THE PUBLIC TRUST DOCTRINE

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INTRODUCTION

Government ownership of land has always carried with it a series of public obligations that collectively limit the use of such land (usually for public rather than commercial or other private-like purposes) as well as its transfer or disposal. Thus, if a government holds or acquires a parcel of land, it may, for example, broadly use it for park, recreation, or government-administrative functions (such as postal services, fire and police stations, and other government offices). Also, broadly speaking, a government may sell or lease such land if it is found to be surplus, and typically it will be subject to no more than a disposal statute or regulation, which may require a public auction or other generalized offer to potential buyers or lessees. An exception is land which the government formally holds in trust for the public, subject to the public trust doctrine.

Broadly stated, the public trust doctrine provides that the government holds certain submerged and adjacent lands, waters, and (increasingly) other resources in trust for the benefit of its citizens, establishing the right of the public to fully enjoy them for a variety of public uses and purposes. Implied in this definition are limitations on the private use of such water, land, or other resources, as well as limitations on the government to transfer interests in those resources to private parties, particularly if such transfer will prevent or hamper their use by the public. These limitations give rise to questions including: (1) What is the distinction between the application of the public trust doctrine and the truism that government always holds land in trust for its citizens? (2) How and to what resources besides water and lands immediately adjacent to water does the public trust doctrine apply—does it apply to inland trails and trailheads, for

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example? (3) What private uses can the government permit on public trust water or land, short of sales or other transfers, which are generally prohibited—can the government permit private wharves for the loading and the unloading of passengers or freight from private vessels, for example? (4) Is public access to a public trust resource—like a pathway across private land to a public beach, for example—automatically a part of the public trust, or must that access be separately acquired by the government from the private landowner?

I. THE PUBLIC TRUST DOCTRINE DEFINED

The public trust doctrine ("PTD") may mean many things to many people, but there is usually at least a sharp divide between the common-law PTD universally associated with water, on the one hand (with roots in Roman law as it was practiced in England and as it came to the United States), and the universal principle that waters and lands held by the government are usually, if not always, held in trust for its citizens. Unfortunately, much literature and many courts confuse the two, with serious consequences for the public and private sector alike. For example, the common-law PTD has historically been applied only to water and resources directly related to water (riparian land, submerged land, and so forth), whereas the latter universal, general trust principle extends (by state statute and constitution, in many cases) to all manner of natural resources "owned" by the government. PTD resources are almost always held by—and are inalienable by—the government, and are limited to use by the public for purposes such as fishing, fowling, and the like. Resources merely held in general trust for the people are usually freely alienable and useable for a variety of private and commercial purposes (usually according to applicable public procurement law)[1] such as mineral exploration and extraction, with caveats that holding such resources for the public usually carries with it the need to preserve some semblance of public use and enjoyment. Aside from this critical distinction, this Paper focuses entirely on the uses of, and access to, PTD resources and the extent to which this formal designation is applicable beyond the traditional trust resources of water and water-related land.

1. *See* DANIELLE M. CONWAY, STATE AND LOCAL GOVERNMENT PROCUREMENT (2012).

II. THE PUBLIC TRUST DOCTRINE BEYOND INTERESTS IN WATER: NOT SO MUCH

There is little uniform application of the public trust doctrine among the states. The doctrine was first recognized in American law in the early nineteenth century in *Arnold v. Mundy*,[2] which held that, like England, submerged lands belong to the sovereign.[3] Within a few decades, the doctrine was expanded to include navigable waters.[4] Thus, the state owns and holds PTD waters that are navigable-in-fact, but lands submerged beneath non-navigable waters can be owned privately.[5] The doctrine has been expanded by some states, as certain courts extended the doctrine to include non-navigable waters,[6] ground water,[7] and (rarely) parklands.[8]

Many states have only extended the scope of the PTD beyond its traditional common-law application covering navigable waterways and tidelands to include more water resources, such as non-navigable waters, drinking water, groundwater, wetlands, all submerged or submersible lands, and even public ownership of all water in the state.[9] In 2007 and 2008, for example, eight Great Lakes states entered the Great Lakes—St. Lawrence River Basin Water Resources

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2. 6 N.J.L. 1 (1821).

3. *Id.* at 8, 32; *see also* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845) (ruling that the federal government held tidal-submerged lands in trust for future states prior to statehood).

4. *See, e.g.*, McManus v. Carmichael, 3 Iowa 1, 18, 30 (1856); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 484–85 (1988) (confirming that lands beneath both tidal and navigable-in-fact waters were state-owned public trust lands).

5. *See generally* Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649, 650 (2010).

6. *See, e.g.*, Montana Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 171 (Mont. 1984); State v. McIlroy, 595 S.W.2d 659 (Ark. 1980); Parks v. Cooper, 676 N.W.2d 823 (S.D. 2004).

7. *Infra* notes 70–71 and accompanying text (for information about Hawai'i and the Waiahole Ditch cases). Vermont has statutes declaring that groundwater resources are held in trust for the public, while the Great Lake States hold the lake water in trust for the public.

8. *See, e.g.*, Paepcke v. Pub. Bldg. Comm'n of Chicago, 263 N.E.2d 11, 15 (Ill. 1970); Friends of Van Cortland Park v. New York, 750 N.E.2d 1050, 1053 (N.Y. 2001).

9. For a meticulous summary of all fifty states' public trusts, including PTDs and the several issues they present, see Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1 (2007), and Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010) [hereinafter Craig, *Western States' Public Trust Doctrines*].

