]pon a river not [tidal], the riparian owner has a fee in the soil, subject of course to a public easement for boating and rafting, and like purposes, to the thread of the stream.”).
- MS: MISS. CODE ANN. § 51-1-4 (Supp. 1988) (“Public waterways” defined and the right of free transport, fishing and water sports reserved to the public).
- NC: *State v. Glenn*, 52 N.C. 321 (1859) (The riparian owner owning the bottomlands beneath a navigable river holds such lands “subject to an easement in the public for the purposes of transportation of ... articles in flats and canoes.”). *See also Burke County v. Catawba Lumber Co.*, 116 N.C. 420 (1895).
- NY: *Fulton Light, Heat and Power Co. v. State*, 200 N.Y. 400, 412, (1911)(“The navigability in fact, of the stream had no relevancy to the question of title to its bed; it was relevant solely to the public right to pass, and to transport, upon it, as upon a highway.”); *St. Lawrence Shores, Inc. v. State*, 60 Misc.2d 74, 302 N.Y.S.2d 606 (1969)(Where non-tidal “waters are navigable in fact, private ownership is subject to the right of the public to use the waters for passage and transportation, so that, as far as the public is concerned, it is immaterial whether the title to the bed of a stream is in the sovereign or a private owner.”).
- OR: *Weise v. Smith*, 3 Or. 445, 449 (1869)(“A stream, which in its natural condition, is capable of being commonly and generally useful for floating boats, rafts or logs, for any useful purpose of agriculture or trade, though it be private property, and not strictly navigable, is subject to the public use as a passage way.”).
- RI: *Bickel v. Polk*, 5 De. 325, 326 (1851) (“In all navigable rivers, where the tide ebbs and flows, the people have of common right the privilege of fishing, and of navigation, between high and low water mark; though it be over private soil.”).
- TX: *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W.2d 441 (1935)(The court held that the public had the right to fish not only in the portion of the lake in which the state held title to the original river bed, but on the whole of the navigable lake, notwithstanding that most of its bed was privately owned).

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WA: *Wilbour v. Gallagher*, 77 Wash.2d 306, 316, 462 P.2d 232 (1969), *cert. denied* 400 U.S. 878 (1970)("[Private submerged] land is subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes ...").

30. In general, the public has the right to navigate all tidal waters, and all navigable freshwaters regardless of whether the navigation is for commercial or recreational purposes.

AK: ALASKA STAT. 38.05.965(12) ("navigable water' means any water of the state ... suitable for ... public boating ... or other recreational purposes.").

CA: *People ex rel. Younger v. County of El Dorado*, 96 Cal.App.3d 403, 157 Cal. Rptr. 815 (1979)(County ordinance banning swimming and travel, *inter alia*, invalid because it amounted to an excessive intrusion of public trust rights.); *Hitchings v. Del Rio Woods Recreation & Park District*, 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1976)(Relying on *People ex rel. Baker v. Mack*, court holds that recreational use for only nine months a year still sufficient to support a finding of navigability.); *People v. Mack*, 19 Cal. App. 3d 1040, 1045, 97 Cal. Rptr. 448 (1971)("It hardly needs citation of authorities that the rule is that a navigable stream may be used by the public for boating, swimming, fishing, hunting and all recreational purposes.").

HI: *See State v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977).

MA: *Attorney General v. Woods*, 108 Mass. 436 (1871) ("If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purposes of trade or agriculture.").

MI: *See Bott v. Natural Resources Commission*, 415 Mich. 45 (1982).

MN: *Nelson v. DeLong*, 213 Minn. 425, 431, 7 N.W.2d 342 (1942)("Public use comprehends not only navigation by water craft for commercial purposes, but the use also for the ordinary purposes of life, such as boating, fowling, skating, bathing, taking water for domestic and agricultural purposes, and cutting ice.").

MT: *Montana Coalition for Stream Access v. Curran*, 210 Mont. 38, 44, 682 P.2d 163 (1984)("[T]he true test of navigability of a stream does not depend on the mode by which commerce is, or may be, conducted. ... The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river...")(quoting *The Montello*, 87 U.S. (20 Wall.) 430, 441-42 (1874)); *Montana Coalition for Stream Access v. Hildreth*, 211 Mont. 29, 684 P.2d 1088 (1984)(Navigability determined by pleasure-boat and commercial tests).

- NH: *State v. Sunapee Dam Co.*, 70 N.H. 458, 50 A. 108 (1900) (State's public trust interests encompass "all purposes useful to the public"); *Whitcher v. State*, 87 N.H. 405, 181 A. 549, 552 (1935)(Any member of the public may exercise the common law-right to boat, fish, and fowl on its public waters). *See also Hartford v. Gilmanton*, 101 N.H. 424, 146 A.2d 851, 853 (1958)(quoting *Whitcher v. State*, 87 N.H. 405, 181 A. 549, 552 (1935)).
- NY: *Trustees of Freeholders & Commonalty of Southampton v. Heilner*, 84 Misc.2d 318, 328, 375 N.Y.S.2d 761 (1975) (The fact that a tidal bay was not very deep and was not adapted to commercial ships does not preclude a finding that the bay, which was used constantly for navigation by shoal-draft pleasure craft and other pleasure boats, is navigable).
- NC: *State v. Baum*, 128 N.C. 442, 446, 40 S.E. 113 (1901)("[T]he public have the right to the unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are in their natural condition capable of such use.").
- OH: *Mentor Harbor Yacht Club v. Mentor Lagoons*, 170 Ohio St. 193, 199-200, 163 N.E.2d 373 (1959)(Navigation for pleasure and recreation is as important in the eyes of the law as navigation for a commercial purpose.); OHIO REV. CODE ANN. § 1506.10 (Page Supp. 1988)(Waters of Lake Erie and land beneath held by State in trust for citizens for "public use" generally).
- OR: *Guilliams v. Beaver Lake Club*, 90 Or. 13, 27, 175 P. 437 (1918)("The vessel carrying a load of passengers to a picnic is in law just as much engaged in commerce as the one carrying grain or other merchandise.").
- WA: *Wilbour v. Gallagher*, 77 Wash.2d 306, 316, 462 P.2d 232 (1969), *cert. denied* 400 U.S. 878 (1970)("[Private submerged] land is subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes ..."); *Caminiti v. Boyle*, 107 Wash.2d 662, 669, 732 P.2d 98 9(1987)(*Jus publicum* includes the right of "navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.")(quoting *Wilbour v. Gallagher*, 77 Wash.2d 306, 316, 462 P.2d 232 (1969)), *cert. denied* 400 U.S. 878 (1970).
- WI: *Nekoosa-Edwards Paper Co. v. Railroad Commission*, 201 Wis. 40, 46, 228 N.W. 144 (1929)("Being navigable, the public may use it for the public rights incidental thereto of hunting, fishing, or pleasure boating."); *Doemel v. Jantz*, 180 Wis. 225, 234, 193 N.W. 393 (1923)("[F]ishing, recreation, boating, bathing, etc., are denominated incident to the right of navigation. Therefore the use of

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these waters for the various purposes enumerated and referred to is open to the public when exercising the right of navigation.”).

31. CA: *Bohn v. Albertson*, 107 Cal.App.2d 738, 238 P.2d 128 (1951)(Public has right to navigate and fish in navigable waters over privately held bottomlands).
- DE: *Bickel v. Polk*, 5 De. 325 (1851) (“[T]he public have the right to take fish below high water mark, though upon soil belonging to the individual, and would not be trespassers in so doing.” But if a person takes “fish above high water mark, or carry them above high water mark and land them on private property, this would be a trespass”).
- MS: MISS. CODE ANN. § 51-1-4 (Supp. 1988) (“Public waterways” defined and the right of free transport, fishing and water sports reserved to the public).
- NC: *State v. Glen*, 52 N.C. 321 (1859) (At common law, the right to harvest fish in waters where the bed is privately owned belonged exclusively to the owner of the bed). By statute, however, the public now has a right to fish in all natural waters of the State’s streams and rivers. See G.S. 113-129(11), (17) and 113-131. This expanded public trust jurisdiction was judicially recognized in *Springer v. Joseph Schlitz Brewing Co.*, 510 F.2d 468 (4th Cir. 1975).
- NY: *Knickerbocker Ice Co. v. Schultz*, 116 N.Y. 382, 387 (1889)(“The right to navigate the public waters and to fish therein are public rights belonging to the people at large. ... The riparian proprietor cannot interfere with such user by the public.”).
- PA: *Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463 (1810).
- TX: *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W.2d 441 (1935)(The court held that the public had the right to right to fish not only in the portion of the lake in which the state held title to the original river bed, but on the whole of the navigable lake, notwithstanding that most of its bed was privately owned).
- WA: *Wilbour v. Gallagher*, 77 Wash.2d 306, 316, 462 P.2d 232 (1969), cert. denied 400 U.S. 878 (1970)(“[Private submerged] land is subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes ...”).
- WI: *Willow River Club v. Wade*, 100 Wis. 86 (1898)(“Fish in the stream were not the property of the [riparian owner] any more than the birds that flew over its land.” Thus, although the riparian owner owned the bottomland of a navigable stream, “defendant was not guilty of trespass by going upon [the stream], as he did, catching the fish in question).

32. DE: *Bickel v. Polk*, 5 De. 325 (1851) (If a person takes “fish above high water mark, or carry them above high water mark and land them on private property, this would be a trespass.”).
- LA: Art. 452 (“Everyone has the right to ... land on the seashore to fish, to shelter himself, to moor ships, to dry nets, and the like, provided that he does not cause injury to the property of adjoining owners.”).
- MS: MISS. CODE ANN. § 51-1-4 (Supp. 1988) (“Public waterways” defined and the right of free transport, fishing and water sports reserved to the public. “Nothing herein contained shall authorize any person utilizing said public waterways, under the authority granted hereby to disturb the banks or beds of such waterways or the discharge of any object or substance into such waters or upon or across any lands adjacent thereto.”).
- MT: *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (1984)(Public has right to use state-owned waters to point of high water mark except in case of barriers in waters which impede passage, where public is allowed to portage in least intrusive way possible, avoiding damage to private property owner’s rights). *See also Montana Coalition for Stream Access v. Hildreth*, 684 P.2d 1088 (1984)(citing *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (1984)).
- NY: *Trustees of Freeholders & Commonalty of Southampton v. Heilner*, 84 Misc.2d 318, 328, 375 N.Y.S.2d 761, 771 (1975) (“On tidal waters the public has the right to use the strand between high and low water for passage and other purposes, *Tucci v. Salzhauer*, 40 A.D.2d 712, 336 N.Y.S.2d 721, and this must assume that the user of the surface of the water can beach his boat there.”).
- OR: *Guilliams v. Beaver Lake Club*, 90 Or. 13, 30, 175 P. 437 (1918) (Persons using a navigable stream do not have “any right to land at any point on defendant’s land without permission.”). *Lebanon Lumber Co. v. Leonard*, 68 Or. 147, 136 P. 891 (1913) (Public cannot use land adjoining a river above the high water mark).
33. *United States v. St. Thomas Beach Resorts, Inc*, 386 F. Supp. 769 (1974), *aff’d* 529 F.2d 513 (1975).
34. *State v. Ibbison*, 448 A.2d 728, 732-3 (1982).
35. *State v. Ibbison*, 448 A.2d 728, 733 (1982).
36. *Id.*

CHAPTER V

THE CONVEYANCE OF PUBLIC TRUST LAND and the NATURE OF THE REMAINING SERVITUDE

Summary

The *jus publicum* interest in trust lands cannot be conveyed or alienated to private ownership, for the State cannot abdicate its trust responsibilities to the people. The *jus privatum* interest, however, may be and often is, conveyed into private ownership. Nearly one-third of all public trust land is privately owned.

The Public Trust Doctrine places strict limitations upon a State when it conveys the *jus privatum* to private ownership. The Legislature must act through legislation to authorize the conveyance. The conveyance must be described in clear and definite language, with all ambiguities construed in favor of the State and against the grantee. The conveyance must primarily benefit the public, with benefits to private parties being secondary or corollary. There must be no substantial impairment of the public interest in the lands and waters remaining. Courts will strictly scrutinize a conveyance of public trust lands for compliance with all of the above requirements.

There is a split among the States concerning the "public interest" limitation: some State courts have looked to whether the conveyance advances one or more of the recognized public trust uses, such as commerce, navigation or fishing, or "some other trust use," while other courts look to whether the conveyance advances the "public interest," a much broader category than the recognized public trust uses.

The nature of the remaining public trust servitude in privately held trust lands varies from State to State. In some States, the servitude may not include many rights of the public. In other States, the bundle of rights held by the public remain so broad, and the corresponding private rights so limited, that the private owner's title has been described as a 'naked fee.' In either case, all of the public's trust rights are dominant to the private rights.

The majority of States hold themselves immune from losing title of public trust lands by adverse possession, although a handful of States recognize adverse possession or prescriptive rights against trust lands.

The public's trust interests in trust lands and waters can only be terminated in small parcels, usually those necessary for the construction of docks and wharves to further waterborne commerce. The termination must further the public's trust interests, although some courts have accepted the furtherance of any public interest, regardless of whether it is related to trust lands and waters, as sufficient to terminate the trust.

A. *The Conveyance of Public Trust Lands into Private Ownership*

Nearly one-third of all public trust lands in the United States is privately owned.¹ Much of the public trust litigation centers around State efforts to exercise its public trust authority over privately held trust land. Seldom is the private trust land owner aware that her title is only the subservient *jus privatum* title, and that the people, through the State as trustee, retain a dominant *jus publicum* interest.

The extent of State public trust authority and responsibility is diminished when trust land is privately owned. Important and very dear private property rights are then involved. Thus, exercising this authority in such a case may bring the State into sharp conflict with the private land owner. For these reasons a State resource manager should be familiar with the limitations upon the State in conveying trust lands, the nature of the dominant *jus publicum* retained by the State, adverse possession claims of trust lands, and those rare cases where full termination of all State public trust interests occur.

This chapter addresses the conveyance of public trust lands from the State to private ownership. Although the conveyance of trust waters (*i.e.* the appropriation of water for agricultural, industrial or residential use) is beyond the scope of this compilation, the reader should be aware that increasingly the Public Trust Doctrine is being recognized and applied in water appropriation cases. For a thorough review of this area of public trust law the reader is referred to the literature on the subject.²

1. *The Alienability of the Jus Privatum in Public Trust Lands*

Although Roman civil law held that the sea's shorelands were incapable of ownership, English common law and American jurisprudence recognize that the sovereign may convey a proprietary interest (the *jus privatum*) in these lands to private persons.³ Several Atlantic States, as well as three Great Lake States have conveyed shorelands to the ordinary low water mark, or further, into private ownership, although the State retains a public trust interest (the *jus publicum*) up to the ordinary high water mark. Similarly, many States also allow private ownership of bottomlands beneath navigable freshwaters. *See* Ch. II, § 2. As is discussed below, States have the authority to convey trust lands into private ownership, but only in conjunction with appropriate legislation.

2. Inalienability of the State's Jus Publicum

Although States clearly may convey a *jus privatum* interest in trust lands to private ownership, the public's *jus publicum* interest, held by the State, cannot be conveyed or alienated.⁴ The *jus publicum* may, on occasion, be terminated by the State (*see* part D, this Chapter) but it may not be conveyed to private persons.

In 1892, the United States Supreme Court, in *Illinois Central Railroad v. Illinois*, held that "The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property ... Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by State can be resumed at any time."⁵

3. Limitations on State Power to Convey the Jus Publicum in Public Trust Lands

It is clear that States have the power to convey the *jus privatum* of trust lands to private ownership. This power, however, is not without restrictions and limitations. The United States Supreme Court, in the 1892 *Illinois Central* case, set out in clear language several limitations upon a State's power of conveyance. Additional federal and State courts have further analyzed these restrictions.

a. Clear Legislative Authority and Intent Required

The initial limitation upon a State's authority to convey trust land is that the legislature must authorize the conveyance through specific legislation.⁶ The legislature itself may exercise the conveyance, as did the Illinois Legislature in the 1892 *Illinois Central* case. The authority to convey trust lands may be delegated to a State agency. In either instance, the legislation authorizing the conveyance must contain "words so unequivocal, as to leave no reasonable doubt concerning the meaning."⁷ Clear and express language is, of course, most desirable, although at least three State courts have allowed a necessary implication of the authority.⁸ At least one other State, however, has precluded any such implications or presumptions.⁹

b. Furtherance of Public Trust Purposes Required

A conveyance of trust land to private persons solely to further private interests violates the Public Trust Doctrine.¹⁰ To be upheld, a conveyance of trust land must,

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at the least, further the 'public interest.' Stated more traditionally, a conveyance should further the 'public's trust interests.'

There is a split among the courts concerning the application of this limitation on a State's authority to convey trust land to private ownership. Some State courts have looked to whether the conveyance advances one or more of the recognized public trust uses, such as commerce, navigation or fishing, or "some other trust use."¹¹

Other courts look to whether the conveyance advances the "public interest," a much broader category than the recognized public trust uses — but nonetheless echoing the "public interest" language used by the United States Supreme Court in the *Illinois Central* case.¹² As a result, courts have approved the conveyance of trust land for non-public trust uses, but nonetheless within the "public interest." For example, conveyances for offshore oil production,¹³ the assurance of marketability of title to structures built on trust lands,¹⁴ a contribution of trust lands from the State to the Federal Government for environmental protection,¹⁵ even the construction of a Y.M.C.A. on leased tidelands,¹⁶ have been upheld.

In a 1991 Arizona case, however, even though the State Supreme Court found that legislation conveying the bottomlands of nearly all rivers in the State served the "valid public purpose" of settling title claims statewide, much as the Massachusetts and Mississippi courts did, the Arizona Supreme Court went on to hold the legislation invalid based on the "anti-gift" provision of the Arizona State Constitution. The Public Trust Doctrine came into strong play by the court when analyzing the legislation in question, because the court recognized that "public trust land is not like other property." Reaching back to the U.S. Supreme Court case *Illinois Central Railroad v. Illinois*, the court noted that "title to lands under navigable waters is "different in character from that which the state holds in lands intended for sale."¹⁷ Although the legislation served another "valid public purpose" the court found the law "deficient" because it failed to provide a mechanism for assessing the amount, value and conveyance of these special public trust lands. Thus, based on the Public Trust Doctrine, the court struck down the statute as violating the constitutional "anti-gift" provision.

One can recognize an erosion of the Public Trust Doctrine by the use of the relatively broad "public interest" limitation rather than the more restrictive "public trust purpose" limitation. By approving a conveyance on the grounds that the new use will fulfill a public interest unrelated to any of the protected public trust purposes is to deny that a State has any special obligations and responsibilities to the public under that State's Public Trust Doctrine. By accepting any purpose which furthers the "public interest" as a legitimate reason to convey trust lands,

courts could easily stray far away from any water-dependency criteria, let alone preserving and protecting the public's trust rights.

As noted, the "public interest" language originates from the *Illinois Central* case. However, using this term alone takes it out of context. What the United States Supreme Court stated in *Illinois Central* was that only conveyances of small parcels to be used for docks, wharves, and piers that would aid commerce were valid, and then only if the conveyance would not "impair the public interest in the lands and waters remaining" ¹⁸ Thus, traditionally, the "public interest" relied upon to validate a conveyance of trust lands should be related to the lands and waters remaining, not simply any interest that would further the general common good of the public. ¹⁹

Things are not so simple today as they were in the days of the *Illinois Central* case (1892). Over the centuries the relationship of the people to the trust resources has changed. Today, States and municipalities are trying to revive decaying urban waterfronts with plans that call for a great mix of uses for waterfront areas -- for example, shopping, dining and entertainment complexes mixed with public access, small boat launches and fishing piers. Stringently limiting the public purpose exception to traditional trust uses could well constrain governments from addressing today's serious urban problems. ²⁰

At the same time, when seeking to improve the general welfare of the people, straying too far away from consideration of traditional trust uses presents a danger that a legislature or local government could subordinate the Public Trust altogether. For example, in the aftermath of the U.S. Supreme Court's decision in *Phillips Petroleum v. Mississippi*, ²¹ the Mississippi legislature enacted the Public Trust Tidelands Act ²² to quiet title in all lands filled prior to the enactment of the 1973 law regulating wetlands filling regardless of whether the filling had been authorized, in effect, fixing the historical mean high water mark at its 1973 location. As a foundation for the legislation, the Legislature included findings which stated that the dispute over tidelands had clouded titles and caused incalculable economic losses, and that its immediate resolution served a higher public purpose than protecting the Public Trust interest in tidelands. ²³

The State of Mississippi soon found itself in an adversarial position with itself. The Mississippi Secretary of State filed suit to have the Tidelands Act declared unconstitutional alleging, among other things, that the Act violated the State constitutional prohibition of donations of State lands to private individuals. ²⁴ In *Secretary of State v. Weisenberg*, ²⁵ the court determined that the transfer of Public Trust property will be allowed if it is "incidental" to achieving the higher purpose of resolving land title disputes. ²⁶ The court quoted the Chancellor's opinion in the

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companion case *Bill Byrd Honda v. Mississippi*: "while a few may improvidently benefit from the 1989 Tidelands Act, and while a few may be harmed by it, the overall effect of the act will not be to donate public property to private interests but will act as a long delayed delineation between public and private interests."²⁷

In the *Weisenberg* case, the Mississippi Supreme Court spoke to coming to a decision which causes the "least amount of harm to the individual citizens and the state as a whole."²⁸ The court saw the need to avoid a time consuming, inconvenient and expensive undertaking with a "once and for all" solution.²⁹

Two other court decisions offer guidance on how to approach cases involving the alienation of Public Trust lands. In *Lake Michigan Federation v. United State Army Corps of Engineers*,³⁰ where Loyola College in Evanston, Illinois, sought to acquire submerged lands of Lake Michigan to be filled and used for athletic facilities, the court asked : "*What is the primary purpose? Who is the primary beneficiary of the conveyance? Are the public benefits merely supplemental or incidental to the direct consequence of the legislative act?*" Even though there were many public benefits associated with the proposed project, such as improved public access to the lakefront, the Court nonetheless voided the legislative conveyance of trust property on the ground that the primary beneficiary of the alienation was the private college.³¹ The Court reasoned that if the conveyance was to withstand challenge merely because some public benefit accompanied it, the legislature would be provided with unfettered discretion to breach the Public Trust so long as it was able to articulate some gain to the public.³²

In *City of Madison v. State*,³³ the court attempted to, if not define a standard, at least further refine the public purpose inquiry. The court posed the following five questions concerning the proposed civic center/auditorium project the city was seeking to build by filling in submerged land:

- Will a public body control the use of the proposed facility?
- Will the facility be devoted to public purposes and open to the public?
- Will the diminution of the lake area be small in comparison to the whole of the lake?
- Will any of the public uses of the lake as a lake be destroyed or greatly impaired? and
- Will the disappointment of those members of the public who may desire to boat, fish or swim in the area to be filled be small when compared to the greater convenience to those members of the public who will use the facility?³⁴

*c. No Substantial Impairment of the Public's Use of
Remaining Public Trust Lands or Waters*

In the *Illinois Central* case, the United States Supreme Court stated the widely adopted test that a State can convey trust land only if it can "be disposed of without any substantial impairment of the public interest in the lands and waters remaining."³⁵ Courts have subsequently interpreted "substantial impairment" to mean only a "small percentage"³⁶ of the public's trust rights being affected, or that only limited encroachments³⁷ would be made into these rights.

On occasion courts have recognized that some impairment of the trust resource or the public's trust rights therein is unavoidable, even though the degree of impairment may not be substantial. In such cases, some courts have noted the states' "duty as trustee to consider the effect of the taking on the public trust, and to preserve, so far as consistent with the public interest, the uses protected by the trust."³⁸

Whether the *jus privatum* in trust waters and lands can be conveyed without impairing the *jus publicum* interest is a legislative determination.³⁹ State legislatures, like the courts, often make the determination that certain conveyance of trust land will further the public's trust purposes.⁴⁰ Advancement of a much broader "public interest" beyond recognized trust purposes, however, has also been relied upon by State legislatures, and upheld by the courts.⁴¹ For example, Florida's legislature has allowed conveyances not only for the purposes of navigation and commerce, but also for the encouragement of new industries. Those purposes were found to promote the interest of "all the people."⁴²

Baseline inventories of public trust resources are very valuable when making "substantial impairment" arguments. Agencies which have responsibility over trust resources should inventory them, quantifying their present and historical availability, uses, and impairments, as well as making projections of future demands on the resources. The San Francisco Bay Conservation and Development Commission (BCDC) compiled information on the Bay's trust resources which was used to overturn prior decisions holding that the public trust was extinguished in filled lands. In addition to quantifying the amount of filled lands in the Bay and the percentage of historic diminishment, the BCDC quantified the categories of existing uses and identified those lands which might still be suitable for public trust purposes.⁴³

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4. *Trust Land Conveyances Interpreted Against Grantee*

Between individuals, conveyances of real estate, when ambiguous, are generally construed most strongly against the grantor (seller) and in favor of the grantee (buyer)⁴⁴ with the presumption that the grantor intended to convey all that she had the power to convey unless clear and specific words indicate otherwise. When, however, the grantor is the government, either federal, State or local, the reverse applies: any ambiguity of the grant is to be construed against the grantee on the ground that the grant is presumed to be made at the solicitation of the grantee.⁴⁵ Further, when the parcel is all or partly public trust lands, ambiguous terms are construed even more strongly against the grantee and in favor of the government, because in such a case the government is not only the representative of the property interests of the people as a whole (the *jus privatum*), but is also trustee of the public's trust rights in those lands (the *jus publicum*).⁴⁶ Unless clear and specific words state otherwise, terms are to be construed so as to cause no interference with the public's dominant trust rights. The presumption is that the government did not intend to part with any portion of the public domain or diminish the *jus publicum*.⁴⁷

5. *Trust Land Conveyances Revocable By State*

In the case of a State legislature determining that a prior conveyance of trust land has the effect of diminishing or destroying its control of the *jus publicum* in that land, a revocation of the conveyance by a subsequent legislature should be upheld as constitutional, and not in violation of the Due Process clause of the United States Constitution. This is grounded on the finding that a State is powerless to "abdicate its trust over property in which the whole people are interested ..."⁴⁸ As a result, the United States Supreme Court in the *Illinois Central* case held that "There can be no irrevocable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it."⁴⁹

6. *"Judicial Skepticism" of Trust Land Conveyances*

In the 1842 case of *Martin v. Waddell* the United States Supreme Court established the precedent of courts carefully reviewing all aspects of a conveyance of trust land into private ownership by stating "[G]rants of [tideland] are therefor construed strictly ..."⁵⁰ This strict and careful review of grants of trust land is commonly referred to as "judicial skepticism" and is employed whenever a court is concerned with legislative efforts to convey trust lands to private individuals at the expense of some public use of those lands. "The very purpose of the public trust doctrine is

to police the legislature's disposition of public lands. If courts were to rubber stamp legislative decisions ... the doctrine would have no teeth."⁵¹

Legislative declarations that a conveyance of public trust land furthers a public purpose are also subject to close judicial scrutiny. "While courts certainly should consider the General Assembly's declaration that given legislation is to serve a described purpose ... the self-serving recitation of a public purpose within a legislative enactment is not conclusive of the existence of such purpose."⁵² Courts will strictly scrutinize any conveyance of trust land, holding a strong presumption against the limitation or termination of public trust uses of the land in question, or the superjacent waters. This "judicial skepticism" is well embedded in federal,⁵³ as well as State law.⁵⁴

B. Nature of Remaining Public Trust Servitude on Conveyed Trust Land

Early writings on the public's right to use trust lands and waters conveyed into private ownership demonstrate that under English common law, "the *jus privatum* of the proprietor is subject to the *jus publicum* of the community."⁵⁵ That is, the public's rights, collectively forming the *jus publicum*, are dominant to the private proprietor's rights. As a result, any conflict between the exercise of public and private rights, under English common law, was resolved in favor of the public.⁵⁶

This principle of English common law remains strongly incorporated in the Public Trust Doctrine. Thus, generally speaking, whenever trust lands are conveyed into private ownership, the public trust easement (*jus publicum*) is reserved for the public,⁵⁷ and remains dominant over the private property interests. The private owner's use of trust lands may be restricted or prohibited in order to protect the public's trust purposes.⁵⁸

As a California Appellate court put it, "Any conveyance of public trust land to a private individual is necessarily subject to the public trust, and the State remains trustee with the duty to supervise the trust."⁵⁹ That is, "the private buyer of public trust land takes title to the land subject to the public's trust rights, ranging from navigation and fishing to environmental protection. The rights of the private owner extend only as far as will allow the public to have full benefit of its trust uses of the privately held land."⁶⁰

Although the language quoted above sounds fairly absolute, things are not quite so simple. There are considerable differences among States regarding those public uses that remain after a conveyance of public trust lands. Narrow interpretations

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can be found where public rights in privately owned tidelands, once used as commons, are limited solely to navigation⁶¹ or to hunting, fowling, and fishing.⁶² Broader interpretations can also be found. In Hawaii, for example, the State supreme court has held that there is a presumption that public trust lands are to be devoted to actual use. The court left the type of uses open, protecting all uses which fall under the undefined category of "recreation."⁶³ In Wisconsin, private rights in trust lands and waters have been held subject to the public right of navigation,⁶⁴ fishing,⁶⁵ and the right to establish a public water supply by damming the river.⁶⁶

Thus, by its nature the remaining public trust servitude on conveyed trust lands is dominant to the private title holders' rights in trust lands or waters, although the scope of rights reserved to the public varies from State to State. One State may provide for a broad array of reserved public trust rights in conveyed trust lands, including, for example, a public right to preserve trust lands in their natural condition. In this situation, the private title has been described as a "naked title."⁶⁷ Another State may provide for a far less expansive array of reserved public rights, including only fishing, hunting or fowling, without any recreational use at all.

This diversity of the scope of reserved public trust rights in privately held trust lands and waters among States is the natural result of the power of each State to determine public's rights in trust lands and waters. The right that the public has in trust lands and waters is a matter of property law, and it is the "general proposition [that] the law of real property is, under our [United States] Constitution, left to the individual states to develop and administer."⁶⁸ Thus, "It is for the state court ... to define rights in land located within the state..." Put another way, "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."⁶⁹

C. Public Trust Lands and Adverse Possession

Adverse possession, the acquisition of land by simply occupying it for a set number of years, of tidelands or submerged land was an unimaginable concept under Roman civil law because the sea, seashore and rivers were considered the property of no one (*res nullius*), being incapable of ownership. No one could acquire ownership through possession of these lands, no matter how long they were occupied.⁷⁰

English common law, however, differs distinctly from Roman civil law in that "everything capable of ownership [was assigned] a certain and determinate owner..."⁷¹ Individuals could acquire by prescription, against the Crown, the right

to the soil beneath public waters.⁷² Nonetheless, the right to the tideland or river bed was only the *jus privatum* right — the right of ownership to the ordinary low water mark. The public retained the dominant *jus publicum* rights of passing and repassing, fishing and navigation.⁷³ While English common law recognized the acquisition of common lands by adverse possession, the public right of beneficial use, the *jus publicum*, could not be extinguished. Public trust rights remained dominant over the acquired private ownership rights.

Nearly all States have rejected the English common law on the question of gaining title to public trust lands through adverse possession. These States do not recognize claims of title against public trust lands based on either adverse possession or prescriptive rights.⁷⁴ A few States, however, do recognize such claims.⁷⁵

In those few States where adverse possession or prescription against the State is recognized, a distinction is often made between those lands in which the State's interest is merely proprietary and those impressed with the public trust. The lands of tidal and navigable waters are provided greater protection from such claims than uplands not dedicated to a public use. Moreover, courts have been careful to note that meeting the requirements for showing adverse possession or a prescriptive interest only establishes a presumption of law, which may be rebutted.⁷⁶

The basis for prescription under the common law is difficult to apply against public trust lands. Based upon the "Lost Grant Doctrine," prescription presumes a grant of title by the use of lands through time immemorial. But a presumption of a grant cannot be found if the State had no power to convey the property.⁷⁷ Furthermore, a showing of continued use of public trust lands for a statutory period has been found to be nothing more than a showing of the exercise of a common trust right.⁷⁸ For instance, occupation and exclusive use of public trust lands are insufficient to claim title where the State recognizes the right of the riparian owner to fill in his waterfront and build a dock or wharf to the navigable part of the stream.⁷⁹ Likewise, a claim of a prescriptive right to an exclusive fishery in public navigable waters cannot be established where all members of the public have a right to fish in such waters.⁸⁰ The user is like a tenant in common who gains no title against his co-tenants by mere occupation and possession of the joint property.⁸¹

Although in nearly all States adverse possession will not establish title, it may have the same practical effect by limiting the State's power to sue for ejectment.⁸² However, the elements establishing an adverse possession claim against the State may be particularly difficult to prove. For example, it has been held that the statute of limitations will not begin to run against the State until the occupant of public trust lands demonstrates his hostile intent by resisting a demand by the State to vacate or otherwise return the property.⁸³

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A question of whether title has been acquired by adverse possession may arise where a State license or permit conditions have been violated for a term exceeding the statute of limitations. Generally, such violation would be found to be a nuisance and no limitation on State action would apply against nuisances, no matter how long they had continued.⁸⁴ However, a distinction has been made between a mere technical violation of a statute or permit, and a violation which involves a threat to public safety or health.⁸⁵

Attempts to prove adverse possession are often evidenced by the payment of taxes. Courts have held that the payment of taxes in itself does not establish title to land, and that if taxes have been erroneously assessed and paid on lands, the proper form of action is for repayment rather than an action in title.⁸⁶

Even in States that do not allow acquisition of title or prescriptive uses, title and prescriptive interests might still be recognized due to gaps in the earlier laws of the States. For instance, in 1836, the Massachusetts legislature enacted a twenty year statute of limitations to claims for recovery of State lands.⁸⁷ An 1867 amendment to the statute which created an exception for lands below the low water mark was later found not to divest those lands from private ownership for which adverse claims were perfected during the window of opportunity between 1836 and 1867.⁸⁸ In such cases, claimants must show that the requisite statutory basis for adverse possession was perfected prior to the repeal of the statutes.⁸⁹

D. Termination of Public Trust Interest in Trust Lands

The public's trust rights in trust lands are not susceptible to easy termination. A mere conveyance of trust lands is not effective to extinguish any of the public's trust rights.⁹⁰ Nor will the unlawful or unauthorized filling of trust lands, even if fully developed, necessarily extinguish the rights of the public to those lands.⁹¹ See Ch. II, § 3.B.2. Nonetheless, given the tremendous amount of filled and converted trust lands into upland, the State courts have at times subverted the rigors of the Public Trust Doctrine to the expediencies of private property expectations, and other "public interests," in the converted trust lands. It is also not surprising that the courts have approached the question of public trust termination from varying perspectives and analyses.

The United States Supreme Court, in the 1892 *Illinois Central Railroad v. Illinois* case, established perhaps the purest standard for termination of the public's trust rights: "The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property ... Any grant of the

kind is necessarily revocable, and the exercise of the trust by which the property was held by State can be resumed at anytime.⁹² Nonetheless, the Court went on to state, albeit in *dicta*, that certain small parcels could be conveyed by the State out of the trust, if the removal of the small parcel did “not substantially impair the public interest in the lands and waters remaining.”⁹³ Such parcels noted were those “that may afford the foundation for wharves, piers, docks and other structures in aid of commerce.”⁹⁴

Even in the conveyance of these small parcels, however, there must be legislation authorizing the conveyance.⁹⁵ The legislation must be clear in its intent to convey the parcel out of the trust.⁹⁶ At a minimum the intent must be “necessarily implied.”⁹⁷ Establishing that termination of the trust is necessarily implied, however, is a heavy burden, for if a court can interpret the statute so as to retain the public’s interest in tidelands, the statute should be so construed.⁹⁸

Termination of the public’s trust rights in trust land is most often sustained when the purpose of the State legislation is to further navigation or commerce, two of the principle uses of public trust land.⁹⁹ Thus, filling of tidelands out to an established harbor line in furtherance of navigational development has been found to terminate the public trust.¹⁰⁰ In such a case, “[t]he land which was formerly shore becomes upland and while the rights to the shore and upland are not changed, they are carried further out into the tidal stream, or sea.”¹⁰¹ Even when the purpose of the legislation is to further navigation or commerce, the termination of the public trust will not occur until the development or navigational improvement has actually occurred.¹⁰²

At least one State court has broadened this test so that the purpose of the legislation extinguishing the public’s trust rights must further navigation, commerce, “or some other trust use.”¹⁰³ Thus, in several States “refilled land, filled in pursuit of trust purposes, rendered physically useless for trust purposes, and which is relatively small, may be exempt.”¹⁰⁴ This exemption raises the question of whether the furtherance of any recognized public trust use could be a satisfactory purpose for a legislature to rely on in order to terminate the public trust.

Another State court did not limit the purpose of legislation to furthering only the public’s trust rights, but rather inquired whether the legislation furthered the “public interest,” clearly a much more inclusive test — but again echoing the “public interest” language used by the United States Supreme Court in *Illinois Central Railroad v. Illinois*. As a result, the court sustained the termination of the public’s trust rights in hundreds of acres of filled land “[i]n order to assure free marketability and mortgageability of title to developed tideland.”¹⁰⁵

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Michigan allows for the conveyance of public trust lands, and the implied termination of public trust uses, only when it can be found that the land has no substantial value for hunting, fishing, swimming, pleasure boating or navigation.¹⁰⁶ Connecticut and New York also recognize that public trust rights might be “necessarily extinguished.”¹⁰⁷

E. Leasing Public Trust Land

Perhaps the best way for a State to avoid this trouble-filled area of the law is to avoid the full alienation of trust land in favor of leasing it. Leasing leaves the State or local government in control, can more clearly delineate the uses of the trust land, provides for income (rents) to the State, and is for a set term of time, in contrast to a permanent alienation. One potential difficulty, however, is that long-term leases have been viewed by the courts as functionally equivalent to a grant; as in the case of a grant, the holder of a long-term lease will have reasonable and justifiable investment-backed expectations in reliance on the full term of the lease. Periodic renewals of the lease at shorter terms, with the leaseholder having the option of renewing the lease, could minimize this problem. In any event, a lease of trust land far more clearly and convincingly leaves the State in the roll of trustee than compared to when the State conveys title into private hands.

Notes

1. This estimate is based upon the responses of 31 coastal States during the course of the 1990 National Public Trust Study. The estimate may be far from exact; it is represented here only as the "best estimate."
2. See generally 19 Env'tl. L. (1989)(Symposium on *The Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow*).
3. The English common law and American jurisprudence recognize that the sovereign may convey a proprietary interest (the *jus privatum*) in these lands into private holding.

EC: See *Constable's Case*, 5 Rep. 106 (date unknown).

AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1118 (1988)("[A]ny attempted conveyance of tidelands by the State which fails to meet the Illinois Central criteria for passing title free of the public trust will pass only 'naked title to the soil,' subject to continuing public trust 'easements' for purposes of navigation, commerce, and fishery.")(footnote omitted).

CT: *East Haven v. Hemingway*, 7 Conn. 186, 198 (1828)("The title of the king, *prima facie*, to all parts and arms of the sea to high water mark, and to the soil thereof, has long been established law; and ... it is settled, that he may grant the property of the soil between high and low water mark to a subject or corporation.").

NJ: *River Development Corp. v. Liberty Corp.*, 51 N.J. Super. 447 (1958)("Tide-flowed lands are held under guardianship of the State legislature and subject to express grant by statute of a freehold or lesser estate ...").

NC: *Ward v. Willis*, 51 N.C. 183 (1858)(Land subject to the ebb and flow of the tide, between the high and low water lines "may be granted by the sovereign.").

OR: *Bowlby v. Shively*, 22 Or. 410, 427 (1892)("As the state became the owner of the tide lands, it had the power ... to sell the same."); *Wilson et al. v. Shively*, 11 Or. 215 (1884)("The owners of property abutting upon tide land may purchase the tideland belonging to the state, and lying in front of the lands owned by them.").

VA: *But see Home v. Richards*, 8 Va. (4 Call) 441, 449, 2 Am. 574 (1798)(Title to a riverbed was "in the commonwealth as a public highway, never granted, because incapable of being appropriated to the use of a single individual.").

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WA: *Caminiti v. Boyle*, 107 Wash.2d 662, 666, 732 P.2d 989, 992 (1987) (“Since statehood, the Legislature has had the power to sell and convey title to state tidelands and shorelands.”).

4. Although States clearly may convey a *jus privatum* interest in trust lands to private ownership, the public’s *jus publicum* interest, held by the State, cannot be so conveyed.

US: *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 453 (1892) (“The State can no more abdicate its trust over property in which the whole people are interested ... than it can abdicate its police powers in the administration of government and the preservation of the peace.”).

CA: *California v. Superior Court (Lyon)*, 29 Cal.3d 210, 226 (1981) (“It is well settled that if the state holds these lands in trust for the benefit of the public, its conveyance of title to private persons does not necessarily free the property from the burden of the public trust.”); *City of Longbeach v. Mansell*, 3 Cal.3d 462, 482 (1970) (“Tidelands subject to the trust may not be alienated into absolute private ownership; an attempted conveyance of such land transfers ‘only bare legal title’ and the property remains subject to the public trust easement.”).

MI: *Collins v. Gerhardt*, 237 Mich. 38, 47, 211 N.W. 115 (1926) (The public trust may not be surrendered, alienated or abrogated). Two exceptions allow for Public Trust lands to be transferred: 1) when the transfer will improve the public trust resource held by the State, and 2) when the use can be made without impairing the public uses or value of the public trust resource. See *Obrecht v. National Gypsum Co.*, 361 Mich. 399, 413, 105 N.W.2d 143 (1960); *Superior Public Rights, Inc. v. Department of Natural Resources*, 80 Mich.App. 72, 85, 263 N.W.2d 290 (1977).

NJ: *Arnold v. Mundy*, 6 N.J.L. 1, 39 (1821) (“[T]he king cannot, by alienation, destroy the *jus publicum* ...”).

NY: *Coxe v. State*, 144 N.Y. 396, 405-406 (1895) (“[A] trust is engrafted upon [the seacoast and shores of tidal rivers] for the benefit of the public of which the State is powerless to divest itself.”). But see *People v. Steeplechase Park Co.* 218 N.Y. 459 (1916) (State may convey exclusive rights to trust land, thereby extinguishing the trust).

OH: *State ex rel. Squire v. Cleveland*, 32 Ohio Op. 111, 123 (1945) (Legislation that permitted alienation of specific submerged lands in Cleveland harbor found unconstitutional because “the state of Ohio, through its legislature, was without the power to relinquish and abandon its trusteeship in and its control over” these bottomlands).

- OR: *Brusco Towboat Co. v. State, By and Through Straub*, 30 Or. App. 509, 517, 567 P.2d 1037, 1043-1044 (1978) (“Unlike the state’s *jus privatum* interest, the *jus publicum* cannot be alienated.”), *reconsideration denied* 570 P.2d 996, 31 Or. App. 491, *aff’d in part, reversed in part*, 589 P.2d 712, 284 Or. 627; *State Land Board v. Hueker*, 548 P.2d 1323, 25 Or. App. 137, 139 (1976) (“the *jus publicum*, the right of the public to use tidelands and navigable waters for commerce and navigation, which the state holds as sovereign in trust for the people and which it cannot grant away.”); *Corvallis and Eastern Railroad Co. v. Benson*, 61 Or. 359, 370 121 P. 418, 422 (1912) (State may sell the “*jus privatum*” but cannot grant away the other element of its tidelands--the “*jus publicum*”); *Lewis v. City of Portland*, 25 Or. 133, 159 (1893) (The state may dispose of bottomlands held in trust only “in such a way as will not impair or prejudice the public interests or privileges, such as fishing, navigation, and commerce.”). *See also Land Board v. Corvallis Sand & Gravel Co.*, 283 Or. 147, 582 P.2d 1352 (1978).
- PA: *Reighard v. Flinn*, 189 Pa. 355, 362, 42 A. 23, 25 (1899) (*Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 435 - 436 (1892) ruling that a State cannot abdicate trust through a transfer in property is applicable to this State); *Conneaut Lake Ice Co. v. Quigley*, 225 Pa. 605, 611, 74 A. 648, 650 (1909) (The State’s trusteeship “is inviolable, the State being powerless to change the situation by in any way abdicating its trust”) citing *Pewaukee v. Savoy* 103 Wis. 271, 79 N.W. 436 (1899).
- VA: *James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*, 122 S.E. 344, 347 (1924) (“The ... Legislature have the power to dispose of such beds and the waters flowing over them subject to the public’s use of navigation, and such other public use, if any, as is held by the state for the benefit of all the people.”).
- WA: *Caminiti v. Boyle*, 107 Wash.2d 662, 666, 732 P.2d 989, 992 (1987) (“The Legislature has never had the authority, however, to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands.”).
5. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 460 (1892).
- US: *Long Sault Dev. Co. v. Call*, 242 U.S. 272, 279 (1916) (The public trust devolved to the States upon gaining statehood and is a trust that the state legislature “[cannot] relinquish by a transfer of the property.”).
- NY: *Smith v. State*, 153 A.D.2d 737, 545 N.Y.S.2d 203, 205 (2d Dept. 1989) (“[T]his fee interest [in underwater lands to an individual] may be revoked by the State when the uses proposed are not in conformity with the public trust doctrine.”).
- WA: *Caminiti v. Boyle*, 107 Wash.2d 662, 666, 732 P.2d 989 (1987) (While the State has authority to convey trust land, “[t]he Legislature has never had the

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authority ... to sell or otherwise abdicate State sovereignty or dominion over such tidelands and shorelands.”).

6. A legislature must authorize the conveyance of trust land through specific legislation.

US: *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842)(“Grants [of tidelands] are therefore construed strictly — and it will not be presumed that [the king] intended to part from any portion of the public domain, unless clear and especial words are used to denote it.”).

AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988)(“Before any tideland grant may be found to be free of the public trust under the ‘public trust purposes’ theory, the legislature’s intent to so convey it must be clearly expressed or necessarily implied in the legislation authorizing the transfer. ... If any interpretation of the statute which would retain the public’s interest in the tidelands is reasonably possible, we must give the statute such an interpretation.”).

CA: *Taylor v. Underhill*, 40 Cal. 471, 473 (1871)(“State can probably sell the [tide]land ... but this must be done in the interest of commerce and that must first be determined by the Legislature.”); *Boone v. Kingsbury*, 206 Cal. 148, 189-193, 273 P. 797, 815-816(1928)(City of Oakland had no power to convey trust lands “unless such power was conferred by the legislature ...”).

MA: *Commonwealth v. City of Roxbury*, 75 Mass. 451, 494 (1857)(General authority to take land for highways does not include taking tide flats beneath navigable waters. Such authority “must appear by express words or necessary implication. Citations omitted. The legislature alone have that power.”).

MI: *Obrecht v. National Gypsum Co.*, 105 N.W.2d 143, 361 Mich. 399 (1960)(“No one ... has the right to construct for private use a permanent deep water dock or pier on the bottom lands of the Great Lakes ... unless and until he has sought and received, from the legislature or its authorized agency, such assent based on due finding as will legally warrant the intended use of such lands.”).

