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The Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View

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Judicial Protection for Beaches and Parks: The Public Trust Doctrine Above the High Water Mark

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I. Introduction

The public trust doctrine long has served as a vital means of protecting the public's interest in certain natural resources. From common law England to the present, the public trust doctrine has ensured the public's right to access and use navigable waterways and has prevented the government from unconditionally privatizing those waterways or their resources.[1] Public rights that historically received protection under the public trust doctrine, most notably navigation and fishing,[2] traditionally have shared a common

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1. *See* Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763-768 (1970) (Magna Charta, from time of its adoption in England, has been extrapolated through common law to protect public right of navigation and prohibit several fisheries).

2. *Id.* at 781-787; *see also Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 383 (1842) ("[t]he sea and its arms are peculiarly and pre-eminently in the king, in respect to their uses; all of which, at common law, are public, and they are held by the king for the public benefit, viz., navigation, fishery, the mooring of vessels. . . .") .

characteristic: a connection to navigable or tidally influenced water. That connection has formed a *de facto* boundary line beyond which courts historically have been reluctant to extend the public trust doctrine.[3]

But the public's interests in access to, use, and management of public lands and resources are not limited to navigable waterways and the lands lying beneath them. Indeed, those interests stretch far from navigable bodies of water to include, among other things, wildlife, parklands, and even the electromagnetic spectrum.[4] This paper addresses the use of the public trust as an "amphibious" doctrine to protect the public interests associated with beaches and parks located above the mean high water mark of navigable waters ("uplands" or dry land).[5]

The public interests associated with uplands are numerous, including recreational benefits in accessing and enjoying dry sandy beaches,[6] economic concerns in preventing fraudulent or wasteful disposition of dedicated public parks,[7] and environmental interests in preventing mismanagement of public parkland,[8] to name a few. This paper argues that the public trust doctrine can and should serve as a means of protecting those interests, regardless of whether a development affects a navigable or tidally influenced body of

3. *See, e.g.*, *Ill. Cent.* R.R. *v.* I*llinois*, 146 U.S. 387, 452 (1892) (implying that public trust doctrine does not limit government disposition of dry public lands); *see also* L*arson v.* S*ando*, 508 N.W.2d 782, 787 (Minn. Ct. App. 1993) (public trust doctrine applies to state management of waterways, but not to state management of land).

4. *See* Deborah G. Musiker, Tom France, Lisa A. Hallenbeck, T*he* P*ublic* T*rust and* P*arens* P*atriae* D*octrines*: P*rotecting* W*ildlife in* U*ncertain* P*olitical* T*imes*, 16 PUB. LAND L. REV. 87 (1995) (arguing that public trust duties apply to wildlife conservation); Michael C. Blumm & Lucus Ritchie, T*he* P*ioneer* S*pirit and the* P*ublic* T*rust*: T*he* A*merican* R*ule of* C*apture and* S*tate* O*wnership of* W*ildlife*, 35 ENVTL. L. 673, 693-701, 713-719 (arguing that state courts applied public trust principles to regulate private capture of wildlife)**;** Charles F. Wilkinson, T*he* P*ublic* T*rust* D*octrine in* P*ublic* L*and* L*aw*, 14 U.C. DAVIS L. REV. 269 (1980) (arguing that public trust doctrine applies to federal parklands); Patrick S. Ryan, A*pplication of the* P*ublic-*T*rust* D*octrine and* P*rinciples of* N*atural* R*esource* M*anagement to* E*lectromagnetic* S*pectrum*, 10 MICH. TELECOMM. TECH. L. REV. 285 (2004) (arguing that electromagnetic spectrum is a public resource capable of protection under public trust doctrine).

5. In a 1986 article, Scott W. Reed explored the potentially amphibious nature of the public trust doctrine. Scott W. Reed, T*he* P*ublic* T*rust* D*octrine*: I*s* I*t* A*mphibious*?, 1 J. ENVTL. L. & LITIG. 107 (1986). That article focused on the application of public trust principles to the management of upland wilderness areas. This paper takes a somewhat broader approach, surveying state court decisions that apply public trust principles to wild and urban parklands as well as decisions that apply public trust principles to protect the public's right to access certain tracts of dry land.

6. B*orough of* N*eptune* C*ity v.* B*orough of* A*von-*B*y-*T*he-*S*ea*, 294 A.2d 47 (N.J. 1972) (ensuring public access to dry sandy portion of municipal beach).

7. G*ould v.* G*reylock* R*eservation* C*omm'n*, 215 N.E.2d 114 (Mass. 1966) (invalidating a state agency lease of state parkland to private party).

8. S*ierra* C*lub v.* D*ep't of* I*nterior*, 376 F. Supp. 90 (N.D. Cal. 1974) (requiring the Secretary of Interior to mitigate potential damage to Redwood National Park land).

water.

An important premise underlying the argument that the public trust doctrine is amphibious is the notion that the public trust doctrine is a flexible, not a static doctrine.[9] Much like the common law in which it is founded, the public trust doctrine can adapt to meet the changing values, needs, and infrastructure of society.[10] As the New Jersey Supreme Court succinctly stated, "[t]he public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."[11] If courts apply the public trust doctrine outside the traditional context of navigable bodies of water, they can employ a valuable and time-tested common law concept to address new and different problems that may arise in the management of public parks and upland beaches as society continues to develop consistent with contemporary social concerns.

Another important premise underlying the extension of the public trust doctrine to uplands is the notion that certain dry lands (notably beaches and public gathering spaces) are inherently public, and their overall value for "sociability" purposes is increased when the public has access to them.[12] This notion serves as a rationale for extending the boundaries of the public trust doctrine, as the cases discussed in this paper have done. Moreover, it also serves as a limiting principle, insofar as the public trust doctrine should not

9. *See Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) ("The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the [public trust doctrine] the state is not burdened with an outmoded classification favoring one mode of utilization over another," citing *Colberg, Inc. v. State*, 432 P.2d 3, 12 (Cal. 1967)).

10. *See* Bertram C. Frey & Andrew Mutz, *The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States*, 40 U. MICH. J.L. REFORM 907, 911-912 (arguing that public trust doctrine, as a common law doctrine, is "inherently dynamic" and evolves as the needs of society change); *see also Barney v. Keokuk*, 94 U.S. 324, 337-338 (1876) (rejecting an argument that public trust doctrine is limited to tidally influenced waters and extending the doctrine to cover inland navigable rivers and lakes); *see also The Propeller Genesee Chief*, 53 U.S. (12 How.) 443, 455 (1851); *see also* Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 579 (1989) (arguing that the public trust doctrine is "chameleon-like," because courts apply it to fashion many different remedies based on the factual context of a case).

11. *Neptune City*, 294 A.2d at 54.

12. *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 774-781 (1986) (arguing that inherently public property doctrines - dedication, custom, and the public trust doctrine - traditionally used to ensure public access to roads and waterways, are equally applicable to lands customarily used for public gatherings, because the "sociability" value of those lands increases when the public has greater access to them, much like the "commerce" value of roads and waterways increases with greater public access). *See infra* Section III, notes 44-54 and accompanying text.

require public access to uplands when no sociability interests are present.[13]

For about a century, a minority of state courts has recognized the importance of protecting the public's interests in upland beaches and parks and accepted the public trust doctrine as a tool to accomplish that end. Those courts laid the framework for applying the public trust doctrine to uplands in a number of different contexts. This paper explores those decisions and examines their underlying factual contexts, policy rationales, and legal principles to suggest how, when, and why the public trust doctrine can and should apply to protect the public's interests in uplands. When the public trust doctrine does apply, courts can protect public recreational interests by ensuring public access to upland beaches and by preventing government management decisions that curtail the public's recreational use of upland parklands.

Section II of this paper provides a brief background of the public trust doctrine.[14] Section III discusses the notion, developed by Professor Carol Rose, that certain uplands have a "sociability" value that increases with greater public access to those lands.[15] The paper then divides the court decisions applying the public trust doctrine to uplands into two categories: access cases (Section IV) and disposition cases (Section V). The former cases ensure the public's right to access and use the dry sandy portion of beaches above the high water mark under the public trust doctrine and the doctrine of custom; the latter cases address governmental disposition and management of upland parks under the public trust doctrine. The distinction between disposition and access cases is a meaningful one, as the former discuss the substance of the public trust doctrine, while the latter interpret its scope.[16] Section VI concludes by recapping the commons elements and public trust principles discussed in Sections III, IV, and V, and suggests how the application of the public trust doctrine can lead to better management of public parks and upland beaches.