Compact, which, among other things, established a compact-wide PTD whose scope reaches waters beyond the individual states' common-law doctrines.[10] Among other things, such extensions of the public trust doctrine have generated tensions between state PTDs and pre-existing private-water rights—especially in the West where water is generally less plentiful, prior appropriation rights dominate, and conveyances of water resources and the lands underlying them often predate the states' succession to federal public trust rights at statehood.[11]

Few states, however, have expanded their PTDs to include lands and natural resources beyond water and the land beneath it. Although around twenty states might claim to have done so in some fashion—through language about holding resources in trust for the public in state constitutions, statutes, or case law—few of these have done so by expressly referencing the common-law public trust doctrine. Rather, they vaguely note that some resources are held in some sort of "public trust."[12] These expansions of the general state language about trusts for the public result in the coverage of wildlife and other natural resources such as air and minerals. These expansions have been mandated by constitutions and statutes as well as declared by appellate courts. In 1998, for example, the Alaska Supreme Court extended its PTD to cover all naturally occurring wildlife and minerals, based in part on several sections of the state constitution,[13] but it took a half step back the following year, describing the State's authority over wildlife and minerals to be merely trust-like but not a formal enlargement of the State's PTD.[14] Iowa followed a similar path, first suggesting that the State's PTD extended to public resources beyond water[15] and then narrowing its interpretation so as not to preclude the removal of natural timber from public lands administered by the conservation board.[16] The court noted that "[t]he purpose

10. Bridget Donegan, Comment, *The Great Lakes Compact and the Public Trust Doctrine: Beyond Michigan and Wisconsin Common Law*, 24 J. ENVTL. L. & LITIG. 455 (2009).

11. Craig, *Western States' Public Trust Doctrines*, *supra* note 9.

12. *Id.* Such states include Alabama, Alaska, California, Colorado, Connecticut, Hawai'i, Illinois, Iowa, Louisiana, Mississippi, New York, Ohio, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, and West Virginia. *Id.*

13. Baxley v. State, 958 P.2d 422 (Alaska 1998).

14. Brooks v. Wright, 971 P.2d 1025, 1031–32 (Alaska 1999).

15. Fencl v. City of Harper's Ferry, 620 N.W.2d 808 (Iowa 2000); *see also* Larman v. State, 552 N.W.2d 158 (Iowa 1996).

16. Bushby v. Washington Cty. Conservation Bd., 654 N.W.2d 494 (Iowa 2002).

of the public-trust doctrine is to prohibit states from conveying important natural resources to private parties" not the prevention of forestry management.[17] In Virginia, a federal court extended the PTD "to protect and preserve" the state's "natural wildlife resources" when the state and federal governments sued for damages in the death of waterfowl following an oil spill in the Chesapeake Bay.[18]

California, in its Fish and Game Code, proclaims that "[t]he fish and wildlife resources are held in trust for the people of the state [but not squarely through the public trust doctrine] by and through the [D]epartment [of Fish and Game]."[19] This provision has been upheld by a California appellate court when it granted summary judgment for private windmill operators in a suit brought by activists over bird deaths caused by wind turbines.[20] The court held that the plaintiffs should have sued the County of Alameda, instead, as the responsible public agency.[21] Connecticut, by statute, has created a public trust in the state's air and natural resources, and granted private parties the right to sue both governmental and private entities to protect them.[22] An Ohio code section—apparently in an attempt to justify laws regulating hunting—gives the state "title to all wild animals, not legally confined or held [privately] . . . in trust for the benefit of all the people."[23] The code in West Virginia does the same and specifically includes fish and amphibians.[24] Hawai'i's constitution, after declaring the need to balance conservation with self-sufficiency, states that "[a]ll public natural resources are held in trust by the State for the benefit of the people."[25] Michigan's constitution obliquely refers to the "public trust in air . . . or other natural resources" when discussing a conservation fund[26] but in practice follows a traditional form of the public trust doctrine. None of these courts or legislatures specifically reference the public trust doctrine, however.

17. *Id.* at 497 (internal quotations and citation omitted).
18. *In re* Stewart Transp. Co., 498 F. Supp. 38 (E.D. Va. 1980).
19. CAL. FISH & GAME § 711.7 (West, Westlaw through Ch. 5 of 2019 Reg. Sess.).
20. Ctr. for Biological Diversity, Inc. v. FPL Grp., 83 Cal Rptr. 3d 588 (Cal. Ct. App. 2008).
21. *Id.* at 606–07.
22. CONN. GEN. STAT. ANN. § 22a-16 (West, Westlaw through the 2014 Supplement).
23. OHIO REV. CODE ANN. § 1531.02 (West, Westlaw through Files 1 to 76 of the 130th Gen. Assembly (2013–2014)).
24. W. VA. CODE ANN. § 20-3-3 (West, Westlaw through the 2014 Reg. Sess.).
25. HAW. CONST. art. XI, § 1.
26. MICH. CONST. art. XI, § 40.

New York arguably represents the most expansive of such public trusts, so far. Under its constitution and statutes, New York's forest-preserve lands and specified state parks are forever inalienable and to be kept in a natural state, with timber removal for any reason prohibited.[27] The New York Supreme Court, since 1871, has held that municipalities hold parklands in trust for the public,[28] and more recently a host of opinions have reiterated that "[d]edicated park areas in New York State are impressed with a public trust."[29] A state appellate court has even held that a municipal parking lot could be within such public trusts if dedicated to public use by deed or legislative act, but it was unwilling to consider use alone in that context: "While a parcel's continuous use as a public park or recreational area may impress that parcel with a public trust by implication, the petitioners have cited no authority for the proposition that a parking lot may achieve public trust status through such means."[30]

In Illinois jurisprudence, which also breaks from tradition, the PTD applies not only to submerged lands but also to parks and conservation areas as long as they have been dedicated as such.[31] Classification of property as a "park" on a village land-use plan is insufficient to trigger the PTD.[32]

> To establish a right to a remedy under the [public trust] doctrine, [a] plaintiff must allege facts showing certain property is held by a government body for a given public use; the government body has taken action that would cause or permit the property to be used for purposes inconsistent with its originally intended public use; and such action is arbitrary or unreasonable.[33]

Much less ambitious than New York or Illinois, Colorado's concept of "public trust" land extends to state school lands, which are "held in a perpetual, inter-generational public trust for the support

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27. N.Y. CONST. art. XIV, § 1; N.Y. ENVTL. CONSERVATION LAW § 9-0301 (West, Westlaw through L.2014, chapters 1 to 17).

