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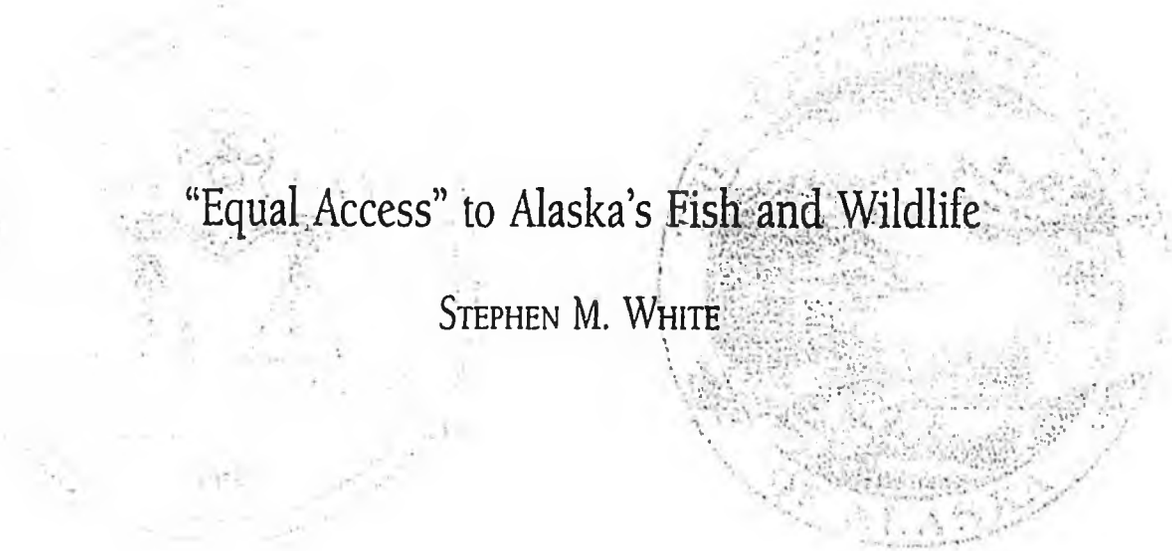

"Equal Access" to Alaska's Fish and Wildlife

STEPHEN M. WHITE

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Duke University School of Law

resource uses. The court is presently faced with these issues in another appeal involving access to fish and wildlife.[2] Thus, the court has an immediate opportunity to more clearly define the meaning of "access" to fish and wildlife, and to concretely establish the scope and limitations of the equal access clauses.

This article will analyze the court's treatment of equal access in the fish and wildlife context to date. First, part II considers the court's "common use clause"[3] jurisprudence. Part III then discusses decisions under the "no exclusive right of fishery" clause.[4] Part IV analyzes the law under the "uniform application clause."[5] Part V then examines some of the unifying principles and themes of the equal access clauses. Part VI discusses the relationship between the equal access clauses and other constitutional provisions, such as the "preferences among beneficial uses" clause and the equal protection clause. Finally, this note concludes that the court should take the next available opportunity to further clarify the meaning of "equal access."

II. THE "COMMON USE" CLAUSE

A. Public Trust Principles

Article VIII, section 3 of the Alaska Constitution, often referred to as the "common use" clause, provides that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[6] The Alaska Supreme Court has called the common use clause "a unique provision, not modeled on any other state constitution."[7] The clause embodies public trust principles that arise from a long history in this country of state managed wildlife resources.[8] The United States Supreme

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2. In *State v. Kenaitze Indian Tribe*, No. S-6162, the state is appealing a decision holding that the provision in Alaska Statutes section 16.05.258, authorizing the establishment of nonsubsistence use areas, violates the equal access clauses. The lower court decision was issued in *Kenaitze Indian Tribe v. State*, No. 3AN-91-4569 Civil (Alaska Super., Nov. 26, 1993) (final judgment).

3. ALASKA CONST. art. VIII, § 3.

4. ALASKA CONST. art. VIII, § 15.

5. ALASKA CONST. art. VIII, § 17.

6. ALASKA CONST. art. VIII, § 3.

7. Owsichek v. State, 763 P.2d 488, 493 (Alaska 1988).

8. The anti-monopoly purpose of the clause "was achieved by constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters. The constitutional framers'

Court has traced this history and concluded that the states have a trust responsibility to manage wildlife for the benefit of the public, not for the benefit of individuals or the government itself.[9]

Although the common use clause was intended to constitutionalize public trust principles,[10] the Alaska Supreme Court has not yet decided whether the clause grants greater protection over public access to natural resources than the public trust doctrine does toward tidelands and submerged lands.[11] To date, the court has held only that the "common law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people."[12]

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reliance on historic principles regarding state management of wildlife and water resources is evident from a written explanation in the committee materials for the term 'reserved to the people for common use.'" *Id.* The framers spoke of "[a]ncient traditions in property rights" which recognize that title to uncaptured wildlife "is reserved to the people or the state on behalf of the people." *Id.* (citing Alaska Constitutional Convention Papers, Folder 210, a paper prepared by Committee on Resources entitled "Terms").

9. Geer v. Connecticut, 161 U.S. 519 (1896). Specifically, the Court said that the state's power over wildlife "is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good." *Id.* at 529. The Alaska Supreme Court surmised that the framers of the constitution relied heavily on *Geer* when they drafted the common use clause. *Owsichek*, 763 P.2d at 495.

10. *Owsichek*, 763 P.2d at 496. Alaska's public trust responsibility to manage wildlife is comparable to its obligations under the "public trust doctrine," where the state has a trust duty to protect the public's right of access to certain lands and navigable waters for certain purposes. *See* Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892) (generally stating the public trust doctrine). In Alaska, the public has continuing access to privately held tidelands and submerged lands for navigation, commerce and fishing. *CWC Fisheries*, 755 P.2d at 1118.

11. In *CWC Fisheries*, the court examined whether a state tideland conveyance was subject to continuing public easements for navigation, commerce, and fisheries. Analyzing the conveyance under requirements of *Illinois Cent. R.R. Co.*, the court concluded that "[w]e need not decide at this time whether a fee simple tideland conveyance which satisfied the structures of *Illinois Central* would nonetheless run afoul of article VIII, section 3." *CWC Fisheries*, 755 P.2d at 1120 n.10.

12. *Owsichek*, 763 P.2d at 495.

B. Broad Public Access to Resources

The Alaska Supreme Court's principal interpretation of the common use clause regarding access to fish and wildlife can be found in *Owsichek v. State*.[13] There the court examined the state's system for assigning exclusive guiding areas to the big game guide industry. Under that system, the Alaska Guide Licensing and Control Board designated geographic areas in which only certain guides could lead hunts. Although persons could hunt recreationally in an "exclusive guide area" ("EGA"), only the Board-assigned guide could lead hunts professionally within the designated area.[14] The court concluded that the EGA system could not be justified as a wildlife management tool because the EGAs were endowed with many of the characteristics of private property.[15] Thus, the court reasoned that the EGAs "resemble[d] the types of royal grants the common use clause expressly intended to prohibit."[16] Although the court noted that the EGAs may have also violated the uniform application clause of the Alaska Constitution,[17] it struck down EGAs solely because they violated the common use clause.[18] In so doing, the court expressed a simple purpose for the common use clause, namely that it "was intended to guarantee broad public access to natural resources."[19]

The principle of broad access was reaffirmed and elaborated upon two years later. In *State v. Hebert*,[20] the court examined a regulation that established two "superexclusive" use fisheries. Under this type of fishery management, fishermen[21] must choose among several geographic areas where a fish species occurs. If a

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13. 763 P.2d 488 (Alaska 1988).

14. *Id.* at 489. In practice, there were two types of EGA's: truly "exclusive guide areas," which had only one designated guide in each, and "joint use areas," which had several designated guides in each. *Id.* The court referred to both types as "EGA's." *Id.* n.1.

15. *Id.* at 498.

16. *Id.* at 497-98.

17. *Id.* at 498 n.17. The court did not consider this issue in full because the parties did not include it in their arguments and because the case could be decided upon other grounds. *Id.*

18. *Id.* at 498.

19. *Id.* at 493.

20. 803 P.2d 863 (Alaska 1990).

21. The term "fishermen" is used for the sake of convenience. The regulation applied equally to male and females engaged in fishing activities.

person registers to fish an area designated as "superexclusive," he or she may not harvest that type of fish in any other area. On the other hand, if the fisherman registers to fish in an area that is not "superexclusive," he or she may not fish for the same species in a "superexclusive" area.[22] The *Hebert* court cited evidence that the number of fishermen would probably increase under this type of registration-choice system, and thus, it would be possible for more rather than fewer persons to participate in the fishery. Therefore, the court upheld the superexclusive use regulation and noted that "if anything, [it] furthers the interests underlying section 3's common use mandate."[23] Thus, "broad public access" is a principle that favors maximizing the number of persons able to participate in a hunt or fishery rather than maximizing an individual's opportunities to catch as much fish or harvest as much game in as many areas as possible.[24]

C. Common Use Clause Prohibitions

The court held in *Owsichek* that the common use clause implicitly prohibits what another equal access clause, the "no exclusive right of fishery" clause,[25] prohibits on its face, namely "special privileges" and "exclusive grants" to fish and wildlife.[26] Although the other two article VIII clauses share these prohibitions, the purposes underlying the common use clause are "wholly apart from the limits imposed by other constitutional provisions."[27] Specifically, the common use clause was enacted with the intent to prevent monopolization of natural resources.[28]

The common use clause's prohibition against "special privileges" is best examined by its application in resolving the constitutionality of the EGA system. When an area was reassigned, the EGA

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22. *Hebert*, 803 P.2d at 864.

23. *Id.* at 867.

24. This principle was followed by the state when it adopted a replacement for the EGA system struck down in *Owsichek*. The new system allows big game guides to select and register for up to three guiding areas in the state. ALASKA ADMIN. CODE tit. 12, § 38.820 (April 1994).

25. ALASKA CONST. art. VIII, § 15.

26. *See Owsichek*, 763 P.2d at 496. In an earlier decision, the court stated that the state's system for limiting entry into commercial fisheries is inconsistent with the common use clause because it grants an exclusive right to a select few. *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983).

27. *Owsichek*, 763 P.2d at 496.

28. *Id.*

system favored an applicant who had already used, occupied or invested in the area. Thus, this procedure worked like a seniority system that favored established guides over new entrants to the profession. The court found that such a system created a "special privilege" in violation of the common use clause.[29]

The EGA system was also found to be in violation of the "no exclusive grants" purpose of the common use clause. The prohibition against "exclusive grants" is another expression of the anti-monopoly principle against the granting of private rights in a public resource. Although the EGA system was unique in wildlife management, the court found it worthwhile to recognize features that gave it private property status. These features included their unlimited duration and the fact that guides could transfer them for profit without providing compensation to the state.[30]

The court found that the EGAs constituted an exclusive grant because they were unlimited in duration. The Alaska Supreme Court contrasted them with leases and concessions on state lands, which are limited in time, and therefore do not violate the common use clause.[31] The court noted that limiting entry into guide areas was inconsistent with the common use clause because it resulted in an exclusive right that could be exercised season after season.[32]

The *Owsichek* court also found that EGAs violated the public trust rationale underlying the common use clause because their sale generated no meaningful compensation to the public. The court again contrasted EGAs with leases and concessions, which do provide remuneration to the state.[33] Previously, the court had stated in dictum that the shore fisheries leasing program would not violate the public trust in part because shore fishery leases require compensation to the state for the use of public trust easements.[34] However, because profits realized from the sale of improvements constructed in an EGA went solely to the former EGA holder, and the Alaska Guide Licensing and Control Board routinely transferred the EGA to the buyer of those improvements, the public

29. *Id.*
30. *Id.* at 497.
31. *Id.* at 496-97.
32. *Id.* at 497.
33. *Id.*
34. *Id.* (citing *CWC Fisheries*, 755 P.2d at 1120-21).

trust doctrine was undermined by what was essentially an exclusive grant.[35]

D. Common Use: Its Scope and Limits

The Alaska courts have held that the "common use" of fish and wildlife is entitled to a high degree of constitutional protection. In a 1983 dissent, Justice Rabinowitz introduced this idea, stating that common use is a "highly important interest running to each person within the state."[36] In later court decisions a majority has supported this statement. For example, the court held in *Owsichek* that the interest is so vital that grants of exclusive rights are subject to "close scrutiny."[37] Furthermore, the clause itself makes no distinction in the level of scrutiny between personal and professional use,[38] and it protects both derivative and direct uses of fish and wildlife.[39] Whether direct or derivative, the right protected under the common use clause must be defined by the nature of the resource (that is, fish, wildlife or waters) and the nature of the use (that is, commercial, sport, subsistence or personal use), but not by a particular method or means of use.[40]

However, the common use clause does not govern all uses of fish and wildlife wherever they may be located. Constitutional history shows that the clause was not intended to govern the domestication of fur-bearing animals.[41] Furthermore, the common

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35. *Id.* at 496-98.

36. State v. Ostrosky, 667 P.2d 1184, 1196 (Alaska 1983) (Rabinowitz, J., dissenting).

37. *Owsichek*, 763 P.2d at 494.

38. In *CWC Fisheries*, the court noted that the public trust doctrine guaranteed fishermen access to public resources for "private commercial purposes" as well as recreation. 755 P.2d at 1121 n.14. Later that year, the court stated, "[t]he same [*CWC Fisheries*] rationale applies to professional hunting guides under the common use clause." *Owsichek*, 763 P.2d at 497.

39. The derivative use, however, should be "closely tied" to the actual taking of the fish or wildlife. For example, although professional hunting guides do not actually take game themselves, the court said that "[t]he work of a guide is so closely tied to hunting and taking wildlife that there is no meaningful basis for distinguishing between the rights of a guide and the rights of a hunter under the common use clause." *Owsichek*, 763 P.2d at 497 n.15.

40. *See* Alaska Fish Spotters Ass'n v. State Dep't of Fish and Game, 838 P.2d 798 (Alaska 1992) (holding that the state may regulate the method of using natural resources without violating the common use clause).

41. 6 Proceedings of the Alaska Constitutional Convention app. V, at 98 (Dec. 16, 1955).

use clause does not govern fish in private ponds or legally registered trap lines.[42] And, although the common use clause protects the public's right to use fish in natural waterways, it does not authorize people to trespass over private property to reach the waters.[43]

III. THE "NO EXCLUSIVE RIGHT OF FISHERY" CLAUSE

A. History of the Clause

Article VIII, section 15 of the Alaska Constitution is often called the "no exclusive right of fishery" clause. It provides:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the state.[44]

Among the equal access clauses, section 15 is unique in two respects. First, because it applies only to fishery resources, this clause is narrower than both the common use clause,[45] which applies to wildlife, waters and fish, and the "uniform application" clause,[46] which applies to all natural resources. Second, unlike the other two clauses, the "no exclusive right of fishery" clause was not adopted in its entirety along with the original constitution. Only the first part, prohibiting exclusive rights and special privileges, was adopted originally. The second part, allowing the state to limit entry into fisheries, was added as an amendment sixteen years later.

The constitutional framers intended the first part to take the place of a pre-statehood federal law that regulated Alaska's fisheries.[47] That law, section 1 of the White Act, prohibited

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42. *Id.*

43. *Owsichek*, 763 P.2d at 494 (citing 4 Proceedings of the Alaska Constitutional Convention at 2460 (January 17, 1956)).

44. ALASKA CONST. art. VIII, § 15.

45. *Id.* § 3.

46. *Id.* § 17.

47. The Committee on Resources of the Constitutional Convention stated that "[t]his section is intended to serve as a substitute for the provision prohibiting the several right of fisheries in the White Act." 6 Proceedings of the Alaska Constitutional Convention 87 (Alaska Legislative Council); *see also* 1960 Op. Att'y Gen No. 9, at 3 (Apr. 8, 1960).

federal regulations from granting an "exclusive or several right of fishery."[48]

The second part of the "no exclusive right of fishery" clause was submitted as a joint resolution to the Seventh Alaska Legislature in February 1971. It initially stated that "[t]he State may restrict entry to any fishery for purposes of conservation of the resource, to relieve economic distress among fishermen and those dependent upon them for a livelihood and to insure fair competition among those engaged in commercial fishing."[49] According to its sponsor, Governor William A. Egan, the purpose of the resolution was to make it "indisputably clear that the state may act to conserve and manage its fisheries in a manner which will benefit all Alaskans."[50] Further, the resolution was intended to remove all doubt that the first part of the clause, which prohibited exclusive rights of fisheries, did not necessarily prohibit "reasonable gear limitations or other restrictions on entry in our fisheries."[51] Thus, the original resolution was considered to be a clarification of the prohibition against exclusive rights and special privileges, not an exception to it.