II. Background

Courts have applied the public trust doctrine to protect the public's

13. *See infra* Section III, notes 44-54 and accompanying text.

14. This paper focuses on the public trust doctrine; however, many state courts have ensured public access to uplands under the doctrine of custom. *See infra* note 85. For that reason, this paper briefly addresses the history of the doctrine of custom to provide the reader with background. *See infra* note 40.

15. *See* Rose, *supra* note 12.

16. The New Jersey Supreme Court recognized this distinction. *See Neptune City*, 294 A.2d at 53 ("The former [aspect of the public trust doctrine] relates to the lawful extent of the power of the legislature to alienate trust lands to private parties; the latter to the inclusion within the doctrine of public accessibility to and use of such lands for recreation and health, including bathing, boating and associated activities.")

interest in accessing and using upland beaches and parks for recreational purposes. This section briefly outlines the origins of the doctrine and its substantive content.

The American public trust doctrine originated in Roman law, with the notion that the public had a right to access and use "the air, running water, the sea, and consequently the shores of the sea."[17] The English common law adopted the notion of common public ownership of those resources, distinguishing between the *jus privatum* (lands the Crown could transfer to private individuals in fee simple) and the *jus publicum* (lands the Crown held in trust for the general public).[18] The *jus publicum* included, among other things, the sea, tidally influenced waters, underlying lands, and the shorelines of such waters below the high water mark.[19] The public had a paramount right to access and use such resources for navigation and fishing purposes, while the owners of the *jus privatum* were limited in their ability to interfere with those interests absent an express grant by the Crown.[20]

After the Europeans colonized North America, early American state courts, faced with title disputes in submerged lands, looked to the English common law for answers. The most prominent of those decisions was *Arnold v. Mundy*.[21] In *Arnold*, the plaintiff claimed an exclusive right to farm oysters from a portion of the bed of the Raritan River and sought to prohibit the defendant from taking those oysters.[22] The Supreme Court of New Jersey concluded that, as a result of the American Revolution, the people of New Jersey originally held title to the riverbed at issue for the common use of the public and could not interfere with that use by conveying that title in fee to private individuals.[23] Because the plaintiff's title derived from that limited

17. The Institutes of Justinian 2.1.1 (T. Cooper trans. 3d ed. 1852)

18. This is an oversimplified history of the adoption and subsequent application of public trust principles in England. For a comprehensive analysis of the history of the public trust doctrine in England, *see* Harrison C. Dunning, *Antiquity of the Public Right*, 4 Waters and Water Rights § 29 (Robert E. Beck ed., Matthew Bender & Co. 1991); *see also* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 429-430 (1989), and James L. Huffman, *Speaking of Inconvenient Truths: A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 19-27 (2007).

19. For a more extensive analysis of the distinction between *jus privatum* and *jus publicum*, see *Shively v. Bowlby*, 152 U.S. 1, 11-14 (1894) (discussing Lord Chief Justice Hale's treatise *De Jure Maris*, 1 Hargrave Tracts 5-44 (1787)).

20. See *Shively*, 152 U.S. at 13; *see also The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, *supra* note 1, at 768-769.

21. 6 N.J.L. 1 (N.J. 1821)

22. *Id.* at 8

23. *Id.* at 53-54. Some state courts at the time differed with respect to whether the state as sovereign could convey title to lands beneath the high water mark of navigable rivers. *See Commonwealth v. Alger*, 61 Mass. (1 Cush.) 53 (1851) (upholding state transfer to private landowner of tidelands below the high water

government title, the plaintiff did not hold fee simple title to the riverbed, and therefore could not prohibit the defendant from harvesting oysters from the oyster farm.[24]

Relying in large part on *Arnold v. Mundy*, the U.S. Supreme Court quickly acknowledged the thirteen original states' sovereign power, inherited from the British Crown following the Revolution, over navigable waters and underlying lands within the state.[25] The Court soon extended this principle to all newly admitted states under the equal footing doctrine.[26] Later, the Court recognized that the public trust doctrine applied to all navigable waterways and "inland seas," regardless of whether those bodies of water were tidally influenced.[27] Together, those decisions placed trust lands in the hands of the states, which set out to define the public trust for themselves, resulting in a diverse body of public trust jurisprudence.[28]

Although often characterized as primarily a creature of state law,[29] the public trust doctrine was heavily influenced by the United States Supreme Court decision of *Illinois Central Railroad Company v. Illinois*,[30] which imposed limits on states' ability to dispose of public trust lands. In *Illinois Central*, the Court upheld the Illinois state legislature's repeal of a grant of submerged lands under Lake Michigan to the Illinois Central Railroad. The Court concluded that the grant was necessarily revocable because the lands granted were subject to the public trust, and the state could not abdicate its role as trustee over such lands by transferring them to a private party.[31] The

mark). However, even in *Alger*, the Massachusetts Supreme Court recognized that the power to convey such lands was necessarily limited by the public's interest in unimpeded navigation. *Id.* at 75. For a thorough examination of public trust principles in the early state case law, *see* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475-489 (1970).

24. *Arnold*, 6 N.J.L. at 54.

25. *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842)

26. *Pollard v. Hagan*, 44 U.S. 212, 230 (1845)

27. *See Barney v. Keokuk*, 94 U.S. 324, 337-338 (1876) (discussed *supra* note 10). Although the Supreme Court eliminated the tidally influenced waters limitation on the scope of the American public trust doctrine, tidally influenced waters were still within the purview of the public trust doctrine, even if such waters were not navigable. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479-480 (1988).

28. *See Shively v. Bowlby*, 152 U.S. 1, 26 (1894) (acknowledging state autonomy in defining the public trust doctrine "according to its own views of justice and policy"); *see also Appleby v. City of New York*, 271 U.S. 364, 380 (1926) ("[T]he extent of the power of the State and city to part with property under navigable waters to private persons . . . is a state question.").

29. *See supra* note 28 and accompanying text.

30. 146 U.S. 387 (1892). In his seminal article on the public trust doctrine, Professor Sax described *Illinois Central* as the "most celebrated public trust case in American law." Sax, *supra* note 23, at 489.

31. *Ill. Central*, 146 U.S. at 452-53.

Court listed two exceptions to that general rule: the state may dispose of public trust lands (1) to promote the interests of the public, or (2) if such disposition does not substantially impair the public interest in those lands.[32]

The *Illinois Central* Court distinguished state title to submerged lands from state title to dry public lands, implying that the public trust doctrine applied to the former but not the latter.[33] That view is the received wisdom on the scope of the public trust doctrine.[34] Nonetheless, the recent growth in popularity of outdoor recreation[35] has encouraged state and federal courts to extend the traditional scope to include the dry sandy shores of beaches,[36] urban parks,[37] rural state parks[38] and, to a limited degree, federal parklands.[39] Sections IV and V examine those decisions in greater detail.[40]

32. *Id*.

33. *Id*. at 452; *see supra* note 3.

34. *See The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, *supra* note 1, at 781-787.

35. *See, e.g., Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 53 (N.J. 1972) (observing that public's interest in tidal waters has grown to encompass recreation). The 1994-1995 National Survey on Recreation and the Environment indicates that, since 1982-1983, the percentage of the U.S. population that participates in at least one outdoor activity has risen from 89% to 94.5%. R. Jeff Teasley, H. Ken Cordell, John C. Bergstrom, and Paul Gentle, *Recreation and Wilderness in the United States* (1997), *available at* http://www.agecon.uga.edu/~erag/finalreport.htm.

36. *See Neptune City*, 294 A.2d at 54; *Van Ness v. Borough of Deal*, 393 A.2d 571, 573-74 (N.J. 1978); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 121 (N.J. 2005).

37. *See, e.g., Grayson v. Town of Huntington*, 160 A.D.2d 835, 837, 554 N.Y.S.2d 269 (N.Y. App. Div. 1990).

38. *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114, 122-123 (Mass. 1966).

39. *Sierra Club v. Dep't of Interior*, 376 F.Supp. 90, 96-96 (N.D. Cal. 1974).

40. This paper focuses on the application of the public trust doctrine to protect public interests in access to and use of uplands. However, a number of state courts have also relied on the doctrine of custom to ensure public access to uplands. *See infra* note 85. Although these two doctrines differ, they both ensure public access to important resources and their underlying rationales are similar.

