THE HISTORY AND DUTIES OF THE PUBLIC TRUST DOCTRINE IN SOUTH CAROLINA:

HOW DO WE FARE?

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I. INTRODUCTION

The Public Trust Doctrine is an ancient concept that provides public trust lands, waters and living resources in a state are held by the state in trust for the benefit of all of the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses. South Carolina is rich with coastal marshlands and wetlands that provide an invaluable resource to the people of the State. Can the public trust doctrine help protect these resources and is the State of South Carolina as trustee doing enough?

In recent decades, the public trust doctrine has become a force to be reckoned with in South Carolina. Environmentalists recognize the doctrine can be utilized to challenge governmental and private actions towards development. Prior to the last two decades, there was little South Carolina judicial interpretation of the public trust doctrine. Thankfully, as the public trust doctrine grew as a recognized national policy and trend, the Supreme Court of South Carolina began openly adopting and interpreting its tenets. In order to properly understand the public trust doctrine and its capabilities for environmental action, one must understand the origins of the doctrine. This note addresses the history of the doctrine from its theoretical birth in Roman civil law to its last notable application by the South Carolina Supreme Court. Further, to adequately judge the applicability of the doctrine, one must comprehend the actual power, duties and authorities vested in the state government under the public trust doctrine.

When taking all these factors into account, the public trust doctrine can be an effective tool for environmentalists and conservationists alike to ensure waterways, resources and pubic rights are being protected with the public's interests in mind.

II. THE HISTORY OF THE PUBLIC TRUST DOCTRINE

A. Roman and English Law

The modern concept of the public trust doctrine can be traced to the Roman civil laws established between 529 and 534 A.D. The Roman concept rested on the notion that state owned property is held for the sole benefit of and use by the entire public for the public good. The Roman concept was developed in order to help establish who would govern the "arbitrarily" defined borders around the seas, seashores and rivers.[1]

Under the codified Roman civil laws, *res ominium communes* was a classification of property that could not be held subject to private rights.[2] Justinian, through his sixth century writing *Institutes and Digest of Justinian*[3], is credited as being the father of the modern public trust doctrine.[4] This codified ancient law recognized

> By the law of nature these things are common to all mankind – the air, running water, the sea, and hence the shores of the sea. Also all rivers and ports are public, so that the right of fishing in a port and in rivers is common to all. And by the law of nations the use of the shore is also public, and in the same manner as the sea itself . . . .[5]

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[1] *See* R. Sohm, *The Institutes: A Textbook of the History And System of Roman Private Law* 302-09 (J. Ledlie trans. 3d. 1970).

[2] *Id.* at 302.

[3] *The Institutes of Justinian* and the accompanying Digest collectively formed the Roman civil law. These laws were codified under the reign of the Roman Emperor Justinian and were based upon the second century Institutes and Journal of Gaius, an eminent Roman jurist, who codified the natural law of Greek philosophers.

[4] T. Cooper, *The Institutes of Justinian* 67-70 (1812).

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

The Romans sought to protect certain interests, most notably navigation and fishing, so as to preserve for the benefit of the public those properties used for such purposes.[6] Accordingly, those properties not used for such activities were distinguished by the lack of restriction on the state to grant ownership rights to private owners.[7] People understood common properties-such as highways, seaways and running water-were dedicated to the perpetual use of the public to benefit the whole.

Still, as Professor Joseph Sax contends, there is some confusion among legal scholars as to whom the Romans believed owned the public waters: no one, the people as a whole, or the State.

> As to the seashore, there is no reason in the nature of things why it should not be owned by private persons . . . . Indeed, there are texts which say that one may become owner of a portion of the shore by building on it, remaining owner, however, only so long as the building stands. But in general the shore was not owned by individuals. One text suggests that it was the property of the Roman people. More often it is regarded as owned by no one, the public having undefined rights of use and enjoyment. There was, no doubt, a tendency, which became more pronounced as time went on, to regard all [such] property of the Roman People, or, as we should say, of the State . . . .[8]

Roman civil law has influenced the jurisprudence of all Western European nations. In England, Roman civil law was adopted, with modifications, through the English common law after the signing of the Magna Carta. English common law reflected the concern the Crown had with regards to the special nature of tidelands and waters. As a result, these lands were protected in the king's name for all the English

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[6] T. Cooper, at 67.

[7] *Id.*

[8] R. Lee, *The Elements of Roman Law* 109-110 (4th ed. 1956) (*See also,* Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 Mich. L. Rev. 471 (1970).

citizens.[9] The King could grant tidal lands to private owners, but such a grant was restricted in that the public's paramount right to the use of the water could not be destroyed.[10] If a grant by the King destroyed or limited the publics' right to use or enjoyment, then the grant was rendered void.[11]

British common law recognized the importance of the public trust doctrine in maintaining viable commerce, trade and navigation. The privatization of these shorelines, tidelands or waterways could destroy or hinder the prosperity of trade and navigation.[12] State regulation of the public use of navigable waters was permitted only in the furtherance of public interests and as was "deemed consistent with the preservation of a public right."[13]

B. Early American Doctrine

When the American Revolution drew to a close, the newly independent Thirteen Colonies became successors of the Crown and adopted the English common law.[14] Established upon early English common law, American federal courts began applying the public trust doctrine; expanding its reach to include all navigable rivers and lakes, not just

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[9] *See People v. New York & Staten Island Ferry Co.,* 68 N.Y. 71, 76 (1877).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 77.