Ultimately, the opening language evolved from "[t]he State may restrict entry to any fishery . . . ," to "[t]his section does not restrict the power of the State to limit entry into any fishery . . . ."[52] The legislature believed that the subtle change was needed to overcome ambiguity arising from the decision in *Bozanich v. Reetz*.[53] In *Bozanich*, the United States District Court for the District of Alaska held that laws limiting licenses to specific

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48. Section 1 of the White Act reads:

> Provided, that every such regulation made by the Secretary of the Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Commerce.

White Act of 1924 ch. 272, § 1, 43 Stat. 464.

49. S.J. Res. 10, 7th Leg., 1971 SENATE J. 116.

50. Letter from Governor William A. Egan to Senator Terry Miller, Chairman, Senate Rules Committee (Feb. 3, 1971) in 1971 SENATE J. 116.

51. *Id.*

52. House Committee Substitute for Committee Substitute for S.J. Res. 10, 7th Leg, 1st Sess. (1971).

53. 297 F. Supp. 300 (D. Alaska 1969), *vacated on other grounds and remanded*, 397 U.S. 82 (1970).

groups of fishermen violated both the common use and the "no exclusive right of fishery" clauses.[54] In response to this decision, the Alaska Legislature altered the opening line in order "to show that the state's power to limit entry is a specific *exception* to the 'exclusive right' prohibition."[55] Because the amendment was intended to create an "exception" to the prohibition against exclusive rights and special privileges, the prohibition is more compelling than if the amendment were only intended to provide clarification.

B. Application of the Clause

In *McDowell v. State*,[56] the Alaska Supreme Court relied largely on section 15 in interpreting the constitutionality of the state's criterion for participating in subsistence uses of fish, game and other wild, renewable resources. Under the 1986 version of the subsistence law, only persons who resided in rural areas of Alaska were eligible to enjoy the subsistence priority, while persons residing in urban areas were excluded from subsistence uses.[57] It was this rural residency criterion that was challenged under the equal access clauses.[58]

The *McDowell* court struck down the rural residency criterion, basing its decision on the "no exclusive right of fishery" clause and on its pre-statehood predecessor, the White Act. Noting that section 1 of the White Act guaranteed access to fisheries regardless of residence, the court reasoned that "section 15 likewise was

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54. *Id.* at 304-07.

55. House Resources Committee, 1971 HOUSE J. 761 (emphasis added).

56. 785 P.2d 1 (Alaska 1989).

57. ALASKA STAT. § 16.05.258 (1987) (amended 1992). The subsistence law established two different systems, or "tiers," for distinguishing who was eligible to participate in subsistence uses. The tiers were determined by resource abundance. When there was enough harvestable resource to satisfy all subsistence uses, that is, at the "first tier" of abundance, the urban-rural criterion determined eligibility. When abundance diminished below the point where all subsistence uses could be satisfied, then rural residents, all of whom who had qualified under the "first tier," were further distinguished by their dependence, their local residency and their availability of alternative resources. *Id.* This is called the "second tier." The *McDowell* court examined the criterion for first-tier eligibility, namely, rural residency.

58. *McDowell*, 785 P.2d at 1.

meant to ensure an equal right to participate in fisheries, regardless of where one resides."[59]

Three years after *McDowell*, the court again construed the "no exclusive right of fishery" clause in *Alaska Fish Spotters Ass'n v. State Department of Fish and Game*.[60] That case involved a ban on aerial fish spotting, the practice of using aircraft to locate fish and direct the operations of commercial fishermen, in the Bristol Bay salmon fishery.[61] The court held that the ban did not violate the "no exclusive right of fishery" clause. The court found that the ban furthered equal access because all fishermen were equally excluded from aerial spotting, and that the pilots were not excluded from the numerous other uses of the resource.[62] This finding suggests that if a certain method or means is prohibited, and a group of individuals has no other way to use the resource, the remaining users may have been granted an unconstitutional "exclusive right" or "special privilege."[63]

Decisions construing the "limited entry" provision of article VIII, section 15 give further insight into the application of the "no exclusive right of fishery" clause. The Alaska Supreme Court has recognized the tension created by the clauses' simultaneous prohibition of exclusive rights in fisheries and the authorization of the state to limit entry.[64] The court has harmonized this apparent conflict by adopting a test of "least possible impingement."[65] This goal is achieved by the "optimum number" provision of Alaska Statutes section 16.43.290. Under this provision, the Commercial Fisheries Entry Commission establishes the optimum number of permits for each fishery. This number may be greater or less than

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59. *Id.* at 9.

60. 838 P.2d 798 (Alaska 1992).

61. *See* ALASKA ADMIN. CODE tit. 5, § 06.378 (June 1990).

62. *Id.* Other uses of the resource, as suggested by the court, were commercial fishing, participating in industries that support the fish harvest, using their planes to spot fish before an open harvest and transporting supplies and personnel for commercial fishing clients. *Id.* at 802.

63. The court made several other significant findings in upholding the fish spotter ban. First, it rejected the pilots' claim that they constituted a "user group" entitled to protection under the common use clause. *Id.* at 802. The court held that user groups are defined according to the nature of the resource (fish or wildlife) and the nature of the use (commercial, sport or subsistence), and not according to the particular tool used to take the resource. *Id.*

64. *See* State v. Ostrosky, 667 P.2d 1184 (Alaska 1983).

65. *Id.* at 1191.

the actual number of permits issued for the fishery. If greater, the state must issue additional permits until the optimum number is reached.[66] If lesser, the state must buy back permits until the optimum number is reached.[67] The Alaska Supreme Court has found that this system strikes an acceptable balance between fishermen's interest in access and the state's interest in conserving resources.[68]

Although limited entry is a unique situation, the "least impingement" principle may apply to other schemes that would create a special privilege for a subset of users.[69] In those instances, the inquiry should focus on whether another scheme, less intrusive upon equal access values, could achieve the same goals. For example, the Alaska Supreme Court suggested in *McDowell* that a system based on individual characteristics could be used to determine subsistence eligibility so long as it only minimally infringes upon the rights of those who are excluded.[70]

As previously discussed, the common use clause does not prohibit restrictive registration systems, such as "superexclusive" fisheries, if the system's restrictions on individuals result in greater public participation.[71] By the same rationale, these systems should also survive the exclusive use prohibitions of the "no exclusive right of fishery" clause. It is the element of choice that distinguishes a system where the state assigns areas (such as the EGA system)

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66. ALASKA STAT. § 16.43.330 (1992).

67. *Id.* §§ 16.43.310-320.

68. Johns v. Commercial Fisheries Entry Comm'n, 758 P.2d 1256 (Alaska 1988).

69. Analysis under the "no exclusive right of fishery" clause, as discussed earlier, applies only to situations where a portion of a user group is granted a privilege over the remaining members or potential members. The analysis is not applicable to differential treatment between resource uses, e.g., an advantage given to sport use over commercial use of a certain fish stock. These "preferences among beneficial uses" are the crux of fish and wildlife allocations, and they are specifically endorsed by the constitution. *See* ALASKA CONST. art. VIII, § 4; McDowell v. State, 785 P.2d 1 (Alaska 1989); Meier v. State 739 P.2d 172 (Alaska 1987); Kenai Peninsula v. State, 628 P.2d 897 (Alaska 1981).

70. *McDowell*, 785 P.2d at 3.

71. For example, the court came to this conclusion when comparing the competitive bidding system for allocating leases and exclusive concessions on state lands with the seniority system for granting EGAs. *See* Owsichek v. State, 763 P.2d 488 (Alaska 1988). The court found that a bidding system is constitutional because it allows a wider field of applicants than does a system based on prior use, occupancy and investment in the area underlying the private rights. *Id.* at 497.

from one where users register for areas (such as the superexclusive registration system). Even though a user may not have access to all areas, he or she is not initially excluded from any particular area. Thus, the apparent meaning of "equal access" is that no citizen enjoys guaranteed and exclusive use of a fish stock or wildlife population.

IV. THE "UNIFORM APPLICATION" CLAUSE

The third equal access clause, section 17 of Article VIII, is often called the "uniform application clause." It states:

> Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.[72]

The legislative history of the "uniform application clause" is sparse. The commentaries to the constitutional convention refer to it only once: "This section is intended to exclude any especially privileged status for any person in the use of natural resources subject to the disposition of the state."[73]

The Alaska Supreme Court recently interpreted the "uniform application" clause in *Gilbert v. State*.[74] There the court examined regulations allocating salmon among "intercept" and "destination" fisheries.[75] The regulations restrict harvest by fishermen who are further from spawning grounds in favor of fishermen who are closer to the grounds.[76] Drawing on principles derived from earlier decisions, the court articulated a test for satisfying the "uniform application" clause. Because the individual interest in equal access to fish and game resources is a "highly important interest running to each person within the state," the state must have an important purpose to countervail that interest.[77] The state then has the burden of proving that the means used to further its important purpose are carefully drawn and designed for the "'least possible infringement on article VIII's open access values.'"[78]

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72. ALASKA CONST. art. VIII, § 17.
73. 6 Proceedings of the Alaska Constitutional Convention 84 (Dec. 16, 1955).
74. 803 P.2d 391 (Alaska 1990).
75. *Id.* at 393.
76. *See* ALASKA ADMIN. CODE tit. 5, § 18.260 (June 1988).
77. *Gilbert*, 803 P.2d at 399.
78. *Id.* (quoting McDowell v. State, 785 P.2d 1, 10 (Alaska 1989)).

A question left open by the *Gilbert* test concerns the meaning of "open access." One type of access not likely to be protected by this test involves access by one user group and a resulting denial of access to another user group. Inequality of access between user groups results from the need to allocate resources and derives support from the constitution's sanction of "preference among beneficial uses."[79] Due to the court's ability to distinguish user groups, it is unlikely that an allocation conflict would ever reach the potentially problematic final step of the *Gilbert* test. Competing groups will likely differ in meaningful ways and, thus, the issue would not qualify for analysis under the test. For example, the opposing fisheries in *Gilbert* differed in their biological spawning patterns, historic catch levels, and participation.[80] Thus, because the fisheries were not "similarly situated," there was not a "non-uniform classification," and the uniform application clause was not implicated.[81]

More likely, the *Gilbert* test applies to situations involving individual access to resource user groups. This inference derives from the court's distinction between allocation and limits on admission to these groups.[82] This interpretation of *Gilbert* is also consistent with the court's decisions in *McDowell* and the limited entry cases. All of these cases examined limits on admission to user groups, not inter-group allocations.

In *Kenaitze Indian Tribe v. State*,[83] however, which is presently pending before the Alaska Supreme Court, a superior court interpreted the *Gilbert* decision differently. *Kenaitze* arose from the prohibitions on subsistence fishing and hunting established by a 1992 statute.[84] That statute states:

> The boards may not permit subsistence hunting or fishing in a nonsubsistence area. The boards, acting jointly, shall identify by regulation the boundaries of nonsubsistence areas. A nonsubsistence area is an area or community where dependence

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79. ALASKA CONST. art. VIII, § 4.

80. *Gilbert*, 803 P.2d at 399.

81. Similarly, the *Gilbert* test also did not apply to the ban on fish spotting in Bristol Bay. Because the ban applied equally to all citizens, there was no "non-uniform classification" and, therefore, the uniform application clause was not implicated. Alaska Fish Spotters Ass'n v. State Dep't of Fish and Game, 838 P.2d 798, 804 (Alaska 1992).

82. *See McDowell*, 785 P.2d at 8.

83. No. 3AN-91-4569 (Alaska Super. Ct. Oct. 26, 1993).

84. ALASKA STAT. § 16.05.258(c) (1992).

> upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community.[85]

Residents of nonsubsistence areas challenged this provision, claiming it violated the equal access clauses.[86] Despite finding that the legislature's purpose for authorizing nonsubsistence areas was to allocate resources, the superior court struck down the provision under the *Gilbert* test.[87]

In *Kenaitze*, the superior court added a new condition for allocating natural resources. It held that, under the "least possible infringement" standard, the state could not prohibit subsistence activities in a certain area without first considering whether resources there could support some kind of balance between all possible uses.[88] Generally, this decision means that the state may not allocate resources so that one use is excluded in an area while maintaining others unless there is a finding that resource abundance will not support all uses simultaneously.

V. UNIFYING THEMES AMONG THE EQUAL ACCESS CLAUSES

There are several common themes and principles unifying the equal access clauses. Among these common themes are the clauses' reference to territorial fish and wildlife management, their prohibition on exclusive or special privileges and their focus on individual admission to resources "user groups."

A. Reference to Territorial Fish and Wildlife Management

In several opinions construing the equal access clauses, the Alaska Supreme Court has referred to pre-statehood fish and wildlife management practices. The court has assumed that the framers of the constitution were aware of these practices, and has consistently concluded that they did not intend the clauses to prohibit contemporary practices that are equivalent to historic ones.

In *Owsichek v. State*,[89] for example, the court stated:

> We observe initially that, in guaranteeing people "common use" of fish, wildlife and water resources, the framers of the constitution clearly did not intend to prohibit all regulation of the use of these resources. Licensing requirements, bag limits, and seasonal restrictions, for example, are time-honored methods of conserv-

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85. *Id.*
86. *Kenaitze*, No. 3AN-91-4569, slip op. at 4.
87. *Id.* at 12.
88. *Id.* at 10.
89. 763 P.2d 488 (Alaska 1988).

> ing the resources that were respected by delegates to the constitutional convention.[90]

Similarly, in *State v. Hebert*,[91] the court observed that gear size and "time and area" limitations are among "time honored brakes" imposed on fishermen to achieve conservation.[92] The court upheld superexclusive registration for herring fisheries because convention debates did not reveal an intent to prohibit a comparable, pre-statehood management tool, namely exclusive registration for salmon fisheries.[93] The court came to a similar conclusion regarding the ban on fish spotting in *Alaska Fish Spotters Ass'n v. State Department of Fish and Game*.[94] Because the framers of the constitution submitted the constitutional provision simultaneously with an ordinance prohibiting fish traps, the court concluded that the framers had found nothing inconsistent in adopting the common use clause while concurrently banning certain methods and means of harvest.[95]

Although the court has recognized historic conservation practices, it is not clear whether the existence of a general conservation purpose will excuse a violation of equal access principles. On the one hand, usefulness in wildlife conservation and management was not sufficient to save the EGA system from being declared unconstitutional.[96] On the other hand, the court implied in *McDowell* that an exclusionary system would be more acceptable if it served conservation purposes.[97]

B. Prohibition on Exclusive or Special Privileges

One principle that applies to all of the equal access clauses is reflected in the wording of the "no exclusive right of fishery" clause.[98] The court has interpreted this clause consistently, stating that "[a]lthough the ramifications of these clauses are varied, they

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90. *Id.* at 492.
91. 803 P.2d 863 (Alaska 1990).
92. *Id.* at 866-67.
93. *Id.* at 866.
94. 838 P.2d 798 (Alaska 1992).
95. *Id.* at 802.
96. *See* Owsichek v. State, 763 P.2d 488 (Alaska 1988).
97. *McDowell*, 785 P.2d at 9. "We do not imply that the constitution bars all methods of exclusion where exclusion is required for species protection reasons." *Id.*
98. ALASKA CONST. art. VIII, § 15.

share at least one meaning: exclusive or special privileges to take fish and wildlife are prohibited."[99]

The court has not limited its "no exclusive right or privilege" analysis to the "no exclusive right of fishery" clause. The court has similarly held that the common use and the uniform application clauses were also intended to prohibit exclusive or special privileges.[100]

C. Individual Admission to Resource "User Groups"

The equal access clauses also scrutinize limits on admission to user groups.[101] In fact, the EGA system and the rural residency criterion, the only state actions struck down under the clauses, have both involved such user group admission limits.[102] Thus, it is important to understand the meaning of "user group" in fish and wildlife management in order to fully comprehend the application of the equal access clauses.