The doctrine of custom originated in England and recognized a community's right to harvest or use certain resources, including grazing lands, timber, and roadways. Rose, *supra* note 12, at 739-749 (discussing the history of custom). Also, citizens asserted customary claims to protect their right to engage in certain recreational uses, including sporting activities and festivals, on otherwise privately held land. *Id*. To successfully assert a customary claim, a litigant had to show that the customary use was (1) ancient, (2) exercised without interruption, (3) peaceable and free from dispute, (4) reasonable, (5) certain, (6) obligatory, and (7) not inconsistent with other customs or law. 1 William Blackstone, Commentaries *76-78; *See also State ex. rel. Thornton v. Hay*, 462 P.2d 671, 677 (Or. 1969) (applying custom requirements).

III. The Value of Public Recreational Use of Uplands

The expansion of the public trust doctrine beyond its historical confines in navigable and tidally influenced waters has generated some criticism.[41] Some critics have argued that this expansion threatens the property rights of private landowners because public access necessarily infringes upon those landowners' constitutional right to exclude others.[42] This is bad because, these commentators maintain, the right to exclude is fundamental to preserving the incentive to use property efficiently.[43]

Professor Rose responded to this criticism by arguing that, in certain contexts, increased public access to and use of land can actually *enhance* the value of that land.[44] Rose started from the premise that certain property, notably roadways and navigable waterways, is susceptible to the "holdout" problem, whereby a single landowner can withhold use of her property and frustrate the completion of a road or the navigability of a waterway.[45] Similarly, according to Rose, lands used for recreational purposes are susceptible to holdout problems.[46] According to Rose, courts responded by applying the public trust doctrine and the related doctrine of custom[47] to

41. *See, e.g.*, Huffman, *supra* note 18, at 93-103 (arguing that expansive interpretations of the public trust doctrine have no basis in the historical roots of the doctrine); *see also* Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L. J. 13, 79-81 (1976) (arguing that contemporary public trust jurisprudence misunderstands Roman law as supporting the notion of commonly held and judicially enforceable rights in resources).

42. *See* Huffman, *supra* note 18, at 99 ("[I]f the jus publicum is just a Latin term for the public interest, the scope of the public trust is limitless and the constitutional protections of property rights are a nullity."). *See also Opinion of the Justices*, 313 N.E.2d 561 (Mass. 1974) (concluding that a proposed bill to create a public 'on-foot free right-of-passage' along the shore between the mean high and low water marks constitutes a taking requiring just compensation to private landowners under Massachusetts and United States constitutions).

43. *See* Richard A. Posner, *Economic Analysis of Law*, *reprinted in* Perspectives on Property Law 45-48 (Robert C. Ellickson, Carol M. Rose, Bruce A. Ackerman eds., Little, Brown and Company, 3d ed. 2002); *see also* Thomas Michael Power, *Environmental Protection and Economic Well Being* 61-63 (M.E. Sharpe, Inc. 1996) (arguing that ability to exclude others from a resource is necessary to realizing a profit from that resource).

44. Carol M. Rose, *Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

45. *Id.* at 749-758.

46. *Id.* at 760. Rose argued that recreational sites may be subject to the holdout problem because communities grow accustomed to holding recreational events on specific pieces of property which, if privately owned, are subject to the landowner's right to exclude. *Id.*

47. *See supra* note 40.

ensure public access when the elements of those doctrines were satisfied.[48] Further, Rose argued that roads, waterways, and recreational sites are more valuable when commonly, as opposed to privately, owned.[49]

Rose relied on the concept of "returns to scale,"[50] which occur when the benefit derived from increased public use of land increases in equal or greater proportion to that increased use.[51] In the context of roadways and waterways, Rose identified enhanced commerce as the benefit derived from increased public access and use.[52] Concerning lands customarily used for recreational sites, Rose pointed to another aspect of commerce - "sociability" - that experiences returns to scale when the public is afforded access to those sites.[53] In sum, for roadways, navigable waterways, and lands used for recreational purposes, public access gains outweigh infringements on rights to exclude because the benefits to commerce, broadly defined, are greater when such lands are publicly held, rather than privately.

Rose identified two elements (hereafter referred to as "commons elements") that justify judicial elevation of public access over private property under the public trust: (1) the property is susceptible to a "holdout" problem, and (2) the property is more valuable when commonly, rather than privately, held.[54] Those commons elements serve as a justification for ensuring public access to recreational lands as well as limiting the public right of access when no recreational purpose would be served. As this paper shows, the commons elements are implicitly or explicitly present in nearly every judicial decision discussed in Sections IV and V. Consequently, this paper refers to the holdout problem and the value of public recreational property to clarify the circumstances under which courts will apply the public trust doctrine to ensure public access to uplands or evaluate their management and disposition.

IV. The Access Cases

Courts have ensured public access to upland beaches for recreational

48. *Id*.

49. *Id*. at 766-771.

50. *Id*. at 766-768.

51. *See* Joan Robinson, E*conomic* H*eresies* 52-53 (Basic Books, Inc. 1971).

52. Rose, *supra* note 12, at 770. ("[T]he 'publicness' of commerce - the increasing returns from greater participation - . . . attached an ever-increasing value to a road or waterway, beyond any alternative use of the property. . . .").

53. *Id*. at 775-777. ("[P]erhaps our most important 'returns to scale' involve activities that are somehow sociable or socializing - activities that allow us to get along with each other."). Rose identified education, politeness, sympathy, appreciation of the environment, and free speech as aspects of sociability that are enhanced with increased public access to recreational sites. *Id*. at 775-776, 778-780.

54. *Id*. at 774.

purposes under the public trust doctrine. This section first focuses on the New Jersey Supreme Court's use of the public trust doctrine to provide equal public access to municipal and privately owned upland beaches.[55] The section then considers how the commons elements addressed in Section III, above, both justify and limit the New Jersey Supreme Court's protection of public access to and use of upland beaches.

A. Beach Access Under New Jersey's Public Trust Doctrine

The New Jersey Supreme Court first discussed the public right to access upland beaches under the public trust doctrine in 1972, in *Borough of Neptune City v. Borough of Avon-By-The-Sea*.[56] In *Neptune*, the ocean-side borough of Avon had amended a municipal ordinance in 1970 to restrict the issuance of seasonal beach use permits solely to Avon residents, and raise the daily beach access fees for nonresidents.[57] A neighboring borough, Neptune City, challenged the ordinance as a violation of the state common law right to access the beach.[58] Relying largely on *Arnold v. Mundy*[59] and *Illinois Central*,[60] the New Jersey Supreme Court reversed the lower court, concluding that the discriminatory application of beach access fees violated the public trust doctrine by impeding the public's right to access the upland beach at issue.[61] The court extended the public trust doctrine to encompass "recreational uses, including bathing, swimming and other shore activities,"[62]

55. New Jersey appears to be the only jurisdiction that has ensured public access to upland beaches under the public trust doctrine. For that reason, Section IV(A) focuses exclusively on New Jersey case law. However, in 2003, North Carolina enacted a statute recognizing a public right of access to and use of upland beaches. N.C. GEN. STAT. §§77-20(d) and (e) (2003). Private landowners challenged that statute as an unconstitutional taking, but the North Carolina Court of Appeals dismissed the lawsuit on procedural grounds. *See Fabrikant v. Currituck County*, 621 S.E.2d 19, 27-29 (N.C. Ct. App. 2005) (affirming dismissal of injunctive relief and declaratory judgment claims to quiet title in upland beach property on sovereign immunity grounds).

56. 294 A.2d 47 (N.J. 1972).

57. *Id.* at 50-51.

58. *Id.* The beach property at issue was municipally owned. Thus, private property rights and takings issues were not present in the litigation.

59. 6 N.J.L. 1 (N.J. 1821), discussed *supra* notes 21-24 and accompanying text.

60. 146 U.S. 387 (1892), discussed *supra* notes 30-33 and accompanying text.

