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Public Rights to Coastal Waters:

Applying the Public Trust Doctrine

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Harbormaster Reference Series

Module I

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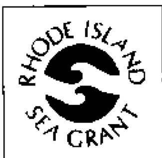

Sea Grant is a national program dedicated to promoting the wise use and development of marine resources for the public benefit.

Module I

PUBLIC RIGHTS TO COASTAL WATERS:
Applying the Public Trust Doctrine

Harbormaster Reference Series

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PREFACE

Throughout the country, coastal municipalities are under increasing pressure to effectively manage shoreline resources and a wide range of water-related activities. The ability to accomplish this improves with the presence of a qualified harbormaster. He or she is primarily responsible for ensuring that the rules and regulations are properly enforced, that information and assistance is provided to all waterway users, and that waterfront safety is achieved. These public servants often find themselves at the center of complex management decisions, involving difficult issues and active special interest groups.

In order to assist harbormasters in meeting their expanding roles, the University of Rhode Island's Coastal Resources Center and Rhode Island Sea Grant, in conjunction with the Rhode Island Harbormaster Association, developed an educational program specifically for municipal harbormasters. This program consists of forty hours of basic training in a wide array of topics including first aid, law enforcement, boating safety, seamanship, mooring management, harbor planning, environmental awareness and liability mitigation. Individual reference materials were developed for each topic. Combined, they create a comprehensive reference guide for harbormasters. The complete reference series consists of six modules, which are intended to be used as reference material to assist harbormasters in carrying out their official responsibilities. It can be used to provide answers to questions from the users of local waters and waterfronts; it can help harbormasters make better informed management decisions for the activities within their jurisdiction; and it can give harbormasters a better understanding of their role in implementing coastal management polices.

A brief summary of each module follows.

MODULE I
Public Rights to Coastal Waters: Applying the Public Trust Doctrine

Part of the expanding role of today's harbormaster is to balance private use of shoreline areas with public demands for greater coastal access. Private control or riparian ownership takes many forms ranging from filling submerged land to the placement of moorings. Public interest extends from getting to the shoreline to the harvesting of the fishery resources. This module is the Executive Summary of a national report on the Public Trust Doctrine by David Slade et al. It provides an overview of the legal status of tidelands held in trust by each state for public use and is intended to provide guidance to coastal managers on the application of the Public Trust Doctrine to trust lands, waters and living resources.

MODULE II
Federal Regulations: Coastal Structures, Environmental Protection and Boating Safety

Harbormasters are required to perform work in the coastal zone and on coastal waters which are subject to a wide assortment of federal rules, regulations and policies. Federal regulations which are most pertinent for harbormasters are presented in this module. The first section presents the federal guidelines for the placement of objects or structures in navigable waters as regulated by the Army Corps of Engineers. The second section presents elements of the Federal Code of Regulations, which are administered by the Coast Guard, pertaining to boating safety and water quality impacted by boating.

MODULE III
Rhode Island State Regulations: Environmental Protection and Boating Safety

Harbormasters are the primary front line enforcement people for water dependent uses. Although the authority to enforce conservation laws varies from state to state, harbormasters, at the very least, have

the ability to monitor the taking of shell and finfish and report any illegal activity to the proper authorities. In addition to protecting the aquatic resources of a state, harbormasters are responsible for enforcing boating safety regulations. The need for active on-the-water patrols and enforcement of boating rules and regulations has increased proportionally to the number of boaters operating on local rivers, harbors, and embayments. This module presents those Rhode Island state laws governing fisheries, water quality and boating safety. It is applicable only to Rhode Island and is intended to be substituted with appropriate laws for other states.

MODULE IV
Municipal Mooring Area Management
Pressures to use surface waters for moorings and docks has increased as the boating population swells. In order to meet this demand, harbormasters are looking for safe techniques for increasing mooring density. The first section of this module presents suggestions for efficient management of harbor surface areas.

The second section, through diagrams, reviews the standard mooring assembly for a single point mooring as used throughout the United States. Proper mooring sets, winterization and inspection processes are also discussed.

MODULE V
Harbormaster Liability: Reducing Risk
Each time a harbormaster goes out on patrol or makes a mooring placement decision, the municipality for which he or she works incurs some liability. This module provides the harbormaster and the city or town with basic information on how to limit liability by reducing risks which occur during routine harbor patrols including medical response, mooring management, towing, hazard mitigation.