In the context of the common use clause, the court has defined user group according to "the nature of the resource (*i.e.*, fish or wildlife) and the nature of the use (*i.e.*, commercial, sport or subsistence)."[103] User groups include recreational hunters,

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99. *McDowell*, 785 P.2d at 6.

100. *See, e.g.*, State v. Hebert, 803 P.2d 863 (Alaska 1990).

101. *See, e.g.*, Tongass Sport Fishing Ass'n v. State, 866 P.2d 1314 (Alaska 1994) ("[T]he 'common use' clause of article VIII, section 3, the 'no exclusive right of fishery' clause of section 15, and the 'uniform application' clause of section 17 are not implicated unless limits are placed on the admission to resource user groups.").

102. This principle was recognized in a recent superior court decision. In *Kodiak Seafood Processors Ass'n v. State*, No. 1JU-93-274 CI, slip op. (Alaska Sup. Ct. Sept. 14, 1993), seafood processors challenged an exploratory scallop fishing permit issued by the Department of Fish and Game to a commercial fisherman. The permit allowed the fisherman, under the control of department biologists, to operate a scallop dredge in an area closed to commercial scallop fishing. *Id.* at 2-3. Plaintiffs claimed, inter alia, that issuance of the permit violated the equal access clauses. *Id.* at 4-5.

The superior court found that the issuance of the permit did not constitute the opening of a "commercial fishery" because it occurred at an exploratory, test-fishing stage during which no user group had access to the resource. *Id.* at 20-21. "Until the resource is open to recognized user groups, and the plaintiffs are excluded from a particular user group, . . . there can be no violation of the 'equal access clauses.'" *Id.* at 22. This holding is presently being appealed to the Alaska Supreme Court. *Kodiak Seafood Processors Ass'n v. State*, No. S-5987.

103. Alaska Fish Spotters Ass'n v. State Dep't of Fish and Game, 838 P.2d 798, 803 (Alaska 1992).

subsistence hunters, sport fishermen, commercial fishermen, personal use fishermen, subsistence fishermen and even professional hunting guides.[104] However, the court has rejected a definition of "user group" that is based on a particular means or method of using the resource. For example, persons who operate aircraft for aerial fish spotting are not a user group for purposes of the common use clause.[105]

The court revisited the "user group" issue recently in *Tongass Sport Fishing Ass'n v. State*.[106] In 1991, the Board of Fisheries allocated chinook salmon in southeast Alaska between the commercial troll and sport fisheries by establishing a percentage of the harvestable stock which each group could catch. Several sport fishing groups filed a suit challenging the allocation scheme, claiming, *inter alia*, that the system violated both the common use and the no exclusive right of fishery clauses of Article VIII.[107]

In rejecting the Article VIII claim, the Alaska Supreme Court restated principles announced in earlier opinions on the equal access clauses. The court affirmed that the equal access clauses are not implicated unless the state places limits to admission on resource user groups.[108] The court cited several opinions, including *Gilbert* and *Alaska Fish Spotters Ass'n*, in which the Board's authority to allocate among different fisheries had been recognized, and distinguished allocating resources from placing limits on admission to resource user groups.[109]

VI. THE EQUAL ACCESS CLAUSES' RELATION TO OTHER CONSTITUTIONAL PROVISIONS

The equal access clauses do not function in a vacuum. In fact, the clauses are significantly influenced by at least two other constitutional provisions. Specifically, the Alaska Supreme Court has had to square the equal access clauses with the "preferences among beneficial uses" clause of Article VIII, section 4. Addition-

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104. The court recognized that "[t]he work of a guide is so closely tied to hunting and taking wildlife that there is no meaningful basis for distinguishing between the rights of a guide and the rights of a hunter under the common use clause." Owsichek v. State, 763 P.2d 488, 497 n.15 (Alaska 1988).

105. *Alaska Fish Spotters Ass'n*, 838 P.2d at 803.

106. 866 P.2d 1314 (Alaska 1994).

107. *Id.* at 1315.

108. *Id.*

109. *Id.* at 1318.

ally, because the equal access clauses have been called "a special type of equal protection guarantee," it is necessary to compare the standard of review used by the court to apply the equal access clauses with the equal protection test articulated by the court under Article I, section 1 of the state's constitution.

A. The "Preferences Among Beneficial Uses" Clause

Article VIII, section 4 of the Alaska Constitution provides:

> Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, *subject to preferences among beneficial uses.*[110]

The Alaska Supreme Court has recognized the tension between the equal access clauses, which prohibit exclusive rights and special privileges, and the last phrase of section 4, which authorizes "preferences." In *McDowell v. State*,[111] Justice Moore rejected any implication in the majority opinion that all preferences, especially subsistence preferences, would violate the equal access clauses.[112] Justice Moore noted the apparent conflict between the clauses' prohibition against special privileges and section 4, which "clearly authorizes some preferences based upon uses."[113] Moreover, in his dissenting opinion, Justice Rabinowitz argued that the majority decision would conflict with the explicit language of section 4, which explicitly authorizes rural preferences.[114]

The court has attempted to clarify this apparent conflict by distinguishing between allocating resources among resource uses and limiting admission to resource user groups. In *Kenai Peninsula Fisherman's Cooperative Ass'n v. State*[115] the court stated:

> While section 15 [the "no exclusive rights" clause] does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sports, and subsistence fishermen. To conclude that, because a certain species is made available for sport fishing in a given area, commercial fishing of the same species must also be allowed, would be to go far beyond the purpose of the section.[116]

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110. ALASKA CONST. art. VIII, § 4 (emphasis added).
111. 785 P.2d 1 (Alaska 1989).
112. *Id.* at 13 (Moore, J., concurring).
113. *Id.* (Moore, J., concurring).
114. *Id.* at 17 (Rabinowitz, J., dissenting).
115. 628 P.2d 897 (Alaska 1981).
116. *Id.* at 904.

In *McDowell v. State*[117] the court stated that "[t]he state may, indeed must, make allocation decisions between sport, commercial, and subsistence users. That authority, however, does not imply a power to limit admission to a user group."[118] As an allocative system, such application is unauthorized under the "preferences" phrase of section 4.

B. Equal Access and Equal Protection

Because the uniform application clause requires that laws and regulations "apply equally to all persons similarly situated,"[119] it provides a clear equal protection guarantee for the use and disposal of natural resources. In *McDowell*, the court described the equal access clauses in general as "a special type of equal protection guarantee."[120] This raises the question of how analysis under Alaska's equal protection clause differs from analysis under the equal access clauses, and in particular, under the uniform application clause.

The equal protection clause in Article I, section 1 of the Alaska Constitution provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law . . . ."[121] When determining whether legislation comports with this clause, Alaska courts employ a "sliding" test that the Alaska Supreme Court has described as follows:

> We first determine the importance of the individual interest impaired by the challenged enactment. We then examine the importance of the state interest underlying the enactment, that is, the importance of the enactment. Depending on the importance of the individual interest, the equal protection clause requires that the state's interest fall somewhere on a continuum from mere legitimacy to a compelling interest. Finally, we examine the nexus between the state interest and the state's means of furthering that interest. Again depending upon the importance of the individual interest, the equal protection clause requires that the nexus fall somewhere on a continuum from substantial relationship to least restrictive means.[122]

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117. 785 P.2d 1 (Alaska 1989).
118. *Id.* at 8.
119. ALASKA CONST. art. VIII, § 17.
120. *McDowell*, 785 P.2d at 11.
121. ALASKA CONST. art. I, § 1.
122. State v. Enserch Constr., Inc., 787 P.2d 624, 631-32 (Alaska 1989) (footnote omitted).

Before *McDowell*, the court had said very little about the test for applying the "uniform application clause," nor had it discussed the equal access clauses in terms of equal protection. In one instance, the court opined that in cases involving natural resources the "uniform application clause" may require more stringent review of a statute than does the general equal protection clause.[123] However, the court did not articulate a specific standard to be applied to natural resource cases.

In *McDowell*, the court implicitly followed an equal protection analysis in striking down the rural residency preference in the subsistence law. Placing the *McDowell* analysis into the equal protection framework leads to the conclusion that the "individual interest" at issue was the interest of each person in the state in participating in subsistence uses of renewable resources. The court said that this was a "highly important" interest.[124]

As for the competing state interest, the court said that it must be at least "important" to sustain legislation that burdens the equal access clause.[125] The court noted that an "important" state interest embodied in the subsistence law was "to ensure that those Alaskans who need to engage in subsistence hunting and fishing in order to provide for their basic necessities are able to do so."[126]

In analyzing the "nexus" between the state's "important" interest and the legislation's "means" for accomplishing it, the court held that the government's approach must be the "least possible infringement on article VIII's open access values."[127] When the court applied this standard, it concluded that the "means used to accomplish this purpose [were] extremely crude."[128] Specifically, the court pointed to evidence showing that there were "substantial numbers of Alaskans living in areas designated as urban who have legitimate claims as subsistence users. Likewise, there are substantial numbers of Alaskans living in areas designated as rural who have no legitimate claims."[129] Thus, the court's ground for striking down the rural-urban classification scheme was that it was

123. Gilman v. Martin, 662 P.2d 120 (Alaska 1983).
124. *McDowell*, 785 P.2d at 10.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 10-11.

both under-inclusive and over-inclusive.[130] In his *McDowell* concurrence, Justice Moore stated that he would have followed an explicit equal protection analysis under article 1, section 1 of the Alaska constitution. He argued that the individual interest at stake, access to wildlife for subsistence purposes, was "a species of the important right to engage in economic endeavor."[131] The subsistence law, therefore, would be subjected to "close scrutiny," and it would have to at least be "closely related to an important state interest."[132] Justice Moore called the state's interest more than "important"; it was "compelling."[133] Therefore, Justice Moore would have found the subsistence law defective because its classification scheme established only a modest correlation, rather than a close relationship, between those who resided in rural areas and those who were dependent on subsistence hunting and fishing.[134]

In dissent, Justice Rabinowitz maintained that the individual interest at stake, the right to participate in subsistence hunting and fishing, was not a fundamental right. Thus, Justice Rabinowitz argued, the "strict scrutiny" and "least restrictive alternative" standards were not applicable.[135] Justice Rabinowitz therefore concluded that the means-end fit of the subsistence criterion was sufficiently close to satisfy equal protection under both the "uniform application clause" and under the general equal protection clause of the constitution.[136]

Recently, the Alaska Court of Appeals addressed the issue of whether the Alaska Supreme Court had created a constitutional analysis for the equal access clauses that was distinct from its analysis for the equal protection clause. The Court of Appeals stated that the Alaska Supreme Court appeared to use the same

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130. *McDowell*, 785 P.2d at 10- 1. After striking down the "extremely crude" means for distinguishing persons who were eligible for subsistence uses, the court suggested a legislative solution: "A classification scheme employing individual characteristics would be less invasive of the article VIII open access values and much more apt to accomplish the purpose of the statute than the urban-rural criterion." *Id.* at 11.

131. *Id.* at 13 (Moore, J., concurring).

132. *Id.* (Moore, J., concurring).

133. *Id.* (Moore, J., concurring).

134. *Id.* (Moore, J., concurring).

135. *Id.* at 19 (Rabinowitz, J., dissenting).

136. *Id.* (Rabinowitz, J., dissenting).

approach for both, requiring the state to meet a rigorous test.[137] The state must demonstrate both an "important" legislative purpose and means narrowly tailored to accomplish that purpose.[138]

VII. CONCLUSION

The equal access clauses are unique to Alaska's constitution and, at the same time, based on established, historic principles arising under the public trust doctrine, pre-statehood fish and wildlife management policy and equal protection analysis. Although largely neglected in their first three decades, the clauses have recently been frequently scrutinized by the Alaska Supreme Court. In six opinions since 1987, the court has attempted to clarify the meaning of "equal access" as it applies to Alaska's fish and wildlife. While exclusive and special privileges to take subsistence resources are prohibited, these limitations are qualified by constitutional provisions that authorize limited entry to commercial fisheries and that enable the state to establish preferences among various uses. From among these provisions, one fundamental, consistently applied principle has emerged: Limitations on admission to fish and wildlife "user groups" are subject to strict judicial scrutiny under the equal access clauses.

Several other principles have evolved pertaining to the individual equal access clauses. The common use clause, for example, disallows the "privatization" of public fish and wildlife resources, especially if special privileges are long-term and do not compensate the public. The "no exclusive right of fishery" clause requires a "least possible infringement" inquiry when faced with a scheme that creates exclusive rights in fisheries, even if it is a form of limited entry. A similar test under the "uniform application" clause applies to nonuniform classifications among Alaskans who harvest these resources.

The pending Alaska Supreme Court decision in *Kenaitze Indian Tribe v. State*[139] affords the court an opportunity to clarify the nature of the "access" guaranteed by the constitution. *Owsichek v. State*[140] and *McDowell v. State*[141] hold that "access"

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137. Baker v. State, 878 P.2d 642, 644-45 (Alaska Ct. App. 1994).
138. *Id.*
139. No. 3AN-91-4569 (Alaska Super. Ct. Oct. 26, 1993).
140. 763 P.2d 488 (Alaska 1988).
141. 785 P.2d 1 (Alaska 1989).

means access to membership in a user group. Other decisions hold that "access" does not mean equal opportunity among user groups to harvest fish and wildlife.[142] However, the issue of whether the state may limit access to fish and wildlife outside of the context of a user group has not been decided.[143] Another unanswered question is whether a restriction on a certain use of a resource may be justified by the availability of other uses of that resource.[144] With Alaska's finite resources and Alaskans' growing demand for fish and wildlife, the equal access provisions of the constitution will have a continuing, central role in providing answers.

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142. *See, e.g.*, Kenai Peninsula v. State, 628 P.2d 897 (Alaska 1981).

143. There is some support for the idea that the court may limit access outside of this context. In interpreting the White Act, the territorial predecessor to the "no exclusive right of fishery clause," the United States Supreme Court stated that "'[e]xclusive,' as used in Section 1 of the White Act, forbids not only a grant to a *single person or corporation* but to any special group or number of people." Hynes v. Grimes Packing Co., 337 U.S. 86, 122 (1949) (emphasis added).

144. The answer to this question is probably yes. In *Alaska Fish Spotters Ass'n v. State Dep't of Fish and Game*, one reason the ban on fish spotting was found not to violate the common use clause is because there were alternative ways that aerial spotters could still use the fisheries resource. 838 P.2d at 802.

USE OF REPRESENTATIVES

ittee on Resources

Juneau, February 24, 1998

NOTE: INTRASTATE, RESIDENCE-BASED PREFERENCES IN THE ALLOCATION OF FISH AND GAME; THE PUBLIC TRUST DOCTRINE; AND EQUAL PROTECTION.

I. INTRODUCTION

The subject of this note is intrastate residential preferences in fish and game statutes. This note first briefly discusses the Public Trust Doctrine. It then briefly considers the doctrine of equal protection, which is found simultaneously with the Public Trust Doctrine in the Alaska Constitution, Article VIII.

It is beyond the scope of this Note to seek to resolve the dispute between those who argue that intrastate residential preferences are permitted because of the constitutional right to accord preferences among beneficial uses (SEE: Rabinowitz, dissenting, McDowell v State, 785 P.2d 1, 14-16 (Alaska 1988) and those who argue that the "common use" clause, the "equal access" clauses, and the Public Trust Doctrine forbid intrastate residential preferences.

II. THE PUBLIC TRUST DOCTRINE AND INTRASTATE, RESIDENCE-BASED PREFERENCES IN THE ALLOCATION OF FISH AND GAME

A. ALASKA'S VERSION OF THE PUBLIC TRUST DOCTRINE

The majority decision of the Alaska Supreme Court tells us that the "common use" clause and the "equal access" clauses of the Alaska Constitution forbid intrastate residential preferences. SEE: McDowell v State, 785 P.2d 1 (Alaska 1988).

Under Alaska's Public Trust Doctrine, Public Trust resources must be managed:

GREGORY FRANK COOK
ATTORNEY AT LAW
P.O. Box 240618
Douglas, Alaska 99824
(907) 586-9719 • Fax (907) 463-5848

GREGORY FRANK COOK
ATTORNEY AT LAW
P.O. Box 240618
Douglas, Alaska 99824
(907) 586-9719 • Fax (907) 463-5848

> ...as a trust for the benefit of the people [as a whole] and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.