[14] *Shively v. Bowlby,* 152 U.S. 1, 14 (1894) ("The common law of England . . . at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several Colonies and States, or by the Constitution and the laws of the United States.")).

those influenced by the tide.[15] State courts began adopting their own perspective of the doctrine as early as 1810, as evident in *Carson v. Blazer.*[16] In that case, the Pennsylvania Supreme Court held a private owner could not have exclusive rights to fish a certain section of the Susquehanna River.[17]

Shortly thereafter in 1821, the first recognized American case dealing with the public trust doctrine and tidelands came down with a New Jersey Supreme Court decision. In *Arnold v. Mundy,*[18] a dispute arose over the right to harvest oysters from the waters of the Raritan Bay. Arnold claimed an exclusive right to harvest oysters based on a seventeenth century grant from the Duke of York, which his family had secured.[19] Mundy countered with a claim, based on the public trust theory, that he had a right on behalf of the public to take oysters from the beds of navigable waters.[20] The New Jersey Court held on behalf of Mundy reasoning neither the King nor his delegate, the Duke of York, had the power to alienate the bed itself.[21]

Federal law relating to the public trust and tidelands developed rapidly with several important cases decided in the second half of the nineteenth century. In *Martin v.*

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[15] *Id.* at 11. ("title to lands under the sea and the rivers and the arms of the sea where the tide ebbs and flows, and of all the lands below high water mark within the jurisdiction of the crown was in the King as the sovereign.").

[16] 2 Binn. 475 (Pa. 1810).

[17] *Id.* at 484.

[18] *Arnold v. Mundy,* 6 N.J.L. 1 (N.J. 1821).

[19] *Id.*

[20] *Id.*

[21] *Id.* at 76-78.

Waddell,[22] the Supreme Court declared "the shores, and rivers, and bays, and arms of the sea, and the land under them [were held] as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery . . . ."[23] In 1894, the Supreme Court ruled that title to tidelands was vested in a new state upon its admission to the Union, clearing the path for states to become trustees.[24]

Perhaps the most seminal case in American public trust jurisprudence is the 1892 decision of *Illinois Central Railroad v. Illinois.*[25] In 1869, the Illinois legislature made an extensive fee simple grant of submerged lands to the Illinois Central Railroad. The grant included the land underlying Lake Michigan for one mile out from the shoreline and extended one mile in length of shoreline along the city of Chicago's business district. The grant encompassed a total area of over one thousand acres and much of the commercial waterfront of the city of Chicago.[26] In 1873, it became apparent the legislature wanted to re-assert its control over the granted lands, especially those beds underlying Lake Michigan. By 1883, the Attorney General brought suit asserting the State of Michigan's title to the bed of the lake and certain other areas of the shore that

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[22] 41 U.S. (16 Pet.) 367 (1842).

[23] *Id.* at 415-418.

[24] *Pollard v. Hagan,* 44 U.S. (3 How.) 212 (1845) (Before 1894, the notion of the State acting as trustee was assumed. In 1894 the court of *Shively v. Bowlby, supra* note 14, determined that before statehood the federal government held the beds of tidal waters in trust for the citizens of the future state and could not alienate the lands so as to impair the trust.)).

[25] 146 U.S. 387 (1892) (Commentators suggest *Illinois Central* as one of the most significant public trust decisions. Ralph W. Johnson & Eileen M. Cooney, *Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters,* 54 Wash. L. Rev. 275, 285 (1979) (*Illinois Central* as "the most significant expression of the public trust doctrine"); Sax, *supra* note 8 (*Illinois Central* as "the most celebrated public trust case in American Law").

[26] *Id.* at 454.

were lined with the railroad's tracks, piers and warehouses.[27] The Supreme Court used the public trust doctrine to invalidate the legislature's original grant. The Court reasoned the navigable waters of the harbor and the lands under them were held in "trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[28] The Court held Illinois did not hold absolute title to the bed of the harbor, but instead held it in trust for the benefit of its citizenry. Therefore, any state attempt to sell off the lands was void to the extent it hindered the purpose of the trust, namely public use by the citizens of Illinois.[29] The Illinois legislature granted the conveyance with a total disregard for the public trust to which its duty to preserve was charged; thus, the conveyance was repealed and voided. The Court found it inconceivable that the state of Illinois would punt its charged duty and vest title to the harbor in a private corporation.[30]

The principles articulated by the *Illinois Central* Court have become the backbone of the modern public trust doctrine. In effect, the decision established in American law the proposition that certain waters are inherently important to the public, and therefore to remove them from the public domain requires "something more than the ordinary majoritarian workings of state government."[31] For the first time, the Court was willing to

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[27] *Id.* at 433.

[28] *Id.* at 452.

[29] *Id.* at 455-456. The Court held the trust purposes to be the traditional triad of navigation, commerce and fishing for the benefit of the people. *Id.* at 452.

[30] *Id.* at 454-455.

[31] Clifford, *Preserving Stream Flows in Montana Through the Constitutional Public Trust Doctrine: An Underrated Solution*, 16 Pub. Land L. Rev. 117, 122 (1995).

hold the state to its fiduciary duty as acting trustee. As Professor Joseph Sax argues, the Court did not actually prohibit the disposition of trust lands to private parties; its holding was much more limited.[32] The Court articulated that a state may not divest itself of authority to govern the whole of an area; to grant almost the entire waterfront of a major city to a private company is, in effect to abdicate legislative authority over navigation.[33] Further, the state has a management duty of holding resources available for the general public and this duty is subject to the Court "look[ing] with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restrictive uses or to subject public use to the self-interest of private parties."[34]

C. Modern American Public Trust Doctrine Expanded

In 1988, the public trust doctrine was again expanded to include those areas known as nonnavigable tidelands. The decision to expand the doctrine came within the opinion of *Phillips Petroleum Co. v. Mississippi*[35] by the United States Supreme Court. The Court found that the public trust in the state of Mississippi includes title to all lands under waters influenced by the ebb and flow of the tide.[36] The State of Mississippi granted oil and gas leases to forty-two acres underlying the north branch of Bayou LaCroix and eleven small drainage streams in southwestern Mississippi. Phillips Petroleum held record title to this land, as the titles were traceable to pre-statehood

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[32] *See* Sax, *supra* note 8 at 489.