MODULE VI
Multi-use Harbor Management: A Case Study for Local Harbormasters
Local harbor management has become a key element in state coastal planning, allowing home-rule decision making and management. In many instances the harbormaster is quickly becoming the person responsible for local coastal management. This module presents a case study which explains the expanding role of harbormasters and examples of effective interaction with local decision makers and harbor users.

Mark Amaral and Virginia Lee
July 1992

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For Module I, we are particularly grateful to David Slade of the Coastal States Organization for allowing the reproduction of the Executive Summary and Glossary of his national study entitled, "Putting the Public Trust Doctrine to Work, The Application of the Public Trust Doctrine to the Management of Lands, Waters and Living Resources of the Coastal States," November 1990.

Copies of the report are available through the Coastal States Organization in Washington, D.C., or the Connecticut Department of Environmental Protection, Coastal Resources Management Division in Hartford, Connecticut.

Mark Amaral and Virginia Lee
July 1992

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INTRODUCTION

Part of the expanding role of today's harbormaster is to balance private control of shoreline areas and public demands for greater coastal access. Private control or riparian ownership takes many forms ranging from filling submerged land to the placement of moorings. Public interest extends from getting to the shoreline to the harvesting of the fishery resources. To compensate for these local pressures it is valuable for harbormasters and waterfront managers to have a working knowledge of the Public Trust Doctrine. This doctrine is an important legal "tool" to use in the fair allocation of uses within a harbor.

This module is a reprint of part of a national report on the application of the Public Trust Doctrine entitled, "Putting the Public Trust Doctrine to Work," prepared by David Slade of the Coastal States Organization in 1990. Because of the size of the report, it is impractical for us to provide it here in its entirety. With the permission of the Project Manager, we have reproduced two sections: Executive Summary and Glossary, as Module I of the Harbormaster Training Series. These are not meant to be a substitute for the entire document, but they do provide a broad overview of the Public Trust Doctrine, its origins and applications at a national and state level.

The body of the report examines, with detail, the variation of the Public Trust Doctrine from state to state through the use of case studies. Questions or comments on this study can be directed to David Slade, Esq., Project Manager, Coastal States Organization in Washington, D.C., or the Connecticut Department of Environmental Protection, Coastal Resources Management Division in Hartford, Connecticut.

Putting the Public Trust Doctrine to Work

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

November 1990

THIS REPORT WAS PREPARED UNDER CONTRACT WITH THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION, COASTAL RESOURCES MANAGEMENT DIVISION, WITH FUNDS PROVIDED UNDER SECTION 309 OF THE FEDERAL COASTAL ZONE MANAGEMENT ACT BY THE OFFICE OF OCEAN AND COASTAL RESOURCES MANAGEMENT, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, AS PART OF A NATIONAL PROJECT ON THE PUBLIC TRUST DOCTRINE.

PUTTING THE PUBLIC TRUST DOCTRINE TO WORK

Executive Summary

Introduction

In 1820, a New Jersey man was collecting oysters along the shores when he was physically challenged as a trespasser by the upland farmer. 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."

If the taking of a few oysters raises such fundamental questions affecting the rights of all citizens, then clearly the building of private docks, construction of 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.

In the United States, each State has the authority and responsibility for applying the Public Trust Doctrine to trust lands, waters and living resources within its jurisdiction. But how can the Public Trust Doctrine be used by the States to its full potential for coastal resource management? This National Public Trust Study is designed to answer this fundamental question.

The following chapters in this volume present some answers to central questions that confront coastal resource managers when using the Public Trust Doctrine:

- What lands, waters and resources are subject to the Public Trust Doctrine. (Ch. II, §1).
- What are the boundaries of public trust lands and waters? (Ch. II, §§2 and 3).
- What uses can the public make of these lands and waters? (Ch. III).
- How does the public get to trust lands and waters? (Ch. IV).
- How about privately owned tidelands and bottomlands? Does the public have any remaining rights to use these privately owned lands? (Ch. V).

- What considerations are there for State agencies with public trust responsibilities? (Ch. VI and IX).
- What role does the federal government play under the Public Trust Doctrine? (Ch. X).
- How can the Public Trust Doctrine be used on common day-to-day issues facing coastal resource managers? (Ch. VIII, §3).
- How can the Public Trust Doctrine be used through the federal consistency provisions of the CZMA? (See Ch. VIII, §4)
- How can the Public Trust Doctrine be used for long-term management and planning? (Ch. VIII, §§1 and 2).
- Does the analogous body of private and charitable trust law have any guidance to offer for those implementing the Public Trust Doctrine? (Ch. XI).
- What must a State consider when trying to incorporate the Public Trust Doctrine into its coastal resource program? (Ch. XII).