Geer v Connecticut, 161 U.S. 519, 529 (1896) overruled by Hughes v Oklahoma, 441 U.S. 322 (1979); but see Owsichek v State, 763 P.2d 488, 495 n.12 (Alaska 1988): "Nevertheless, the trust responsibility that accompanie[s] state ownership remains."

In Alaska constitutional law, the Public Trust Doctrine has been found to be implicit in the "common use clause" of the Alaska Constitution, Article VIII, § 3. SEE: CWC Fisheries v Bunker, 755 P.2d 1115, 1119 (Alaska 1988); McDowell v State, 785 P.2d 1, 15 (Alaska 1989); Owsichek v State, 763 P.2d 488, 493 (Alaska 1988); 4 Alaska Constitutional Convention Proceedings at 2492 (1955).

The State must manage fish and wildlife for the benefit of "all the people of the state." (emphasis added). Metlakatla Indian Community, Annette Island Reserve, v Egan, 362 P.2d 901, 915 (Alaska 1961), affirmed, 369 U.S. 45 (1962).

The State must provide for "...equitable regulation of seasonal harvests for the greatest benefit to the greatest number, while conserving and rebuilding for posterity." Id., at 932.

> [T]he public trust doctrine dictates that...[public trust resources] must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.

B. OTHER SOURCES OF THE COMMON LAW PUBLIC TRUST DOCTRINE

Slocum v Borough of Belmar, 569 A.2d 312, 316 (N.J. Super Ct., 1989) quoting Borough of Neptune City v Borough of Avon-by-the-Sea, 294 A.2d 47, 59 (N.J. 1972).

Common law principles of the law of trusts hold that one of the bedrock fiduciary duties of a trustee is the duty of impartiality. (Restatement (Second) of Trusts, §§ 170-199 (1959); Scott, The Law of Trusts, §171 (4th ed. 1987).

Under the State's fiduciary duty of impartiality, when it

is dealing with Public Trust resources like fish, wildlife, waters, public lands, and unappropriated minerals, the State must act in favor of the interests of the state as a whole, not for the discrete advantage of one geographic region or ethnic group. SEE ALSO: Owsichek v State, 763 P.2d 488, 495 n.12 (Alaska 1988).

III. EQUAL PROTECTION AND INTRASTATE, RESIDENCE-BASED PREFERENCES IN THE ALLOCATION OF FISH AND GAME

A. INTRODUCTION

At the same time that it requires management according to the sustained yield principle, the Alaska Constitution also explicitly authorizes "preferences among beneficial uses." Alaska Constitution, Article VIII, §4, SEE ALSO Kenai Peninsula Fisherman's Marketing Ass'n v State, 628 P.2d 897, 9004 (Alaska 1981). The Alaska Constitution, Article VIII, §4, provides for preferences among "beneficial uses," not "users."

Preferences among beneficial uses of fish and game must nonetheless pass muster under equal protection analysis.

The "equal access" clauses of the Alaska Constitution, Article VIII, §§ 3, 15, and 17, contain an equal protection guarantee simultaneously with their Public Trust component.[1]

The cases discussed below were cited by Alaska Supreme Court Chief Justice Warren Matthews in the Court's majority opinion in McDowell v State, 785 P.2d 1, 11, fn 21, for the proposition that the "equal access" clauses of the Alaska Constitution, Article VIII, §§ 3, 15, and 17, and which are a "special type of equal protection guaranty," bar the residential discrimination that was at issue in McDowell, i.e., a preference for "rural" subsistence users in the allocation of fish and game.[2]

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[1] Article I, § 1, of the Alaska Constitution also guarantees equal rights, opportunities, and protection under the law.

[2] In McDowell, Justice Compton expressed no opinion as to the part of the Court's opinion discussing equal protection. Justice Moore concurred in that part of the opinion, but also wrote

GREGORY FRANK COOK
ATTORNEY AT LAW
P.O. Box 240618
Douglas, Alaska 99824
(907) 586-9719 Fax (907) 463-5848

Since Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200 (Maryland App. 1971), and State v Bryan 99 So. 327 (Florida 1924) were each cited with approval by the Alaska Supreme Court in McDowell, it seems reasonable to review and analyze the facts and legal reasoning of those decisions in order to better understand the Alaska Supreme Court's interpretation of the Alaska Constitution's multiple guarantees of equal protection.

Each case is clearly distinguishable from the issue of the constitutionality under Alaska law of a rural preference. They nonetheless permit a better explication of the common law of equal protection in Alaska in the context of fish and game.

B. Bruce v Director, Dept. of Chesapeake Affairs

Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200 (Maryland App. 1971) involved state laws restricting the commercial harvest of crab and oysters. Maryland residents were prohibited from commercial harvest of these shellfish outside the waters of their home county (except where the use of pots was involved).[3]

Maryland's residential requirements and territorial restrictions were HELD unconstitutional under equal protection analysis. Bruce at 208-209. No valid conservation purpose was found to support the residential discrimination among state citizens.[4]

The Maryland court blended equal protection considerations with Public Trust analysis.

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that he agreed with the court "to the extent that it holds that an intrastate geographical preference for the taking of wildlife violates §§ 3 and 15 of Article VIII of the Alaska Constitution." (McDowell at 13.) Justice Rabinowitz dissented from the entire decision of the Court in McDowell.

[3] Complex restrictions on methods and means of harvest exist for crabbing in Maryland, and pot fishing is not the only legal method.

[4] Crabs are a migratory species capable of very rapid migration. Oysters are not migratory, especially after spatfall. SEE: "More About Oysters Than You Wanted to Know," 30 Md. L. Rev. 199 (1970).

GREGORY FRANK COOK
ATTORNEY AT LAW
P.O. Box 240618
Douglas, Alaska 99824
(907) 586-9719 • Fax (907) 463-5848

...the State holds the title to fish in public waters in trust for the public, and all members of the public, regardless of where they may live in the state, have the right to take the fish subject to reasonable and nondiscriminatory regulations.

Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200, 207 (Maryland App. 1971).

...it is equally clear that the power of the Legislature to restrict the application of statutes to localities less in extent than the State, as the exigencies of the several parts of the State may require, cannot be used to deprive the citizens of one part of the State of the rights and privileges which they enjoy in common with the citizens of all other parts of the State, unless there is some difference between the conditions in the territory selected and the conditions in the territory not affected by the statute sufficient to afford some basis, however slight for classification. Maryland Coal and Realty Co. v Bureau of Mines, 69 A.2d 471, 477 (Md. 1947), cited in Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200, 211 (Maryland App. 1971).

The court in Bruce noted that although a rational basis exists for distinguishing tidewater from non-tidewater counties insofar as oyster and crab fishing are concerned, those fishery resources are nonetheless

...held in trust by the State for all of its citizens, no matter in which part of the state they may live. To that extent an otherwise legitimate classification of residents which may be made for many purposes, cannot be made if it affects a right (in this case to the enjoyment and use of natural resources) which, as citizens of this State, they enjoy equally.

Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200, 211 (Maryland App. 1971).

The Maryland Court in Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200, 212 (Maryland App. 1971) distinguished, in dictum, the issue of discrimination between state residents from the issue of discrimination favoring the residents of one state over the non-residents.

...the States own the tidewaters themselves, and the fish in them...For this purpose, the State represents its

GREGORY FRANK COOK
ATTORNEY AT LAW
P.O. Box 240618
Douglas, Alaska 99824
(907) 586-9719 • Fax (907) 463-5848

people, and the ownership is that of the people in their united sovereignty. Martin v Waddell, 16 Pet. [367] 410...The right which the people of the State thus acquire arises not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship. citing McCready v Virginia, 94 U.S. 394-395.

The U.S. Supreme Court has never overruled McCready, but it has distinguished the situation of discrimination against non-residents regarding sedentary species of shellfish from that of discrimination against non-residents in the commercial harvest in the marginal sea, i.e., bounding the coastline of a state, as to free-swimming, migratory fish. Toomer v Witsell, 334 U.S. 401-402 (1948).

The Maryland Court in Bruce took the occasion to cite, with approval, the concurring opinions of JJ. Frankfurter and Jackson in Toomer, stating:

> A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers.
>
> When the Constitution was adopted, such, no doubt, was the common understanding regarding the power of States over their fisheries, and it is this common understanding that was reflected in McCready. The McCready case is not an isolated decision to be looked at askance. It is the symbol of one of the weightiest doctrines in our law. It expressed the momentum of legal history that preceded it and around it in turn has clustered a voluminous body of rulings. Not only has a host of State cases applied the McCready doctrine as to the power of States to control their game and fisheries for the benefit of their own citizens, but in our own day this Court formulated the amplitude of the McCready doctrine by referring to the 'regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States.'

Toomer v Witsell, 334 U.S. 408-409, cited in Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200, 213 (Maryland App. 1971).

GREGORY FRANK COOK
ATTORNEY AT LAW
P.O. Box 240618
Douglas, Alaska 99824
(907) 586-9719 • Fax (907) 463-5848

Each government may, the argument continues, regulate the corpus of the trust in the way best suited to the interests of the beneficial owners, its citizens, and may discriminate against persons lacking any beneficial interest. (emphasis added) Toomer v Witsell, 334 U.S. 385, 399-400 (1948), cited in Bruce, at 208.

Bruce v Director, Dept. of Chesapeake Affairs, 276 A.2d 200, 213 (Maryland App. 1971), can safely be said to stand for the proposition that in the allocation of opportunities to harvest fish or wildlife, a state may not discriminate among its citizens based solely upon their place of residence within the state.

C. State v Bryan

State v Bryan 99 So. 327 (Florida 1924), involved a challenge to a statute that involved discrimination in the amount of licensing fees paid by non-residents of certain Florida counties compared to the fee to be paid by residents of other Florida counties in order to hunt game in that county. The Florida Supreme Court HELD the intrastate geographical preference to be invalid and a violation of equal protection.

Bryan did not involve an absolute prohibition of use by non-residents; it involved disproportionate financial burdens. The county's legislation was based on a Florida statute which expressly provided that the ownership and title to all wild birds and game in the State of Florida is vested in the counties of the state.

The Florida Supreme Court, citing Geer 161 U.S. 519, wrote:

The power to control and regulate the killing and use of game ...passed with the title to game in its natural condition to the several states as they became sovereigns, for the use and benefit of all the people of the states, respectively...
...the beneficial use of the game belongs to all the people of the state, and a regulation that unjustly discriminates against any of the people of the state may in effect be a denial of the equal protection of the laws to those so unjustly discriminated against.

Bryan at 329.

> ...when a statute...by its plain terms excludes from its benefits a portion of the residents of the state, or imposes upon some residents of the state burdens not put upon other residents of the state with reference to the subject regulated, and there appear to be no real differences in conditions with reference to the regulation to fairly justify the classification as made...it may deny equal protection.

Id.

The Florida Supreme Court used language from the common law of trusts when they wrote:

> All the bona fide citizens of the state, irrespective of the counties in which they live, have a qualified beneficial property interest, subject to lawful governmental regulations for the public good, in all wild game while it is in any county of the state, and not reduced to lawful possession of any one; and as the state cannot lawfully deny to any of its citizens substantially equal rights with all other citizens of the state, under like conditions, to lawfully hunt wild game in the state, the vesting of title to such game in the several counties is ineffectual to impair individual rights in the game or to relieve the state of the power and duty of just regulations for the good of all.

Bryan at 329.

The Florida Supreme Court followed its use of common law trust language with an equal protection analysis.

> Classifications ..for the purpose of prescribing regulations...that in effect impose burdens on some of the citizens of the state that in kind or extent are not imposed upon other citizens of the state under practically similar conditions, with no conceivably just basis for the classifications or discriminations, constitute a denial to those injuriously affected of the equal protection of the laws...(citations omitted)

Bryan at 329-330.

In sum, Bryan may be cited as authority for the proposition that in general, in the allocation of opportunities to hunt and fish, a state may not discriminate against certain of its residents on the basis of where, within the state, they reside.

Prepared for the Alaska State Legislature
House Resources Committee
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D. State v Norton

A third case cited by the Alaska Supreme Court in McDowell, yet cited without approval by the Alaska Court, was State v Norton, 335 A.2d 607 (Maine 1975).

Norton involved the validity of a municipal ordinance enacted by an island community and which closed a portion of Penobscot Harbor to shellfishing by non-residents of the municipality.

Relying on a unique and centuries-old history of shellfish management law, the Maine Supreme Court UPHELD the principle of intra-state discrimination as to clam and oyster harvest opportunities only, where the discrimination is based on a citizen's place of residence within the state, PROVIDED there is a reasonable conservation need for the restriction and the non-local resident is not completely excluded from the fishery.

Because the municipal ordinance bore no reasonable relation to conservation, it was OVERTURNED. The municipality had made no prior determination that the local clams were endangered from excessive harvest; exclusion of non-residents had had no demonstrable impact on clam abundance.

Norton analyzes in depth the pre-existing case law in Maine regarding the legal issue of whether or not a State can legitimately discriminate among its residents in the allocation of fishery resources, based on the location within the state of their residence.

In Maine, tidelands and the right to take shellfish are among the quintessential elements of the jus publicum and are protected by the Public Trust Doctrine. State v Norton, 335 A.2d 607, 610 (Maine 1975). The State of Maine holds those resources as trustee for the people of the entire State. Id.

Long-established precedent in Maine held that the State's responsibility is to regulate and control clam fisheries for the benefit of all the people of the State. Moulton v Libbey, 37 Me. 472 (Maine 1854), cited in State v Norton, 335 A.2d 607, 611 (Maine 1975).

Unlike Alaska, in Maine it has been the official policy since 1641 to consider the inhabitants of towns with clam flats as entitled to preferential treatment in their enjoyment for

GREGORY FRANK COOK
ATTORNEY AT LAW
P.O. Box 240618
Douglas, Alaska 99824
(907) 586-9719 • Fax (907) 463-5848

strictly non-commercial, personal, and family use, as well as to give those lucky municipalities some measure of responsibility in the management of those shellfish. Id.

In Norton, a Maine statute specifically authorized municipalities to determine the qualifications for shellfishing licenses. Case law from the Maine Supreme Court established that a complete exclusion of nonresident clam diggers was not authorized under the statute. Id.

The Maine Supreme Court HELD that municipalities may only exclude non-residents "only when and to the extent it is reasonably necessary for the proper conservation of this valuable resource." Norton, 335 A.2d 607, 613-614.

Under the State of Maine's constitution, equal protection is interpreted to allow a certain measure of inequality of treatment.

> ...inequality of treatment is not forbidden if it is based upon an actual difference bearing some substantial relation to a proper public purpose which is sought to be accomplished--when it is a 'proper discrimination based on the requirement of the commonweal.' " Norton, at 614.
>
> The Legislature, as the sovereign-trustee of the people's property, has obligation to manage the shellfish populations to preserve, as far as possible, their benefit for all the people. But this does not mean that every citizen in the State must have identical opportunity with every other citizen to harvest clams in every area where clams are found because equality of opportunity might result in the destruction of some vulnerable clam populations to the detriment of all the people.

Norton, at 614.

Bag limits, open and closed seasons, and limited entry, are all appropriate methods of conservation. In some areas, as to clams, daily bag limits might need to be so small in order to be effective that they would be of no practical value to individual diggers. Norton, at 614. For this special reason, and in this special context only, Maine has upheld intra-state discrimination based on residency.

In Norton, the Maine Supreme Court expressly distinguished the issue of clam management from the issue of management of free-swimming fish, for the reason that clams have fixed

GREGORY FRANK COOK
ATTORNEY AT LAW
P.O. Box 240618
Douglas, Alaska 99824
(907) 586-9719 • Fax (907) 463-5848

habitats in depletable beds. Norton, at 615, citing McCready v Virginia 94 U.S. 391 (1876) and Toomer v Witsell, 334 U.S. 385 (1948). (Those courts found no relationship between the purposes of conservation and discrimination against nonresidents.)[5]

E. State v Leavitt

State v Leavitt, 72 A. 875 (Maine 1909), is cited extensively in Norton. Leavitt is useful to better understand Maine's unique legal history. Leavitt also shows why Alaska's legal situation is not directly analogous to Maine's law of clam digging.

State v Leavitt, 72 A. 875 (Maine 1909), involved a Maine statute that granted a single municipality the unique right to close certain clam flats to clam digging, except by residents for their personal or family use, or by resident hotel keepers for use in their hotels.