NH: *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 6, 25 A. 718, 720 (1889)(“[T]he purpose and nature of the trust in which the basins of these public waters are held are such that an alienation of the title of the soil is not an exercise of executive power, and cannot be effected without legislative authority.”).

NC: *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674 (1996)(Legislature may, by special legislative grant, convey trust lands free of public trust rights, but “only if the special grant does so in the clearest and most express terms.”).

- TX: *Lorino v. Crawford Packing Co.*, 142 Tex. 51, 175 S.W.2d 410 (1943) (“No one should have an exclusive right to the enjoyment of [lands covered by tidal waters], unless and until the legislature has granted such right.”).
7. A legislature must authorize the conveyance of trust land into private ownership with clear and specific language.
- US: *United States v. Holt Bank*, 270 U.S. 49, 54, 55 (1926) (“disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.”); *Martin v. Waddell*, 16 U.S. 367, 411 (1842) (“A grant of an exclusive fishery will not be presumed “unless clear and especial words are used to denote it.”).
- AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988) (“Before any tideland grant may be found to be free of the public trust under the ‘public trust purposes’ theory, the legislature’s intent to so convey it must be clearly expressed or necessarily implied in the legislation authorizing the transfer. ... If any interpretation of the statute which would retain the public’s interest in the tidelands is reasonably possible, we must give the statute such an interpretation.”); *State Dep’t of Natural Resources v. City of Haines*, 627 P.2d 1047, 1052 (1986) (Statute conveying tidelands to municipality found to be “clear and unambiguous,” and thus conveyance valid).
- CT: *East Haven v. Hemingway*, 7 Conn. 186, 199 (1828) (“A right so important as this is to the public, cannot be considered as parted with, except by words so unequivocal, as to leave no reasonable doubt concerning the meaning.”).
- LA: *Gulf Oil Corporation v. State Mineral Board*, 317 So.2d 576, 589 (1975) (“[A]ny alienation or grant of the title to navigable waters by the legislature must be express and specific and is never implied or presumed from general language in a grant or statute.”) (quoting *California Co. v. Price*, 74 So.2d at 21).
- MD: *Browne v. Kennedy*, 5 H.&J. 195, 203 (1821) (“[W]herever grants have been held not to pass the soil [beneath navigable waters] it was not because the King had not the capacity or right to grant it, but because there were not apt words in the grant to effect this purpose...”).
- MI: *Klais v. Donowski*, 373 Mich. 262, 275, 129 N.W.2d 414, 420-421 (1964) (Conveyances of public trust land “are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.”) (quoting *United States v. Holt v. State Bank*, 270 U.S. 49 (1926)).

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- NY: *Appleby v. City of New York*, 271 U.S. 364, 383-384 (1925)(Trust land can be conveyed by State to private hands “only ... upon clear evidence of [the legislature’s] intention and of the public interest in promotion of which it acted.”).
- NC: *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674 (1996)(Special legislative grant may convey trust lands free of public trust rights, but “only if the special grant does so in the clearest and most express terms.” Special grant of marshlands to the State Board of Education lacked sufficient specificity to convey public trust rights in navigable waters); *RJR Tech Co. v. Pratt*, 339 N.C. 588, 453 S.E.2d 842 (1995)(Legislation authorizing grant to riparian owner for “fishing purposes” in navigable waters lacked sufficient specificity to convey exclusive fishing rights).
- OR: *Hume v. Rogue River Packing Co.*, 51 Or. 237, 83 P. 391 (1908)(“[A]n intention to part with any portion of such public right will not be presumed unless clear and special words are used to denote” the conveyance).
8. Clear and express statutory language is necessary to allow a conveyance of trust land, although at least three State courts have allowed a necessary implication of the authority.
- AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988)(“Before any tideland grant may be found to be free of the public trust under the ‘public trust purposes’ theory, the legislature’s intent to so convey must be clearly expressed or necessarily implied in the legislation authorizing the transfer.”).
- CA: *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79, 88 (1913)(“When the state, in the exercise of its discretion as trustee, has decided that portions of the tideland should be thus excluded from navigation, and sold to private use ... that intent must be clearly expressed or necessarily implied.”). *See also City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (Cal. 1980).
- MA: *Commonwealth v. City of Roxbury*, 75 Mass. 451, 493 (1857)(A grant “will not be held to include any portion of such public right, unless it is included in its terms, by express words or necessary implication.”).
9. At least one State has precluded any such implications or presumptions, holding that the intent must be express.
- LA: *Gulf Oil Corporation v. State Mineral Board*, 317 So.2d 576, 589 (1975)(“[A]ny alienation or grant of the title to navigable waters by the legislature must be express and specific and is never implied or presumed from general language in a grant or statute.”)(quoting *California Co. v. Price*, 74 So.2d at 21).

10. A conveyance of trust land to private persons solely to further private interests violates the Public Trust Doctrine.

US: *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892)(Public trust is violated when the primary purpose of a legislative grant is to benefit a private interest).

IL: *Lake Michigan Federation v. U.S. Army Corps of Engineers et al.*, 742 F. Supp. 441 (N.D. Ill., 1990). (“The conveyance of lakebed property to a private party — no matter how reputable and highly motivated that private party may be — violates the public trust doctrine.”). *See also People ex rel. Scott v. Chicago Park District*, 66 Ill.2d 65, 360 N.E.2d 773, 781 (1976).

NJ: *Bell v. Gough*, 23 N.J.L. 624, 680, 681 (1852)(A legislature “has no power to divest [trust lands] ... because this would ... sacrifice public rights for the promotion of mere private interests.”).

MS: *Rouse v. Saucier's Hiers*, 166 Miss. 704, 713, 146 So. 291, 292 (1933)(“Neither the state nor the federal government can validly convey title in fee simple [of trust lands] to private owners for private purposes.”). *See also Parks v. Simpson*, 242 Miss. 894, 137 So.2d 136 (1962); *Giles v. City of Biloxi*, 237 Miss. 65, 112 So.2d 815 (1959); *Xidis v. City of Gulfport*, 221 Miss. 79, 72 So.2d 153 (1954); *Crary v. State Highway Commission*, 219 Miss. 284, 68 So.2d 468 (1953).

RI: *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1043 (1995)(Public trust lands “will not be appropriated by, or conferred upon, private individuals for purely private benefit. It is this principle that forms the foundation of the public-trust doctrine in Rhode Island as well as in the other states.”).

VT: *State of Vermont and City of Burlington v. Central Vermont Railway*, 153 Vt. 337, 571 A.2d 1128 (1989)(“[T]he legislature cannot grant rights in public trust property for private purposes.”). *See also Hazen v. Perkins*, 92 Vt. 414, 419, 105 A. 249, 251 (1918).

11. State courts have looked to whether the conveyance advances one or more of the recognized public trust uses, such as commerce, navigation or fishing, or “some other trust use.”

City of Berkeley v. Superior Court of Alameda, 606 P.2d 362, 370 (Cal. 1980).

US: *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892)(“It is grants of parcels of lands under navigable waters that may afford the foundation for wharves, piers, docks and other structures in aid of commerce ...that are chiefly considered and sustained.”).

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AZ: *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 368, 837 P.2d 158 (Ariz. App. Div. 1, 1991).

CA: *Eldridge v. Cowell*, 4 Cal. 80, 87 (1854)(State has the authority as administrator of the trust on behalf of the public to dispose absolutely of title to tidelands to private persons if the purpose of the conveyance was to promote navigation and commerce).

12. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892)("It is grants of parcels of lands under navigable waters that may afford the foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining that are chiefly considered and sustained ... as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state.").

13. Courts have approved the conveyance of trust land for offshore oil production as being in conformance with the Public Trust Doctrine.

CA: *See Boone v. Kingsbury*, 206 Cal. 148, 189-193, 273 P. 797, 815-16 (1928).

14. Courts have approved the conveyance of trust land for the assurance of marketability of title to structures built on filled-in trust lands as being in conformance with the Public Trust Doctrine.

MA: *Opinion of the Justices*, 383 Mass. 972, 931 - 933 (1981)(In order to assure free marketability and mortgageability of title to developed tideland, "The Legislature may properly enact legislation eliminating any public trust rights in submerged land lying landward of a certain line shown on a plan of the City of Boston.").

MS: *Secretary of States v. Wiesenberg*, 633 So. 2d 983, 987 (Miss. 1994).

15. FL: *See Weller v. Askew*, 363 So.2d 1091, 1094 (Fla. 1978). *See also* Florida Constitution, art. X, §11 (1968)(providing for an "in the public interest" test for sales of trust lands).

16. *People v. City of Long Beach*, 51 Cal. 2d 875, 880, 338 P.2d, 177, 179 (Cal. 1959) (Court upheld a statutorily authorized lease of tidelands for the construction of an armed services Y.M.C.A. The court found that the facility promoted "the moral and social welfare of seaman, naval officers and enlisted men, and other persons engaged in and about the harbor ... Personnel are as vital to [navigation and commerce] as the ships and other facilities used therein, and no distinction can properly be drawn between providing dormitories and other facilities for maritime personnel and docks for ships, warehouses for goods, or convention, exhibition, and banquet space for use

by trade, shipping and commercial organizations.") The court did not explain why uplands could not be used to accomplish the same objective.

17. *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 170 (Ariz.App.Div. 1 1991).
18. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892) (emphasis added).
19. The "public interest" relied upon to validate a conveyance of trust lands should be related to the lands and waters remaining, not simply any interest that would further the general common good of the public.

IL: *People ex rel. Scott v. Chicago Park District*, 66 Ill.2d 65, 77-81, 360 N.E.2d 773, 779-781(1976)(Grant of Lake Michigan bottomland would promote employment and economic improvement, purposes "too indirect, intangible, and elusive to satisfy the requirement of a public purpose.").
20. LR: Sax, Joseph L., *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L.R. 482.
21. 484 U.S. 469 (1988).
22. MISS. CODE ANN. §29-15-1 *et seq.* (1990).
23. MISS. CODE ANN. §29-15-3(2)(Supp. 1989).
24. MISS. CONST. Art. 4, §95.
25. 633 So. 2d 983 (Miss. 1994).
26. *Id.* at 993.
27. *Id.* at 991.
28. *Id.* at 988. The Court went on to note that the Legislature found, in accordance with justice and policy, that "resolving the problems in the manner herein set out would create far less harm and be a greater benefit to the state and its citizens in terms of preventing economic loss, loss of jobs, loss of development, use and enjoyment of the tidelands and submerged lands, loss of industry and loss of revenue to the state than any benefits which would be derived from any attempt to completely rectify unregulated wetlands use which has occurred in the past.").
29. The *Weisenberg* court rejected the alternative mapping scheme offered by the Secretary of State whereby individual properties would be delineated as each was proposed to be developed or further developed. The rejection was based, in part, on the expense

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where the court noted that the cost of surveying for the 2400 acres originally at issue in the dispute that became the *Cinque Bambini* case cost "an astounding" \$1.5 million. *Secretary of State v. Weisenberg*, 633 So.2d 983, 992 (Miss. 1994).

30. 742 F. Supp. 441 (N.D. Ill., 1990).
31. 742 F. Supp. 441 (N.D. Ill., 1990).
32. 742 F. Supp. 441 (N.D. Ill., 1990).
33. *City of Madison v. State*, 1 Wis. 2d 252, 83 N.W. 2d. 674 (1957)(discussing *Muench v. Public Service Commission*, 261 Wis. 492, 515, 53 N.W. 2d 514, 55 N.W. 2d 40).
34. *City of Madison v. State*, 1 Wis. 2d 252, 83 N.W. 2d. 674, 678 (1957).
35. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892).
 - AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988)("In determining whether a state conveyance has passed title to a parcel of tideland free of any trust obligations under *Illinois Central*, we must ask, first, whether the conveyance was made in furtherance of some specific public trust purpose and, second, whether the conveyance can be made without substantial impairment of the public's interest in state tidelands.")
 - MI: *Superior Public Rights, Inc. v. State Dep't of Nat. Resource*, 80 Mich.App. 72, 84, 263 N.W.2d 290, 295-296 (1977)(quoting *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892)).
 - OR: *Morse v. Oregon Div. of State Lands*, 285 Or. 197, 202-203, 590 P.2d 709-711(1979)(citing *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892)).
36. Courts have interpreted "substantial impairment" to mean only a "small percentage" of the public's trust rights being affected.
 - CA: *See Orange County v. Heim*, 30 Cal.App.3d 694, 723-726, 106 Cal.Rptr 825, 849-852 (1973).
 - MI: *People v. Broedell*, 365 Mich. 201, 204-05, 112 N.W.2d 517 (1961)(No harm to the trust is too small to be protected).
 - WI: *State v. Public Serv. Comm'n*, 275 Wis. 112, 118, 81 N.W.2d 71, 73-74 (1957)("The diminution of the lake area will be very small when compared with the whole of Lake Wingra.")

37. Courts have interpreted "substantial impairment" to mean that only limited encroachments would be made into these rights.
- NY: *Riviera Ass'n v. Town of North Hempstead*, 52 Misc.2d 575, 276 N.Y.S.2d 249, 256-257 (Sup. Ct. Nass. Co. 1967), *aff'd by ref. sub. nom. Mannor Marine Realty, v. Wachtler*, 22 N.Y.S.2d 825 (1968)("[W]hile conveyance of lands underwater for a public purpose is permissible because it accords with the public trust, purpose is not the determinative factor. Rather, the validity of the conveyance turns on the degree to which the public interest will be impaired.").
- WA: *Caminiti v. Boyle*, 107 Wash.2d 662, 732 P.2d 989 (1987)(Legislature conveyed a private interest free of charge in public trust lands to littoral owners for private recreational docks. Court held that the legislature gave away relatively little control over its *jus publicum* interests and that the revocable license did not violate the trust).
- WI: *See Hixon v. Publ. Serv. Comm'n*, 32 Wis.2d 608, 618, 146 N.W.2d 577, 582 (1966).
38. *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 446, 658 P.2d 709, 728, 189 Cal.Rptr 346, 365, *cert. denied*, 464 U.S. 977 (1983).
- AL: *Abbot v. Doe*, 5 Al. 393, 395 (1843)("The sovereign power can make no disposition of the shore, by grant, or otherwise, prejudicial to the rights of those for whom it is holden in trust.").
39. Whether the *jus privatum* in trust waters and lands can be conveyed without impairing the *jus publicum* interest is a legislative determination.
- US: *Illinois Central R.R. Co. v. Illinois*, 13 S.Ct. 110, 146 U.S. 387, 36 L.Ed. 1018 ("While the state holds the title to lands under navigable waters in a certain sense as trustee for the public, it is competent for the supreme legislative power to authorize and regulate grants of the same for public, or such other purposes as it may determine to be for the best interests of the state.").
- MI: *Nedtwag v. Wallace*, 237 Mich. 14, 208 N.W. 51, *aff'd* 211 N.W. 647 (1922)(The Legislature is vested with power to determine how the public interests will be best served).
40. State legislatures, like the courts, often make the determination that certain conveyance of trust land will further the public's trust purposes.
- HI: *King v. Oahu Ry. & Land Co.*, 11 Haw. 717, 727 (1899)(discussing *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892)(State can grant parcels of lands under navigable waters for use as foundations of piers, wharves, etc., in order

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to further the public interest of navigation. These conveyances, however, must not substantially impair the remaining public interest in the lands and waters).

41. Advancement of a much broader "public interest" beyond recognized trust purposes has also been relied upon by State legislatures, and upheld by the courts.

MA: *Opinion of Justices to Senate*, 424 N.E.2d 1092 (1981)(Extinguishment of public trust interest in filled and developed tidelands for the purposes of clearing titles to assure marketability and mortgageability found to be a matter of substantial public interest).

42. *See State v. Gerbing*, 47 So. 353, 56 Fla. 603, 22 L.R.A. (N.S.) 337 (1908).

43. *City of Berkeley v. Superior Court of Alameda*, 606 P.2d 362, 370 (Cal. 1980).

44. Between individuals, conveyances of real estate, when ambiguous, are generally construed most strongly against the grantor (seller) and in favor of the grantee (buyer).

LR: *See generally* 91 C.J.S. Vendor and Purchaser § 84.

MA: *Commonwealth v. Roxbury*, 75 Mass. 451, 495 (1857)("Under the ordinary maxim ... words are to be construed most strongly against the grantor, and the presumption [exists] that all passed which the grantor could convey").

45. When the grantor is the government, either federal, state or local, any ambiguity of the grant is construed against the grantee on the ground that the grant is presumed to be made at the solicitation of the grantee.

US: *Chenango Bridge Co. v. The Binghamton Bridge Co.*, 70 U.S. 51, 75 (1865)("The principle is this: that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State.").

MA: *Commonwealth v. Roxbury*, 75 Mass. 451, 492 (1857)("As a general rule, in all grants from the government to the subject, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor--reversing the common rule as between individuals--on the ground that the grant is supposed to be made at the solicitation of the grantee").

NC: *State ex rel. Blount v. Spencer*, 114 N.C. 770, 779, 19 S.E.93, 96 (1894)("If the terms of the grant are doubtful, that construction will be adopted which least restricts the rights of the State and of the public, inasmuch as public grants,

whether made by the Crown or by Congress or by a State, are construed strictly and pass only what appears by express words or necessary implication.”).

VT: *State of Vermont and City of Burlington v. Central Vermont Railway*, 153 Vt. 337, 571 A.2d 1128 (1989)(“General words used in a statute will not apply to a state to the detriment of sovereign rights or interests unless such an intent clearly appears from the language used...”) quoting *Hazen v. Perkins*, 92 Vt. 414, 420, 105 A. 249, 251 (1918).

46. MA: *Commonwealth v. Roxbury*, 75 Mass. 451, 492 (1857)(“The colonial government stood in two relations to its subjects: First, as owners of the land, to be granted to settlers and purchasers, to be held in severalty in fee; and secondly, as incident to the powers of government, they held a prerogative right to the sea and the seashores in a fiduciary relation, for the public use. As a general rule, in all grants from the government to the subjects, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor — reversing the common rule as between individuals — on the ground that the grant is supposed to be made at the solicitation of the grantee, and the form and terms of the particular instrument of grant prepared by him, and submitted to the government for its allowance. But this rule applies *a fortiori* to a case where such a grant by a government to individual proprietors is claimed to be not merely a conveyance of title to land, but also of a portion of the public domain, which the government held in a fiduciary relation, for general and public use.”).

47. Unless clear and specific words state otherwise, terms are to be construed so as to cause no interference with the public’s dominant trust rights, for the presumption is that the government did not intend to part with any portion of the public domain or diminish the *jus publicum*.

US: *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 411 (1842)(“Grants [of tidelands] are therefore strictly construed — and it will not be presumed that [the King] intended to part from any portion of the public domain, unless clear and especial words are used to denote it.”).

48. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892).

WA: *Caminiti v. Boyle*, 732 P.2d 989, 992 (1987)(“By enacting the statute ..., the Legislature has seen fit to grant only a revocable license allowing owners of land abutting state-owned tidelands and shorelands to build recreational docks thereon subject to state regulation and control The legislature did not thereby surrender sovereignty or dominion over these tidelands and shorelands.”).

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49. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 460 (1892).

HI: *See King v. Oahu Ry. & Land Co.*, 11 Haw. 717, 723-725 (1899)(discussing *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892)).

NY: *Coxe v. State*, 144 N.Y. 396, 407 (1895)("Such a grant [of tidelands], therefore, can never constitute a contract between the state and the grantee which is beyond the power of revocation by a subsequent legislature.").

50. *Martin v. Waddell*, 41 U.S. 366, 411 (1842).

51. *Lake Michigan Federation v. United States Army Corps of Engineers*, 742 F.Supp. 441 (1990).

AZ: *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 169 (Ariz.App.Div. 1 1991)("We come to our analysis of [State legislation conveying public trust bottomlands] ... with deference to the legislature's findings, yet cognizant that we must not merely rubber-stamp the legislature's decision. (Citation omitted). We believe ... we must give public trust dispensations "a close look."").

52. *Lake Michigan Federation v. United States Army Corps of Engineers*, 742 F.Supp. 441 (1990)(quoting *City of Salem v. McMackin*, 53 Ill.2d 347, 291 N.E.2d 807 (1972)).

53. Judicial skepticism is well embedded in federal law.

US: *Martin v. Waddell*, 41 U.S. 366, 411 (1842)("Grants of [land beneath tidal waters] are therefor construed strictly — and it will not be presumed that [the State] intended to part from any portion of the public domain, unless clear and especial words are used to denote it ..."); *Lake Michigan Federation v. United States Army Corps of Engineers*, 1990 U.S. Dist. LEXIS 7632 (June 22, 1990) ("[C]ourts should be critical of attempts by the State to surrender valuable public resources to a private entity.").

LR: Sax, Joseph L., *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L.R. 489-491 ("When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self interest of private parties.").

54. Judicial skepticism is well embedded in State law.

US: *See Appleby v. City of New York*, 271 U.S. 364, 383-384 (1925).

- AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988) (“Before any tideland grant may be found to be free of the public trust under the ‘public trust purposes’ theory, the legislature’s intent to so convey it must be clearly expressed or necessarily implied in the legislation authorizing the transfer. ... If any interpretation of the statute which would retain the public’s interest in the tidelands is reasonably possible, we must give the statute such an interpretation.”).
- AZ: *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 169 (Ariz.App.Div. 1 1991) (“We come to our analysis of [State legislation conveying public trust bottomlands] ... with deference to the legislature’s findings, yet cognizant that we must not merely rubber-stamp the legislature’s decision. (Citation omitted). We believe ... we must give public trust dispensations “a close look.””).
- CA: *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79, 88 (1913) (“[S]tatutes purporting to authorize an abandonment of ... public use will be carefully scanned to ascertain whether ... such was the legislative intention, and that intent must be clearly expressed or necessarily implied. It will not be implied if any other inference is reasonably possible.”). See also *City of Berkeley v. Superior Court of Alameda*, 26 Cal.3d 515, 606 P.2d 362, 367, 162 Cal. Rptr. 327 (1980) (quoting *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79, 88 (1913)).
- IL: *People ex rel. Scott v. Chicago Park Dist.*, 66 Ill.2d 65, 360 N.E.2d 773 (1976) (Courts should be critical of attempts by the State to surrender valuable public resources to a private entity); *Paepcke v. Public Building Commission of Chicago*, 46 Ill.2d 330, 263 N.E.2d 11, 16 (1970) (Court should be skeptical of governmental conduct allocating public resources to the self interest of private parties). See also *People ex rel. Moloney v. Kirk*, 162 Ill. 138, 45 N.E. 830 (1896).
- MA: *Cleveland v. Norton*, 60 Mass. 380, 383 (1850) (“[O]ne who claims a franchise or exclusive privilege, in derogation of the common rights of the public, must prove his title thereto by a grant clearly and definitely expressed and cannot enlarge it, by equivocal or doubtful provisions or mere probable inferences.”); *Commonwealth v. Roxbury*, 75 Mass. 451, 492 (1857) (“As a general rule, in all grants from the government to the subject, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor--reversing the common rule as between individuals--on the ground that the grant is supposed to be made at the solicitation of the grantee”). See also *Commissioners of Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446 (1870); *Attorney General v. Jamaica Pond Aqueduct*, 133 Mass. 361 (1882); *Proprietors of Mills on the Monatiquot River v. Commonwealth*, 164 Mass. 227 (1895); *Commonwealth v. Boston Terminal Co.*, 185 Mass. 281 (1904); *Tilton v. Haverhill*, 311 Mass. 572 (1942); *Boston Waterfront Development Co. v. Commonwealth*, 378 Mass. 629 (1979).

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- NY: *DeLancey v. Piepgras*, 138 N.Y. 26, 38 (1893) (“It will not be presumed that the sovereign power intended to part with any of its prerogatives or with any portion of the public domain, unless clear and express words are used to denote the intention.”). *See also Appleby v. City of New York*, 271 U.S. 364, 383-384 (1925).
- OR: The Tidelands Sales Act of 1872, was interpreted by the State judiciary as allowing “the alienation only on the condition that the *jus publicum*, or traditional public rights of navigation, commerce, fishing, and recreation, be read into the deeds and grants.” *See Regulating Fills in Estuaries: The Public Trust Doctrine in Oregon*, 61 Or. L. Rev. 523, 559 (1982).
- VT: *State of Vermont and City of Burlington v. Central Vermont Railway*, 153 Vt. 337, 571 A.2d 1128 (1989) (“[T]he public trust doctrine, particularly as it has developed in Vermont, raises significant doubts regarding legislative power to grant title to the lakebed free of the trust.”).
- LR: Sax, Joseph L., *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L.R. 489-491 (“When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self interest of private parties.”).
55. Lord Hale, *De Jure Maris*, reprinted in Hargrav’s Tract’s, 32.
56. Any conflict between the exercise of public and private rights, under English common law, was resolved in favor of the public.
- LR: *See Angell on Tide Waters*, 33-34. (“The king, it is true, may grant the soil of any arm of the sea, ...but the right of the grantee so derived is always subservient to the public rights...”).
57. Generally speaking, whenever trust lands are conveyed into private ownership, the public trust easement (*jus publicum*) is reserved for the public.
- AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1118 (1988) (“We adopt the approach employed by our sister states on this question, and hold that any state tideland conveyance which fails to satisfy the requirement of *Illinois Central* will be viewed as a valid conveyance of title subject to continuing public easements for purposes of navigation, commerce and fishing.”).
- CA: *People v. California Fish Co.*, 166 Cal. 576, 138 P.79 (1913) (“[A patentee of tidelands owns] the soil subject to the easement of the public for the public uses of navigation and commerce, and to the right of the state, as administrator and

controller of these public uses and the public trust therefor, to enter upon and possess the same for the preservation and advancement of public uses, and to make such changes and improvements; as may be deemed advisable for those purposes.”); *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, 172 Cal. Rptr. 696, 625 P.2d 239, 248 (1981)(“It is well settled that if the State holds lands in trust for the benefit of the public, its conveyance of title to private persons does not necessarily free the property from the burden of the public trust.”); *Newcomb v. City of Newport Beach*, 7 Cal.2d 393, 60 P.2d 825, 828 (1936)(“The effect of the patent issued by the state ... was to vest in him title to the tidelands ... subject to the public easement for navigation, commerce, and fishing... ‘A conveyance of tidelands ... does not convey or affect the public rights of navigation and fishery, or the power of the state to regulate and control the same, and alter and improve the premises in the interest of navigation, but transferred only title to the soil, subject to said public rights and powers.’”)(quoting *People v. Southern Pacific R.R. Co.*, 166 Cal. 627, 628, 138 P. 103, 104). See also *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 162 Cal. Rptr. 327, 606 P.2d 362 (1980).

- MA: *Slater v. Gunn*, 170 Mass. 509, 515 (1898)(“[A]t the time that private ownership was extended to low water mark, the right of fishery and of passage was expressly reserved...”). See also *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851); *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55 (1846).
- MD: *Browne v. Kennedy*, 5 H.&J. 195, 203 (1821)(“[T]he property in the soil [beneath navigable waters] may be transferred by grant ... subject, however, to the *jus publicum*, which cannot be prejudiced by the *jus privatum* acquired under the grant.”).
- NJ: *Matthews v. Bay Head Improvement Ass’n*, 95 N.J. 306, 471 A.2d 355, 369 (1984)(“[P]rivate land is not immune from a possible right of access to the foreshore for swimming or bathing purposes.”).
- NY: *People v. Steeplechase Park Co.*, 218 N.Y. 459 (1916)(As a general rule, conveyances of foreshore by the State to individuals do not affect public rights. However, when the State makes unrestricted grants of foreshore to individuals for “beneficial use and enjoyment” the public trust can be extinguished).
- NC: *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674 (1996)(Grant to the State Board of Education of intertidal marshlands in navigable waters remained subject to all public trust rights). See also N.C. GEN. STAT. 146-20.1(b)(Areas of regularly flooded estuarine marshlands within conveyances made by the State Board of Education “remain subject to all public trust rights.”).

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- OR: *Bowlby v. Shively*, 22 Or. 410, 427 (1982) (“As the state became the owner of the tide lands, it had the power ... to sell the same. It has, however, no authority to dispose of its tidelands in such a manner as may interfere with the free and untrammelled navigation of its rivers, bays, inlets, and the like. The grantees of the state took the land subject to every easement growing out of the right of navigation inherent in the public.”); *Corvallis & Eastern Railroad Co. v. Benson*, 61 Or. 359, 121 P. 418 (1912) (“The State, however, cannot abdicate or grant away the other element of its title to tidelands — the *jus publicum*, or public authority over them.”).
- PA: *Conneaut Lake Ice Co. v. Quigley*, 225 Pa. 605, 74 A. 648 (1909) (All grants of title to submerged lands remain subject to the public trust; the Commonwealth cannot alienate that trust). See also *Reighard v. Flinn*, 189 Pa. 355, 42 A. 23 (1899).
- WA: *Caminiti v. Boyle*, 107 Wash.2d 662, 666, 732 P.2d 989, 992 (1987) (“The Legislature has never had the authority, however, to sell or otherwise abdicate state sovereignty or dominion over such tidelands or shorelands.”).
58. The private owner’s use of trust lands may be restricted or prohibited in order to protect the public’s trust purposes.
- CA: *People v. California Fish Co.*, 166 Cal. 576, 138 P.79 (1913) (“[A patentee of tidelands owns] the soil subject to the easement of the public for the public uses of navigation and commerce, and to the right of the state, as administrator and controller of these public uses and the public trust therefor, to enter upon and possess the same for the preservation and advancement of public uses, and to make such changes and improvements; as may be deemed advisable for those purposes.”); *Newcomb v. City of Newport Beach*, 7 Cal.2d 393, 60 P.2d 825, 828 (1936) (“The effect of the patent issued by the state ... was to vest in him title to the tidelands ... subject to the public easement for navigation, commerce, and fishing ... ‘A conveyance of tidelands ... does not convey or affect the public rights of navigation and fishery, or the power of the state to regulate and control the same, and alter and improve the premises in the interest of navigation, but transferred only title to the soil, subject to said public rights and powers.’”)(quoting from *People v. Southern Pacific R.R. Co.*, 166 Cal. 627, 628, 138 P. 103, 104).
- MN: *Nelson v. Delong*, 213 Minn. 425, 431, 7 N.W.2d 342, 346 (1942) (“A riparian owner’s rights are qualified, restricted, and subordinate to the paramount rights of the public.”).
- PA: 32 PENN. STAT. § 675-676 (Any right granted by the Commonwealth in the bed of any navigable waters is declared void whenever it becomes inimical to the public interest).

- TX: TEX. NAT. RES. CODE § 61.001 (Vernon Supp. 1996)(“Public beach’ means any beach area, whether publicly or privately owned, ... to which the public ... has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.”).
- WA: *Wilbour v. Gallagher*, 77 Wash.2d 306, 316, 462 P.2d 232 (1969), cert. denied 400 U.S. 878 (1970)(“[Private submerged] land is subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes ...”); See also *Hill v. Newell*, 86 Wash. 227, 231 (1915)(quoting *People v. California Fish Co.*, 166 Cal. 576, 138 P.79 (1913)); *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 89 (1909); *Wilbour v. Gallagher*, 77 Wash.2d 306, 462 P.2d 232, 238 (1969)(A riparian owner’s title to land between the high and low water line “is qualified by the public right of navigation and the state may prevent any use of it that interferes with that right.”); *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 131-132 (1908); *Eisenbach v. Hatfield*, 2 Wash. 236, 240-243 (1891).
- WI: *State v. Bleck*, 114 Wis.2d 454, 467 (1983)(Riparian rights “are still subject to the public’s paramount right and interest in navigable waters.”).
59. *Golden Feather Community Association v. Thermalito Irrigation District*, 199 Cal. App.3d 402, 244 Cal.Rptr. 830 (1988).
60. *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971). See also *City of Los Angeles v. Venice Peninsula Properties*, 182 Cal.Rptr. 599, 644 P.2d 792, 31 Cal.3d 288 (1982)(Court held that tidelands that were granted to private ownership by Mexican government, were held today by grantees to the same extent as all U.S. citizens, and that the tidelands, though privately held, remained subject to the public’s trust rights under the public trust doctrine).
61. CT: *Orange v. Resnick*, 94 Conn. 573 (192)(“In this State the only substantial public right which is superior to the rights of a riparian owner, is the right to free and unobstructed use of navigable waters for navigation.”).
62. MA: *Opinion of the Justices*, 383 Mass. 895, 902 (1981)(“[T]he public rights are of a limited nature.”... “[T]he littoral owner owns [tidal flats] subject at least to the reserved public rights of fishing, fowling, and navigation.”); *Boston Waterfront Development Co. v. Commonwealth*, 378 Mass. 629 (1979)(discussed *Butler v. Attorney General*, 195 Mass. 79 (1907), where the court held that private land between high and low water mark was subject to an easement of the public for the purposes of “navigation and free fishing and fowling, and of passing freely over and through the water without any use of the land underneath” but not for bathing purposes.); *Opinion of the Justices*, 365 Mass. 681 (1974)(“[T]he right of passage over dry land at periods of low tide cannot be reasonably included as one of the traditional rights of navigation.”); *Commonwealth v. Alger*, 61

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Mass. 53 (1851); *Weston v. Sampson*, 62 Mass. 347 (1851); *Porter v. Sheehan*, 73 Mass. 435, 437 (1856) (“[T]he common right of fishery in the sea and on the seashore [gives] no right to take the soil, or fishshells, part of the soil, except as slight portions of the soil would necessarily and ordinarily be attached to shellfish, when taken. No such public rights exists, to take the soil of flats belonging to the proprietor of upland bounding on the sea, to be used as manure, although some living shellfish may be mixed in it.”). See also *Anthony v. Gifford*, 84 Mass. 549 (1861); *Butler v. Attorney General*, 195 Mass. 79 (1907); *Barry v. Grella*, 372 Mass. 278 (1977).

ME: *Bell v. Inhabitants of Wells*, 557 A.2d 168, 176 (1989) (“[I]n 1820 the Maine constitution both confirmed the grant of intertidal land in fee to the upland owners and took over as the law of Maine the reserved public easement limited to fishing, fowling, and navigation.”).

VA: *Bradford v. Nature Conservancy*, 224 Va. 181, 294 S.E. 2d 866 (1982) (Public’s right to use of privately owned “commons” is limited to “fish, fowl or hunt.”). NOTE: this case applies only to conveyances of property to private persons where the property had formerly been used as a common. If the property was used as a common prior to conveyance, then the public’s right to fish, fowl and hunt is preserved. Otherwise, private grantees of subaqueous land take subject only to the federal navigational servitude.

63. *State By Kobayashi v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725 (1977) (“Under public trust principles, the State as trustee has the duty to protect and maintain trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g. recreation.”).

64. *Muench v. Public Service Comm.*, 261 Wis. 492, 53 N.W.2d 514 (see also 55 N.W.2d 40) (1952).

65. *Willow River Club v. Wade*, 100 Wis. 86, 76 N.W. 273 (1898).

66. *Ashwaubenon v. Public Service Comm.*, 22 Wis.2d 38, 125 N.W.2d 647 (1963).

67. Title to private trust land wherein the remaining public trust servitude is expansive has been described as a naked fee.

CA: *People v. California Fish Co.*, 166 Cal. 576, 598, 138 P. 79 (1913) (Patentee of tideland has “naked title to the soil” down to the ordinary low water mark, subject only to the “public easements”).

- OH: *Mentor Harbor Yacht Club v. Mentor Lagoons*, 170 Ohio St. 193, 195, 163 N.E.2d 373, 375 (1959)(Title to freshwater bottomlands is only partial title, and certain rights remain with the public).
- IL: *City of Chicago v. Van Ingen*, 152 Ill. 624, 38 N.E. 894 (1894)(A riparian proprietor upon a river owns to the center thereof, subject to the easement of the public over the navigable portion of the stream).
- WA: *Wilbour v. Gallagher*, 77 Wash.2d 306, 462 P.2d 232, 238 (1969)(A riparian owner's title to land between the high and low water line "is qualified by the public right of navigation and the state may prevent any use of it that interferes with that right.").
68. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944); *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935).
69. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 475 (1988).
70. See Angell, J.K., *A Treatise on Tide Waters* (1826), at 100.
71. *Cobb v. Davenport*, 32 N.J.L. 369, 378 (Sup. Ct. 1867).
72. Gould, J.M., *The Law of Waters* (1883), at 85.
73. Angell, J.K., *A Treatise on Tide Waters* (1826), at 101.
74. Nearly all states have rejected the English common law on the question of gaining title to public trust lands through adverse possession.
- AK: A.S. 38.905.010 ("No title or interest to land under the jurisdiction of the state may be acquired by adverse possession or prescription, or in any other manner, except by conveyance from the state.").
- AL: *Webb v. Demopolis*, 95 Ala. 116, 13 So. 289 (1891)(Although *Webb* involved a dispute over title of land dedicated to use as a public highway the principles enunciated in the case would apply to public trust lands and uses. The court found that where an obstruction is placed on lands held in trust for the public, neither prescription, the acquiescence of state officers, statute of limitations, nor doctrines of laches and equitable estoppel can defeat a suit to remove the obstruction).
- CA: CAL. CIV. CODE § 1007 ("[N]o possession by any person, firm or corporation, no matter how long continued of any land, water, water right, easement, or other property whatsoever dedicated to a public use by a public utility, or dedicated to or owned by the state or any public entity shall ever ripen into any

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title, interest or right against the owner thereof.”); *People v. Kerber*, 152 Cal. 733-734, 93 P. 878 (1908)(“Property ... held by the state in trust for public use cannot be gained by adverse possession, and the statute of limitations does not apply to an action by the state or its agents to recover such property from one using it for private purposes not consistent with the public use.”); *Cimpher v. City of Oakland*, 162 Cal. 87, 88, 121 P. 374 (1912)(“[T]he space in question is tideland ... This being the case, it was charged with a public trust for the purpose of navigation and fishery, and no title thereto could be obtained by any private person by prescription.”); *Patton v. City of Los Angeles*, 169 Cal. 521, 526-534, 147 P. 141, 143 (1915)(“[N]o character or period of adverse possession could terminate or affect the public easements for purposes of navigation and fishery.”).

CT: *Goldman v. Quadrato*, 142 Conn. 398, 403 (1955)(“Title to realty held in fee by a state or any of its subdivisions for a public use cannot be acquired by adverse possession.”).

DE: *See Commissioners of Lewes v. Blankenberg*, 161 A.2d 424, 39 Del. Ch. 178 (Del. 1960).

GA: GA. CODE ANN. § 44-5-163 (“Possession of real property in conformance with the requirements of Code Section 44-5-161 for a period of 20 years shall confer good title by prescription to the property against everyone except the state ...”).

HI: *In re Kelly*, 50 Haw. 567, 445 P.2d 538, 547 (1968)(“There is no adverse possession against the sovereign, ... unless expressly provided by statute.”) Note: the dispute in *Kelly* involved title of beachfront land dedicated to use as a highway.

IL: *Hammond v. Shepard*, 186 Ill. 235, 57 N.E. 867, 868, 78 Am. St. Rep. 274 (1900)(“[A]s no statute of limitation could run against the state, plaintiff wholly failed to prove a prescriptive title ...”).

LA: LA. CONST. Art. IX, § 4(B)(“Lands ... of the state ... shall not be lost by prescription.”).

MA: MASS. GEN. LAWS ANN. Ch. 260, § 31. (“Actions by the Commonwealth: No action for the recovery of land shall be commenced by or in behalf of the Commonwealth, except within twenty years after its right or title thereto first accrued, or within twenty years after it or those under whom it claims have been seized or possessed of the premises; but this section shall not apply to ... the Back Bay lands, so called in Boston, or to any property right, title or interest of the Commonwealth below high water mark or in the great ponds.”).

- MD: *Sollers v. Sollers*, 77 Md. 148, 152 (1892) (“Title by possession presumes a grant, and such a presumption cannot be entertained as against one incapable of granting ... No title, therefore, could be acquired by possession as against the state, in the face of the [Act of 1862], which expressly provides that no such grant shall be made”). See also *Sterling v. Sterling*, 211 Md. 493, 128 A.2d 277 (1957).
- ME: *Moulton v. Libbey*, 37 Me. 472, 59 Am. 57 (1854) (One accustomed to dig clams for sixty years in certain flats subject to the flux and reflux of the tide, cannot set up such acts as evidence of an exclusive right within such limits.”).
- MI: *State v. Venice of America Land Co.*, 160 Mich. 680, 702, 125 N.W. 770, 779 (Mich. 1910) (“[T]itle to submerged lands in the Great Lakes held by the state cannot be divested by adverse possession; it being held in trust for the public”). See also *Kavanaugh v. Raboir*, 192 N.W. 623, 222 Mich. 68 (1923) (quoting *State v. Venice of America*, 160 Mich. 680, 125 N.W. 770, 779 (Mich. 1910)).
- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508 (Miss. 1986) (“The State’s title may not be lost via adverse possession, limitations or laches.”); *Secretary of State v. Weisenberg*, 633 So.2d 983, 989 (1994) (“We must also reiterate that title to tidelands can not be lost by adverse possession, laches, or any other equitable doctrine”)(citations omitted).
- NC: In 1985, the General Assembly adopted a statute that expressly provides that title to public trust property cannot be acquired by adverse possession. See N.C. GEN. STAT. 1-45.1. *State ex. rel. Rohrer v. Credle*, 322 N.C. 522, 534 (1988) (“The general common law rule is that no right in natural oyster beds can be gained by prescription against the state. ... [T]he legislature has mandated that in evaluating claims of the type upon which defendant builds his prescription theory, the public ownership of submerged lands and public trust rights shall be favored.”). See also *Town of Shelby v. Cleveland Mill & Power Co.*, 155 N.C. 196, 71 S.E. 218 (1911).
- NH: *Concord Manuf’g Co. v. Robertson*, 66 N.H. 1, 22, 25 A. 718, 720 (1889) (“[T]here is no exceptional power of invading the public right by prescription.”); *Collins v. Howard*, 65 N.H. 190, 192, 18 A. 794 (1889) (“A riparian owner cannot acquire a prescriptive right against the public to impede or in any way injure navigation or any other public easement in the matters of the state.”); *State v. Franklin Falls Co.*, 49 N.H. 240, 254 (1870) (“[A]n adverse user, which is known to have originated without right within the memory of persons now living, will not alone and of itself, legitimate a public nuisance, or bar the public of their rights.”); *State v. Stafford Co.*, 99 N.H. 91 (1954) (Rights to public lands or waters may not be acquired from the State by adverse possession).

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- NJ: *O'Neill v. State Highway Dept.*, 50 N.J. 307 (1967) (“It is settled that State’s title in tidelands cannot be lost by adverse possession or prescription.”); *Quinlan v. Fairhaven*, 102 N.J.L. 443, 131 A. 871, *rev’d on other grounds* 102 N.J.L. 654, 133 A. 398 (1926) (“[T]here can be no title by prescription against the public.”).
- NY: *Campbell v. Rodgers*, 182 App. Div. 791, 170 N.Y.S. 258 (1918) (A riparian owner could not, as against the state, acquire title by adverse possession or prescription to the bed of a tidal stream and arm of the sea below the high water mark); *In Re Roma*, 227 N.Y.S. 46, 223 App. Div. 769 (1928) (Portion of property involved was land below tide waters, and therefore title was in state and upland owner could not acquire title by adverse possession).
- OH: *Haynes v. Jones*, 91 Ohio 197, 202 (1915) (“[T]itle[of the State] could not be divested by any adverse user ...”).
- OR: *Gatt v. Hurlburt*, 131 Or. 554, 284 P. 172, 174-175 *reh. den.* 286 P. 151 (1930) (“[T]he title to the soil underlying the water, that is, to the bed of the river itself, is vested in the state, and held by the state in its sovereign capacity as trustee for the public, and the adverse possession of no person, however long continued, can divest it of its title.”).
- PA: *Lacy v. Montgomery*, 124 A.2d 492, 181 Pa. Super. 640 (1956) (In case involving land dedicated for use as a public highway, court held that no adverse possession could run against land impressed with a public trust.); *Tinicum Fishing Co. v. Carter*, 61 Pa. 21 (1869) (Private citizen cannot acquire a prescriptive right against land below tidal waters).
- TX: TEX. CIV. PRAC. & REM. CODE ANN. §16.030(b) (Vernon 1986) (“A person may not acquire through adverse possession any right or title to real property dedicated to public use.”); *Heard v. State*, 146 Tex. 139, 204 S.W.2d 344 (Tex. 1947) (Title to that part of bed of navigable river held by state could not be acquired by adjacent owner by limitation); *Lorino v. Crawford Packing Co.*, 142 Tex. 51, 175 S.W.2d 410, 415 (1943) (Possession for 30 years of oyster house and wharf under navigable waters along Gulf Coast and built up above high tide by artificial means did not raise a presumption of rightful possession under a lawful grant from the state, in absence of showing of authority from the Legislature ... to grant such exclusive possession).
- VT: *State v. Malmquist*, 114 Vt. 96, 106 (1944) (A person cannot “claim a prescriptive right as against the State, no matter to what extent and for how long the waters have been used by him and his predecessors in title.”); *Hazen v. Perkins*, 92 Vt. 414 (1918) (“[N]o prescriptive rights ... affecting real property of the State [can] be acquired.”).

WA: *Eisenbach v. Hatfield*, 2 Wash. 236, 245 (1891)("[N]o individual can have any legal right whatever to claim any easement in, or to impose any servitude upon, the tidewaters within the limits of the State, without the consent of the legislature.").

WI: *Milwaukee-Western Fuel Co. v. Milwaukee*, 152 Wis. 247, 258, 139 N.W. 540, 543 (1913)("[A] navigable stream is as much a public highway as a street, and no private rights can be acquired therein by its user as such.").

75. A few States do recognize gaining title to public trust lands through adverse possession.

MA: Massachusetts tidelands or rights therein "below high water mark or in great ponds" may pass by adverse possession or prescription only by twenty years adverse use during the "window period" between 1836, when R.S. Ch. 119, § 12 was enacted allowing adverse possession against the Commonwealth, and 1867 when tidelands and great ponds were excluded from the scope of the 1836 statute. *Nichols v. Boston*, 98 Mass. 39, 42 (1867)("[B]y the Revised Statutes of 1836, the time of limitation of real actions by the Commonwealth was made the same as those by individuals, and twenty years' (sic) exclusive possession barred the right of the Commonwealth to maintain an action for the recovery of flats."); *Attorney General v. Revere Copper Co.*, 152 Mass. 444, 452 (1890)("By the St. of 1867, c. 275, it was provided that the statute of limitations of real actions brought by the Commonwealth shall not apply to 'any property, right title, or interest of the Commonwealth below high-water mark or in the great ponds.' ... After the passage of the statute, possession could not avail for the acquisition of new rights, but those which were then perfect were not taken away by the enactment.").

NY: *Hinkley v. State*, 234 N.Y. 309, 319 (1922)("There may be circumstances which would justify the running of the Statute of Limitations against the State, and we refrain from holding that in no instance can title be acquired by adverse possession where the State in the first instance could have made a grant of the land to private individuals.").

RI: *Brown v. Goddard*, 13 R.I. 76, 81 (1880)("We cannot give the deeds effect as absolute conveyances. But the grantor, though he had no actual title, and accordingly could convey none, yet had a sort of inchoate or title by virtue of his right to fill out under leave of the State and this, under deeds purporting to convey the lots as platted, would inure to the benefit of the grantees, agreeably to the plat by way of estoppel or agreement enforceable in equity.").