61. *Neptune City*, 294 A.2d at 55. The court later qualified this holding by noting that a municipality may charge non-residents higher access fees to the extent that residents finance beach facilities through payment of local property taxes. *Hyland v. Borough of Allenhurst*, 393 A.2d 579, 581 (N.J. 1978). In *Hyland*, the court also concluded that municipalities may not prohibit non-residents from using municipal toilet facilities located near public beaches. *Id.* at 582. The court, however, expressly declined to rest that conclusion on the public trust doctrine. *Id.*

62. *Id.* at 54-55.

acknowledging the flexibility of the public trust doctrine,[63] the scarcity of beach property, and the importance of such property to the public welfare.[64]

Six years after *Neptune*, the New Jersey Supreme Court reexamined the public trust doctrine in the 1978 case of *Van Ness v. Borough of Deal*.[65] In *Van Ness*, the New Jersey Public Advocate argued that the borough of Deal discriminated against non-residents in violation of the public trust doctrine by restricting membership in a municipally owned casino and beach resort to residents of Deal.[66] Deal claimed that *Neptune* was distinguishable because it was limited to the portion of the beach between the low and high water marks, and because the Deal beach, unlike the beach in *Neptune*, had not been dedicated by the borough as a public beach.[67] Reversing the New Jersey Appellate Division, the New Jersey Supreme Court rejected those arguments, concluding that the public trust doctrine applied to the upland sand area.[68] The majority stressed that the dwindling availability of beach property necessitated prompt judicial action,[69] rejecting the dissent's position that public access to beach property is better left to the legislature.[70]

Both *Neptune City* and *Van Ness* enforced the public trust doctrine to ensure public access to municipally owned dry upland beaches. The New Jersey Supreme Court took the first step in applying the public trust doctrine to privately owned beaches in *Matthews v. Bay Head Improvement Ass'n*.[71] In *Matthews*, a resident of Point Pleasant sought access to a beach in the borough of Bay Head.[72] The beach at issue had seventy-six lots, seventy of which were privately owned.[73] The Bay Head Improvement Association (Association) owned the remaining six lots in fee and restricted its membership to Bay Head residents.[74]

Reversing the New Jersey Appellate Division, which had affirmed the

63. *Id.* at 54. ("The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.").

64. *Id.* at 53.

65. 393 A.2d 571 (N.J. 1978).

66. *Id.* at 571.

67. *Id.* at 573-574.

68. *Id* at 574. The court also noted that dedication of the beach to public use is immaterial. *Id.*

69. *Id.* at 574.

70. *Id.* at 576 (Mountain, J., dissenting).

71. 471 A.2d 355, 358 (N.J. 1984).

72. *Id.* at 358.

73. *Id.* at 359.

74. *Id.* The Association also held leases in the sandy upland portion of a number of private beachfront lots. In the summer months, the Association restricted beach use during the day to Association members, thereby preventing nonresidents from using the beach. *Id.*

Superior Court's grant of summary judgment for the Association, the New Jersey Supreme Court observed that the public's right to use the foreshore is often dependent on a right to pass across the upland beach, concluding that the public had a right under the public trust doctrine to pass across privately owned uplands to access the foreshore.[75] Further, the court noted that the public's interest in the upland sands is not limited to passage but also includes "some enjoyment of the dry sand area."[76] The decision thus extended the public trust doctrine, as announced in A*von*, to include privately owned upland beaches, although not without some limitations.[77]

The New Jersey Supreme Court recently enforced the public trust doctrine against privately held beach uplands in 2005 in R*aleigh* A*venue* B*each* A*ss'n v*. A*tlantis* B*each* C*lub*, I*nc*.[78] In R*aleigh*, the Raleigh Avenue Beach Association ("Association") sought access to a 480-foot wide stretch of upland sand beach owned by the Atlantis Beach Club ("Atlantis"), a private beach club.[79] To determine the extent of the public's right of access to and use of Atlantis' private upland beach under the public trust doctrine, the court applied four factors central to the decision in M*atthews v*. B*ay* H*ead* I*mprovement* A*ss'n*.[80] Affirming the Appellate Division, the court concluded that Atlantis' upland beach "must be available for use by the general public under the public trust doctrine" in light of the following facts: (1) the "longstanding public access to and use of the beach" permitted by Atlantis' predecessor in interest, (2) a New Jersey Department of Environmental Protection (DEP) development permit condition requiring public access to the beach at issue, (3) documented public demand for access to the beach at issue, (4) the lack

75. I*d*. at 364. The court observed that the public right of access is not unrestricted; reasonable access is all that is required. I*d*.

76. I*d*. at 365.

77. I*d*. The court noted that the public's rights in private beaches are not "co-extensive with the rights enjoyed in municipal beaches." I*d*.

78. 879 A.2d 112 (N.J. 2005).

79. I*d*. at 113. The New Jersey Department of Environmental Protection (DEP) also played a major role in the litigation. In 1986, the DEP issued a development permit to Atlantis' predecessor in interest on condition that the public be afforded access to and use of the beach at issue. I*d*. at 114. In 2003, DEP filed an administrative action against Atlantis for violating the permit when Atlantis closed beach access to the public. I*d*. at 116. A large part of the ensuing court opinion dealt with DEP's authority to review Atlantis' beach access fees, and is beyond the scope of this paper. The court ultimately concluded that DEP had authority to review the fees on the ground that Atlantis' construction of a boardwalk constituted a "development" triggering DEP jurisdiction. I*d*. at 125.

80. I*d*. at 121-124. In M*atthews*, the New Jersey Supreme Court listed four factors it would consider in determining the scope of public use of private upland beaches: (1) location of the dry sand area in relation to the foreshore, (2) extent and availability of publicly owned upland sand area, (3) nature and extent of the public demand, and (4) usage of the upland sand by the owner. M*atthews v*. B*ay* H*ead* I*mprovement* A*ss'n*, 471 A.2d 355, 365 (N.J. 1984).

of nearby publicly owned beaches, and (5) Atlantis' use of the beach as a private club.[81] The court failed to explain the extent of the public use required by its decision, although it did observe that Atlantis could charge reasonable fees to the extent required for management services, subject to the supervision of the DEP.[82]

From *Neptune City* in 1972 through *Raleigh Avenue* in 2005, the New Jersey Supreme Court removed the public trust doctrine from its historical confines in navigable and tidally influenced waters and applied it to protect the public's recreational access to dry upland beaches.[83] New Jersey thus established itself in the forefront of public trust jurisprudence in the context of public beach access,[84] serving as a paradigm for jurisdictions grappling with the problem of increased public demand for limited upland beach resources.[85]

81. *Raleigh Avenue Beach Ass'n* at 124.

82. *Id.* at 125. The dissent argued that the public's access and use rights under the public trust doctrine would have been satisfied by opening a ten-foot-wide strip of Atlantis' upland beach area to the public. *Id.* at 129 (Wallace, J., dissenting).

83. *See Raleigh Avenue*, 879 A.2d at 119-120 (observing that the New Jersey Supreme Court has extended the public trust doctrine from traditional public rights of navigation and commerce in tidal lands to encompass recreational use of upland beaches).

84. *See* Timothy Mulvaney & Brian Weeks, *"Waterlocked": Public Access to New Jersey's Coastline*, 34 ECOLOGY L. Q. 579, 608 (2007) ("New Jersey has been at the forefront of the evolution of modern public access rights under the public trust doctrine. . . .")

85. A handful of jurisdictions have also ensured similar public rights of access to and use of upland beaches for recreational purposes under the doctrine of custom. Although this paper primarily focuses on the public trust doctrine, decisions applying custom shed light on alternative approaches to protecting public rights in uplands. For that reason, they are briefly discussed below. For an outline of the history and substantive content of the doctrine of custom, *see supra* note 40.

Oregon was one of the first states to ensure public access to upland beaches under the doctrine of custom. *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969). In *Thornton*, the Oregon Supreme Court affirmed a court of appeals' injunction against private landowners from fencing off a portion of their land located in the "dry-sand area" located between the mean high-tide line and the vegetation line. *Id.* at 672. The court declined to base its decision on doctrines of implied dedication or prescription argued at the trial and appellate level; instead, on its own initiative, the court relied on the doctrine of custom. *Id.* at 676. Briefly applying the seven elements of custom mentioned in Blackstone's Commentaries, *see supra* note 40, the court concluded that the underlying facts satisfied those elements. *Id.* at 677. In particular, the court noted the long history of public use of the dry-sand area of the beach for "picnics, gathering wood, building warming fires" and the historical unsuitability of the dry-sand area for any other purposes. *Id.* at 673-674. The court thus established a sweeping rule ensuring public access to the upland dry-sand area along the entire Oregon coastline.

Other jurisdictions have recognized varying degrees of public rights in upland beaches under the doctrine of custom. *See In re Application of Ashford*, 440 P.2d 76, 77

B. Commons Elements In Beach Access Cases

The beach access cases discussed in this section are not the result of unrestrained judicial zeal for public access at the expense of private property rights. Instead, each decision was a measured response to the privatization of a limited and vital public resource, as the commons elements discussed in Section III demonstrate.