Attacked on grounds that the statute violated equal protection, the Maine Supreme Court UPHELD the statute on grounds that it was reasonably necessary for resource conservation.

The Leavitt court concluded that the State's interest in the clam population was "an inalienable property right," and that the State, in the exercise of its power of regulation, may grant inequality of treatment of its citizens if for a proper governmental purpose and if the difference bears a just and proper relation to the classification.

> Since it must be assumed that the public interest required some limitation upon the right of clam fishing, it does not seem to us that it is unreasonable or arbitrary for the state having a proprietary interest as well as a governmental power all for the public benefit to give the preference to those whom the law for more than two hundred and fifty years has given a preference, and who were

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[5] The Norton court found that the right to travel was not improperly infringed upon because the plaintiffs did not seek to move to New Haven, the municipality whose clam-digging ordinance was at issue. Instead, the Norton plaintiffs wanted to remain as residents of their home towns and merely come to North Haven to dig clams when they chose. Norton, at 616.

GREGORY FRANK COOK
ATTORNEY AT LAW
P.O. Box 240618
Douglas, Alaska 99824
(907) 586-9719 • Fax (907) 463-5848

> **enjoying a preference when the fourteenth amendment was adopted, namely the inhabitants of the town within which the fisheries are located. The discrimination between them and the inhabitants of other towns seems to us to 'bear a just and proper relation' to the difference in situation, in locality, and in the actual enjoyment of prior legal rights or privileges. It is not unreasonable that they to whose doors nature has brought these 'succulent bivalves' shall be entitled to them before those who are less favorably situated whenever there must be restriction. And we do not think that the legislative recognition of this existing superiority in situation and privilege denies to others the equal protection of the law.**

State v Leavitt, 72 A. 875, 879 (Maine 1909).

In sum, although Maine allows a limited amount of intra-state discrimination among its citizens in the allocation of harvest opportunities for certain "succulent bivalves," it does so in a legal context vastly different from Alaska's. I do not believe Maine's limited exception to the general rule of equal protection would be persuasive to the Alaska Supreme Court.

IV. CONCLUSION

In McDowell, the Alaska Supreme Court wrote that intrastate discrimination in the allocation of fish and wildlife harvest opportunities based solely on differences of intrastate residency was invalid and violated numerous provisions of Alaska's Constitution. The Alaska Supreme Court cited, with approval, several other state's decisions on this general issue. Those non-Alaska cases rested on a legal analysis that blended the Public Trust Doctrine with traditional equal protection analysis.

For this reason, it is possible to surmise that the advocates of a constitutional amendment[6] (new Article VIII, § 19), may not have paid sufficient attention to McDowell v State, 785 P.2d 1 (Alaska 1989).

HJR 46 (2d Sess., 1998) states that it would allow the Legislature to provide a subsistence preference "consistent with

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[6] SEE: House Joint Resolution 46, 2d Sess., 20th Legislature, introduced January 11, 1998, iteration under consideration as of February 24, 1998.

GREGORY FRANK COOK
ATTORNEY AT LAW
P.O. Box 240613
Douglas, Alaska 99824
(907) 586-9719 • Fax (907) 463-5848

the sustained yield principle." However, proposed § 19 says nothing about whether a subsistence preference would be consistent with the Alaska Constitution's special guarantee of equal protection that is found in the Article VIII "equal access" clauses.

The Alaska Supreme Court in McDowell ruled that a rural preference in the allocation of fish and wildlife violates three clauses of the Alaska Constitution: Article VIII, §§ 3, 15, and 17.

The McDowell Court held that a rural preference is invalid for two, discrete reasons:

> 1) special harvest privileges based on one's place of residence within Alaska unfairly restrict access to fish and wildlife and constitute an improper "special privilege" in violation of the § 3 common use clause, the § 15 no exclusive right of fishery clause, and the § 17 uniform application clause (McDowell v State, 785 P.2d 1, 9 (Alaska 1989)); and
>
> 2) special harvest privileges based solely on one's place of residence within Alaska violate the guarantee of equal protection of the laws which subjects intrastate residential classifications to strict scrutiny. (McDowell v State, 785 P.2d 1, 7 (Alaska 1989), citing Gilman v Martin, 662 P.2d 120, 125 (Alaska 1983); and Neuman, Territorial Discrimination, Equal Protection, and Self-Determination, 135 U.Pa. L. Rev. 261, 274-275 (1987).)

The authority to allocate fish and wildlife does not imply a power to limit admission to a user group. Legislation that burdens the equal access clauses of Article VIII must be designed for the "least possible infringement" on Article VIII's open access values. McDowell v State, 785 P.2d 1, 10 (Alaska 1989), citing Ostrosky at 1191 and Johns v CFEC, 758 P.2d 1256, 1266 (Alaska 1988).

Limits on admission to user groups are subject to scrutiny under the article VIII equal access clauses. McDowell v State, 785 P.2d 1, 8, fn.14 (Alaska 1989), citing State v Ostrosky, 667 P.2d 1184, 1189 (Alaska 1983); Owsichek v State, 763 P.2d 488, 492 (Alaska 1988).

GREGORY FRANK COOK
ATTORNEY AT LAW
P.O. Box 240618
Douglas, Alaska 99824
(907) 586-9719 • Fax (907) 463-5848

The "urban-rural" antinomy, like most forms of discrimination based solely on one's place of residence within a State, is too crude a distinction to pass muster under traditional equal protection analysis. McDowell v State, 785 P.2d 1, 11 (Alaska 1989), see especially fn.21.

In my opinion, the guarantee of equal protection found in the Alaska Constitution, Article VIII, dovetails with the Public Trust Doctrine. The common law fiduciary obligations of a trustee include the duty to deal impartially with all the beneficiaries. (Restatement (Second) of Trusts § 183 (1959).

> Where the necessity for the preservation of the wild game and fish exists in certain territories of the state, that territory may be segregated for the purpose of regulating the right to taking game and fish therein; but the privilege of taking and using same must be extended to the people of the state outside of the territory upon the same terms that are given to those who are residents of the territory embraced in the legislation. (citations omitted).

McDowell v State, 785 P.2d 1, 12 (Alaska 1989), citing Lewis v State, 161 S.W. 154, 156 (Arkansas 1913).

Perhaps the proponents of HJR 46 are relying on the strength of the principle of constitutional interpretation that would strive to harmonize proposed § 19 with other constitutional provisions with which HJR 46 conflicts. SEE: Abrams v State, 534 P.2d 91, 95 (Alaska 1975). The prudence of such a legislative strategy is certainly questionable, especially when explicit language of supremacy could easily have been included by the draftsman.

I believe that in order to permit intra-state discrimination in the allocation of fish and game by the Alaska Legislature, based on rural residency, it may be necessary to expressly state an intent to over-ride at least four protections of the Alaska Constitution: Article I, § 1, and Article VIII, §§ 3, 15, and 17.

GREGORY FRANK COOK
ATTORNEY AT LAW
P.O. Box 240618
Douglas, Alaska 99824
(907) 586-9719 • Fax (907) 463-5848

PUTTING THE PUBLIC TRUST DOCTRINE TO WORK

SECOND EDITION

Prepared By:

COASTAL STATES ORGANIZATION, INC.

David C. Slade, Esq.
Project Consultant
Bowie, Maryland

R. Kerry Kehoe, Esq.
Project Manager
Coastal States Organization

Jane K. Stahl, Esq.
Assistant Director
Long Island Sound Program
Connecticut Department of Environmental Protection

Illustrations by:

Thomas Ouellette
Connecticut Department of Environmental Protection

CHAPTER II

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

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

Summary

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

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

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

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

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

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

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

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

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

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

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

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

The United States Supreme Court, in a seminal American public trust decision, *Shively v. Bowlby*, reviewed and summarized the laws of the Thirteen Original States. After this summary the Court stated that "there is no universal and uniform law upon the subject, but that each State has dealt with the lands under the tidewaters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public."[13] Therefore, the Supreme Court went on to say, "Great caution ... is necessary in applying precedents in one State to cases arising in another."[14]

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

- Has public trust interests, rights and responsibilities in its navigable waters, the lands beneath these waters, and the living resources therein;

- Has the authority to define the boundary limits of the lands and waters held in public trust;

- Has the authority to recognize and convey private proprietary rights (the *jus privatum*) in its trust lands, and thus diminish the public's rights therein, with the corollary responsibility not to substantially impair the public's use and enjoyment of the remaining trust lands, waters and living resources;

- Has a trustee's duty and responsibility to preserve and continuously assure the public's ability to fully use and enjoy public trust lands and waters for certain trust uses; and

- Does not have the power to abdicate its role of trustee of the public's *jus publicum* rights, although in certain limited cases the State can terminate the *jus publicum* in small parcels of trust land.

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

Second, the Thirteen Original States, under the Articles of Confederation, did not cede their tidelands to the new Federal government as they did their western lands when they adopted the Articles of Confederation, or when the Confederated Congress enacted the Northwest Ordinance of 1787 (discussed below). Nor did this change when the first Congress reenacted the Northwest Ordinance on August 7, 1789.[15] Thus, at the time of the adoption of the Constitution, the Thirteen Original States reserved full sovereignty, dominion, ownership and control over their tidelands, "subject only to the rights surrendered by the Constitution of the United States."[16]

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

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

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

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

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

In applying the Equal Footing Doctrine the United States Supreme Court has consistently found that "the new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the *tide waters*, and in the lands under them, within their respective jurisdictions."[19] Alternatively put, "First, The shores of *navigable waters*, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states."[20] These rights, sovereignty, and jurisdiction of the states were "subject only to the rights surrendered by the Constitution of the United States."[21] As can be seen by the word usage in the quotes above, these rights have been variously described as pertaining to lands beneath either "tidewaters" or "navigable waters," a dichotomy of definitions that would trouble and confuse courts for two centuries.

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

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

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

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

3. Evolution of the Term 'Navigable Waters'

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

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

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

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

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

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

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

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

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

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

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

c. State Definitions of 'Navigable Waters'

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

Although it is a Federal question as to what lands and waters were received in trust by a State upon entering the Union,[47] "it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[48] For bottomland title purposes, States may apply their own definition of 'navigable waters' as long as there is no conflict with Federal law.[49] For purposes of public use of the navigable waters, without regard to ownership of the bed, the State may adopt different (and less stringent) tests of 'navigable waters,'[50] tests that need not be evaluated as of the time of Statehood, but afterwards.[51]

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

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

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

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

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

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

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

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

Each of the Thirteen Original States claimed ownership and control of the submerged lands off their coasts.[68] Likewise, the new ocean-bordering States that subsequently entered the Union on an equal footing also claimed ownership and control of the submerged lands off of their coasts. However, in 1947, the United States Supreme Court overruled these original State claims, and held that the "Federal Government rather than the State has paramount rights in and power over [the submerged lands within three nautical miles], an incident to which is full dominion over the resources of the soil under that water area."[69] In 1953, however, Congress affirmed State ownership and control over submerged lands extending from the coastline out three geographic miles[70] (or three leagues[71] in the case of the Gulf of Mexico boundaries of Florida and Texas), when the 1953 Submerged Lands Act was enacted.[72] Although the Submerged Lands Act, which applies only to the States of the Union,[73] is silent regarding any public trust rights or duties imposed upon an adjacent coastal State, many ocean-bordering States do hold their submerged lands out three miles (or three leagues) in the public trust, either through judicial determination or constitutional or statutory provision.[74]

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

2. Freshwater Bottomlands

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

C. Waters Within the Public Trust

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

1. Tidewaters

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

2. Navigable Freshwaters

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

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

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

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

4. Non-navigable Tributaries Flowing into Navigable Freshwaters

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

D. Living Resources Within the Public Trust

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

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

Notes

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

2. Angell, J.K., *A Treatise on Tide Waters* (1826), at 17.

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

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

3. *Shively v. Bowlby*, 152 U.S. 1, 14 (1894).

   NY: *Fulton Light, Heat & Power Co. v. State of New York*, 200 N.Y. 400, 412-13 (1911)("In adopting the common law of England, the people of this state took over such of its rules as were applicable to, and consistent with, their conditions and circumstances. It became, and is, the law of the state and the basis of its jurisprudence, except so far as its principles and rules of action have been modified by Constitution, statutes, or usages; or were inapplicable to our situation.").

4. *Shively v. Bowlby*, 152 U.S. 1, 14, 15 (1894). *See also Martin v. Waddell*, 41 U.S. 367, 410 (1842)("When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.").

   PA: *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869)("[B]y the revolution and the acknowledgement of the independence of the colonies by the treaty of peace, all the rights and sovereignty of the crown were transferred to and vested in the several states.").

5. *Carson v. Blazer*, 2 Binn. 475, 477 (Pa. 1810).

6. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935).

7. *Attorney General v. Chambers*, 4 De G.M. & G. 206 (1789).

99. *See National Audubon Society v. Superior Court of Alpine County*, 189 Cal.Rptr. 346, 658 P.2d 709 (1983), *cert. denied sub nom. City of Los Angeles Dep't of Water & Power v. National Audubon Society*, 104 S. Ct. 413 (1983). *See also Golden Feather Community Association v. Thermalito Irrigation District*, 199 Cal.App.3d 402, 244 Cal. Rptr. 830 (1988)(The Public Trust Doctrine does not extend or apply to non-navigable waterways absent some impact on the public trust uses of navigable waters fed by the non-navigable waters).

100. *Rettkowski v. Department of Ecology*, 858 P.2d 232, 237, 122 Wash.2d 219 (1993)("First, we have never previously interpreted the doctrine to extend to non-navigable waters or groundwater." Noting in note 5 that "We similarly do not need to address the scope of the doctrine today.").

101. *See* W. Rodgers, ENVIRONMENTAL LAW, 172-73 (1977).

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

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

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

a. Land Bordering the Great Lakes

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

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

b. Land Bordering Navigable Rivers and Inland Lakes

(i) River Bottomlands

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

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

LA: LA. CIV. CODE Art. 450 (The bottoms [beds below the low water mark] of navigable rivers and streams are public things not susceptible of private ownership); LA. CIV. CODE Art. 456 (West 1979)("The bank of a navigable river or stream is the land lying between the ordinary low and ordinary high stage of the water. The banks of navigable rivers or streams are private things that are subject to public use."); LA. CONST. Art. IX, § 3 ("The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion.").

MN: *Miller v. Mendenhall*, 43 Minn. 95, 96, 44 N.W. 1141 (1890)("The State holds the title to low-water mark in its sovereign capacity.").

PA: *Freeland v. Pennsylvania Railroad Co.*, 197 Pa. 529, 538, 47 A. 745, 746 (1901)("[I]t has been held in many cases that a survey, returned as bounded by a large navigable river, vests in the owner the right of soil to ordinary low watermark of the stream, subject to the public right of passage for navigation, fishing, etc., in the stream, between ordinary high and ordinary low watermark.").

TX: *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W. 2d 441 (1935)(The border between the private upland and the State-owned land within the trust exists halfway between the high and low levels of waterflows); *State v. Bradford*, 121 Tex. 515, 549, 50 S.W.2d 1065, 1078 (1932)("The decisions of this state announce the rule that the state can grant soil beneath navigable public waters.").

41. Many States exclusively own their bottomlands, setting the boundary of the upland owner at the "ordinary high water mark."

US: *United States v. Willow River Power Co.*, 324 U.S. 499, 507 (1945)("[A]n owner has no private rights in the stream or body of water which are appurtenant to his land."); *Silas Mason Co. v. Tax Comm. of Washington*, 302 U.S. 186, 198 (1937)("Title to the riverbed ... [is] in the state."); *James v. Dravo Contracting Co.*, 302 U.S. 134, 140 (1937)("The title to the beds of ... rivers [is] in the state.").

AK: ALASKA STAT. 38.05.965(18)("[S]horeland means land belonging to the state which is covered by nontidal water that is navigable under the laws of the United States up to the ordinary high water mark as modified by accretion, erosion or reliction.").