This volume is intended to serve as an overall review of the subject—a starting point for anyone interested in the Public Trust Doctrine or managing trust lands, waters and resources. It is our hope that the reader will gain a national perspective on how to use and apply this ancient body of law to coastal resource management in today's modern world.

What is the Public Trust Doctrine?

In the United States, shorelands, bottomlands, tidelands, tidewaters, navigable freshwaters and the plant and animal life living in these waters are accorded special treatment under State and Federal law. For the most part, these lands, waters and wildlife are owned by the public, but held in trust by the State for the benefit of the public. Generically, the body of law pertaining to these lands, waters and living resources is called the Public Trust Doctrine.

The Public Trust Doctrine provides that title to tidal and navigable freshwaters, the lands beneath, as well as the living resources inhabiting these waters within a State is a special title. It is a title held by the State in trust for the benefit of the public, and establishes the right of the public to use and enjoy these trust waters, lands and resources for a wide variety of recognized public uses. Of great importance, it is also a title with two components: the public's trust title (*jus publicum*) and a private proprietary title (*jus privatum*), discussed more fully below.

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 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—all 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. 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. See Ch. I.A and B.

Origins and History of the Public Trust Doctrine

The Public Trust Doctrine dates back to the sixth century Institutes of Justinian and the accompanying Digest, which collectively formed 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, 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 all could "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." Further, the right to build a cottage, dry or repair nets, fish, or use the banks of rivers to tie boats to trees, and to place any part of their cargo there, even though the banks of a river are private property, were assured by the Institutes.

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." See Ch. I.C.

Lands, Waters and Living Resources Subject to the Public Trust Doctrine

To apply the Public Trust Doctrine, one must first determine whether the land, water or living resources in question are indeed within the geographic scope of the doctrine. **Generally speaking, all "navigable waters," the lands beneath these waters and the living resources inhabiting them are subject to the Public Trust Doctrine.**

What is meant by the term "navigable waters" has been the source of confusion for centuries in both State and Federal courts. Under the English common law, due to the geography of England, the term "tidewaters" and "navigable waters" were synonomous. The presumption was that tidelands were owned by the king, although a grant of the private *jus privatum* interest could be conveyed into private hands. In such a case, the public's *jus publicum* interest remained paramount over the *jus privatum* interest. See Ch. II, §1.A.3.

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 their lands subject to the ebb and flow of the tide, up to the ordinary high water line. Each also had, and continues to have, the authority to define the term "navigable waters" under State law, define the boundary limits of the lands held in public trust, as well as the authority to recognize private rights in their trust lands, and thus diminish the public's rights therein.

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 original thirteen. The 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. See Ch. II, §1.A.2 and 3.

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.**

The Dual Title in Public Trust Lands: Jus Publicum & Jus Privatum

Public trust lands, i.e. tidelands, freshwater shorelands and submerged lands, are special in nature. Because of the salt content, weathering action, constant flooding and adverse environment, they are useless for nearly all types of agriculture. Structures built on trust lands must be strongly reinforced to weather the tremendous forces of wind, wave and ice placed upon them. Traditionally, "permanent" structures built on trust lands were to further navigation or waterborne commerce.

Because of the special nature and public character of these lands, the title 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 collective rights of the public to fully 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. See Ch. I.D and E.

The *jus publicum* interest cannot be conveyed or alienated to private ownership, for the State cannot abdicate its trust responsibilities to the people. These collective rights are the public's property rights in these lands, waters and resources, rights that are held in trust by the State.

On the other hand, the *jus privatum* interest may be and often is conveyed into private ownership. Nearly one-third of all public trust land is privately owned. In most cases, when a private individual or firm "owns" tidelands, shorelands, or submerged lands, he or she holds only the *jus privatum* interest, an interest that remains subject to the public's dominant *jus publicum* interest.

It is commonly stated that trust lands are either publicly owned or privately owned. In both instances, however, the State retains and holds in trust the public's *jus publicum* interest. For 'publicly' owned trust lands, the State also holds the *jus privatum* title, whereas for 'privately' owned trust lands the State has conveyed the *jus privatum* into private ownership. Thus, the difference between publicly owned and privately owned trust lands is whether the State has validly conveyed the *jus privatum*. See Ch. V.A.