[33] *Id.*

[34] *Id.* at 490.

[35] 484 U.S. 469 (1988).

[36] *Id.* at 484. (Not all justices agreed with the decision as Justice O'Conner felt this "radical expansion of the historical limits of the public trust" was too expansive and would have lasting ill effects. *Id.* at 493 (O'Conner J., dissenting)).

Spanish land grants.[37] The plaintiff had paid taxes on the land for over one hundred years. Even though the plaintiff asserted title, Mississippi based its ownership of title on the "equal footing doctrine"[38] and claimed that it owned all tidelands in the state and therefore held them in public trust.[39] The plaintiff's contended that "navigability, and not tidal influence, has become the *sine qua non* of the public trust interest."[40]

The Court rejected the plaintiff's navigability argument and held the doctrine's scope to include *all* lands beneath waters influenced by the ebb and flow of the tide.[41] Further, the Court adopted the defendants' assertions based on the "equal footing doctrine" as states, upon entry to the Union, were given ownership of all lands under tidal waters.[42] Because the lands at issue fell under the ebb and flow of the tide, the title passed to the State of Mississippi upon its entry into the Union.[43]

In addition and perhaps most controversial was the emphasis of the Court to recognize "the long established rule" that "states have the authority to define limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[44]

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[37] *Id.* at 472.

[38] An implied rule of constitutional law which provided that all new states enter the Union on a status equal to the original Thirteen Colonies. The Court first articulated this doctrine in the 1845 case of *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), where it ruled the federal government holds the land beneath navigable waters in U.S. territories in trust for the benefit of future states. Upon statehood, each state takes title to the land beneath navigable waters within its borders, just as the original colonies took title to the land underlying their waters from the English crown after the revolution. *See supra* note 35 at 486 (O'Conner, J. dissenting).

[39] *Id.*

[40] *Id.* at 478.

[41] *Id.* at 479-480 (emphasis added).

[42] *Id.* at 481-484.

[43] *Id.* at 476.

[44] *Id.* at 475.

This "long established rule" is at the crux of many legal scholars' arguments that the public trust doctrine has been expanded too far into nonnavigable tidelands. To settle nerves, the Court asserted that the decision and rule will not upset titles in coastal states which have, as a matter of state law, granted public trust tidelands to private property owners.[45] Many land title disputes have been resolved by the ebb-and-flow rule for tidelands as a holding that navigability was the determinative factor in state public trust interests would upset far more titles and settled expectations of property owners.[46] By holding the ebb-and-flow rule the standard, regardless of navigability, the public rights to fishing, hunting and bathing would be retained even in states where tidelands have been granted to private owners.[47]

Justice O'Conner's, joined by Justice Stevens and Justice Scalia, dissent argued the decision was too expansive. In their view, the decision extended the state's public trust interest to tidal, nonnavigable waters, which include discrete bodies of water remote from and indirectly interconnected to the ocean or navigable tidal waters.[48] This extension, they argued, would include such waters that could be easily prevented from inclusion by making navigability, not tidal influence, the standard of public trust interest.[49] Furthermore, the dissent makes a compelling argument based on the fact that thousands of innocent record title and leaseholders of land could be displaced by the

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[45] *Id.* at 482.

[46] *Id.* at 483.

[47] *Id.* at 483-484.

[48] *Id.* at 490.

[49] *Id.*

majority's opinion.[50] The dissent notes over nine million acres of land have been classified as fresh or saline wetlands; the majority's rule will increase challenges to those titles.[51] Still, many commentators are fearful the decision "could fortify the operation of the trust as a state tool for economic and environmental control of significant resources [giving strength to] legislatures and activists who choose to assert the public interest more forcefully in an age of ever-increasing property conflicts."[52]

III. SOUTH CAROLINA'S PUBLIC TRUST DOCTRINE

A. Recognized Aspects of the Public Trust Doctrine Relating to Tidelands in South Carolina

Compared to many other states, South Carolina has a small amount of case law interpreting the public trust doctrine. Since South Carolina has a vast amount of shoreline, most of the disputes involve issues surrounding the ownership of land beneath navigable waters around the coastal regions of the state.

The South Carolina Supreme Court first addressed the public trust in *State v. Pacific Guano Co.*[53] The defendant's raised an adverse possession defense claiming that the creek beds in dispute were included as part of a grant from the state to their predecessor in title. The circuit court relied on *The Daniel Ball*[54] "navigability in fact" test and determined two of the tidal streams at issue were not navigable as "although the

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[50] *Id.* at 493.

[51] *Id.* at 494.

[52] *See Phillips Petroleum Co. v. Mississippi and the Public Trust Doctrine; Strengthening Sovereign Interest in Tidal Property,* 38 Cath. U.L. Rev. 571, 597-98 (1989).

[53] 22 S.C. 50 (1884).

[54] 77 U.S. 557 (1870) (The United States Supreme Court rejected a strict tidal test of navigability in favor of one based on "navigability in fact." "[T]hey [rivers] are navigable in fact when they are used or are susceptible to being used, in their ordinary condition, as a highway for commerce, over which trade and travel are, or may be, conducted in the customary modes of trade or travel on water." *Id.* at 563.)).

tide ebbs and flows through them, the conditions necessary to sustain trade and commerce of any kind do not exist . . . . They lose themselves in the marshes with which they are surrounded."[55] The South Carolina Supreme Court refused to review the finding, essentially agreeing with the circuit court's opinion adopting the "navigability in fact" test.[56] Clearly, the Court realized and accepted that commerce was an important and legitimate goal of the doctrine and would protect that interest with the fullest authority of the law.