WI: *Scheuber v. Held*, 47 Wis. 340, 351-352(1879)("We conclude, then, that, under the effect of § 26, ch. 138, R.S. 1858, the adverse possession and user of the lands in question, by means of the mill-dam for more than twenty years, would

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be protected both by statute of limitations and by prescription, and confer a title to the lands for such use upon the defendants, as against the state and other parties.”).

76. Courts have been careful to note that meeting the requirements for showing adverse possession or a prescriptive interest only establishes a presumption of law, which may be rebutted.

CT: *Chalker v. Dickenson*, 1 Conn. 382, 384 (1815) (“It is considered that no man would permit another thus to occupy and possess his right without a grant; and in all these cases the law presumes there has been a grant; ... But as the grant depends upon a presumption of law, it is always competent to rebut it by proof of circumstances as shew (sic) no grant could have been made.”).

DE: *Phillips v. State*, 449 A.2d 250, 256 (Del. Ch. 1982) (“[T]he doctrine is merely a presumption to quiet title to land in long possession. (citations omitted) The presumption is subject to rebuttal.”).

77. A presumption of a grant cannot be found if the state had no power to convey the property.

MD: *Sollers v. Sollers*, 77 Md. 148, 152 (1892) (“Title by possession presumes a grant, and such a presumption cannot be entertained as against one incapable of granting ... No title, therefore, could be acquired by possession as against the state, in the face of the [Act of 1862], which expressly provides that no such grant shall be made.”).

78. A showing of continued use of public trust lands for a statutory period has been found to be nothing more than a showing of the exercise of a common trust right.

CT: *Chalker v. Dickenson*, 1 Conn. 382, 384 (1815) (“The fishery in Connecticut river below high water mark is common to all the citizens; ... and the mere lawful exercise of a common right for fifteen years has never been considered as conferring an exclusive right.”).

ME: *Moulton v. Libbey*, 37 Me. 472, 59 Am. 57 (1854) (One accustomed to dig clams for sixty years in certain flats subject to the flux and reflux of the tide, cannot set up such acts as evidence of an exclusive right within such limits.”).

79. NY: *Hinkley v. State*, 202 A.D. 570, 195 N.Y.S. 914, *aff'd* 234 N.Y. 309, 137 N.E. 599, motion to amend remittitur den. 236 N.Y. 637, 142 N.Y. 315 (1923).

80. A claim of a prescriptive right to an exclusive fishery in public navigable waters cannot be established where all members of the public have a right to fish in such waters.
- CT: *Chalker v. Dickenson*, 1 Conn. 382, 384 (1815) (“The fishery in Connecticut river below high water mark is common to all the citizens; ... and the mere lawful exercise of a common right for fifteen years has never been considered as conferring an exclusive right.”).
- ME: *Moulton v. Libbey*, 37 Me. 472, 493, 59 Am. 57 (1854) (“Such a taking [of clams] would prove nothing more than a lawful exercise of their common right to do so until they had been precluded by some regulation of that common right.”).
81. See *Tracy v. Norwich Railroad Co.*, 39 Conn. 382 (1872).
82. Although in nearly all States adverse possession will not establish title, claims based on adverse possession may have the same practical effect by limiting the state’s power to sue for ejectment.
- NY: *Hinkley v. State*, 202 A.D. 570, 195 N.Y.S. 914, 918 (“No statute permits that title to lands as against the state may be acquired by adverse possession ... These are limitation statutes which do not declare title, but renounce the right to sue. Under these acts title by adverse possession cannot be acquired; but they act as statutes of repose, so that in cases to which they apply, while title is not acquired by the occupant, the state will not sue to eject him.”).
83. NY: *Hinkley v. State*, 202 A.D. 570, 195 N.Y.S. 914, *aff’d* 234 N.Y. 309, 137 N.E. 599, motion to amend remittitur den. 236 N.Y. 637, 142 N.Y. 315 (1923)
84. NC: *Town of Shelby v. Cleveland Mill & Power Co.*, 155 N.C. 196, 71 S.E. 218, 220 (1911) (In suit claiming prescriptive right to dump raw sewage into public waters the court held that “There is no such thing as a prescriptive right to maintain a public nuisance.”).
85. MA: *Attorney General v. Revere Copper Co.*, 152 Mass. 444, 25 N.E. 605 (1890) (The rule that no length of time will legalize a public nuisance does not apply where no other nuisance exists than an abridgement of the public’s enjoyment of property by the long continued use of same part of it by an individual under a claim of right, in the way a private owner would ordinarily use it, and where a statute exists permitting acquisition by disseisin of a complete title against the state).

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86. State courts have held that the payment of taxes in itself does not establish title to lands, and that if taxes have been erroneously assessed and paid on lands, the proper form of action is for repayment rather than an action in title.

DE: *See Phillips v. State*, 449 A.2d 250 (Del. Ch. 1979).

NC: *See Sessoms v. McDonald*, 237 N.C. 720, 75 S.E.2d 904 (1953)(Listing and payment of taxes is relevant fact tending to show claim of title by adverse possession, but no sufficient by itself to show adverse possession).

87. MA: Massachusetts tidelands or rights therein "below high water mark or in great ponds" may pass by adverse possession or prescription only by twenty years adverse use during the "window period" between 1836, when R.S. Ch. 119, § 12 was enacted applying the statute of limitations to actions for the recovery of real property by the commonwealth, and 1867, when R.S. 275 excluded tidelands and great ponds from the scope of the 1835 statute. *See Nichols v. Boston*, 98 Mass. 39 (1867); *Attorney General v. Revere Copper Co.*, 152 Mass. 444 (1890).

88. MA: *Attorney General v. Revere Copper Co.*, 152 Mass. 444, 25 N.E. 605 (1890)(A prescriptive right to lower the waters of a great pond below low water mark might be gained after the enactment of the R.S. c.119, § 12 which made the statute of limitation of real actions applicable to suits brought by the commonwealth. The amendatory St. of 1867, c.275, which excepted suits relating to the commonwealth's title in great ponds, did not operate to divest such prescriptive rights already acquired).

89. MA: *Attorney General v. Revere Copper Co.*, 152 Mass. 444, 452, 25 N.E. 605 (1890)("After the passage of the statute [repealing the application of the statute of limitations against the state], possession could not avail for the acquisition of new rights, but those which were then perfect were not taken away by the enactment.").

90. A mere conveyance of trust lands is not effective to extinguish any of the public's trust rights.

CA: *Golden Feather Community Association v. Thermalito Irrigation District*, 199 Cal. App.3d 402, 244 Cal. Rptr. 830, 833 (1988)("Any conveyance of public trust land to a private individual is necessarily subject to the public trust, and the State remains trustee with the duty to supervise the trust.").

91. US: *United States v. Turner*, 175 F.2d 644, 647 (1949)("[T]he right of a riparian owner on navigable waters to obtain access thereto does not give the owner any title to the lands by which he obtains this access.").

- CA: *Marks v. Whitney*, 6 Cal.3d 251, 261, 88 Cal. Rptr. 790, 797, 491 P.2d 374, 381 (1971)(Reclamation of tidelands does not in and of itself terminate the public trust). See also *City of Longbeach*, 3 Cal.3d 462, 483, 91 Cal. Rptr. 23, 476 P.2d 423 (1970); *Newcomb v. City of Newport Beach*, 7 Cal.2d 393, 402, 60 P.2d 625 (1936); *Atwood v. Hammond*, 4 Cal.2d 31, 40-41, 48 P.2d 20 (1935).
- HI: See HAWAII REV. STAT. § 171-53.
- IL: ILL. REV. STAT. Ch. 19, pars. 71, 73, 76 (1987)(Encroachments on public waters for private use are unlawful).
- LA: LA. REV. STAT. 41:1714 (In the case of unlawful encroachments on state lands [including unpermitted filling of state water bottoms], the state may either require the removal of the encroachment or require that a permit or lease for encroachment be obtained from the state. In either case, the state's title to the land is maintained. The state may assert its rights to land where unlawful encroachments have occurred whenever it discovers them.); LA. CONST. of 1974, Art. IX, § 4(B)(Acquisitive prescription against the state prohibited.); LA. CODE CIV. PROC. Art. 3651 (Practically, however, any encroachment that has existed unchallenged for a year or more shifts the burden to the state to prove that the filled area was once a state water bottom. Such proof could be difficult given the extensiveness and physical characteristics of Louisiana's wetlands and water bodies).
- MA: See *Attorney General v. Baldwin*, 361 Mass. 199 (1972).
- MD: MD. CODE ANN. NR 9-601(d)(1983 Repl. Vol.)("Any person who knowingly violates any provision of [the Wetlands Act of 1970] is liable to the State for restoration of the affected wetland to its condition prior to the violation if possible.").
- MI: Great Lakes Submerged Lands Act, 1955 P.A. 247, M.C.L.A. 322.702.
- MS: See *Harrison Co. v. Guice*, 244 Miss. 95, 140 So.2d 838 (1962).
- NH: *State v. Strafford*, 99 N.H. 92, 105 A.2d 569 (1954)(Littoral owner may not dredge or fill public trust waters in an effort to change its character, function or legal status without a grant of right issued by the State).
- NY: *Saunders v. New York Cent. & H.R.R.R.*, 144 N.Y. 75, 38 N.E. 992 (1885)(Upland owner will not obtain ownership of bottomland which he has wrongfully filled).
- OH: *Thomas v. Sanders*, 65 Ohio App.2d 5, 413 N.E.2d 1224 (1979)(Land which was reclaimed was still part of trust estate and title to such land could not thereafter

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be held by private persons to exclusion of beneficiaries of trust estate, nor could city or state abdicate trust so as to leave reclaimed in control of private persons.) *See also* OHIO REV. CODE § 1506.10.

OR: Compare OR. REV. STAT. 196.855 (Filling without a permit constitutes a public nuisance.) with OR. REV. STAT. 196.880 (Filling with a permit presumed not to infringe on public rights of navigation, fishery or recreation, and the public rights on land created by the fill shall be considered extinguished).

TX: *Lorino v. Crawford Packing Co.*, 142 Tex. 51, 175 S.W.2d 410, 414 (1943) (“No one should have an exclusive right to the enjoyment of [lands covered by tidal waters] unless and until the legislature has granted such right.”).

VA: *Marine Resources Comm’n v. Forbes*, 214 Va. 109, 112, 197 S.E.2d 195, 197 (1973) (At common law riparian owners had no express right to deposit fill on the beds adjoining their highlands).

VI: *Alexander Hamilton Life Ins. Co. v. Government of the Virgin Islands*, 20 D.C.V.I. 333, 343 (1983) (Unauthorized filling of submerged lands does not extinguish ownership of these lands by the Government, nor any of the Government’s rights incident to ownership). *See also* 12 V.I.CODE ANN. TIT. 12, § 403 (“No person, firm, corporation, association or other legal entity shall create, erect, maintain, or construct any obstruction or barrier, or restraint of any nature whatsoever upon, across or within the shorelines of the Virgin Islands as defined in this section, which would interfere with the right of the public individually and collectively, to use and enjoy any shoreline.”).

WA: WASH. REV. CODE 90.58.030(2)(b) (Washington State’s Shoreline Management Act recognizes only those changes in location of the ordinary high water mark (the line that forms the public trust lands boundary) that occur naturally or are authorized by government permits).

WI: *Diedrich v. The N.W.U. Ry. Co.*, 42, Wis. 248, 3 N.W. 749 (1877) (Except for a wharf, “[a]ny other extension or intrusion into the water, beyond the natural shore,...is a purpresture, vesting no title in him who made it.”).

92. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 453, 455 (1892).

93. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892) (“It is grants of parcels of lands under navigable waters that may afford the foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining that are chiefly considered and sustained ... as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state.”).

94. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).
95. There must be legislation authorizing the conveyance of a parcel of land out of the public trust.
- AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988)(“Before any tideland grant may be found to be free of the public trust under the ‘public trust purposes’ theory, the legislature’s intent to so convey it must be clearly expressed or necessarily implied in the legislation authorizing the transfer. ... If any interpretation of the statute which would retain the public’s interest in the tidelands is reasonably possible, we must give the statute such an interpretation.”).
- CA: *Taylor v. Underhill*, 40 Cal. 471, 473 (1871)(“State can probably sell the [tide]land ... but this must be done in the interest of commerce and that must first be determined by the Legislature.”); *Boone v. Kingsbury*, 206 Cal. 148, 189-193, 273 P. 797, 815-816 (1928)(City of Oakland had no power to convey trust lands “unless such power was conferred by the legislature ...”).
- MA: *Commonwealth v. City of Roxbury*, 75 Mass. 451, 494 (1857)(General authority to take land for highways does not include taking tide flats beneath navigable waters. Such authority “must appear by express words or necessary implication. Citations omitted. The legislature alone have that power.”).
- MI: *Obrecht v. National Gypsum Co.*, 361 Mich. 399, 105 N.W.2d 143, (1960)(“No one ... has the right to construct for private use a permanent deep water dock or pier on the bottom lands of the Great Lakes ... unless and until he has sought and received, from the legislature or its authorized agency, such assent based on due finding as will legally warrant the intended use of such lands.”).
- NH: *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 6, 25 A. 718, 720 (1889)(“the purpose and nature of the trust in which the basins of these public waters are held are such that an alienation of the title of the soil is not an exercise of executive power, and cannot be effected without legislative authority.”).
- TX: *Lorino v. Crawford Packing Co.* 142 Tex. 51, 175 S.W.2d 410, 414 (1943)(“No one should have an exclusive right to the enjoyment of [lands covered by tidal waters], unless and until the legislature has granted such right.”).
96. The legislation must be clear in its intent to convey the parcel out of the trust.
- CA: *People v. California Fish*, 166 Cal. 576, 138 P.79, 82 - 83 (1913)(In “statutes purporting to authorize an abandonment of ... public use” the “intent must be clearly expressed or necessarily implied.”); *City of Berkeley v. Superior Court of*

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Alameda, 606 P.2d 362, 369 (1980)("Statutes purporting to abandon the public trust ... must be clearly expressed or necessarily implied.").

97. At a minimum the legislative intent to convey a parcel out of the public trust must be "necessarily implied."

AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988)("Before any tideland grant may be found to be free of the public trust under the 'public trust purposes' theory, the legislature's intent to so convey must be clearly expressed or necessarily implied in the legislation authorizing the transfer.").

CA: *People v. California Fish*, 166 Cal. 576, 138 P.79, 82 - 83 (1913)(In "statutes purporting to authorize an abandonment of ... public use" the "intent must be clearly expressed or necessarily implied."); *City of Berkeley v. Superior Court of Alameda*, 606 P.2d 362, 369 (1980)("statutes purporting to abandon the public trust ... must be clearly expressed or necessarily implied.").

MA: *Commonwealth v. City of Roxbury*, 75 Mass. 451, 493 (1857)(A grant "will not be held to include any portion of such public right, unless it is included in its terms, by express words or necessary implication.").

98. If a court can interpret the statute so as to retain the public's interest in tidelands, the statute should be so construed.

CA: *People v. California Fish*, 166 Cal. 576, 138 P.79, 82 - 83 (1913)("[I]f any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation."); *City of Berkeley v. Superior Court of Alameda*, 606 P.2d 362, 369 (1980)("[I]f any interpretation of the statute is reasonably possible which would retain the public's interest in tidelands, the court must give the statute such an interpretation.").

99. Termination of the public's trust rights in trust land is most often sustained when the purpose of the State legislation is to further navigation or commerce, two of the principle uses of public trust land.

US: *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892)("It is grants of parcels of lands under navigable waters that may afford the foundation for wharves, piers, docks and other structures in aid of commerce ... that are chiefly considered and sustained.").

CA: *Eldridge v. Cowell*, 4 Cal. 80, 87 (1854)(State has the authority as administrator of the trust on behalf of the public to dispose absolutely of title to tidelands to private persons if the purpose of the conveyance was to promote navigation and commerce); *City of Berkeley v. Superior Court of Alameda*, 606 P.2d 362, 370

(1980)(To extinguish the public trust interest, the legislation authorizing the conveyances must have "a clear intent ...that the purpose of the act was to further navigation ...").

100. Filling of tidelands out to an established harbor line in furtherance of navigational development has been found to terminate the public trust.

CA: *People v. California Fish*, 166 Cal. 576, 138 P.79, 82 - 83 (1913)("in the administration of the trust, when the plan or system of improvement or development adopted by the state for the promotion of navigation and commerce cuts off a part of these tidelands or submerged lands from the public channels, so that they are no longer useful for navigation, the state may thereupon sell and dispose of such excluded lands into private ownership or private uses, thereby destroying the public easement in such portion of the lands, and giving them over to the grantee, free from public control and use.").

RI: *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1045 (R.I. 1995)(Riparian gas and electric utilities found to own in "fee simple absolute" filled in lands, and such land was not subject to the public trust doctrine, despite lack of express legislative grant or conveyance, where utilities had at least tacit approval to fill land, and they built plants on the land in reliance on that tacit approval). *See also Allen v. Allen*, 19 R.I. 114, 116 (1895)("The establishment of a harbor line permits a riparian owner to carry the upland or high water mark out a certain distance from the natural shore. Actual extension of the upland to the new line extinguishes all public rights within it. The land which was formerly shore becomes upland and while the rights to the shore and upland are not changed, they are carried further out into the tidal stream, or sea." Cases cited omitted).

101. RI: *Allen v. Allen*, 19 R.I. 114, 116 (1895).

102. CA: *City of Berkeley v. Superior Court of Alameda*, 606 P.2d 362, 372 (1980)("a grant of tidelands, even if made for the improvement of navigation, does not vest absolute title in a private party until the improvements are actually made." Citing *People v. Williams*, 64 Cal. 498, 499, 2 P. 393 (1884); *People v. Kerber*, 152 Cal. at 736-737, 93 P. 878 (1908); *People v. California Fish*, 166 Cal. 576, 599 - 600, 138 P.79 (1913).

103. *City of Berkeley v. Superior Court of Alameda*, 606 P.2d 362, 370 (1980).

104. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 484-496 (1970).

CA: *Berkeley v. Superior Court*, 26 Cal.3d 515, 606 P.2d 362, 373, 162 Cal.Rptr. 327 (1980)("Properties that have been filled, whether or not they have been substantially improved, are free of the trust to the extent the areas of such

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parcels are not subject to tidal action.”). *See also Atwood v. Hammond*, 4 Cal. 2d 31, 40 (1935); *People v. California Fish Co.*, 166 Cal. 576, 585, 593-594, 596 (1913); *County of Orange v. Heim*, 30 Cal. App. 3d 694, 710-711, 723-726 (1970).

MA: *See Opinion of the Justices to the Senate*, 383 Mass. 927, 424 N.E.2d 1111 (1981).

NC: *See Home Real Estate and Insurance Co. v. Parmele*, 214 N.C. 63 (1938); *Kelly v. King*, 225 N.C. 709 (1945); *Parmele v. Eaton*, 240 N.C. 539 (1954).

OR: OR. REV. STAT. 196.880 (“If the director issues a permit to fill pursuant to [ORS 541.550 to 541.685], it shall be presumed that such fill does not infringe upon the public rights of navigation, fishery or recreation, and the public rights to land created by the fill shall be considered extinguished.”).

WA: *Orion Corp. v. State*, 109 Wash.2d 621, 747 P.2d 1062, 1072 (1987)(citing *Berkeley v. Superior Court*, 26 Cal.3d 515, 606 P.2d 362, 373, 162 Cal.Rptr. 327 (1980)).

105. *Opinion of the Justices*, 383 Mass. 972, 931 - 933 (1981)(In order to assure free marketability and mortgageability of title to developed tideland, “The Legislature may properly enact legislation eliminating any public trust rights and submerged land lying landward of a certain line shown on a plan of the city of Boston.”).

106. *People ex rel. MacMullan v. Babcock*, 38 Mich. App. 336, 196 N.W.2d 489, 497 (1972)(“It is thus the public policy of this State with respect to submerged lands in the Great Lakes that they may be disposed of only when ... such lands are of no substantial public value for hunting, fishing, swimming, pleasure boating or navigation and that the general public interest will not be impaired.”); *Obrecht v. National Gypsum Co.*, 361 Mich. 399, 416, 105 N.W.2d 143 (1960)(Legislature allows for conveyance of Great Lakes bottomlands only when it is “determined ... that such lands have no substantial public value for hunting, fishing, swimming, pleasure boating or navigation, and that the general public interest will not be impaired by such sales, lease or other disposition.”) quoting P.A. 1955, No. 247, § 2, as amended.

107. US: *See Appleby v. City of New York*, 271 U.S. 364 (1925).

CT: *Orange v. Resnick*, 94 Conn. 573, 578 (1920)(“The public rights of fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge and passing and repassing, are necessarily extinguished, *pro tanto*, by any exclusive occupation of the soil below high-water mark on the part of a riparian owner.”).

NY: *People v. Steeplechase Park Co.*, 218 N.Y. 459 (1916)(When the State makes unrestricted grants of the foreshore to private entities for their “beneficial use and enjoyment” the public trust in such foreshore can be extinguished).

CHAPTER VI

STATE POWERS, DUTIES, LIMITATIONS AND PROHIBITIONS UNDER THE PUBLIC TRUST DOCTRINE

Summary

State and federal courts have long recognized that the Public Trust Doctrine devolves upon the States, as trustees of the public trust lands, waters and living resources, certain powers and corollary duties, along with limitations and prohibitions on these powers for managing the "assets" of the public trust. The courts have elucidated these powers, duties, limitations and prohibitions in order to assure the preservation of the public's trust rights to use and enjoy these lands, waters and living resources.

State powers under the Public Trust Doctrine include the authority to protect the trust lands, waters and resources, govern the public's trust rights in trust lands, waters and resources, exercise continuous control over public trust lands, waters and living resources, define the limits of the lands and the navigability of the waters held in public trust, convey the *jus privatum* title to public trust lands, revoke a conveyance that unduly diminishes or destroys the State's *jus publicum* control over the conveyed land, require leases for structures on State's public trust lands, and restrict or prohibit fishing.

State duties under the Public Trust Doctrine include the obligations to supervise the trust, preserve, so far as consistent with the public interest, the uses protected by the trust, and protect and maintain trust property and regulate its use by devoting trust lands, waters and living resources to actual public uses.

Of the powers and authorities listed above, the courts have only circumscribed a State's power to convey trust lands into private ownership. The limitations on a State's conveyance of the *jus privatum* title into private ownership provide that there must be clear legislative authority for the conveyance, a definite furtherance of public trust purposes, and no substantial impairment of the public's use of the remaining public trust lands, waters or living resources.

Finally, the Public Trust Doctrine prohibits a State from abdicating its sovereignty or dominion over public trust lands, waters and living resources. Nonetheless, complete termination of the public's trust rights in certain parcels of public trust lands can be accomplished by a State, but only if there is legislation with the clear intent to convey a certain parcel of trust land out of the trust.

CHAPTER VI

A. State Powers and Authorities Under the Public Trust Doctrine

Over the last two centuries the American Public Trust Doctrine has evolved significantly as a basis for managing public trust lands, waters and living resources within each State. Over the decades the courts have found that under the doctrine the States, as trustees, have certain powers and corollary duties, along with limitations on these powers. Of central importance, however, is that the common intent and purpose of each power, duty or limitation is the full preservation of the public's trust rights to use and enjoy these lands, waters and living resources.

There is no one seminal case enumerating all of the powers and duties of the States, or the concurrent limitations and prohibitions, devolved upon them by the Public Trust Doctrine. So many factual circumstances and situations render that impossible. Thus, in order to circumscribe the general body of these trustee powers, duties, limitations and prohibitions, the entire collection of State and federal case law may be analyzed. To that end, the powers, duties, limitations and prohibitions that are discussed herein are all derived from cases discussed elsewhere in this book.

Nearly every State in the Union is now cognizant of, and implementing, the Public Trust Doctrine. In some States, however, decades have passed since the State asserted its authority as a trustee under the doctrine. The U.S. Supreme Court recognized in the 1988 *Phillips Petroleum v. Mississippi* case that the State was not precluded from asserting ownership of tidelands under the doctrine, for the first time since it entered the Union in 1817.¹ As succinctly put by the Arizona Supreme Court:

“That generations of trustees have slept on public rights does not foreclose their successors from awakening.”²

A State's powers, duties, limitations and prohibitions are as viable today as they were “at the instant it achieved the constitutional status of a State.”³ Under the Public Trust Doctrine, States have the power and authority to:

- Govern, manage and protect the public's trust rights in lands and water subject to the Public Trust Doctrine;⁴
- Exercise a continuous supervision and control over public trust lands, waters and living resources;⁵
- Define the limits of the lands held in public trust;⁶
- Convey the *jus privatum* title to public trust lands;⁷

- Revoke a conveyance that unduly diminishes or destroys the State's *jus publicum* control over the conveyed land;⁸
- Require leases or easements for structures on State's public trust lands;⁹ and
- Restrict or prohibit fishing.¹⁰

B. State Duties and Obligations Under The Public Trust Doctrine

The Public Trust Doctrine has been described as “an affirmation of the duty of the State to protect the people’s common heritage in streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.”¹¹ This duty of protecting public trust resources is central to the Public Trust Doctrine, for as stated by an Oregon court “These resources, after all, can only be spent once. Therefore the law has historically and consistently recognized that rivers and estuaries, once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee.”¹²

As one reviews the following duties and obligations of States under the doctrine, it becomes clear that each of the powers and authorities listed in the preceding section has a corollary duty to implement the authority through some affirmative action. Indeed, more and more States are recognizing duties upon the State trustees to implement the trust for the benefit of the public and future generations. Accordingly, under the Public Trust Doctrine each State has the duty and obligation to:

- Supervise the trust;¹³
- Preserve, so far as consistent with the public interest, the uses protected by the trust;¹⁴ and
- Protect and maintain trust property and regulate its use by devoting trust lands, waters and living resources to actual public uses.¹⁵

C. Limitations and Prohibitions on State Powers and Authority

Under the Public Trust Doctrine, States are completely prohibited from abdicating their sovereignty or dominion over public trust lands, waters and living resources.¹⁶ Of the powers and authorities listed in section A. above, the courts have only circumscribed a State's power to convey trust lands into private ownership. All other powers and authorities appear to remain plenary.

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The complete termination of the public's trust rights in certain parcels of trust land can be accomplished by a State, although only in accordance with several conditions. There must be legislation authorizing the conveyance of trust lands out of the trust.¹⁷ The legislation must be clear in its intent to convey the parcel out of the trust.¹⁸ At a minimum the intent must be "necessarily implied."¹⁹ Establishing that termination of the trust is necessarily implied, however, is a heavy burden, for if a court can interpret the statute so as to retain the public's interest in tidelands, the statute should be so construed.²⁰ This placement of the burden on the claimant is also bolstered by the rule of statutory construction that, in the cases of a claimed grant from a State to a private owner, the conveyance is to be construed most favorably for the State. *See* Ch. V.A.4. The legislation authorizing the termination of the public's trust rights in trust land must clearly further the public's trust interests.²¹ *See* Ch. V.D.

Finally, all State public trust powers and authorities must be exercised consistently with State and U.S. Constitutional limitations, such as prohibitions on gifts of public assets to private entities. This "gift" prohibition is in many (if not all) State constitutions and has been raised to challenge purported conveyances of public trust lands, as have equal protection and due process clauses.²²

Notes

1. *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988).
2. *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 171 (Ariz.App.Div. 1 1991).
3. *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 162 (Ariz.App.Div. 1 1991).
4. States have the power and authority to govern, manage and protect the public's trust rights in lands and water subject to the Public Trust Doctrine.

CT: *Lane v. Harbor Commission*, 70 Conn. 685, 694 (1898) ("The State has the *jus publicum*, or right of governing its shores and navigable waters for the protection of public rights.").
5. States have the power and authority to exercise a continuous supervision and control over public trust lands, waters and living resources.

CA: *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 425-426, 437, 658 P.2d 709, 712, 721, 189 Cal.Rptr. 346, 349, 358, *cert. denied*, 464 U.S. 977 (1983)("[T]he core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters.").

VT: *State of Vermont and City of Burlington v. Central Vermont Railway*, 571 A.2d 1128 (1989)(quoting *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 425-426, 437, 658 P.2d 709, 712, 721, 189 Cal.Rptr. 346, 349, 358 (1983)).
6. States have the power and authority to define the limits of the lands held in public trust.

US: *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 475 (1988)("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.").

MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 513 (1986)("Federal law recognizes state authority over trust property as plenary; once the trust was funded, so to speak, the federal role was spent.") *aff'd sub nom. Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988).

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7. States have the power and authority to convey the *jus privatum* title to public trust lands.

US: *Bowlby v. Shively*, 22 Or. 410, 427 (1982) (“As the state became the owner of the tide lands, it had the power ... to sell the same.”).

CA: *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 523, 162 Cal. Rptr. 327, 331, 606 P.2d 362, 366 (1980) (“Even before *Illinois Central* was decided it was recognized in California that the state had the authority as administrator of the trust on behalf of the public to dispose absolutely of title to tidelands to private persons if the purpose of the conveyance was to promote navigation and commerce.”).

WA: *Caminiti v. Boyle*, 107 Wash.2d 662, 666, 732 P.2d 989 (1987) (While the State has authority to convey title to tidelands and shorelands, “the Legislature has never had the authority ... to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands.”).

8. States have the power and authority to revoke a conveyance that unduly diminishes or destroys the State’s *jus publicum* control over the conveyed land.

US: *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 460 (1892) (“The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property ... Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held the by State can be resumed at any time.”).

9. States have the power and authority to require leases or easements for structures on State public trust lands.

NC: *Walker v. North Carolina Dept. of Env’t, Health & Nat. Resources*, 111 N.C. App. 851, 433 S.E.2d 767, rev. denied, 335 N.C. 243, 438 S.E.2d 164 (1993) (Riparian owner required to obtain easement from State to develop commercial marina in navigable waters).

OR: *Brusco Towboat Co. v. State ex rel. State Land Board*, 284 Or. 627, 637, 589 P.2d 712 (1978) (Affirms state’s authority to require leases for structures on State’s submerged and submersible lands.)

10. States have the power and authority to restrict or prohibit fishing.

US: *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1855) (“The state holds the propriety of this [bottomland] for conservation of public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the

destruction of that fishery. In other words, it may forbid all such acts as would render the public right less valuable or destroy it altogether.”).

11. *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 441, 658 P.2d 709, 189 Cal.Rptr. 346, *cert. denied*, 464 U.S. 977 (1983).

12. *Morse v. Oregon Division of State Lands*, 581 P.2d 520 (1978).

13. Each State has the duty and obligation to supervise the trust.

AZ: *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 169 (Ariz.App.Div. 1 1991)(“Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res (citations omitted) so the legislative and executive branches are judicially accountable for their dispositions of the public trust.”).

CA: *Golden Feather Community Association v. Thermalito Irrigation District*, 199 Cal.App.3d 402, 244 Cal. Rptr. 830 (1988)(State, as trustee, has the duty to supervise the trust.); *National Audobon Society v. Superior Court*, 33 Cal.3d 419, 437, 658 P.2d 709, 721, 189 Cal.Rptr. 346, 358, *cert. denied*, 464 U.S. 977 (1983)(The State’s power to supervise trust property in perpetuity is coupled with the ineluctable duty to exercise this power).

14. Each State has the duty and obligation to preserve, so far as consistent with the public interest, the uses protected by the trust.

AL: *Abbot v. Doe*, 5 Al. 393, 395 (1843)(“The sovereign power can make no disposition of the shore, by grant, or otherwise, prejudicial to the rights of those for whom it is holden in trust.”).

CA: *National Audobon Society v. Superior Court*, 33 Cal.3d 419, 446, 658 P.2d 709, 728, 189 Cal.Rptr. 346, 365, *cert. denied*, 464 U.S. 977 (1983)(Courts have noted the States’ “duty as trustee to consider the effect of the taking on the public trust, and to preserve, so far as consistent with the public interest, the uses protected by the trust.”).

MS: *Secretary of State v. Weisenberg*, 633 So.2d 983, 993-94 (Miss. 1994)(“Further, the Legislature and the Secretary of State are charged not only with maintaining title to trust properties in the State’s name, but they have a higher duty. This duty being to continuously seek avenues for proper and effective management of the public trust so that there is a return to the public of use, environmental protection and advancement and, in the appropriate areas, a return of economic growth. To stagnantly hold tidelands is not always in the public’s best interest, nor is it responsive to the public’s trust.”).

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15. Each State has the duty and obligation to protect and maintain trust property and regulate its use by devoting trust lands, waters and living resources to actual public uses.

CA: *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 441, 658 P.2d 709, 189 Cal.Rptr. 346, cert. denied, 464 U.S. 977 (1983)(The Public Trust Doctrine is “an affirmation of the duty of the state to protect the people’s common heritage in streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.”).

FL: *Hayes v. Bowman*, 91 So.2d 795 (1957)(“[I]t is well settled in Florida that the State holds title to lands under tidal navigable waters and the foreshore thereof(land between high and low water marks). As a common law this title is held in trust for the people for purposes of navigation, fishing, bathing and similar uses. Such title is not held primarily for purposes of sale or conversion into money. Basically it is trust property and should be devoted to the fulfillment of the purposes of the trust, towit: the service of the people.”).

HI: *State By Kobayashi v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725 (1977)(“Under public trust principles, the State as trustee has the duty to protect and maintain trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g. recreation.”).

16. States are prohibited from abdicating their sovereignty or dominion over public trust lands, waters and living resources.

US: *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892)(“The State can no more abdicate its trust over property in which the whole people are interested ... than it can abdicate its police powers in the administration of government and the preservation of the peace.”).

CA: *California v. Superior Court (Lyon)*, 29 Cal.3d 210, 226 (1981)(“It is well settled that if the state holds these lands in trust for the benefit of the public, its conveyance of title to private persons does not necessarily free the property from the burden of the public trust.”); *City of Longbeach v. Mansell*, 3 Cal.3d 462, 482 (1970)(“Tidelands subject to the trust may not be alienated into absolute private ownership; an attempted conveyance of such land transfers 'only bare legal title' and the property remains subject to the public trust easement.”).

NJ: *Arnold v. Mundy*, 6 N.J.L. 1, 39 (1821)(“[T]he king cannot, by alienation, destroy the *ius publicum* ...”).

- NY: *Coxe v. State*, 144 N.Y. 396, 405-406 (1895)("[A] trust is engrafted upon [the seacoast and shores of tidal rivers] for the benefit of the public of which the State is powerless to divest itself."). *But see People v. Steeplechase Park Co.* 218 N.Y. 459 (1916)(State may convey exclusive rights to trust land, thereby extinguishing the trust).
- OR: *Bowlby v. Shively*, 22 Or. 410, 427 (1982)("As the state became the owner of the tide lands, it had the power ... to sell the same. It has, however, no authority to dispose of its tidelands in such a manner as may interfere with the free and untrammled navigation of its rivers, bays, inlets, and the like."); *Brusco Towboat Co. v. State, By and Through Straub*, 30 Or. App. 509, 517, 567 P.2d 1037, 1043-1044 (1978)("Unlike the state's *jus privatum* interest, the *jus publicum* cannot be alienated."); *reconsideration denied* 570 P.2d 996, 31 Or. App. 491, *aff'd in part, reversed in part*, 589 P.2d 712, 284 Or. 627; *State Land Board v. Hueker*, 548 P.2d 1323, 25 Or. App. 137, 139 (1976)("the *jus publicum*, the right of the public to use tidelands and navigable waters for commerce and navigation, which the state holds as sovereign in trust for the people and which it cannot grant away."); *Corvallis and Eastern Railroad Co. v. Benson*, 61 Or. 359, 370 121 P. 418, 422 (1912)(State may sell the "jus privatum" but cannot grant away the other element of its tidelands—the "jus publicum"); *Lewis v. City of Portland*, 25 Or. 133, 159 (1893)(The State may dispose of bottomlands held in trust only "in such a way as will not impair or prejudice the public interests or privileges, such as fishing, navigation, and commerce."). *See also Land Board v. Corvallis Sand & Gravel Co.*, 283 Or. 147, 582 P.2d 1352 (1978).
- PA: *Reighard v. Flinn*, 189 Pa. 355, 362, 42 A. 23, 25 (1899)(*Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 435 - 436 (1892) ruling that a State cannot abdicate trust through a transfer in property is applicable to this State); *Conneaut Lake Ice Co. v. Quigley*, 225 Pa. 605, 611, 74 A. 648, 650 (1909)(The State's trusteeship "is inviolable, the State being powerless to change the situation by in any way abdicating its trust")(citing *Pewaukee v. Savoy*, 103 Wis. 271, 79 N.W. 436).
- VA: *James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*, 122 S.E. 344, 347 (1924)("The ... Legislature have the power to dispose of such beds and the waters flowing over them subject to the public's use of navigation, and such other public use, if any, as is held by the state for the benefit of all the people.").
- WA: *Caminiti v. Boyle*, 107 Wash.2d 662, 666, 732 P.2d 989, 992 (1987)("The Legislature has never had the authority, however, to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands.").

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17. There must be legislation authorizing the conveyance of trust lands out of the trust.

AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988) (“Before any tideland grant may be found to be free of the public trust under the ‘public trust purposes’ theory, the legislature’s intent to so convey it must be clearly expressed or necessarily implied in the legislation authorizing the transfer. ... If any interpretation of the statute which would retain the public’s interest in the tidelands is reasonably possible, we must give the statute such an interpretation.”).

CA: *Taylor v. Underhill*, 40 Cal. 471, 473 (1871) (“State can probably sell the [tide]land ... but this must be done in the interest of commerce and that must first be determined by the Legislature.”); *Boone v. Kingsbury*, 206 Cal. 148, 189-193, 273 P. 797, 815-16 (1928) (City of Oakland had no power to convey trust lands “unless such power was conferred by the legislature ...”).

MA: *Commonwealth v. City of Roxbury*, 75 Mass. 451, 494 (1857) (General authority to take land for highways does not include taking tide flats beneath navigable waters. Such authority “must appear by express words or necessary implication. Citations omitted. The legislature alone have that power.”).

MI: *Obrecht v. National Gypsum Co.*, 361 Mich. 399, 105 N.W.2d 143 (1960) (“Noone ... has the right to construct for private use a permanent deep water dock or pier on the bottom lands of the Great Lakes ... unless and until he has sought and received, from the legislature or its authorized agency, such assent based on due finding as will legally warrant the intended use of such lands.”).

NH: *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 6, 25 A. 718, 720 (1889) (“The purpose and nature of the trust in which the basins of these public waters are held are such that an alienation of the title of the soil is not an exercise of executive power, and cannot be effected without legislative authority.”).

TX: *Lorino v. Crawford Packing Co., et al.*, 142 Tex. 51, 175 S.W.2d 410 (1943) (“No one should have an exclusive right to the enjoyment of [lands covered by tidal waters], unless and until the legislature has granted such right.”).

18. The legislation must be clear in its intent to convey the parcel out of the trust.

AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988) (“Before any tideland grant may be found to be free of the public trust under the “public trust purposes” theory, the legislature’s intent to so convey must be clearly expressed or necessarily implied in the legislation authorizing the transfer.”).

- CA: *People v. California Fish*, 166 Cal. 576, 138 P.79, 82 - 83 (1913)(In “statutes purporting to authorize an abandonment of ... public use” the “intent must be clearly expressed or necessarily implied.”); *City of Berkeley v. Superior Court of Alameda*, 606 P.2d 362, 369 (1980)(“Statutes purporting to abandon the public trust ... must be clearly expressed or necessarily implied.”).
19. At a minimum the legislative intent to convey a parcel out of the trust must be “necessarily implied.”
- AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988)(“Before any tideland grant may be found to be free of the public trust under the ‘public trust purposes’ theory, the legislature’s intent to so convey must be clearly expressed or necessarily implied in the legislation authorizing the transfer.”).
- CA: *People v. California Fish*, 166 Cal. 576, 138 P.79, 82 - 83 (1913)(In “statutes purporting to authorize an abandonment of ... public use” the “intent must be clearly expressed or necessarily implied.”); *City of Berkeley v. Superior Court of Alameda*, 606 P.2d 362, 369 (1980)(“statutes purporting to abandon the public trust ... must be clearly expressed or necessarily implied.”).
- MA: *Commonwealth v. City of Roxbury*, 75 Mass. 451, 493 (1857)(A grant “will not be held to include any portion of such public right, unless it is included in its terms, by express words or necessary implication.”).
20. Establishing that termination of the trust is necessarily implied by the legislation, however, is a heavy burden, for if a court can interpret the statute so as to retain the public’s interest in tidelands, the statute should be so construed.
- CA: *People v. California Fish*, 166 Cal. 576, 138 P.79, 82 - 83 (1913)(“[I]f any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation.”); *City of Berkeley v. Superior Court of Alameda*, 606 P.2d 362, 369 (1980)(“[I]f any interpretation of the statute is reasonably possible which would retain the public’s interest in tidelands, the court must give the statute such an interpretation.”).
21. The legislation authorizing the termination of the public’s trust rights in trust land must further the public’s trust interests.
- US: *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, (1892)(“It is grants of parcels of lands under navigable waters that may afford the foundation for wharves, piers, docks and other structures in aid of commerce ... that are chiefly considered and sustained.”).

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- CA: *Eldridge v. Cowell*, 4 Cal. 80, 87 (1854)(State has the authority as administrator of the trust on behalf of the public to dispose absolutely of title to tidelands to private persons if the purpose of the conveyance was to promote navigation and commerce); *City of Berkeley v. Superior Court of Alameda*, 606 P.2d 362, 370 (1980)(To extinguish the public trust interest, the legislation authorizing the conveyances must have “a clear intent ...that the purpose of the act was to further navigation ...”).
22. AZ: *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 837 P.2d 158 (Ariz.App.Div. 1 1991).
- MA: *Opinion of the Justices*, 383 Mass. 927, 931-33, 424 N.E.2d 1111, 1115 (1981).
- MS: *Secretary of State v. Weisenberg*, 633 So.2d 983 (1994).

CHAPTER VII

THE CONFLUENCE OF RIPARIAN RIGHTS AND THE PUBLIC TRUST DOCTRINE

Summary

The law has recognized the co-existence of public and private rights in navigable waters, tidelands and submerged lands for hundreds, if not thousands, of years. In the United States there is a long history of these two interests being reconciled such that both may exist to the reasonable satisfaction of the other. Nonetheless, with the rapid intensification of demand on coastal resources and the corresponding advent of environmental management and regulation, public and riparian rights are thrown into more frequent conflict.

"Riparian" and "littoral" rights derived from the English common law, and are part and parcel of the property rights enjoyed by owners of land adjoining navigable waters, including both tidal and non-tidal waters. In modern usage the term "riparian rights" is understood as encompassing both riparian and littoral rights. For purposes of this discussion, the term "riparian rights" is used in its general sense encompassing both.

Under the English common law, the bundle of riparian rights included the rights of access to the water, to wharf out, to gain by accretions (and lose by erosion) and to replace land lost by avulsion. The right of access to the water is the most basic right of the riparian owner under which other riparian rights are created and protected.

Today, nearly every State has modified the English common law, either by Constitution or legislatively, to such an extent that what were previously regarded as riparian "rights" can best be described today as merely riparian "privileges." But though States have broad authority to modify or nullify unexercised riparian rights, this discretion is limited once these rights are "vested" in the riparian owner. Riparian rights, once vested to a riparian owner, can only be deprived in accordance with due process, and with just compensation.

There is a pyramid of authority over navigable waters. At the top, and operating within a narrow scope of "improvements to navigation" is the federal navigational servitude. Next is the State authority, as trustee, to manage its trust lands, waters and resources for the benefit of the public's various trust uses, including the authority to reasonably regulate riparian rights, or to deny them altogether. Finally, riparian owners have certain rights, of which some, such as filling-in shorelands, are regulated to such an extent that today they have been described as a mere franchise.

A State may accord special consideration to riparians. At the same time, when a riparian owner desires to "improve" the shorelands the State can best safeguard the public's trust rights if it affirmatively regulates these riparian improvements.

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The law has recognized the co-existence of public and private rights in navigable waters, tidelands and submerged lands for hundreds, if not thousands, of years.¹ While there is an inherent antagonism between private and public interests in these common resources, the overall history is one of reasonableness and accommodation. The complex set of rules that have evolved in response to these competing claims employ standards of reasonableness to manage the manifold, and sometimes outright conflicting, demands placed upon waters and watercourses.² These controversies are resolved by identifying the existence, nature, and scope of the property interest asserted by the riparian, and by reviewing the governmental power relied upon. Critical to this inquiry is the determination of whether State law recognizes the asserted riparian property "right"; whether that right has "vested;" and whether the State retains authority to refuse to recognize, modify, or revoke that right.

With the rapid intensification of demand on coastal resources and the corresponding advent of environmental management and regulation, public and riparian rights may well be thrown into more frequent conflict. Given the finite availability of coastal resources and increasing development pressures, conflicts between the public's interests and those of riparian owners, seeking to maximize the use and value of their riparian property, are likely to intensify.

A. History and Evolution of Riparian Rights

"Riparian," or "littoral" rights, derived from the English common law, are those enjoyed by owners of land adjoining navigable waters, including both tidal and non-tidal waters. Strictly speaking, the rights of an owner whose land abuts tidewaters are called "littoral rights," and whose land abuts navigable rivers and lakes are called "riparian rights." In modern usage, however, the term "riparian rights" is understood as encompassing both,³ although in some States the distinction is maintained.⁴ For purposes of this discussion, the term "riparian rights" is used in its general sense encompassing both.

Under the English common law, the bundle of riparian rights included the right to:⁵

- access the water;
- wharf out;
- acquire accretions; and
- replace land lost to avulsion.

Of these, the right of access to the water, is "first and most basic right of the riparian owner,"⁶ under which other riparian rights are created and protected.⁷ The right of access ensures the riparian owner's "right to be and remain a riparian proprietor,"⁸ protects the riparian owner's ability to reach the navigable portions of adjacent waters without unreasonable impediment, supports the riparian's right to wharf out,⁹ and includes the right to erect structures in aid of navigation.¹⁰ The right of access is also the foundation for a riparian owner's right to take title to accreted lands, without which access to the water could be effectively cut off.¹¹

Riparian rights are "property" but may be enjoyed only "in due subjection to the rights of the public."¹² Once vested, riparian rights may be taken only for the public good with payment of compensation.¹³

In *Shively v. Bowlby*,¹⁴ the U.S. Supreme Court surveyed the evolution of riparian rights and the Public Trust Doctrine from their English common law roots to their subsequent adoption and modification in America. The *Shively* decision noted that the common law of England "at the time of the emigration of our ancestors is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several Colonies and States, or by the Constitution and the laws of the United States."¹⁵ Under the English common law, a riparian landowner had a proprietary right of access to the waters adjacent to her land, and could demand compensation for the cutting off of that access by the construction of public works. The Court noted that this right was not "a title in the soil below high-water mark, nor a right to build thereon, but a right of access only, analogous to that of an abutter upon a highway."¹⁶

Under the English common law as it existed in the colonies and the later-admitted States, unauthorized encroachments upon tidewaters were considered *purprestures*.¹⁷ In general a *purpresture* is analogous to a "taking" by a private individual or entity of property belonging to the public.¹⁸ *Purprestures* are akin to public nuisances, but the two are not identical in that a *purpresture* may exist without having caused or threatening to cause any public inconvenience.¹⁹ At common law, the *purpresture* was subject to removal, demolition or re-appropriation by the State for its own use and benefit.²⁰ In this country, *purpresture* actions have fallen into disuse.