First, upland beaches are a finite resource susceptible to private "holdout" power.[86] In each decision discussed below, private landowners sought to exclude the public from an upland beach property in order to retain that property for their own use. This sort of exclusion does not present a holdout problem if the public can easily recreate in other locales.[87] But as the New Jersey Supreme Court noted, "[o]ceanfront property is uniquely suitable for bathing and other recreational activities. Because it is unique and highly in demand, there is growing concern about the reduced 'availability to the public of its priceless beach areas.'"[88] Given upland beaches' connection to the ocean, they offer one-of-a-kind recreational opportunities that the public cannot engage in elsewhere.

Beyond the limited availability of upland beaches, the decisions

(Haw. 1968) (relying on historical Hawaiian custom and practice to establish the seaward property boundary of "royal patents" issued by King Kamehameha V to private persons at the "upper reaches of the wash of waves, usually evidenced by the edge of vegetation"); *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73, 77-78 (Fla. 1974) (observing that the public's right to access and use upland beaches for recreational purposes may be protected under the doctrine of custom when the elements of custom are met); *Matcha v. Mattox*, 711 S.W.2d 95, 98-99 (Tex. App. 1986) (recognizing a customary public right to access and use beaches seaward of the vegetation line for recreational purposes); *United States v. St. Thomas Beach Resorts, Inc.*, 386 F.Supp. 769, 772-773 (D. V.I. 1974) (upholding injunction against private landowner from fencing in upland property in light of customary public right of access and use).

86. Almost all natural resources can be characterized as finite. However, the increasingly high demand for access to and use of unique upland beaches for recreational purposes, as demonstrated by the case law discussed in this section, makes the finite nature of those lands particularly apparent.

87. *See* Rose, *supra* note 12, at 758 (noting a lack of a holdout problem where the public can engage in a specific recreational activity in numerous places).

88. *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 364 (N.J. 1984) (quoting *Van Ness*, 393 A.2d at 574 (N.J. 1978)); *see also Lusardi v. Curtis Point Property Owners Ass'n*, 430 A.2d 881, 886 (N.J. 1981) (noting that use of upland beaches is "practically inseparable from enjoyment of ocean swimming"); *Gion v. City of Santa Cruz*, 2 Cal.3d 29, 43, 465 P.2d 50 (Cal. 1970) (noting that increased urbanization of California's coastline has rendered shoreline areas sufficiently definite to justify application of implied dedication). The holdout problem is less evident in sparsely populated western states. However, as the population increases, greater public demand is bound to give rise to holdout problems.

discussed in this section also identify a value in public access to and use of upland beaches that outweighs the land's value when there is a private right to exclude. The New Jersey Supreme Court noted the importance of public recreational use of upland beaches to the public welfare.[89] The Oregon Legislature also emphasized the importance of recreational use of upland beaches in a statute preserving public access to the Oregon coast.[90] And the Florida Supreme Court waxed poetic about the value of public access to and recreational use of upland beaches.[91] These legislative and judicial statements demonstrate that public access to upland beaches has a value that, although difficult to quantify, is integral to the overall public welfare.[92]

The commons elements[93] also indicate when public access to uplands should yield to private landowners' right to exclude. When the uplands at issue are not susceptible to the holdout power, and when the value of public access is minimal, the right to exclude should prevail.[94]

V. The Disposition Cases

The public trust doctrine is not limited to cases ensuring public access to public trust lands. Instead, the doctrine also can enable courts to oversee

89. *Neptune City*, 294 A.2d at 53. *See also Matthews*, 471 A.2d at 363 ("[h]ealth, recreation and sports are encompassed in and intimately related to the general welfare of a well-balanced state. Extension of the public trust doctrine to include bathing, swimming and other shore activities is consonant with and furthers the general welfare.") (citation omitted).

90. *See* OR. REV. STAT. § 390.610(4) ("The Legislative Assembly further declares that it is in the public interest to do whatever is necessary to preserve and protect scenic and recreational use of Oregon's ocean shore."); *see also* OR. REV. STAT. § 390.010(2) ("The economy and well-being of the people are in large part dependent upon proper utilization of the state's outdoor recreation resources for the physical, spiritual, cultural, scientific and other benefits which such resources afford.").

91. *See Daytona Beach*, 294 So.2d at 75 ("We recognize the propriety of protecting the public interest in, and right to utilization of, the beaches and oceans of the State of Florida. No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches.").

92. *See* Rose, *supra* note 12, at 780 ("The public's recreational use arguably is the most valuable use of [beaches] and requires an entire expanse of beach (for unobstructed walking, viewing, contemplation) which could otherwise be blocked and 'held up' by private owners.").

93. *See supra* Section III note 54 and accompanying text.

94. The factors announced in *Matthews* (*see supra* note 81) demonstrate how a court can balance the public right of access with private property rights. For example, where the upland beach is removed from the ocean, other public beaches are nearby, public demand for the upland beach is minimal, and the private landowner is making use of her upland beach, the private landowner should be able to exclude the public.

state or municipal management or disposition of trust lands.[95] The cases discussed in this section all involved judicial oversight of federal, state, and local government management of upland trust lands and demonstrate that the public trust doctrine is not, and should not be, limited to the traditional context of navigable waters and their underlying lands.

A. *Gould v. Greylock Reservation Commission*

In *Gould v. Greylock Reservation Commission*,[96] the Massachusetts Supreme Judicial Court considered a citizen challenge of actions taken by the Greylock Reservation Commission (Commission) and the Mount Greylock Tramway Authority (Authority) regarding the Greylock State Reservation.[97] The Massachusetts legislature established the Greylock State Reservation in 1898 and created the Commission, with authority to acquire additional land for the park.[98] Over a half-century later, in 1953, the legislature created the Authority for the purpose of constructing and operating an aerial tramway[99] within the park, to be paid for through the sale of revenue bonds.[100] The Authority struggled to obtain underwriting for the revenue bonds until 1964, when it entered into an agreement with American Resort Services, Inc.[101] That agreement proved to be financially disadvantageous to the Authority, resulted in a substantial delegation of the Authority's power to the resort, and involved the construction of ski facilities much more extensive than the

95. Professor Sax identified three general restrictions state courts have imposed on governmental authority under the public trust doctrine: (1) trust property must be used for a public purpose and open to the public, (2) trust property may not be sold, and (3) trust property must be maintained for particular types of uses. *See* Sax, supra note 21, at 477. Section IV discussed the first restriction. Section V discussed the latter two restrictions. *See also Neptune City*, 294 A.2d at 53 ("[One aspect of the public trust doctrine] relates to the lawful extent of the power of the legislature to alienate trust lands to private parties.").

96. 215 N.E.2d 114 (Mass. 1966).

97. *Id.* at 116. At the time of the litigation, the Reservation included approximately 8800 acres of wilderness surrounding Mt. Greylock, a 3491-foot-high mountain.

98. *Id.*

99. In addition to the tramway, the Authority was authorized to construct "all appurtenances thereto," which included, among other things, parking facilities, ski facilities, restaurants and gift shops. *Id.* at 118 n 6.

100. *Id.* at 118-119. The arrangement was somewhat complex, involving the leasing of 4000 acres of the reservation by the Commission to the Authority. Through that lease, the Commission delegated its maintenance obligation of the leased lands to the Authority.

101. *Id.* at 119-120. The resort was a joint venture between Allen & Company, an investment house, and Willamette Construction Company. *Id.*

original tramway project authorized by the enabling legislation.[102] After the Authority and the resort executed the agreement, but before the project began, a group of citizens unsuccessfully petitioned the Superior Court to invalidate the 4000-acre lease and the agreement.[103]

The Massachusetts Supreme Judicial Court, which reversed the Superior Court's upholding of the lease, observed that the Greylock Reservation, as rural park land, was not to "be diverted to another inconsistent use without plain and explicit legislation to that end."[104] The court examined the statute that authorized construction of the tramway, failing to find language supporting a project of the scale envisioned by the Authority and the resort.[105] For that reason, the court concluded that the Commission's 4000-acre lease to the Authority exceeded the scope of the statute.[106] The court also ruled that the statute did not authorize the Authority to delegate its statutory functions to the resort to the extent contemplated by the agreement.[107] The court ultimately invalidated both the 4000-acre lease and the agreement.[108]

Although the Massachusetts Supreme Court did not expressly invoke the public trust doctrine, commentators regularly cite its decision in *Greylock* for its public trust implications.[109] *Greylock* announced that as manager of trust land the government may not divert land devoted to one public use to an inconsistent use without explicit legislation authorizing such disposition.[110] This rule serves as a principle of statutory construction

102. *Id*. at 119-121. The court specifically referenced the impact the proposed ski facilities would have on the ecology of the reservation, noting that the chair lifts would require removal of trees and vegetation on 226 acres. *Id*. at 120.