Only one year later, the South Carolina Supreme Court handed down yet another definitive case regarding tidelands and the public trust. In *State v. Pinckney*[57], the Court held the State could have dominion over salt marshes beneath nonnavigable tidal waters, in effect establishing public ownership interests in marshes.[58] The dispute surrounding *Pickney* arose when the State, asserting its ownership of the marshes, filed suit against the defendants for digging, mining and removing minerals from salt marshlands surrounding Morgan Island.[59] The Court's ruling was based on the common law rule that the boundary of land bordered by a tidal navigable stream extended only to the high water mark. If the land is bounded by the "sea or an arm of the sea", the space between the high and low water mark is the shore, and belongs by common law to the State.[60]

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[55] *Pacific Guano, supra* note 53 at 57.

[56] *Id.* at 83.

[57] 22 S.C. 484 (1885).

[58] *Id.* at 509.

[59] *Id.* at 495.

[60] *Id.* at 507.

Therefore, the State holds this land in trust for the public, thus precluding the claim of any person who has not acquired direct title by grant from the State.[61]

Interestingly, the Court applied the doctrine to vast areas of salt marsh located far inland all the while discussing the application of the trust in terms of land bordered by the sea and tidal navigable streams. Title to the marshland between low water and ordinary high water had never been conveyed by the State; therefore, clearing the path for the State to recover its ownership of the disputed marshland.[62]

Further developments in South Carolina law after *State v. Pickney* but before the 1928 decision of the South Carolina Supreme Court in *Cape Romain Land and Improvement Co. v. Georgia-Carolina Canning Co,*[63] are found in eight cases best summarized by the following statements.

> [T]here are some nine cases reported before 1928 which deal more or less directly with the questions of the extent of State ownership of tidelands and the ability of the State to grant these lands . . . [i]n those cases in which the extent-of-ownership issue is important, the court consistently recognized the common law "high water mark" rule applied to tidal navigable streams. As for the question concerning the ability of the State to grant tidelands . . . the point is either not reached or the factual circumstances of the case make it appear that the general *jus publicum* rule is not appropriate in the particular case. Thus before 1928 . . . title to land between the high and low water mark was in the State . . . whether or not the State could grant this land in the usual manner was a matter of serious doubt.[64]

The *Cape Romain* court's decision caused confusion in the legal community as to whether non-navigable tidal waters are subject to the public trust. The plaintiff sued to

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[61] *Id.*

[62] *Id.* at 510.

[63] 146 S.E. 434 (1928).

[64] William A. Clineburg and John E. Krahmer, *The Law Pertaining to Estuarine Lands in South Carolina*, S.C.L. Rev. 7, 20 (1971) (citations omitted).

restrain the defendant canning companies from trespassing on lands claimed by the plaintiff and for damages from past trespasses. The defendants denied trespassing and claimed they were lawfully operating on the lands under a lease from the State Board of Fisheries which entitled them to engage in oyster cultivation between the high and low water marks along several locations in question.[65] The lower court ruled for the defendant because the plaintiff failed to prove title to the lands lying between the high and low water marks as alleged in their complaint.[66] In granting review, the Supreme Court addressed the issue of whether the plaintiff had title to the low water mark in the disputed location. The Court reviewed the grants from the State Board of Fisheries and applied a strict rule of construction deciding that none of the grants were sufficient to pass title from the State to the plaintiff.[67] The Court reasoned "title to land below highwater mark on tidal navigable streams, under the well settled rule in the state, is not for the purpose of sale, but to be held in trust for public purposes."[68] As a result, many were left questioning whether the Court would ever allow the State of South Carolina to grant private ownership rights in tidal lands.

The confusion resulting from *Cape Romain* was clarified in *State v. Hardee*[69] in 1972. The State brought an action against the defendant to restrain and enjoin him from trespassing on, filling, constructing or otherwise changing the natural state of the

[65] *Cape Romain*, *supra* note 63 at 436.

[66] *Id.*

[67] *Id.* at 439 (The court based its decision on the *Shively v. Bowlby*, *supra* note 14 at 548, where the court held: "It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark, *unless either the language of the grant*, or long usage under it, clearly indicates that such was the intention." (emphasis added)).

[68] *Id.* at 438.

[69] 259 S.C. 535 (1972).

tidelands.[70] The State asserted it held title to all tidelands and submerged lands in trust for the people of the state regardless of the conveyance.[71] The Court concluded the issue was one of construction in reading the grant and based the decision on a clarified version of its previous holding in *Cape Romain.*

> In the absence of specific language, either in the deed or on the plat, showing that it [the grant] was intended to go below high water mark, the portion of the land between high and low water mark remains in the State in trust for the benefit of the public. The burden was on the appellant to prove here title to land to the low water mark on Salt Creek.
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> [T]he actual and necessary holding of *Cape Romain* is that tidelands are owned by the State in trust for the people, and that any grant which purports to convey such land will be very strictly construed; but this is not to say that such lands can never be sold as might be indicated by the language quoted above, but rather that the ability to sell and the method of sale remain open questions under *Cape Romain.*[72]

Still in the 1979 decision of *Hobonny Club, Inc. v. McEachern*[73], the Supreme Court of South Carolina demonstrated its willingness to *uphold* a grant of tidelands despite the "special or unique status"[74] afforded to tidelands. The plaintiff brought an action to quiet title to a plantation he felt was within his holding. The plaintiff was concerned because the State claimed title to all tidelands within the plantation boundaries. Following a stipulation by both parties that the State did not have any claim to land lying above the high water mark and Hobonny did not have any claim to land

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[70] *Id.* at 498 (Hardee received by grant a deed purporting to give her ownership of a strip of tideland and the issue of the dispute was whether under the language of the said grant by the State of South Carolina to the predecessor of Hardee, who owns the land to the usual low water mark.).