B. Status of Riparian "Rights" Today

As noted above, English riparian owners possessed numerous "rights" that were protected under the common law. Further, the common law of England remains the common law of the several States "except so far as it has been modified by the

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charters, constitutions, statutes or usages of the several Colonies and States, or by the Constitution and the laws of the United States.”²¹ In the colonial days and early decades of the United States there was little modification of the English common law. Today, however, nearly every State has modified the English common law, either by Constitution or legislatively, to such an extent that what were previously regarded as riparian "rights" can often be described today as merely riparian "privileges."

Under the English common law, "the *jus privatum* of the proprietor is subject to the *jus publicum* of the community."²² The "community" mentioned includes both the State and the Federal Governments. As a result, both State and federal courts have resolved conflicts between the exercise of public and private rights, in favor of the public.²³ As stated by the U.S. Supreme Court in *Phillips Petroleum v. Mississippi*, "it has been long-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."²⁴

In the early days of the country a riparian owner could rightly be said to have a right to "reclaim" land lost by erosion by filling in the shoreland. Today, the act of filling in navigable waters is greatly restricted by both federal and State legislation and regulation. See Ch. IX, §3.E. for further discussion. Likewise, in the early decades of the country the right to wharf out was commonly recognized; today nearly every coastal State regulates the construction of wharves, piers and docks. Even the common law right to accretions has been reversed by some States.²⁵

In fact, a State may completely nullify the English common law's protection of riparian rights, as illustrated by the 1921 case *Port of Seattle v. Oregon and Washington R.R. Co.* ²⁶ In this case the U.S. Supreme Court upheld the State of Washington's law that recognized "no right of any kind either in land below highwater mark ... or in, to, or over the water ...," and that a riparian owner in Washington State has no "right of access over the intervening land and water area to the navigable channel."²⁷ The Court characterized Washington's refusal to recognize riparian rights:

"So complete is the absence of riparian or littoral rights that the State may - subject to the superior rights of the United States -- wholly divert a navigable stream, sell the river bed and yet have impaired in so doing no right of the upland owners whose land is thereby separated from all contact with the water."²⁸

The Court went on to note that the State's interest is a "full proprietary right" to either make or completely withhold rights in the adjoining water area. And

whether a riparian owner "has any right or interest in those [navigable] waters or the land under the same, is a matter wholly of local law."²⁹

The U.S. Supreme Court has also recognized that it is within a States' discretion to grant riparian rights to persons "whether owners of the adjoining upland or not, as it is considered for the best interests of the public."³⁰

C. The Vesting of Riparian Rights

Though it is well established that States have broad authority to modify or nullify unexercised riparian rights, this discretion is limited once these rights are "vested" in the riparian owner. The 1870 U.S. Supreme Court case *Yates v. Milwaukee*³¹ concerned a riparian owner (Yates) who, in 1856, built a commercial wharf into the Milwaukee River. Two years prior, in 1854, the Wisconsin legislature passed an act which authorized the City of Milwaukee to establish by ordinance "dock and wharf lines." But it wasn't until 1864 -- 8 years after the wharf was built -- that the City of Milwaukee actually drew the lines. The line cut through Yates' wharf, and the City declared it "an obstruction to navigation, and a nuisance," and ordered Yates to remove it.³² When the City attempted to remove the wharf, Yates brought suit to enjoin the City from so doing. The U.S. Supreme Court held that, under Wisconsin law a riparian has a right of access to navigable water and to wharf out.

"This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."³³

The Court also looked with skepticism at the simple declaration in the ordinance that the wharf was a nuisance. "But the mere declaration by the city council of Milwaukee that a certain structure was an encroachment or an obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character."³⁴

States may and do differ in the degree to which they recognize riparian rights, and in their determination of whether and when these rights vest and thus become compensable property rights. While riparian rights are treated as irrevocable easements in some States, in others, these rights may be deemed a license.

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However, even where a particular riparian right is considered a mere license, it may become a compensable interest, or even irrevocable, once the riparian actually exercises this right by building a wharf, dock, or pier, or other structure.³⁵

A modern Oregon case illustrates the dynamic relationship between vested riparian and public rights in lands and waters subject to the Public Trust. In the 1977 case *Brusco Towboat Co. v. Oregon*, the State of Oregon sought to impose submerged lands leases upon existing wharves, threatening ejectment actions against those who refused to enter into a lease agreement.³⁶ The Brusco Towboat Company had built its wharf before the leasing program was enacted, and challenged the program, arguing that the State's proprietary interest in the submerged lands underlying navigable waterways did not empower it to charge rent to landowners who were merely exercising their riparian rights to build structures in aid of navigation over the submerged lands, and that the leasing program therefore resulted in a taking of their riparian rights without compensation.³⁷

The Oregon Supreme Court³⁸ held that under Oregon law, riparian "privileges" exist only until the State decides otherwise.³⁹ Judicial recognition that a privilege exists "until prohibited by the legislature" does not entitle those who choose to exercise that privilege "to assume that the legislature will not act to limit or prohibit it in the future."⁴⁰ The court held that the State's requirement that "riparian owners who have taken advantage of the legislature's past failure to prohibit their exclusive occupation of the State's submerged and submersible land [to now] pay rental for the privilege of continuing to do so does not violate any right of property. Leases may, therefore, be required of those parties who claim riparian status and who have exercised in the past the privileges accompanying that status."⁴¹

Most States recognize a limited riparian right to extend a wharf, dock, or pier into adjacent waters,⁴² subject to governmental regulations related to navigation and commerce.⁴³ The extent of this right is limited to that necessary for navigation. As soon as the point of navigability is reached, the right to extend into navigable waters ceases.⁴⁴ The standard is one of reasonableness.⁴⁵ A riparian owner may not use navigable waters in a manner inconsistent with the rights of other riparians or the public right of navigation.⁴⁶ A wharf extending further than reasonably necessary to reach navigable waters, or which unreasonably interferes with the uses of the public, has been held to constitute a public nuisance.⁴⁷

Each case is resolved by resort to rules of reason applied to the particular facts and circumstances, taking into consideration the size and nature of the waterbody, location of navigable channels, total number of wharves, docks, or piers on a watercourse, and customary length of piers constructed by other riparian owners.⁴⁸

Consistency with upland uses may also be considered in determining reasonableness. A dock for commercial uses may not be reasonable where surrounded by residential upland properties.⁴⁹

Although the riparian right of access has been interpreted liberally in order to encourage commercial development, some uses have been found to be unrelated to the right of access. Among the uses which have been found not to be necessary to the right of access are restaurants,⁵⁰ amusement parks,⁵¹ meat processing plants,⁵² breweries,⁵³ and removal of sand for sale.⁵⁴ A question of the reasonableness of riparian use may also arise where the extent of use of the water is far greater than the amount of adjoining upland held by the riparian.⁵⁵

Public rights may further limit the riparian right of access. It is not uncommon for a riparian's right of access to be cut off by, for instance, navigational improvements, shoreline protection structures (e.g., jetties, groins, seawalls), by filling adjacent submerged lands, or by the construction of bridges, roads, and highways.⁵⁶

D. The Hierarchy of Federal, State and Riparian Rights In Trust Lands and Waters

The federal navigational servitude is the dominant servitude over navigable waters. See Ch. X.B.1.a. "The right of the United States in the navigable waters within the several States is, however, "limited to the control thereof for the purposes of navigation."⁵⁷ When Congress does act within the limited scope of its navigational servitude, this power is superior to State regulatory powers. Further, because all navigable waters are impressed with the navigational servitude, any property rights, such as riparian rights, vested after Statehood have always been encumbered by the federal navigational servitude. As a result, when Congress acts within the scope of this servitude with the result that private property or riparian rights are destroyed (taken) compensation is not due.⁵⁸ The courts are sensitive, however, to the loss of riparian rights. The Supreme Court has noted that "And while Congress, in the exercise of this power, may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution (citation omitted) it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end."⁵⁹

Though it has long been recognized that riparian rights are property rights, they are, however, "still subject to the public's paramount right and interest in navigable waters" under the Public Trust Doctrine.⁶⁰ Thus, in the event of a direct conflict

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between a riparian right and one or more of the public's trust rights, the public rights will prevail over the private.⁶¹ See Ch. V.B. for further discussion.

Thus, there is a pyramid of authority over navigable waters. At the top, and operating within a narrow scope of "improvements to navigation" is the federal navigational servitude. Next is the State authority, as trustee, to manage its trust lands, waters and resources for the benefit of the public's various trust uses, including the authority to reasonably regulate riparian rights, or to deny them altogether.⁶² Finally, riparian owners have certain rights, of which some, such as filling-in shorelands, are regulated to such an extent that today that they have been described as "a mere franchise."⁶³

Notes

1. See *Ch. I.C.* The public trust doctrine traces its roots to the Institutes of Justinian, a codification of Roman civil law between 529 and 534 A.D. The Justinian code was based upon the second century Institutes of Gaius, which was, in turn, a codification of the natural law of earlier Greek philosophers. See also Sandars, T., *THE INSTITUTES OF JUSTINIAN* 73 (4th ed. 1867). Roman and civil law provided the framework and justification for riparian rights adopted by the English common law. Angell, Joseph K., *A TREATISE ON THE RIGHT OF PROPERTY IN TIDEWATERS AND IN THE SOILS AND SHORES THEREOF* 15-34 (1826).
 2. For example, riparian rights must be exercised by the owner in such a manner as not to interfere with the rights of other riparians and the rights of the public. See *U.S. v. Willow River Power Co.*, 324 U.S. 499, 510, 65 S.Ct. 761, 89 L.Ed.2d 1101 (1924) (“Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.”).
 3. Tarlock, A. Dan, *LAW OF WATER RIGHTS AND RESOURCES* §3.05 (looseleaf 1995), citing *Stoesser v. Shore Drive Partnership*, 494 N.W.2d 204 (Wis. 1993); *Hunter v. Kellog*, 563 N.E.2d 1338, 1339 (Ind.App. 1990).
 4. Tarlock, A. Dan, *LAW OF WATER RIGHTS AND RESOURCES* §3.05 (looseleaf 1995), citing *Water St. Assoc. Ltd. Partnership v. Innipak Plastics Corp.*, 230 Conn. 764, 646 A.2d 790 (1994).
 5. Dellapenna, Joseph W., *Introduction to Riparian Rights* in 1 *WATER AND WATER RIGHTS* 89-90 (Robert E. Beck, ed. 1991).
- FL: *Game Commission v. Lake Islands, Ltd.*, 407 So.2d 189, 192 (Fla. 1981)(Common-law riparian rights in Florida include the rights of alluvion, right of access, right of reasonable use of the water for domestic purposes, the right to have the water kept free from pollution, the right to protect against trespass, among others). See also Fla. Stat. §253.141(1).
- ME: *Great Cove Boat Club v. Bureau of Public Lands*, 672 A.2d 91, 95 (Me.1996)(In Maine, “traditional common law rights included: (1) the right to have the water remain in place and retain, as nearly as possible, its natural character, (2) the right of access to the water, (3) subject to reasonable restrictions, the right to wharf out to the navigable portion of the body of water, and (4) the right of free use of the water immediately adjoining the property for the transaction of business associated with wharves.”).

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- MN: *McLafferty v. St. Aubin*, 500 N.W.2d 165, 168 (Minn. App. 1993) (“Riparian rights include the right to build and maintain, for private or public use, wharves, piers, and landings on the riparian land and extending into the water. They also include such rights as hunting, fishing, boating, sailing, irrigating, and growing and harvesting wild rice.”). *Citations omitted*.
- VA: *Thurston v. City of Portsmouth*, 205 Va. 909, 911-12, 140 S.E.2d 678, 680 (1965) (Riparian rights in Virginia include the right to be and remain a riparian owner, the right of access to the water, the right to wharf out, the right to accretions and alluvium, and the right to make reasonable use of the water as it flows past).
- WI: *Stoesser v. Shore Drive Partnership*, 172 Wis.2d 660, 666 n.2, 494 N.W.2d 204, 207, n.2 (1993) (Riparian rights in Wisconsin include the right to reasonable use of the water, right of access, right to lands formed by accretion or reliction, and other rights limited by statute).
6. Dellapenna, Joseph W., *Introduction to Riparian Rights*, in 1 WATERS AND WATER RIGHTS 90 (Robert E. Beck, ed. 1991).
- US: *See Bonnelli Cattle Co. v. Arizona*, 414 U.S. 313, 326 (1973).
- CT: *State v. Knowles-Lombard Co.*, 122 Conn. 263, 266, 188 A. 275, 276 (1936) (“The fundamental right on which all others depend is the right of access.”). *See also Orange v. Resnick*, 94 Conn. 573, 578, 109 A. 864, 867 (1920).
- IL: *Linn Farms, Inc. v. Edlen*, 111 Ill.App.2d 294, 299, 250 N.E.2d 681, 684 (1969) (“The whole doctrine of accretions rests upon the right of access to the water, and it must be convenient access. The right to preserve his contact with the water is one of the most valuable of a riparian owner.”) (citing *City of Peoria v. Central National Bank*, 224 Ill. 43, 56, 79 N.E. 296, 299).
- MA: *See Michaelson v. Silver Beach Improvement Ass’n*, 342 Mass. 251 (1961).
- MD: *People’s Counsel v. Maryland Marine Mfg. Co.*, 316 Md. 491, 502, 560 A.2d 32, 37 (1989) (“the right of access to the water is fundamental ...”). *Citations omitted*.
- MN: *Park Elm Homeowner’s Association v. Mooney*, 398 N.W.2d 643, 645 (1987) (“His main right -- on which other rights depend and which often constitutes the principal value of property so situated -- is an exclusive right of access to the water in front of his land.”) (citing *State v. Slotness*, 289 Minn. 485, 486, 185 N.W.2d 530, 532 (1971)).
- NY: *See Tiffany v. Town of Oyster Bay*, 234 N.Y. 15, 21, 136 N.E. 224, 225 (1922).

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- SC: *Horry County v. Tilghman*, 283 S.C. 475, 480, 322 S.E.2d 831, 834 (1984) ("It is generally acknowledged that the riparian rights -- access to the water -- "often constitute the principal value of teh land.""). *Citations omitted*.
- VA: *See Thurston v. City of Portsmouth*, 205 Va. 909, 911-12, 140 S.E.2d 678, 680 (1965).
- WA: *Strom v. Sheldon*, 12 Wash. App. 66, 68, 527 P.2d 1382, 1383 (1974), *rev. denied*, 85 Wash.2d 1001 (1975) ("Courts have long recognized that access to water is part of the consideration for the deed, and it may well be the most valuable feature of the property.").
7. US: *See Hughes v. Washington*, 389 U.S. 290, 293-94 (1967).
- CT: *See Water Street Assoc., Ltd. v. Innopak Plastics Corp*, 230 Conn. 764, 646 A.2d 790, 796 (1994) ("In apportioning littoral rights along an irregular or concave shore, the basic aim is to preserve the essential right of both parties to wharf out and to achieve reasonable access to the channel."). *Citations omitted*.
- NH: *See Opinion of the Justices*, 139 N.H. 82, 649 A.2d 604, 609 (1994) (citing *Sundell v. Town of New London*, 119 N.H. 424, 425-26, 146 A.2d 851, 853 (1979)).
8. *Thurston v. City of Portsmouth*, 205 Va. 909, 911-12, 140 S.E.2d 678, 680 (1965) (Riparian rights in Virginia include the right to be and remain a riparian owner).
9. US: *See United States v. River Rouge Imp. Co.*, 269 U.S. 411 (1926).
- CA: *See Colberg v. California*, 67 Cal.2d 408, 432 P.2d 3 (1967), *cert. denied* 390 U.S. 949 (1968).
10. FL: *Board of Trustees of the Internal Improvement Trust Fund v. Madeira Beach Nominee, Inc.*, 272 So.2d 209, 214 (Fla. App. 1973) ("Riparians appear to have a qualified common law right to wharf out to navigable waters in the absence of a statute.").
- MN: *State v. Slotness*, 289 Minn. 485, 487, 185 N.W.2d 530, 532 (1971) ("A riparian owner has the right to project docks to the point of navigability."). *Cited in Wheller v. City of Wayzata*, 511 N.W.2d 39, 42 n. 2 (Minn.App. 1994).
- NH: *See Sundell v. Town of New London*, 119 N.H. 839, 409 A.2d 1315 (1979).
11. OR: *See Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

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12. *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 504, 19 L.Ed. 984 (1870). *See also* Ch. V.B.

FL: *Game Commission v. Lake Islands, Ltd.*, 407 So.2d 189, 192 (Fla. 1981)(In Florida, riparian rights are "subject to the superior rights of the public as to navigation and commerce, and to the concurrent rights of the public as to fishing and bathing and the like").

13. *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 504, 19 L.Ed. 984 (1870)("This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.").

NY: *See also* McKinneys Unconsolidated Laws (NY) §7702 which includes rights in waters among "property" rights for which the State Department of Transportation must pay compensation when taken for transportation purposes; *Rumsey v. NY&NE RR Co.*, 133 N.Y. 79, 88 (date unknown)(citing *St. Louis v. Rutz*, 138 U.S. 226 (1891)).

14. 152 U.S. 1 (1894).

15. 152 U.S. 1, 14 (1894).

16. *Shively v. Bowlby*, 152 U.S. 1 (1894).

MA: *See Home for Aged Women v. Commonwealth*, 202 Mass. 422, 429 (1909); *Michealson v. Silver Beach Improvement Ass'n*, 342 Mass. 251 (1961).

17. In this country, the purpresture actions have fallen into disuse.

CT: *See Orange v. Resnick*, 94 Conn. 573, 578, 109 A. 864 (1920).

NY: One authority has commented that the English rule regarding purpresture was renounced by New York (Warren's *Weed*, New York Real Property, Land Under Water §6.06).

OR: The last case recognizing purpresture in Oregon was in 1953. *See Sweet v. Irrigation Canal Co.*, 198 Or. 166, 254 P.2d 700 (Or. 1953).

18. BLACK'S LAW DICTIONARY 1112 (5th ed. 1979)("Purpresture" is defined as "an encroachment upon public rights and easements by appropriation to private use of that which belongs to the public."). The term was defined by Blackstone: "Where there is a house erected, or an inclosure made, upon any part of the King's demesnes, or of a highway, or common street, or public water, or such like public things, it is properly

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called a *purpresture*.” See *Mamontella v. First Bank of Oak Park*, 97 Ill.App.3d 579, 53 Ill.Dec. 12, 423 N.E.2d 204, 205-06 (1981)(citing 4 W. Blackstone, COMMENTARIES 167).

CA: *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797, 816 (1928)(“[t]he state may at any time remove structures from the oceans erected by its citizens, even though they have been erected with its license of consent, if it subsequently determines them to be *purprestures*.”).

19. IL: See *Mamontella v. First Bank of Oak Park*, 97 Ill.App.3d 579, 53 Ill.Dec. 12, 423 N.E.2d 204, 205-06 (1981).
 20. CA: See *Woods v. Johnson*, 241 Cal.App.2d 278, 50 Cal.Rptr. 515 (landfill extending into navigable waters a *purpresture* subject to confiscation by the state).
 21. *Shively v. Bowlby*, 152 U.S. 1, 14 (1894).
 22. Lord Hale, *De Jure Maris*, reprinted in Hargrav’s Tract’s, 32.
 23. See Ch. V.B.
 24. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 475 (1988)(citing *Shively v. Bowlby*, 152 U.S. 1, 26 (1894)).
- OR: *Land Board v. Corvalis Sand & Gravel Co.*, 283 Or. 147, 582 P.2d 1352 (1978)(“A state which has, in its constitution or by statute, adopted the common law in general terms is not precluded by the federal constitution from asserting state ownership of the beds of non-tidal, as well as tidal, navigable waters. [Citation omitted]. It was open to this state to determine, when the question arose, whether it would assert its title to the beds of all navigable rivers or whether, by recognition and adoption of the English rule, it would resign its title over the reach of the tide to the riparian owners.”).
- LR: Farnham, W.P., *Water and Waters Rights*, Vol. I, 244 (1904)(“Such states may, by statute or Constitution, adopt whatever rule they please in the first instance. They may retain title in the public, and some states have done so. They may define the limits of the riparian rights and retain as much or as little as seems best for the public. There can be no objection to such a course.”).
25. See Ch. II, §3.A, note 6.
 26. 255 U.S. 56, 41 S. Ct. 237, 65 L.Ed. 500 (1921).

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27. *Port of Seattle v. Oregon and Washington R.R. Co. Port of Seattle*, 255 U.S. 56, 64, 41 S. Ct. 237, 65 L.Ed. 500 (1921). The Court noted that Washington law “differs in this respect from the law generally prevailing elsewhere.”
 28. *Port of Seattle v. Oregon and Washington R.R. Co. Port of Seattle*, 255 U.S. 56, 64, 41 S. Ct. 237, 65 L.Ed. 500 (1921)(citations omitted).
 29. *Port of Seattle v. Oregon and Washington R.R. Co. Port of Seattle*, 255 U.S. 56, 63, 41 S. Ct. 237, 65 L.Ed. 500 (1921).
 30. *Shively v. Bowlby*, 152 U.S. 1 (1894).
 31. 77 U.S. (10 Wall.) 497, 19 L.Ed. 984 (1870).
 32. *Yates v. Milwaukee*, 77 U.S. 497, 501-03 (1870).
 33. *Yates v. Milwaukee*, 77 U.S. 497, 504 (1870).
 34. *Yates v. Milwaukee*, 77 U.S. 497, 505 (1870).
- MA: *Commissioner v. Alger*, 61 Mass. 53 (1851)(“Statutes establishing lines beyond which no wharf shall be extended or maintained do not affect the right to maintain wharves erected before their passage.”).
- WI: W.S.A. §30.13(c)(“A wharf or pier is a permissible preexisting wharf or pier if it existed prior to the establishment of the pierhead line ...”).
35. *Brusco Towboat Co. v. State*, 30 Or.App. 509, 567 P.2d 1037, 1046-48 (1977) *aff’d as modified* (while right to structures in aid of navigation is a license, it can become irrevocable).
- IA: *Upper Iowa River Protection Ass’n, Inc.*, 497 N.W.2d 865 (Iowa 1993)(Because of State’s interest in waters, only restriction on State authority to interfere with riparian rights is due process clause).
- LR: Similarly, some States have required riparians to take some affirmative action (e.g., registering use with state or making improvements) to preserve riparian rights, revoking without compensation unperfected rights. See Tarlock, A. Dan, LAW OF WATER RIGHTS AND RESOURCES at §3.20(3).
36. *Brusco Towboat Co. v. Oregon*, 567 P.2d at 1040-41.
 37. *Brusco Towboat Co. v. Oregon*, 567 P.2d at 1041.
 38. *Brusco Towboat v. Oregon (Brusco II)*, 284 Or. 627, 589 P.2d 712 (1978).

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39. *Brusco Towboat v. Oregon (Brusco II)*, 589 P.2d at 724.
40. *Brusco Towboat v. Oregon (Brusco II)*, 589 P.2d at 724.
41. *Brusco Towboat v. Oregon (Brusco II)*, 589 P.2d at 724.
42. See 65 C.J.S. 239-40, §73 (1966 and Supp. 1995).
 - CT: See *Water Street Associates Ltd. Partnership v. Innopak Plastics Corp.*, 230 Conn. 764, 769 (1994); *Port Clinton Assoc. v. Board of Selectmen*, 217 Conn. 588, 597 (1991); *Lovejoy Van Emmenes*, 177 Conn. 287, 290-291, 416 A.2d 1192 (1979); *Shorehaven Golf Club, Inc. v. Water Resources Commission*, 146 Conn. 619, 624, 153 A.2d 444 (1959); *Rochester v. Barney*, 117 Conn. 462, 469-470, 169 A. 45 (1933); *Prior v. Swartz*, 62 Conn. 132, 138, 25 A. 398 (1892); *Mather v. Chapman*, 40 Conn. 382, 395 (1873).
 - WI: W.S.A. §30.13.
43. CT: See *Hotchkiss Grove Ass'n v. Water Resources Commission*, 161 Conn. 50, 282 A.2d 890 (1962).
 - NY: *Town of Hempstead v. Oceanside Yacht Harbor, Inc.*, 328 N.Y.S.2d, *aff'd* 32 N.Y.2d 859, 299 A.2d 895.
44. CT: See *Port Clinton Assoc. v. Board of Selectmen*, 217 Conn. 588, 597 (1991); *Lane v. Harbor Commissioners*, 70 Conn. 685, 40 A. 1058 (1898).
 - NC: See *Weeks v. North Carolina Dept. of Natural Resources & Community Development*, 97 N.C.App. 215, 388 S.E.2d 228, *rev. denied*, 326 N.C. 601, 393 S.E.2d 890 (1990).
45. NY: See *Tiffany v. Town of Oyster Bay*, 234 N.Y. 15, 21 (1922).
 - MA: *Lummis v. Lilly*, 395 Mass. 41 (1982).
46. US: See *Public Utility District v. City of Seattle*, 382 F.2d 666, *cert. denied* 396 U.S. 803; *Tri-State Materials Corp. v. United States*, 550 F.2d 1 (1977).
 - FL: *Game Commission v. Lake Islands, Ltd.*, 407 So.2d 189, 192 (Fla. 1981)(In Florida, riparian rights are "subject to the superior rights of the public as to navigation and commerce, and to the concurrent rights of the public as to fishing and bathing and the like").
47. CA: See *Woods v. Johnson*, 241 Cal.App.2d 278, 50 Cal.Rptr. 515 (landfill extending into navigable waters a purpresture subject to confiscation by the state).

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- NY: *See Tiffany v. Town of Oyster Bay*, 234 N.Y. 15, 20-21 (1922); *Town of Hempstead v. Oceanside Yacht Harbor, Inc.*, 338 A.D. 2d 263, 328 N.Y.S. 2d 894 (1972).
48. *See* 65 C.J.S. 248, §77 (1966 and Supp. 1995).
- NY: *See* Warren's Weed, New York Real Property, Land Under Water §6.07-08; *Haber's Sodus Point Bait Shop v. Wigle*, 528 N.Y.S.2d 244 (App.Div. 1987), *appeal den.* 73 N.Y.2d 701 (1988).
- WA: *See Hefferline v. Langkow*, 15 Wash.App. 896, 552 P.2d 1079 (1976), *citing Bach v. Sarich*, 74 Wash. 575, 445 P.2d 648 (1968); *Zapffe v. Srbeny*, 587 N.E.2d 177 (Ind. App. 1992).
49. *See Islip v. Powell*, 78 Misc. 2d 1007, 385 N.Y.S.2d 985.
50. *See Matter of City of New York [Neptune v. Emmons Aves.]*, 280 N.Y. 604 (1939).
51. *See People v. Steeplechase Park Co.*, 218 N.Y. 459 (1916).
52. *See City of New York v. Wilson & Co.*, 278 N.Y. 86 (1938).
53. *See Hinkley v. State*, 234 N.Y. 309 (1922).
54. *See State v. Knowles-Lombard Co.*, 122 Conn. 263, 267 (1936).
55. NY: *Haheer's Sodus Point Bait Shop, Inc. v. Wigle*, 139 A.D.2d 950, 528 N.Y.S. 2d 244 (1988)(Riparian with less than one acre of upland and 75 feet of water frontage constructed commercial dockage covering more than an acre and a half reaching 310 feet in length).
56. *See Frost v. Washington County R.R.*, 96 Me. 76, 51 A. 806, 809 (1901); *Mississippi State Highway Comm'n v. Gilich*, 609 So.2d 367, 375-376 (Miss. 1992); *see also Thurston v. City of Portsmouth*, 205 Va. 909, 140 S.E.2d 678 (1965) (right of visual access); *Xidis v. City of Gulfport*, 72 So.2d 153, 158 (1954).
57. *United States v. River Rouge Co.*, 269 U.S. 411, 419 (1926)(quoting *Port of Seattle v. Oregon Railroad*, 255 U.S. 56, 63 (1921)).
58. US: *Gibson v. United States*, 166 U.S. 269 (1897)(Riparian ownership on navigable waters is subject to the obligation to suffer the consequences of an improvement of the navigation, under an act of Congress, passed in the exercise of the dominant right of the Government in that regard; and damages resulting from the prosecution of such an improvement cannot be recovered in the Court of Claims); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913)("If, in the

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judgment of Congress, the use of the [privately owned] bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation." See also *Bridge Co. v. United States*, 105 U.S. 470 (1882); *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690 (1899); *United States v. River Rouge Co.*, 269 U.S. 411, 419 (1926); *Ford and Sons v. Little Falls Co.*, 280 U.S. 369 (1930); *United States v. Commodore Park*, 324 U.S. 386 (1945); *United States v. Twin City Power Co.*, 350 U.S. 222 (1956); *United States v. Rands*, 389 U.S. 121 (1967).

59. *United States v. River Rouge Co.*, 269 U.S. 411, 419 (1926).
60. CA: *Colberg v. California*, 67 Cal.2d 408, 432 P.2d 3, 8 (1967), cert. denied 390 U.S. 949 (1968)(A riparian "right must yield without compensation to a proper exercise of the power of the state over its navigable waters.").
- CT: *Port Clinton Associates v. Board of Selectment of Town of Clinton*, 587 A.2d 126, 217 Conn. 588 (1991), cert. denied 112 S.Ct. 64, 502 U.S. 814, 116 L.Ed. 39 (Although riparian rights are, in fact, property rather than simply rights that constitute elements of ownership, they are so limited by superior public rights that they may be referred to as a mere franchise).
- ME: *Great Cove Boat Club v. Bureau of Public Lands*, 672 A.2d 91 (1996)(Riparian landowner has certain rights which inhere in ownership of land adjacent to body of water, but these rights are subject to reasonable regulation by State in exercise of public trust rights).
- NH: *Opinion of the Justices*, 649 A.2d 604, 609 (N.H. 1994)("The rights of littoral owners on public waters are ... always subject to the paramount right of the State to control them reasonably in the interests of navigation, fishing and other public purposes. In other words, the rights of these owners are burdened with a servitude in favor of the State which comes into operation when the State properly exercises its power to control, regulate and utilize such waters.").
- WI: *State v. Bleck*, 338 N.W.2d 492, 498, 114 Wis.2d 454 (1983)("Such [riparian] rights, however, are still subject to the public's paramount right and interest in navigable waters" under the public trust doctrine).
61. OH: *Thomas v. Sanders*, 65 Ohio App.2d 5, 413 N.E.2d 1224 (1979)("It has been established that the littoral owner of property bordering navigable lakes is held to have an intangible right to make use of those navigable waters by building wharfs in the aid of navigation and commerce, but for no other purpose, and provided the exercise of this right does not interfere with the public rights.").

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- MN: *Nelson v. Delong*, 213 Minn. 425, 431, 7 N.W.2d 342, 346 (1942) (“A riparian owner’s rights are qualified, restricted, and subordinate to the paramount rights of the public.”).
- PA: 32 PENN. STAT. § 675-676 (Any right granted by the Commonwealth in the bed of any navigable waters is declared void whenever it becomes inimical to the public interest).
- WA: *Wilbour v. Gallagher*, 77 Wash.2d 306, 462 P.2d 232, 238 (1969) (A riparian owner’s title to land between the high and low water line “is qualified by the public right of navigation and the state may prevent any use of it that interferes with that right.”)
- WI: *State v. Bleck*, 114 Wis.2d 454, 467 (1983) (Riparian rights “are still subject to the public’s paramount right and interest in navigable waters.”).
62. *Port of Seattle v. Oregon and Washington R.R. Co.* *Port of Seattle*, 255 U.S. 56, 64, 41 S. Ct. 237, 65 L.Ed. 500 (1921) (State of Washington recognizes “no right of any kind either in land below highwater mark ... or in, to, or over the water ...”, and that a riparian owner in Washington State has no “right of access over the intervening land and water area to the navigable channel.”).
63. CT: *Port Clinton Associates v. Board of Selectment of Town of Clinton*, 587 A.2d 126, 217 Conn. 588 (1991), *cert. denied* 112 S. Ct. 64, 502 U.S. 814, 116 L.Ed. 39 (Although riparian rights are, in fact, property rather than simply rights that constitute elements of ownership, they are so limited by superior public rights that they may be referred to as a mere franchise). *See also State v. Knowles-Lombard Co.*, 122 Conn. 263, 266, 188 A. 275, 276 (1936).

CHAPTER VIII

CONCURRENT FEDERAL AND STATE AUTHORITY OVER PUBLIC TRUST RESOURCES

Summary

In the United States both the State and Federal Governments exercise concurrent jurisdiction over public trust resources. The Federal Government, acting primarily through Congress, has certain limited "enumerated" powers granted to it by the Constitution. Four of these powers, used by the Federal Government to regulate, use or own public trust lands and waters are discussed in this Chapter. These authorities are found in the Commerce Clause (encompassing the federal navigational servitude), the Enclave Clause, the Property Clause and the federal power of eminent domain. The Commerce Clause provides the Federal Government with regulatory powers, whereas the Enclave Clause, the Property Clause and powers of eminent domain provide the basis for and govern its property ownership.

The 1953 Submerged Lands Act, reaffirming State ownership and control of navigable waters, the lands beneath these waters and the resources therein, provides a clear statutory framework of concurrent State/Federal authority of public trust resources.

When there is a clear and direct conflict between the exercise of State and federal authority, the State law and policy must yield to the federal. In such a case, courts will find preemption only as a last resort after trying to reconcile the two authorities, and preserve State sovereign authority.

In the areas of environmental and natural resource management, Congress has often deferred to State control as a matter of policy. The Coastal Zone Management Act is an example of congressionally recognized concurrent authority regarding public trust resources.

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A. Concurrent Federal and State Sovereignty over Public Trust Resources

Approximately 191,000 square miles of navigable waters and the lands beneath lie within the boundaries of the States, all subject to the Public Trust Doctrine. See Chapters I and II. With the States as sovereigns of general jurisdiction, and the Federal Government as the dominant sovereign but of limited jurisdiction, both the State and Federal Governments exercise concurrent jurisdiction over this vast area of navigable waters and submerged lands. As a result, State resource managers regularly have reason to examine the scope of federal authority over these public trust resources.

Under the U.S. Constitution, federal statutes, congressional policy, and common law, the State and Federal Governments operate concurrently according to the interests and duties of each;¹ each is sovereign and, thus, supreme within its own sphere of sovereignty.² The scope of State or federal authority is essentially a question of capacity, which, in practice, becomes a question of purpose. Courts closely examine the specific purpose of any State or federal action, before applying the general principles of supremacy, preemption, or immunity, to determine which government, federal or State, is acting within its capacity and whose authority predominates.

In the 1894 case *Shively v. Bowlby*, the U.S. Supreme Court reaffirmed this concurrent federal and State authority over public trust lands. The Court recognized that title and dominion “vested in the original States within their respective borders subject to the rights surrendered by the Constitution of the United States.”³ More recently, in *Phillips Petroleum Co. v. Mississippi*, the Court recognized that State sovereignty and dominion over lands beneath navigable waters was not a function of any federal test of navigability of the waters, but rather was an incident of its sovereignty that it gained upon Statehood.⁴ And in language consistent with, but more specific than, the *Shively* decision, the Court noted in *Phillips Petroleum* that “lands under navigable [waters] were within the public trust given the new States upon their entry into the Union, subject to the federal navigation easement and the power of Congress to control navigation on those streams under the Commerce Clause.”⁵

B. Federal Regulatory and Property Powers

The authority of the United States to regulate, use or own public trust lands and waters is constitutionally delimited by the Commerce Clause, the Enclave Clause,

the Property Clause and the federal power of eminent domain. The Commerce Clause provides the Federal Government with regulatory powers, whereas the Enclave Clause, the Property Clause and power of eminent domain provide the basis for and govern its property ownership and use. Each of these is discussed below.

1. Regulatory Powers: The Commerce Clause

Under the Commerce Clause of the U.S. Constitution⁶ the Federal Government has the paramount power to regulate interstate and foreign commerce. As noted in prior chapters, commerce in the early days of the country was almost exclusively conducted by navigation. Thus, it is not surprising that a central power that has unfolded from the federal commerce clause is the authority to regulate the use of navigable waters, known as the "federal navigational servitude". Today, even though the conduct of "commerce" is much broader than maritime commerce, the navigational servitude remains of central importance when dealing with public trust lands, waters and resources.

a. The Federal Navigational Servitude

The navigational servitude⁷ is a dominant servitude over navigable waters and the lands beneath that allows the United States to regulate the use of the waters and submerged lands for purposes related to navigation and commerce, and to do so without compensation.⁸ The navigational servitude, which is interpreted as an incident of the historical public right of navigation,⁹ the *jus publicum*, has become a doctrine of federal power under the Commerce Clause.¹⁰ Because the federal navigational servitude emanates from the Commerce Clause power, the scope of the servitude is strictly limited to the scope of Commerce Clause purposes, even though the scope of the Commerce Clause is broadly construed by the federal courts.

The federal navigational servitude confers only regulatory power, not ownership.¹¹ Exercise of the navigational servitude by the Federal Government, or any of its agencies, does not effect a transfer of title.¹² As the constitutional delegatee of the national *jus publicum* interest in navigation and commerce, the United States has a public use interest in public trust lands and waters. The States, on the other hand, hold not only title to the public trust lands and waters, but are also vested with sovereignty. The States have both ownership and regulatory power over these resources.

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Functionally, the federal navigational servitude:

- can be exercised only by Congress or its agents;¹³
- must have either a purpose or an effect, however general or incidental, within the scope of the Commerce Clause, though broadly construed;¹⁴
- is discretionary and may be foregone where Congress chooses not to exercise it or chooses to act under another constitutional power;¹⁵
- supersedes any ownership right in burdened property;¹⁶
- burdens only property or property rights initially located within the boundaries of navigable waters;¹⁷ and
- attaches to any activity with a commerce clause purpose or effect that has an actual, positive relationship to navigation.¹⁸

When Congress acts under its commerce power in the interest of navigation, it is presumed by the federal courts to have exercised the navigational servitude. But, where it acts under another power, congressional exercise of the navigational servitude is not necessarily presumed.¹⁹ Rather, the Act of Congress under which a project is authorized determines whether the navigational servitude is being exercised. For example, the Grand Coulee Dam on the Columbia River was initially authorized under the National Industrial Recovery Act of 1933 as a hydroelectric public works project, and later reauthorized under the Rivers and Harbors Act of 1935 as a power, reclamation, navigation and flood control project.²⁰ Congress was deemed to have intended to include the requisite navigational benefits within a "multiple-purpose project."²¹

The navigational servitude is also subject to administrative procedural requirements governing the federal agency that exercises the servitude. For example, the Army Corps of Engineers has been held accountable under the administrative procedure of the Rivers and Harbors Act, the statute that confers the Corps' authority over navigation, even when a particular project for which the Corps used the navigational servitude was authorized by the Flood Control Act.²²

2. Property Based Powers

The balance of State/Federal concurrent authority over public trust lands and waters depends upon whether those resources were held by the Federal Government before or after Statehood. For the 37 "new" States, the Federal Government at one time held, under the Property Clause, the territorial lands in trust for the creation of the future State(s). Prior to statehood the Federal Government had exclusive control over territorial property. When a State enters the Union, however, the transition from exclusive federal control to concurrent

State/Federal authority occurs, bringing into play the equal footing doctrine. See Ch. II, §1.A.2. After Statehood, certain federal enclaves may be owned outright by the Federal Government, through the Enclave Clause, or the government may condemn land and take ownership through its powers of eminent domain.

a. Pre-Statehood

i. Property Clause

Under the Property Clause, Congress has exclusive power over the territory and property of the United States.²³ Neither the Ninth nor the Tenth Amendments, which together limit the powers of the Federal Government to those enumerated in the U.S. Constitution and reserve for the people all other powers, affect this Property Clause power. A State cannot circumscribe the title of the United States.²⁴ Because the Property Clause gives the United States exclusive power over its territory and property, there are, presumably, no latent powers remaining that could belong to a State under the Tenth Amendment.²⁵ Under the Supremacy Clause, furthermore, the Property Clause supersedes any State laws that conflict with the exclusive control of the United States.²⁶

When it comes to public trust lands and waters, however, the Property Clause does not delegate exclusive federal control. As the U.S. Supreme Court said in the 1845 case of *Pollard's Lessee v. Hagan*: "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."²⁷ Thus, public trust lands are outside the scope of the Property Clause power, except when the United States acts as trustee prior to Statehood. This lack of exclusive Property Clause power over public trust lands has generally been distinguished from the exclusive power of the Federal Government to dispose of uplands.²⁸

This is in accord with Congressional policy. Congress has never treated public trust lands as part of the "public domain" of the United States. "Congress has never undertaken by general laws to dispose of [lands below high water mark of navigable waters in any Territory of the United States],"²⁹ and "the general legislation of Congress in respect to public lands does not extend to tide lands."³⁰ Public trust lands were not included within the classifications in statutes relating to sales of public land and were not covered by the Swamp Land Act.³¹ When the boundaries of regular federal patents of the public domain included public trust lands as a result of the imprecision of meandering (*i.e.* the general depiction as opposed to

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specific delineation of small water course) they did not pass title to the public trust lands of their own force, but as a result of ratification by the State.³²

Congress appears to have acquiesced to the common law vesting of sovereign ownership in the several States and its non-preemption by the Constitution.³³ Furthermore, before and after Statehood, all navigable waters of the United States were to be always and forever common highways.³⁴ As a result, the beds and shores of navigable waters were not subject to survey and disposition by the United States.

The lands in the public domain granted by the United States to States in their enabling acts included only uplands.³⁵ Lands under navigable waters are not explicitly addressed, but covered by the admission of the State on an equal footing.³⁶ The equal footing doctrine recognizes that, upon admission to the Union, the "new" State acquires, as an incident of its sovereignty, all lands lying under navigable waters. The United States, thus, did not convey ownership of trust lands at Statehood in the same manner as it conveyed the uplands, but rather acknowledged the State's ownership, by virtue of its sovereignty, of the trust lands which had been held in trust by the Federal Government during territorial times.³⁷

ii. International Obligations

As trustee of trust lands in a territory prior to Statehood, the United States could convey these lands in order to perform an international obligation.³⁸ Although the United States had full power to convey these lands, Congress historically has refrained from making general pre-Statehood grants of public trust lands.³⁹ Their dominion and propriety, with a few exceptions, was preserved intact for the future State, on an equal footing with the original thirteen States. The United States as trustee confined itself to exercise its power in the areas of commerce, international obligations, public exigencies, and purposes related to the territory.⁴⁰

However, a prior Sovereign's grant of exclusive ownership, confirmed by the United States, has been interpreted as excepting the lands from the public use easement.⁴¹ See Ch. II, §4. For example, when the United States acquired California from Mexico, it was obligated under international law to recognize grants that the Mexican government had made to certain *pueblos* of tidelands, most notably to the pueblo of San Francisco. By confirming title, the United States fulfilled an international duty to protect previously created property rights.⁴² The power and duty of the United States to do so under a treaty is considered superior to any rights of the State, which arise subsequently.⁴³ As a result, where the tidelands of California would have, as an incident of State sovereignty, been held in trust for

the benefit of the people, certain tidelands that were part of the Mexican *pueblo* grants were not subject to the public trust doctrine.

b. Post-Statehood

After a State is admitted to the Union, the Federal Government can acquire land through two constitutional powers. One is the power to purchase "places" with the consent of the Legislature of the State where the place is located. This is commonly known as the "Enclave Clause" and is akin to when a willing buyer and willing seller make a transaction.

The other power is that of eminent domain, or the power of condemnation. It is an implied power of the Federal Government, flowing from the Fifth Amendment's express prohibition against taking private property for public use without just compensation.⁴⁴ The U.S. Supreme Court has reasoned that since the government is prohibited from taking private property without just compensation, then there is a tacit recognition that the government has the power to take private property for public use *with* just compensation.⁴⁵ Use of the eminent domain power is akin to when a person or State is unwilling to sell property, so the Federal Government takes it and pays "just compensation."

i. Enclave Clause

Under the Enclave Clause, the United States has exclusive jurisdiction over any "places" acquired for enumerated purposes by purchase with the consent of the State Legislature.⁴⁶ These places, or enclaves, are expressly described in the Constitution as those areas which are needed "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

Generally speaking, the Enclave Clause gives the United States exclusive jurisdiction over the "place" only for the specified public purpose for which the land was purchased.⁴⁷ However, the Supreme Court has held that a State may convey, and the Congress may accept, either exclusive or qualified jurisdiction over property acquired for purposes other than those enumerated above.⁴⁸ In the event of a State conveyance of qualified jurisdiction, the Supreme Court has recognized the validity of "concurrent jurisdiction" over the place.

Only when either the State or the Federal Government immediately and directly exercises its own sovereign powers is it immune from the jurisdiction of the other.⁴⁹ Neither may substantially curtail the exercise of the other's power.⁵⁰ According to Enclave Clause jurisprudence as it has developed, consistent with *Pollard's Lessee*

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v. Hagan,⁵¹ the Clause empowers the United States to acquire exclusive control over property only to the extent of fulfilling one or more of its specific delegated powers.⁵²

The question has seldom been raised as to whether the State has any right of reversion if the Federal Government abandons the use of the property for governmental purposes. One instance where the issue will become important, however, is when the Federal Government closes military bases, many of which are coastal properties. See Ch. IX, §3.D for further discussion.

ii. Eminent Domain

When a State Legislature is unwilling to convey property, the Federal Government has the power of eminent domain, *i.e.* the power to condemn the land as an incident of sovereignty. This power can be exercised by the Federal Government only so far as is necessary to exercise one or more of its enumerated powers.⁵³ Although a State cannot prevent the Federal Government from acquiring property by eminent domain, a question exists in the federal courts as to whether a State's sovereign title and authority over public trust lands can be extinguished by the Federal Government's taking of trust lands by eminent domain, or if there are any reversionary public trust interests still held by the State.

