Re-imagining the Public Trust Doctrine to Conserve U.S. Ocean Ecosystems

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public trust doctrine
the government must manage certain common natural resources in the best interest of its citizens
THE UNITED STATES IS AN OCEAN NATION

The U.S. exclusive economic zone (EEZ) extends 200 nautical miles offshore, encompassing diverse ecosystems and vast natural resources, such as fisheries and energy and other mineral resources. The U.S. EEZ is the largest in the world, spanning over 13,000 miles of coastline and containing 3.4 million square nautical miles of ocean—larger than the combined land area of all fifty states. (A square nautical mile is equal to 1.3 square miles.)

U.S. states also have jurisdiction over a significant portion of the Great Lakes. This chain of freshwater lakes and its tributaries constitute the largest reservoir of fresh surface water on the planet, containing 6.5 quadrillion gallons of fresh water and covering an area of about 72,000 square nautical miles. The Great Lakes' U.S. coastline borders eight states and is roughly the same length as the entire Atlantic Coast.

SOURCE: U.S. COMMISSION ON OCEAN POLICY
what if we were to enclose all U.S. waters in a **national public trust**?

- legal standpoint?
- utility standpoint?
utility?

**public trust doctrine**

“It is the policy and duty of the United States government to manage, protect, and restore its ocean trust resources for the benefit of current and future generations.”
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SOURCES: HARRINGTON ET AL. 2005; NMFS; U.S. COMMISSION ON OCEAN POLICY; NYTIMES

28% of fish stocks overfished
21% still being fished unsustainably

2002 landings: 3,700,000 mt
2002 discards: 1,060,000 mt

Western Atlantic bluefin tuna is commercially very valuable. It has been overfished to a dangerous degree.

Eastern Gulf of Mexico red snapper was gradually overexploited by commercial and recreational fishing.
A cacophony of activities, mostly regulated by separate federal agencies

SOURCES: CROWDER ET AL. 2006; TURNIPSEED ET AL. 2009; U.S. COMMISSION ON OCEAN POLICY
THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

June 12, 2009

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: NATIONAL POLICY FOR THE OCEANS, OUR COASTS, AND THE GREAT LAKES

June 12, 2009

The United States has “a stewardship responsibility to maintain healthy, resilient, and sustainable oceans, coasts, and Great Lakes resources for the benefit of this and future generations.”
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How do we operationalize a “stewardship responsibility?”
Trust Law

"A public trustee is endowed with the same duties and obligations as an ordinary

Powers and duties that are ascribed to private and charitable trustees include:

(1) the duty to preserve trust resources and not to waste them;

(2) the duty to administer the trust loyalty, in the interest of its beneficiaries
(both present and future); and

(3) the duty to provide complete and accurate information to trust
beneficiaries regarding the management of the trust.
Duty to preserve trust
Designate large marine ecosystems in U.S. waters the “corpus” of the trust and disallow waste

Duty of loyalty, impartiality
Agencies bound by the public trust doctrine must take into account and not discriminate between the needs of present and future generations

Duty to furnish information to beneficiaries
Keep the public informed about not only the status of the ocean trust resources, but also about their actions that affect them

SOURCES: CROWDER ET AL. 2006; TURNIPSEED ET AL. 2009; U.S. COMMISSION ON OCEAN POLICY
“With a clear national policy and a revitalized, empowered, unifying and comprehensive framework to coordinate efforts among Federal, State, tribal, and local authorities, including regional governance structures, non-governmental organizations, the private sector, and the public, we can work together towards the changes needed to secure the health and prosperity of the ocean, our coasts, and the Great Lakes.”

STEWARDSHIP? FOR THE BENEFIT OF CURRENT AND FUTURE GENERATIONS?

Interim Report
Of The
Interagency Ocean Policy Task Force

September 10, 2009
A carefully articulated federal ocean public trust doctrine would . . .

1) provide a common, overarching mandate and a suite of enforceable trusteeship duties;

2) work at multiple levels to help Congress and federal agencies reshape the regulatory framework used to manage U.S. ocean space; &

3) provide legal underpinning for immediate action towards ecosystem-based management.
Thank you


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Stop the Beach Renourishment & the Public Trust Doctrine

Donna R. Christie
Elizabeth C. and Clyde W. Atkinson
Professor of Law
Florida State University
College of Law
Critically eroding beaches in Destin and Walton County
1986 Beach and Shore Preservation Act (BSPA)

- The State has a “necessary governmental responsibility to properly manage and protect Florida beaches … from erosion and [directed] that the Legislature make provision for beach restoration and nourishment projects [for critically eroding beaches].”