[71] *Id.* at 497-498.

[72] *Id.* at 500-501 (*see also* Bradford Wyche and Samuel Finklea, *Environmental Law In South Carolina,* at 234-235 (South Carolina Bar: CLE Division Press 1999)).

[73] 272 S.C. 392 (1979).

[74] *Id.* at 396.

lying below the usual low water mark, the lower court entered a summary judgment in favor of Hobonny.[75] The lower court found that "despite the special status accorded tidelands, the government . . . had the power to grant . . . tidelands to subjects, who exercised private ownership."[76] The Court aligned this rule with the historic common law of England, which permitted the King to grant tidelands to subjects who could show private ownership through legitimate predecessor's grant. The Court recognized that since the eighteenth century grants in dispute had specific plat references, there was sufficient evidence of intent to convey the land below the high water mark. Such grants satisfying these clear requirements of the Court are adequate to convey title from the public trust to private ownership or private corporate ownership.[77] Though this decision seems to favor privatization of tidelands, the Court qualified and limited this notion with *State v. Fain.*[78]

In *State v. Fain*, the State prevailed against the private ownership claim of Fain. The State asserted its title to tidelands adjacent to a tidal navigable stream. Since the grants lacked language-evidencing intent to convey the tidelands below the high water mark, the State had proper title as the tidelands fell into the public trust. Once again, the Supreme Court held that title to the portion between the high and low water mark remained in the State for the public's benefit.[79] Essentially, the Court noted it would be

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[75] *Id.* 136.

[76] *Id.* at 136 (*citing Lane v. McEachern,* 162 S.E.2d 174 (S.C. 1968)).

[77] *Id.*

[78] 273 S.C. 748 (1979).

[79] *Id.* at 752.

nearly impossible to prove a grant of tidelands to private hands was made with the requisite intent without a plat specifically stating the intent to convey below the mark.[80]

> It is further a settled rule of construction that a grant by the government to a subject is construed most strongly against the grantee in favor of the grantor . . . . The grants are lacking in any language disclosing an intent to convey lands below the high water mark and, as previously stated, the grants are not supported by plats.[81]

Perhaps the most expansive public trust opinion relating to tidelands was handed down by the South Carolina Supreme Court in *State v. South Carolina Coastal Council.*[82] This case is important because it represents the modern trend of public trust disputes. In prior South Carolina cases, the dispute arose around proper title. In *Coastal,* the dispute centered over a permit issued by the South Carolina Coastal Council involving 660 acres of marshland at Annandale Plantation in the Santee River Delta area of Georgetown County.[83] The permit requested would have allowed the private landowner to impound those 660 acres through a series of embankments choking the area off from private use and/or development.

Although the Court's reasoning for overruling the Coastal Council's issuance of the permit was abuse of discretion by the Council[84], the decision mirrored many other jurisdictions regarding public trust issues. The Court used the tenets of the public trust to

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[80] The Court further found that "all tidelands remain in the state unless there is 'specific language, either in the deed or on the plat, showing that it was intended to go below the high water mark' . . . [it did] not hold that . . . all extrinsic testimony on this issue should be excluded." *Id.* at 753.

[81] *Id.*

[82] 289 S.C. 445 (1986).

[83] *Id.* at 446.

[84] The Court held that "the findings and conclusions of the Coastal Council, which were affirmed by the circuit court, [were] clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record and [were] affected by other errors of laws." *Id.* at 450.

protect a legitimate state interest in navigability and boating.[85] Navigability in the region of the 660 acres would have been affected had the private embankments and fill occurred. Using the navigability as a dispositive factor, the Court further used tenets of the public trust to prevent the private development of marshland.

> [T]he use of this waterway by the general public for boating, hunting, and fishing is a legitimate and beneficial public use. It is our view that these waterways not only have the navigable capacity as required under *Heyward v. Farmers Mining Co.,*[86] but they are navigable in fact as evidenced by their use by the general public. The Coastal Council does not have the authority to authorize the complete blockage of navigable streams and waterways, especially in a case such as this were there is no overriding public interest.[87]

The *Coastal* ruling was a bright shinning light that the Supreme Court of South Carolina was and is willing to adopt and encase under the public trust umbrella tidelands and *wetlands*. Subsequently, the case law regarding the public trust doctrine has centered on the fact South Carolina will protect its marshland and wetlands with the public trust doctrine.

In 1995, the Court handed down the *Sierra Club*[88] decision, which explicitly adopted the *Illinois Central*[89] language that public trust interests can never be conveyed except to promote the public interest.

[85] The Court was convinced it needed to protect “the strong emphasis and protection afforded to public boating.” *Id.* at 451.

[86] 42 S.C. 138 (1894) (The standard the Court adopted was if the waterway has ever been used as a highway for commerce of any sort or if a prospect of it ever being so used.).

[87] *Coastal Council, supra* note 82 at 451.

[88] *Sierra Club v. Kiawah Resort Associates,* 318 S.C. 119 (1995).

[89] *Illinois Central, supra* note 25 at 453.

> The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.[90]

Since the *Sierra Club* decision, the tenets of the public trust doctrine have been instilled in South Carolina, especially in tidelands, marshlands and bordering wetlands.

B. The Future of the Public Trust Doctrine: *McQueen v. South Carolina Coastal Council*

The most recent case decided by the Supreme Court of South Carolina, *McQueen v. South Carolina Coastal Council,*[91] may spell out the most support for the pubic trust doctrine of all the cases decided prior. In addition, the dispute arising from this case will likely be brought again to the court system. The issue deals with wetland or marsh fill-in, which creates an ever-intensifying battle between environmentalist and private owners.