Upper Boundary of Public Trust Lands

In general, the upper boundary of public trust shorelands, whether those lands are privately or publicly held, is 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. These States have judicially recognized that the use of the dry sand beach is essential for the public to fully enjoy their public trust rights of access and use to trust lands (below the mean high tide line) and waters. This is certainly a common sense approach, in that the tides rise above the "mean" high tide line atleast half the time; the public's trust rights should not be temporarily cut off during these times of higher high tides. See Ch. IV.B.1.

Further, there may be public trust considerations concerning the use of non-navigable tributaries to navigable freshwaters and public trust uses therein. See Ch. II, §2.

Boundaries of Public Trust Land: A Moveable Freehold

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

Man-induced changes such as 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 if the upland owner is a "stranger" to the man-induced change.

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 and statutes on the point.** See Ch. II, §3.

Lands Exempt from the Public Trust Doctrine

Lands beneath tidal and navigable fresh waters and below the ordinary high water mark are presumptively subject to the Public Trust Doctrine. In fact, many States apply the Public Trust Doctrine to all tide waters, navigable freshwaters and the lands below these waters within their respective jurisdictions without exception.

Exceptions do exist, however, although their occurrence is infrequent and usually strictly limited. Nonetheless, these exceptions are important, for if presumably 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. See Ch. II, §4.

Public Uses Protected by the Public Trust Doctrine

The original purpose of the doctrine was to assure public access to navigable waters for navigation and commerce (waterways being the principal transportation arteries of early days) and for fishing, an important source of food. Thus, **historically, the common law rights of the public in trust lands and waters were related to navigation, commerce and fishing.** 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."

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. Recognized public uses of trust lands today include fishing, bathing, sunbathing, swimming, strolling, pushing a baby stroller, hunting, fowling, both recreational and commercial navigation, environmental protection, preservation of scenic beauty, and perhaps the most basic use, just being there.

The Public Trust Doctrine has evolved from preserving the public's rights to use trust lands and waters for commerce, navigation and fishing, to protecting modern uses that are "related to the natural uses peculiar to that resource." This dynamic nature, firmly documented by the courts over the centuries and 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 to assure public access to, and use of, trust lands, waters and living resources and the doctrine would slowly whither away.** See Ch. III.

The Conveyance of Public Trust Land

As noted, 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.

There are strict limitations upon the State in order to convey 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 further the public interest, 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. Non-compliance with any of these requirements violates the Public Trust Doctrine, and can render the conveyance void.

Courts will strictly scrutinize a conveyance of public trust lands for compliance with all of the above requirements. In addition, if a State legislature later determines that a prior conveyance of trust land has the effect of diminishing or destroying its control of the *jus publicum*, the conveyance may be lawfully revoked. See Ch. V.A.

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 against public trust lands. See Ch. V.C.

The public's rights and interests in trust lands and waters can only be terminated in certain small parcels, usually those necessary for the construction of docks and wharves to further navigation or 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. See Ch. V.D.

The Nature of the Remaining Public Trust Servitude

Once the *jus privatum* interest has been conveyed from the State to private hands, the public's remaining trust rights in the trust land, collectively known as the public's trust servitude, are usually diminished. The nature of the remaining public trust servitude in privately held trust lands varies from State to State. In one State, the servitude may not include many rights of the public, not even the right to use trust lands solely for recreational purposes. 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. See Ch. V.B.

State Exercise of its Public Trust Authority

Authority vested in the State through the Public Trust Doctrine is based upon its power over State property, rather than a State's regulatory powers through its sovereign "police powers." Thus, if the lands, waters or living resources are within the scope of the doctrine, then the State can govern and manage them as its own property. This is in sharp contrast to a State regulating a citizen's private property through its police powers.

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 property owners hold extremely strong 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 perception that he or 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 he or 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 is, unaware that the State has a reserved *jus publicum* interest up to the "ordinary high water mark"—a boundary line that is often difficult to factually determine. 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 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 "takings and charges of governmental interference in private property rights should be expected. See Ch. I.F.

"Takings" Claims and the Public Trust Doctrine

A central strength of the Public Trust Doctrine is that it allows the State to manage its trust resources as a property owner, rather than having to exercise either its regulatory police powers or its powers of eminent domain. In other words, most claims that the State has unlawfully "taken" private property when it manages its trust properties would be unfounded. This is not to say that "takings" challenges won't occur. Rather, the chances of a private party prevailing against the State on a takings claim are much less, with all of the burden of proof on the private party making the claim.