28. Brooklyn Park Comm'rs v. Armstrong, 45 N.Y. 234 (1871).

29. Grayson v. Town of Huntington, 160 A.D.2d 835 (1990); *see also* Johnson v. Town of Brookhaven, 230 A.D.2d 774 (N.Y. App. Div. 1996).

30. 10 E. Realty, LLC v. Incorporated Vill. of Valley Stream, 49 A.D.3d 764 (N.Y. App. Div. 2008), *rev'd on other grounds*, 907 N.E.2d 274 (N.Y. 2009).

31. Timothy Christian Sch. v. Vill. of Western Springs, 675 N.E.2d 168 (Ill. App. Ct. 1996).

32. *Id.* at 174–75.

33. *Id.* at 174 (quoting Paschen v. Vill. of Winnetka, 73 Ill. App. 3d 1023, 1028 (1979)).

of public schools."[34] In Alabama, the state constitution creates a "Forever Wild Land Trust" that buys and holds areas of natural beauty in trust for the people, however the trustee is not the State but an appointment board.[35] Unquestionably, the most extreme example of potentially expanding the public trust doctrine to lands with no relationship to water comes from Hawai'i, where plaintiffs seeking to block the construction of the world's largest reflecting telescope just off the summit of the state's 13,900-foot mountain, Mauna Kea, have challenged its construction in part on public trust doctrine grounds. The site is in an "astronomy precinct" on land leased by the University of Hawai'i from the State, and thirteen astronomical telescopes are already built and operating in the precinct.[36] In an earlier concurring opinion dealing with due process, two justices of the state supreme court specifically asked for thorough consideration of the application of the public trust doctrine to the site, which is dozens of miles from the nearest navigable water, and, of course—at thirteen thousand feet—never submerged.[37] However, in its subsequent opinion upholding a state department's granting a permit for the construction, the court failed to address the application of the PTD—as a concurring justice correctly observed—but instead held only that all public lands, like those on Mauna Kea, were held in some sort of trust for the public.[38] PTD in Hawai'i, so far, applies only to water.

While a few commentators have suggested that the public trust doctrine should be applied to some or all natural resources everywhere,[39] few courts have accepted this extension. Thus, for example, only the Supreme Courts of California, New Jersey, and Vermont have gone so far as to declare the PTDs in their states are elastic and

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34. COLO. CONST. art. IX, § 10.

35. ALA. CONST. art. XI, § 219.08.

36. *In re* Contested Case Hearing re Conservation District Use Application (Mauna Kea II), 431 P.3d 752, 773–75, 143 Haw. 379, 400–03 (2018). See, for commentary on Hawai'i's version of the public trust doctrine as well as an argument for more than one public trust doctrine, Thomas W. Merrill, *The Public Trust Doctrine: Some Jurisprudential Variations and Their Implications*, 38 U. HAW. L. REV. 261 (2016).

37. Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res. (Mauna Kea I), 363 P.3d 224, 251–57, 136 Haw. 376, 403–09 (2015).

38. *Mauna Kea II*, 431 P.3d at 785–87, 773–75. 143 Haw. at 412–14.

39. Hope Babcock, *Is Using the Public Trust Doctrine to Protect Public Parkland from Visual Pollution Justifiable Doctrinal Creep?*, 42 ECOLOGY L.Q. 1 (2015); Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741 (2012).

should evolve with the needs of the people they benefit.[40] On the other hand, in *Sanders-Reed v. Martinez*,[41] the New Mexico court held that the public trust doctrine did not empower the judicial branch to establish the best way to protect the atmosphere, citing decisions from other jurisdictions who also refused to extend the PTD to the atmosphere.[42] Indeed, some states have refused to extend the PTD from surface water to underground water.[43]

At least three states have recognized or created public trusts separate from, and as alternatives to broadening the scope of, their existing common-law PTDs. In Connecticut, the courts have applied two notions of "public trust": a common-law PTD "under which the state holds in trust for public use title in waters and submerged lands waterward of the mean high tide line,"[44] and a statutory public trust that "provides broadly that any person or corporation may maintain an action for declaratory and equitable relief against the state . . . for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction."[45] Moreover, according to the state supreme court, both types of "public trusts" are distinct from the principle that public parks and beaches are held by municipalities "for the benefit of the residents of the state."[46]

As noted by one PTD scholar, "several states have extended the concept of a public trust in waters to environmental protection," creating what she calls an "ecological public trust. California and Hawai'i have most extensively developed their ecological public trust doctrines,"[47] and they have done so by making law apart from the

40. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983) (en bank); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 879 A.2d 112 (N.J. 2005) (reaffirming principle discussed in *Borough of Neptune City*); State v. Cent. Vermont Ry., Inc., 571 A.2d 1128 (Vt. 1989).

41. 350 P.3d 1221 (N.M. Ct. App. 2015).

42. *Id.*

43. *See* Envtl. Law Found. v. State Water Res. Bd., 237 Cal. Rptr. 3d 393 (Cal. Ct. App. 2018).

44. Fort Trumbull Conservancy, LLC v. Alves, 815 A.2d 1188, 1192–93 n.4 (Conn. 2003) (quoting Leydon v. Town of Greenwich, 777 A.2d 552 (Conn. 2001)).

45. Fort Trumbull Conservancy, LLC v. City of New London, 925 A.2d 292 (Conn. 2007) (quoting CONN. GEN. STAT. ANN. § 22a-16 (West, Westlaw through the 2014 Supplement)) (internal quotations and ellipses omitted).