In the early 1960's, McQueen purchased two non-contiguous lots located on manmade saltwater canals in North Myrtle Beach. He held the properties unimproved until 1991 at which time he applied to the Office of Ocean and Coastal Resource Management (OCRM) for permits to build bulkheads and fill his property to create a higher and more solid ground in which to build.[92] The OCRM determined the area proposed for fill-in as a "critical area wetland" and denied the permits.[93] McQueen

[90] *Sierra Club, supra* note 88 at 402 (*quoting Illinois Central R. Co. v. Illinois,* 146 U.S. 387, 453 (1892)).

[91] 354 S.C. 142 (2003).

[92] *Id.* at 146. (The properties had reverted to tidelands or critical area saltwater wetlands because of "continuous" erosion. Without the backfill and bulkheads, the property would not have enough high ground to be developed.) *Id.*

brought action seeking compensation for a regulatory taking as the denial of the permits made his property far less valuable. By a divided court, the Court of Appeals affirmed the finding of a taking because McQueen was deprived of all economically beneficial use of his property.[94] The case was reviewed by the Supreme Court of South Carolina which reversed, finding McQueen had no reasonable investment-backed expectation because of pre-existing wetlands regulations, meaning no taking had occurred.[95] McQueen then appealed to the United States Supreme Court which remanded to the South Carolina Supreme Court. The U.S. Supreme Court asked the lower court to review its decision taking into consideration a new takings case.[96] In determining that no taking had occurred, the State Supreme Court sidestepped the U.S. Supreme Court's remand and convincingly based the no taking ruling on the public trust doctrine.

Explicitly, the Supreme Court noted South Carolina abides by the public trust doctrine in the context of land bordering navigable waters.[97] "The State has the exclusive right to control land below the high water mark for the public benefit and cannot permit activity that substantially impairs the public interest in marine life, water quality, or

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[93] S.C. Code Ann. § 48-39-130(C) (Supp. 2002) provides that "no person shall fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first obtaining a permit from the department." Under Section 48-39-10(J), "critical area" includes tidelands. "Tidelands means "all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine system involved." S.C. Code Ann. § 48-39-10 (Supp. 2002).

[94] *McQueen, supra* note 91 at 147.

[95] *Id.*

[96] *Palazzolo v. State,* 746 A.2d 707 (2000). (The United States Supreme Court had ruled a Rhode Island state body had instituted a partial taking of property including wetlands. The Court reversed South Carolina and remanded asking re-review to include the *Palazzolo* decision that pre-existing regulation was not dispositive in itself, either in the context of determining ownership rights under background principles of stat law or in determining the investment-backed expectation factor in partial taking. *McQueen, supra* note 91 at 147.)).

[97] *McQueen, supra* note 91 at 149.

public access."[98] In addition, the Court clarified an earlier finding by stating, "wetlands created by the encroachment of navigable tidal water belong to the State."[99] Even if McQueen was able to show his land was encroached upon by the tide and destroyed during the course of his ownership, the State's presumptive title in the tidelands cannot be defeated.

> The tidelands included on McQueen's lots are public trust property subject to control of the State. McQueen's ownership rights do not include the right to backfill or place bulkheads on public trust land and the State need not compensate him for the denial of permits to do what he cannot otherwise do. Any taking McQueen suffered is not a taking effected by State regulation but by the forces of nature and McQueen's own lack of vigilance in protecting his property.[100]

The *McQueen* decision is a clear win for environmentalists, as the public trust doctrine was applied to protect "critical tidelands and wetlands." The Court, in a clear and convincing fashion, showed its willingness to protect these critical areas using the public trust doctrine as a tool. Environmentalists may take the public trust doctrine and use it as a springboard for action to prevent the over development of tidelands and wetlands. Clearly, this decision represents the courts willingness to extend the doctrine to wetlands or any waterway that can be reached through navigable means. The door is open to environmentalists to use the doctrine in many more critical areas far more inland than ever anticipated.

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[98] *Id.* (*See Sierra Club v. Kiawah Resort Assocs. supra* note 88; *Heyward v. Farmer's Min. Co.,* 42 S.C. 138 (1884).

[99] *Id.* at *150.*

[100] *Id.*

IV. PROTECTED USES OF THE PUBLIC TRUST DOCTRINE

In order to bring appropriate action under the color of the public trust doctrine, it is important to understand the applicability of the doctrine as well as exactly what the doctrine protects. There are certain functions or public interests the courts have expressly protected through utilization of the doctrine.

A. Navigation and Commerce

The ancient public trust rights to navigation and commerce date back to the pre-Roman days when these rights were regarded as fundamental to society's existence. These rights were regarded as tantamount to the progress of the United States and, therefore, adopted as one of the first acts of the United States in the Northwest Ordinance of 1787:

> The navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.[101]

As discussed above, the United States Supreme Court has explicitly used the public trust doctrine to protect the "peoples'" right to navigation and commerce on the waters of this nation. First, in 1842 with the *Martin v. Waddell* decision, the Court held navigation was a protected use as "the shores and the rivers, and bays, and arms of the sea, and the land under them . . . held as a public trust for the benefit of the whole community, to be freely used by all for *navigation* and fishery."[102] Then with *Illinois Central Railroad Co. v. Illinois* in 1892, commerce was specifically addressed and distinguished as the Court

[101] Sax, *supra* note 8 at 484 (*quoting* Act of July 13, 1787, art. IV, 1 Stat. 51.).