In the 1988 case *United States v. 11.037 Acres of Land*,⁵⁴ one federal district court held that the power of eminent domain allows the United States to take complete title to public trust land, extinguishing all easements and other interests, including the public trust. The court held that even though a State has exclusive power of eminent domain within its own jurisdiction, it cannot, under the Supremacy Clause, use that power to impress a public trust easement where it would frustrate or limit the exercise of eminent domain essential to the sovereign government of the United States.⁵⁵

In rendering its decision the court overruled its 1986 decision in *City of Alameda v. Todd Shipyards*.⁵⁶ In *City of Alameda*, the court held that the United States by condemnation acquired full fee simple title without destroying the public trust, because neither government has the power to destroy the trust or the other sovereign. The United States simply acquired the land subject to the public trust, as though no other party had held an interest in the land.⁵⁷

The *City of Alameda* court cited *United States v. 1.58 Acres of Land, Etc.*,⁵⁸ a federal district court case in Massachusetts, which the *United States v. 11.037 Acres of Land* court declined to follow. The U.S. District Court for the District of Massachusetts found that our system of dual sovereignty modified common law public trust

theory.⁵⁹ Sovereignty was divided between the United States and a State according to the aspect of the interest in public trust lands that is within the respective constitutional power of each. The United States acts as trustee over commerce and the other constitutional powers delegated to the Federal Government, while the State acts as trustee over all other non-preempted matters reserved to the States.⁶⁰ Thus, “[w]hen the Federal Government takes such [public trust] property by eminent domain ... [it] obtains the fullest fee that may be had in land of this peculiar nature: the *jus privatum* and the federal government's paramount *jus publicum*.”⁶¹ The court further noted that the Federal Government cannot abdicate its *jus publicum* any more than the State can; nor can either trust responsibility be destroyed.⁶²

The *1.58 Acres of Land* decision is more consistent with traditional notions of concurrent State and Federal authority. The Supremacy Clause has been interpreted by the U.S. Supreme Court in numerous cases as operating only within the sphere of enumerated powers granted to the Federal Government by the States through the U.S. Constitution.⁶³ The federal power of eminent domain is an incident of federal sovereignty, the same as a State's public trust authority over trust lands and waters is an incident of State sovereignty.⁶⁴ The federal sovereign through its paramount, though limited, powers should not be able to destroy an incident of sovereignty of a State.⁶⁵ Nonetheless, a conflict on this question exists at the federal district court level. None of the federal appellate courts or the U.S. Supreme Court has addressed the question.

C. Submerged Lands Act

The 1953 Submerged Lands Act⁶⁶ was a reaffirmation by Congress of title in the States to lands beneath navigable waters.⁶⁷ The act reversed the 1947 decision of the U.S. Supreme Court in *U.S. v. California*⁶⁸ that held that the Federal Government had paramount rights in, and full dominion and power over the navigable waters, submerged lands, and resources therein, seaward of the ordinary low-water mark.

The concurrent jurisdiction of the Federal and State governments over the navigable waters, the submerged lands and the natural resources within these lands and waters is recognized by the Submerged Lands Act. The act retains the paramount authority of the Federal Government to the “use, development, improvement, or control . . . arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power.”⁶⁹ The act also affirms the right and power of the States to

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“manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law ...”⁷⁰ Thus, the dual sovereignty described by the Supreme Court in the 1845 case *Pollard’s Lessee v. Hagan* is retained in the basic framework of the Submerged Lands Act.

The Submerged Lands Act in and of itself is neither an explicit or implicit preemption of any State authority. Rather, it is an affirmation of concurrent State/Federal jurisdiction. Any area of alleged conflict is subject to standard preemption analysis.⁷¹

D. Federal Supremacy and State Preemption

No preemption of State action can occur in the absence of affirmative action by the Federal Government.⁷² When the Federal Government does act, in furtherance of constitutional purposes, federal preemption must be explicit, implicit, or the result of an actual conflict of laws.⁷³ In practice, State regulations should generally prevail against the likely preemptive effect of the paramount power of Congress over navigation, when there is no specific congressional act, no need for national uniformity, and no evidence that the State action impedes interstate commerce.⁷⁴ When a State attempts to protect its public trust resources, it is less likely to lose on claims of federal preemption because the State is acting in an area of its traditional power.⁷⁵ The Supreme Court maintains a presumption against federal preemption when Congress legislates in an area of traditional State power.⁷⁶ Property law, including the public trust doctrine, is one such area. Two recent federal decisions are instructive as to how the courts analyze questions of preemption.

In the 1993 case of *Murphy v. Department of Natural Resources*,⁷⁷ the residents of "Houseboat Row" off of Key West, Florida, alleged that the State of Florida was trying to evict them from their homes through the State’s implementation of submerged land leases. The houseboat owners claimed that Florida was barred by federal law from implementing the submerged land leases. The federal district court carefully analyzed the question of federal preemption, both explicit and implicit, and whether there was an "actual conflict" between the exercise of the State authority and federal authority. The court found that the federal navigation regulations were not explicitly preemptive of State leasing of aquatic lands and the water column above them.⁷⁸ They were also not implicitly preemptive, because they were not so comprehensive as to leave no room for supplemental State action.⁷⁹ There was also no actual conflict of State and federal laws because the federal laws

involved, the Submerged Lands Act and the Coastal Zone Management Act, specifically promote exercise of State ownership and management rights.⁸⁰

In a 1994 case, *Barber v. State of Hawaii*,⁸¹ raising similar issues, the owner of a large "free anchored" barge challenged the authority of the State of Hawaii to implement anchorage and mooring regulations statewide. The court conducted a thorough preemption analysis and held that within the concurrent jurisdiction of the Submerged Lands Act, State regulation of anchorage and mooring did not present a specific actual conflict with other federal regulations.⁸² Nor did the court find that there was any implicit preemption of State action evident from congressional intent in reserving the navigational servitude or from either the extent of federal regulation or any federal interest.⁸³

E. Congressional Policy of Concurrent Authority

In the areas of environmental and natural resource management, Congress has often deferred to State control as a matter of policy. State regulation of federal projects has been established by congressional policies favoring shared responsibility in environmental protection and natural resources management.⁸⁴

In the Coastal Zone Management Act (CZMA),⁸⁵ Congress provides that it is national policy "to encourage and assist the states to exercise effectively their responsibilities in the coastal zone ..."⁸⁶ One of the key elements of the CZMA is the "federal consistency" powers that Congress grants to the States. The federal consistency powers expressly require that federal agencies, when conducting or supporting activities that affect resources in the coastal zone (e.g. public trust resources), the federal agency must conduct the activity "to the maximum extent practicable" with a State's federally approved coastal zone management (CZM) program.⁸⁷ Further, whenever a federal agency issues a permit to a private person to conduct an activity that affects resources in the coastal zone, that permittee must conduct the activity in a manner fully consistent with the State's federally approved CZM program.⁸⁸ This is an excellent example of concurrent State/Federal authority over public trust resources. Without the authority provided by the CZMA's consistency provisions over federal activities and federally permitted projects, State public trust law may either be preempted or severely limited in its effect upon such activities.

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Notes

1. See *Ryan v. State*, 188 Wash. 115, 61 P.2d 1276, 1284 (1936), cited in *Silas Mason, Co. Inc. et al. v. Tax Commission of State of Washington et al.*, 302 U.S. 186, 206, 58 S. Ct. 233 (1937).
2. See *South Carolina v. United States*, 199 U.S. 437, 26 S. Ct. 110 (1905) (“In other words, the two governments, National and state, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers.”); *Kohl v. United States*, 91 U.S. 367, 372 (1875).
3. *Shively v. Bowlby*, 152 U.S. 1, 57, 14 S. Ct. 548 (1894).
4. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479, 108 S. Ct. 791 (1988).
5. *Id.*, citing *Barney v. Keokuk*, 94 U.S. 324, 338 (1877).
6. U.S. Const. art. I, § 8, cl. 3.
7. *American Law of Property* § 12.27 (A. James Casner, ed. 1952). See generally, Powell, *Just Compensation and the Navigation Power*, 31 Wash. L.Rev. 271 (1956).
8. See *Gibbons v. United States*, 166 U.S. 269 (1897); *Bridge Co. v. United States*, 105 U.S. 470 (1882); *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690 (1899); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913); *United States v. Commodore Park, Inc.*, 324 U.S. 386 (1945). See also CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS & INTERPRETATION, Congressional Research Service, Library of Congress (1992) at 170-75.
9. *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799 (1950); *United States v. Chicago, M. St. P. & P. R. Co.*, 312 U.S. 592 (1941); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913).
10. *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249, 74 S. Ct. 487 (1954).
11. *James v. Dravo Contracting Co.*, 302 U.S. 134, 140-141 (1937).
12. *Id.*
13. *United States v. Commodore Park, Inc.*, 324 U.S. 386 (1945) (“This [navigational servitude] power Congress may exercise itself or through its duly authorized agents). See also *Union Bridge Co. v. Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (18 How.) 421 (1851); *United States v. Arizona*, 295 U.S. 174 (1934); *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 107 S. Ct. 1487 (1987).

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14. *United States v. Commodore Park, Inc.*, 324 U.S. 386 (1945); *United States v. Grand River Dam Authority*, 363 U.S. 229, 80 S. Ct. 1134 (1960); *United States v. Twin City Power Co.*, 350 U.S. 222, 76 S. Ct. 259.
15. *United States v. Gerlach Livestock Co.*, 339 U.S. 725, 70 S. Ct. 955 (1950); *FPC v. Niagara Mohawk Power Co.*, 347 U.S. 239, 74 S. Ct. 487 (1954); *United States v. Twin City Power Co.*, 350 U.S. 222, 76 S. Ct. 259.
16. *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *United States v. M. St. P & P. R. Co.*, 312 U.S. 592 (1941); *Scranton v. Wheeler*, 179 U.S. 141 (1900); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (1913). See also *American Law of Property* § 28.59.
17. *United States v. Cress*, 243 U.S. 316 (1916); *Kaiser Aetna et al. v. United States*, 444 U.S. 164, 100 S. Ct. 383, 384 (1979).
18. *United States v. Gerlach Livestock Co.*, 339 U.S. 725, 70 S. Ct. 955 (1950); *Kaiser Aetna et al. v. United States*, 444 U.S. 164, 100 S. Ct. 383, 384 (1979).
19. See *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960); *United States v. Certain Parcels of Land*, 666 F.2d 1236 (1982); *Coastal Petroleum v. United States*, 524 F.2d 1206 (1975).
20. *Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1104-1105 (Fed. Cir. 1992).
21. *Confederated Tribes v. United States*, 20 Cl. Ct. 31, 34 (1990).
22. *United Texas Transmission v. Army Corps of Engineers*, 7 F.3d 436, 445-446 (5th Cir. 1993).
23. U.S. Const., art. IV, §3 cl. 2.
24. See generally 91 C.J.S. § 75 (right of the United States to dispose of its property is expressly granted by the Constitution).
25. See U.S. Const. amend. X (powers not delegated to the United States, nor prohibited to the states, are reserved to the states).
26. See, e.g., *Camfield v. United States*, 167 U.S. 518 (1897), and *Kleppe v. New Mexico*, 426 U.S. 529 (1976). See generally, David E. Engdahl, *State and Federal Power over Federal Property*, 18 *Arizona Law Review* 1 (1976).
27. *Pollard's Lessee v. Hagan et al.*, 44 U.S. (3 How.) 212, 230 (1845). See also *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987)(Title to Utah Lake

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bottomland passed to Utah under the equal footing doctrine upon Utah's admission to the Union).

OR: *Johnson v. Department of Revenue*, 292 Or. 373, 639 P.2d 128 (1982) ("Equal footing doctrine" provides that since the original 13 states were vested with title to submerged and submersible lands from the English crown on formation of the union by virtue of their sovereignty, all states subsequently joining the union were to be similarly vested).

28. *See Mann v. Tacoma Land Company*, 153 U.S. 273, 284 (1894) ("It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands."); *Borax Consolidated v. City of Los Angeles*, 56 S. Ct. 23, 27 (1935) (title of the state complete on admission, no power of disposition remains in the United States); *Goodtitle ex dem Pollard v. Kibbe*, 50 U.S. 471, 478 (1851) (invalid Spanish grant could not enlarge power of United States after statehood, nor authorize it to grant or confirm a title).
29. *Shively v. Bowlby*, 152 U.S. at 48.
30. *Mann v. Tacoma Land Company*, 153 U.S. at 284.
31. *American Law of Property* § 12.25.
32. *Hardin v. Shedd*, 190 U.S. 518, 519, 23 S. Ct. 685 (1903).
33. *See Shively v. Bowlby*, 152 U.S. at 31-41.
34. *Id.* at 33.
35. *Kean v. Calumet Canal Co.*, 190 U.S. 452, 481, 23 S. Ct. 651 (1902).
36. *See Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).
37. *Id. See also Knight v. U.S. Land Association*, 142 U.S. 161, 183 (1891) ("Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory.").
38. *Shively v. Bowlby*, 152 U.S. 1, 48 (1894) ("We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States whenever it becomes necessary to do so in order to perform international obligations ...").
39. *Id.* at 44.

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40. *Id.* at 48.
41. *See Summa Corporation v. California ex rel. State Lands Commission and City of Los Angeles*, 466 U.S. 198, 104 S. Ct. 1751 (1984); *San Francisco v. LeRoy*, 138 U.S. 656 (1890); *Knight v. United Land Association*, 142 U.S. 161 (1891).
42. *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 21, 56 S.Ct. 23 (1935).
43. *Knight v. United Land Association*, 142 U.S. 161, 186 (1891).
44. *See Kohl v. United States*, 91 U.S. 367, 371 (1875) (“The right [of eminent domain] is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.”).
45. *United States v. Carmack*, 329 U.S. 230, 241-42 (1946).
46. U.S. Const. art. I, § 8, cl. 17.
47. *See State v. Williams*, 23 Wash. App. 694, 598 P.2d 731 (1979). *See generally* David E. Engdahl, *State and Federal Power over Federal Property*, 18 *Arizona Law Review* 1 (1976).
48. *See Collins v. Yosemite Park Co.*, 304 U.S. 518, 530 (1938).
49. *Silas Mason, Co. Inc., et al. v. The State Tax Commission et al.*, 188 Wash. 98, 101-102 (1936).
50. *Id.*
51. 44 U.S. at 223
52. *See Silas Mason, Inc. et al. v. The State Tax Commission et al.*, 302 U.S. 186 (1937); *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 46 S. Ct. 172 (1926).
53. *See United States v. Kansas City*, 159 F.2d 125 (10th Cir. 1946).
54. 685 F. Supp. 214 (N.D. Cal. 1988).
55. *Id.* at 217.
56. 635 F. Supp. 1447 (N.D. Cal. 1986).
57. *Id.* at 1450.
58. *United States v. 1.58 Acres of Land, Etc.*, 523 F. Supp. 120 (D. Mass. 1981).

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59. *Id.* at 123 (citing *Illinois Central R.R. Co. v. Illinois*, 146 U.S. at 435).
60. *Id.* at 123 (“those aspects of the public interest in the tideland and the land below the low water mark that relate to the commerce and other powers delegated to the federal government are administered by Congress in its capacity as trustee of the *jus publicum*, while those aspects of the public interest in this property that relate to non-preempted subjects reserved to local regulation by the states are administered by state legislatures in their capacity as co-trustee of the *jus publicum*.”).
61. *Id.* at 124.
62. *Id.* at 125.
63. See CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS & INTERPRETATION, Congressional Research Service, Library of Congress (1992) at 917 - 942.
64. See *Kohl v. United States*, 91 U.S. 367, 371 (1875) (“The right [of eminent domain] is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.”); *United States v. Carmack*, 329 U.S. 230, 236 (1946) (“The power of eminent domain is essential to a sovereign government.”). See also *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).
65. *United States v. 1.58 Acres of Land, Etc.*, 523 F. Supp. 120, 124 (D. Mass. 1981) (“Since the trust impressed upon this property is governmental and administered jointly by the state and federal governments by virtue of their sovereignty, neither sovereign may alienate this land free and clear of the public trust.”).
66. 43 U.S.C. § 1301 *et seq.*
67. 43 U.S.C. § 1314(a).
68. *United States v. California*, 332 U.S. 19 (1947).
69. 43 U.S.C. § 1311 (d).
70. 43 U.S.C. § 1311 (a).
71. See *Murphy v. Department of Natural Resources*, 837 F. Supp. 1217, 1221 - 1225 (S.D. Fla. 1993). See also *Barber v. State of Hawaii*, 42 F.3d 1185 (9th Cir. 1994).
72. *Murphy v. Department of Natural Resources*, 837 F. Supp. 1217, 1221 (S.D. Fla. 1993). See also *Barber v. State of Hawaii*, 42 F.3d 1185 (9th Cir. 1994); CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS & INTERPRETATION, Congressional Research Service, Library of Congress (1992) 918 - 919.

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73. *Id.*
74. Ralph W. Johnson, Craighton Goepple, David Jansen, & Rachel Paschal, *Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 591 (1992).
75. For a more thorough discussion of this point, see Ralph W. Johnson, *Oil and the Public Trust Doctrine in Washington*, 14 U. Puget Sound L. Rev. 671 (1991).
76. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
77. *Murphy v. Department of Natural Resources*, 837 F.Supp. 1217 (S.D. Fla. 1993).
78. *Id.* at 1222.
79. *Id.*
80. *Id.* at 1223.
81. *Barber v. State of Hawaii*, 42 F.3d 1185 (9th Cir. 1994).
82. *Id.* at 1190-1192.
83. *Id.* at 1192-1194.
84. See *California Coastal Commission v. Granite Rock*, 107 S. Ct. 1419 (1987); *Friends of the Earth v. United States Navy*, 841 F.2d 927, 934-35 (9th Cir. 1988).
85. 16 U.S.C. §1451 *et seq.*
86. 16 U.S.C. §1452(2).
87. 16 U.S.C. §1456 (c)(1) and (2).
88. *Id.* at (c)(3)(A) and (B).

CHAPTER IX

THE PUBLIC TRUST DOCTRINE AND COASTAL RESOURCE MANAGEMENT

Summary

Thirty two of a possible 35 States, Territories and Commonwealths of the United States now have federally approved Coastal Zone Management (CZM) Plans under the Coastal Zone Management Act. In addition, there are 28 estuaries that have completed or are in the process of developing management plans under the National Estuary Program (NEP) through section 320 of the Clean Water Act. State CZM and NEP programs can incorporate the Public Trust Doctrine in order to enhance coastal resource management.

Several coastal States have constitutional provisions which, although they often do not use the term "public trust," clearly recognize the responsibilities of the State to manage and preserve its public trust lands, waters and resources. Virtually all coastal States articulate public trust principles in their coastal zone management legislation and federally approved program documents. Nonetheless, through routine implementation of existing coastal programs, revising current program regulations, permit conditions, or in some cases amending State programs, the Public Trust Doctrine can be better incorporated into coastal management. This would improve a State's ability to implement comprehensive management.

Five selected coastal resource issues -- setting beach fees, aquaculture, estuarine management, federal disposition of coastal land (military base closures) and riparian "rights" to protect land from flooding or erosion are discussed. The assertion by a State of its Public Trust Doctrine through the federal consistency powers granted to a State by the Coastal Zone Management Act is also discussed.

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Section 1: Using The Public Trust Doctrine To Enhance Coastal Resource Management

Thirty two of a possible 35 States, Territories and Commonwealths of the United States now have federally approved Coastal Zone Management (CZM) Plans¹ under the Coastal Zone Management Act.² In addition, there are 28 estuaries that have completed or are in the process of developing management plans under the National Estuary Program (NEP) through section 320 of the Clean Water Act.³ Many of the CZM programs already have incorporated the Public Trust Doctrine in their federally approved programs, although more can be done. The NEP program could also benefit by incorporating the Public Trust Doctrine, as implemented by the appropriate State, in the management plans.

A. Sources of Public Trust Authority in State Law

As has been fully discussed, the Public Trust Doctrine came to the United States through the English common law. The doctrine is well embedded in the common law of each State, and remains the law of the State until it is modified by the State Constitution or State legislation. *See* Ch. II, §1.A.

1. State Constitutional Provisions and the Public Trust Doctrine

Several coastal States have constitutional provisions which, although they often do not use the term "public trust," clearly recognize the responsibilities of the State to manage and preserve its public trust lands, waters and resources. A few are included here.

California. California has taken the approach of specifically providing in its constitution for public access to public trust lands:

"No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."⁴

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Florida. Florida's constitution provides a traditional public trust approach in its constitution:

“The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the State, by virtue of its sovereignty, in trust for all of the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such land may be authorized by law, but only when not contrary to the public interest.”⁵

Hawaii. The Hawaii Constitution recognizes the application of public trust principles in the management of all its natural resources:

“For the benefit of present and future generations, the state and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation All public natural resources are held in trust by the state for the benefit of the people.”⁶

The same article provides that the State accepts an “obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.”

Massachusetts. The Massachusetts Constitution provides:

“The people shall have the right to clear air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and aesthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.”⁷

This section also requires a two-thirds vote of each branch of the legislature prior to the transfer or change in use of any lands or easements, including public trust lands, taken or acquired in furtherance of these purposes.

Michigan. The 1963 Michigan Constitution provides:

“The conservation and development of the natural resources of the State are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The Legislature shall

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provide for the protection of the air, water and other resources of the State from pollution, impairment and destruction.”⁸

North Carolina. The North Carolina Constitution establishes a policy of conservation and protection of State lands and waters for the benefit of all citizens and recognizes that the State’s wetlands, estuaries and beaches are part of its “common heritage.”⁹

Pennsylvania. In 1971, Pennsylvania amended its constitution by adding an “Environmental Rights” provision:

“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”¹⁰

Rhode Island. The Rhode Island Constitution provides that the people of the State

“shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state ...”

This section goes on to provide that the “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.”¹¹

Virginia. In 1979, Virginia adopted a new constitution that states:

“it shall be the policy of the Commonwealth . . . to protect its atmosphere, lands and waters from pollution, impairment or destruction, for the benefit, enjoyment and general welfare of the people of the Commonwealth”¹²

and that

“the natural oyster beds, rocks and shoals in the waters of the Commonwealth shall not be leased, rented or sold but shall be held in trust for the benefit of the people of the Commonwealth.”¹³

The need for legislation to implement this type of constitutional provision varies from State to State. In Pennsylvania, for example, the courts have ruled that its

constitutional amendment is “self-executing,” and creates citizens’ rights and Commonwealth duties.¹⁴ In Hawaii, citizens’ rights are authorized explicitly by the Constitution.¹⁵ More commonly, however, the State constitutional recognition of public trust rights is not self-executing and must be made effective by legislation.¹⁶

2. State Legislation Codifying the Public Trust Doctrine

Virtually all coastal States recognize the importance of coastal areas to their economic and environmental well-being. While public trust principles have been incorporated into several State constitutions, as seen above, it is more common for States to articulate public trust principles in their coastal zone management legislation and federally approved program documents.

Some coastal programs clearly incorporate the Public Trust Doctrine, while other programs contain public trust-like provisions but do not specifically refer to the doctrine. For example, the North Carolina Coastal Area Management Act states as one of its goals the “[p]rotection of present common-law and statutory public rights in the lands and waters of the coastal area.”¹⁷ In contrast, the goals set forth in Washington’s Shoreline Management Act of 1971 do not explicitly mention the Public Trust Doctrine, although they have been found to reflect public trust principles.¹⁸

In Massachusetts, public trust principles are codified in Chapter 91 of the Massachusetts General Laws assigning broad management authority to the Department of Environmental Protection over the conservation and preservation of the public’s rights in tidelands. The purpose of the regulations under Chapter 91 is to protect the public interest in “tidelands, Great Ponds, and non-tidal rivers and streams in accordance with the Public Trust Doctrine as established by common law and codified in the Colonial Ordinances of 1641-47 and subsequent statutes and case law of Massachusetts.”¹⁹

Maine’s Shoreland Zoning Law²⁰ provides that the State trustee must manage “shoreland areas” and water “to promote public health, safety and the general welfare.” Note that this language reflects the traditional public interests protected by regulatory police powers, in contrast to the Public Trust Doctrine’s focus on property (trust lands, waters and resources) and the public’s uses of these resources.

Ohio nonetheless recognizes the historical uses of navigation, water commerce, and fishing. Further, Ohio law states that Lake Erie and its submerged lands belong

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“to the state as proprietor in trust for the people of the state, for the public uses to which it may be adapted ...”²¹

Section 2: Applying the Public Trust Doctrine For More Effective Coastal Resource Management

Coastal resource managers can make much more effective use of the Public Trust Doctrine if it is explicitly contained in coastal programs. Coastal resource managers should consider a range of actions to incorporate the Public Trust Doctrine into their coastal programs, including rule making under existing law to establish land and water use categories and priorities, permit conditions, or new legislation to implement the common law doctrine. For example, where coastal programs already incorporate public trust principles in program authorities, managers may issue regulatory guidelines for planning and permitting actions that fully describe the relevant public trust authority. Rule making may be required for programs that incorporate basic public trust authority but lack any comprehensive trust land and water use categories to guide planning and permitting decisions. Where State programs do not incorporate such basic public trust authority, State agencies may still be able to incorporate the Public Trust Doctrine into permit conditions. Alternatively, they may have to initiate new legislation.

A. Comprehensive Management

Coastal management is, in basic terms, area-wide management of the coastal zone and its resources. The overlap between the coastal zone and the “zone” of public trust lands, waters and resources allows States to ground their management and enforcement programs in public trust principles as a source of legal authority in addition to the State’s police power. There are two major advantages to this strategy: (1) obtaining legal justification to prioritize and prohibit uses within the public trust/coastal management area; and (2) providing a defense against regulatory takings claims based on property, not regulatory, law. *See* Ch. X, §3.A.

B. Prioritizing and Prohibiting Uses

A limitation of the Public Trust Doctrine for coastal management purposes is that it does not in and of itself impose a hierarchy of public uses for public trust resources. On the other hand, the doctrine’s traditional flexibility permits States to weigh social values and thereby balance different uses at different times. *See* Ch.

III.B. This flexibility can be seen in the growing number of uses that courts (and coastal managers) have found to be subject to the Public Trust Doctrine. *See* Ch. III. Although the Public Trust Doctrine does not impose a hierarchy of public uses, it has been used to prohibit uses of trust resources that are not protected by the doctrine. Further, impermissible uses can be prohibited by the trustee with much less risk of successful "takings" claims. *See* Ch. X, §3.

Section 3: Applying the Public Trust Doctrine in Selected Coastal Issues

In addition to the general role public trust principles can play in coastal resource management, there are specific issues of concern for coastal managers to which the Public Trust Doctrine should be applied. Five areas are discussed here: beach fees; aquaculture; estuarine management; federal disposition of land (military base closures); and riparian management including shoreline flood and erosion control.

A. Beach Fees

In considering the use of beach access fees in light of the Public Trust Doctrine, courts in New Jersey and Florida have held that user fees are permissible so long as: (1) they are "reasonable";²² (2) the revenue generated from fees is used to protect the beach and its users;²³ and (3) the fees do not discriminate between residents and non-residents (at least those who are State citizens).²⁴ For example, New Jersey courts have struck down attempts by municipalities to charge higher fees to out-of-town users, stating that, "the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary State or municipal action is impermissible."²⁵ New Jersey courts have also consistently struck down indirect attempts to limit access, for example by restricting access to public toilets.²⁶

Some municipalities have tried to limit access to adjacent beaches by more subtle means. Belmar, New Jersey, for example, charged three dollars for weekdays and six dollars for weekends, but only forty dollars for a full season, which benefitted the residents. Not surprisingly, Belmar found itself in court, the subject of a suit by the Public Advocate challenging the beach fee structure.²⁷ The court held that Belmar is a trustee over its beach area and that it breached its duties and obligations as a trustee by increasing beach fees, rather than real estate taxes, to raise the borough's general revenues.²⁸ The court also found that Belmar's price structure for beach fees discriminated against non-residents by imposing a disproportionately high fee on daily and weekend beach badge purchasers.²⁹

B. Aquaculture

Aquaculture encompasses a wide range of activities, including what is generally thought of as fish farming, hatcheries and shellfish cultivation. Fishing and shellfishing are traditional public trust uses. Given that fish and shellfish are held in trust for the public by the State, and that the State is obligated to preserve and protect this trust, regulations designed to facilitate the cultivation of fish ought to be considered lawful (and perhaps a preferred use) under the Public Trust Doctrine.

The idea that a State may authorize the use of public trust lands and waters for the propagation of fish is not new. In the early 1900s the Supreme Court of Florida held that, while public trust lands may not be sold outright to individuals, the State may grant to an individual limited rights to exclusively use public trust lands when such use will encourage new industries and the development of natural and artificial resources.³⁰ The court considered "planting and propagating oysters or shell-fish" an activity that enhanced and improved the rights and interests of the whole people.³¹ Therefore, lands held within the public trust could be made available to a private person for undertaking these activities.³² However, the court was careful to point out that the private use of State-owned public trust land was allowable only so long as it did not unreasonably interfere with the public's use of the area for those purposes preserved by the Public Trust Doctrine.³³ This Florida decision provides an early example of a State using the Public Trust Doctrine to support a State-regulated but privately operated aquacultural effort. The public trust concept both justified the private use (it is in the interest of the public welfare) and limited it (it must not impede the public's pursuit of other protected public trust uses).

The Supreme Judicial Court of Maine has similarly recognized the ability of the State to lease lands under the public trust for private aquaculture operations. In *Harding v. Commissioner of Marine Resources*,³⁴ the court upheld the validity of a lease of public trust land for an aquaculture project, concluding that in granting such a lease the State need only make sure that the lease will not interfere with "other uses of the area" such as fishing, lobstering, shellfishing, swimming and boating.³⁵ Since Maine law requires that public trust lands be managed for the benefit of the public,³⁶ by upholding the lease the court essentially held that aquaculture serves the public interest under the public trust.

North Carolina provides a specific statutory exception for shellfishing from its general rule that public trust lands are available to all for navigation, fishing and commerce. Since the late 1800s the State has issued licenses for shellfish cultivation

on public trust lands where no natural beds existed.³⁷ Under current North Carolina law, “[l]eases are granted in order to increase the use of suitable areas underlying coastal fishing waters for the production of shellfish.”³⁸ The grant of the lease is contingent on a determination that the public will benefit from the lease and subject to the State’s duty to conserve marine resources.³⁹ Public trust lands containing natural shellfish beds are not available for lease,⁴⁰ but are to remain open to the public. Thus, North Carolina also allows public trust lands and waters to be leased for private aquaculture operations provided that the public interest is primarily served and other public trust uses are not significantly impaired.

The issue of State leasing for aquaculture purposes becomes more difficult when the land under consideration is privately owned although subject to the public’s trust rights. In such a situation, the State must assert that aquaculture is an activity that, like navigation, fowling and fishing, is preserved for the public under the Public Trust Doctrine, notwithstanding conveyances of the area to private ownership. In addition, the State must assert that it can regulate these protected activities.

In a 1988 Massachusetts case, *Town of Wellfleet v. Glaze*,⁴¹ the town issued licenses for the planting, cultivating and harvesting of shellfish within a specified area pursuant to State statutory authorization. One of the issues in the case was whether the legislature could authorize towns to issue shellfishing licenses for areas of land privately owned but subject to the public trust. The court found that under the Public Trust Doctrine the public was allowed to fish on private lands subject to the trust and that fishing included the right to shellfish.⁴² The court also stated that the legislature may enact reasonable regulations restricting the public right to fish, including granting exclusive fishing rights to particular individuals.⁴³ Based on these two observations, the court held that a town could, pursuant to State authorization, issue licenses for shellfishing on privately owned public trust lands.⁴⁴

The court qualified its holding in two respects. First, it expressly declined to comment on whether a license to conduct aquaculture—as opposed to merely shellfish collecting—on privately owned land would be permissible.⁴⁵ Second, the court stated that the license to shellfish must not impair the private rights of the landowner, holding that the landowner had the right to moor boats in the area covered by the license, even if the exercise of this right meant that at low tide the boats would rest on and damage the shellfish beds.⁴⁶

In 1994, in *Pazol v. Director of Marine Fisheries*,⁴⁷ the court picked up where *Glaze* left off, and considered whether aquaculture was an activity within the scope of public trust rights. The court distinguished aquaculture from the public’s trust right

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of shellfishing, holding that aquaculture was beyond the scope of the public's rights reserved in the Colonial Ordinance of 1641-1647.

In a recent South Carolina case, the court struck down a permit issued by the South Carolina Coastal Council to the private owner of 660 acres of public trust land to impound the land and thereby block several navigable waterways. The permit was conditioned on the landowner allowing State and federal agencies to perform mariculture experiments on the impounded land.⁴⁸ The State of South Carolina challenged the permit, claiming that the impoundment would prevent the public from navigating through the land, a protected public trust use, and that there was no overriding public interest that mitigated this public loss.

Although the court expressly recognized the potential public benefit that an aquaculture industry could provide to the State, the court found that the main reason for the impoundment of the land was to allow the private owner to lease additional duck blinds. Therefore, the court concluded that there was no overriding public interest that would justify the loss to the public of the right to navigate through the public trust land, and held that the Coastal Council lacked the authority to issue the permit.⁴⁹ Although the court thus appeared to prevent State coastal resource managers from using public trust land for aquaculture purposes, the court in fact made it clear that it doubted whether aquaculture was the motivating factor behind this particular permitting arrangement. Moreover, the court's opinion indicated that it viewed aquaculture to be a potential source of great public benefit, and that if aquaculture were the bona fide use to which public trust land would be put, such use might be permitted even if another public trust use such as navigation was lost.

The State of California, through the California Coastal Act, has enacted a statutory framework grounded in the Public Trust Doctrine for the promotion and regulation of aquaculture industries. The Act provides the several goals of the act, one of which is to "[p]rotect, maintain, and, where feasible, *enhance and restore* . . . natural and artificial resources" (emphasis added).⁵⁰ The cultivation of marine life is an activity that would further this stated goal. The Act's provisions pertaining to marine resources reiterates the State's concern for the maintenance and continuation of marine life, providing that the marine environment shall be used in a way "that will maintain healthy populations of all species of marine organisms."⁵¹ Aquaculture is specifically provided for in the Act, which states that "[o]cean front land that is suitable for coastal dependent aquaculture shall be protected for that use, and proposals for aquaculture facilities located on those sites shall be given priority, except over other coastal dependent developments or uses."⁵²

Hence, this statute provides coastal zone managers with an express statement by the legislature that aquaculture is a priority use on suitable public trust lands. Further legislative support for aquaculture is provided in the California Fish and Game Code, which has, since 1982, been devoted exclusively to aquaculture. Under this Act, the Aquaculture Development Section is created within the Department of Fish and Game to regulate and provide information on the aquaculture industry.⁵³ The Act further provides for the leasing of State water bottoms for aquaculture purposes.⁵⁴

The concerns reflected in these California provisions are similar to those expressed in the North Carolina statutes previously discussed. State water bottoms may be leased for aquaculture purposes provided that the lease is determined to be in the public interest. The State must designate areas that have been used by the public for digging clams, and cannot lease these areas for aquaculture.⁵⁵ The Act gives the lessee the “exclusive right to cultivate and harvest the aquatic organisms in the area leased.”⁵⁶

Consistent with the traditional concepts of the Public Trust Doctrine, there must not only be an initial determination that the public interest is furthered by the lease, but also lessees may not unreasonably interfere with public use of the area for fishing, navigation, commerce or recreation.⁵⁷ However, where uses conflict the statute appears to tilt toward the private use: “The lessee may . . . limit public access to the extent necessary to avoid damage to the leasehold and the aquatic life culture therein.”⁵⁸ Thus, California has, in the case of aquaculture, provided an example of using public trust principles to further ultimate public benefit by initially favoring private activities.

C. Estuarine Management

In 1987 Congress recognized that “the Nation’s estuaries are of great national significance for fish and wildlife resources and provide important recreation and economic opportunities.” As such, Congress declared that it was national policy to “maintain and enhance the water quality in estuaries and provide for the biological integrity of these waters.”⁵⁹ To this end, Congress established the National Estuary Program with the goal of developing and implementing comprehensive management plans for each “estuary of national significance” to, in part, assure a “balanced, indigenous population of shellfish, fish, and wildlife, and allow[] recreational activities, in and on the water ...”⁶⁰

These management plans are to first, take into account “uses of the estuary”⁶¹ and second, “assure that the designated uses of the estuary are protected.”⁶² Clearly

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the "uses" of an estuary's waters, tidelands, submerged lands and living resources are those that would be protected by the Public Trust Doctrine. See Ch. III. Further, the doctrine's applicability for environmental protection would also provide a legal basis for maintaining and enhancing water quality, in order to have a healthy habitat for living resources, *i.e.* to assure the "biological integrity" of the water. See Ch. III.B.2.

The NEP management plans will need all of the authority available to them in order to be successful. The Public Trust Doctrine should be incorporated into each NEP plan in the national program.

D. Military Base Closures and Other Dispositions of Federal Land

When the Federal Government disposes of its waterfront properties which often consist of filled public trust lands and associated littoral areas, State and federal trustees, as well as potential private purchasers, must inquire whether the federal entity has clear title to convey or whether the land is encumbered by its public trust status or the purpose for which the land was originally acquired. These questions are particularly applicable to the process set in motion in 1988 by the U.S. Congress for reviewing the necessity of the multitude of U.S. military installations within and outside of the country when it passed the "Defense Authorization Amendments and Base Closure and Realignment Act."⁶³ This act provided the procedures to "facilitate the closure and realignment of obsolete or unnecessary military installations."⁶⁴ A "closure" or "realignment" of a military installation could mean a conveyance from the Federal Government to either public (State or local government) or private hands. Many of the military installations that are scheduled for closure under this law are in the coastal area, and include tidelands, shorelands, or filled in lands -- lands traditionally viewed as public trust lands. See Ch. II, §1. Further, these military installation lands are extremely valuable, often including large parcels of coastal and waterfront property of vital importance to the local, State, regional and national economy. Their "disposal" from federal hands to either public or private hands raises a panoply of issues, one of which is the important question of the application of the Public Trust Doctrine to any *prima facie* public trust lands.

These issues have received little attention by either State or federal courts, and there is little U.S. Supreme Court jurisprudence to resort to for guidance. Given the vast acreage of coastal land potentially involved nationwide with the closing of hundreds of military installations, however, answering this question will be of great importance.

Any analysis of whether land involved in a military base closure is subject to the Public Trust Doctrine must start by asking the factual question: What lands were Public Trust lands at the establishment of the military installation, and how have these lands been modified? This is a question requiring a factual determination to be made through review and analysis of records and evidence that existed at the time of establishment. All of the issues and methodologies discussed in Chapter II, §4 regarding the determination of trust boundaries should be considered in developing this factual record.

Whether the Public Trust Doctrine applies to any of these *prima facie* public trust lands may depend upon how the land in question became federal land. Therefore, the next question is: How, and for what purpose, did the Federal Government acquire the land in question? The Federal Government has become the vested owner of land through the Constitution's Property Clause, Enclave Clause, and through eminent domain. See Ch. VIII.B.2.

1. Federal Acquisition: How and for What Purpose?

Property Clause: If the Federal Government acquired the land through the Property Clause, such as for military bases in the U.S. Territories, there seems little question that the Public Trust Doctrine would apply. All of the land formerly held by the Federal Government as U.S. Territory (*i.e.* that land which became the 37 "new" States) was held by the Federal Government under the Property Clause. The Equal Footing Doctrine brought the 37 new States into the Union on par with the original 13 States. The United States Supreme Court has consistently found that "the new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions."⁶⁵ See Ch. II, §1.A.2. Thus, the Public Trust Doctrine is applicable in all 50 States, as well as the U.S. Territories.

There seems no legal or policy reason, nor is there any precedent, for military installation land acquired by the Federal Government through the Property Clause not to be subject to the Public Trust Doctrine. In the event such federal lands are conveyed back to State or private control, the trusteeship (*jus publicum*) for the public's trust rights in trust lands and waters should pass back from federal to State hands, even if the *jus privatum* ends up in private ownership. If these federal trust lands are conveyed into private ownership, they will once again be burdened by the Public Trust Doctrine.

Enclave Clause: The Federal Government acquires land through the Enclave Clause when a State willingly conveys by legislation to the Federal Government the

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land in question. *See* Ch. VIII.B.2.b. A State may convey, and the Congress may accept, either exclusive or qualified jurisdiction over property acquired within the geographical limits of a State.⁶⁶

The applicability of the Public Trust Doctrine can only be determined by first analyzing the legislation of conveyance. But again, there seems no legal or policy reason, nor is there any precedence, for land acquired by the Federal Government from a State as an Enclave not to be subject to the Public Trust Doctrine. Any State legislation conveying public trust land to the Federal Government should be reviewed in accordance with the principles discussed in Chapter V regarding the nature of the remaining servitude.

Eminent Domain: At the core of an eminent domain action by the Federal Government is the taking of property “for public use.”⁶⁷ Taking property for a military installation is clearly putting that property to the public use of national defense. There is nothing inherent in the Public Trust Doctrine that is inconsistent with, or could serve to frustrate, this mission of national defense. Thus, when the military installation was established, the use of the lands subject to the Public Trust Doctrine were changed from one public use (public trust uses as discussed in Chapter III) to another public use (national defense). Once it is deemed appropriate by Congress to change the public use of the military installation land from national defense, it follows that these lands, which have always been subject to some type of public use requirement (either through the Public Trust Doctrine or through the Fifth Amendment of the U.S. Constitution), should not be reclassified as totally private in nature, with all public use servitudes destroyed.

As discussed in Ch. VIII.B.2.b.ii, the U.S. District Court for the Northern District of California is at odds with the U.S. District Court for the District of Massachusetts over whether the public’s trust rights are terminated through the Eminent Domain process. No higher court has ruled on the question.

The cases differ on how the courts perceived what title the Federal Government acquired through the condemnation proceeding. In the California case, the U.S. District Court reasoned:

“The power of eminent domain is essential to a sovereign government. ... The State may not frustrate that power, nor limit it. ... Should this Court impress the *California* public trust easement on the lands acquired by the United States, the Federal Government’s power of eminent domain would become subjugated to the interests of the State.”⁶⁸ (Emphasis added).

Here, the Court could not envision a transfer of trusteeship from the State to the Federal Government. It only considered that the State would retain trusteeship, and thus frustrate a completely unburdened title being transferred to the Federal Government. It did not consider impressing a *federal* public trust easement on the lands; instead it terminated the trust altogether.

On the other hand, in the Massachusetts case, the Court recognized that under our "system of dual sovereignty" both the State and Federal Governments are burdened by the Public Trust Doctrine. The Court cited the 1947 U.S. Supreme Court case *United States v. California*, involving the submerged lands off California, noting the Court's finding that the Federal Government holds "its interests here as elsewhere in trust for all the people ..."⁶⁹ Thus, "When the federal government takes such property by eminent domain ... [it] obtains the fullest fee that may be had in land of this peculiar nature; the *jus privatum* and the *jus publicum*."⁷⁰ So perpetual is the trust, in this Court's view, that by its nature "it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign."⁷¹

2. Federal Legal Policy in Natural Resource Cases

The Federal Government has taken the position in two other federal cases that the Public Trust Doctrine provided the legal basis for the Federal Government, acting as a trustee, to collect damages for harm done to natural resources. In the first, the State of Virginia and the Federal Government sought compensation for harm caused to migratory birds by an oil spill.⁷² The Federal Government argued that it had a justiciable right under the Public Trust Doctrine, even though it was not the owner of the land or waters involved, to recover for the loss of migratory waterfowl based on its sovereign right to protect the public interest in preserving wildlife resources. The Court agreed, holding "Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people."⁷³

In the second case, the United States brought suit under the Public Trust Doctrine to collect damages caused by a fire set by a railroad that burned valuable waterfowl habitat held by the Federal Government through the U.S. Department of the Interior. The Federal Government argued that the Public Trust Doctrine was sufficient authority under which to seek damages. The Court agreed, stating "it appears that the United States ... can maintain an action to recover for damages to its public lands and the natural resources on them, which in this action would encompass the destroyed wildlife."⁷⁴

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Viewing these two natural resource cases together with the California eminent domain case, an inherent legal policy conflict is apparent. On the one hand, the Federal Government asserts in some federal courts that it is cloaked with the Public Trust Doctrine -- regardless of ownership of the land in question -- and thus has the authority and duty to protect the public's interest in natural resources. On the other hand, the Federal Government argues in another court -- when it is the owner of the land in question -- that the Public Trust Doctrine has been extinguished, and along with it the public's trust rights in vast acreage of valuable, scarce and fragile trust lands and waters which quite clearly are wildlife habitat.

E. State Management Practices Involving Riparian Rights and Shoreline Flood and Erosion Control

While States have paramount rights and interests in public trust lands and waters, they must recognize any vested riparian rights in those same lands and waters. Many riparian owners have investment-backed expectations flowing from the premium price paid for waterfront property. A riparian owner may also feel justified on relying on implied assurances the State may give. Thus, even though riparian "rights" are at the bottom of the pyramid of authority (*see* Ch.VII.D) "the quality of being riparian, especially to navigable water, may be the land's "most valuable feature" and is part and parcel of the ownership of the land itself."⁷⁵

When a riparian owner desires to "improve" the shorelands, however, by constructing or modifying the natural land, the State is in the best position to safeguard the public's trust rights if it affirmatively regulates riparian improvements.⁷⁶ By statute, a State should require a lease or license (or much less preferably, an express grant) before riparians may erect new structures or substantially improve existing structures on public trust lands.⁷⁷ The riparian has no right to compensation for improvements erected without explicit State approval once the State begins to regulate trust land improvements.⁷⁸ Furthermore, the State approval, whether a lease, license or grant,⁷⁹ may be limited to a specific term with neither an automatic right to renewal nor compensation for the improvements once the term expires.⁸⁰

At the same time a State may accord special consideration to riparians under the State's public trust land licensing or leasing program. A riparian who erected or maintained structures on abutting trust lands prior to the effective date of a leasing statute could be granted automatic leases under the statute.⁸¹ Leases for certain small structures, such as private docks for a single family dwelling, could be rent free.⁸² In New Jersey, riparians have a statutory right of first refusal on all third

party applications for a license to improve public trust land.⁸³ If the riparian decides not to exercise this right, the licensee still must compensate the riparian for injury to the riparian's right to use the water.⁸⁴

Every statutory program governing private use of public trust resources should consider including provisions explicitly forbidding State authorization where the proposed use would unduly obstruct navigation or interfere with other public trust rights. Dockominiums (dock or slip spaces that an individual owns rather than leases from the State) may be one such use. This private ownership of public trust waters can expunge all public rights in these waters if granted without proper safeguards or conditions. While a State may permanently alienate small parcels of public trust land in certain limited situations,⁸⁵ the private and potentially exclusive nature of dockominiums calls for particularly close scrutiny before the State consents to any such conveyances. Ultimately, no private uses of public trust land, including those by a riparian owner, should be unconditionally irrevocable.⁸⁶

A riparian's "right" to protect her upland property from flooding or erosion, and to what extent the boundary between the riparian and public trust land may be affected by "hard" structures which modify the shoreline, have not been litigated in Public Trust Doctrine terms. Nonetheless, as protection of riparian property is pursued by riparian owners, public trust issues must be considered.

Recognizing that the coastal area is a highly dynamic environment, with sections often classified as hazardous zones due to the ever present flooding, erosion and accretion, coastal management practices nationwide generally discourage, and often prohibit through regulatory programs, the use of "hard" erosion control structures such as seawalls, bulkheads, riprap, groins and jetties. Hard structures can significantly modify sand flow systems and redirect wave energies, altering the shoreline configuration and affecting other trust resources such as habitat upon which fish and wildlife depend. On the other hand, riparian owners often view hard structures as the most permanent, effective mechanism of protecting their property from flooding and erosion. With the premium purchase price of waterfront property, the loss of any upland is often seen by the riparian owner as something that must be stopped right now and forever.