103. *Id*. at 116.

104. *Id*. at 121 (quoting *Higginson v. Slattery*, 99 N.E. 523, 527-528 (Mass. 1912)).

105. *Id*. at 122-123.

106. *Id*. at 123.

107. *Id*. at 124.

108. *Id*. at 126.

109. *See, e.g.*, Sax, supra note 23, at 492 (arguing that *Greylock* has important implications for the public trust doctrine); Peter Egan, *Applying Public Trust Tests to Congressional Attempts to Close National Park Areas*, 25 B.C. ENVTL. AFF. L. REV. 717, 721 (1998) (arguing that *Gould* is the seminal public trust case in Massachusetts); Wilkinson, *supra* note 18, at 466 (arguing that *Gould* applied the public trust doctrine to state parks).

110. *Greylock*, 215 N.E.2d at 122 ("We thus are to interpret the relevant statutory provisions strictly and as permitting within this forest reservation *no activities inconsistent with the apparent purpose* of [the enabling legislation], except as the Legislature, in the exercise of those powers which it possesses, may clearly have given permission for them.) (citation omitted) (emphasis added); *see also* Sax, *supra* note 21, at 494 ("[The *Greylock*] court devised a legal rule which imposed a presumption that the state does not ordinarily intend to divert trust properties in such a manner as to lessen public uses."). The court later clarified this rule,

enabling courts to closely examine legislative dispositions of trust lands.[111] If the legislature fails to adequately identify the public interest served by disposing of or diverting trust lands, courts can invalidate the transfer.[112] Further, as evidenced by the *Greylock* decision, that interpretive rule applies to all trust lands, regardless of a connection to navigable or tidally influenced waters, including uplands above the high water mark.

B. Management of Urban Parks Under the Public Trust Doctrine

Many states also have applied public trust principles to the management of upland urban parks.[113] For example, in *Williams v. Gallatin*,[114] the New York Court of Appeals invalidated a ten-year lease of the Arsenal Building in New York's Central Park by the commissioner of Parks to the Safety Institute of America to establish a safety and sanitation museum in the building.[115] The court reversed the New York Appellate Division, observing that public parks "facilitate free public means of pleasure, recreation, and amusement, and thus provide for the welfare of the community."[116] In contrast, the court noted, the purpose of the proposed

requiring that a diversion of trust land to another inconsistent use must be authorized by legislation that identifies (a) the land to be diverted, (b) the current use of that land, and (c) the proposed use of that land. *Robbins v. Dep't of Pub. Works*, 244 N.E.2d 577, 580 (Mass. 1969) (enjoining state agency diversion of parklands for construction of a highway).

111. *See* Blumm, *supra* note 10, at 587-589 (arguing that the public trust doctrine can serve as a rule of statutory interpretation requiring explicit legislative identification of public purposes served by diversion of trust lands).

112. *Id.* at 588 n.69 and accompanying text.

113. This subsection focuses on three jurisdictions, New York, California, and Pennsylvania, to illustrate the public trust principles applied by many states to protect urban upland parks. *See, e.g.*, *Citizens For Preservation of Buehler Park v. City of Rolla*, 230 S.W.3d 635, 640 (Mo. Ct. App. 2007) (citizens have standing under public trust doctrine to challenge city's disposition of dedicated park land); *Paepcke v. Public Bldg. Comm'n of Chicago*, 263 N.E.2d 11, 18-21 (Ill. 1970) (citizens have standing under public trust doctrine to challenge city's diversion of public park lands for school facilities, but legislation authorized the diversion); *Lord v. City of Wilmington*, 332 A.2d 414, 418-420 (Del. Ch. 1975) (citizens have standing under public trust doctrine to challenge city's diversion of an urban park to construct a water tower). *But see Larson v. Sando*, 508 N.W.2d 782, 787 (Minn. Ct. App. 1993) (concluding that public trust doctrine applies only to navigable waterways and does not limit state's ability to sell uplands within state wildlife management area). For further discussion on states' use of the public trust doctrine to protect upland urban parks, *see* Serena M. Williams, *Sustaining Urban Green Spaces: Can Public Parks be Protected Under the Public Trust Doctrine?*, 10 S.C. ENVTL. L.J. 23 (2002).

114. 128 N.E. 121 (N.Y. 1920).

115. *Id.* at 123.

116. *Id.*

museum was to promote public safety and health.[117] The court therefore invalidated the lease, concluding that, because the relation between these two purposes was remote, the lease impermissibly diverted park resources from traditional park purposes without direct and specific approval by the state legislature.[118]

Williams established the rule that park areas in New York are impressed with a public trust, and their use for other than park purposes requires direct and specific approval by the state legislature. New York courts have applied this rule to order the removal of city sanitation equipment from a public park,[119] invalidate the reconveyance of dedicated public parkland to a private developer,[120] and to uphold the conveyance of parkland for the construction of low-income housing.[121]

California also has prevented government diversion of dedicated public parks to inconsistent uses. In *Big Sur Properties v. Mott*,[122] the California Court of Appeal affirmed a Superior Court decision upholding the denial of a private landowner's application for a permit allowing a vehicular right of way over a state park.[123] The court observed that the park had been privately dedicated to the public for use as a park, was held by the state in trust for the public, and the state lacked the power to "divert the use of the property from its dedicated purposes."[124] The court determined that use of the property as a right-of-way was "fundamental[ly]" inconsistent with traditional park purposes and concluded that the state properly denied the landowner's application.[125] Since *Big Sur Properties*, California courts have used the public trust doctrine to prevent a county from renovating a fairground acquired through private deed[126] and to enjoin a city from selling a public library to a

117. *Id.*

118. *Id.*

119. *Ackerman v. Steisel*, 104 A.D.2d 940 (N.Y. App. Div. 1984).

120. *Ellington Constr. Corp. v. Zoning Bd. of Appeals*, 152 A.D.2d 365, 378-79 (N.Y. App. Div. 1989).

121. *Grayson v. Town of Huntington*, 160 A.D.2d 835 (N.Y. App. Div. 1990). In *Grayson*, the court found specific legislative approval supporting conveyance of the parkland at issue because it "liberally construe[d]" the legislation in light of the public purpose of encouraging the development of low-income housing. *Id.* at 837.

122. 132 Cal. Rptr. 835 (Cal. Ct. App. 1976).

123. *Id.* at 840.

124. *Id.* at 838.

125. *Id.* at 838-839. The landowner also argued that the state had the discretion to grant a permit for a right-of-way under California Public Resources Code § 5003.5, which authorizes the provision of a "means of ingress to and egress from all state parks." CAL. PUB. RES. CODE §5003.5. The court rejected that argument, concluding that the public trust doctrine could be abrogated only through explicit legislation. *Big Sur Properties*, 132 Cal. Rptr. at 839.

126. *County of Solano v. Handlery*, 66 Cal. Rptr. 3d 201, 207-212 (Cal. Ct. App. 2007) (concluding that public trust doctrine restricted county's ability to divert

developer.[127]

Pennsylvania has taken a similar approach to protecting public use of upland urban parks. For example, in *Board of Trustees of Philadelphia Museums v. Trustees of Univ. of Pennsylvania*,[128] the Pennsylvania Supreme Court affirmed the Court of Common Pleas order setting aside Philadelphia's conveyance of public park lands to the University of Pennsylvania. The court observed that Philadelphia had dedicated the land at issue to public use as a park, held the land subject to a public trust, and lacked the power to convey it for private purposes.[129] Pennsylvania courts have since applied the *Board of Trustees* rule to prevent the sale of a public square to private interests,[130] prohibit the diversion of public parkland for the construction of a school,[131] and uphold the construction of an amphitheatre on public park land.[132]

The Pennsylvania Constitution also provides protection to upland parks in Pennsylvania. Article I, section 27, of the Pennsylvania Constitution requires Pennsylvania to protect the public use of upland parks.[133] In *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*,[134] the Commonwealth Court of Pennsylvania interpreted that provision as self-executing and concluded that it imposed a duty on the state Attorney General to enforce its

dedicated parkland and rejecting county's argument that public trust doctrine is limited to tidelands).

127. *Save the Welwood Murray Mem'l Library Com. v. City Council*, 263 Cal. Rptr. 896, 902-904 (Cal. Ct. App. 1989).

128. 96 A. 123 (Pa. 1915).