FL: *Martin v. Busch*, 93 Fla. 535, 563, 112 So. 276 (1927)("Upon the admission of Florida into the Union, ... the state, by virtue of its sovereignty, became the owner of all lands under the navigable waters within the state, including the

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

C. Federal Acquisition of State Public Trust Land

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

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

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

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

2. Fishing

Fishing is a natural incident of the public right to use public trust lands and waters,[14] as well as incidental uses such as fowling[15], and shellfishing.[16] The public right of fishing has been closely related by the courts to the public right of navigation.[17] Numerous claims of exclusive fishing rights of upland owners owning the bottomlands of navigable lakes and rivers have been defeated on public trust grounds.[18]

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

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

3. Other Traditional Uses

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

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

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

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

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

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

US: *Douglas v. Seacoast Products*, 431 U.S. 265, 284-5 (1977)("A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. ... The "ownership" language of such cases must be understood as no more tha a Nineteenth Century legal fiction expressing the "importance to its people that a State have power to preserve and regualte the exploitation of an important resource." ... Under modern analysis, the question is simp0ly whether the State has exercised its police power in conformity with the federal laws and the Constitution." Citations omitted.) This case draws into question the validity of the progeny of cases following *Geer v. Connecticut*, 161 U.S. 519, 529 (1896)(Following the English common law, the court held that "ownership" of fish and game is in the State not in a proprietary sense but in its sovereign capacity, and must be exercised "as a trust for the benefit of the people." Citing *Martin v. Waddell*, 41 U.S. 366, for the proposition that the "ownership is that of the people in their united sovereignty."). *Geer* was also expressly overruled by *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

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

STATE POWERS, DUTIES, LIMITATIONS AND PROHIBITIONS UNDER THE PUBLIC TRUST DOCTRINE

POWERS LIMITATIONS

Summary

State and federal courts have long recognized that the Public Trust Doctrine devolves upon the States, as trustees of the public trust lands, waters and living resources, certain powers and corollary duties, along with limitations and prohibitions on these powers for managing the "assets" of the public trust. The courts have elucidated these powers, duties, limitations and prohibitions in order to assure the preservation of the public's trust rights to use and enjoy these lands, waters and living resources.

State powers under the Public Trust Doctrine include the authority to protect the trust lands, waters and resources, govern the public's trust rights in trust lands, waters and resources, exercise continuous control over public trust lands, waters and living resources, define the limits of the lands and the navigability of the waters held in public trust, convey the *jus privatum* title to public trust lands, revoke a conveyance that unduly diminishes or destroys the State's *jus publicum* control over the conveyed land, require leases for structures on State's public trust lands, and restrict or prohibit fishing.

State duties under the Public Trust Doctrine include the obligations to supervise the trust, preserve, so far as consistent with the public interest, the uses protected by the trust, and protect and maintain trust property and regulate its use by devoting trust lands, waters and living resources to actual public uses.

Of the powers and authorities listed above, the courts have only circumscribed a State's power to convey trust lands into private ownership. The limitations on a State's conveyance of the *jus privatum* title into private ownership provide that there must be clear legislative authority for the conveyance, a definite furtherance of public trust purposes, and no substantial impairment of the public's use of the remaining public trust lands, waters or living resources.

Finally, the Public Trust Doctrine prohibits a State from abdicating its sovereignty or dominion over public trust lands, waters and living resources. Nonetheless, complete termination of the public's trust rights in certain parcels of public trust lands can be accomplished by a State, but only if there is legislation with the clear intent to convey a certain parcel of trust land out of the trust.

CHAPTER VI

A. State Powers and Authorities Under the Public Trust Doctrine

Over the last two centuries the American Public Trust Doctrine has evolved significantly as a basis for managing public trust lands, waters and living resources within each State. Over the decades the courts have found that under the doctrine the States, as trustees, have certain powers and corollary duties, along with limitations on these powers. Of central importance, however, is that the common intent and purpose of each power, duty or limitation is the full preservation of the public's trust rights to use and enjoy these lands, waters and living resources.

There is no one seminal case enumerating all of the powers and duties of the States, or the concurrent limitations and prohibitions, devolved upon them by the Public Trust Doctrine. So many factual circumstances and situations render that impossible. Thus, in order to circumscribe the general body of these trustee powers, duties, limitations and prohibitions, the entire collection of State and federal case law may be analyzed. To that end, the powers, duties, limitations and prohibitions that are discussed herein are all derived from cases discussed elsewhere in this book.

Nearly every State in the Union is now cognizant of, and implementing, the Public Trust Doctrine. In some States, however, decades have passed since the State asserted its authority as a trustee under the doctrine. The U.S. Supreme Court recognized in the 1988 *Phillips Petroleum v. Mississippi* case that the State was not precluded from asserting ownership of tidelands under the doctrine, for the first time since it entered the Union in 1817.[1] As succinctly put by the Arizona Supreme Court:

> "That generations of trustees have slept on public rights does not foreclose their successors from awakening."[2]

A State's powers, duties, limitations and prohibitions are as viable today as they were "at the instant it achieved the constitutional status of a State."[3] Under the Public Trust Doctrine, States have the power and authority to:

- Govern, manage and protect the public's trust rights in lands and water subject to the Public Trust Doctrine;[4]
- Exercise a continuous supervision and control over public trust lands, waters and living resources;[5]
- Define the limits of the lands held in public trust;[6]
- Convey the *jus privatum* title to public trust lands;[7]

- Revoke a conveyance that unduly diminishes or destroys the State's *jus publicum* control over the conveyed land;[8]
- Require leases or easements for structures on State's public trust lands;[9] and
- Restrict or prohibit fishing.[10]

B. State Duties and Obligations Under The Public Trust Doctrine

The Public Trust Doctrine has been described as "an affirmation of the duty of the State to protect the people's common heritage in streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."[11] This duty of protecting public trust resources is central to the Public Trust Doctrine, for as stated by an Oregon court "These resources, after all, can only be spent once. Therefore the law has historically and consistently recognized that rivers and estuaries, once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee."[12]

As one reviews the following duties and obligations of States under the doctrine, it becomes clear that each of the powers and authorities listed in the preceding section has a corollary duty to implement the authority through some affirmative action. Indeed, more and more States are recognizing duties upon the State trustees to implement the trust for the benefit of the public and future generations. Accordingly, under the Public Trust Doctrine each State has the duty and obligation to:

- Supervise the trust;[13]
- Preserve, so far as consistent with the public interest, the uses protected by the trust;[14] and
- Protect and maintain trust property and regulate its use by devoting trust lands, waters and living resources to actual public uses.[15]

C. Limitations and Prohibitions on State Powers and Authority

Under the Public Trust Doctrine, States are completely prohibited from abdicating their sovereignty or dominion over public trust lands, waters and living resources.[16] Of the powers and authorities listed in section A. above, the courts have only circumscribed a State's power to convey trust lands into private ownership. All other powers and authorities appear to remain plenary.

The complete termination of the public's trust rights in certain parcels of trust land can be accomplished by a State, although only in accordance with several conditions. There must be legislation authorizing the conveyance of trust lands out of the trust.[17] The legislation must be clear in its intent to convey the parcel out of the trust.[18] At a minimum the intent must be "necessarily implied."[19] Establishing that termination of the trust is necessarily implied, however, is a heavy burden, for if a court can interpret the statute so as to retain the public's interest in tidelands, the statute should be so construed.[20] This placement of the burden on the claimant is also bolstered by the rule of statutory construction that, in the cases of a claimed grant from a State to a private owner, the conveyance is to be construed most favorably for the State. *See* Ch. V.A.4. The legislation authorizing the termination of the public's trust rights in trust land must clearly further the public's trust interests.[21] *See* Ch. V.D.

Finally, all State public trust powers and authorities must be exercised consistently with State and U.S. Constitutional limitations, such as prohibitions on gifts of public assets to private entities. This "gift" prohibition is in many (if not all) State constitutions and has been raised to challenge purported conveyances of public trust lands, as have equal protection and due process clauses.[22]

15. Each State has the duty and obligation to protect and maintain trust property and regulate its use by devoting trust lands, waters and living resources to actual public uses.

    CA: *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 441, 658 P.2d 709, 189 Cal.Rptr. 346, *cert. denied*, 464 U.S. 977 (1983)(The Public Trust Doctrine is "an affirmation of the duty of the state to protect the people's common heritage in streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.").

    FL: *Hayes v. Bowman*, 91 So.2d 795 (1957)("[I]t is well settled in Florida that the State holds title to lands under tidal navigable waters and the foreshore thereof(land between high and low water marks). As a common law this title is held in trust for the people for purposes of navigation, fishing, bathing and similar uses. Such title is not held primarily for purposes of sale or conversion into money. Basically it is trust property and should be devoted to the fulfillment of the purposes of the trust, towit: the service of the people.").

    HI: *State By Kobayashi v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725 (1977)("Under public trust principles, the State as trustee has the duty to protect and maintain trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, *e.g.* recreation.").

16. States are prohibited from abdicating their sovereignty or dominion over public trust lands, waters and living resources.

    US: *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892)("The State can no more abdicate its trust over property in which the whole people are interested ... than it can abdicate its police powers in the administration of government and the preservation of the peace.").

    CA: *California v. Superior Court (Lyon)*, 29 Cal.3d 210, 226 (1981)("It is well settled that if the state holds these lands in trust for the benefit of the public, its conveyance of title to private persons does not necessarily free the property from the burden of the public trust."); *City of Longbeach v. Mansell*, 3 Cal.3d 462, 482 (1970)("Tidelands subject to the trust may not be alienated into absolute private ownership; an attempted conveyance of such land transfers 'only bare legal title' and the property remains subject to the public trust easement.").

    NJ: *Arnold v. Mundy*, 6 N.J.L. 1, 39 (1821)("[T]he king cannot, by alienation, destroy the *jus publicum* ... .").

17. There must be legislation authorizing the conveyance of trust lands out of the trust.

AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988)("Before any tideland grant may be found to be free of the public trust under the 'public trust purposes' theory, the legislature's intent to so convey it must be clearly expressed or necessarily implied in the legislation authorizing the transfer. ... If any interpretation of the statute which would retain the public's interest in the tidelands is reasonably possible, we must give the statute such an interpretation.").

CA: *Taylor v. Underhill*, 40 Cal. 471, 473 (1871)("State can probably sell the [tide]land ... but this must be done in the interest of commerce and that must first be determined by the Legislature."); *Boone v. Kingsbury*, 206 Cal. 148, 189-193, 273 P. 797, 815-16 (1928)(City of Oakland had no power to convey trust land "unless such power was conferred by the legislature ...").

MA: *Commonwealth v. City of Roxbury*, 75 Mass. 451, 494 (1857)(General authority to take land for highways does not include taking tide flats beneath navigable waters. Such authority "must appear by express words or necessary implication. Citations omitted. The legislature alone have that power.").

MI: *Obrecht v. National Gypsum Co.*, 361 Mich. 399, 105 N.W.2d 143 (1960)("Noone ... has the right to construct for private use a permanent deep water dock or pier on the bottom lands of the Great Lakes ... unless and until he has sought and received, from the legislature or its authorized agency, such assent based on due finding as will legally warrant the intended use of such lands.").

NH: *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 6, 25 A. 718, 720 (1889)("The purpose and nature of the trust in which the basins of these public waters are held are such that an alienation of the title of the soil is not an exercise of executive power, and cannot be effected without legislative authority.").

TX: *Lorino v. Crawford Packing Co., et al.*, 142 Tex. 51, 175 S.W.2d 410 (1943)("No one should have an exclusive right to the enjoyment of [lands covered by tidal waters], unless and until the legislature has granted such right.").

18. The legislation must be clear in its intent to convey the parcel out of the trust.

AK: *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1119 (1988)("Before any tideland grant may be found to be free of the public trust under the "public trust purposes" theory, the legislature's intent to so convey must be clearly expressed or necessarily implied in the legislation authorizing the transfer.").

CHAPTER VII

THE CONFLUENCE OF RIPARIAN RIGHTS AND THE PUBLIC TRUST DOCTRINE

Summary

The law has recognized the co-existence of public and private rights in navigable waters, tidelands and submerged lands for hundreds, if not thousands, of years. In the United States there is a long history of these two interests being reconciled such that both may exist to the reasonable satisfaction of the other. Nonetheless, with the rapid intensification of demand on coastal resources and the corresponding advent of environmental management and regulation, public and riparian rights are thrown into more frequent conflict.

"Riparian" and "littoral" rights derived from the English common law, and are part and parcel of the property rights enjoyed by owners of land adjoining navigable waters, including both tidal and non-tidal waters. In modern usage the term "riparian rights" is understood as encompassing both riparian and littoral rights. For purposes of this discussion, the term "riparian rights" is used in its general sense encompassing both.

Under the English common law, the bundle of riparian rights included the rights of access to the water, to wharf out, to gain by accretions (and lose by erosion) and to replace land lost by avulsion. The right of access to the water is the most basic right of the riparian owner under which other riparian rights are created and protected.

Today, nearly every State has modified the English common law, either by Constitution or legislatively, to such an extent that what were previously regarded as riparian "rights" can best be described today as merely riparian "privileges." But though States have broad authority to modify or nullify unexercised riparian rights, this discretion is limited once these rights are "vested" in the riparian owner. Riparian rights, once vested to a riparian owner, can only be deprived in accordance with due process, and with just compensation.

There is a pyramid of authority over navigable waters. At the top, and operating within a narrow scope of "improvements to navigation" is the federal navigational servitude. Next is the State authority, as trustee, to manage its trust lands, waters and resources for the benefit of the public's various trust uses, including the authority to reasonably regulate riparian rights, or to deny them altogether. Finally, riparian owners have certain rights, of which some, such as filling-in shorelands, are regulated to such an extent that today they have been described as a mere franchise.

A State may accord special consideration to riparians. At the same time, when a riparian owner desires to "improve" the shorelands the State can best safeguard the public's trust rights if it affirmatively regulates these riparian improvements.

the Property Clause and the federal power of eminent domain. The Commerce Clause provides the Federal Government with regulatory powers, whereas the Enclave Clause, the Property Clause and power of eminent domain provide the means for and govern its property ownership and use. Each of these is discussed below.

1. Regulatory Powers: The Commerce Clause

Under the Commerce Clause of the U.S. Constitution[6] the Federal Government has the paramount power to regulate interstate and foreign commerce. As noted in prior chapters, commerce in the early days of the country was almost exclusively conducted by navigation. Thus, it is not surprising that a central power that has unfolded from the federal commerce clause is the authority to regulate the use of navigable waters, known as the "federal navigational servitude". Today, even though the conduct of "commerce" is much broader than maritime commerce, the navigational servitude remains of central importance when dealing with public trust lands, waters and resources.

a. The Federal Navigational Servitude

The navigational servitude[7] is a dominant servitude over navigable waters and the lands beneath that allows the United States to regulate the use of the waters and submerged lands for purposes related to navigation and commerce, and to do so without compensation.[8] The navigational servitude, which is interpreted as an incident of the historical public right of navigation,[9] the *jus publicum*, has become a doctrine of federal power under the Commerce Clause.[10] Because the federal navigational servitude emanates from the Commerce Clause power, the scope of the servitude is strictly limited to the scope of Commerce Clause purposes, even though the scope of the Commerce Clause is broadly construed by the federal courts.

The federal navigational servitude confers only regulatory power, not ownership.[11] Exercise of the navigational servitude by the Federal Government, or any of its agencies, does not effect a transfer of title.[12] As the constitutional delegatee of the national *jus publicum* interest in navigation and commerce, the United States has a public use interest in public trust lands and waters. The States, on the other hand, hold not only title to the public trust lands and waters, but are also vested with sovereignty. The States have both ownership and regulatory power over these resources.