Hard shoreline structures often cause the riparian/public trust land boundary to be pushed waterward, encroaching upon public trust lands, waters and resources. In the event that a hard structure is to be authorized, coastal managers should consider including in the authorization (*e.g.* a permit or lease) language which fixes the legal private/public boundary as it exists prior to the installation of a new, or significant improvement of an existing, hard structure. Further, any authorization for the maintenance or upgrade of an existing hard shoreline structure should be

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limited to in-kind, in-place or landward replacements to prevent sequential additional occupation of the public's trust lands, waters and resources.

Also, if it's expected that the hard shoreline structure may cause damage to adjacent trust resources, for example, by scouring the intertidal area or degrading or destroying habitat, the coastal manager may want to require some baseline study or documentation of the status of trust resources, living and non-living, prior to the installation of the structure. Appropriate language could be included in the authorization that would provide a basis for the State as trustee to either seek compensation for the loss of any of the public's trust assets, or for removal of the structure.

Section 4: Asserting the Public Trust Doctrine Through A State's Federal Consistency Powers

Through the federal consistency powers granted the States by Congress through the Coastal Zone Management Act (CZMA)⁸⁷, a State can directly apply the Public Trust Doctrine to federal agency actions that affect public trust resources. The CZMA provides that:

“Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the *enforceable policies* of approved State management programs.”⁸⁸
(Emphasis added).

The term "enforceable policies" was amended in 1990 to include not only "constitutional provisions, laws, regulations, land use plans, ordinances" and the like, but also "judicial and administrative decisions by which a State exerts control over private and public land and water uses and natural resources in the coastal zone."⁸⁹ These "judicial decisions" concerned with "private and public land and water uses and natural resources" are often judicial rulings on the application of the Public Trust Doctrine in the State.

To the extent that a State has judicial decisions concerned with the management of public trust resources, these decisions can be incorporated in a State's coastal zone management (CZM) plan, and if federally-approved, can be applied through the consistency provisions to federal activities. If the Public Trust Doctrine is incorporated into a State's CZM plan, then federal agency activities must be "consistent to the maximum extent practicable,"⁹⁰ and federally permitted projects

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affecting coastal or trust lands and resources must be “conducted in a manner consistent” with the enforceable policies of a State’s CZM plan. Thus, Army Corps of Engineers Section 404 dredge and fill permits and National Pollution Discharge Elimination System (NPDES) permits for activities affecting trust lands, waters, or resources may be reviewed on public trust grounds for consistency with a State’s CZM plan.

Because of the overlap between the “coastal zone,” as defined by the CZMA,⁹¹ and public trust lands, waters and resources, the federal consistency powers allow State programs to use the Public Trust Doctrine when reviewing federally conducted or permitted activities. However, without the authority provided by consistency over federal agency activities and federally permitted projects, State public trust law may either be severely limited or preempted altogether in its effect upon such activities. *See* Ch. VIII. Used together, however, these provisions give State programs an effective mechanism to enforce their coastal management policies.

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Notes

1. All coastal States except Georgia, Indiana and Minnesota have federally approved CZM plans as of May, 1997.
2. 16 U.S.C. §1401 *et seq.*
3. 33 U.S.C. §1330 *et seq.*
4. CAL. CONST. art. 10, §4.
5. FLA. CONST. art. 10, §11.
6. HAWAII CONST. art. XI, §1.
7. MASS. CONST. amend. art. 97.
8. MICH. CONST. art. 4, §52.
9. N.C. CONST. art. XIV, §5.
10. PA. CONST. art. 1, §27.
11. R.I. CONST. art. I, §17.
12. VA. CONST. art. XI, §1.
13. VA. CONST. art. XI, §3.
14. *Pennsylvania Gas and Water Co. v. Kassab*, 14 Pa. Cmmw. Ct., 564, 322 A.2d 775 (1974); *Payne v. Kassab*, 11 Pa. Cmmw. Ct. 14, 312 A.2d 86 (1973), *aff'd* 468 Pa. 226, 361 A.2d 263 (1976).
15. HAWAII CONST. art. XI, §9: ("Each person has the right to a clean and healthful environment, as defined by law relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitation and regulation as provided by law.").
16. *See State v. Cozzens*, 2 R.I. 561 (1850)(Construing art. 1, §17 of the Rhode Island Constitution).
17. N.C. GEN. STAT. §113A-102(b)(4)(f) (1983).

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18. WASH. REV. CODE §90.58.020 (1971): (“The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration and preservation The legislature further finds that much of the shorelines of the state and uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state...”). The Supreme Court of Washington has held that the Shoreline Management Act is reflective of public trust principles, even though they are not explicitly articulated in the Act. *See Orion Corp. v. State*, 109 Wash.2d at 640-41, 747 P.2d at 1072-73.
19. 310 C.M.R. 9.01(2)(a).
20. ME. REV. STAT. ANN. tit. 38, §435 (Supp. 1989).
21. OHIO REV. CODE ANN. §123.03.
22. FL: *City of Dayton Beach Shores v. State*, 483 So.2d 405 (Fla. 1985).
NJ: *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47 (1972).
23. FL: *City of New Smyrna v. Board of Trustees of Internal Improvement Trust Fund*, 543 So.2d 824 (Fla. 1989)(Beach fee revenue had to be used to keep the beach in good repair, but expenses for beach maintenance need not be limited to acts done directly on the sandy beach itself).
24. NJ: *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. at 308-09, 294 A.2d at 54. Note that the court’s holding is limited to municipally owned beaches.
IL: *But See Broekl v. Chicago Park District*, 131 Ill.2d 79, 544 N.E.2d 792 (1989)(Where there was clear legislative authority, municipality could charge higher fees to non-residents for municipal moorings).
25. *Neptune City v. Avon-by-the-Sea*, 61 N.J. at 308-09, 294 A.2d at 54. In *Hyland v. Borough of Allenhurst*, 78 N.J. 190, 393 A.2d 579 (1978), the New Jersey Supreme Court affirmed that “the general public is entitled to access to both the public trust lands along the Allenhurst shoreline and to all portions of the dedicated beach area in that municipality for a fee no greater than that charged residents for similar use.” *Id.* at 193-94, 393 A.2d at 581 (quoting *Hyland v. Borough of Allenhurst* 148 N.J. Super. 437, 441, 372 A.2d 1133, 1135 (1977)).

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26. *Hyland v. Borough of Allenhurst*, 78 N.J. 190, 393 A.2d 579 (1978). Note that although the court struck down the toilet restrictions, it upheld the municipality's right to charge higher fees to non-residents for use of the beach club facilities.
27. *Slocum v. Borough of Belmar*, 569 A.2d 312 (N.J. Super. Ct. 1989).
28. *Id.* at 317.
29. *Id.*
 - II: *But See Broeckl v. Chicago Park District*, 131 Ill.2d 79, 544 N.E.2d 792 (1989)(Upholding higher mooring fees for non-residents over objections raised under the Public Trust Doctrine).
30. *See State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353 (1908).
31. *Id.* at 611, 47 So. at 356.
32. *Id.* at 612, 47 So. at 356.
33. *Id.*
34. 510 A.2d 533 (Me. 1986).
35. *Id.* at 536.
36. *Id.* at 537.
37. *State of North Carolina v. Credle*, 322 N.C. 522, 369 S.E.2d 825 (1988).
38. *Id.* at 11 (quoting N.C. GEN. STAT. §113-202(a) (1987)).
39. N.C. GEN. STAT. §113-202(h) (1987).
40. N.C. GEN. STAT. §113-202(a)(2) (1987).
41. 406 Mass. 79, 525 N.E.2d 1298 (1988).
42. *Id.* at 84, 525 N.E.2d at 1301.
43. *Id.*
44. *Id.*
45. *Id.* at 84 n.8, 525 N.E. 2d 1301 n.8.

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46. *Id.* at 86, 525 N.E. 2d at 1301.
47. 417 Mass. 565, 631 N.E.2d 547 (1994) (“Aquaculture is a contemporary method of farming shellfish. We conclude that it is not incidental to or reasonably related to or a natural derivative of the public’s right to fish.”).
48. *State v. South Carolina Coastal Council*, 289 S.C. 445, 346 S.E.2d 716 (1986).
49. *Id.* at 451; 346 S.E.2d at 720.
50. CAL. PUB. RES. CODE §30001.5 (West 1986).
51. CAL. PUB. RES. CODE §30230 (West 1986).
52. CAL. PUB. RES. CODE §30222.5 (West 1986).
53. CAL. FISH & GAME CODE §15100 (West Supp. 1990).
54. CAL. FISH & GAME CODE §15400 (West Supp. 1990).
55. CAL. FISH & GAME CODE §15401 (West. Supp. 1990).
56. CAL. FISH & GAME CODE §15402 (West. Supp. 1990).
57. CAL. FISH & GAME CODE §15411 (West. Supp. 1990).
58. *Id.*
59. 1987 U.S. CODE & CONG. ADMIN. NEWS, at 32.
60. 33 U.S.C. §1330(a)(1) and (2).
61. 33 U.S.C. §1330(b)(1).
62. *Id.* at (b)(4).
63. P.L. 100-526, Title II (Oct. 24, 1988), 102 Stat. 2623, 10 U.S.C. §2687 note. *See also* P.L. 101-510, Title XXIX, Part A, 10 U.S.C. §2687 note.
64. *Id.* The term “military installations” “means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility, which is located within any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, or Guam. Such term does not include any

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facility used primarily for civil works, rivers and harbors projects, or flood control projects." *Id.*, codified at 10 U.S.C. §2687(e)(1).

65. *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)(emphasis added).
66. *See State v. Williams*, 23 Wash. App. 694, 598 P.2d 731 (1979). *See generally* David E. Engdahl, *State and Federal Power over Federal Property*, 18 Arizona Law Review 1 (1976).
67. U.S. CONST. amend. V ("... nor shall private property be taken for *public use*, without just compensation.")(emphasis added).
68. *United States v. 11.037 Acres of Land*, 685 F.Supp. 214, 217 (N.D.Cal. 1988). Citations omitted.
69. *United States v. 1.58 Acres of Land*, 523 F.Supp 120, 124 (1981), quoting from *United States v. California*, 332 U.S. 19 (1947).
70. *Id.*
71. *Id.*
72. *See Matter of Steurt Transportation Co.*, 495 F.Supp. 38 (1980).
73. *Id.* at 40.
74. *See United States v. Burlington Northern R. Co.*, 710 F.Supp. 1286 (D.Neb 1989).
75. *Bonnelli Cattle Co. v. Arizona*, 414 U.S. 313, 326 (1973).
76. *See Weeks v. North Carolina Dept. of Natural Resources and Community Development*, 388 S.E.2d 228 (1990)(Upholding denial of a riparian owner's application for a permit to construct a 900-foot pier to reach to deep water based, in part, on public trust principles).
77. A Wisconsin statute regulating wharves, piers and swimming rafts reflects such legislation: "The wharf or pier is constructed to allow the free movement of water underneath and in a manner which will not cause the formation of land upon the bed of the waterway." WIS. STAT. ANN. §30.13(1)(e)(West 1987). *See also* MASS. GEN. LAWS ANN. Ch. 91, §23; N.J. STAT. ANN. 12:3-19; WASH. REV. CODE §79.90.105.
78. *Id.*

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79. See Ch. VIII, §2.E for discussion of licenses and leases, and Ch. V for a discussion of the conveyance of public trust land.
80. See, e.g., MASS. CODE REGS. tit. 310, §9.00 (Public Hearing Draft, 1989).
81. OH: See OHIO REV. CODE, §123.031(D).
NC: See N.C. GEN. STAT. 146-12.
82. CA: See CAL. PUB. RES. CODE §6503.5 (West 1977).
NC: See N.C. GEN. STAT. 146-12.
83. N.J. STAT. ANN. 12:3-7 (1979).
84. N.J. STAT. ANN. 12:3-9 (1979).
85. See Ch. V for discussion of such conveyances.
86. For a more complete discussion on dockominiums, See Cheung, *Dockominiums: An Expansion of Riparian Rights That Violates the Public Trust Doctrine*, 16 B.C. Env. Aff. L. Rev. 821 (1989). See Ch. V.A.5 regarding revocation of conveyances.
87. 16 U.S.C. §1451 *et seq.*
88. *Id.* at 1456(c)(1)(A).
89. *Id.* at 1453(6a).
90. *Id.* at 1456(c)(1)(A).
91. *Id.* at 1453(1).

CHAPTER X

AGENCY CONSIDERATIONS WHEN APPLYING THE PUBLIC TRUST DOCTRINE

Summary

When an agency bases its management actions on the Public Trust Doctrine, it must consider the possibility of being challenged by an "aggrieved" land owner who asserts that the agency lacks such authority, that the agency took improper action either procedurally or substantively, or that its action resulted in an unconstitutional "taking" of private property.

An executive branch agency has only as much authority as is validly delegated to it by the State legislature. For delegated authority to be valid the agency must be acting in accordance with its enabling act, the enabling act must provide meaningful standards to guide the agency, and the agency's exercises of authority must be subject to procedural safeguards, in conformity with substantive standards promulgated in agency regulations with the stated purpose of implementing statutory goals, and subject to judicial review.

Coastal managers must be prepared to defend suits claiming that their management actions concerning trust lands, waters or resources violate the Public Trust Doctrine. Private citizens may sue the State, the State agency, or State officials, to attempt to "enforce" the public's trust rights. Such a "citizen suit" raises questions of "standing" of the citizen to sue, and what Public Trust Doctrine claim the citizen can press.

Private owners of public trust land may bring "takings" cases against the State, agency or officials. A State's management of the public's trust assets should be less vulnerable to (but not immune from) takings challenges. Because the owner received the trust land already burdened by the public's trust rights, a private owner's argument that she had unfettered investment-backed expectations is far more tenuous.

In potential "takings" cases, State agencies should (1) have the administrative flexibility to furnish additional steps that could provide relief to the claimant, and thus keeping the case from "ripening", (2) avoid rendering property totally valueless, and (3) analyze the economic "taking" on the basis of the entire parcel of property, not just the portion subject to the regulations.

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A. Legislative Delegation of Public Trust Authority

An executive branch agency has only as much authority as is validly delegated to it by the State legislature.¹ Until relatively recently, one of the most common challenges to administrative agencies, including coastal management agencies, has been based upon the theory of improper delegation of authority by the legislature to the agency, in violation of the doctrine of "separation of powers."² The combination of legislative and judicial powers in an agency within the executive branch is now almost always approved by the courts -- if certain conditions are satisfied.

First, the agency must be acting in accordance with its enabling act, the fundamental source of the agency's power, which both defines what the agency may do and the extent of its authority. Agency actions within the scope of the statutory authority expressly or impliedly conferred upon it by the enabling act are presumptively valid exercises of delegated powers; actions outside or beyond the scope of that authority are presumptively invalid.

Second, the enabling act must provide meaningful standards to guide the agency, otherwise, its actions will not pass constitutional muster. So long as some standards are provided by the legislature, the agency can administer the details of the statutory policy without violating the separation of powers principle. Although in the past courts commonly insisted that the enabling statute contain detailed standards, many statutory standards for agencies have been upheld despite being far from explicit.³

Third, even when statutory standards or policies are less than clear, most State and federal courts are willing to uphold legislative delegations to agencies, provided that the agency's exercises of authority are:

- subject to procedural safeguards;
- in conformity with substantive standards promulgated in agency regulations with the stated purpose of implementing statutory goals; and
- subject to judicial review.

Thus, even when the legislature has not given specific directions, agencies should be able to deflect a delegation challenge by pointing to their own enunciation of reasonable and intelligible standards rationally related to statutory policy and their own provision of fair procedures for those affected by their actions.

1. Rule Making Authority

Probably the most important power delegated to administrative agencies is the authority to promulgate rules or regulations, since rule making has come to occupy a central position in modern administrative law as the most effective means for enacting the legislature's broad policy statements. Like all agency powers, rule-making authority must be derived either from express provisions of the enabling statute or by necessary implication. Most modern statutes do confer rule-making authority on agencies in broad and express terms, since the very rationale of the modern administrative agency lies in the recognition that legislatures are unable or unwilling to provide detailed, experienced and ongoing regulation of essential areas of governmental concern.

Yet most courts will uphold agency regulations, even when the authority cannot be traced to specific words in a statute, whenever they conclude that the promulgation of regulations is necessary to carry out the purposes expressed in the statute and they can find at least some rational relationship between the regulation and the purposes of the empowering statute. The implication of authority cannot, however, arise from a total statutory vacuum, and courts will not uphold regulations that have no relationship to, or are inconsistent with, the statutes creating the agency. Therefore, an agency's ability to cite a legislative or judicial basis for its rule making or to support it as in furtherance of statutory goals, is of great importance.

Agency rule making is essential to a coherent coastal management program for several reasons. Regulations are given the same legal force and effect as a statute and are accorded the same presumptions of validity as a statute. Furthermore, an agency's interpretation of its own regulations will be accorded great deference by the courts. Challenged regulations will be upheld as lawful exercises of discretion so long as they are supportable on any rational basis, placing the burden on those opposing them to prove the absence of any conceivable ground on which they can be upheld.⁴ On the basis of these principles, an agency with statutory jurisdiction over trust resources should have little difficulty in implementing the Public Trust Doctrine by rule making and regulation.⁵

2. Delegation of other Powers

a. Eminent Domain

The power of eminent domain, the power to take private property for public use, is a legislative power which may be delegated to an agency, so long as fair procedures are provided for determining just compensation for the taking, and the

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issue of whether the exercise of the power is for a public purpose remains subject to judicial review.

b. Fines and Penalties

The power to impose civil fines and penalties for violation of regulations may be delegated to an agency where it is reasonably necessary to assist the agency in the performance of its duties, where a reasonable upper monetary limit is set by the legislature, and where the purpose of such penalties is not to punish the commission of a crime through the disguised device of a civil penalty.

c. License Fees

The power to charge license fees may properly be exercised by an agency, even in the absence of explicit statutory language, if the agency has been clearly delegated licensing powers and the fees are rationally related to the agency's licensing activities.

d. Sub-Delegation of Powers

An agency that has been delegated rule-making and adjudicatory powers may not, in the absence of explicit statutory authorization, itself delegate discretionary (as opposed to purely routine or ministerial) actions either to subordinate agency officials, other governmental units or groups of private persons.

B. Citizen Suits To Enforce the Public Trust Doctrine

Coastal managers must be prepared to defend suits claiming that their actions regarding trust lands, waters or resources violate the Public Trust Doctrine.⁶ Individual managers may be named as defendants in such a lawsuit.⁷ Most such lawsuits seek injunctive relief: asking the court to order the agency to take or not to take some action in the future. However, if monetary damages are sought, individual managers should consult the laws of their State to determine the State's policy toward indemnifying them against a judgment rendered against them.⁸

1. "Standing"

Lawsuits to enforce the Public Trust Doctrine are most often brought by a citizen who disagrees with the way public trust lands, waters or resources are used. In defending such a claim, the agency must first ask the court to determine, as a

procedural matter, whether the person bringing the suit has “standing” — that is “whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”⁹ In the absence of a State constitutional or statutory provision conferring standing on citizens with no direct interest in the matter, the person bringing the suit must establish standing, or the right, to sue a governmental agency. The generally accepted rule for determining whether or not an individual has standing is to demonstrate that the action being challenged has or will create an injury-in-fact and that she will be among the injured.¹⁰ This requirement is intended “to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome,” and to insulate government agencies from attacks by “organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.”¹¹

Such thinking has led courts to conclude that, absent a litigant with an injury-in-fact, a public right is most appropriately vindicated by the arm of the government charged with enforcing such rights — usually the State’s attorney general or coastal management agency.¹² This view is supported by the traditional perception that where a State has entrusted the vindication of certain public rights to duly empowered State officials, the discretion of such officials should be relied upon and not preempted by piecemeal and uncoordinated intervention by members of the public.¹³

Some courts, however, have determined that reliance on the heavily overburdened resources of an attorney general will not adequately protect and enhance the environment. These courts have constructed what amounts to a private attorney general theory, which permits a member of the public to sue to enforce a public right. Such a private citizen need only demonstrate that she will suffer a specific injury other than that which is suffered by the public generally.¹⁴ Examples of specially affected individuals who may well have standing to sue would be those who rely on access to the shore and the tidelands for their livelihood, such as fishermen, shellfish harvesters, fish processors and those engaged in boat servicing and repair.

2. "Claims" Based on the Public Trust Doctrine

If a citizen succeeds in establishing standing, she still has the burden to state a claim for which relief can be granted — that is, to articulate a legal theory under which the court is empowered to grant relief. Because the Public Trust Doctrine does not give any individual an identifiable and vested property right capable of recordation (as well as the fact that the property rights at issue are the public’s generally and not the individual’s), the litigant loses any potential claim under the

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State or federal constitution that her property has been “taken” by the government and that she is entitled to just compensation. *See* discussion below.

In certain circumstances, an individual litigant might have a sustainable claim for improper delegation of authority or for acts which are beyond the agency’s statutory authority. Legislatures delegate authority to implement their directives to administrative agencies such as coastal commissions. Despite generally liberal attitudes toward most exercises of agency power, courts have tended to take a narrow view of a legislature’s delegation of authority in connection with the alienation of public trust lands, and such decisions made by non-elected agencies rather than by the legislature itself will be subjected to closer scrutiny than will legislative decision making.¹⁵ Some courts have gone so far as to invalidate agency action regarding land in which the public retains an interest, even where the agency action appeared to be specifically authorized by the legislature.¹⁶

Agencies should also be prepared to defend against actions by private parties in the nature of the common law writ of *mandamus* to compel them to take action to safeguard and manage public trust lands and resources. A *mandamus* action can only be maintained, however, where an agency is required to take action. If the agency has discretion to either act or not act, the challenge will usually fail.¹⁷ A *mandamus* action compelling the attorney general to take action to defend the public trust may also fail, because the attorney general has broad discretion to determine whether governmental intervention is appropriate.¹⁸

C. Management of Public Trust Resources and the “Taking” of Private Property

Public trust land has been held by the State in trust for the benefit of the public since Statehood. *See* Ch. II, §1.A.2. Therefore, public trust land that has been conveyed to private ownership has always been burdened by the public’s trust rights. Given this, when a State acts pursuant to its trust authority to manage the public’s trust assets, it should be less vulnerable to, but not immune from,¹⁹ takings challenges. Because the owner received the trust land already burdened by the public’s trust rights, a private owner’s argument that she had unfettered investment-backed expectations is far more tenuous.

However, as States assert their public trust responsibilities, their actions are likely to conflict with the interests of private property owners. Where the Public Trust Doctrine has not been enforced over a period of time and expectations of private owners have grown in the interim, a question arises as to whether a State can

affirm its public trust rights and obligations without violating the property rights of the private owner.

Specifically, does a State's reaffirmation of the public's trust rights and its obligations as trustee give rise to a "taking" of private property for public use without just compensation? Private property owners may raise potential "takings" claims where a State, in affirmation of its role as trustee, either (1) imposes restrictions on privately held trust lands; (2) requires public access to trust lands across these privately owned lands, or (3) expands the scope of public activities encompassed by the Public Trust Doctrine.

1. The "Takings" Doctrine

The Fifth Amendment of the United States Constitution provides, in part:

No person shall . . . be deprived of life, liberty or property, without due process of law; *nor shall private property be taken for public use, without just compensation.* (Emphasis added.)

The Fifth Amendment applies to the several States through the Fourteenth Amendment, which provides, in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth and Fourteenth Amendments were traditionally applied to physical takings of private property by government entities. However, beginning in the early 1900s, courts began to recognize takings claims where a government entity so severely restricted the use of private land that those restrictions had the practical effect of taking the property, hence the term "regulatory takings."

The United States Supreme Court laid the groundwork for the concept of a "regulatory taking" in 1922 in a challenge to Pennsylvania's Kohler Act, which prohibited coal companies from removing coal from beneath the surface in a way that would cause the land to subside.²⁰ The Supreme Court found the Kohler Act was an unconstitutional taking without just compensation because it made the mining of certain coal "commercially impracticable." In what has become a famous and oft-quoted holding, the Court stated "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes *too far* it will be

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recognized as a taking."²¹ The Court did not, unfortunately, define what it meant by going "too far."²²

The U.S. Supreme Court again looked at a regulatory takings question in a 1978 challenge to the New York City Landmarks Commission denial of a plan to build a 50-story office tower above Grand Central Station.²³ The Court described regulatory takings cases as "essentially ad hoc, factual inquiries," and set out three factors to be considered: (1) the economic impact of the regulation on the landowner; (2) the extent to which the regulation interferes with distinct investment-backed expectations of the landowner; and (3) the balance between the public interest promoted by the regulation and the private property rights burdened by the regulation.²⁴ (Note that this third factor was modified by the Court in the 1992 *Lucas* case. See discussion below). As is evident from this three-part test, there is no general rule; rather, the facts of each regulatory takings claim must be considered individually.²⁵

In 1987 the Supreme Court reviewed three regulatory takings challenges.²⁶ In the first, *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, the Supreme Court found that a Pennsylvania subsidence statute almost identical to the 1922 Kohler Act was *not* a taking.²⁷ In the second, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, the Court plowed new ground by holding that if a regulation results in only a temporary taking, the Constitution nonetheless requires that the private landowner be justly compensated.²⁸ In the third, *Nollan v. California Coastal Commission*, the Court found that a State's requirement that a private landowner provide public passage along the shore in return for a building permit, where the State could not demonstrate a connection (nexus) between the requirement and the permit, was a regulatory taking requiring compensation.²⁹

In the final analysis, any regulatory taking claim has two components. First, it must be established that the regulation has in substance "taken" the property, that is, that the regulation "goes too far." Second it must be determined what compensation would be "just."³⁰

2. Procedural and Factual Requirements for A "Takings" Determination

a. "Ripeness" of a "Takings" Claim

A threshold issue in any takings case is whether the case is "ripe" for judicial review. In a 1985 decision, the U.S. Supreme Court clearly stated what was necessary for a takings claim to be ripe:

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“As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.”³¹

Thus, a property owner claiming that a government regulation has "taken" her property must have thoroughly exhausted all administrative remedies. Otherwise, "it is impossible [for a court] to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed."³² In other words, without exhausting all administrative remedies, there is no "concrete controversy" upon which the court can rule.³³ "Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property."³⁴

Following this reasoning, a takings claim brought by an association of surface coal miners against the Federal Government, claiming that the Surface Mining Control and Reclamation Act of 1977 made it "economically and physically impossible" to mine their land, was held by the U.S. Supreme Court as "not ripe" because the association failed to "avail themselves of the opportunities provided by the Act to obtain administrative relief" in the form of variances or waivers.³⁵ In a more obvious situation, the Court held that a challenge to the application of a zoning ordinance was not ripe because the property owners hadn't even submitted their plan for developing their property to the planning agency.³⁶

In Washington State, however, the State Supreme Court held, in what it described as a "very close call" that a "takings" case was ripe even though all administrative remedies had not been exhausted. Looking at the facts of the case, the court was convinced that "resort to the administrative procedures would be futile and vain."³⁷ Courts are sympathetic to the plight of permit applicants, knowing that the process can be long and expensive, and they will be hesitant to require permit applicants to "pump oil from a dry hole."³⁸ Thus, by invoking the "futility exception" to the rule of full exhaustion of administrative remedies, a Court may find a "takings" case ripe in spite of the fact that further administrative steps are available.

The timing and procedural path a case takes also may affect the ripeness analysis. For example, in the 1992 case *Lucas v. South Carolina Coastal Council*,³⁹ after briefing and oral argument of the case before the South Carolina Supreme Court, but before the decision was handed down, the statute in controversy was amended by the State legislature to allow the Coastal Council to issue "special permits" for the construction or reconstruction of structures in certain coastal areas. This would have allowed Lucas to build on his property. Before the U.S. Supreme Court, on

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appeal from the South Carolina Supreme Court, the Council argued that the amendment rendered the takings claim unripe, as Lucas could yet be able to secure the permit to build on his property. Not so, said the Court. The Court noted that the South Carolina Supreme Court "shrugged off the possibility of further administrative and trial proceedings ... preferring to dispose of Lucas's takings claim on the merits."⁴⁰ Thus, the Court found that "it would not accord with sound process to insist that Lucas pursue the late-created "special permit" procedure before his takings claim can be considered ripe."⁴¹ Nonetheless, even though the Court held that the takings claim was ripe, it did recognize that the ripeness determination was "a threshold matter."⁴²

b. What has been "Taken"?

Assuming that a takings case is ripe, the question arises as to what property has been taken. There are two facets to this question: the degree of economic use remaining in the land burdened by the regulation, and the parcel of property in question.

i. The Economic Value of the "Taken" Property

Just when does a regulation go "too far" and result in a "taking" of property? There is no easy answer to that question. As stated in *Lucas*, "In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "set formula" for determining how far is too far, preferring to "engage in ... essentially ad hoc, factual inquiries."⁴³ The only situation which has a cut-and-dried answer is when a regulation deprives a landowner of all economically beneficial or productive use of the land. "[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."⁴⁴

Thus, when a regulation renders a parcel "valueless" a "takings" has occurred. But when a regulation only renders a parcel to be of "less value" the courts will engage in a case-by-case inquiry, weighing the three factors listed above, and summarized below. The diminution in value can be significant without the courts finding that a "takings" has occurred. For example, a 75% reduction in value of land resulting from a zoning ordinance was held not to constitute a "taking."⁴⁵ Whether a 95% reduction in value would constitute a "takings" is a question raised in *dicta* by the U.S. Supreme Court, but as of yet, not answered.⁴⁶

ii. The Property "Taken": The "Denominator" Problem

The question of whether there has been a total or partial diminution in value of the property depends upon how the parcel is defined. For example, in coastal areas a parcel of property may only be partially covered by wetlands, with the remaining portion being upland. If the filling of wetlands is prohibited, and the only way any economic benefit of the wetlands area could be produced is by filling the wetlands, then all economic value of the wetlands area has been destroyed by the regulation. But the parcel has economic value in the remaining uplands, which can still be developed. Should the owner be fully compensated for the loss of the potential value of the filled wetlands? Or should the court look at the parcel as a whole, and determine that substantial economic value still exists in the parcel as a whole? This is the "denominator" problem.

Again, there are no clear answers. In *Loveladies Harbor, Inc. v. United States*,⁴⁷ a permit to fill a 12.5 acre parcel was denied. The 12.5 acre parcel (almost entirely wetlands) was part of a larger 51 acre parcel, which in turn, was part of a larger 250 acre tract. The denial of the permit rendered the 12.5 acre parcel valueless. Loveladies Harbor argued that the "denominator" should be the 12.5 acre parcel (with a resulting complete loss of value) and the U.S. Government argued that the denominator should be the full 250 acre tract (with only a partial, non-compensable reduction in overall value occurring). The court considered the chronological order of when the land was purchased (1958), when different parts were developed, when the regulation on wetland fill was enacted (1972), when the permit was applied for (1982) and other agreements between the government and the permit applicants. The court found that the relevant property for the takings analysis was the 12.5 acre parcel, and held that a "takings" had occurred.⁴⁸

Commentators on this issue have raised the concern that unscrupulous developers owning large tracts of land containing wetlands could divide the uplands into lots, improve and sell them, leaving only the wetlands. Then, they would apply for a wetlands fill permit, and upon denial, file a takings claim solely on the basis of the remaining wetland parcel.⁴⁹ Given the long-standing regulation of wetlands fill, however, it would seem improbable that the owner would have the required investment-backed expectation of making a profit by filling in the wetlands.

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c. The Affect of Lucas on the "Takings" Analysis

When the U.S. Supreme Court accepted the *Lucas v. South Carolina Coastal Commission* case in 1992:

"the case was understood to confront the Court with a much-heralded opportunity to clarify how courts were to balance public interest claims against liberty claims of private property owners, and to do it in a case in which the issue was sharply focused on fundamental ecological and environmental values. Instead, the Court recast the issue. The question, said the Court, was not one of balance between competing public and private claims. Rather, the question is simply one of basic property ownership rights: within the bundle of [property] rights ... is the right or interest at issue, as a matter of law, owned by the property owner or reserved to the state?"⁵⁰

As a result, the third "balancing factor" in the "takings" analysis, as laid down by the U.S. Supreme Court in the 1978 *Penn Central Transportation Co. v. City of New York* case (*i.e.*, the balance between the public interest promoted by the regulation and the private property rights burdened by the regulation) was "dramatically change[d]"

"from one in which courts, including federal courts, were called upon to make *ad hoc* balancing decisions, balancing private property rights against state regulatory policy, to one in which state property law, incorporating common law nuisance doctrine, controls. This sea change removed from regulatory takings the vagaries of the balancing process, so dependent on judicial perceptions with little effective guidance in law."⁵¹

Thus, although the first two *Penn Central* balancing factors remain unchanged, the third factor, after *Lucas* can now be restated as: Is the claimed property right or interest vested in the owner as a matter of State property law, and not within the power of the State to regulate under its common law principles of property and nuisance law?

d. "Takings" Analysis in a Nutshell

Clearly this is a dynamic field of law, and the courts in general and the U.S. Supreme Court in particular have not spoken their final words on the topic of regulatory takings. Nonetheless, the current state of regulatory takings analysis is neatly summarized in the 1994 *Loveladies Harbor* case as follows:

- “a) A property owner who can establish that a regulatory taking of property has occurred is entitled to a monetary recovery for the value of the interest taken, measured by what is just compensation.
- b) With regard to the interest alleged to be taken, there has been a regulatory taking if:
 - 1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
 - 2) the property owner had distinct investment-backed expectations; and
 - 3) it was an interest vested in the owner as a matter of state property law, and not within the power of the state to regulate” under common law principles of property and nuisance law.⁵²

**3. "Takings" and the Management of Public Trust Land:
*Orion Corporation v. State of Washington, A Case Example***

The Public Trust Doctrine is clearly a part of a State's common law on property. A State agency managing State-held public trust land operates in a completely different legal environment than it does when it regulates privately-held land. In the former, the State is managing the use of property it owns; in the latter the State is regulating the use of privately owned property.

As noted above, public trust land has been held by the State in trust for the benefit of the public since Statehood. Because the owner received the trust land already burdened by the public's trust rights, a private owner's argument that she had unfettered investment-backed expectations is far more tenuous. In the *National Audubon Society* case, the California court explicitly addressed this issue and refused to find a taking, stating:

Once again we reject the claim that establishment of the public trust constituted a taking of property for which compensation was required: 'we do not divest anyone of title to property; the consequence of our decision will be only that some landowners whose predecessors in interest acquired property under the 1870 act will, like the grantees in *California Fish*, hold it subject to the public trust.'⁵³

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Only a few cases have addressed the question of the regulation of public trust lands in light of the takings doctrine. The most thorough discussion of this issue is contained in a Washington State case.⁵⁴ The Orion Corporation owned tidelands and submerged lands that it planned to dredge and fill to build a residential community. After Orion had purchased the land, the State adopted a series of coastal and tidelands regulations, the effect of which was to limit Orion's use of its property to non-intensive recreation or aquacultural uses.

The Orion Corporation challenged the new coastal and tideland regulations as a regulatory taking. The Washington Supreme Court held that title to Washington's shorelines vested in the State when it entered the Union in 1889 and, therefore, when Orion purchased its tideland property it did so subject to the Public Trust Doctrine. Thus, Orion had no reasonable investment-backed expectations other than those permissible under the Public Trust Doctrine.

The court also found, however, that some of the uses of the land which were permissible under the Public Trust Doctrine were not under the challenged tidelands regulations. In other words, the court found the regulations more restrictive than the Public Trust Doctrine. The court thus stated that, to the extent the challenged regulations prohibited uses which would violate the public trust, they were clearly insulated from a takings challenge.⁵⁵ However, to the extent the regulations prohibited uses that did not violate the public trust, and to the extent those regulations, though enacted for the public health and safety, denied Orion Corporation all economically viable uses of the property, the regulations would constitute a taking.

The Court added that if there *were* a regulatory taking, the State would be given the choice of two remedies: it could either pay compensation for the taking or amend its regulations to permit the Orion Corporation to use the property for uses allowable under the Public Trust Doctrine. Any takings compensation would be limited to the reduction in value of the land as a result of the new regulations, taking into account that the value of the land was limited from the outset by restrictions inherent in the Public Trust Doctrine.

Thus, States may attempt to bolster efforts to protect public trust lands by regulating the permissible uses and development of public trust land under the Public Trust Doctrine. However, if in doing so a State has not established a specific public trust use for the lands and imposes regulations which are *more* severe than the inherent limitations imposed by the Public Trust Doctrine in that State, such regulation may be successfully challenged as a regulatory taking.

4. Expanding the Geographic Scope of the Doctrine: Providing Access to Trust Lands

Perhaps the more interesting question relating to the interface of the Public Trust Doctrine with the takings doctrine is the potential risk faced by States which move to expand the geographical scope of public trust lands or provide meaningful access to public trust lands across privately owned land.

As discussed in Ch. II, §1, the geographic extent of the Public Trust Doctrine is limited to tidal and navigable fresh waters, as further limited by each State's interpretation of the doctrine. A few recent cases, however, suggest that States may be able to extend the reach of their public trust authority beyond its traditional reach, if only to protect public trust lands and waters from injury arising out of non-public trust areas.

In California, for example, public trust authority reaches to control non-navigable tributaries of Mono Lake, a navigable lake.⁵⁶ The theory argued by the State to extend its public trust authority to such non-navigable tributaries was analogous in some respects to a nuisance theory. The State successfully argued that it had authority, under the Public Trust Doctrine, to influence the diversion of water from the tributaries away from Mono Lake. This case may provide some precedent for California and other States to exercise their authority under the Public Trust Doctrine to waters above the public trust boundary in order to adequately protect the State's public trust resources.

Another approach, endorsed by the New Jersey courts, is to extend the Public Trust Doctrine itself to include the dry sand beach above the ordinary high tide line. The New Jersey Supreme Court has held that a right of access to public trust lands is inherent in the Public Trust Doctrine. As stated by the New Jersey Supreme Court:

The bathers' right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the waters' edge. The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to recreational use of the ocean . . . where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the [public trust] doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.⁵⁷

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Based upon this reasoning, the New Jersey courts have consistently struck down attempts by local communities and private property owners to close off access to their beaches.

In sharp contrast to the New Jersey holdings, the Maine Supreme Judicial Court has recently ruled against those who sought access to public trust resources across privately held land for purely recreational (as opposed to traditional public trust) purposes. In *Bell v. Town of Wells Beach*,⁵⁸ private landowners challenged Maine's Public Trust and Intertidal Land Act which provided that the public's trust rights included "the right to use intertidal land for recreation" and as a "footway between points along the shore." The Maine Supreme Judicial Court found the Act an unconstitutional violation of the takings clause of the United States Constitution. Thus, as in Maine, a State statute attempting to enhance public access to public trust resources may not survive a takings challenge.

The Maine court did, it should be noted, reaffirm the fact that private owners of shorefront property held title subject to an easement permitting public use for fishing, fowling and navigation (whether recreational or commercial) and other uses reasonably incidental or related thereto.⁵⁹ Consequently, a statute guaranteeing access across private property for such purposes would presumably have been upheld.

Similarly, in a 1974 opinion to the legislature evaluating proposed legislation declaring that the reserved public rights in the intertidal zone included a "public on-foot free right-of-passage", the Massachusetts Supreme Judicial Court reaffirmed the public's right to use the intertidal zone for "fishing, fowling and navigation and the natural derivatives thereof", but declined to find that they included a right of passage. The Court expressly rejected a dynamic concept of public trust rights, stating that "the grant to private parties effected by the colonial ordinance has never been interpreted to provide the littoral owners only such uncertain and ephemeral rights as would result from such an interpretation."⁶⁰ The Court then examined the "takings" implications of the proposed legislation. "The permanent physical intrusion into the property of private persons, which the bill would establish, is a taking of property within even the most narrow construction of that phrase possible under the Constitutions of the Commonwealth and the United States. ... The interference with private property here involves a wholesale denial of an owner's right to exclude the public. If a possessory interest in real property has any meaning at all it must include the general right to exclude others."⁶¹ Maine and Massachusetts, it should be noted, are both "low water" States wherein the "right to exclude others" had by State law been extended to the low water mark. See Ch. II, §2.B.

5. Access Beyond the Public Trust Doctrine: Police Power Regulations

In a State such as Maine, where the State law will not permit the State to extend the reach of its traditional public trust authority upland to protect trust uses and resources or to secure access, the State must resort to its traditional police power authority if it seeks to provide meaningful access to public trust lands or to preserve public trust resources that may be threatened by upland activities.

Before embarking on a regulatory scheme to provide access to public trust lands or to protect public trust resources, however, each State must plan for the risk that its regulations will be challenged as regulatory takings, whatever the source of its authority.

The most recent example of this risk is illustrated by the Supreme Court's decision in *Nollan v. California Coastal Commission*.⁶² *Nollan* was not argued on public trust grounds, although the case arose out of the California Coastal Commission's efforts to provide lateral access for public use of ocean beaches. The Supreme Court held that the California Coastal Commission requirement that the Nollans dedicate a public easement constituted a regulatory taking. In so holding, the Supreme Court emphasized the character of the governmental action as a physical occupation.

A regulation that results in the government entity physically occupying the land or restricting the private owner's right to exclude others from the property is clearly most susceptible to a takings challenge. Traditionally, the right to exclude others from the property has been deemed a fundamental stick in the bundle of property rights.⁶³

In the public trust context, governments may face a risk in requiring private owners to grant, without compensation, easements and rights-of-way for the purpose of permitting meaningful access to the beach or shore. The holding in the *Nollan* case should be instructive. The court found that a land use regulation must "substantially advance legitimate State interests," and that, "unless the permit condition serves the *same* governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an 'out and out plan of extortion.'"⁶⁴ Because the condition imposed by the Commission did not resolve the problem created or worsened by the proposed development (blockage of visual access), the condition was found to be an unconstitutional taking.

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6. Agency Considerations in "Takings" Cases

Because the financial costs can be significant to both the State and the landowner, a "takings" case should be avoided whenever possible. In order to do this, a State agency should bear in mind three principal considerations when dealing with a foreseeable "takings" case.

a. Availability of Administrative Remedies

As discussed above, before a property owner can take to court a claim that a government regulation has "taken" her property, she must have thoroughly exhausted all administrative remedies. Otherwise, there is no "concrete controversy" upon which a court can rule. A State agency should, to the greatest extent possible, always provide an additional administrative step that could provide relief to the claimant. This perhaps would entail providing waivers or variances in special situations.

Simply providing additional administrative steps, however, won't forestall a case from becoming ripe if "resort to the administrative procedures would be futile and vain."⁶⁵ The agency must be providing a *bona fide* opportunity for a claimant to be provided substantive relief. Otherwise, the court may act upon the "futile" procedures exception to the ripeness requirement, and take the case as if there had been an actual final administrative determination.

b. Avoid Rendering Property "Valueless"

Although "takings" jurisprudence is a dynamic field of law, with cases being analyzed on their unique facts and circumstances, the courts have nonetheless been crystal clear on one point: When a government regulatory action renders private property totally valueless, it is a taking for which just compensation is due. When regulating private property, a State agency must be cognizant of the affect of the regulation on the overall value of the property.

Any potential alternative uses of the property should be considered at the outset of any regulatory action that might significantly affect the current or proposed use of the property. Potential alternative uses might be few, however. For example, in areas which are zoned for residential use only and the regulation acts to prohibit the property from being used for residential purposes, the property would be rendered valueless. This was the fact situation of the *Lucas* case.

Nonetheless, if a property owner asserts that her property has been "taken" but a viable alternative use of the property could be made (albeit one that the property owner didn't intend but would still give the property a re-sale value), then the property would not be rendered totally valueless by the regulatory action.

c. Watch "The Denominator"

As discussed above, the question of whether there has been a total or partial diminution in value of the property depends upon how the parcel is defined. This is another area of "takings" jurisprudence that is dynamic, and thus unclear. In any event, a State agency should, from the outset, frame the case in terms of the largest possible denominator. For example, if a State regulation prohibits any use of wetlands except in their natural state, the agency should proceed with caution if an entire parcel of property is covered by wetlands. But if only a part of the parcel is wetlands, the economic impact of the regulation should be determined by looking at the uses of the remaining upland on the parcel of property.

An aspect of the denominator issue unique to public trust lands is, of course, whether the property is privately owned. Factual determinations of the public/private boundary will be key to defining the parcel. *See* Ch. II, §4.

Notes

1. On delegation in general, see K.C. Davis, *Administrative Law Treatise*, Volume I, Chapter 2 (2d ed. 1978).
2. NC: *Adams v. North Carolina Dep't. of Natural and Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978)(Upholding the North Carolina Coastal Area Management Act of 1974 against an attack asserting that the statutory charge to the agency to develop and adopt guidelines for the coastal area was an unconstitutional delegation of authority).

FL: *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978)(Holding unconstitutional provisions of the Florida Environmental Land and Water Management Act of 1972 delegating to the Florida Division of State Planning the power to designate areas of critical State concern within which development would be controlled).
3. One of the principal reasons courts are willing to imply the existence of standards is the doctrine, recognized in every jurisdiction, that courts are obligated to interpret a statute, if at all possible, so as to avoid serious doubts about its constitutional validity. Thus, such broad phrases as "just and reasonable rates" in the Interstate Commerce Commission's railroad regulation; "public interest, convenience, or necessity" in the Federal Communications Commission's issuing of radio broadcast licenses; and "unfair methods of competition" in the Federal Trade Commission's regulation of business conduct, have been judicially upheld as legally adequate.
4. Agencies must, of course, follow the procedures specified for the promulgation of regulations in the enabling act or the applicable state administrative procedure act or their own regulations for their rules and regulations to be presumptively valid. Furthermore, under the *ultra vires* principle, rules and regulations can extend no further than the scope of the authority expressly or by necessary implication conferred on the agency by the enabling statute.
5. In view of the extremely broad discretion possessed by a coastal agency — not only because of these deferential principles of administrative law applied by the courts but also because coastal agencies are not merely regulating under the general police power but are managing the use of public property (i.e., the lands subject to the public trust) — it is likely that virtually any rule or regulation promulgated by the agency that is explicitly based upon protecting or advancing the public trust will be upheld against challenge, so long as the agency fully articulates the regulation's basis and purpose, including an identification of the public trust interests involved. Consequently, a coastal agency could create valid regulations (including regulations classifying types of shores and coasts) which, for example, preserve particularly sensitive shorelines in their natural state and prohibit any development thereon; create temporary moratoria or freezes on all development, or on certain types of development; prohibit activities

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with unduly adverse impact on water quality; give aesthetic values and considerations (related to enjoyment of the coastal area) primacy in evaluating projects; or authorize specified public trust uses in certain areas to the exclusion of others (so long as reasonable opportunities to engage in the others are not totally extinguished).