- Requires DEP to identify those beaches of the state which are critically eroding and to develop and maintain a comprehensive long-term management plan for their restoration.
Status of Florida Beaches

- Of the 825 miles of sandy beach in the State,
  - over 485 miles, about 59%, is eroding,
  - 387 miles of beach, about 47%, are “critically eroded.”
Beach Restoration and Management

- The State has spent at least $600 million on beach erosion control and beach restoration, and the Florida Department of Environmental Protection (DEP) now manages about 200 miles of restored beaches.
BSPA Provisions for a Beach Renourishment Project

- **The erosion control line (ECL)**
  - Establish the line of mean high water for the area to be restored.
  - The MHWL is the primary reference for the erosion control line (ECL) for the project.
  - ECL may also take into account
    - the requirements of proper engineering in the beach restoration project,
    - the extent to which erosion or avulsion has occurred, and
    - the need to protect existing ownership of as much upland as is reasonably possible.
BSPA Procedures for a Beach Renourishment Project

- If the ECL must be located landward of the MHWL in order to accomplish the project, BSPA provides eminent domain authority to acquire such lands.

- After ECL recorded, title to all land seaward of the ECL is “deemed to be vested in the state by right of its sovereignty . . .”
The effect of beach restoration projects on riparian & littoral rights

“The common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of [ECL], either by accretion or erosion or by any other natural or artificial process . . . .”

- The BSPA goes on to provide statutory protection for most of the rights that characterize riparian ownership, including but not limited to:
  - rights of ingress, egress, view, boating, bathing, and fishing.
  - state shall not allow any structure to be erected upon - lands created, either naturally or artificially, seaward of any erosion control . . . , except such structures required for the prevention or erosion.
  - [no] use [shall] be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee;
  - municipalities, counties and special districts are authorized and directed to enforce this provision through the exercise of their respective police powers.
Background Legal Principles

- The mean high water line (MHWL)
  - Art. X, § 11, Fla. Const.: the boundary between upland private ownership and sovereignty lands along the state’s beaches is the mean high water line (MHWL).
  - Fla. Stat. § 117.27(15): “mean high water” is the average of the high tide heights over a 19-year period. “MHWL” means the intersection of the tidal plane of mean high water with the shore.
Background Legal Principles

- In Florida riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights:
  - (1) the right of access to the water, including the right to have the property's contact with the water remain intact;
  - (2) the right to use the water for navigational purposes;
  - (3) the right to an unobstructed view of the water; and
  - (4) the right to receive accretions and relictions to the property.

Background Legal Principles

- **Common law riparian rights**
  - ‘Accretion’ means the gradual and imperceptible accumulation of land along the shore or bank of a body of water,” while erosion involves the gradual and imperceptible removal of land.

- **Exceptions to accretions rule:**
  - if an owner causes the artificial accretions, the “accreted land remains with the sovereign.”
  - if the addition to the shore is not a “gradual and imperceptible accumulation of land along the shore,” the change is considered **avulsion**, rather than accretion, and does not change the property boundary.
Background Legal Principles

- The Fl. S.Ct. has defined avulsion as “the sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream.”

- Florida Supreme Court has never addressed whether beach restoration by the methods in the previous slides is accretion or avulsion or something else.
In the Florida Supreme Court –

The Certified Question

- As reframed by the Florida Supreme Court as a facial challenge to the BSPA:

On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?
Doctrine of Avulsion

- “[W]hen an avulsion event leads to the loss of land, the doctrine of avulsion recognizes the affected property owner’s right to reclaim the lost land within a reasonable time.”

- “[I]f the shoreline is lost due to an avulsive event, the public has the right to restore its shoreline up to that MHWL.”
Facially constitutional

- Avulsive event
- ECL set at the pre-avulsion MHWL
- State fills in lost in “shoreline”
- Basically returns situation to pre-avulsive status quo
- Does no more than allowed by the common law, therefore—facially constitutional!
Second part of case

- Whether the BSPA “takes” without compensation
  - the right to accretion and
  - The right to contact with the water.
The Nature of Common Law Rights of Littoral Owners

The Upland Owners and Florida’s Beaches

“[S]pecial or exclusive common law littoral rights:

- (1) the right to have access to the water;
- (2) the right to reasonably use the water;
- (3) the right to accretion and reliction; and
- (4) the right to the unobstructed view of the water.