46. *Alves*, 815 A.2d at 1193 n.4.

47. Craig, *Western States' Public Trust Doctrines*, *supra* note 9, at 71.

traditional common-law doctrine related to waterways and tidelands. In 2008, the California Supreme Court decided that there are

> two distinct public trust doctrines[:] . . . the common law doctrine, which involves the government's affirmative duty to take the public trust into account in the planning and allocation of water resources . . . [and] a public trust duty derived from statute, specifically Fish and Game Code section 711.7, pertaining to fish and wildlife.[48]

Arguably, Hawai'i boasts four public trusts: (1) a navigable-waters PTD under traditional common law; (2) a Native Hawaiian "public" trust derived from Hawaiian history and culture under which chiefs and, later, the monarchy held all water in trust for the people; (3) a statutory public trust set out in the State Water Code, which incorporates both (1) and (2) and, among other things, provides for a Commission on Water Resource Management to regulate uses of both groundwater and surface water via an often contentious permitting process; and (4) a constitutional public trust over the lands returned by the federal government at statehood, benefiting Native Hawaiians and the public at large.[49] All four public trusts are supported under Hawai'i's Constitution.[50]

In sum, courts, legislators, and state constitutions often declare various lands and other resources to be held in trust for the public. However, they rarely declare such land and resources to be subject to the public trust doctrine.

III. THE PUBLIC TRUST DOCTRINE AND PRIVATE PROPERTY

While it is true that sometimes public property held in trust for the public is subject to the public trust doctrine, the situation is somewhat different with respect to private property. There are two major lines of cases: first, those cases in which a state was allowed to convey

48. Envtl. Prot. Info. Ctr. v. California Dep't of Forestry & Fire Prot., 187 P.3d 888, 926 (Cal. 2008).

49. *See* Craig, *Western States' Public Trust Doctrines*, *supra* note 9, at 86–88, 118–27 (discussing the complex nature and history of water, land, and the public trust in Hawai'i); HAW. REV. STAT. §§ 174C-1 to -101 (West, Westlaw through Act 247 of the 2013 Reg. Sess.) (setting forth Hawai'i's state water code).

50. HAW. CONST., art. XI, §§ 1, 7; *id.* art. XII, § 4.

public trust lands to a private property owner because a public purpose was still being served and the public trust lands were not adversely affected by the conveyance, and second, those cases in which a state conveyed, outright, lands held in the trust for the public.[51] However, in the second line of cases, the private owners could only use such lands insofar as the use was consistent with the public trust doctrine. Regardless of which line of reasoning the courts adopted, the main point appears to be that private use of public trust lands, whether or not clearly subject to the public trust doctrine, is allowed, so long as it furthers the purpose of the public trust.

A. Illinois Central *and Private Interests*

In the landmark 1892 case, *Illinois Central Railroad v. Illinois*,[52] the United States Supreme Court provided that a state

> can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.[53]

Illinois Central did provide that privatization of public trust doctrine resources could occur if the conveyance furthered a public purpose and there was no substantial impairment of remaining trust resources.[54] Several cases have adopted these *Illinois Central* exceptions, notably in California with *Boone v. Kingsbury* (though this case has not been cited by any other case, in California or elsewhere).[55] In *Boone*, the California Supreme Court upheld leases given to private parties to drill oil on trust lands, concluding that it would not substantially interfere with the trust and noting that the State could revoke the leases if there was substantial interference.[56] In Wisconsin, the state supreme court upheld the conveyance of submerged lands of Lake Michigan to a private party because it was part of a larger public scheme.[57]

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51. *See infra* discussion in Part III.
52. 146 U.S. 387 (1892).
53. *Id.* at 453–54.
54. *Id.*
55. 273 P. 797 (Cal. 1928).
56. *Id.* at 816.
57. City of Milwaukee v. State, 214 N.W. 820, 830 (Wis. 1927); *accord* State v. Vill. of Lake

Generally, in cases where a state has conveyed a public trust interest, private parties are still burdened by the public trust doctrine. After *Illinois Central*, the public trust doctrine did not require full public ownership of lands; privatization was (and is) allowed as long as the *res publicum* is maintained. Almost a century later, the U.S. Supreme Court recognized that individual states may define the lands held in public trust and recognize private rights in such lands.[58]

B. Examples of Private Interests in Public Trust (Doctrine) Property

Generally, as long as the property is not placed beyond the state's control and the private party is upholding the interests of the public trust (doctrine), private use of public trust resources is allowed. Essentially, the private party becomes the trustee for that particular parcel. Should the private party cease to use the property in a way that benefits the public trust, the state can reclaim that land, even if it appears to be held by the private property owner in fee simple.

1. Alaska

A corporation and caretaker filed an action against a fisherman for trespass in *CWC Fisheries, Inc. v. Bunker*.[59] The Alaska Supreme Court found that the corporation could not maintain the action against the fisherman because, while the property had been conveyed by the State to the private corporation, it was still subject to the public trust. Thus, there was a continued public easement across the property.[60]

2. California

In 1971, the California Supreme Court decided *Marks v. Whitney*,[61] recognizing that a landowner could have private interests (possession and alienation) in public trust land but that interest was burdened

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Delton, 286 N.W.2d 622 (Wisc. App. 1979); W. Indian Co. v. Gov't of Virgin Islands, 643 F. Supp. 869 (D.V.I. 1986). *See also* State v. S. Sand & Material Co., 167 S.W. 854, 856 (Ark. 1914) (upholding the legislature's authority to sell sand and gravel, as it did not impair the right of common enjoyment).

58. Phillips Petrol. Co. v. Mississippi, 484 U.S. 469, 475 (1988).

59. 755 P.2d 1115 (Alaska 1988).

