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from the words of the state's high court: "[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand on contact to meet the new and different conditions

...¹²⁸

JAMES C. FULLER, JR.

Defining Navigable Waters and the Application of the Public-Trust Doctrine in North Carolina: A History and Analysis

AN INTRODUCTION TO THE IMPORTANCE AND PROBLEMS OF NORTH CAROLINA'S COASTAL LANDS AND WATERS

On March 12, 1969, a remarkable color photograph was taken by Astronaut Rusty Schweikart aboard the spacecraft Apollo 9. The photograph shows a large portion of the North Carolina coastline on a cloudless day from an altitude of one hundred twenty miles. Pictured in this photograph are all of the Outer Banks, including the treacherous shallows extending out from Cape Hatteras and the shoals of Cape Lookout. The varying blue and green hues of the water in the picture give some indication of its depth. Beyond the shallow, light aqua waters extending several miles from the Outer Banks is the deep blue of the Gulf Stream. Inside the Outer Banks the pale green waters of Currituck, Albemarle, Croatan, Pamlico, Core, and Bogu Sounds make it apparent that North Carolina's great inland seas are quite shallow.¹ If one looks closely, patches of green can be seen in many places on the lee side of the Outer Banks and all along the coastline of the mainland, especially at rivermouths. These are the rich coastal marshlands which play such a vital role in the coastal ecology.

In many respects the land and waters shown in Astronaut Schweikert's photograph comprise the most valuable area on the east coast of the United States. It is only very recently that laymen have been made aware of the immense value and unique qualities of this estuarine system, composed of marshlands, sounds, rivermouths, bays, and lagoons. In took the death of Lake Erie and the smell of dead fish and sewage in many of our nation's rivers and lakes to awaken the public

¹²⁸City of Elizabeth City v. Aydette, 201 N.C. 602, 606, 161 S.E. 78, 80 (1931).

¹Currituck Sound has a maximum depth of only seven feet, while Pamlico Sound reaches a depth of only twenty feet. 3 FISH AND WILDLIFE SERVICE, U.S. DEPT OF THE INTERIOR, NATIONAL ESTUARY STUDY 113 (1970) [hereinafter cited as ESTUARY STUDY].

to the sickening revelation that we have polluted many of our waters beyond use.

At the same time our water was becoming polluted, strange "nibbling phenomena"² were occurring in our nation's coastal areas. Shoal waters and marshlands were generally regarded as wastelands³ with no taxable value. Cities filled them with garbage and rusty car bodies. Developers found that through dredge-and-fill operations, inexpensive home, recreational, and industrial sites could be created. Engineers found no difficulty in putting roads through such areas. In the interest of mosquito control, thousands of acres of prime estuarine habitat were drained with little thought being given to the end result.

The statistics showing the amount of estuarine land destroyed are grim indeed. From 1940 to 1966 California lost sixty-seven per cent of its remaining estuary acreage.⁴ From 1954 to 1968 New York lost 28.6 per cent of its remaining estuarine acreage, Connecticut 21.7 per cent, New Jersey 10.5 per cent, and North Carolina 7.1 per cent.⁵ Another estimate places North Carolina's loss at more than twenty-five per cent in the last fifteen years.⁶

The above statistics are even more appalling when one realizes that many states, especially those on the East Coast, had comparatively little estuarine habitat initially. At present North Carolina has 2,206,000 acres of estuarine land, and Virginia with its gigantic Chesapeake Bay has 1,670,000 acres.⁷ This is in sharp contrast to Maine's 39,400 acres. Georgia's 170,800, New York's 376,600, and the east coast of Florida with only 525,000 acres.⁸ North Carolina has by far the largest estuarine complex on the East Coast and nationally is behind only Alaska and Louisiana.⁹

This vast array of land and water combines to provide one of the largest relatively unspoiled natural areas on the eastern coast of the

²Nelson, *State Disposition of Submerged Lands Versus Public Rights in Navigable Waters*, 3 NATURAL RESOURCES LAW. 492 (1970).

³ESTUARY STUDY 133.

⁴113 CONG. REC. 16706 (1967) (speech by Representative Theodore Kupferman).

⁵G. SPINNER, A PLAN FOR THE MARINE RESOURCES OF THE ATLANTIC COASTAL ZONE 4 (1969) [hereinafter cited as SPINNER]. Statistics for all other East Coast states are listed.

⁶WILDLIFE IN NORTH CAROLINA, Nov., 1968, at 4-10.

⁷SPINNER 5.

⁸*Id.*

⁹Rice, *Estuarine Land of North Carolina: Legal Aspect of Ownership, Use and Control*, 46 N.C.L. REV. 779 (1968) [hereinafter cited as Rice].

United States.¹⁰ The fact that North Carolina's estuarine zone is ranked first in overall importance¹¹ is dramatically illustrated by biological and economic data.