These special littoral rights “are such as are necessary for the use and enjoyment” of the upland property, but “these rights may not be so exercised as to injure others in their lawful rights.”
Nature of Littoral Rights

- Though subject to regulation, these littoral rights are private property rights that cannot be taken from upland owners without just compensation.
- Littoral rights are not subordinate to public rights and cannot be eliminated without compensation.
- These special rights are *easements* incident to the [littoral] holdings and are property rights. The common-law [littoral] rights that arise by implication of law give no title to the land under navigable waters except such as may be lawfully acquired by accretion, reliction, and other similar rights.
Nature of Littoral Rights

- “rights to access and use are affirmative easements”

- “rights to access, use, and view are rights relating to the present use of the foreshore and water.”

- “[T]he littoral right to accretion and reliction is distinct from the rights to access, use, and view.

- *The right to accretion and reliction is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion or reliction.”*
“[T]he common law rule of accretion . . . is not implicated in the context of this Act.”

- Rationale for common law right to accretions
  1. De minimis non curat lex; (2) he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion; (3) it is in the interest of the community that all land have an owner and, for convenience, the riparian is the chosen one; (4) the necessity for preserving the riparian right of access to the water.
“[T]he common law rule of accretion . . . is not implicated in the context of this Act.”

- None of the policy reasons that apply to the common law accretions doctrine apply to the BSPA.
- No currently accreted property concerned
- No “property” implicated, so there can’t be a taking.
- Therefore, BSPA is not unconstitutional because it does not constitute a taking of the right to accretions.
Contact is Ancillary to the Littoral Right of Access

1. “[U]nder Florida common law, there is no independent right of contact with the water. Instead, contact is ancillary to the littoral right of access to the water.”

2. “The ancillary right to contact with the water exists to preserve the upland owner’s core littoral right of access to the water. . . [T]he Act expressly protects the right of access to the water, which is the sole justification for the subsidiary right of contact.”
Court’s Findings

1. The Beach and Shore Preservation Act effectuates the State’s constitutional duty to protect Florida’s beaches.
2. The Act facially achieves a reasonable balance between public and private interests in the shore.
   a. The Act benefits upland owners by restoring lost beach, by protecting their property from future storm damage and erosion, and by preserving their littoral rights to use and view.
   b. The Act also benefits upland owners by protecting their littoral right of access to the water, which is the sole justification for the ancillary right of contact.
Court’s Findings

3. Additionally, the Act authorizes actions to reclaim public beaches that are also authorized under the common law after an avulsive event.

4. The littoral right to accretion is not implicated by the Act because the reasons underlying this common law rule are not present in this context.

Holding: The Act, on its face, does not unconstitutionally deprive upland owners of littoral rights without just compensation. [Decision “is strictly limited to the context of restoring critically eroded beaches under the Beach and Shore Preservation Act.”]
Cert. granted by US Supreme Court

- Three questions presented, but most of focus is on the first question:

  [Whether the] Florida Supreme Court invoked ‘nonexistent rules of state substantive law’ to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a ‘judicial taking’ proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?
Taking of Property requires just compensation under Fifth Amendment

- Applicable to legislative & executive branches
- Does it apply to the courts?
  - *Chicago, Burlington & Quincy Railroad v. Chicago* (1897)
    - No deference to state courts to the extent that decision constitutes *a sudden change in state law, unpredictable in terms of the relevant precedents*
  - *Stevens v. City of Cannon Beach* (1994) (Scalia dissenting to denial of cert)
    - A State may not deny rights protected under the Federal Constitution . . . by invoking nonexistent rules of state substantive law
    - Courts shouldn’t be able to invoke “new found” and “fictional” background property principles to redefine property and avoid takings
Commentators

- Seminal article: Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990)
  - “[J]udicial changes in property law raise the same concerns as legislative and executive takings,” so courts should be subject to the same constitutional restrictions as other branches of government.

- Only a handful of articles on the issue, but until recently almost all argued against finding a concept of judicial taking.
Caselaw

- Only one modern era case in 1985 – and it was vacated by the Supreme Court on other grounds.
- 15 cases arguing for “judicial taking” denied cert.
- Justice Brandeis: “the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decision on which a party relied, does not give rise to a [takings] claim under the [Fifth and] Fourteenth Amendment . . . .” *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, (1930).
TAKING?