129. *Id.* at 125. In a later case, the Pennsylvania Supreme Court reserved the question as to whether the state legislature could constitutionally authorize the sale of public parks to private entities. *See Hoffman v. City of Pittsburgh*, 75 A.2d 649, 655 (Pa. 1950).

130. *Hoffman*, 75 A.2d at 655. In *Hoffman*, the court enjoined the sale of a public square to a private party for the purpose of raising revenue, noting that the value of the square for recreation and health purposes outweighed the value of increased revenue. *Id.* at 654.

131. *In re Conveyance of 1.2 Acres of Bangor Mem'l Park to Bangor Area School Dist.*, 4 Pa. D. & C.4th 343, 354-355 (Pa. Com. Pl. 1988), *aff'd*, *In re Conveyance of 1.2 Acres of Bangor Mem'l Park to Bangor Area School Dist.*, 567 A.2d 750 (Pa. Commw. Ct. 1989), *overruled on other grounds by In re Erie Golf Course*, 963 A.2d 605 (Pa. Commw. Ct. 2009).

132. *Bernstein v. City of Pittsburgh*, 77 A.2d 452, 455 (Pa. 1951). In *Bernstein*, the court upheld the construction of an amphitheatre in a public park, noting that such use is consistent with park purposes, which include "aesthetic recreation and mental and cultural entertainment." *Id.*

133. Article I, section 27 provides: "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." PA. CONST. ART. I, § 27.

134. 302 A.2d 886 (Pa. Commw. Ct. 1973).

requirements.[135] The same court clarified the judicial review required under Article I, section 27, in *Payne v. Kassab*,[136] stating that a court must determine whether a government action (1) complied with all applicable statutes and regulations, (2) demonstrated a reasonable effort to minimize environmental incursion, and (3) balanced the benefit of disposition with the risk of environmental harm.[137] The Pennsylvania Constitution thus provides additional protection to upland parks by forcing state agencies to consider potential environmental harm that may result from management decisions concerning those parks.

In sum, many state courts have employed public trust principles to protect public interests in free and open public parks from legislative diversions to inconsistent uses. Such state court decisions have recognized both the limited availability of public parks, as well as the importance of such parks to the general public welfare.[138] Finally, those decisions applied public trust principles to upland parks regardless of a connection to navigable or tidally influenced waters.

C. The *Redwood National Park* Litigation

One federal district court also has invoked public trust principles in the context of federal management of the Redwoods National Park. In *Sierra Club v. Dep't of the Interior*,[139] the Sierra Club sought an injunction directing the Department of the Interior (Department) to prevent damage to the Redwood National Park caused by logging adjacent to the park.[140] The Sierra Club argued that the department had a judicially enforceable duty under the National Park System Act[141] and the Redwood National Park Act[142] to take

135. *Id.* at 892. In *Nat'l Gettysburg Battlefield Tower*, the Pennsylvania Attorney General, at the urging of the U.S. Secretary of the Interior, sought to enjoin the erection of a large tower near the Gettysburg National Military Park. *Id.* at 887-888. The court noted that Article I, section 27 of the Pennsylvania Constitution authorized the Attorney General, as trustee of park lands, to challenge the tower's erection, but concluded on limited review that testimony in the record supported the lower court decision to allow the erection of the tower. *Id.* at 892-895.

136. 312 A.2d 86 (Pa. Commw. Ct. 1973).

137. *Id.* at 94. The court in *Payne* concluded that a street-widening project complied with article. I, section 27, even though it resulted in the elimination of a half-acre of public parkland. *Id.* at 94-96.

138. *See infra* notes 153-156 and accompanying text.

139. 376 F.Supp. 90 (N.D. Cal. 1974).

140. *Id.* at 92.

141. 16 U.S.C. § 1. That statute provides, in part: "The [National Park Service] shall promote and regulate the use of the Federal areas known as national parks . . . to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

steps to protect the park from the harmful effects of logging on adjacent lands.[143] The court denied the department's motion to dismiss, concluding that the two statutes imposed a judicially enforceable duty on the agency to take steps to protect the park from nearby logging.[144]

When the department failed to take action, Sierra Club again filed suit, arguing that the agency had failed to meet its trust obligation.[145] The federal district court again agreed, determining that the department had failed to implement any recommendations made under a series of reports it commissioned, save for certain "cooperative agreements" the agency reached with timber companies.[146] The court therefore ordered the department to take "reasonable steps within a reasonable time" to carry out its duty as trustee to protect the park from further damage by timber companies.[147]

Although the court in the Redwood Park litigation applied public trust principles to protect upland federal parklands, its conclusions suffer from some limitations. The court's decisions were based in part on a statute applicable solely to the Redwood National Park.[148] Also, Congress amended the National Park Service Organic Act in 1978 to clarify the National Park Service's statutory duties and provide additional protection to national parks,[149] and one court concluded that that amendment restricted any public trust duties to those specifically contained in the statute.[150] Nonetheless,

142. 16 U.S.C. § 79a et seq. The relevant provision of that statute requires the Secretary of the Interior to protect the Redwood National Park by entering into cooperative agreements with neighboring landowners to mitigate adverse effects on park lands occasioned by logging. 16 U.S.C. § 79c(e).

143. *Sierra Club*, 376 F.Supp. at 92-94.

144. *Id*. at 95-96. The court noted that it could not substitute its judgment for the Secretary's, but could review any action taken by the Secretary to determine whether it was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id*. at 96.

145. *Sierra Club v. Dep't of Interior* II, 398 F.Supp. 284 (N.D. Cal. 1975).

146. *Id*. at 293. The court characterized the cooperative agreements as inadequate in light of their unenforceability and numerous qualifications. *Id*. at 292.

147. *Id*. at 294. One year later, the Sierra Club again sued the department, arguing that it still had failed to implement adequate protections. *Sierra Club v. Dep't of Interior* III, F.Supp. 172 (N.D. Cal. 1976). However, this time the court determined that the agency had pursued all reasonable measures available in light of limited funding by Congress and concluded that it had fulfilled its duty as trustee. *Id*. at 174-176. Despite the court's refusal to force the agency to take additional protective measures, the litigation eventually led to 1978 legislation that provided additional protection to the park. *See infra* note 149 and accompanying text.

148. 16 U.S.C. § 79a.

149. 16 U.S.C. § 1. *See* Act of March 27, 1978, P.L.95-250, 92 Stat. 166 (codified at 16 U.S.C. § 1a-1).

150. In *Sierra Club v. Andrus*, 487 F.Supp. 443, 449 (D. D.C. 1980), the court concluded that the legislative history underlying that amendment indicated that Congress intended to eliminate any extra-statutory public trust duty on the Secretary

some commentators argue that the National Park Service Organic Act imposes general public trust duties on the federal government as manager of federal parklands.[151]

D. Commons Elements in Disposition Cases

Much like a private property owner's exercise of her right to exclude the public, misguided or arbitrary government managerial decisions can curtail the public's ability to access and use upland park resources.[152] A government's lease of public parkland for commercial development may result in destruction of the scenic value the park was originally established to protect.[153] A municipality's use of urban parks for non-park purposes may infringe on the public's ability to recreate in those parks.[154] And the government's failure to adequately protect limited and priceless park resources may restrict the public's ability to enjoy and appreciate those resources.[155] The cases discussed above reflect the notion that urban and rural parklands are a finite resource, and courts can protect them from government management and disposition inconsistent with park purposes.

Additionally, the case law establishes the paramount importance of the public's right to use upland parks for recreational purposes. The public's recreational use of upland parks confers a benefit not only on the individual, but also on the community at large.[156] As noted by Professor Rose, the

of the Interior. *See also Sierra Club v. Block*, 622 F.Supp. 842, 866 (D.C. Colo. 1985) ("[I]t is not for the courts to say how [the public] trust shall be administered. That is for Congress to determine. Where Congress has set out statutory directives . . . for the management and protection of public lands, those statutory duties comprise *all* the responsibilities which defendants must faithfully discharge.") (citations omitted) (emphasis in original).

151. *See* Wilkinson, *supra* note 4, at 290-293 (arguing that language in the 1978 amendments continues to impose a general public trust duty on the National Park Service); *see also* Egan, *supra* note 109, at 731-732 (same).

152. Poor government management of parklands can be seen as an inverse of the traditional holdout problem examined by Rose, *supra* note 12, at 749-761. Although the cases discussed in Section IV do not involve private landowners "holding out" their property from public use, government disposition of public land to a private entity or diversion of public land to a use inconsistent with park purposes can have the same effect by curtailing public recreational use of upland parks.