60. *Id.*

61. 491 P.2d 374 (Cal. 1971).

by the public's rights.[62] Thus, private development or use was restrained if it was inconsistent with the public's rights.[63] This has been followed by New York,[64] South Carolina,[65] and Michigan.[66]

In a more recent California Supreme Court decision, the court found that there was continuous state supervision of public trust resources, regardless of whether the property was in public or private ownership.[67] This principle has been followed by several other districts; for example, in the Vermont cases cited below,[68] as well as in New Jersey[69] and Hawai'i.[70] Courts following this doctrine do not *eliminate* private property but rather place conditions on it (*e.g.*, should the property no longer be used for the public trust, the state has a right of re-entry).[71] Thus, while private property interests are not eliminated, they can be restricted, especially with respect to development rights.[72]

3. Idaho

In *Kootenai Environmental Alliance v. Panhandle Yacht Club*,[73] the plaintiff environmental group sued to stop a private dock from being

62. *Id.*

63. *Id.* at 380–81.

64. Arnold's Inn, Inc. v. Morgan, 35 A.D.2d 987, 993 (N.Y. Sup. Ct. 1970) (ordering a landowner to remove fill he put in a bay).

65. McQueen v. South Carolina Coastal Council, 580 S.E.2d 116, 119 (S.C. 2003) (denying a takings claim concerning the denial of a fill permit for Myrtle Beach).

66. Glass v. Goeckel, 703 N.W.2d 58, 65 (Mich. 2005) (holding that public trust gave the public access to privately owned lands along the Great Lakes below mean high water mark).

67. Nat'l Audubon Soc'y v. Superior Court (*Mono Lake*), 658 P.2d 709, 712 (Cal. 1983).

68. *See infra* notes 97–105 and accompanying text.

69. Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 121 (N.J. 2005) (requiring an upland private property owner to provide public access to the water even though public use of the upland is subject to an accommodation of interest of the owner).

70. *In re* Water Use Permit Applications (Waiahole I), 9 P.3d 409, 452, 454 (Haw. 2000) (citing *Mono Lake* as instructive and indicating a preference to accommodate both instream and offstream uses where feasible); *In re* Water Use Permit Applications (Waiahole II), 93 P.3d 643, 658 (Haw. 2004) (noting that public and private water uses should be evaluated on a case-by-case basis when considering the public trust).

71. *See Waiahole I*, 9 P.3d 409 (The court affirmed the authority of the state to grant nonvested usufructuary rights to appropriate water even if the diversions harm public trust uses. Courts and agencies are required to approve such diversions and to minimize harm to the trust); *Waiahole II*, 93 P.3d 643 (affirming the same authority as *Waiahole I*); *see also* Ctr. for Biological Diversity, Inc. v. FPL Grp., 83 Cal Rptr. 3d 588, 601 (Cal. App. 2008).

72. *See* Blumm, *supra* note 5, at 650.

73. 671 P.2d 1085 (Idaho 1983).

built on a lake.[74] The Idaho Supreme Court ultimately held that although the grant to build the dock was subject to the public trust doctrine, it did not violate the doctrine since there was a navigational or economic necessity to justify the permit.[75] Moreover, the court found there would be no adverse effect on the property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, or water quality.[76]

In subsequent cases, the State attempted to construct a public beach, docks, and parking lot on property the landowner allegedly owned in fee simple. Ultimately, the court concluded that the State failed to demonstrate that the property in question was subject to the public trust doctrine; therefore, the State was enjoined from its construction since the plan exceeded the district's rights under the easement over the property.[77]

4. Illinois

A century ago, in *People ex rel. Attorney General v. Kirk*,[78] the Illinois Supreme Court found that the legislature had the power to convey lands held under the public trust doctrine in order to build boulevards and driveways, because the public interest was not impaired.[79] Similarly, in a 2003 case the Illinois Supreme Court found that collecting an admission fee did not ipso facto diminish or impair the rights of the public in the trust.[80] Although in that case it was determined that there were no private interests at issue, presumably if there was a private interest in public trust lands that involve charging a nominal fee, it would likely be upheld—so long as the public interest was served and the rights of the public were not harmed.[81]

Worth noting and following is the erupting litigation in Illinois that has attempted to block the location of the Obama Presidential

74. *Id.*
75. *Id.* at 1095.
76. *Id.* at 1095–96.
77. *See* Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvem't Dist., 733 P.2d 733 (Idaho 1987), *further reviewed in* Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvem't Dist., 17 P.3d 260 (Idaho 2000).
78. 45 N.E. 830 (Ill. 1896).
79. *Id.*
80. Friends of Parks v. Chicago Park Dist., 786 N.E.2d 161, 168 (Ill. 2003).
81. *Id.*

Library on Chicago lakefront parkland.[82] Chicago is contesting the objectors' claims both that the parkland, having never been submerged, could be subject to the public trust doctrine as interpreted in the *Illinois Central* case and that such a quasi-public use would, in any event, be inconsistent with the *res publicum* in the parkland, noting that a museum and a planetarium already sit on such land.[83] The issues are strikingly similar to those raised in Hawai'i's TMT case,[84] where the first issue—about the mountain failing to be subject to the PTD because it had never been submerged—was studiously avoided by the Hawai'i Supreme Court. However the court clearly and unanimously held that the telescope, to be built by a consortium of universities, would, in any event, be an appropriate use not conflicting with a *res publicum*. It also noted that other telescopes were already constructed on the summit and slopes of the state-owned, mountaintop land.[85]

5. New Jersey

An interesting case is that of *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club*,[86] in which a private beach club charged its members a fee to access the private beach.[87] Basing its decision on *Matthews v. Bay Head Improvement Ass'n*,[88] the New Jersey Supreme Court found that the private beach had to be opened to the public for a reasonable fee (the amount to be determined later by the State).[89] In a roundabout way, this could be construed as an example of a private use or benefit of public trust land, especially if the members paid a different fee structure than the public.