Nonetheless, challenges can be expected. As States exercise their public trust authority, their actions are likely to conflict with the interests of private upland owners. This is especially so where the Public Trust Doctrine has not been enforced over a period of time and the private upland owners expectations of exclusive possession have grown in the interim.

When trust land is wholly publicly owned, it is clear that a private upland owner would have no property interest in that land, except as a member of the general public. Any riparian "rights" of an upland owner, as noted, are subject to the public's dominant trust rights. Thus, it appears impossible for any action a State takes under its public trust authority on publicly owned trust lands to result in a taking of private property without just compensation.

The question becomes more complex, however, in the many instances where the *jus privatum* title in certain trust land has been conveyed into private hands. In such a case, if the State's actions are clearly within its public trust authority, the private trust land owner's interest in the trust land are subservient to the *jus publicum*. Further, the privately held trust land was conveyed subject to the Public Trust Doctrine from the outset and therefore nothing has been taken. As a result, a private owner cannot have any reasonable investment-backed expectations.

When a State attempts to govern privately held trust land, either through regulations or statute, in a manner broader than its trust authority, a takings claim is more likely. For example, in Washington, the State attempted to limit or prohibit uses that could be made of its public trust lands and waters. Upon challenge, the Washington Supreme Court held in part that the regulations limited or prohibited uses of the land that were permissible under the Public Trust Doctrine. Thus, to this extent, the regulations were more restrictive than the doctrine, and the regulations constituted a "taking" in violation of the U.S. Constitution.

This example demonstrates that any action taken by a State under its public trust authority should clearly be within the scope of the Public Trust Doctrine within that State. See Ch. IX, §3.

Federal Preemption and the Public Trust Doctrine

A series of United States Supreme Court cases has held that **upon the American Revolution, absolute property in, and dominion and sovereignty over, all lands under navigable waters were held in trust by the Thirteen Original States**. Further, upon adoption of the United States Constitution, the Thirteen Original States withheld their tidelands and navigable waters from the United States, and did not cede these land over to the new Federal Government. As a result, coastal State authority over trust lands is plenary, subject only to the powers surrendered to the Federal Government upon ratification of the Constitution of the United States.

What powers over State trust lands were surrendered to the Federal Government by the Constitution? First, the Constitution provides that the Constitution, all federal laws and international treaties "shall be the supreme law of the land." State laws that irreconcilably conflict with federal statutes are preempted, in accordance with the Supremacy clause, by the federal statute. There is no clear and distinct formula, however, that is applied by the courts in preemption cases. State law may be allowed to stand under various circumstances. Where a State's historic police powers are at issue, it is presumed that the federal law does not preempt the State law unless Congress clearly manifests this intent in the federal statute. Courts will also carefully scrutinize the federal statute for indications that Congress did not intend federal regulation to be exclusive, or whether federal agencies are required to consult with State authorities and to comply with their regulations. Finally, in the absence of an actual conflict between the State and Federal law, courts have found that there is no preemption. See Ch. X, §1.A and B.

The Constitution also provides that Congress has plenary authority "to regulate Commerce with foreign nations, and among the several states." The Commerce Clause permits Congress to exercise extensive authority over the nation's waters, especially over navigation. Despite Congress's unquestioned paramount power over State law in the area of navigation, State regulation of navigation is afforded substantial leeway when there is no directly applicable federal law, no need for a uniform national rule, and no evidence that the State action impedes the free and efficient flow of interstate or foreign commerce. See Ch. X, §1.C.

Finally, federally conducted activities may not be subject to a State's public trust authority (independent of a State's federally-approved CZM plan) on the basis of sovereign immunity. The presumption of federal sovereign immunity for federal actions is only overcome by an explicit waiver of such immunity in federal law (*e.g.*, section 307 of the CZMA). Nevertheless, both Congress and the courts have repeatedly made it clear that some degree of State control over federal activities within its borders is not only permitted but often desirable. Long-standing public policies recognize that the federal and state governments share responsibility for managing certain resources. Without an express

waiver of sovereign immunity, however, a State is greatly limited in exercising direct regulatory control over federal activities. See Ch. X, §1.D.

Asserting the Public Trust Doctrine Through the Coastal Zone Mangement Act

Sections 307(c)(1) and (3) of the Coastal Zone Management Act (CZMA) provide important and substantial authority for the States to require federally conducted and federally permitted projects to comply with a State's Public Trust Doctrine. For example, federal agencies planning construction projects in the coastal zone may be required to modify such projects if they adversely affect the public's trust interests. Further, federal agencies may be limited by the Public Trust Doctrine if they sell trust lands to private parties.