[102] *Supra* note 22 at 413.

decided "it is a title held in trust for the people of the State that they may enjoy the navigation of the waters [and] *commerce* over them."[103]

Abiding by the Supreme Court of the United States, South Carolina courts have used the public trust doctrine to promote and protect the value of commerce and navigation over and through our waters. The Constitution of South Carolina recognizes all navigable waters in South Carolina are "common highways" over which the public has the right to free and unobstructed passage.[104] Through this constitutionally sanctioned right, the Supreme Court has determined a right of passage and use for commerce is one of "great value" which "the State, as trustee for the people," may protect through any judicial means necessary.[105] As *State v. Columbia Water Power Co.* suggests and commentator Bradford Wyche notes, "even when the competing uses are public in nature, the navigational right will prevail."[106]

Columbia Water centered around a dispute involving the removal, as a public nuisance, a system of pipes and support structure that provided the public drinking water and electricity to the City of Columbia.[107] The obstruction caused by the defendants' structure severely hindered the navigability of the canal for almost any type of vessel. The Attorney General brought the action, under the auspice that the canal was a navigable water of the State, to have the defendants, Columbia Water and the City of

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[103] *Supra* note 25 at 453 (emphasis added).

[104] S.C. Const. Art. XIV, § 4 ("All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed; and no tax, toll impost or wharfage shall be imposed . . . unless the same be authorized by the General Assembly.").

[105] *State v. Columbia Water Power Co.,* 82 S.C 181, 193 (1909).

[106] Wyche and Finklea, *supra* note 72 at 246 (*See also*, *State v. Columbia Water Power Co., supra* note 105.).

[107] *Supra* note 25 at 182.

Columbia, remove the structure and/or show cause as to why the structure should remain.[108] The defendants answered the complaint by asserting that the public would benefit from the structure as power and water would be provided in an efficient manner to the city. Further, the defendants argued the canal was not adequate to support navigation as it was meant for flood control. Still, the Court rejected these assertions as they held it a navigable water and therefore

> [t]he respondents have no right to obstruct it; that the extent of the public use is no defense; that the respondents cannot be allowed to say that the state cannot complain on behalf of the public, because the use of the canal for navigation is undeveloped, when the obstruction placed by them will effectually prevent the development of the sue for navigation.[109]

The Court's paramount concern was not that of efficiency for the public good of the City of Columbia, but the Court wanted to protect all citizens' right to navigation for "purposes of travel either for business or pleasure." Subsequently, the Court ordered the removal of the structure even though "the right of navigation of the Columbia Canal may be of small value in comparison with the great value to the city of Columbia of the structure . . . ."[110] As Wyche notes, even when the competing uses are public in nature, the navigational right will prevail.[111] In support of this assertion, it is important to point out the Court's reasoning that although the character of the water was in doubt, the fact the water had never been used for navigation, was not an issue. The Court still firmly believes the canal's navigability must be protected as "it is true the canal is unfinished,

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[108] *Supra* note 105 at 181.

[109] *Id.* at 193.

[110] *Id.* at 194.

[111] *Supra* note 106 at 246.

but the fact that a public highway is unfinished does not make its obstruction any the less a public nuisance."[112]

B. Fishing

There is little debate as to whether fishing in tidal waters and navigable freshwaters is protected by the public trust doctrine in South Carolina. The use of navigable waterways, if accessed legally, is not only statutorily protected though S.C. Code Ann. § 49-1-10[113], but this protection is specifically enumerated in the South Carolina State Constitution.[114] Other statutory provisions provide for the public right of fishing as S.C. Code Ann. § 50-1-10 states that "all wild birds, wild game, and fish, except fish in strictly private ponds and lakes and lakes entirely segregated from other waters or held or grown in bona fide aquaculture operations are the property of the State."[115]

In a 1997 South Carolina Court of Appeals decision, *State v. Head,*[116] the court expressly adopted the public trust doctrine to protect the fishing rights of a private citizen. The case involved the State's appeal of a circuit court reversal of a criminal conviction for fishing without consent. Head was charged under Section 50-1-90 which makes it unlawful for "any person [who] shall hunt or range on any lands or shall enter

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[112] *Supra* note 105 at 192.

[113] S.C. Code Ann. § 49-1-10 (Supp. 2002) ("All streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free.")).

[114] *Supra* note 104.

[115] S.C. Code Ann. § 50-1-10 (Supp. 2002).

[116] *State v. Head*, 330 S.C. 79 (S.C. App. 1997) *cert. denied* (S.C. Aug. 27, 1998).

thereon, for the purpose of hunting, fishing, or trapping, without consent of the owner or manager thereof . . . ."[117] Head was fishing from a boat on Black's Pond, which is a 246-acre lake on Black Creek in Lexington County.[118] Black's Pond was created by a predecessor-in-interest who dammed Black Creek to create the lake. The dam has a spillway, through which Black Creek continues to eventually link with the North Fork of the Edisto River. The dam blocks any navigation of Black Creek past the lake, and a boat would have to be physically carried across the dam and down the bank in order to continue down the creek.[119] Head sought and was granted permission to place his boat in the creek upriver from Black's Pond and then floated into the pond for fishing. The magistrate ruled that since the dam prevents boats from traveling downstream without interruption, Black's Pond is not navigable and is private property.[120] The circuit court reversed Head's convictions, and noted that if placement of a dam along a waterway is alone sufficient to prevent navigability, "owners of property adjoining navigable waters across our state [could] dam whatever areas they wish to appropriate to their own private and exclusive use."[121]

The Court of Appeals cited Article XIV, § 4[122] and Section 49-1-10[123] for the proposition that the public is entitled to the free use of all navigable waters within the State.[124] The court ruled:

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[117] S.C. Code Ann. § 50-1-90 (Supp. 2002).

[118] *Supra* note 116 at 84.

[119] *Id.*

[120] *Id.* at 85.

[121] *Id.*

[122] *Supra* note 104.

> Obviously, in most cases where a watercourse is navigable, a person who legally accesses the watercourse, and fishes from within a boat on the watercourse, cannot be convicted of violating Section 50-1-90, as such a person has a Constitutional and Statutory right to be there.[125]

Fishing in South Carolina is a multi-billion dollar industry and it does not shock the conscious that courts are willing to protect this industry and right through the public trust doctrine. Although the ramification of such a ruling for private landowners is discouraging, as the decision in effect strips the fundamental property right of exclusion, the environmentalists and recreationalists can realize the usefulness of the public trust doctrine.