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82. Protect Our Parks, Inc. v. Chicago Park Dist., No. 1:18-CV-03424, 2018 WL 2194256 (U.S.D.C./N.D. Ill. 2019).

83. *See* Defendant's Memorandum in Support of their Motion to Dismiss for Lack of Subject Matter Jurisdiction, *Protect Our Parks, Inc.*, 2018 WL 2194256 (filed Nov. 21, 2018).

84. *See In re* the Contested Case Hearing re Conservation District Use Application (CDUA) for the Thirty Meter Telescope of the Mauna Key Science Reserve, SCOT-17-0000705 (Haw. 2018).

85. *In re* Contested Case Hearing re Conservation District Use Application (Mauna Kea II), 431 P.3d 752, 773–75, 785–87, 143 Haw. 379, 400–03, 412–14 (2018).

86. 879 A.2d 112 (N.J. 2005).

87. *Id.* at 121.

88. *See* Matthews v. Bay Head Improvem't Ass'n, 471 A.2d 355 (N.J. 1984).

89. *Atlantis Beach Club, Inc.*, 879 A.2d at 124.

6. Rhode Island

In a Rhode Island case, a town sought to enjoin a ferry boat from docking over a pond.[90] The Rhode Island Supreme Court held that while the State had transferred all "right[s], title[,] and interest[s]" of the pond to the town, the State did not relinquish its public trust responsibilities.[91] Because there was a state statute allowing the ferry boat company exclusive jurisdiction over development and operations, the court ruled that the town could not enjoin the company's activities despite violations of the town's zoning laws.[92]

7. Texas

In *City of Galveston v. Menard*,[93] the Supreme Court of Texas upheld the validity of a land patent for submerged beds, noting that while ordinarily it is best to devote the State's water interests to public use, sometimes the public's use and enjoyment of property can best be fulfilled by allowing portions to be used for wharves and docks.[94] In a subsequent case a century later, the State argued that it owned certain submerged land as part of the public trust despite a patent conveying that land to a private owner.[95] Based on earlier decisions, the court noted that where the grant was explicit as to its reservations (and did not include an encumbrance based on the public trust doctrine), the State could not later assert an interest.[96] The lands were not encumbered by the public trust doctrine.

8. Vermont

In Vermont, the state's supreme court ruled that although a railroad company held fee simple title to filled lands along the city's waterfront, it did not hold title free of the public trust doctrine; therefore the lands could only be used for purposes approved by the legislature as public uses.[97] Should the company use the lands for anything

90. Champlin's Realty Assocs., v. Tillson, 823 A.2d 1162 (R.I. 2003).
91. *Id.* at 1167.
92. *Id.* at 1169.
93. 23 Tex. 349 (1859).
94. *Id.*
95. Natland Corp. v. Baker's Port, Inc., 865 S.W.2d 52, 59 (Tex. App. 1993).
96. *Id.*
97. State v. Cent. Vermont Ry., Inc., 571 A.2d 1128 (Vt. 1989).

but railroad, wharf, or storage purposes, the State would have a right of re-entry.[98] Quoting the California *Mono Lake* case, Vermont's high court stated:

> the 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 lands underlying those waters. . . . The corollary rule which evolved in tideland and lakeshore cases bar[s] conveyance rights free of the trust except to serve trust purposes . . . . [P]arties acquiring rights in trust property generally hold those rights subject to the trust and can assert no vested right to use those rights in a manner harmful to the trust.[99]

The Vermont court also cited a Massachusetts case involving early nineteenth-century statutes granting a wharf company the right to construct wharves in the Boston Harbor and hold them in fee simple.[100] In 1964, a development company that had obtained the rights to the wharves attempted to confirm the title in the lands beneath them. The Massachusetts court ultimately decided that the development corporation had title to the property, "but subject to the condition subsequent that it be used for the public purposes for which it was granted."[101]

In a 2001 case, the Vermont Supreme Court ruled in favor of the State over a bank and condominium association.[102] A project held in condominium ownership had been developed over land that had once been part of a lake (it had been filled in the 1800s). The project was constructed on the land, and, ultimately, it was determined that the land over which it was constructed was part of the public trust. The bank and condominium association argued that the public trust doctrine should be modified to recognize the power of the legislature to convey public trust lands to private ownership.[103] While recognizing that this power does technically exist, the court did not find that the State clearly intended to convey the land free of the public trust

98. *Id.* at 1135.

99. *Cent. Vermont Ry., Inc.*, 571 A.2d at 1132 (quoting Nat'l Audubon Soc'y v. Superior Court (*Mono Lake*), 658 P.2d 709, 712 (Cal. 1983)).

100. Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356 (Mass. 1979).

101. *Id.* at 367.

102. Cmty. Nat'l Bank v. State, 782 A.2d 1195 (Vt. 2001).

103. *Id.* at 1197.

obligations.[104] Thus, the court affirmed that the bank and association held the property subject to the state's public-trust-doctrine interest. While the property values decreased,[105] presumably some private use still existed (although the case is not clear).

In sum, private ownership and use of public resources impressed with the public trust doctrine is allowed, so long as the private use conforms to public trust purposes.

IV. ACCESS TO THE PUBLIC-TRUST-DOCTRINE RESOURCE

Above the mean high water mark, several theories have been applied to give the public access to privately owned beach areas, including prescriptive easements, implied dedication, custom, and extension of the public trust.[106] This section focuses only on the extension of public trust doctrine, specifically those cases and secondary sources discussing access to public-trust-doctrine resources.[107] Trust resources are often surrounded by privately owned property, raising questions of the public's ability to reach the resource.[108] While some jurisdictions hold that access to the resource is part of the public trust doctrine, this access is limited,[109] and government agencies employ the police power to regulate access.[110]

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104. *Id.* at 1198.

105. *Id.* at 1197.