6. Suits by “concerned citizens” and environmental groups attacking state and federal agency decisions affecting the use of natural resources have multiplied in recent years. Whether such an action can name a given state agency as the defendant or whether the defendant will be the state itself will largely be determined by whether the agency’s enabling statute grants it the right to sue and be sued. It should be noted that such a general statutory grant is insufficient to waive a state’s sovereign immunity under the Eleventh Amendment from suit in a federal court. See *Attascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).
7. Naming individual managers as defendants rather than the state or its agency directly avoids the Eleventh Amendment bar to suing a state in federal court. See *Ex parte Young*, 209 U.S. 123 (1908). If the suit is for retroactive money damages, however, which must be paid out of the state’s treasury, as opposed to injunctive relief, the Eleventh Amendment bar still holds. See *Edelman v. Jordan*, 415 U.S. 651 (1974).
8. Typically, individual State officials will either be legally immune from or indemnified for money judgments which arise out of the good faith performance of their authorized duties.
9. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).
10. This requirement of individualized injury was elaborated by the United States Supreme Court in *Sierra Club v. Morton*, 405 U.S. 727 (1972) where the Sierra Club, a nationally renowned conservation group, attempted to restrain a federal official from approving an extensive ski area in the Sequoia National Forest. The Court held that the Club’s special interest in preserving the forest was insufficient to give it standing. The Court went on to deny standing because “[t]he Sierra Club failed to allege that it or any of its members would be affected in their activities or pastimes by the Disney development.” 405 U.S. at 735. The *Sierra Club* standard has been relaxed somewhat in its later interpretations in *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973) and *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), the effect of which is to give standing to environmental groups who can demonstrate actual injury in fact to specific members of the group. The decisions in *Sierra Club*, *S.C.R.A.P.*, and *Duke Power* are interpretations of the case or controversy provision of Article III of the Constitution, which determines the jurisdiction of the *federal* courts. It is not directly applicable or binding on State courts, many of which are not restricted by the “case or controversy” standard. Nevertheless, many State courts have embraced its reasoning.

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11. *Sierra Club v. Morton*, 405 U.S. at 740. One should note that in most States private individuals may participate as intervenors in an adjudicatory proceeding before a state agency merely by being an interested person, with the right to present arguments orally and in writing, even if such persons do not have standing to be a full-fledged party because they are unable to show they may be substantially and specifically affected by the proceedings.
12. RI: *See Nugent v. Vallone*, 91 R.I. 145, 161 A.2d 802 (1960).
13. US: *See Cort v. Ash*, 422 U.S. 66 (1975).
IL: *See Scott v. Chicago Park District*, 66 Ill.2d 65, 360 N.E.2d 773 (1977)(Upholding the Illinois Attorney General's right to bring an action to enforce the Public Trust Doctrine after the same action had been dismissed when brought by private citizen in *Droste v. Kerner*, 34 Ill.2d 495, 217 N.E.2d 73 (1966)).
14. CA: *Marks v. Whitney*, 6 Cal.3d 251, 98 Cal. Rptr. 790, 491 P.2d 374 (1971)(Permitting member of the public to determine existence and extent of public easement in tidelands).
CT: *See Bedford v. City of New Haven*, 170 Conn. 46, 364 A.2d 194 (1975).
15. ID: *See Kootenai Environmental Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 629-30, 671 P.2d 1085, 1092-93 (1983).
WI: *See Meunch v. Public Service Comm'n*, 261 Wis. 492, 53 N.W.2d 512 (1952).
16. In *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 215 N.E.2d 114 (1966), the court ordered the cancellation of a lease and management agreement between the state and private business to manage a ski area because the state agencies involved had exceeded their legal authority in consigning a public park to use as a large scale commercial operation even though the Massachusetts Legislature had expressly approved the development of a ski area. Although this case did not involve public trust lands, it is useful by analogy because of the characterization of public park land as "public trust" property.
17. *See Lutheran Service Ass'n of New England, Inc. v. Metropolitan Dist. Comm'n*, 397 Mass. 341, 344, 491 N.E.2d 255, 258 (1986)(No mandamus action allowed to compel a park agency to take plaintiff's riverfront property which the agency had originally intended to do in a comprehensive plan but later decided against).
18. *See Secretary of Administration and Finance v. Attorney General*, 367 Mass. 154, 326 N.E.2d 334 (1975). If a plaintiff does convince a court to issue a writ of *mandamus*, the court will not instruct the public defendant as to how her authority should be exercised, but only order her to exercise it conscientiously.

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19. MI: See *Peterman v. State Department of Natural Resources*, 521 N.W.2d 499 (“ ... damage to riparian properties arising from navigational improvements are often not compensable takings. This is so because the title of such property is held subordinate to the public’s right to navigate and the state’s authority to improve navigation.” Nonetheless, State held liable for taking riparian beach (including below ordinary high water mark) and upland, even though it was improving navigation by constructing a boat launch. Court held that the State’s action “must be necessary or possess an essential nexus to the navigational improvement in question.”).
20. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
21. *Id.* at 415 (emphasis added).
22. The Supreme Court revisited the issue of regulatory takings in 1987 in a very similar case in *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987), which involved a state statute requiring that 50 percent of the coal beneath certain structures be left in the ground in order to provide surface support. The Supreme Court found no taking, despite the similarity to *Pennsylvania Coal*. The Court distinguished that case on two grounds. First, it found significant that *Pennsylvania Coal* had involved private, not public, rights. Second, it found that the purpose of the act involved in *Keystone* was to protect public safety — i.e. to prevent damage to land — and not to protect private parties *per se*. The Act stated on its face that it was designed to protect the public health, safety and welfare. This second prong of the Court’s decision solidified the “public safety/nuisance” exception to the notion of regulatory takings.
23. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).
24. *Id.* at 124.
25. See *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 -9 (1986) (“As Justice Holmes emphasized throughout his opinion for the Court in *Pennsylvania Coal Co v. Mahon*, ... "this is a question of degree - and therefore cannot be disposed of by general propositions." To this day we have no "set formula to determine where regulation ends and taking begins.") *citations omitted*.
26. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).
27. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987).

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28. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987)(Temporary takings which deny a landowner all use of his property are not different in kind from permanent takings for which the Constitution clearly requires compensation).
29. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). It is important to note that although the *Nollan* case involved access to the shore, it was *not* argued on Public Trust Doctrine grounds. Instead, the case was argued on a straight police power theory, stressing the State's authority to impose restrictions on development permits in order to protect public health, safety and welfare.
30. See *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986), and cases cited therein.
31. *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985).
32. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 349 (1986), citing *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186, 190 n. 11 (1985). Bracketed text as in original.

FL: *City of Riveria Beach v. Shillingburg*, 659 So.2d 1174 (Fla. 4th DCA 1995)(Judgment of inverse condemnation reversed on ripeness grounds).
33. *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 295 (1981).
34. *Id.*, at 296.
35. *Id.*, at 297.
36. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).
37. *Orion Corp. v. State*, 693 P.2d 1369, 1378-79 (Wash. 1985).
38. *Id.*, citing *Ogo Associates v. Torrance*, 37 Cal.App.3d 830, 834, 112 Cal.Rptr. 761 (1974). See also *Dooley v. Town Plan & Zoning Commission*, 151 Conn. 304, 197 A.2d 770 (1964).
39. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
40. *Id.*, at 1011.
41. *Id.*, at 1012. But see Stevens, J., arguing in his dissenting opinion that the Court "cavalierly" dismissed the doctrine of judicial restraint by ruling on the merits of the case. *Id.*, at 1062.

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42. *Id.*, at 1010.
43. *Id.*, at 1015.
44. *Id.*, at 1019.
45. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926).
46. See footnotes 7 and 9 in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016, 1019 (1992).
47. 28 F.3d 1171 (Fed.Cir. 1994).
48. *Id.*, 1180-81. Note that this case was brought to, and decided by, the U.S. Court of Claims, a court of limited jurisdiction.
49. See Kennedy, P., *The United States Claims Court: A Safe "Harbor" from Government Regulation of Privately Owned Wetlands*, 9 Pace Env'tl.L.Rev. 723, 744 (1992). See also *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed.Cir. 1994); CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION (1992), Congressional Research Service, Library of Congress, at 1384, note 260.
50. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1178-79 (Fed.Cir. 1994).
51. *Id.* at 1179.
52. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed.Cir. 1994). Note also the discussion here about the effect of *Lucas* on the third factor, changing it "from one in which courts, including federal courts, were called upon to make *ad hoc* balancing decisions, balancing private property rights against state regulatory policy, to one in which state property law, incorporating common law nuisance doctrine, controls. This sea change removed from regulatory takings the vagaries of the balancing process ... [and] substituted instead a referent familiar to property lawyers everywhere ..."). *Id.*
53. *National Audubon Society v. Superior Court*, 189 Cal. Rptr. at 359, 658 P.2d at 722 (1983). See also *McDonald v. Halvorson*, 92 Or. App. 478, 760 P.2d 263 (1988)(The court, having established in an earlier case that all "dry sands" areas along the Oregon coast are subject to the public's right of recreational use as a matter of law, refused to find a taking in applying that doctrine to private property, finding that the private property owner had failed to show that it had a protected property interest). See also *Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. 629, 393 N.E.2d 356 (1979).

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54. *Orion Corp. v. State*, 109 Wash.2d 621, 747 P.2d 1062 (1987), *cert. denied* 486 U.S. 1022 (1988).
55. *Id.*, 109 Wash.2d at 654, 747 P.2d at 1090.
56. *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P.2d 709 (1983). *See also* Ch. II, §1.C.4.
57. *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984). *See also* *Lusardi v. Curtis Point Property Owners Association*, 86 N.J. 217, 430 A.2d 881 (1981); *Van Ness v. Borough of Deal*, 78 N.J. 174, 393 A.2d 571 (1978); *Hyland v. Borough of Allenhurst*, 148 N.J. Super. 437, 372 A.2d 1133 (1977); *Borough Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47, 51 (1972).
58. 557 A.2d 168 (1989).
59. 557 A.2d 168 (1989).
60. *Opinion of the Justices*, 365 Mass. 681, 313 N.E.2d 561, 567 (1974).
61. *Id.* at 572.
62. 483 U.S. 825 (1987).
63. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-435 (1982) ("In short, when the 'character of the governmental action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owners.") (quoting *Penn Central*, 438 U.S. at 124). Note that the court limited its ruling in the *Loretto* case to permanent occupations of a property *by a third party*, distinguishing regulations which require landlords to provide mail boxes and other facilities to their tenants. *Id.* at 440-41.
64. *Nollan v. California Coastal Commission*, 483 U.S. at 837 (quoting *J.E.D. Assoc., Inc. v. Atkinson*, 121 N.H. 881, 584, 432 A.2d 12, 14-15 (1981)).
65. *Orion Corp. v. State*, 693 P.2d 1369, 1378-79 (Wash. 1985).

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CHAPTER II

Section 1: Lands, Waters and Living Resources Generally Recognized as Subject to the Public Trust Doctrine

Roman Civil and English Common Law

- DE: *State v. Pennsylvania Railroad Company*, 228 A.2d 587, 598 (1967).
- NJ: *Cobb v. Davenport*, 32 N.J.L. 369, 378 (1867).

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- EC: *Attorney General v. Chambers*, 4 De G.M. & G. 206 (1789).
- US: *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 22, 475 (1988); *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935); *Shively v. Bowlby*, 152 U.S. 1, 14, 26, 57 (1894); *Knight v. United States Land Association*, 142 U.S. 161, 183 (1891); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845); *Martin v. Waddell*, 41 U.S. 367, 410 (1842).
- FL: *State v. Gerbing*, 47 So. 353, 355 (1908).
- GA: *Oemler v. Green*, 134 Ga. 198, 67 S.E. 433 (1910).
- ID: *Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District*, 733 P.2d 733, 112 Idaho 512 (1987).
- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 517 (1986).
- NY: *Fulton Light, Heat & Power Co. v. State of New York*, 200 N.Y. 400, 412-3 (1911).
- OR: *Land Board v. Corvalis Sand & Gravel Co.*, 283 Or. 147, 582 582 P.2d 1352 (1978).
- PA: *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869); *Carson v. Blazer*, 2 Binn. 475, 477 (Pa. 1810).

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- US: *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988); *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987); *Utah v. United States*, 403 U.S. 9, 10 (1971); *United States v. Oregon*, 295 U.S. 1,14 (1935); *Appleby v. City of New York*, 271 U.S. 364, 381 (1926); *United States v. Holt Bank*, 270 U.S. 46, 55-56 (1926); *Oklahoma v. Texas*, 258 U.S. 574, 583 (1922); *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 435 (1892); *Hardin v. Jordan*, 140 U.S. 371, 381 (1891); *Knight v. United States Land Association*, 142 U.S. 161, 183 (1891); *McCready v. Virginia*, 94 U.S. 391, 394 (1877); *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall) 57, 65-66 (1873); *Pollard's Lessee v. Hagan*, 44 U.S. 212, 223 (1845); *Martin v. Waddell*, 41 U.S. 367, 409, 410 (1842).
- AZ: *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 161 (Ariz.App.Div. 1 1991).
- CA: *Hitchings v. Del Rio Woods Recreation & Park District*, 55 C.A.3d 560, 567, 127 Cal Rptr. 830 (1976); *Bohn v. Albertson*, 107 Cal.App.2d 738, 742 (1951); *Newcomb v. City of Newport Beach*, 7 Cal.2d 393, 399 (1936).
- NV: *State v. Bunkowski*, 88 Nev. 623, 503 P.2d 1231, 1234 (1972).
- OR: *Johnson v. Department of Revenue*, 292 Or. 373, 639 P.2d 128 (1982).

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- MN: *Nelson v. DeLong*, 213 Minn. 425, 431, 7 N.W.2d 342, 346 (1942); *Lamprey v. Metcalf*, 52 Minn. 181, 185 (1893).

English common law definition of 'navigable waters'

- US: *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 478 (1988); *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892); *Barney v. Keokuk*, 94 U.S. 324, 336 (1876); *The Daniel Ball*, 77 U.S. 557 (1871); *The Genessee Chief v. Fitzhugh*, 53 U.S. 443, 455 (1851).
- CA: *California v. Superior Court (Lyon)*, 29 Cal.3d 210, 218 (1981).
- NH: *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 5, 25 A. 718 (1889).
- WI: *Willow River Club v. Wade*, 100 Wis. 86, 76 N.W. 273, 274 (1893).

Federal definitions of 'Navigable Waters'

- US: *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988); *United States v. Holt Bank*, 270 U.S. 46, 55-56 (1926), citing *The Montello*, 20 Wall. 430, 439; *Illinois*

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CA: *National Audubon Society v. Superior Court*, 33 Cal. 3rd 419, 435 (1983).

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AL: *Sayre v. Dickerson*, 278 Ala. 477, 491, 179 So.2d 57, 70 (1965); *Tallahassee Falls Mfg. Co. v. State*, 13 Ala. App. 623, 68 So. 805, 807 (Ala. Ct. App. 1915); *Walker v. Allen*, 72 Ala. 456, 458 (1882); *Bullock v. Wilson*, 2 Port. 436 (1835).

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CT: *Balf v. Hartford Electric Light Co.*, 106 Conn. 315, 138 A. 122, 125 (1927); *Burrows v. Gallup*, 32 Conn. 493, 501 (1865); *Adams v. Pease*, 2 Conn. 481, 484 (1818).

DE: *Hagan v. Delaware Anglers' & Gunners' Club*, 655 A.2d 292 (Del.Ch. 1995).

FL: *Martin v. Busch*, 93 Fla. 535, 563, 112 So. 274, 283, (1927).

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- ID: *Southern Idaho Fish and Game Association v. Picabo Livestock Co.*, 96 Idaho 360, 362, 528 P.2d 1295, 1297 (1974).
- IL: *Dupont v. Miller*, 310 Ill. 140, 145, 141 N.E. 423, 425 (1923); *Healy v. Joliet & C.R. Co.*, 2 Ill App. 435, rev'd 94 Ill. 416, aff'd 6 S. Ct. 352, 116 U.S. 191, 29 L. Ed. 607 (1878). See also *Economy Light & Power Co. v. U.S.*, 256 U.S. 113, 122, 41 S. Ct. 409, 412, 65 L. Ed. 847 (1921);
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- MA: *Attorney General v. Woods*, 108 Mass. 436, 439 (1871); *Trustees of Hopkins Academy v. Dickinson*, 63 Mass. (9 Cush.) 544, 546-548 (1852); *Rowe v. Granite Bridge Corp.*, 38 Mass. (21 Pick) 344, 345 (1838); *Commonwealth v. Chapin*, 22 Mass. (5 Pick.) 199 (1827); *Ingraham v. Wilkinson*, 21 Mass. (4 Pick.) 268, 270-272 (1826); *Commonwealth v. Charlestown*, 18 Mass. (1 Pick.) 179 (1822).
- ME: *Brown v. Chadbourne*, 31 Me. 9, 21 (1849).
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- MN: *Lamprey v. State*, 52 Minn. 181, 200, 53 N.W. 1139, 1144 (1893); *Castner v. Steamboat Dr. Franklin*, 1 Minn. 73 (1852).
- MS: *Morgan and Harrison v. Redding*, 11 Miss. 334 (1844); *State ex rel. Rice v. Stewart*, 184 Miss. 202 (1938); *Cinque Bambini Partnership v. State*, 491 So.2d 508, 517 (1986). See also *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 108 S. Ct. 791 (1988).
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- NH: *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 21, 25 A. 718, 728 (1889).
- NJ: *Cobb v. Davenport*, 32 N.J.L. 369, 378 (1867).
- NC: *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674 (1996).
- OH: *Mentor Harbor Yacht Club v. Mentor Lagoons*, 170 Ohio St. 193, 195, 163 N.E.2d 373, 374 (1959); *The East Bay Sporting Club v. Miller*, 118 Ohio St. 360, 370 161 N.E. 12, 15 (1928).

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- PA: *Conneaut Lake Ice Co. v. Quigley*, 225 Pa. 605, 610, 74 A. 648, 650 (1909); *Flanagan v. Philadelphia*, 42 Pa. 219, 230 (1862); *Carson v. Blazer*, 2 Binn. 475 (1810).
- SC: *State ex rel Medlock v. S.C. Coastal Council*, 289 S.C. 445, 449, 346 S.E.2d 716, 719 (1986).
- TX: *Diversion Lake Club v. Heath*, 126 Tex. 129, 137, 86 S.W2d 441, 444 (1935).
- VT: *Cabot v. Thomas*, 147 Vt. 207, 212 (1986); *State v. Malmquist*, 114 Vt. 96, 101, 40 A.2d 534, 538 (1944); *Boutwells v. Champlain Realty Co.*, 89 Vt. 80, 87, 94 A. 108, 111 (1915); *New England Trout and Salmon Club v. Mather*, 68 Vt. 338, 346-347, 35 A. 323, 326 (1895).
- VA: *Ewell v. Lambert*, 177 Va. 222, 228, 13 S.E.2d 333, 335 (1941).
- WA: *Wilbour v. Gallagher*, 77 Wn.2d 306, 316, 462 P.2d 232, 40 A.L.R.3d 760 (1969), *cert. denied* 400 U.S. 878 (1970); *Proctor v. Sim*, 134 Wash. 606, 611, 236 P. 2d 114, 116 (1925); *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L.R.A. 199 (1901).
- WI: *State v. Bleck*, 114 Wis.2d 454, 459, 338 N.W.2d 492, 495 (1983); *DeBayner & Co. v. DNR*, 70 Wis.2d 936, 945, 236 N.W.2d 217, 221 (1975); *Muench v. Public Service Commission*, 261 Wis. 492, 506, 53 N.W.2d 514,519 (1951); *Nekoosa-Edwards Paper Co. v. Railroad Comm.*, 201 Wis. 40, 228 N.W. 144, 229 N.W. 631 (1929/30); *Attorney General ex rel. Becker v. Bay Boom W.R. & F. Co.*, 172 Wis. 363, 375, 178 N.W. 569 (1920).

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- OR: *Lewis v. City of Portland*, 25 Or. 133, 159, 35 P. 256, 260 (1893); *Bowlby v. Shivley*, 22 Or. 410, 415, 427 (1892) *aff'd* 152 U.S. 1; *Hinman v. Warren*, 6 Or. 408, 411 (1877).
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- US: *U.S. v. Maine*, 420 U.S. 515 (1975); *United States v. California*, 332 U.S. 19, 38-39 (1947), *Martin v. Waddell*, 41 U.S. 366, 416 (1842).
- AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1118 (1988).
- HI: *King v. Oahu Railway & Land Co.*, 11 Haw. 717, 725 (1899).
- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 515 (Miss. 1986) *aff'd* 484 U.S. 469 (1988).
- NC: *Capune v. Robbins*, 273 N.C. 581 (1968).
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- TX: *City of Galveston v. Mann*, 135 Tex. 319, 330, 143 S.W.2d 1028, 1033 (1940).

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- US: *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 476 (1988); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988) *citing* *Barney v. Keokuk*, 94 U.S. 324, 338 (1877) and *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 435 - 436 (1892); *Barney v. Keokuk*, 94 U.S. 324, 336 (1876); *The Genessee Chief v. Fitzhugh*, 53 U.S. 443, 454 (1851).
- CA: *National Audubon Society v. Superior Court*, 33 Cal. 3rd 419, 435 (1983).
- IL: *Schulte v. Warren*, 218 Ill. 108, 75 N.E. 783, 784 (1905).
- NJ: *Cobb v. Davenport*, 32 N.J.L. 369, 378 (Sup. Ct. 1867).

TX: *Diversion Lake Club v. Heath*, 126 Tex. 129, 135, 86 S.W.2d 441, 443 (1935); *Landry v. Robison*, 110 Tex. 295, 219 S.W. 819, 820 (1920).

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Waters Within the Public Trust

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NY: *People v. New York and Ontario Power Co.*, 219 App. Div. 114, 116, 219 N.Y.S. 497, 501 (1927).

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LA: *Morgan v. Negodich*, 3 So. 636, 640 (1888).

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Extent of "Navigable Waters" from Shore-to-Shore

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- MI: *State v. Lake St. Clair Fishing and Shooting Club*, 127 Mich. 580, 87 N.W. 117 (1901).
- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 515 (1986).
- NY: *State v. Bishop*, 46 A.D. 2d 654, 359 N.Y.S. 2d 817, 820 (1934); *Munson v. Hungerford*, 6 Barb. 265 (1849).
- NC: *Swan Island Hunt Club v. White*, 114 F. Supp 95 (E.D.N.C. 1953); *Insurance Co. v. Parmele*, 214 N.C. 63 (1938); *Ward v. Willis*, 51 N.C. 183, 185 (1858).
- OH: *The Winous Point Shooting Club v. Slaughterbeck et al.*, 96 Oh. St. 139.
- WI: *State v. Trudeau*, 139 Wis. 2d 91, 103 - 104, 408 N.W.2d 337, 342 - 343 (1987) *cert. denied*, 108 S.Ct. 701 (1988).

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- CA: *National Audubon Society v. Superior Court of Alpine County*, 189 Cal. Rptr. 346 (1983), *cert. denied sub nom. City of Los Angeles Dep't of Water & Power v. National Audubon Society*, 104 S. Ct. 413 (1983); *Golden Feather Community Association v. Thermalito Irrigation District*, 199 Cal App.3d 402, 244 Cal. Rptr. 830 (1988).
- WA: *Rettkowski v. Department of Ecology*, 858 P.2d 232, 237, 122 Wash.2d 219 (1993).

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- US: *Springer v. Schlitz*, 510 F.2d 468, 470 (4th Cir. 1975); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Geer v. Connecticut*, 161 U.S. 519, 529 (1896); *Martin v. Waddell*, 41 U.S. 366.
- CA: *People v. K. Houden Co.*, 215 Cal. 54, 56 (1932); *People v. Glenn Colusa Irr. Dist.*, 15 P.2d 549, 552 (1932); *People v. Monterey Fish Products Co.*, 195 Cal. 548, 563 (1925).
- FL: *Nash v. Vaughn*, 133 Fla. 499 (1938); *State v. Stoutamire*, 131 Fla. 698 (1936).
- MA: *Commonwealth v. Algier*, 61 Mass. 53, 98 (1851); *Commonwealth v. Chapin*, 22 Mass. (5 Pick.) 199 (1827).

- NY: *Sloup v. Town of Islip*, 78 Misc.2d 366, 356 N.Y.S.2d 742, 745 (1974); *Lawton v. Steele*, 119 N.Y. 226, 234 (1890) aff'd 152 U.S. 133 (1892).
- NC: *State v. Gallop*, 126 N.C. 979, 983 (1900).
- OR: *State v. Hume*, 52 Or. 1, 5, 95 P. 808 (1908).
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- WA: *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80 (1936).

CHAPTER II

Section 2: Upper Boundaries of Public Trust Shorelands

Roman and English Law

- US: *Borax Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935) quoting *Blundell v. Catterall*, 5 B.& A. 268, 292; *Cobb v. Davenport*, 32 N.J.L. 369, 378 (Sup. Ct. 1867); *United States v. Pacheco*, 69 U.S. 587, 590 (1864); *Attorney General v. Chambers*, 4 De G.M. & G. 206 (1854), as reported in *Borax Ltd. v. Los Angeles*, 296 U.S. 10, 24, 25 (1935).
- DE: *State v. Pennsylvania Railroad Company*, 228 A.2d 587, 598 (1967).

Tidelands

- US: *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (1984); *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935), citing *Barney v. Keokuk*, 94 U.S. 324, 338; *Shively v. Bowlby*, 152 U.S. 1, 40; *Hardin v. Jordan*, 140 U.S. 371, 382; *Port of Seattle v. Oregon & Washington R. Co.*, 255 U.S. 56, 63.
- AL: *Abbot v. Doe*, 5 Al. 393, 395 (1843); *City of Mobile v. Eslava*, 9 Part. 577, 599-600 (1839), aff'd 41 U.S. 234 (1842).
- AS: *Lago v. Mageo*, 4 A.S.R. 287, 298 (1962).
- CA: *Fogerty v. State of California*, 187 Cal. App. 3d 224, 231 Cal. Rptr. 810 (1986); *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 518, n.1, 521, 162 Cal.Rptr. 327, 328, n.1, 329, 606 P.2d 362, 363, n.1, 364 (1980); *People v. Wm. Kent Estate Co.*, 242 Cal. App. 2d 156, 51 Cal Rptr. 215 (1966).
- CT: *Mihalczo v. Woodmont*, 175 Conn. 535, 538, 400 A.2d 270 (1978); *Mather v. Chapman*, 40 Conn. 382, 395 (1873); *Church v. Meeker*, 34 Conn. 421, 424 (1867); *Simons v. French*, 25 Conn. 346, 352 (1856).

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- FL: *Thiesen v. Gulf, F&A Railway Co.*, 75 Fla. 28, 57, 78 So. 491, 500 (1918); *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 608, 47 So. 353, 356 (Fla. 1908).
- HI: *Sanborn*, 57 Haw. 585, 594, 562 P.2d 771, 777 (1977); *State of Hawaii v. Sotomura*, 55 Haw. 176, 182, 517 P.2d 56, 62 (1973); *In Re Ashford*, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968).
- LA: *Buras v. Salinovich*, 97 So. 748 (1923); *Morgan v. Negodich*, 3 So. 636 (1888).
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- MD: *Hirsch v. Md. Dept. of Nat. Resources*, 288 Md. 95, 98-99, 416 A.2d 10, 12 (1980); *Wicks v. Howard*, 40 Md. App. 135, 136, 388 A.2d 1250, 1251 (1978); *Day v. Day*, 22 MD 530, 537 (1865).
- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508 (1986).
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- NH: *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 20.
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- NY: *Dolphin Lane Association, Ltd. v. Town of Southampton*, 37 N.Y.2d 292, 296, 372 N.Y.S.2d 52, 54, 333 N.E.2d 358, 359 (1975); *Wismall v. Hall*, 3 Paige Ch. 313, 318 (N.Y. 1832).
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- TX: *Luttes v. State*, 159 Tex. 550, 324 S.W.2d 167 (1959).
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Private Ownership of Navigable Freshwater Bottomlands

- US: *United States v. Holt State Bank*, 270 U.S. 49, 54 (1926); *Massachusetts v. New York*, 271 U.S. 65, 89 (1926); *Fox River Co. v. Railroad Commission*, 274 U.S. 651, 655 (1926).
- NY: *Moyer v. State*, 56 Misc.2d 549, 551, 289 N.Y.S.2d 114,116 (1968).
- VA: *James River and Kanawha Power Company v. Old Dominion Iron and Steel Corp. Etc.*, 138 Va. 461, 122 S.E. 344 (1924).

Land Bordering the Great Lakes

- IL: *Schulte v. Warren*, 218 Ill. 108, 117, 75 N.E. 783, 784 (1905).
- PA: *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 539, 47 A. 745, 746 (1901).
- WI: *State v. Trudeau*, 139 Wis.2d 91, 408 N.W.2d 337 (1987), *cert. denied*, 108 S. Ct. 701 (1988); *Doemel v. Jantz*, 180 Wis. 225, 226, 193 N.W. 393, 397 (1923).

River Bottomlands

- US: *United States v. Willow River Power Co.*, 324 U.S. 499, 507 (1945); *Silas Mason Co. v. Tax Comm. of Washington*, 302 U.S. 186, 198 (1937); *James v. Dravo Contracting Co.*, 302 U.S. 134, 140 (1937); *Oklahoma v. Texas*, 260 U.S. 606, 631 (1923).
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- HI: *Wailuku Sugar Co. v. Hawaiian Commercial and Sugar Co.*, 13 Haw. 583 (1901).
- ID: *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 625, 671 P.2d 1085, 1088 (1983).
- IL: *Wilton v. VanHessen*, 249 Ill. 182, 188, 94 N.E. 134, 136 (1911); *Schulte v. Warren*, 218 Ill. 108, 117, 75 N.E. 783, 784 (1905); *City of Chicago v. Van Ingen*, 152 Ill. 624, 635, 38 N.E. 894, 897 (1894).
- IA: *State v. Sorenson*, 271 N.W. 234, 236 (1937).
- LA: *Gulf Oil v. State Mineral Board*, 317 So.2d 576 (La. 1975); *California v. Price*, 225 La. 706, 74 So.2d (La. 1954), *Seibert v. Conservation Commission of Louisiana*, 159 So. 375, 377 (1935).
- ME: *Wilson and Son v. Harrisburg*, 107 Me. 207, 211 77A. 787, 789 (1910).
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- MI: *Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115, 117 (1926).
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- NJ: *Kanouse v. Stockbower*, 48 N.J.Eq. 42 (1891); *Cobb v. Davenport*, 32 N.J.L. 369, 384 (1867); *Arnold v. Mundy*, 6 N.J.L. 1, 81 (1821).
- NC: *Lewis and Jackson v. Keeling*, 46 NC 299, 306 (1854).
- OH: *State ex rel Brown v. Newport Concrete Co.*, 44 Ohio App. 2d 121, 123, 336 N.E.2d 453, 455 (1975); *Gavit v. Chambers*, 3 Ohio 496, 498 (1828).
- OR: *Winston Brothers v. State Tax Commission*, 156 Or. 505, 510, 62 P.2d 7, 9 (1937); *State v. Portland General Electric Co.*, 52 Or. 502, 519, 95 P. 722, 728 (1908) citing *Montgomery v. Shaver*, 40 Or. 244 (66 Pac. 923); *Johnson v. Knott*, 13 Or. 308, 310, 10 P.418, 419-420 (1886); *Wilson v. Welch*, 12 Or. 353, 358 7 Pac. 341, 344 (1885).
- PA: *Warren Sand & Gravel Co. v. Commonwealth*, 20 Pa. 186, 194, 341 A.2d 556, 560 (1975); *Paasch v. Wright*, 317 Pa. 454, 456, 177 A. 795, 796 (1935); *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 538, 47 A. 745, 746 (1901).
- SC: *State ex rel. McLeod v. Sloan Construction Co.*, 284 S.C. 491, 328 S.E.2d 84, 87 (1984).
- TX: *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W. 2d 441 (1935); *State v. Bradford*, 121 Tex. 515, 549, 50 S.W.2d 1065, 1078 (1932).
- VI: *Alexander Hamilton Ins. v. Government of the Virgin Islands*, 20 V.I. 333, 343 (D.C.V.I., 1983).
- VA: *James River and Kanawha Power Company v. Old Dominion Iron and Steel Corporation*, 138 Va. 461, 122 S.E. 344 (1924).
- WI: *State v. Trudeau*, 139 Wis.2d 91, 408 N.W.2d 337 (1987) *cert denied* 108 S. Ct. 701 (1988); *Baker v. Voss*, 217 Wis. 415, 417, 259 N.W. 413, 414 (1935); *Willow River Club v. Wade*, 100 Wis. 86, 95, 76 N.W. 273, 274 (1898); *Priewe v. Wis. State L.&I. Co.*, 93 Wis. 534, 546, 67 N.W. 918, 920 (1896); *Delaplaine v. C. & N.W. R. Co.* 42 Wis. 214 (1877).

Lake and Pond Bottomlands

- CA: *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, 172 Cal.Rptr. 696, 625 P.2d 239 (1981).

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- FL: *Caples v. Taliaferro*, 144 Fla. 1, 5, 197 So. 861, 862 (1940); *Martin v. Busch*, 93 Fla. 535, 563, 112 So. 276 (1927); *Ferry Pass Inspectors & Shippers Ass'n v. White's River Inspectors & Shipping Ass'n*, 57 Fla. 399, 48 So. 643, 644 (1909).
- ID: *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 625, 671 P.2d 1085, 1088 (1983).
- IL: *Wilton v. VanHessen*, 249 Ill. 182, 188, 94 N.E. 134, 136 (1911); *Schulte v. Warren*, 218 Ill. 108, 117, 75 N.E. 783, 784 (1905).
- LA: *Gulf Oil v. State Mineral Board*, 317 So.2d 576 (La. 1975); *California v. Price*, 225 La. 706, 74 So.2d (La. 1954).
- MD: *Anne Arundel Co. v. Litz*, 45 Md. App. 186, 412 A.2d 1256 (1979); *Linthicum v. Shipley*, 140 Md. App 96, 116 A. 871 (1922).
- MI: *Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115, 117 (1926).
- NH: *Hartford v. Gilmanton*, 101 N.H. 424, 146 A.2d 851 (1958); *State v. Sunapee Dam Co.*, 70 N.H. 458, 461, 50 A. 108, 109 (1900); *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 4, 25 A. 718, 719 (1889) citing *State v. Gilmanton*, 9 N.H. 461 (1838).
- NY: *Ransom v. Shaeffer*, 153 Misc. 199, 274 N.Y.S. 570 (1934); *Stewart v. Turney*, 237 N.Y. 117, 121, 142 N.E. 437, 438 (1923); *Gouverneur v. National Ice Co.*, 134 N.Y. 355, 359, 31 N.E. 865 (1892).
- PA: *Conneaut Lake Ice Co. v. Quigley*, 225 Pa. 605, 74 A. 648 (1909); *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 539, 47 A. 745 (1901).
- VT: *McBurney et al. v. Young*, 67 Vt. 574, 576, 32 A. 492 (1895).
- VI: *Alexander Hamilton Ins. v. Government of the Virgin Islands*, 20 V.I. 333, 343 (D.C.V.I., 1983).
- WI: *State v. Trudeau*, 139 Wis.2d 91, 104, 408 N.W.2d 337, 343 (1987), cert. denied, 108 S.Ct. 701 (1988); *Zinn v. State*, 112 Wis.2d. 417, 334 N.W.2d. 67 (1983); *Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393, 397 (1923); *Priewe v. Wis. State L.&I. Co.*, 93 Wis. 534, 546, 67 N.W. 918, 920 (1896).

Mineral Rights in Privately Held Navigable Freshwater Bottomlands

- CA: *People v. California Fish Co.*, 166 Cal. 576, 598, 138 P. 79, 88 (1913).
- MS: *Archer v. Greenville Sand & Gravel*, 233 U.S. 60, 67 (1914).

NH: *New Hampshire Water Resources Board v. Lebanon Sand & Gravel Co.*, 108 N.H. 254, 233 A.2d 828 (1967).

TX: *State v. Bradford*, 121 Tex. 515, 50 S.W.2d 1065 (1932); *State v. Aransas Dock and Channel Co.*, 365 S.W.2d 220 (Tex. Civ. App.-San Antonio 1963, writ ref'd).

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MA: *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 557, 18 N.E. 465, 472 (1888); *Potter v. Howe*, 141 Mass. 357, 359 (1886); *Paine v. Woods*, 108 Mass. 160, 169 (1871); *West Roxbury v. Stoddard*, 89 Mass. 158, 171 (1863).

NH: *State v. Strafford*, 99 N.H. 92, 99, 105 A.2d 569, 573 (1954); *State v. Sunapee Dam*, 70 N.H. 458, 461 (1900); *Concord Manuf'g Co. v. Robertson*, 66 N.H. 1, 4, 25 A. 718, 719 (1889).

VT: *Cabot v. Thomas*, 147 Vt. 207, 208-210, 514 A.2d 1034, 1036-1037 (1986); *State v. Cain*, 126 Vt. 463, 468 (1867); *Haven v. Perkins*, 92 Vt. 414, 419, 105 A. 249, 251 (1918).

**Upper Boundary of a State's Public Trust Interest Over the Bottomlands:
The Ordinary High Water Mark**

US: *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913); *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 453-454 (1892).

CA: *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, 222-232, 172 Cal.Rptr. 696, 625 P.2d 239 (1981); *State v. Superior Court*, 29 Cal.3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1980); *Newcomb v. City of Newport Beach*, 12 Cal.2d 235, 83 P.2d 21 (1938); *People v. California Fish Co.*, 166 Cal. 576, 598, 138 P. 79, 88 (1913).

FL: *Caples v. Taliaferro*, 144 Fla. 1, 5, 197 So. 861, 862 (1940); *Ferry Pass Inspectors & Shippers Assn. v. White's River Inspectors & Shippers Assn.*, 57 Fla. 399, 403; 48 So. 643, 645 (1909).

IL: *People v. Chicago Park District*, 66 Ill.2d 65, 360 N.E.2d 773 (1976), reversing *Droste v. Kerner*, 34 Ill.2d 495, 217 N.E.2d 73 (1966); *West Chicago Street Railroad v. People*, 214 Ill. 9, 20, 73 N.E. 393, 397 (1905); *City of Chicago v. Van Ingen*, 152 Ill. 624, 38 N.E. 894 (1894).

LA: *Gulf Oil v. State Mineral Board*, 317 So.2d 576 (1975).

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- MD: *Susquehanna Power Co. v. State Tax Commission of Maryland*, 159 Md. 334, 349, 151 A. 29, 35 (1930), *aff'd* 283 U.S. 291 (1931); *Browne v. Kennedy*, 5 Har. & J. 195, 202 (1821).
- ME: *Wilson and Son v. Harrisburg*, 107 Me. 207, 211, 77 A. 787, 789 (1910).
- MS: *Archer v. Greenville Sand & Gravel Co.*, 233 U.S. 60, 66, 58 L. Ed. 850, 34 S. Ct. 567, 569 (1913).
- NH: *Connecticut River Co. v. Olcott Falls Co.*, 65 N.H. 290, 377-378, 21 A 1090, (1889); *N.H. Water Resource Board v. Lebanon Sand and Gravel Co.*, 108 N.H. 254, 259, 233 A.2d 828, 831 (1967).
- NY: *Adirondack League Club v. Sierra Club*, 3 Dept., 615 N.Y.S.2D 788, 201 A.D.2D 225 (A.D.3 Dept. 1994); *Fulton Light, Heat and Power Company v. State of New York*, 200 N.Y. 400, 415, 94 N.E. 199, 202 (1911).
- NC: *Burke County v. Catawba Lumber Co.*, 116 N.C. 731 (1895); *State v. Glen*, 52 N.C. 321, 327 (1859).
- OH: *Mentor Harbor Yacht Club v. Mentor Lagoons*, 170 Ohio St. 193, 195163 N.E.2d 373, 375 (1959); *Gavit v. Chambers*, 3 Ohio 496, 498 (1828).
- PA: *Paasch v. Wright*, 317 Pa. 454, 456, 177 A. 795, 796 (1935); *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 538, 47 A. 745, 746 (1901); *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869).
- WA: *Caminiti v. Boyle*, 107 Wash. 2d 662, 666, 732 P.2d 989 (1987); *Wilbour v. Gallagher*, 77 Wash.2d 306, 462 P.2d 232, 238 (1969).
- WI: *State v. Trudeau*, 139 Wis.2d 91, 408 N.W.2d 337 (1987), *cert. denied*, 108 S. Ct. 701 (1988); *Zinn v. State*, 112 Wis.2d 417, 334 N.W.2d 67 (1983); *Ashwaubenon v. Public Service Comm.*, 22 Wis. 2d 38, 49, 125 N.W.2d 647, 653 (1963); *Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393, 397 (1923); *Bradley v. Rock Falls*, 166 Wis. 9, 163 N.W. 168 (1917).

CHAPTER II
Section 3: Boundaries, and the Additions and
Losses of Public Trust Land and Waters
Due to Natural and Man-Induced Changes

Gradual and Imperceptible Changes: “A Moveable Freehold”

- US: *California ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1981); *Barney v. Keokuk*, 94 U.S. 324, 337 (1876); *Shively v. Bowlby*, 152 U.S. 1, 35 (1894); *County of St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46, 66, 23 L.Ed. 59 (1874).
- AL: *Abbot v. Doe*, 5 Ala. 393, 395 (1843); *Hagen v. Campbell*, 8 Port. 9, 26 (1838).
- AK: *Honsinger v. State of Alaska*, 642 P.2d 1352, 1354 (1982); *De Boer v. U.S.*, 653 F.2d 1313 (9th Cir. 1981).
- AR: *Crow v. Johnston*, 209 Ark. 1053, 194 S.W.2d 193, 196 (1946).
- AS: *Lago v. Mageo*, 4 A.S.R. 287, 297 (1962).
- CA: *City of Los Angeles v. Anderson*, 206 Cal. 662, 666-668 275 P. 789, 791-792 (1929); *City of Oakland v. Buteau*, 180 Cal. 83, 179 P. 170 (1919); *Strand Improvement Co. v. Long Beach*, 173 Cal. 765, 773, 161 P. 975, 978 (1916); *Taylor v. Underhill*, 40 Cal. 471, 473 (1871).
- CT: *Lockwood v. New York & New Haven Railroad Co.*, 37 Conn. 387, 391 (1879).
- FL: *Ford v. Turner*, 142 So. 2d 335, 340 (Fla. 1962).
- HI: *State v. Zimring*, 58 Haw. 106, 119, 566 P.2d 725 (1977); *Halstead v. Gay*, 7 Haw. 587, 588 (1889).
- ID: *Smith v. Long*, 73 Id. 309, 311, 251 P.2d 206, 207 (1952).
- IL: *Schulte v. Warren*, 218 Ill. 108, 118-119, 75 N.E. 783, 785 (1905).
- LA: *State v. Placid Oil Co.*, 300 So.2d 154, 173 (La. 1974); *Miami Corporation v. State*, 186 La. 784, 810, 173 So. 315, 323 (1936).
- MA: *East Boston Co. v. Commonwealth*, 203 Mass. 68, 75, 89 N.E. 236, 238 (1909).
- MD: *Hirsch v. Md. Dept. of Nat. Resources*, 288 Md. 95, 99, 416 A.2d 10, 12 (1980); *Dept. of Nat. Resources v. Mayor of Ocean City*, 274 Md. 1, 14, 332 A.2d 630, 638 (1975).
- MI: *Hilt v. Weber*, 252 Mich. 198, 202, 233 N.W. 159, 164 (1930).

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- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 519 (1986) *aff'd sub. nom Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988); *International Paper Co. v. Mississippi State Highway Dept.*, 271 So.2d 395 (1973).
- MT: *Montana Department of State Lands v. Armstrong*, 251 Mont. 235, 824 P.2d 255 (1992).
- NH: *Martin v. Prescott*, 122 N.H. 353, 444 A.2d 556 (1982); *State v. Stafford*, 99 N.H. 92, 105 A.2d 569 (1954); *Concord Mfg. Co. v. Robertson*, 66 N.H. 1, 25 A. 718 (1889); *Batchelder v. Keniston*, 51 N.H. 496, 12 A.R. 143 (1872).
- NJ: *Dickenson v. Fund for the Support of Free Public Schools*, 95 N.J. 65, 469 A.2d 1 (1983); *Garrett v. State*, 118 N.J. Super. 594, 600, 289 A.2d 542, 545 (1972); *Borough of Wildwood Crest v. Masciarella*, 51 N.J. 352, 240 A.2d 665 (1968); *Harz v. Board of Commerce and Navigation*, 126 N.J. Eq. 9, 7 A.2d 803 (1939); *Ocean City Ass'n v. Shrives*, 64 N.J.L. 550, 46 A. 690 (1900).
- NY: *Trustees of the Freeholders and Commonality of Southhampton v. Heilener*, 84 Misc. 318, 375 N.Y.S.2d 761, 772 (1975); *Mulroy v. Norton*, 100 N.Y. 424, 434 (1885); *Halsey v. McCormick*, 18 N.Y. 147 (1858).
- NC: *State v. Johnson*, 278 N.C. 126, 179 S.E.2d 371 (1971); *Carolina Beach Fishing Pier v. Town of Carolina Beach*, 277 N.C. 297, 177 S.E.2d 513 (1970); *Murray v. Sermon*, 8 N.C. 56 (1820).
- OH: *State ex rel. Duffy, Atty. Genl., v. Lakefront East Fifty-Fifth Street Corp.*, 137 Ohio St. 8 (1940); *Baumhart v. McClure*, 21 Ohio App. 491, 493, 153 N.E. 211, 212 (1926).
- OR: *Guber v. Town and Stoutenburg*, 202 Or. 55, 72, 273 P.2d 430, 438 (1954); *Armstrong v. Pincus*, 81 Or. 156, 162, 158 P. 662, 664 (1916); *Wilson v. Shively*, 11 Or. 215, 217-218, 4 P. 324, 325 (1884).
- PA: *Black v. American International Corp.*, 264 Pa. 260, 262, 107 A. 737, 738 (1919); *Houseman v. International Navigation Co.*, 214 Pa. 552, 566, 64 A. 379, 384 (1906); *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 540, 47 A. 745, 747 (1901).
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- TX: *Matcha v. Mattox*, 722 S.W.2d 95, 99 (Tex. App.-Austin 1986, Writ ref'd n.r.e), *cert denied* 481 U.S. 1024 (1986); *Feinman v. State*, 717 S.W.2d 106 (Tex. App.-Houston

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Sudden Changes: Fixed Boundaries

US: *State of Nebraska v. State of Iowa*, 143 U.S. 359 (1892).

AL: *Hagen v. Campbell*, 8 Port. 9, 26 (1838).

AS: *Lago v. Mageo*, 4 A.S.R. 287, 297 (1962).

CA: *People v. Ward Redwood Co.*, 225 Cal. App.2d 385, 37 Cal. Rptr. 397 (1964).

CT: *Roche v. Fairfield*, 186 Conn. 490, 496, 442 A.2d 911, 915 (1982).

FL: *Municipal Liquidators, Inc. v. Tench*, 153 So. 2d 728, 730 (Fla. 1963).

HI: *State by Kobayashi v. Zimring*, 58 Haw. 106, 120, 566 P.2d 725, 735 (1977).

IL: *Wall v. Chicago Park District*, 378 Ill. 81, 97, 37 N.E. 2d 752, 760 (1941); *Schulte v. Warren*, 218 Ill. 108, 118-119, 75 N.E. 783, 785 (1905).

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MI: *Klais v. Danowski*, 373 Mich. 262, 129 N.W.2d 414 (1964).

MS: *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 520 (1986) *aff'd sub nom. Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988).