State/Federal authority occurs, bringing into play the equal footing doctrine. *See* Ch. II, §1.A.2. After Statehood, certain federal enclaves may be owned outright by the Federal Government, through the Enclave Clause, or the government may condemn land and take ownership through its powers of eminent domain.

a. Pre-Statehood

i. Property Clause

Under the Property Clause, Congress has exclusive power over the territory and property of the United States.[23] Neither the Ninth nor the Tenth Amendments, which together limit the powers of the Federal Government to those enumerated in the U.S. Constitution and reserve for the people all other powers, affect this Property Clause power. A State cannot circumscribe the title of the United States.[24] Because the Property Clause gives the United States exclusive power over its territory and property, there are, presumably, no latent powers remaining that could belong to a State under the Tenth Amendment.[25] Under the Supremacy Clause, furthermore, the Property Clause supersedes any State laws that conflict with the exclusive control of the United States.[26]

When it comes to public trust lands and waters, however, the Property Clause does not delegate exclusive federal control. As the U.S. Supreme Court said in the 1845 case of *Pollard's Lessee v. Hagan*: "First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states."[27] Thus, public trust lands are outside the scope of the Property Clause power, except when the United States acts as trustee prior to Statehood. This lack of exclusive Property Clause power over public trust lands has generally been distinguished from the exclusive power of the Federal Government to dispose of uplands.[28]

This is in accord with Congressional policy. Congress has never treated public trust lands as part of the "public domain" of the United States. "Congress has never undertaken by general laws to dispose of [lands below high water mark of navigable waters in any Territory of the United States]",[29] and "the general legislation of Congress in respect to public lands does not extend to tide lands."[30] Public trust lands were not included within the classifications in statutes relating to sales of public land and were not covered by the Swamp Land Act.[31] When the boundaries of regular federal patents of the public domain included public trust lands as a result of the imprecision of meandering (*i.e.* the general depiction as opposed to

specific delineation of small water course) they did not pass title to the public trust lands of their own force, but as a result of ratification by the State.[32]

Congress appears to have acquiesced to the common law vesting of sovereign ownership in the several States and its non-preemption by the Constitution.[33] Furthermore, before and after Statehood, all navigable waters of the United States were to be always and forever common highways.[34] As a result, the beds and shores of navigable waters were not subject to survey and disposition by the United States.

The lands in the public domain granted by the United States to States in their enabling acts included only uplands.[35] Lands under navigable waters are not explicitly addressed, but covered by the admission of the State on an equal footing.[36] The equal footing doctrine recognizes that, upon admission to the Union, the "new" State acquires, as an incident of its sovereignty, all lands lying under navigable waters. The United States, thus, did not convey ownership of trust lands at Statehood in the same manner as it conveyed the uplands, but rather acknowledged the State's ownership, by virtue of its sovereignty, of the trust lands which had been held in trust by the Federal Government during territorial times.[37]

ii. International Obligations

As trustee of trust lands in a territory prior to Statehood, the United States could convey these lands in order to perform an international obligation.[38] Although the United States had full power to convey these lands, Congress historically has refrained from making general pre-Statehood grants of public trust lands.[39] Their dominion and propriety, with a few exceptions, was preserved intact for the future State, on an equal footing with the original thirteen States. The United States as trustee confined itself to exercise its power in the areas of commerce, international obligations, public exigencies, and purposes related to the territory.[40]

However, a prior Sovereign's grant of exclusive ownership, confirmed by the United States, has been interpreted as excepting the lands from the public use easement.[41] *See* Ch. II, §4. For example, when the United States acquired California from Mexico, it was obligated under international law to recognize grants that the Mexican government had made to certain *pueblos* of tidelands, most notably to the pueblo of San Francisco. By confirming title, the United States fulfilled an international duty to protect previously created property rights.[42] The power and duty of the United States to do so under a treaty is considered superior to any rights of the State, which arise subsequently.[43] As a result, where the tidelands of California would have, as an incident of State sovereignty, been held in trust for

the benefit of the people, certain tidelands that were part of the Mexican *pueblo* grants were not subject to the public trust doctrine.

b. Post-Statehood

After a State is admitted to the Union, the Federal Government can acquire land through two constitutional powers. One is the power to purchase "places" with the consent of the Legislature of the State where the place is located. This is commonly known as the "Enclave Clause" and is akin to when a willing buyer and willing seller make a transaction.

The other power is that of eminent domain, or the power of condemnation. It is an implied power of the Federal Government, flowing from the Fifth Amendment's express prohibition against taking private property for public use without just compensation.[44] The U.S. Supreme Court has reasoned that since the government is prohibited from taking private property without just compensation, then there is a tacit recognition that the government has the power to take private property for public use *with* just compensation.[45] Use of the eminent domain power is akin to when a person or State is unwilling to sell property, so the Federal Government takes it and pays "just compensation."

i. *Enclave Clause*

Under the Enclave Clause, the United States has exclusive jurisdiction over any "places" acquired for enumerated purposes by purchase with the consent of the State Legislature.[46] These places, or enclaves, are expressly described in the Constitution as those areas which are needed "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

Generally speaking, the Enclave Clause gives the United States exclusive jurisdiction over the "place" only for the specified public purpose for which the land was purchased.[47] However, the Supreme Court has held that a State may convey, and the Congress may accept, either exclusive or qualified jurisdiction over property acquired for purposes other than those enumerated above.[48] In the event of a State conveyance of qualified jurisdiction, the Supreme Court has recognized the validity of "concurrent jurisdiction" over the place.

Only when either the State or the Federal Government immediately and directly exercises its own sovereign powers is it immune from the jurisdiction of the other.[49] Neither may substantially curtail the exercise of the other's power.[50] According to Enclave Clause jurisprudence as it has developed, consistent with *Pollard's Lessee*

v. Hagan,[51] the Clause empowers the United States to acquire exclusive control over property only to the extent of fulfilling one or more of its specific delegated powers.[52]

The question has seldom been raised as to whether the State has any right of reversion if the Federal Government abandons the use of the property for governmental purposes. One instance where the issue will become important, however, is when the Federal Government closes military bases, many of which are coastal properties. *See* Ch. IX, §3.D for further discussion.

ii. Eminent Domain

When a State Legislature is unwilling to convey property, the Federal Government has the power of eminent domain, *i.e.* the power to condemn the land as an incident of sovereignty. This power can be exercised by the Federal Government only so far as is necessary to exercise one or more of its enumerated powers.[53] Although a State cannot prevent the Federal Government from acquiring property by eminent domain, a question exists in the federal courts as to whether a State's sovereign title and authority over public trust lands can be extinguished by the Federal Government's taking of trust lands by eminent domain, or if there are any reversionary public trust interests still held by the State.

In the 1988 case *United States v. 11.037 Acres of Land*,[54] one federal district court held that the power of eminent domain allows the United States to take complete title to public trust land, extinguishing all easements and other interests, including the public trust. The court held that even though a State has exclusive power of eminent domain within its own jurisdiction, it cannot, under the Supremacy Clause, use that power to impress a public trust easement where it would frustrate or limit the exercise of eminent domain essential to the sovereign government of the United States.[55]

In rendering its decision the court overruled its 1986 decision in *City of Alameda v. Todd Shipyards*.[56] In *City of Alameda*, the court held that the United States by condemnation acquired full fee simple title without destroying the public trust, because neither government has the power to destroy the trust or the other sovereign. The United States simply acquired the land subject to the public trust, as though no other party had held an interest in the land.[57]

The *City of Alameda* court cited *United States v. 1.58 Acres of Land, Etc.*,[58] a federal district court case in Massachusetts, which the *United States v. 11.037 Acres of Land* court declined to follow. The U.S. District Court for the District of Massachusetts found that our system of dual sovereignty modified common law public trust

theory.[59] Sovereignty was divided between the United States and a State according to the aspect of the interest in public trust lands that is within the respective constitutional power of each. The United States acts as trustee over commerce and the other constitutional powers delegated to the Federal Government, while the State acts as trustee over all other non-preempted matters reserved to the States.[60] Thus, "[w]hen the Federal Government takes such [public trust] property by eminent domain ... [it] obtains the fullest fee that may be had in land of this peculiar nature: the *jus privatum* and the federal government's paramount *jus publicum*."[61] The court further noted that the Federal Government cannot abdicate its *jus publicum* any more than the State can; nor can either trust responsibility be destroyed.[62]

The *1.58 Acres of Land* decision is more consistent with traditional notions of concurrent State and Federal authority. The Supremacy Clause has been interpreted by the U.S. Supreme Court in numerous cases as operating only within the sphere of enumerated powers granted to the Federal Government by the States through the U.S. Constitution.[63] The federal power of eminent domain is an incident of federal sovereignty, the same as a State's public trust authority over trust lands and waters is an incident of State sovereignty.[64] The federal sovereign through its paramount, though limited, powers should not be able to destroy an incident of sovereignty of a State.[65] Nonetheless, a conflict on this question exists at the federal district court level. None of the federal appellate courts or the U.S. Supreme Court has addressed the question.

C. Submerged Lands Act

The 1953 Submerged Lands Act[66] was a reaffirmation by Congress of title in the States to lands beneath navigable waters.[67] The act reversed the 1947 decision of the U.S. Supreme Court in *U.S. v. California*[68] that held that the Federal Government had paramount rights in, and full dominion and power over the navigable waters, submerged lands, and resources therein, seaward of the ordinary low-water mark.

The concurrent jurisdiction of the Federal and State governments over the navigable waters, the submerged lands and the natural resources within these lands and waters is recognized by the Submerged Lands Act. The act retains the paramount authority of the Federal Government to the "use, development, improvement, or control . . . arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power."[69] The act also affirms the right and power of the States to

"manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law ... "[70] Thus, the dual sovereignty described by the Supreme Court in the 1845 case *Pollard's Lessee v. Hagan* is retained in the basic framework of the Submerged Lands Act.

The Submerged Lands Act in and of itself is neither an explicit or implicit preemption of any State authority. Rather, it is an affirmation of concurrent State/Federal jurisdiction. Any area of alleged conflict is subject to standard preemption analysis.[71]

D. Federal Supremacy and State Preemption

No preemption of State action can occur in the absence of affirmative action by the Federal Government.[72] When the Federal Government does act, in furtherance of constitutional purposes, federal preemption must be explicit, implicit, or the result of an actual conflict of laws.[73] In practice, State regulations should generally prevail against the likely preemptive effect of the paramount power of Congress over navigation, when there is no specific congressional act, no need for national uniformity, and no evidence that the State action impedes interstate commerce.[74] When a State attempts to protect its public trust resources, it is less likely to lose on claims of federal preemption because the State is acting in an area of its traditional power.[75] The Supreme Court maintains a presumption against federal preemption when Congress legislates in an area of traditional State power.[76] Property law, including the public trust doctrine, is one such area. Two recent federal decisions are instructive as to how the courts analyze questions of preemption.

In the 1993 case of *Murphy v. Department of Natural Resources,*[77] the residents of "Houseboat Row" off of Key West, Florida, alleged that the State of Florida was trying to evict them from their homes through the State's implementation of submerged land leases. The houseboat owners claimed that Florida was barred by federal law from implementing the submerged land leases. The federal district court carefully analyzed the question of federal preemption, both explicit and implicit, and whether there was an "actual conflict" between the exercise of the State authority and federal authority. The court found that the federal navigation regulations were not explicitly preemptive of State leasing of aquatic lands and the water column above them.[78] They were also not implicitly preemptive, because they were not so comprehensive as to leave no room for supplemental State action.[79] There was also no actual conflict of State and federal laws because the federal laws

CHAPTER IX

Section 1: Using The Public Trust Doctrine To Enhance Coastal Resource Management

Thirty two of a possible 35 States, Territories and Commonwealths of the United States now have federally approved Coastal Zone Management (CZM) Plans[1] under the Coastal Zone Management Act.[2] In addition, there are 28 estuaries that have completed or are in the process of developing management plans under the National Estuary Program (NEP) through section 320 of the Clean Water Act.[3] Many of the CZM programs already have incorporated the Public Trust Doctrine in their federally approved programs, although more can be done. The NEP program could also benefit by incorporating the Public Trust Doctrine, as implemented by the appropriate State, in the management plans.

A. Sources of Public Trust Authority in State Law

As has been fully discussed, the Public Trust Doctrine came to the United States through the English common law. The doctrine is well embedded in the common law of each State, and remains the law of the State until it is modified by the State Constitution or State legislation. *See* Ch. II, §1.A.

1. State Constitutional Provisions and the Public Trust Doctrine

Several coastal States have constitutional provisions which, although they often do not use the term "public trust," clearly recognize the responsibilities of the State to manage and preserve its public trust lands, waters and resources. A few are included here.

California. California has taken the approach of specifically providing in its constitution for public access to public trust lands:

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."[4]

Any analysis of whether land involved in a military base closure is subject to the Public Trust Doctrine must start by asking the factual question: What lands were Public Trust lands at the establishment of the military installation, and how have these lands been modified? This is a question requiring a factual determination to be made through review and analysis of records and evidence that existed at the time of establishment. All of the issues and methodologies discussed in Chapter II, §4 regarding the determination of trust boundaries should be considered in developing this factual record.

Whether the Public Trust Doctrine applies to any of these *prima facie* public trust lands may depend upon how the land in question became federal land. Therefore, the next question is: How, and for what purpose, did the Federal Government acquire the land in question? The Federal Government has become the vested owner of land through the Constitution's Property Clause, Enclave Clause, and through eminent domain. *See* Ch. VIII.B.2.

1. Federal Acquisition: How and for What Purpose?

Property Clause: If the Federal Government acquired the land through the Property Clause, such as for military bases in the U.S. Territories, there seems little question that the Public Trust Doctrine would apply. All of the land formerly held by the Federal Government as U.S. Territory (*i.e.* that land which became the 37 "new" States) was held by the Federal Government under the Property Clause. The Equal Footing Doctrine brought the 37 new States into the Union on par with the original 13 States. The United States Supreme Court has consistently found that "the new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions."[65] *See* Ch. II, §1.A.2. Thus, the Public Trust Doctrine is applicable in all 50 States, as well as the U.S. Territories.

There seems no legal or policy reason, nor is there any precedent, for military installation land acquired by the Federal Government through the Property Clause not to be subject to the Public Trust Doctrine. In the event such federal lands are conveyed back to State or private control, the trusteeship (*jus publicum*) for the public's trust rights in trust lands and waters should pass back from federal to State hands, even if the *jus privatum* ends up in private ownership. If these federal trust lands are conveyed into private ownership, they will once again be burdened by the Public Trust Doctrine.

Enclave Clause: The Federal Government acquires land through the Enclave Clause when a State willingly conveys by legislation to the Federal Government the

affirm its public trust rights and obligations without violating the property rights of the private owner.

Specifically, does a State's reaffirmation of the public's trust rights and its obligations as trustee give rise to a "taking" of private property for public use without just compensation? Private property owners may raise potential "takings" claims where a State, in affirmation of its role as trustee, either (1) imposes restrictions on privately held trust lands; (2) requires public access to trust lands across these privately owned lands, or (3) expands the scope of public activities encompassed by the Public Trust Doctrine.

1. The "Takings" Doctrine

The Fifth Amendment of the United States Constitution provides, in part:

> No person shall . . . be deprived of life, liberty or property, without due process of law; *nor shall private property be taken for public use, without just compensation.* (Emphasis added.)

The Fifth Amendment applies to the several States through the Fourteenth Amendment, which provides, in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth and Fourteenth Amendments were traditionally applied to physical takings of private property by government entities. However, beginning in the early 1900s, courts began to recognize takings claims where a government entity so severely restricted the use of private land that those restrictions had the practical effect of taking the property, hence the term "regulatory takings."

The United States Supreme Court laid the groundwork for the concept of a "regulatory taking" in 1922 in a challenge to Pennsylvania's Kohler Act, which prohibited coal companies from removing coal from beneath the surface in a way that would cause the land to subside.[20] The Supreme Court found the Kohler Act was an unconstitutional taking without just compensation because it made the mining of certain coal "commercially impracticable." In what has become a famous and oft-quoted holding, the Court stated "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes *too far* it will be

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Gregory F. Cook

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Gregory F. Cook*

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*B.A., Pomona College, 1972; J.D., University of Oregon, 1978. The author is a sole practitioner in Douglas, Alaska, where he specializes in public interest natural resources law. The author originally presented an earlier version of this paper May 9, 1992, at Centennial Hall, Juneau, Alaska, to the Continuing Legal Education Seminar entitled, *Wildlife and Fisheries Law in Alaska*, co-sponsored by the Alaska Bar Association and the Wildlife and Fisheries Law Institute.

I

INTRODUCTION

A. The Public Trust Doctrine In A Nutshell

The public trust is one part of our government's complex system of checks and balances. It is a strong tradition in American government which enables the judicial branch to restrain the legislative and executive branches from alienating certain "common property" public resources comprising the wealth of the state.

At its simplest level, the public trust doctrine revolves around the concept that government owes its citizens special duties of care, or stewardship, regarding certain natural resources which the state holds in trust for the public. At this most basic level, the public trust doctrine holds that government must act as a fiduciary in its management of the resources which constitute the corpus of the trust. The beneficiaries of the trust are the citizens of the state, including future generations.