- Not as good a candidate for establishing principle as *Hughes* or *Cannon Beach*
- Did the Florida Supreme Court *startlingly* reinterpret riparian rights or simply recognize that the circumstances of beach restoration are *sui generis*?
- What reliance is impaired even if the case did change the law?
- Even if some riparian rights are no longer applicable in this context, is the upland property or even the bundle of riparian rights substantially impaired?
- Would the Supreme Court have to come up with a new way to assess a taking to find a taking?
Even if a judicial taking found- How does it affect beach restoration in FL?

In any action alleging a taking of all or part of a property or property right as a result of a beach restoration project . . . if a taking is judicially determined to have occurred as a result of a beach restoration project, the enhancement in value to the owner's remaining adjoining property by reason of the beach restoration project shall be offset against the value of the property or property right alleged to have been taken. If the enhancement in value shall exceed the value of the damage, if any, to the remaining adjoining property, there shall be no recovery over against the property owner for such excess.

2007 amendment to s.161.141
Effect on the Public Trust Doctrine

- Public trust doctrine is largely court-made law – how can it evolve?
- Other doctrines affecting access to beaches, like custom
- Chilling effect on state courts in responding to changes in society, gaps in the law …
- Will it make the federal courts the ultimate determiners of what constitutes property – an area traditionally within the scope of state law?
Presented by:

David C. Slade

State & Federal Cases:

1997-2008
The Evolving Public Trust Doctrine

September 24, 2009
The Public Trust Doctrine In Motion

A Study of the Evolution of the Doctrine
1997 - 2008

DEVELOPMENT OF THE BOOK

• The term “Public Trust Doctrine” was searched for in all state and federal court cases from 1997 through May, 2008.
  
  - 284 decisions containing the term – 34 federal and 250 state cases
  
  - 25 coastal and 15 inland states.

• Written for non-attorneys, although very valuable resource for attorneys
The doctrine is firmly embedded in state property, resource and environmental protection law in most states, but not all.
- Hawaii is the vanguard State: Waiahole I (Supreme Court of Hawaii, 2000)
- Wisconsin, California, New York, New Jersey, Rhode Island, Washington, Massachusetts aggressively invoking their Trust Power
- Maryland silent: Chesapeake Bay with vast dead zones

Trust Power broad power: used to ban jet skis, set speed limits for watercraft, limit the size of docks, ban the use of propelled water craft in shallow waters, assure public access to trust resources, require leasing of bottomlands for marinas, oystering and geoduck harvesting, set minimum flow standards, reserve groundwater for future use, and more.

Some states unlinking the doctrine from traditional “navigable” waters to those that are “recreational”

State budgets are dependent to a good degree on trust land leases, fees, etc.

The Public Trust Doctrine is by no means a panacea, but is a very valuable tool in the sovereign powers “tool box”.

MAJOR FINDINGS FROM THE STUDY
MAJOR FINDINGS FROM THE STUDY

• Numerous states attempting to bring ground waters within the scope of the Public Trust Doctrine (NH, MI, WA, CA) unsuccessfully
  - Hawaii and New Mexico have extended doctrine to ground waters

• Citizen “standing” often challenged in Public Trust Doctrine cases
  - Standing legislation needed, but even then not certain (MI)

• Fifth Amendment ‘takings’ cases are numerous, with the Public Trust Doctrine constituting the “background principles of State law” as a shield, per the *Lucas* decision.

• Waterfront property cases involving the Public Trust Doctrine are occurring all around the nation

• Western state ‘water rights’ cases: Public Trust Doctrine is central argument in ‘prior appropriation’ states (NV, AZ, MT, HI, CA)

• Claims of private interests in public trust resources; conveyances of trust lands

• Growing number of States recognizing the “Sovereign Trust Power”, while State legislatures often confused / unclear as to whether exercising the Trust Power or the Police Power.
“That generations of trustees have slept on public rights does not foreclose their successors from awakening.”

Supreme Court of Arizona
Arizona Center for Law in the Public Interest v. Hassell
1991
Schnittker v. Ohio
Court of Appeals of Ohio, 2001
Schnittker v. Ohio
Court of Appeals of Ohio, 2001

• 1984 - Robert Schnittker bought waterfront property on Kelleys Island, Lake Erie, which included a sizeable pier out into Lake.