106. Linda A. Malone, *Public Rights in Beach Areas*, *in* 1 ENVIRONMENTAL REGULATION OF LAND USE § 3:4 (2013).

107. *See, e.g.*, A. Dan Tarlock, *Access to Public Waters-Beach Access*, *in* LAW OF WATER RIGHTS AND RESOURCES § 8:32 (2013) ("Because there is no privilege to trespass on private land to exercise a public right, the public may not enter on privately owned upland to reach public rights. Access must either be over public land open to the public or by the permission of the upland owner. . . . [T]he line between public rights and exclusive private property is eroding. There are two primary reasons. One is the practical problem that a citizen exercising a public right to use water cannot easily determine the water boundary. Also, some temporary upland use may be necessary to enjoy the public right. Second, in addition to these practical problems, there are pressures to expand access to public waters caused by a growing population with an increasing taste for leisure. Courts and legislatures have responded both to the practical problems and to the pressures by creating new public rights of access. These public rights extend mainly to beaches, but limited rights to use the uplands bordering navigable recreational streams exist in some states.").

108. RICHARD G. HILDRETH & RALPH W. JOHNSON, OCEAN AND COASTAL LAW 94 (1983) ("Preserving public recreational access rights in navigable waters has become one of the principal uses of the public trust doctrine.").

109. *See, e.g.*, Township of Neptune v. State, 41 A.3d 792, 802 (N.J. App. Div. 2012) (holding that the State is under no obligation to dredge channels in a body of water to ensure access).

110. *See, e.g.*, State v. Oliver, 727 A.2d 491, 497 (N.J. Super. Ct. App. Div. 1999) (upholding

Public trust access also has an equal-protection component: state and local governments cannot allow some members of the public to use the trust resource and deny others access without a rational basis.[111] Issues regarding equal access most often arise when a public trust resource is conveyed or leased to private parties, which inevitably, to some extent, deprives other members of the public access.[112] The public's right to use public trust resources bars the owners of property contiguous to the resource from interfering with the public's lawful access.[113]

Some states define the public trust doctrine as including the protection of public access to navigable waters and of environmental quality.[114] In a series of cases, the New Jersey Supreme Court has

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conviction of the defendants for surfing when the beach had been closed due to a hurricane and stating that "[w]e need not, on these facts, determine the outer limits of such jurisdiction [of the Borough of Spring Lake] or the further relationship between the Public Trust Doctrine and territorial jurisdiction"); Sea Watch, Inc. v. Borough of Manasquan, 451 A.2d 192 (N.J. Super. Ct. App. Div. 1982) (holding that the municipality could charge a reasonable fee to use a walkway).

111. Capano v. Borough of Stone Harbor, 530 F. Supp. 1254 (D.N.J. 1982). Applying New Jersey law, the court held that the public trust doctrine did not require the defendants to permit swimming on all of the beach areas of a city. *Id.* The city could not, however, allow a group of nuns to use a particular beach while denying access to other members of the public. *Id. Cf.* Secure Heritage, Inc. v. City of Cape May, 825 A.2d 534, 548 (N.J. Super. Ct. App. Div. 2003) (holding that establishing limits on the number of beach passes and on the transferability of passes was non-discriminatory and did not violate the public trust doctrine); Jersey City v. State Dep't of Envtl. Prot., 545 A.2d 774, 783 (N.J. Super. Ct. App. Div. 1988) (finding no violation of the public trust doctrine where a marina was to be open to the general public on a non-discriminatory, first-come-first-serve basis, and commending that "[u]nsubsidized market-mechanism price determination for berthing service does not alone imply invidious discrimination").

112. ABKA Ltd. P'ship v. Wisconsin Dep't of Natural Res., 635 N.W.2d 168, 182 (Wis. Ct. App. 2001) ("In essence, a dockominium development attempts to offer a small class of boat owners the exclusive and permanent right to own and to occupy a portion of public trust waters and provides access to the waters to a select group of the public, which fails to satisfy the purpose of the public trust doctrine."); Kootenai Envtl. All., Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1098 (Idaho 1983) (Bistline, J., concurring) (stating that a private yacht club "is not a public purpose which is within the power of the state to grant under its trust duties to the public which it serves").

113. *In re* Ownership of Sanders Beach, 147 P.3d 75, 85 (Idaho 2006) (rejecting the argument by landowners of lakeside property that as part of their littoral rights they could exclude the public from the area between the high and low water mark during periods when water did not cover the area, on the grounds that this suggested littoral right "would be contrary to the central substantive thought in public trust litigation"); South Dakota Wildlife Fed'n v. Water Mgmt. Bd., 382 N.W.2d 26, 30 (S.D. 1986) ("[T]he riparian owner may not interfere with or prevent the public's use or lawful access.").

114. *See, e.g.*, State v. Sorensen, 436 N.W.2d 358 (Iowa 1989). In holding that the public trust applied to land formed by accretion from the Missouri River, the court noted that the

broadly defined public-access rights, requiring adjacent property owners to provide that access.[115] In *Neptune City v. Avon-by-the-Sea*,[116] the New Jersey Supreme Court held that a municipality could not discriminate between residents and non-residents when charging a fee for the use of a municipally owned beach.[117] The issue raised was the right to ocean access under the public trust doctrine. The court concluded that the doctrine "dictates that the beach and the ocean waters must be open to all on equal terms."[118] The court reasoned that the public trust doctrine requires the use of municipally owned dry-sand beaches to facilitate access to trust resources.[119]

In 2003, *Neptune City* was affirmed when an appellate court held that a provision of an ordinance banning the sale and transferability of seasonable beach tags to the lodging industry "does not discriminate against non-residents nor does it offend the public trust doctrine."[120] However, the section of the ordinance banning the sale of seasonable beach tags to hotels, motels, inns, and the like, while allowing individuals to purchase transferable beach tags violated equal protection.[121]