For purposes of the public trust, state-owned property is conceptually divided into two categories: 1) property held by the state as a "proprietor," or *"jus privatum,"* and 2) property held by the state in its "soveriegn capacity, or *"jus publicum."*[1]

Resources which the state holds as a proprietor would include, for example, cars in the motor pool, office furniture, computer equipment, books, and the like. Such resources are not subject to the public trust. In contrast to proprietary resources, "common property" resources like fish, wildlife, waters, minerals, and land, are held by the state in its soveriegn capacity and subject to the public trust.

The import of this distinction is set forth in one leading case as follows:

> The title of both of these [classes of property], for the greater order, and perhaps, of necessity, is placed in the hands of the sovereign power, but it is placed there for different purposes. The citizen cannot enter upon the domain of the crown and apply it, or any part of it, to his immediate use. He cannot go into the king's forests and fall and carry away the trees, though it is the public property; it is placed in the hands of the king for a different purpose; it is the domain of the crown, a source of revenue; *so neither can the king intrude upon the common property, thus understood, and appropriate it to himself, or to the fiscal purposes of the nation,*

[1] *See, e.g.*, Caminiti v. Boyle, 732 P.2d 989, 993-94 (Wash. 1987), *cert. denied*, 484 U.S. 1008 (1988).

> *the enjoyment of it is a natural right which cannot be infringed or taken away . . . .*[2]

The development of the public trust doctrine in the United States historically has been marked by consistent recognition of this elemental distinction between rights and duties of state governments vis-a-vis public trust resources, and the rights and duties of the state when it deals with non-trust resources.

A more modern case rephrases the historic formulation more prosaically, but with greater brevity: "Traditionally, the [public trust] doctrine has functioned as a constraint on states' ability to alienate public trust lands and as a limitation on uses that interfere with [public] trust purposes."[3]

The fundamental characteristic of lands and resources held by the state in trust is that states as trustees act "not as proprietors, but in their sovereign capacity as the representatives and for the benefit of all their people in common."[4]

B. A Short History of the Public Trust Doctrine

The historical antecedents of the public trust doctrine reach back at least as far as Roman times.[5] In the sixth century A.D., the Emperor and jurist Justinian wrote that by "the law of nature, the air, running water, the sea, and consequently the shores of the sea" were "common to mankind."[6] This indefeasible public interest in certain natural resources remains the heart of the public trust doctrine as we prepare to enter the twenty-first century A.D.

In American jurisprudence, courts facing public trust issues look

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[2] Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 361 (N.J.), *cert. denied*, 469 U.S. 821 (1984) (alteration in original) (citation omitted).

[3] District of Columbia v. Air Fla., 750 F.2d 1077, 1082 (D.C. Cir. 1984) (footnotes omitted).

[4] Organized Village of Kake v. Egan, 174 F. Supp. 500, 504 (D. Alaska 1959).

[5] A variety of fascinating academic surveys exist for the student seeking extensive historic treatment of the public trust doctrine. *See generally* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Joseph L. Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980); Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 233 (1980); Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269 (1980); Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970); THE PUBLIC TRUST AND THE WATERS OF THE AMERICAN WEST: YESTERDAY, TODAY AND TOMORROW (Nov. 18-19, 1988) (Continuing Legal Education Program, Lewis & Clark Northwestern School of Law); MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 37 (1983).

[6] J. INST. 2.1.1.pr; *see also* 2 WILLIAM BLACKSTONE COMMENTARIES 403.

primarily to English law, including the Magna Carta, to explain the scope and impact of the public trust doctrine.[7]

Federal law in the United States has a long and continuing history of public trust jurisprudence. Nonetheless, the public trust doctrine in America is primarily a creature of state common law:

> There is no universal and uniform law on [the public trust doctrine] . . . each State applies the doctrine to the lands under the tide waters within its borders according to its own views of justice and policy. . . . Great caution, therefore, is necessary in applying the precedents in one State to cases arising in another.[8]

II

HISTORY OF THE PUBLIC TRUST DOCTRINE IN ALASKA

A. The Alaska State Constitution

In Alaska, the evolution of the public trust doctrine is not as historically elaborate as in many other states. Because of Alaska's relatively recent admission to the Union (1959), it is not possible to describe adequately the purview of the doctrine in Alaska without some

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[7] *See, e.g.*, Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 410 (1842). *See generally* Geer v. Connecticut, 161 U.S. 519 (1896), *overruled by* Hughes v. Okla., 441 U.S. 332 (1979).

Spanish law, and subsequently Mexican law, recognized the public trust doctrine. *See* City of Los Angeles v. Venice Peninsula Properties, 644 P.2d 792, 794 (Cal. 1982). Some commentators suggest that public trust rights guaranteed by the Treaty of Guadalupe Hidalgo serve as independent basis for the public trust doctrine in California. *See* Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 197 (1980); Dion G. Dyer, *California Beach Access: The Mexican Law and the Public Trust*, 2 ECOLOGY L.Q. 571 (1972).

[8] Shively v. Bowlby, 152 U.S. 1, 26 (1894). *See also* Gilbert v. State, Dept. of Fish & Game, Bd. of Fisheries, 803 P.2d 391, 398-99 (Alaska 1990); McDowell v. State, 785 P.2d 1, 12-18 (Alaska 1989); CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115 (Alaska 1988); Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 492-496 (Alaska 1988); District of Columbia v. Air Fla., 750 F.2d 1077, 1082 (D.C. Cir. 1984); Herscher v. State, Dep't of Commerce, 568 P.2d 996, 1003-05 (Alaska 1977); Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 905 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962); City of Madison v. State, 83 N.W.2d 674 (Wis. 1957); State v. Longyear Holding Co., 29 N.W.2d 657 (Minn. 1947) (offering different examples of state interpretations of the public trust doctrine).

For a review of most Alaska statutes governing administration of natural resources in Alaska, see generally ALASKA BAR ASS'N SYMPOSIUM, NATURAL RESOURCES AND THE PUBLIC TRUST DOCTRINE (1986). This symposium antedates and therefore does not discuss the key Alaska cases of *CWC Fisheries*, 755 P.2d 1115, and *Owsichek*, 763 P.2d 488. Also, the 1986 ABA Symposium omitted discussion of Alaska's public trust umbrella statute, ALASKA STAT. § 38.05.502 (1992).

reference to jurisprudence from neighboring jurisdictions. Nonetheless, Alaskan public trust law is already surprisingly well-developed.[9]

Even before statehood, Alaska recognized the force of the public trust doctrine. It is understandable that this would be true in a large, undeveloped territory facing the imminent prospect of statehood and the attendant responsibilities of managing and developing immense natural resource wealth.

To protect the patrimony of Alaska against intemperate disposal, Alaskans adopted a state constitution with exceptional provisions regarding natural resources.[10] In those constitutional provisions, one finds the genesis of the public trust doctrine in Alaska law.

The Alaska Constitution, adopted by the Alaska Constitutional Convention on February 5, 1956, and ratified by the people of Alaska on April 24, 1956, is the primary source of the public trust doctrine in Alaska.[11]

The framers of the Alaska Constitution were conversant with the nature and obligations of the public trust doctrine.[12] Although the framers did not elect to explicitly incorporate the public trust doctrine into the Alaska Constitution,[13] they intended the "common use" clause of Article VIII, Section 3, to implicitly adopt the public trust doctrine.[14] The "common use" clause provides: "Wherever occurring in the natural state, fish, wildlife, and waters are reserved to the people for common use."[15]

Since statehood, a host of decisions by the Alaska Supreme Court have recognized the force of the public trust doctrine in Alaska and have consistently expanded the scope of the public trust.[16] These decisions of the Alaska Supreme Court have established beyond debate

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[9] *See infra* note 16 and accompanying text.

[10] *See* ALASKA CONST. art. VIII.

[11] The Alaska Constitution did not become operative until statehood was formally proclaimed on January 3, 1959.

[12] *See* COMMITTEE PROPOSAL NO. 8, 6 ALASKA CONSTITUTIONAL CONVENTION PROCEEDINGS 75-103 (1955) [hereinafter CONVENTION PROCEEDINGS].

[13] The Alaska Constitution, art. VIII, § 6, as originally proposed, would have placed all state lands "in trust." *Id.* at 78.

[14] Often what is implied is as much a part of the Alaska Constitution as what is expressed. *See* Wade v. Nolan, 414 P.2d 689 (Alaska 1966).

[15] ALASKA CONST., art VIII, § 3.

[16] *See e.g.*, Hayes v. A.J. Assocs., Inc., 846 P.2d 131 (Alaska 1993); Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries, 803 P.2d 391, 398-99 (Alaska 1990); McDowell v. State, 785 P.2d 1, 18 (Alaska 1989); Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 492-96 (Alaska 1988); CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1117-21 (Alaska 1988); Herscher v. State, Dept. of State, 568 P.2d 996, 1003, 1005 (Alaska 1977); Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 905 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962).

that the public trust doctrine is implicit in the "common use" clause.[17] In *Owsichek v. State*, the Alaska Supreme Court stated:

> We begin by examining the constitutional history to determine the framers' intent in enacting the common use clause. This was a unique provision, not modeled on any other state constitution. Its purpose was antimonopoly. This purpose was achieved by constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters.[18]

The court also noted that "title [to fish and wildlife] is reserved to the people, or the state *on behalf of the people*,"[19] and:

> [T]he power or control lodged in the state . . . is to be exercised like all other powers of government *as a trust for the benefit of the people*, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.[20]

The *Owsichek* Court held that "common law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife, and water resources of the state for the benefit of all the people."[21] Finally, the court concluded:

> In light of this historical review (e.g., Geer v. Connecticut, 161 U.S. 519, 529 (1896), and Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892)), we conclude that the common use clause was intended to engraft on our constitution certain trust principles guaranteeing access to the fish, wildlife, and water resources of the state.[22]

To recapitulate, since the earliest days of statehood, the Alaska Supreme Court has recognized the constitutional stature of the public trust doctrine in Alaska and its integral role in Alaskan law in the preservation of our natural resources.[23]

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[17] *See, e.g., CWC Fisheries*, 755 P.2d at 1119; *McDowell*, 785 P.2d at 15.

[18] *Owsichek*, 763 P.2d at 493 (quoting 4 CONVENTION PROCEEDINGS, *supra* note 12, at 2492) (footnote omitted).

[19] *Id.* (quoting 4 CONVENTION PROCEEDINGS, *supra* note 12, Folder 210) (emphasis added).

[20] *Id.* at 494 (quoting Geer v. Connecticut, 161 U.S. 519, 529 (1896)).

[21] *Id.* at 495 (footnote omitted).

[22] *Id.* at 496.

[23] *See* Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 905 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962).

B. The Alaska Statutes

In Alaska, the Lieutenant Governor must present the electorate with explanatory material to accompany intiatives that qualify for state-wide ballots. Perhaps in recognition of its status as the cynosure of Alaskan resource law, the public trust doctrine in Alaska has been explicitly recognized by our state's electorate. Through the citizen initiative process of the Alaska Constitution,[24] the voters of Alaska in 1983 proposed and adopted an initiative containing an express statutory statement of the public trust doctrine: "[A]ll land in the state and all minerals not previously appropriated are the exclusive property of the people of the state and the state holds title to the land and minerals in trust for the people of the state."[25]

This extraordinary initiative — reiterating the most fundamental tenet of law regarding management of the main source of Alaska's current and future wealth — has not yet been the basis for a reported decision by the Alaska Supreme Court. As this statute springs directly from the citizens, virtually no legislative history exists to help interpret it, either. Lacking judicial gloss as well as a reliable indication of the animus behind the trust portion of the 1983 Intiative, popularly known as the "Sagebrush Initiative," one must rely on other tools of statutory interpretation to explicate the statute. Interpretation will call for judicial recourse to the rule of law that is most advisable in light of reason and public policy.

As a matter of statutory interpretation, courts should not assume that Alaska Statute section 38.05.502 is a mere redundancy.[26] Section 38.05.502 must be seen as expanding the purview of the public trust doctrine beyond that which is contained in the Alaska Constitution and as strengthening the affirmative obligations of stewardship imposed upon the state as trustee.

Section 38.05.502 enlarges the scope and purposes of the public trust in Alaska by clearly applying the doctrine to minerals and all publicly owned land, regardless of the land's relationship to the ebb and flow of the tides. Although it did not cite section 38.05.502 specifically, Alaska's Supreme Court recently signalled a substantial expansion of the public trust doctrine as it applies to tidelands.[27]

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[24] ALASKA CONST. art. XI, §§ 1-4.

[25] 1983 Initiative Proposal No. 5, § 1, codified at ALASKA STAT. § 38.05.502 (1992). The public trust doctrine, however, was certainly not the focus of the 1983 initiative. Most of the public debate regarding the initiative dealt with tension between the land management roles of the federal government and the State of Alaska in keeping with the general tenor of the "Sagebrush Rebellion."

[26] Alaska Transp. Comm'n v. AIRPAC, Inc., 685 P.2d 1248, 1253 (Alaska 1984).

[27] *See* Hayes v. A.J. Assocs., Inc., 846 P.2d 131, 133 (Alaska 1993).

The usual rule applied by the Alaska Supreme Court is to construe initiatives broadly.[28] A broad judicial construction of section 38.05.502 would result in the conclusion that the statutory component of Alaska's public trust doctrine protects all state-owned land in Alaska, including the fish, wildlife, timber, and water resources found on the land, and all state-owned minerals not appropriated prior to adoption of the 1983 initiative.

Although ambiguity is in the eyes of the beholder, it may be useful to speculate how the Alaska Supreme Court would interpret the statute. When a statute is unambiguous, legislative history generally is not used to determine the statute's meaning.[29] The language of section 38.05.502 appears unambiguous as to the fact that one purpose of this initiative was to state unequivocally that all state-owned land in Alaska and all unappropriated minerals[30] are held in trust for the people of the state.

There is at least a latent ambiguity in the statute insofar as the meaning intended to be given to the term "land." That ambiguity disappears, however, when section 38.05.502 is construed in conjunction with Alaska's pre-existing statutory definition of "land" or "state land."[31] The term "land" has been given an extremely broad definition in Alaska: "'state land' or 'land' means all land, including shore, tide and submerged land, *or resources* belonging to or acquired by the state."[32] The 1983 Initiative's application of the public trust doctrine

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[28] City of Fairbanks v. Fairbanks Convention & Visitors Bureau, 818 P.2d 1153, 1154 (Alaska 1991); Thomas v. Bailey, 595 P.2d 1, 3 (Alaska 1979).

[29] State v. City of Haines, 627 P.2d 1047, 1049 n.6 (Alaska 1981); TVA v. Hill, 437 U.S. 153, 184 n.29 (1978).

[30] Under Alaska law, the mineral estate is the dominant estate and carries with it the right to make such use of the surface estate as is reasonably necessary to remove the minerals. Norken Corp. v. McGahan, 823 P.2d 622, 628 (Alaska 1991).

Nonetheless, the "rights of the mineral estate 'are to be exercised with due regard for the rights of the owner of the servient estate.'" *Id.* at 628 (quoting Getty Oil Co. v. Jones, 470 S.W. 2d 618, 621 (Tex. 1971)); *see generally* Annotation, *Grant, Reservation, or Lease of Minerals and Mining Rights as Including, Without Expressly so Providing, the Right to Remove the Minerals by Surface Mining,* 70 A.L.R. 3rd 383 (1976).

Where mineral extraction would be wholly incompatible with public trust uses of the land, a strong argument could be made that the mineral extraction is forbidden. Under Alaska law, gravel is not a mineral. Norken Corp. v. McGahan, 823 P.2d at 628. Gravel is the essence of the surface estate, and its extraction can render land unsuited for public recreation or wildlife or fisheries habitat. Courts are virtually unanimous in holding that gravel is not a "mineral" in the legal sense of that word. *See, e.g.,* Anchorage Sand & Gravel Co. v. Schubert, 114 F. Supp. 436, 437-38 (D. Alaska 1953); Miller Land & Mineral Co. v. State Highway Comm'n, 757 P.2d 1001, 1003-04 (Wyo. 1988).

[31] *See* ALASKA STAT. § 38.05.965 (1992).

[32] *Id.* (emphasis added); *see also* Op. Alaska Att'y Gen. 166-136-85, at 6-7 (1985).