With respect to federally permitted projects, public trust principles may be used to require project modifications or to prohibit the projects altogether if they unacceptably affect the public's trust interests. Thus, Army Corps of Engineers "404" permits, or the Environmental Protection Agency's "NPDES" permits may be reviewed by a State in light of the State's Public Trust Doctrine.

In order to utilize the consistency provisions of the CZMA for implementing a State's Public Trust Doctrine, however, a State must clearly incorporate the State's Public Trust Doctrine into the "enforceable policies" of its federally-approved coastal zone management plan. Otherwise, the State's public trust law may either be preempted or severely limited by federal law governing these projects. See Ch. VIII, §4.

The Public Trust Doctrine And Selected Coastal Management Issues

1. Access to Public Trust Lands and Waters Based on The Public Trust Doctrine

It has been recognized by several courts that in order for the Public Trust Doctrine to have substance, the public must have reasonable access to trust lands and waters. **"Without some means of access" a New Jersey Court has written, "the public right to use the fore shore would be meaningless."**

With little exception, however, 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. Most often public rights of perpendicular access across private land are based on theories of custom, implied dedication, prescription, public easement,or as a condition for either a shoreland development permit, or a lease of State trust lands. 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 perpendicular access rights over private land.

In all States, the Public Trust Doctrine assures the public some right of lateral access along shorelands between the ordinary high and low water lines. For the most part, the public's lateral access includes recreational use of the shorelands. Maine and Massachusetts, however, do not recognize the public's right to use the tidelands for solely recreational purposes.

A limited but growing 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. 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." 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."

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." 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." See Ch. IV.

2. *Beach Fees*

Courts have held that beach fees are permissible so long as: (1) they are "reasonable," (2) the revenue generated from the fees is used to protect the beach and the beach-goers, and (3) the fees do not discriminate between residents and non-residents (at least those who are State citizens). Courts have struck down attempts by municipalities to charge higher

fees to out-of-town beach-goers by stating that "the public trust doctrine dictates that the beach andthe ocean waters must be open to all on equal terms and without preference and that any contrary State or municipal action is impermissible." See Ch. VIII, §3.A.

3. Private Docks and Wharves

Waterfront property owners often assume that their property's location entitles them to special rights to the adjacent shorelands and water. Over the centuries, both the common law and legislation have granted or upheld their right to build private docks and wharves on abutting public trust land to gain access to the navigable waters. In general, courts have tended to uphold such rights to the extent that they promote some public purpose without substantially impairing the public's interest in or use of trust lands.

As noted above, all of the public's trust rights are dominant to the private rights, such as any riparian or littoral "rights." Nonetheless, the traditional common law right to wharf out does not, in the absence of a statute to the contrary, require prior State approval. This "right" to wharf out is really a privilege, however, in that the right is merely implied from the State, and exists only so long as the State so permits.

In the event of a conflict between the construction or use of a private dock or wharf and the public's trust interests, a State can either order the removal of the dock or wharf or restrict the riparian's use of it. Either approach presents the coastal manager with potential "takings" claims. However, once the State regulates the construction and use of docks and wharves through legislation, a waterfront owner has no right to compensation for limitations or prohibitions placed on his docks or wharves.

"Dockominiums" are a special category of private docks and wharves. A dockominium is a private dock or slip space which an individual purportedly owns under a condominium-type ownership arrangement, rather than leases from the State. If this private ownership is of public trust lands and waters, it can terminate all public rights therein if granted without proper conditions. **The private and exclusive nature of dockominiums, where trust land is conveyed by the State legislature to private hands without furthering any trust interest, violates the Public Trust Doctrine.** Nor should any conveyance of a property interest in trust lands to private ownership be unconditionally irrevocable. See Ch. VIII, §3.B.

4. Tidelands Oil and Gas Development

The Public Trust Doctrine has been applied in several states to regulate the exploration, development and production of oil and gas found on public trust lands. The power of a State to convey leaseholds in trust lands for oil and gas production has been confirmed. At the same time, these conveyances have been held to be nothing more than permission

for such persons to explore or producethe oil and gas resource, while remaining subject to the public's continued trust rights to use the area in accordance with the Public Trust Doctrine in that State.

The production of oil and gas from State trust lands has been found to further the public's trust interests by promoting both commerce and navigation, and therefore is a proper use of public trust land. Revenue flowing to the State from oil and gas production is often partly or fully appropriated to study, preserve and manage coastal resources. Such funds clearly provide a public benefit for the public's trust resources. See Ch. VIII, §3.C.