• Pier was actually built in the early 1900s, long before Schnittker came along. No permit or lease was needed at the time the pier was built.

• 1917 – Ohio Legislature passed “Fleming Act” which required leases for docks or piers, but no previous owner ever applied.

• 1993 - Ohio Department of Natural Resources sought enforcement of the Fleming Act, requiring Schnittker to obtain a lease for the pier.

• Schnittker objected, and the case went to the top court of Ohio, which held that a lease was required:
“The state as trustee for the public cannot, by acquiescence, abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created. Whatever the littoral owner does is done with knowledge on his part that the title to the subsoil is held by the state, as trustee for the public, and nothing can be done which will destroy or weaken the rights of the beneficiary's trust estate. Mere non-use of the trust property by the public cannot authorize the appropriation of it by private persons to private uses and thus thwart the purpose of the trust.”
Lake Union Drydock Co. v. Department of Natural Resources
Court of Appeals of Washington, 2008

• Commercial marine repair and construction business on a 7.8 acre parcel on Lake Union, Washington.

• Leases 2.8 acres of bottomland from the Department of Natural Resources.

• Lease rate for submerged lands determined by a statutory formula based on assessed value of upland parcel.

• The twist? 7.8 acre upland parcel was highly contaminated, although the contamination had no adverse effect on the shipyard’s business. But due to the contamination, the county assessor determined that because the cost to clean up the contamination exceeded the land’s value, the upland parcel was assessed at a nominal value of $1,000.

• Under the statutory formula, the lease for the 2.8 acres of bottomland came to a mere $5.41.

• DNR maintained that in such a situation, it’s trust authority obligated it to locate a ‘comparable alternative parcel’ with the same zoning. DNR recalculated the annual lease rate at $29,512.92.

• Lake Union Drydock challenged DNR’s authority to vary from the statute – and lost. The case went to the top court of the State, which held:
“According to the public trust doctrine, the State holds state shorelines and waters in trust for the people of Washington, and ‘the state can no more convey or give away this *jus publicum* interest than it can abdicate its police powers in the administration of government and the preservation of the peace.’ To implement this public trust, the Legislature expressly delegated authority to the DNR to manage state-owned aquatic lands for ‘the benefit of the public ... using the revenues derived from leases ... to enhance ... public benefits associated with the aquatic lands of the state.’ If the DNR were to accept Lake Union Drydock's proposed annual rental rate of $1.93 per acre, a commercial business would then occupy state-owned land virtually rent-free, a result that clearly violates public policy and our state Constitution.”
Stewart v. Hoover
Supreme Court of Mississippi, 2002

- Follow up case of 1988 *Phillips Petroleum v. Mississippi*.

- 1989 MS legislature enacted “Public Trust Tidelands Act”
  - required Secretary of State to prepare a ‘Preliminary” and then “Final” map of “Public Trust Tidelands” which were publicly posted.

- Lawrence Stewart was next door neighbor of Jim and Sandy Hoover on Heron Bayou.
  - The marshland between his upland and the open water of the Bayou was never included in any map.
  - He never received statutory required notice from the Secretary of State that his marshland was included within the public trust lands.
  - More than three years had passed, making boundaries final, in accordance with the Tidelands Act.

- 1992, Hoovers applied for, and received, a permit to build a 110’ pier right across Stewart’s marshland. They built the pier.
  - Stewart sued, introducing the Certified Map, lack of notice, running of 3 years.

- Case went to State’s top court, which ruled against Stewart on PTD grounds.
“We are of the opinion that the Legislature's goal of establishing certain and stable land titles does not contemplate a loss of public trust lands because of an oversight in the mapping process. . . . Title to tidelands cannot be lost through adverse possession, limitations or by laches. Whatever the reason for not including the subject property on the preliminary map or final certified map, the delay of the State in asserting its ownership interest should not be preclusive because such interest was not expressed in the maps.”

- Even when party is right statutorily, MS Court was reluctant to allow lands clearly subject to the ebb and flow of the tide to be lost from the trust due to mapping inaccuracies.
Sandusky Marina Limited Partnership v. State of Ohio
(Court of Appeals of Ohio, 1998)
Sandusky Marina Limited Partnership v. State of Ohio  
(Court of Appeals of Ohio, 1998)

- In 1989 Sandusky Marina contracted with ODNR for a 50-year lease for submerged land in Lake Erie for a marina;  
  - annual rent of $2,500 for the first five years;  
  - After 5 years, rent could be adjusted for “any variations in property values.”

