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COMMENT: WHO SHOULD HAVE TITLE TO VIRGINIA TIDELANDS?

The Virginia tidelands are one of the state's greatest resources. Article XI of the Virginia Constitution raises to constitutional status the need to preserve the state's natural resources, and the Virginia Wetlands Act, VA. CODE ANN. §62.1-13.1 *et seq.* provides the mechanism by which the protection of the tidelands is to be achieved.

Counterpoised to this constitutional and legislative regard for the tidelands is section 62.1-2 of the Virginia Code, which provides that the rights and privileges of landowners with waterfront property shall extend to mean low-water mark. As interpreted in *Miller v. Commonwealth*, 159 Va. 924, 166 S.E. 557 (1932) (interpreting a predecessor statute), that language is not merely a grant of the right to use and enjoyment, but is a grant of title to the land between high- and low-water mark in fee simple absolute. Thus, Virginia is one of the few states to make a general grant of lands usually considered to be within the public domain. It is inevitable that private interests in the tidelands must collide with public concern for the preservation of natural resources. [For a thorough discussion of the problem, see Brion, *Virginia Natural Resources Law and the New Virginia Wetlands Act*, 30 Wash. & Lee L. Rev. 19 (1973).]

A more moderate approach than that taken in *Miller* would have been to recognize the rights of adjacent highland owners, but to have retained fee simple title in the state. Such an approach would have been in keeping with the "public trust" concept first suggested by the United States Supreme Court in *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842). The Court there opposed the alienation of state lands underlying navigable or tidal waters, noting that such lands were part of a "public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish as for floating fish." *Id.* at 413.

The principles of *Martin* were reaffirmed in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), wherein the Court upheld the right of Illinois to rescind an overextensive grant of lakebed along the Chicago waterfront. The Court relied on the public trust concept to oppose any alienation of public lands which would not benefit the public interest.

The public trust concept thus was developed well before *Miller v. Commonwealth*, and should have militated against an overbroad interpretation of the "rights and privileges" statute. Since the court in *Miller* was concerned with protecting exclusive hunting and fishing rights in the tidelands, it need only have found that the grant of rights and privileges gave sufficient color of title to adjacent highland owners to protect their interests in the tidelands. Indeed, this approach was taken by the Supreme Court of Georgia in a similar instance, the court finding that a grant of rights sufficient to protect one's interests in improvements made to oyster beds was not a grant of absolute title. See, *State v. Ashmore*, 236 GA. 401, 224 S.E.2d 334 (1976).

It is time for Virginia to reconsider the ownership of the tidelands. The public trust concept might prove the means by which increased control over the tidelands could be achieved. If the state courts were to accept the idea that the "rights and privileges" of section 62.1-2 are less extensive than the absolute title suggested in *Miller*, a landowner seeking to make changes to the tidelands would go before his local wetlands board carrying a heavier burden of proof. It is one thing to argue that one ought to be able to do what one wishes to one's own property, and quite another to argue for the right to alter lands held by the Commonwealth for the public good.

K.D.N.