5. Aquaculture

Fish are held in trust by the State for the public, and the State is obligated to preserve and protect this trust. Regulations governing the artificial cultivation of fish and shellfish are clearly within the scope of the Public Trust Doctrine, and in fact should incorporate public trust principles.

In the issuance of leases or permits for aquaculture, many states include provisions that the aquaculture operation will not interfere with other public uses of the area, such as fishing, lobstering, shellfishing, bathing or boating. Such express limitations on the operations are encouraged to clearly inform all parties that the aquaculture operation is subject to the State's Public Trust Doctrine.

Limitations have been placed on aquaculture, such as artificial oyster propagation, in order to protect naturally occuring marine species. For example, private shellfish aquaculture operations often are not allowed on public trust lands where natural shellfish beds occur.

The issuance of leases or permits for aquaculture becomes more problematic when the trust land is privately owned. In this case, the State is in the more difficult position of asserting that aquaculture is one of the public trust uses that, like navigation, commerce and fishing, was reserved by the State when the conveyance was made. In other words, the State must assert that aquaculture is part of the *jus publicum* interest reserved by the State, and was not included in the *jus privatum* conveyance to the private trust land owner.

If the aquaculture lease holder is different from the private trust land owner, questions will naturally arise as to how the rights of the two parties compare. Although it is broadly held that the public's *jus publicum* rights are superior to any *jus privatum* rights, it has been held in Massachusetts that a license to shellfish must not impair the private rights of the landowner to moor his boat in the area covered by the license, even if at low tide the boat would rest on, and therefore damage, the shellfish beds. See Ch. VIII, §3.D.

6. Environmental Protection

Historically, the common law rights of the public in trust lands and waters were related to navigation, commerce and fishing. **Recently, however, several states have recognized that in order for the public to exercise their right of fishing, there must be fish.** That is, there must be a sustaining environment within which the fish can live. Thus, the step from managing trust fisheries to preserving the ecological integrity of trust waters is not such a large one. As a result, the Public Trust Doctrine serves as a solid basis for environmental protection legislation or regulations.

Some State courts have upheld the regulation, and prohibition, of certain activities in order to protect water quality in accordance with the Public Trust Doctrine. A limitation on the diversion of water from tributaries feeding into navigable trust waters, which would result in a deterioration of trust water quality, as well as a moratorium on shorefront building permits have both been upheld by the courts based on public trust grounds.

A major problem confronting coastal resource managers is the deterioration of water quality due to non-point pollution resulting from upland land use practices. To date, no court has upheld an expansion of the doctrine as a basis for regulating land use above the ordinary high water mark.

Even as a basis for such regulation below the high water mark, applying the Public Trust Doctrine to water quality protection may be challenged in court. While water quality regulations would serve the public interest in one respect, they are likely to restrict other uses which the doctrine protects. See Ch. III.B.2.

7. Estuarine Ecosystems

Several States, in response to judicial decisions that have brought preservation of estuarine ecosystems within the scope of the Public Trust Doctrine, have included public trust principles into their estuarine management programs. Typically, these programs contain a "public purpose" test developed by the courts under the Public Trust Doctrine: the use must be water-dependent with minimal impact on public trust lands, waters and resources.

Estuarine management plans often exist in context, or are required to be consistent, with a State's federally-approved CZM plan. The CZMA requires comprehensive management plans, and encourages special area management plans. As a result, several States have designated estuaries as "areas of environmental concern" or "critical areas," and developed management plans to preserve the quality and integrity of entire estuarine ecosystems. See Ch. VIII, §3.E.

8. Waterfront, Harbor and Marina Development

Urban harbors and waterfronts have historically been the center of commercial activity, providing for widespread employment and generating tax revenues for State and local governments. Until recently, however, harbors and waterfronts have seen the economic and physical decline and decay resulting from a similar economic decline in activities protected by the Public Trust Doctrine, namely commercial and recreational fishing, fish processing, and ship maintenance and repair. Over time many waterfronts have become the least attractive areas of communities, marked by deteriorating wharves and warehouses, vacant buildings, incinerators, power plants and other facilities deemed too undesirable to go anywhere else. The clear trend in these economically decayed waterfront areas is for the historical and traditional water-dependent uses to be replaced by non-water dependent facilities—those that do not need a waterfront location but seek to maximize their value with water vistas and the general maritime ambience.