C. Recreation/Hunting

In addition to navigation, commerce and fishing, South Carolina allows public trust waters to be utilized by its citizens for many uses including boating, hunting, swimming, waterskiing, sunbathing, collecting seashells, birding and daydreaming.[126] The Attorney General has issued several opinions that conclude the same outright declaration:

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[123] *Supra* note 113.

[124] *Supra* note 116 at 86.

[125] *Id.* at 87.

[126] Wyche and Finklea, *supra* note 72 at 247.

> The position of the State of South Carolina is that these tidelands, submerged lands and navigable waters are trust property . . . to be held by the State for the benefit of the public at large for the development of fishing, recreation, navigation and other public purposes.[127]

Although there is little direct case authority as to these propositions, one can assume the courts of South Carolina are more than willing to extend the protection over such uses. Many other states have recognized such uses since New Jersey's 1821 decision of *Arnold v. Mundy*[128] where "fishing, fowling, sustenance and all other uses of the water and its products" was protected under the public trust doctrine.

V. DUTIES OF THE STATE AS TRUSTEE

The aforementioned decisions reached by the courts, tout the State as the keeper of the public's interest. State and federal courts have long recognized that the public trust doctrine devolves upon the states, as trustees of the public trust waters, certain powers and duties, along with limitations and prohibitions on these powers for managing the "assets" of the public trust. Through adjudicative means, the courts have expressed that these powers, duties, limitations and prohibitions are recognized by the states in order to assure the preservation of the public's trust rights to the use and enjoyment of the waterways.

David Slade, editor of *Putting the Public Trust Doctrine to Work,* notes among the powers and authorities granted to the states includes:

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[127] 1970 Op. Att'y Gen. 329, 334 (December 10, 1970).

[128] *Supra* note 18 at 12.

- Govern, manage and protect the public's trust rights in lands and water subject to the Public Trust Doctrine;
- Exercise a continuous supervision and control over public trust lands, waters and living resources;
- Define the limits of the lands held in public trust; and
- Revoke a conveyance that unduly diminishes or destroys the State's *jus publicum* control over the conveyed land.[129]

Perhaps the most important duties placed upon the state is the duty to preserve, so far as consistent with the public interest, the uses protected by the trusts and protect and maintain trust property and regulate its use by devoting trust lands, waters and living resources to actual public uses.[130] Environmentalists and conservationists argue these resources should be protected for the use and enjoyment of future generations. As the Supreme Court of Oregon so eloquently stated, "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."[131] Should the courts continue to keep this thinking in mind, both environmentalists and conservationists can expect good things to come from the application of the public trust doctrine.

Still, states must play by certain rules in applying the public trust doctrine. As discussed above, *Illinois Central R.R. v. Illinois*[132] taught state governments that they are generally prohibited from abdicating their sovereignty or dominion over public trust

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[129] *Putting the Public Trust Doctrine To Work: The Application of the Public Trust Doctrine To the Management of Lands, Waters and Living Resources of the Coastal States* (David C. Slade et al. eds., 2nd ed., Coastal States Organization 1997 at 278.).

[130] *Id.* at 279.

[131] *Morse v. Oregon Division of State Lands,* 581 P.2d 520 (1978).

[132] *Supra* note 25.

lands.[133] However, applicability of the public trust doctrine does not depend on public ownership of the property. The private owner of a tract of salt marsh or of the bed of a navigable river holds title subject to the trust.[134] Any alteration, construction or development of public trust lands usually requires a permit from both the Department of Health and Environmental Control (DHEC) and the United States Army Corps of Engineers. The State of South Carolina has embraced this duty of protecting the public trust lands and passed the authority to DHEC's Office of Ocean Coastal Resource Management. One of their many duties is to ensure the public's interest is protected with regards to public trust lands.

The motive of the General Assembly is probably to develop commerce, but one could certainly make the argument the authority is a win-win situation for both business and environmentalists. Although commerce and navigation is being promoted, public use for recreation is protected along with preventing degradation of waterways through development. Still, South Carolina must remain vigilant that individual property rights are protected. The right to exclude others from one's land certainly comes to mind when dealing with the public trust doctrine. The State must continue to balance the public trust doctrine in a manner that will provide the most benefit for the public interest as a whole.

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[133] *Supra* note 129 at 279 (*citing Illinois Central R.R. v. Illinois, supra* note 25 at 453 ("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 peace.")).

[134] *Rice Hope Plantation v. South Carolina Public Service Auth.*, 216 S.C. 500, 531 (1950) (holding "any such [private] ownership would be, in our opinion, subject to the dominant power of the government (State and Federal) to control and regulate navigable waters").

VI. CONCLUSION: WHAT NOW?

The relatively recent buttressing of the public trust doctrine in South Carolina represents a larger trend of increasing environmental controls and protective legislation. This trend will bring a broad smile to the face of environmentalist wishing to challenge development and an even broader smile to those conservationists who want to open navigable waters to world-class fishing and recreation. The State of South Carolina has taken an affirmative role in its duties as trustee in protecting the public's interest where the public trust applies.

Although detractors argue application of the public trust doctrine may hinder private property rights, the overall feeling from the public trust doctrine is warm. As states begin to assert their public trust responsibilities, their actions are likely to conflict with the interests of private property owners. Still, the environmental problems facing America are of such magnitude as to require correspondingly dramatic and far-reaching legislative and judicial remedial intervention. While the public trust doctrine is not so far reaching as to constitute a label as "far reaching intervention", the public trust doctrine offers a win-win situation for both the supporters and the disbelievers as the land is held in trust for the benefit of public interest, both public and private.