153. *See Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114, 118, n.4, 120 (lease of parkland to construct ski facilities thereon would result in removal of trees and vegetation on land "frequently visited by students, ornithologists, scientists, and naturalists, as well as by tourists, motorists, and persons walking on the trails").

154. *Board of Trustees of Philadelphia Museums v. Trustees of Univ. of Pennsylvania*, 96 A. 123 (Pa. 1915)

155. *See Sierra Club* (I) *and* (II), 376 F.Supp. at 95-96, 398 F.Supp. at 293-294.

156. *See Williams v. Gallatin*, 128 N.E. 121, 123 (N.Y. 1920). (public parks provide "free public means of pleasure, recreation, and amusement, and thus provide for the

public's enjoyment of upland parks has a certain sociability value that experiences increasing returns to scale with increased public access to and use of those parks.[157] Further, urban parks provide a unique forum for public speech,[158] and the disposition or diversion of those parks reduces the availability of a locale for such activities.[159] Such uses are integral to the public welfare and arguably outweigh the monetary benefits gained by disposing of parkland or diverting it to an inconsistent use.

The public trust doctrine does not and should not apply to all uplands managed by the government. First, public trust principles may not apply to upland parks when the commons elements[160] are not present. If the park at issue is not subject to a holdout problem (i.e., the park is a large tract of public land), or if the park has little value for sociability purposes, the public trust doctrine might not apply.[161] Second, uplands must be dedicated in some manner to public use in order for the doctrine to apply.[162] When uplands are not dedicated to public use, federal, state, and local government managers may be free to dispose of them as they see fit.

VI. Conclusion

Many different entities have a stake in upland beaches and parks used by the public for recreational purposes. Private landowners wish to protect their right to exclude others. State, federal, and local governments seek to manage public uplands and sometimes dispose of them to raise revenue or

welfare of the community."); *see also* H*offman v*. C*ity of* P*ittsburgh*, 75 A.2d 649, 654 (Pa. 1950) ("[H]uman values - air, light, rest, recreation and health which can be derived from any public square - are more important and valuable to the citizens of Pittsburgh than the increased revenue which will likely be produced by a sale of this public property.").

157. S*ee supra* note 53 and accompanying text.

158. S*ee* U*nited* S*tates v*. G*race*, 461 U.S. 171, 177-178 (1983) (noting that parks are traditional forums associated with the free exercise of expressive activities).

159. S*ee* Rose, *supra* note 12, at 778 (arguing that free speech, along with commerce, is a socializing practice for society, and is a rationale for preserving public access and use of public parks).

160. S*ee supra* Section III note 54 and accompanying text.

161. This observation is supported by the broad tracts of federally owned uplands that are not subject to the public trust doctrine. S*ee* Wilkinson, *supra* note 4, at 273-277 (noting that the public trust doctrine traditionally does not apply to federal public lands); *see also* I*ll. C*e*nt*. R.R. *v*. I*llinois*, 146 U.S. 387, 452 (1892) (implying that the public trust doctrine does not apply to public uplands).

162. Dedication of a park to public use can occur expressly in a deed conveying property to a government, *see* B*ernstein v*. C*ity of* P*ittsburgh*, 77 A.2d 452, 454 (Pa. 1951), through formal declaration of dedication by a government, B*oard of* T*rustees of* P*hiladelphia* M*useums v*. T*rustees of* U*niv*. *of* P*ennsylvania*, 96 A. 123, 123-124 (Pa. 1915), or impliedly through a long history of public use, *see* H*offman v*. C*ity of* P*ittsburgh*, 75 A.2d 649, 650-651 (Pa. 1950).

encourage alternative uses. And the general public has an interest in accessing and using upland beaches and parks for recreational purposes. Those interests regularly conflict and, when they do, the general public often is at a distinct disadvantage in light of the inherent difficulty in organizing a multitude of disorganized citizens (many of whom are uninterested) to defend a commonly held right.[163]

Fortunately, courts can and do apply the public trust doctrine to protect rights held by this disorganized public, even when navigable or tidally influenced waters are not involved. But they do not do so as a matter of course; instead, the uplands at issue must satisfy the "commons elements," as discussed in Section III.[164] First, the land at issue must be subject to some form of holdout power, either through a private landowner's ability to exclude, or through a government's ability to divert or dispose to an inconsistent use.[165] The unique and finite nature of public parks and upland beaches, as well as the rising demand for their use occasioned by an increasing population, make the holdout problem especially pronounced.[166]

Second, the land at issue must be more valuable when used publicly than when privately owned or diverted to an inconsistent use.[167] Although that value may be difficult to quantify, it is no less real, as is demonstrated by courts and legislatures that regularly extol the benefits to the public welfare

163. *See* Note, *supra* note 1, at 762 n. 4 (acknowledging difficulty general public faces in protecting "fleeting" access and use interests); *see also* Sax, *supra* note 23, at 560 (noting that disputes involving public resources often pit "self-interested and powerful" minorities against a "disorganized and diffuse majority"). Many commentators also argue that, in the context of legislative decisions regarding public lands, private interest groups often have an advantage over the general public in influencing legislation. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 14 (University of Chicago Press 1991) ("Public choice models often treat the legislative process as a microeconomic system in which 'actual political choices are determined by the efforts of individuals and groups to further their own interests'") (quoting Gary S. Becker, A *Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371, 371 (1983); *see also* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 415-422 (1994) (arguing that special interest groups exert excessive influence over laws governing public land resources).

164. *See supra* note 54 and accompanying text.

165. *See supra* notes 45-49 and accompanying text.

166. *See, e.g., Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 364 (N.J. 1984).("Beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and improvement of transportation facilities."); *see also* Note, *Public Access to Beaches: Common Law Doctrines and Constitutional Challenges*, 48 N.Y.U. L. Rev. 369, 369 (1973) ("[T]he fixed supply of beaches, together with an increasing population, has led to a situation in which most Americans, particularly those in urban settings, find the opportunities for beach recreation continually dwindling.").

167. *See supra* notes 50-53 and accompanying text.

that result from public recreational use of dry upland areas.[168] As Professor Rose observed, "[i]nsofar as recreation educates and socializes us, it acts as a 'social glue' for everyone, not just those immediately engaged. . . ."[169]

When courts unshackle the public trust doctrine from its historical roots in navigable and tidally influenced waters,[170] they can protect public interests in uplands in two important ways. First, in the context of access cases, courts can allow the public to assert its interest in accessing and using dry upland beaches for recreational purposes alongside private interests in excluding others and can ensure public access when the public interest outweighs the private.[171] Second, in the context of disposition cases, courts can encourage better government decisionmaking regarding upland public parks by giving a voice to the public's interest in preserving traditional park purposes.[172] When courts give that voice a forum, the public can preserve its right to free and open parklands and beaches available for recreation and can hold government decisionmakers accountable when they fail to take that interest into account.[173] Together, those tools provide courts with a flexible means of protecting the public's recreational interests in uplands.

The public trust doctrine is not a static concept, fixed in time and unsuitable to change in society. Instead, it is a common law doctrine ready to meet the "felt necessities" of our time.[174] Over a century ago, the United States Supreme Court recognized the flexible nature of the public trust doctrine, extending it from navigable and tidally influenced waters to waters navigable in fact.[175] Today, as an increasing population seeks access to upland beaches and parks to recreate, relax, and socialize, the public trust doctrine once more can serve to protect those interests now and for

168. *See supra* notes 89-92, 156-159 and accompanying text.

169. Rose, *supra* note 12, at 779.

170. Joseph Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 186-188 (1980) (arguing that public trust doctrine should be "unshackled" from its historic roots in tidelands and expanded to protect "reasonable expectations" that the general public attaches to *all* public resources).

171. *See supra* Section IV, notes 56-85 and accompanying text.

172. *See supra* Section V, notes 96-151 and accompanying text; *see also* Sax, *supra* note 23, at 560-561 (noting that the public trust doctrine serves a "democratiz[ing]" function by enabling courts to remand an issue to the legislature when public interests have not been adequately addressed).

173. *See* Blumm, *supra* note 10, at 595 ("The [public trust] rules demanding clear legislative revocations of the trust and close judicial scrutiny of administrative alienation of trust resources ensure the public a meaningful opportunity to participate in the allocation of trust resources and to hold accountable responsible officials.").

174. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Little, Brown and Company 1938).

175. *See Barney*, 94 U.S. at 337-338; *see also The Propeller Genesee Chief*, 53 U.S. (12 How.) at 455.

generations to come.

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