This trend provides a vivid illustration of the dilemmas and the extraordinarily difficult balancing process facing those charged with managing public trust lands and resources. In making the difficult decisions about how to allocate the limited waterfront resources among competing uses, coastal resource managers can make effective use of the Public Trust Doctrine because it affords them a legal basis for preferring water dependent uses and preventing undue encorachment of non-water dependent and private development near the water's edge without running afoul of takings challenges from upland property owners.

Marinas inherently symbolize these dilemmas. They are an omnipresent feature of most harbors, and serve a solid public trust purpose by serving the need for recreational boating facilities and furthering both commerce and navigation. They are clearly water-dependent uses. At the same time, their construction and operation can adversely affect public navigation, fisheries, water quality and ecologically sensitive areas. Moreover, their exclusive use of limited shorespace may lead to restricting rather than expanding public access to the trust waters. Tremendous demand to build marinas also raises the necessity of considering the cumulative impact of their construction and operation. See Ch. VIII.3.F.

9. Licensing and Leasing

One of the most important considerations for coastal managers is the extent of an agency's power to issue licenses or leases for activities on public trust lands. The control of coastal and waterfront development through licensing and leasing constitutes a significant portion of State regulatory activity.

Generally, a State agency needs statutory authorization to grant leases. If an agency does not have the explicity authority to grant leases, however, if it has general licensing

authority, the power tolease as well as license may well be implied. See Ch. IX, §1. This is so because a lease is essentially a legal authorization for the landowner to possess and use a parcel of land, which is not functionally different than a license. See Ch. VIII, §2.E.3.

By implementing a licensing or leasing program for public trust lands, a State agency can assume much greater control over activities and development of coastal resources, as well as having each license or lease come up periodically for renewal. Further, the fees raised by the licenses or lease payments should be applied towards coastal resource management, thus helping the agency accomplish its chief mission.

Since the trust lands subject to leasing is of great public importance and subject to potential controversy, the prudent agency should use regulations to establish the terms of years for various types of leases. Although an agency may be empowered to issue leases without regulations on an *ad hoc* adjudicatory basis, promulgating leasing regulations forces important issues to full public display, as well as putting the agency in a much better position in the case of a court challenge. Courts subject regulations to less rigorous judicial scrutiney than agency adjudicatory decisions and are consequently more likely to survive intact if challenged. See Ch. VIII, §2.E

Conclusion

The Public Trust Doctrine offers a coastal resource manager a powerful tool in addition to a State's regulatory police power. The doctrine places the coastal manager in the stronger position of managing publicly owned resources, rather than regulating privately owned property. The doctrine also provides a sound legal basis for requiring all uses of trust lands and waters to be water-dependent. Further, although much trust land is privately owned, these private rights in trust land are for the great part subject to the dominant rights of the public to use these same lands for a wide variety of recognized uses.

The Public Trust Doctrine is tremendously versatile. It can be used to address problems as diverse as public access to coastal areas, oil and gas production, and environmental quality. For example, negotiations on a permit application for a marina development, the promulgation of regulations to improve water quality, statutory restrictions on conveyances of trust lands to private ownership, or assessing leases and royalties on leasehold or mineral development, can all be based upon the Public Trust Doctrine.

In short, 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.

In addition, exercising a State's public trust authority is to exercise power over a State's own property. This places the coastal resource manager in a well protected position from successful "takings" arguments. The State and Federal case law concerning the "taking" of private property by a government without "just compensation" stems almost solely from the exercise of State police power; i.e. when the State attempts to regulate the use of someone else's property. By exercising its public trust authority, however, a State is managing its own property. Nearly all of the "takings" case law is thus irrelevant to this situation.

In the final analysis, the Public Trust Doctrine is a valuable legal legacy from Roman emperors and English kings to the American Public—the right to use and enjoy America's trust lands, waters and resources for a wide variety of legally protected public uses. This legal doctrine places over 191,000 square miles of lands and waters and the aquatic life therein, plus the 98,664 miles of shoreland below the ordinary high water line, in trust for the benefit of the public. As the public's trustee of these assets, each State is an important steward over what Roman Emperor Justinian claimed by the law of nature to be common to all mankind.

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 above 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.

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 (e.g. of 18.6 years).

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 (e.g. of 18.6 years).

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.

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 accretions and relictions, 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. More specifically, it is the zone between the "ordinary high water mark" and the "ordinary low watermark."

Tide waters: 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 mean high tide and the mean low tide lines.

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