- In 1992 ODNR adopted new rental rates based on a fee per square foot.

- When first 5-year period expired, the ODNR informed Sandusky Marina that, based on the new regulations, the annual rent would increase from $2,500 to $33,654 for the next five year term of the lease.

- Sandusky Marina’s lawyers invoked the ancient legal principle: “Goeth Jumpeth in the Laketh”

- Trial court ruled in favor of the marina. ODNR appealed, arguing “the public trust doctrine permits the director [of ODNR] to override the contract.”

- Ohio’s top court invoked the ancient legal principle advanced by Sandusky Marina.
“While the doctrine charges the state with the responsibility and authority to maintain offshore submerged lands for the benefit of the public, the doctrine does not give the state the unbridled power to do anything it pleases. Contracts of the state are subject to the same obligations as those of a private individual. The state may not exercise its [trust] power to the extent that it acts to unilaterally abrogate contracts into which it entered.”
OBLIGATIONS IMPOSED ON TRUSTEES
BY THE PUBLIC TRUST DOCTRINE

Are the authorities and duties of a ‘trustee’ of public trust resources (state legislature, governor, attorney general, or a state agency) analogous to those of a trustee of a private or charitable trust?

- Very little direct discussion by the courts on this question.
- Citizen suits often brought to enforce a ‘duty’ of the Trustee
- Preserving trust resources in their natural state may be best use, whereas preserving private trust resources (money) in its natural state may be the lowest use, open to challenge by beneficiary.
Baxley v. Alaska
Supreme Court of Alaska, 1998

- Case concerned state legislature awarding sole rights in certain oil fields to one private company.

“The public trust doctrine provides that the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use, ‘and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary.’ We apply basic principles of trust law to public land trusts. One basic principle is that, when a trustee has discretion, a court will only review the trustee's acts for abuse of discretion.”
Brooks v. Wright
Supreme Court of Alaska, 1999

• “. . . application of private trust principles may be counterproductive to the goals of the trust relationship in the context of natural resources.”

• “. . . although trust law dictates that the acts of a trustee should be reviewed for abuse of discretion, we have held that grants of exclusive rights to harvest natural resources listed in the common use clause are subject to close scrutiny.”

• “. . . general principles of trust law do provide some guidance, they do not supercede the plain language of statutory and constitutional provisions when determining the scope of the state's fiduciary duty or authority.”
Secure Heritage v. City of Cape May
Superior Court of New Jersey, 2003

• Case involved charging ‘beach fees’ for the use of the beaches of Cape May, New Jersey

• Citizen group argued that the beach fees were for the use of public trust resources (the beach) and thus a separate trust fund strictly for beach fees must be established.

• Court held that a city has ‘a duty to take special care to account for all costs and revenue related to the beach operation.’ Separate trust account not required. Rather, the focus must be on the internal accounting measures of the general budget.
Kelly vs. 1250 Oceanside Partners  
Supreme Court of Hawaii, 2006

- In the mid-1990s, Oceanside Partners received permit to construct 1,540 acre development on the island of Hawaii. The surrounding ocean waters were “pristine” — the “wilderness character of these areas shall be protected.”

- Strict development restrictions were placed on the permit by the County and State.

- September, 2000, heavy rainstorms hit Kona. Severe runoff resulted because Oceanside did not implement all of the runoff management measures specified in its permit. Surrounding waters severely degraded.

- Citizen group sued State and County, arguing that under the PTD, they had an ‘affirmative duty’ to enforce the runoff restrictions in Oceanside’s permit.

- County and state officials defended by arguing they had “absolute discretion.

- Supreme Court of Hawaii held that under the Public Trust Doctrine, the county and the State both had an ‘affirmative duty to protect the waters’ of Hawaii.
“... we are not convinced by DOH's argument that its duties under the public trust doctrine are undertaken in its ‘absolute’ discretion. ... ‘The duties imposed upon the state are the duties of a trustee and not simply the duties of a good business manager.’ As guardian of the water quality in this state, DOH then ‘must not relegate itself to the role of a ‘mere umpire’ ... but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.’ Such a duty requires DOH to not only issue permits after prescribed measures appear to be in compliance with state regulation, but also to ensure that the prescribed measures are actually being implemented after a thorough assessment of the possible adverse impacts the development would have on the State's natural resources.”
The Public Trust Doctrine In Motion

Thanks!