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land was suited for public access to the river and took judicial notice "of the expanding involvement of Iowans in recreational activities on or near navigable waters such as the Missouri River." *Id.* at 363. For a comprehensive analysis of this development, see Craig, *Western States' Public Trust Doctrines*, *supra* note 9. In *DeWolf v. Apovian*, No. 08 MISC 381982 HMG, 2012 WL 3139702 (Mass. Land Ct. 2012), *adhered to on reconsideration*, 2012 WL 6684766 (Mass. Land Ct. 2012), the Massachusetts Land Court held that the owner of a lot adjacent to a lot on which a jetty is located had no easement to use the jetty, but that "the structure and land between the mean high and mean low water marks remain subject to the rights of the public encompassed within the Public Trust Doctrine." *Id.* at *9. *See also* A. Dan Tarlock, *The Public Trust*, *in* LAW OF WATER RIGHTS AND RESOURCES § 8.18 (2013) ("Because the doctrine is almost entirely judge-made, in the early years of the environmental movements, lawyers seized upon the trust as a basis for judicial review of all resource choices. As a result, the classic public trust is being merged with the traditionally unrelated assertion of state ownership of water in trust for the people to produce judicial limitations on the exercise of all water rights." (citations omitted)).

115. For a complete overview of all New Jersey cases, see Thomas J. Fellig, *Pursuit of the Public Trust: Beach Access in New Jersey from* Neptune v. Avon *to* Matthews v. BHIA, 10 COLUM. J. ENVTL. L. 35 (1985).

116. 294 A.2d 47 (N.J. 1972).

117. *Id.*

118. *Id.* at 54.

119. *Id. See, e.g.*, Van Ness v. Borough of Deal, 393 A.2d 571, 573 (N.J. 1978) (stating that its holding in *Avon* did not apply only to the wet-beach area between low and high water); *see also* Lusardi v. Curtis Point Prop. Owners Ass'n, 430 A.2d 881 (N.J. 1981).

120. Secure Heritage, Inc. v. City of Cape May, 825 A.2d 534, 548 (N.J. Super. Ct. App. Div. 2003).

121. *Id.* at 549.

The decision in *Neptune City* raises the question of whether the same public beach access would be required if the dry-sand beach had not been publicly held.[122] In *Matthews v. Bay Head Improvement Ass'n*, the court answered this question affirmatively.[123] There, an association of property owners sought to restrict the public's access to beaches controlled by the association. Further expanding the public trust doctrine and access rights, the court held that the public must be afforded reasonable access to the shore and a suitable area for recreation on the dry sand, even if the public's rights on private beaches are not coextensive with the rights they enjoy on municipal beaches.[124] Ultimately, the court required the owners association to open its beach by offering membership in the association to the public.[125]

In *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc.*,[126] an appellate court clarified *Matthews*, liberally holding in favor of public access and requiring that the owners of a private beach provide access across the dry sand for the public to enjoy trust resources.[127] The court ignored the landowner's claims that public access would prevent the owner from generating a profit from serving its own clientele, would require the landowner to provide lifeguard services without charge, and would even address the fee that the landowner could charge.[128]

On the other hand, some jurisdictions are adamant that access across private land in order to reach a public trust resource is the equivalent of an easement, requiring compensation to the affected private landowner. Maine, Massachusetts, and New Hampshire so require. Perhaps the clearest of these judicial declarations comes from *Opinion of the Justices (Public Use of Coastal Beaches)*,[129] in which the Supreme Court of New Hampshire rejected a statutory attempt to legislate access to public beaches across private property. Liberally citing the Maine case of *Bell v. Town of Wells*[130] (which was decided

122. *Access to Trust Resources*, *in* 1 STATE ENVIRONMENTAL LAW § 4:19 (2013).

123. 471 A.2d 355 (N.J. 1984).

124. *Id.* at 365–66.

125. *Id.* at 369.

126. 851 A.2d 19 (N.J. Super. Ct. App. Div. 2004).

127. *Id.* at 29 (rejecting the argument that no access was required because the public had other means of reaching the sea, in part because of "the inconvenience associated with the nearest available perpendicular access to the north").

128. *Id.* at 29–30, 33.

129. 649 A.2d 604 (N.H. 1994).

130. 557 A.2d 168 (Me. 1989).

on the constitutional right to exclude the public from private property[131]), the New Hampshire court held that "[a]lthough the State has the power to permit a comprehensive beach access and use program by using its power of eminent domain, it may not take property rights without compensation through legislative decree."[132] The court closed by noting that "if the work is one of great public benefit, the public can afford to pay for it."[133]

CONCLUSION

In sum, there continues to be a lot of confusion between the public trust doctrine and the concept of the government generally holding property or resources in trust for its citizens. The former carries a lot more public responsibilities with it. The latter does or does not, depending upon the language of the constitution or legislation that establishes the resource as either a different kind of trust or no trust at all. It is also clear that despite suggestions and commentary to the contrary, there is virtually no movement to extend the public trust doctrine beyond its traditional association with and application to water and water resources, submerged lands, and shoreland.[134] Moreover, it is abundantly clear that many private uses of public trust resources are routinely permitted so long as the *res publicum* of the PTD is preserved and there is some public benefit to the private use. Finally, most state courts that have considered the matter do not extend the PTD to include the public's right to access the PTD resource across private property. Courts in New England are particularly clear that if the public wants access to a PTD resource across private land, the public must pay for it.

131. *Id.* at 178 ("The interference with private property here involves a wholesale denial of an owner's right to exclude the public.").

132. *Opinion of the Justices*, 649 A.2d at 611.

133. *Id.* (quoting Eaton v. B.C. & M.R.R., 51 N.H. 504, 518 (1872)).

134. The only true exception appears to be in New York, the courts of which extend the PTD to public parks.