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- NC: *State v. Johnson*, 278 NC 126, 146, 179 S.E.2d 371, 384 (1971).
- OH: *United States v. 461.42 Acres of Land*, 222 F. Supp. 55, 25 O. Ops.2d 365 (1963).
- OR: *Purvine v. Hathaway*, 393 P.2d 181, 183, 238 Or. 60, 62, 63 (1964).
- TN: *State v. West Tennessee Land Co.*, 127 Tenn. 575, 158 S.W. 746 (1913).
- TX: *Feinman v. State*, 717 S.W.2d 106 (Tex. App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.); *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 643 (Tex. App.—Austin 1981, writ ref'd n.r.e.); *State v. Balli*, 144 Tex. 195, 190 S.W.2d 71 (Tex. 1945).
- VA: *Woody v. Abrams*, 160 Va. 683, 692, 169 S.E. 915, 918 (1933).
- WA: *Harper v. Holston*, 119 Wash. 436, 205 P. 1062, 1064, 119 Wash. 436 (1922).
- WI: *Muench v. Public Service Commission*, 261 Wis. 492, 53 N.W. 2d 514, 518 (1952); *Boorman v. Sunnuchs*, 42 Wis. 233, 245 (1877).

Man-Induced (Artificial) Changes to the Shoreline

- US: *California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 285 (1982); *Nordale v. Waxberg*, 84 F.Supp. 1004 (D.C. Alaska 1949) *aff'd* 182 F.2d 1022 (9th Cir. 1950); *Barney v. Keokuk*, 94 U.S. 324, 337 (1876); *County of St. Claire v. Lovington*, 90 U.S. 46, 68 (1874).
- AL: *Reid v. State*, 373 So.2d 1071, 1074 (1979); *State v. Gill*, 259 Ala. 177, 66 So.2d 141 (1953).
- AK: *State Dept. of Natural Resources v. Pankratz*, 538 P.2d 984, 989 (Alaska, 1975); *Schafer v. Schnabel*, 494 P.2d 802, 807 (Alaska, 1972).
- CA: *Carpenter v. City of Santa Monica*, 63 Cal. App. 2d 772, 789-794, 147 P.2d 964, 972-975 (1944); *Los Angeles Athletic Club v. Santa Monica*, 63 Cal. App. 2d 795, 147 P.2d 976 (1944); *City of Los Angeles v. Anderson*, 206 Ca. 662, 275 P. 789 (1929); *Patton v. Los Angeles*, 169 Cal. 521, 525-526, 147 P. 141, 142 (1915).
- FL: *Martin v. Busch*, 93 Fla. 535, 574, 112 So. 274, 287 (Fla. 1929).

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- IL: *Brundage v. Knox*, 279 Ill. 450, 117 N.E. 123 (1917); *Lovington v. St. Clair County*, 64 Ill. 56 (1872).
- MA: *Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629 (1979); *Michaelson v. Silver Beach Improvement Ass'n.*, 342 Mass. 251, 173 N.E.2d 273 (1961); *Burke v. Commonwealth*, 283 Mass. 63, 186 N.E. 277 (1933); *Allen v. Wood*, 256 Mass. 343, 152 N.E. 617 (1926); *Home for Aged Women v. Commonwealth*, 202 Mass. 422, 89 N.E. 124 (1909); *Crocker v. Champlin*, 202 Mass. 437, 89 N.E. 129 (1909); *Sewall and Day Cordage v. Boston Water Power Co.*, 147 Mass. 61, 16 N.E. 782 (1888); *Commonwealth v. Roxbury*, 75 Mass. (9 Gray) 451 (1857).
- MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 520 (Miss. 1986); *H.K. Porter Co., Inc. v. Board of Supervisors of Jackson County*, 324 So.2d 746, 750 (Miss. 1975); *International Paper Co. v. Mississippi State Highway Dept.*, 271 So.2d 395, 398 (1973); *Moore v. Kuljis*, 207 So. 2d 604, 610-611 (Miss. 1967) citing *Harrison County v. Guice*, 244 Miss. 95, 140 So.2d 838, 842 (1962).
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- NH: *State v. 6.0 Acres of Land*, 101 N.H. 228, 139 A.2d 75, 77 (1958); *State v. Strafford Co.*, 99 N.H. 92, 99 (1954).
- NJ: *Borough of Wildwood Crest v. Masciarella*, 51 N.J. 352, 240 A.2d 665, 668-669 (1968).
- NY: *In re Hutchinson River Parkway Extension in City of New York*, 14 N.Y.S.2d 692 (1939); *Steers v. City of Brooklyn*, 101 N.Y. 51, 4 N.E. 7 (1885).
- OH: *Thomas v. Sanders*, 65 Ohio App.2d 5, 413 N.E.2d 1224 (1979); *State ex rel. Duffy v. Lakefront East Fifty-Fifth Street Corp.*, 137 OH 8, 17, 27 N.E.2d 485 (1940); *State v. Cleveland and Pittsburgh Railway Co.*, 94 Ohio St. 61, 113 N.E. 677, 682 (1916).
- OR: *State By and Through McKay v. Sause*, 217 Or. 52, 99, 342 P.2d 803, 826 (1959).
- PA: *Black v. American International Corp.*, 264 Pa. 260, 262-263, 107 A. 737, 738 (1919).
- TX: *Lorino v. Crawford Packing Co.*, 142 Tex. 51, 57, 175 S.W. 2d 410, 414 (1943).
- VA: *Lambert's Point Co. v. Norfolk & Western Railway*, 113 Va. 270, 74 S.E. 156 (1912).
- WI: *Desimone v. Kramer*, 77 Wis.2d 188, 252 N.W.2d 653, 657 (1977); *Menominee River Lumber Co. v. Seidl*, 149 Wis. 316, 135 N.W. 854 (1912).

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US: *City of Mobile v. Sullivan Timber Co.*, 129 F. 298, 303 (5th Cir. 1904).

AL: *City of Mobile v. Sullivan Timber Co.*, 129 F. 298, 303 (5th Cir. 1904).

AS: *Lago v. Mageo*, 4 A.S.R. 301.

CA: *Cal. ex rel. State Lands Comm'n v. United States*, 805 F.2d 857, 863 (9th Cir. 1986); *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 283 (1982); *Carpenter v. City of Santa Monica*, 63 Cal.App.2d 772, 789-794, 147 P.2d 964, 975 (1944); *Los Angeles Athletic Club v. Santa Monica*, 63 Cal. App.2d 795, 147 P.2d 976 (1944); *City of Los Angeles v. Anderson*, 206 Cal. 662, 667, 275 P. 789, 791 (1929); *Patton v. Los Angeles*, 169 Cal. 521, 525-526, 147 P. 141, 142 (1915).

MA: *Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629, 641-644 (1979).

MI: *Obrecht v. National Gypsum Co.*, 361 Mich. 399, 105 N.W.2d 143 (1960).

NY: *Hinkley v. State*, 234 N.Y. 309, 319 (1922).

OH: *Thomas v. Sanders*, 65 Ohio App.2d 5, 413 N.E.2d 1224 (1979).

OR: *Brusco Towboat Co. v. State ex rel State Land Board*, 284 Or. 627, 637, 589 P. 2d 712 (1978); *State Land Board v. Sause*, 217 Or. 52, 102, 342 P. 2d 803 (1959).

PA: *Black v. American International Corp.*, 264 Pa. 260, 262-163, 107 A. 737 (1919).

TX: *Lorino v. Crawford Packing Co., et al.*, 142 Tex. 51, 175 S.W.2d 410 (1943).

VA: *Lambert's Point Co. v. Norfolk & W. Ry.*, 113 Va. 270, 74 S.E. 156 (1912).

WA: *Caminiti v. Boyle*, 107 Wn.2d 662, 668 (1987).

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MN: *Miller v. Mendenhall*, 44 NW 1141, 1142-3 (1890).

Lawful Filling

- US: *City of Alameda v. Todd Shipyards Corp.*, 632 F.Supp. 333, 340 (N.D.Cal. 1986).
- AK: *Hayes v. A.J. Associates, Inc.*, 846 P.2d 131, 133.
- AS: *Lago v. Mageo*, 4 A.S.R. 287, 301 (1962).
- CA: *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 162 Cal.Rptr. 327, 339 n. 19, 606 P.2d 362, 374 n. 19 (1980); *Marks v. Whitney*, 6 Cal.3d 251, 491 P.2d 374, 98 Cal.Rptr. 790 (1971) quoting *Newcomb v. City of Newport Beach*, 7 Cal.2d 393, 402 (1936); *Atwood v. Hammond*, 4 Cal.2d 31, 40-41 (1935); *People v. California Fish Co.*, 166 Cal. 576, 599, 138 P. 79 (1913).
- CT: *Lockwood v. New York & New Haven Railroad Co.*, 37 Conn. 388, 391 (1870); *Nichols v. Lewis*, 15 Conn. 137, 143 (1842).
- FL: *Brickell v. Trammel*, 77 Fla. 544, 82 So. 221 (1919).
- LA: *City of New Orleans v. New Orleans M & C R.R. Co.*, 27 La. Ann. 414 (1875).
- MD: *Board of Public Works v. Larmar*, 262 Md. 24 (1971); *Culley v. Hollis*, 180 Md. 372, 25 A. 2d 196 (1942); *Hodson v. Nelson*, 122 Md. 330, 89 A. 934 (1914); *Western Maryland Tidewater Railroad Co. v. Mayor and City Council of Baltimore*, 106 Md. 561 (1907); *Hess v. Muir*, 65 Md. 586 (1886); *Casey v. Inloes*, 1 Gill 430 (1844); *Giraud v. Hughes*, 1 G. & J. 249 (1829).
- MA: *Opinion of the Justices*, 383 Mass. 895, 424 N.E.2d 1092 (1981).
- MO: *Conran v. Girvin*, 341 S.W.2d 75, 81 (1960).
- MS: *International Paper Co. v. Mississippi State Highway Dep't*, 271 So.2d 395 (1972)
- NH: *Poire v. Serra*, 99 N.H. 154, 106 A.2d 391 (1959); cf. *Watson v. Horne*, 64 N.H. 416 (1848).
- NJ: *O'Neill v. State Highway Dept.* 50 N.J.307, 235 A.2d 1 (1967).
- NY: *Matter of City of New York (12th Ave.)*, 295 N.Y. 415, 429 (1946); *Haraway Improvement Co. v. Partridge*, 203 App. Div. 174, 197 N.Y.S. 116 (2d Dept.) aff'd 236 N.Y. 563 (1923); *O'Neil v. Murray*, 120 Misc. Rep. 151, 198 N.Y.S. 705 (Sup. Ct., Albany Co., 1922).
- OH: *Thomas v. Sanders*, 65 Ohio App.2d 5, 413 N.E.2d 1224 (1979).

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- RI: *Allen v. Allen*, 19 R.I. 114, 115, 32 A. 166 (1895) citing *Weston v. Sampson*, 8 Cush. 347; *Moulton v. Libbey*, 37 Me. 472; *Packard v. Ryder*, 144 Mass. 440.
- SC: *Epps v. Freeman*, 261 S.C. 375, 200 S.E. 2d 235 (1973).
- VT: *State of Vermont v. Central Vermont Railway*, 153 Vt. 337, 571 A.2d 1128 (Vt. 1989).
Cert. denied 495 U.S. 931.
- WI: *Menominee River Lumber Co. v. Seidl*, 149 Wis. 316, 135 N.W. 854 (1912).

Unlawful Filling

- US: *Santa Fe Land Improvement Co.*, 449 U.S. 840 (1980); *United States v. Turner*, 175 F.2d 644, 647 (1949).
- CA: *Berkeley v. Superior Court*, 26 Cal.3d 515, 606 P.2d 362, 372, 162 Cal.Rpt. 327, 338 (1980); *County of Orange v. Heim*, 30 Cal. App. 3d 694, 710-711, 723-726, 106 Cal. Rptr. 825 (1970); *Marks v. Whitney*, 6 Cal.3d 251, 261, 88 Cal. Rptr. 790, 797, 491 P.2d 374, 381 (1971); *City of Longbeach v. Mansell*, 3 Cal.3d 462, 483, 91 Cal. Rptr. 23, 476 P.2d 423 (1970); *Atwood v. Hammond*, 4 Cal. 2d 31, 40, 48 P.2d 20 (1935); *People v. California Fish Co.*, 166 Cal. 576, 585 593-594, 596, 138 P. 79 (1913).
- MA: *Opinion of the Justices to the Senate*, 424 N.E.2d 1111, 383 Mass. 927 (1981); *Attorney General v. Baldwin*, 361 Mass. 199 (1972).
- MS: *Harrison Co. v. Guice*, 244 Miss. 95, 140 So.2d 838 (1962).
- NH: *State v. Strafford*, 99 N.H. 92, 105 A.2d 569 (1954).
- NY: *Saunders v. New York Cent. & H.R.R.R.*, 144 N.Y. 75, 38 N.E. 992 (1885).
- NC: *Parmele v. Eaton*, 240 N.C. 539, 83 S.E.2d 93 (1954); *Kelly v. King*, 225 N.C. 709, 36 S.E.2d 220 (1945); *Home Real Estate and Insurance Co. v. Parmele*, 214 N.C. 63, 197 S.E. 714 (1938).
- OH: *Thomas v. Sanders*, 65 Ohio App.2d 5, 413 N.E.2d 1224 (1979).
- RI: *Great Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1043 (R.I. 1995) discussing *Hall v. Nasciemento*, 594 A.2d 874 (R.I. 1991).
- TX: *Lorino v. Crawford Packing Co., et al*, 142 Tex. 51, 175 S.W.2d 410, 414 (1943).
- VA: *Marine Resources Comm'n v. Forbes*, 214 Va. 109, 112, 197 S.E.2d 195, 197 (1973).

VI: *Alexander Hamilton Life Ins. Co. v. Government of the Virgin Islands*, 20 D.C.V.I. 333, 343 (1983)

WI: *Diedrich v. The N.W.U. Ry. Co.*, 42, Wis. 248, 3 N.W. 749 (1877).

Affect of Harbor Lines

US: *Port of Seattle v. Oregon & W.R. Co.*, 255 U.S. 56, 41 S. Ct. 237 (1921); *Philadelphia Co. v. Stimson, Secretary of War*, 223 U.S. 605, 32 S.Ct. 340 (1912); *Montgomery v. Portland*, 190 U.S. 89, 23 S. Ct. 735 (1903).

CT: *Orange v. Resnick*, 94 Conn. 573, 578; 109 A. 864 (1920).

MA: *Boston Waterfront Development Corporation v. Commonwealth*, 378 Mass. 629 (1979).

MN: *Miller v. Mendenhall*, 44 NW 1141 (1890).

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OH: *Thomas v. Sanders*, 65 Ohio App.2d 5, 413 N.E.2d 1224 (1979).

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RI: *Great Providence Chamber of Commerce v. State*, 657 A.2d 1038 (R.I. 1995).

CHAPTER II

Section 4: Factual Determination of Public Trust Waters and Riparian Boundaries

Freshwaters: Are they "navigable-in-fact"?

MS: *Black v. Williams*, 417 So. 2d 911, 912 (Miss. 1982).

NC: *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674 (1996).

Tidewater Boundaries: Mean High and Low Tidelines

US: *Borax, Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935).

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NJ: *O'Neill v. State Highway Dept.*, 50 N.J. 307, 235 A.2d 1, 9 (1967).

Freshwater Boundaries: Ordinary High and Low Watermarks

US: *U.S. v. Cameron*, 466 F. Supp. 1099 (M.D. Fla. 1978).

FL: *Tilden v. Smith*, 113 So. 708 (Fla. 1927).

OR: *Belmont v. Umpqua Sand & Gravel, Inc.*, 273 Or. 581, 590, n. 12, 542 P.2d 884 (Or. 1975).

CHAPTER II

Section 5: Exceptions to the Public Trust Doctrine

Conveyance Prior to Statehood

US: *Summa Corp. v. California ex rel Lands Commission*, 466 U.S. 198, 209 (1984); *United States v. Holt Bank*, 270 U.S. 49, 54, (1926); *United States v. Coronado Beach Co.* 255 U.S. 472, 487 (1921); *San Francisco v. LeRoy*, 138 U.S. 656 (1890); *Knight v. U.S. Land Association*, 142 U.S. 161, 183 (1891); *Martin v. Waddell*, 16 U.S. 367, 411 (1842).

AK: *State Dep't of Natural Resources v. City of Haines*, 627 P.2d 1047, 1052 (1986).

FL: *Trustees v. Root*, 63 Fla. 666, 682, 58 So. 371, 376 (1912); *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 609, 47 So. 353, 355 (1908).

CT: *Chapman v. Kimball*, 9 Day 38, 41 (1831); *East Haven v. Hemingway*, 7 Conn. 186, 199 (1828).

LA: *Gulf Oil Corp. V. State Mining Board*, 317 So. 2d 576 (1975); *California v. Price*, 225 La. 706, 74 So.2d 1 (1954).

MD: *Browne v. Kennedy*, 5 H.&J. 195, 203 (1821).

MA: *Lynnfield v. Peabody*, 219 Mass. 322, 328-329, 106 N.E. 977, 979-980 (1914); *Watuppa Reservoir Co. v. Fall River*, 154 Mass. 305, 28 N.E. 257 (1891); *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158, 171 (1863).

MI: *Klais v. Donowski*, 373 Mich. 262, 275, 129 N.W.2d 414, 420-421 (1964) quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 518 (Miss. 1986).

NY: *Appleby v. City of New York*, 271 U.S. 364, 383-384 (1925); *Tiffany v. Town of Oyster Bay*, 234 N.Y. 15, 136 N.E. 224 (1922); *People v. Steeplechase Park Co.*, 218 N.Y. 459, 113 N.E. 521 (1916); *Delancey v. Piepgras*, 138 N.Y. 26, 36, 33 N.E. 822 (1893); *People v. N.Y. & S.I. Ferry Co.*, 68 N.Y. 71, 77-78 (1877).

OH: *Hogg v. Beerman*, 41 Ohio St. 81 (1884).

OR: *Hume v. Rogue River Packing Co.*, 51 Or. 237, 83 P. 391 (1908).

WA: *Stockwell v. Gibbons*, 58 Wash.2d 391, 398, 363 P.2d 111, 115 (1961).

Conveyances in Accordance with International Obligations

US: *West Indian Co. v. Virgin Islands*, 643 F.Supp. 869 (D. Virgin Islands 1986); *Summa Corp. v. California ex rel. Lands Commission*, 466 U.S. 198, 205 (1984); *United States v. Holt Bank*, 270 U.S. 49, 54 (1926); *Shively v. Bowlby*, 152 U.S. 1, 48 (1894); *Knight v. U.S. Land Association*, 142 U.S. 161 (1891); *San Francisco v. LeRoy*, 138 U.S. 656 (1890).

CA: *City of Los Angeles v. Venice Peninsula Properties*, 182 Cal.Rptr. 599, 644 P.2d 792, 31 C.3d 288 (1982).

FL: *Trustees v. Root*, 66 Fla. 666, 58 So. 371 (1912); *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353 (1908).

MI: *Klais v. Danowski*, 373 Mich. 262, 272-273, 129 N.W.2d 414, 419-420 (1964).

Federal Acquisition of State Public Trust Land

US: *11.037 Acres*, 685 F.Supp 214 (N.D. Cal. 1988); *Alameda v. Todd Shipyards*, 635 F. Supp. 1447, 1450 (N.D. Cal., 1986); *U.S. v. 1.58 Acres*, 523 F. Supp. 120, 124 (D. Mass., 1981); *Marks v. Whitney*, 6 Cal.3d 251, 261, 98 Cal. Rptr. 790, 491 P.2d 374 (1971).

Artificially Created Shorelands

US: *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979).

MS: *Cinque Bambini Partnership v. State*, 491 So.2d 508, 520 (1986).

NY: *Thornhill v. Skidmore*, 32 Misc. 2d 320, 227 N.Y.S.2d 793 (1961); *Fairchild v. Kraemer*, 11 A.D.2d 232, 236, 204 N.Y.S.2d 823, 826 (1960).

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- TX: *Diversion Lake Club v. Heath*, 126 Tex. 129, 139, 86 S.W.2d 441, 445-446 (1935).
- WI: *Haase v. Kingston Co-operative Creamery Ass'n*, 212 Wis. 585, 589, 250 N.W. 444, 445 (1933).

Other Exceptions

- HI: *Kamakana*, 58 Haw. 632, 574 P.2d 1346 (1978); *Boundaries of Paunau*, 24 Haw. 546 (1918).
- NC: *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674 (1996).

CHAPTER III

Protected Uses of the Public Trust Doctrine

- US: *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984).
- CA: *Marks v. Whitney*, 6 Cal.3d 251, 259-60, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).
- NJ: *Neptune City v. Avon-by-the-Sea*, 61 N.J. 296, 304, 294 A.2d 47 (1972).

Traditional Public Uses of Trust Lands and Waters

- MA: *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158, 167 (1863).

Navigation and Commerce

- US: *State of New York ex rel. New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission*, 954 F.2d 56, 61-62 (2nd Cir. 1992); *Oregon v. Riverfront Protector*, 672 F.2d 792, 793 (9th Cir. 1982); *United States v. Holt Bank*, 270 U.S. 49, 56 (1925); *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 453 (1892); *The Daniel Ball*, 77 U.S. (10 Wall) 557, 563 (1870); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 413 (1842).
- AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1118 (1988); *United States v. Utah*, 403 U.S. 9, 10 (1971); *Hayes v. A.J. Associates, Inc.*, 846 P.2d 131, 133.
- AL: *Alabama Power Co. v. Smith*, 229 Ala. 105, 110, 155 So. 601 (1934); *Tennessee & Coosa R.R. Co. v. Danforth & Armstrong*, 112 Ala. 80, 96, 20 So. 502, 506 (1895); *Harold v. Jones*, 86 Ala. 274, 277, 5 So. 438, 439 (1889); *Bullock v. Wilson*, 2 Port. 436, 448 (1835).

- CA: *State of California v. Superior Court (Lyon)* 29 Cal.3d 210, 229, 625 P.2d 239, 172 Cal. Rptr. 696 (1981); *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521; 606 P.2d 362, 162 Cal Rptr. 327 (1980); *People ex rel. Younger v. County of El Dorado*, 96 Cal. App. 3d 403, 157 Cal. Rptr. 815 (1979); *Hitchings v. Del Rio Woods Recreation & Park District*, 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1976); *People v. Mack*, 19 Cal. App. 3d 1040, 1045, 97 Cal. Rptr. 448 (1971).
- CT: *Orange v. Resnick*, 94 Conn. 573, 578, 109 A. 864 (1920); *Adams v. Pease*, 2 Conn. 481, 483 (1818).
- FL: *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 612, 42 So. 353 (1908).
- HI: *State v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977); *King v. Oahu Railway and Land Co.*, 11 Haw. 717, 725 (1899).
- IL: *Dupont v. Miller*, 310 Ill. 140, 145, 141 N.E. 423 (1923).
- ME: *Veazie v. Dwinel*, 50 Me. 479, 484 (1862).
- MD: *City of Baltimore v. Baltimore & Philadelphia Steamboat Co.*, 104 Md. 485, 494, 65 A. 353 (1906); *Delmarva Power & Light Co. of Md. v. Eberhard*, 247 Md. 273, 276-77, 230 A.2d 644 (1967).
- MA: *Opinion of the Justices*, 383 Mass. 895, 902-03, 424 N.E.2d. 1092 (1981); *Attorney General v. Woods*, 108 Mass. 436, 440 (1871).
- MI: *Bott v. Natural Resources Commission*, 415 Mich. 45 (1982); *Nedtweg v. Wallace*, 208 N.W. 51, 52, 237 Mich. 14, 16-17 (1926) *aff'd* 237 Mich. 37, 211 N.W. 647 (1926).
- MN: *Nelson v. DeLong*, 213 Minn. 425, 431, 7 N.W.2d 342 (1942).
- MS: *State Ex Rel. Rice v. Stewart*, 184 Miss. 202, 222, 184 So. 44, (1938); *Rouse v. Saucier's Heirs*, 166 Miss. 704, 713, 146 So. 291 (1933); *Smith v. Fonda*, 64 Miss. 551, 554, 1 So. 757 (1887).
- MT: *Montana Coalition for Stream Access v. Curran*, 210 Mont. 38, 44, 682 P.2d 163 (1984) (quoting *The Montello*, 87 U.S. (20 Wall.) 430, 441-42 (1874)); *Montana Coalition for Stream Access v. Hildreth*, 211 Mont. 29, 684 P.2d 1088 (1984).
- NH: *Hartford v. Gilmanton*, 101 N.H. 424, 426, 146 A.2d 851 (1958) quoting *Whitcher v. State*, 87 N.H. 405, 409, 181 A. 549 (1935); *State v. Sunapee Dam Co.*, 70 N.H. 458, 460, 50 A. 108 (1900); *Collins v. Howard*, 65 N.H. 190, 191, 18 A. 794 (1889); *Connecticut River Lumber Co. v. Olcott Falls Co.*, 65 N.H. 290, 389-90, 21 A. 1090 (1889).

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- NY: *Adirondack League Club V. Sierra Club*, 615 N.Y.S.2d 788, 791 (A.D. 3 Dept. 1994); *Trustees of Freeholders & Commonalty of Southhampton v. Heilner*, 84 Misc.2d 318, 328, 375 N.Y.S.2d 761 (1975); *Tucci v. Salzhauer*, 40 A.D.2d 712, 336 N.Y.S.2d 721, 723 (2d Dept.) *aff'd* 33 N.Y.2d 854, 352 N.Y.S.2d 198 (1973); *Granger v. City of Canandaigua*, 257 N.Y. 126, 131, 177 N.E. 394 (1931); *Smith v. City of Rochester*, 92 N.Y. 463, 482 (1883).
- NC: *State v. Baum*, 128 N.C. 442, 446, 40 S.E. 113 (1901); *Tatum v. Sawyer*, 9 N.C. (2 Hawks) 226, 229 (1822); *Burke County v. Catawba Lumber Co.*, 116 N.C. 420, 21 S.E. 941 (1895).
- OH: *Mentor Harbor Yacht Club v. Mentor Lagoons*, 170 Ohio St. 193, 199-200, 163 N.E.2d 373 (1959).
- OR: *Guilliams v. Beaver Lake Club*, 90 Or. 13, 27, 175 P. 437 (1918); *Lewis v. City of Portland*, 25 Or. 133, 159, 35 P. 256 (1893); *Nutter v. Gallagher*, 19 Or. 375, 24 P. 250 (1890); *Haines v. Welch*, 14 Or. 319, 12 P. 502 (1886); *Shaw v. Oswego Iron*, 10 Or. 371 (1882); *Weise v. Smith*, 3 Or. 445, 449 (1869); *Kanin v. Normand*, 50 Or. 9, 91 P. 448.
- PA: *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 539, 47 A. 745 (1901).
- TX: *Feinman v. State*, 717 S.W.2d 106, 111 (Tex. 1986); *Carrithers v. Terramar Beach Community Improvement Assoc. Inc.*, 645 S.W.2d 772, 774 (Tex. 1983); *Motl v. Boyd*, 116 Tex. 82, 111, 286 S.W. 458 (1926); *Welder v. State*, 196 S.W. 868 (Tex. Civ. App.-Austin 1917, writ ref'd).
- VA: *Bradford v. Nature Conservancy*, 224 Va. 181, 189, 294 S.E. 2d 866 (1982); *Boerner v. McCallister*, 197 Va. 169, 175, 89 S.E.2d 23 (1955); *Commonwealth v. Newport News*, 158 Va. 521, 543, 164 S.E. 689 (1932).
- WA: *Caminiti v. Boyle*, 107 Wash.2d 662, 669, 732 P.2d 98 9(1987) quoting *Wilbour v. Gallagher*, 77 Wash.2d 306, 316, 462 P.2d 232 (1969), *cert. denied* 400 U.S. 878 (1970); *State v. Wright*, 84 Wash.2d 645, 650-651, 529 P.2d 453 (1974).
- WI: *State v. Bleck*, 114 Wis.2d 454, 465, 338 N.W.2d 492 (1983); *Nekoosa-Edwards Paper Co. v. Railroad Commission*, 201 Wis. 40, 46, 228 N.W. 144 (1929); *Doemel v. Jantz*, 180 Wis. 225, 234, 193 N.W. 393 (1923); *Olson v. Merrill*, 42 Wis. 203, 212 (1877).

Fishing

- CL: *The Royal Fishery of the River Banne*, Davis 55, 80 Eng. Rep. 540 (K.B. 1610).
- US: *Douglas v. Seacoast Products*, 431 U.S. 265, 284-5 (1977); *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 453 (1892); *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1855).
- AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1118 (1988).
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- CT: *Peck v. Lockwood*, 5 Day 22, 28 (1811).
- DE: *Bickel v. Polk*, 5 Del. (5 Harr.) 325, 326 (1851).
- FL: *Nash v. Vaughn*, 133 Fla. 499 (1938); *State v. Stoutamire*, 131 Fla. 698 (1936); *Ex Parte Powell*, 70 Fla. 363, 376, 70 So. 392 (1915); *State ex rel Ellis v. Gerbing*, 56 Fla. 603, 613, 47 So. 353 (1908).
- HI: *Bishop v. Mahiko*, 35 Haw. 608 (1940).
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- MI: *Attorney General ex rel. Director of Conservation v. Taggart*, 306 Mich. 432, 443, 11 N.W.2d 193 (1943); *Nedtweg v. Wallace*, 237 Mich. 14, 20, 208 N.W. 51, 54 (1926) *aff'd* 237 Mich. 37, 211 N.W. 647 (1926).

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- NH: *Hartford v. Gilmanton*, 101 N.H. 424, 146 A.2d 851 (1958); *Whitcher v. State*, 87 N.H. 405, 181 A. 549 (1935).
- NJ: *Cobb v. Davenport*, 33 N.J.L. 369, 378 (1867).
- NY: *Sloup v. Town of Islip*, 78 Misc.2d 366, 356 N.Y.S.2d 742, 745 (1974); *People v. Johnson*, 7 Misc.2d 385, 388, 166 N.Y.S.2d 732, 735 (1957); *Lawton v. Steele*, 119 N.Y. 226, 234 (1890) aff'd 152 U.S. 133 (1894).
- NC: *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527, 369 S.E.2d 825 (1988); *Springer v. Joseph Schlitz Brewing Co.*, 510 F. 2d 468 (4th Cir. 1975); *State v. Gallop*, 126 N.C. 979, 983 (1900); *State v. Glen*, 52 N.C. 321 (1859); *Collins v. Benbury*, 25 N.C. (3 Ired.) 277 (1842); *Swan Island Club v. White*, 114 F.Supp. 95 (E.D.N.C. 1953)(aff'd sub nom *Swan Island Club v. Yarbrough*, 209 F.2d 698 (4th Cir. 1954).
- OR: *Monroe v. Withycombe*, 84 Or. 328, 335, 165 P. 227 (1917); *Cook v. Dabney*, 70 Or. 529, 532, 139 P. 721 (1914); *State v. Hume*, 52 Or. 1, 5, 95 P. 808 (1908).
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- TX: *Dodgen v. Depuglio*, 146 Tex. 538, 209 S.W.2d 588 (1948); *Stephenson et al. v. Wood et al.*, 119 Tex. 564, 569 (1931).
- WA: *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80 (1936).
- WI: *Willow River Club v. Wade*, 100 Wis. 86, 102-03, 76 N.W. 273 (1898).

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- CT: *Orange v. Resnick*, 94 Conn. 573, 578, 109 A. 864 (1920); *Mather v. Chapman*, 40 Conn. 382, 401 (1873); *Church v. Meeker*, 34 Conn. 421, 433 (1867); *Chapman v. Kimball*, 9 Day 38, 42 (1831).
- ID: *Southern Idaho Fish & Game Ass'n v. Picabo Livestock Co.*, 96 Idaho 360, 362, 528 P.2d 1295 (1974).

- ME: *Wilson & Son et al. v. Harrisburg*, 107 Maine 207, 215 (1910); *Stevens v. Kelley*, 78 Maine, 445.
- MA: *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. 158, (7 Allen) 171 (1863); *Cummings v. Barret*, 64 Mass. (10 Cush.) 186, 188 (1852).
- MN: *Lamprey v. Metcalf*, 52 Minn. 181, 200, 53 N.W. 1139 (1893).
- NH: *Hartford v. Gilmanton*, 101 N.H. 424, 426, 146 A.2d 851 (1958) quoting *Whitcher v. State*, 87 N.H. 405, 409, 181 A. 549 (1935); *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 30 (1889).
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- RI: *New England Naturist Ass'n v. Larsen*, 692 F.Supp. 75 (D.R.I.) 1988.
- WI: *Gadow v. Hunholz*, 160 Wis. 293, 296, 151 N.W. 810 (1915); *Abbot v. Cremer*, 118 Wis. 377, 95 N.W. 387 (1903); *Rossmiller v. State*, 114 Wis. 169, 89 N.W. 839 (1902); *Reysen v. Roate*, 92 Wis. 543, 544, 66 N.W. 599 (1896).
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- US: *District of Columbia v. Air Florida, Inc.*, 750 F. 2d 1077 (D.C. Cir. 1984); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894); *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 460 (1892).
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- IL: *People ex rel Scott v. Chicago Park District*, 66 Ill. 2d 65, 78, 360 N.E.2d. 773 (1976).
- MA: *Barry v. Grela*, 372 Mass. 278, 361 N.E.2d 1251 (1977); *In the Opinion of the Justices*, 365 Mass. 681, 687-88, 313 N.E.2d 561 (1974); *Slater v. Gunn*, 170 Mass. 501, 514 (1898); *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158, 167 (1863).
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- OR: *State ex rel Thornton v. Hay*, 254 Or. 584, 462 P.2d 671, 679 (1969).
- VT: *State of Vermont and City of Burlington v. Central Vermont Railway*, 153 Vt. —, 571 A.2d 1128 (1989).
- WA: *Caminiti v. Boyle*, 107 Wash.2d 662, 669, 732 P.2d 989 (1987), *cert. denied* 108 S. Ct. 703 (1988); *Orion Corporation v. State*, 109 Wn.2d 621, 661, 747 P.2d 1062 (1987).
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- CA: *National Audubon Society v. Superior Ct.*, 33 Cal.3d 419, 435, 658 P.2d 709, 189 Cal. Rptr. 49 (1983); *State of California v. Superior Court (Lyon)* 29 Cal.3d 210, 229, 625 P.2d 239, 172 Cal. Rptr. 699 (1981); *Marks v. Whitney*, 6 Cal. 3d 251 [491 P.2d 374, 98 Cal. Rptr. 790] (1971); *People ex rel Baker v. Mack*, 19 Cal.App.3d 1040, 1045, 97 Cal. Rptr. 448 (1971).
- CT: *State v. Brennan*, 3 Conn. Cir. 413, 416, 216 A.2d 294, 296 (1965); *Orange v. Resnick*, 94 Conn. 573, 578, 109 A. 864 (1920).
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- NJ: *Matthews v. Bay Head Improvement Ass'n.*, 95 N.J. 306, 312, 471 A.2d 355 (1984); *Van Ness v. Borough of Deal*, 139 N.J.Super. 83, 352 A.2d 599 (1975); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309, 294 A.2d 47 (1972); *Arnold v. Mundy*, 6 N.J.L. 1, 12 (1821).
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- NC: *Gwathmey v. State of North Carolina*, 342 N.C. 287, 300, 464 S.E.2d 674 (1996); *State v. Baum*, 128 N.C. 600, 604, 38 S.E. 900 (1901).
- OH: *Mentor Harbor Yacht Club v. Mentor Lagoons*, 170 Ohio St. 193, 200, 163 N.E.2d 373 (1959).
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- LA: *Save Ourselves v. Louisiana Environmental Control Commission*, 452 So.2d 1152, 1158 (1984).
- NY: *People of the Town of Smithtown v. Poveromo*, 71 Misc.2d 524, 532, 336 N.Y.S.2d 764 (1972) *aff'd in part and rev'd in part on other grounds* 79 Misc.2d 42, 359 N.Y.S.2d 848 (1973).
- OR: *Saxon v. Division of State Lands*, 31 Or. App. 511, 570 P.2d 1197 (1979).
- WA: *Orion Corporation v. State*, 109 Wash.2d 621, 641, note 10, 747 P.2d 1062 (1987).
- WI: *Just v. Marinette County*, 56 Wis.2d 7, 17, 201 N.W.2d 761 (1972).

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- US: *Springer v. Joseph Schlitz Brewing Co.*, 510 F.2d 468 (4th Cir. 1975).
- CA: *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 435, 658 P.2d 709, 189 Cal.Rptr. 346, (1983).
- ID: *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 632, 671 P.2d 1085 (1983).
- WI: *State v. Trudeau*, 139 Wis.2d 91, 104, 408 N.W.2d 337 (1987); *City of Madison v. Tolzman*, 7 Wis.2d 570, 574, 97 N.W.2d 513 (1959); *City of Madison v. State*, 1 Wis.2d 252, 258, 83 N.W.2d 674 (1957); *Muench v. Public Service Commission*, 261 Wis. 492, 508, 53 N.W.2d 514 (1952).

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- US: *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 476 (1988).

CHAPTER IV
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- CA: *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 90 P. 532 (1907).
- HI: *Kalipi v. Hawaiian Trust*, 66 Haw. 1 (1982); *Akau v. Olohana*, 65 Haw. 383 (1982); *Barba v. Okuna*, 65 Haw. 680 (1982).
- LA: *Pizanic v. Gauthreaux*, 173 La. 737, 138 So. 650 (1932).
- ME: *Flood v. Earle*, 145 Me. 24, 71 A.2d 55 (1950).
- MA: *Slater v. Gunn*, 170 Mass. 509, 515 (1898).
- MI: *Hilt v. Weber*, 252 Mich. 198, 233 N.W. 159 (1930).
- NH: *Hartford v. Gilmanton*, 101 N.H. 424, 146 A.2d 851 (1958); *St. Regis Co. v. Board*, 92 N.H. 164, 171 (1942); *Hoban v. Bucklin*, 88 N.H. 73, 88 (1936).
- NY: *Mackall v. White*, 87 A.D.2d 696, 445 N.Y.S.2d 486 (2d Dept. 1981).
- TX: *Diversion Lake Club v. Heath*, 126 Tex. 129, 138 - 139 (1935)
- VT: *Trout and Salmon Club v. Mather*, 68 Vt. 338, 348 (1895).
- WA: *Kemp v. Putnam*, 47 Wash.2d 530, 537, 288 P.2d 837 (1955).

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- US: *Nollan v. California Coastal Commission*, 107 S.Ct. 3141, 3157 (1987)(Brennan dissent); *United States v. St. Thomas Beach Resorts, Inc.*, 386 F.Supp. 769, 772 (D.C.V.I. 1974), aff'd 529 F.2d 513 (3rd Cir. 1975).
- CA: *Grupe v. California Coastal Commission*, 166 Cal. App. 3d 148, 171-172, 212 Cal Rptr. 578, 592-593 (1985). See also *Nollan v. California Coastal Commission*, 107 S.Ct. 3141, 3157 (1987)(Brennan dissent).
- CT: *Adams v. Pease*, 2 Conn. 481, 483 (1818); *Orange v. Resnick*, 94 Conn. 573, 578, 109 A. 864 (1920).
- FL: *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974).
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CA: *Pacific Gas & Electric Co. v. Superior Court*, 145 Cal.App.3d 253, 257-259, 193 Cal.Rptr. 336 (1983); *Hitchings v. Del Rio Woods Recreation & Park District*, 55 Cal.App.3d 560, 127 Cal. Rptr. 830 (1976); *People ex rel. Baker v. Mack*, 19 Cal.App.3d 1040, 97 Cal. Rptr. 448 (1971); *Bohn v. Albertson*, 107 Cal. App.2d 738, 238 P.2d 128 (1951).

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OR: *Lebanon Lumber Co. v. Leonard*, 68 Or. 147, 136 P. 891 (1913).

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- US: *United States v. St. Thomas Beach Resorts, Inc*, 386 F. Supp. 769 (1974), *aff'd* 529 F.2d 513 (1975).

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- RI: *State v. Ibbison*, 448 A.2d 728, 732-3 (1982).

CHAPTER V

The Alienability of the Jus Privatum in Public Trust Lands

- EC: *Constable's Case*, 5 Rep. 106 (date unknown).
- AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1118 (1988).
- CT: *East Haven v. Hemingway*, 7 Conn. 186, 198 (1828).
- NJ: *River Development Corp. v. Liberty Corp.*, 51 N.J. Super. 447 (1958).
- NC: *Ward v. Willis*, 51 N.C. 183 (1858).
- OR: *Bowlby v. Shively*, 22 Or. 410, 427 (); *Wilson et al. v. Shively*, 11 Or. 215 (1884).

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US: *Long Sault Dev. Co. v. Call*, 242 U.S. 272, 279 (1916); *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 460 (1892).

CA: *California v. Superior Court (Lyon)*, 29 Cal.3d 210, 226 (1981); *City of Longbeach v. Mansell*, 3 Cal.3d 462, 482 ().

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VA: *James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*, 122 S.E. 344, 347 (1924).

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- CT: *East Haven v. Hemingway*, 7 Conn. 186, 199 (1828).
- LA: *Gulf Oil Corporation v. State Mineral Board*, 317 So.2d 576, 589 (1975) quoting *California Co. v. Price*, 74 So.2d at 21).
- MD: *Browne v. Kennedy*, 5 H.&J. 195, 203 (1821).
- MA: *Commonwealth v. City of Roxbury*, 75 Mass. 451, 494 (1857).
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- NH: *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 6, 25 A. 718, 720 (1889).
- NY: *Appleby v. City of New York*, 271 U.S. 364, 383-384 (1925).
- NC: *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674 (1996).
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Furtherance of Public Trust Purposes Required

- US: *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988); *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).
- AZ: *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 368, 837 P.2d 158 (Ariz. App. Div. 1, 1991).
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- MA: *Opinion of the Justices*, 383 Mass. 972, 931 - 933 (1981).
- MS: *Secretary of States v. Wiesenberg*, 633 So. 2d 983, 987 (Miss. 1994); *Treuting v. Bridge & Park Commission*, 199 So.2d 627 (Miss. 1967); *Parks v. Simpson*, 242 Miss. 894, 137 So.2d 136 (1962); *Giles v. City of Biloxi*, 237 Miss. 65, 112 So.2d 815 (1959); *Xidis v. City of Gulfport*, 221 Miss. 79, 72 So.2d 153 (1954); *Crary v. State Highway Commission*, 219 Miss. 284, 68 So.2d 468 (1953); *Rouse v. Saucier's Hiers*, 166 Miss. 704, 713, 146 So. 291, 292 (1933).
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- AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988).
- CA: *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 446, 658 P.2d 709, 728, 189 Cal.Rptr 346, 365, cert. denied, 464 U.S. 977 (1983); *Orange County v. Heim*, 30 Cal.App.3d 694, 723-726, 106 Cal.Rptr 825, 849-852 (1973).
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- US: *The Binghamton Bridge*, 70 U.S. 51, 75 (1865); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 411 (1842).
- MA: *Commonwealth v. Roxbury*, 75 Mass. 451, 492 (1857).
- VT: *State of Vermont and City of Burlington v. Central Vermont Railway*, 153 Vt. 337, 571 A.2d 1128 (1989) quoting *Hazen v. Perkins*, 92 Vt. 414, 420, 105 A. 249, 251 (1918).

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- HI: *King v. Oahu Ry. & Land Co.*, 11 Haw. 717, 723-725 (1899)(discussing *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892)).
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- US: *Lake Michigan Federation v. United States Army Corps of Engineers*, 742 F.Supp. 441 (1990); *Appleby v. City of New York*, 271 U.S. 364, 383-384 (1925); *Martin v. Waddell*, 41 U.S. 366, 411 (1842).
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- AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1118 (1988).
- CA: *Golden Feather Community Association v. Thermalito Irrigation District*, 199 Cal App.3d 402, 244 Cal. Rptr. 830 (1988); *City of Los Angeles v. Venice Peninsula Properties*, 182 Cal.Rptr. 599, 644 P.2d 792, 31 C.3d 288 (1982); *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, 172 Cal. Rptr. 696, 625 P.2d 239, 248 (1981); *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 162 Cal. Rptr. 327, 606 P.2d 362 (1980); *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971); *Newcomb v. City of Newport Beach*, 7 Cal.2d 393, 60 P.2d 825, 828 (1936); *People v. California Fish Co.*, 166 Cal. 576, 138 P.79 (1913); *People v. Southern Pacific R. Co.*, 166 Cal. 627, 628, 138 P. 103, (1913).

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- PA: *Conneaut Lake Ice Co. v. Quigley*, 225 Pa. 605, 74 A. 648 (1909); *Reighard v. Flinn*, 189 Pa. 355, 42 A. 23 (1899).
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- WA: *Caminiti v. Boyle*, 107 Wash.2d 662, 666, 732 P.2d 989, 992 (1987); *Wilbour v. Gallagher*, 77 Wash.2d 306, 462 P.2d 232 (1969), *cert. denied* 400 U.S. 878 (1970); *Hill v. Newell*, 86 Wash. 227, 231 (1915)(quoting *People v. California Fish Co.*); *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 89 (1909); *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 131-132 (1908); *Eisenbach v. Hatfield*, 2 Wash. 236, 240-243 (1891).

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- US: *United States v. Turner*, 175 F.2d 644, 647 (1949); *Appleby v. City of New York*, 271 U.S. 364 (1925); *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 452 (1892).
- AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988).
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- WI: *Diedrich v. The N.W.U. Ry. Co.*, 42, Wis. 248, 3 N.W. 749 (1877).

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CHAPTER VI

State Powers and Authorities Under the Public Trust Doctrine

- US: *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988); *Bowlby v. Shively*, 22 Or. 410, 427 (1982); *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 460 (1892); *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1855).
- AZ: *Arizona Center for Law in the Public Interest v. Hassell*, 837 P.2d 158, 171 (Ariz.App.Div. 1 1991).
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- WA: *Caminiti v. Boyle*, 107 Wash.2d 662, 666, 732 P.2d 989, 992 (1987).

CHAPTER VII

The Confluence of Riparian Rights and the Public Trust Doctrine

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- CA: *Colberg v. California*, 67 Cal.2d 408, 432 P.2d 3 (1967), *cert. denied* 390 U.S. 949 (1968); *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797, 816 (1928); *Woods v. Johnson*, 241 Cal.App.2d 278, 50 Cal.Rptr. 515.
- CT: *Water St. Assoc. Ltd. Partnership v. Innipak Plastics Corp.*, 230 Conn. 764, 646 A.2d 790 (1994); *State v. Knowles-Lombard Co.*, 122 Conn. 263, 266, 188 A. 275, 276 (1936); *Orange v. Resnick*, 94 Conn. 573, 578, 109 A. 864, 867 (1920).
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- IL: *Mamonlella v. First Bank of Oak Park*, 97 Ill.App.3d 579, 53 Ill.Dec. 12, 423 N.E.2d 204, 205-06 (1981); *Linn Farms, Inc. v. Edlen*, 111 Ill.App.2d 294, 299, 250 N.E.2d 681, 684 (1969), citing *City of Peoria v. Central National Bank*, 224 Ill. 43, 56, 79 N.E. 296, 299.
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