This massive ecosystem provides food, cover, nesting, and spawning areas for countless finfish, shellfish, waterfowl, and fur and game animals. It has been estimated that ninety per cent of the total fertility in coastal waters is in the marshlands.¹² It is in the marshes that the food chain begins. The tiny wiggling microscopic animals of the marsh are swept by lunar and wind tides¹³ into the bays and sounds where they are then eaten by larger creatures, which in turn are the food for shellfish, shrimp, and bait fish, ad infinitum. In terms of economic productivity, good marshland has an annual economic yield of one thousand dollars per acre.¹⁴

The National Estuary Study of 1970, issued by the United States Department of the Interior, states that ninety per cent of North Carolina's commercial finfish and shellfish are dependent on the estuaries.¹⁵ In 1961 and 1962, commercial fishermen caught an average of 3.6 million dollars worth per year of inshore fish (including crabs and oysters) and another 2.5 million dollars worth of offshore fish.¹⁶ In 1960 saltwater sports fishermen visiting the North Carolina coast spent over nine million dollars.¹⁷ It is probably safe to say that the total of the amount spent by sports fishermen and the value of the commercial catch is much greater today than in the early sixties.

The biological and economic importance of North Carolina's estuarine habitat is felt up and down the entire East Coast. While the estuarine complexes of other states have been destroyed, North Carolina's has continued to provide the nursery area for flounder, croaker, and spotted seatrout.¹⁸ These fish and others are caught by

¹⁰ESTUARY STUDY 118.

¹¹SPINNER 6.

¹²WILDLIFE, *supra* note 6, at 6.

¹³Sounds such as Currituck and Albemarle are virtually landlocked; therefore, there is almost no lunar ebb and flow in them. Waters moved by the winds in these sounds serve essentially the same purpose as the lunar tides.

¹⁴113 CONG. REC., *supra* note 4, at 16706-07. To put it another way, Dr. Eugene Odum, Director of Georgia's Institute of Ecology, stated recently that good salt marsh is "four times more productive than the most intensively cultivated corn." NATIONAL GEOGRAPHIC, March, 1971, at 375.

¹⁵ESTUARY STUDY 116.

¹⁶*Id.* at 124-25.

¹⁷*Id.* at 123.

¹⁸*Id.*

sport and commercial fishermen as far north as Massachusetts.¹⁹ It is necessary for the whole East Coast that the coastal waters of North Carolina be spared the commercial ravage which has destroyed similar lands in other states.

The marshlands of our estuarine system are also of immense importance because of the twofold protection they provide for our beaches. First, they filter out the mud and sediment carried by rivers which can foul our beaches and surrounding water and fill in navigation channels. Second, the marshes serve as a buffer zone in absorbing the high tides and storms which are not uncommon on North Carolina's coast.²⁰ Without our coastal marshes the Outer Banks and many of our beaches would erode away.

In addition to the biological, economic, and conservational factors already mentioned, there are many less pragmatic reasons why these areas must be preserved. The North Carolina coastline possesses great natural beauty and recreational assets which this state and nation can ill afford to lose. Fortunately, the state has taken seriously its responsibility to preserve much of its estuarine habitat. Preservation in the past was not motivated by conservationists and environmental zealots, but rather by the state's desire to preserve the use of navigable waters and the bounty under them for all of its citizens. Generally speaking, it can be said that the state holds the lands under the navigable waters of its sounds, rivers, bays, and inlets in trust for everyone. Stated simply, this doctrine of public trust says that every member of society possesses such intrinsically important rights, privileges, and interests in these waters that it is the duty of the state to protect them. Yet even after its evolution through Roman law, English common law, the laws of the United States, and state law, the scope, limits, and powers of the public-trust doctrine remain largely undefined.

Aside from determining the limits of the public-trust doctrine, one of the biggest problems facing this state is the quest for that almost invisible boundary between navigable and non-navigable waters or, better yet, between trust and non-trust lands. Although the public-trust doctrine—a vestige of North Carolina's common law birthright—has been an obstacle to the alienation of submerged lands by the state, such estuarine land has found its way into private hands in the form of either a fee title or a special interest in these lands.²¹

¹⁹*Id.*

²⁰NATIONAL GEOGRAPHIC, *supra* note 14, at 377.

²¹See text accompanying notes 108-52 *infra*.

It is implicit in the preceding discussion that private ownership of estuarine land is basically incompatible with the preservation of estuarine habitat. This opinion is based on the premise that

[e]ach individual user wants to engage in whatever use he desires when and where he desires But such a situation may in the long run be self-defeating for the individual concerned and most certainly will be self defeating for the community.²²

This is not to say that the state and federal governments have been perfect in providing protection for the lands in their control, but when one looks at the havoc wrought by the dragline in massive dred-and-fill and ditching operations, it becomes apparent that traditional land-use policies involving private ownership should not be applicable to these unique and interdependent lands. The problem of planning for the future protection and use of these lands—whether through zoning, the establishment of parks, or condemnation proceedings—cannot be solved until conclusive boundaries are established and ownership disputes are settled.

The purpose of this comment is to examine the history of the public-trust doctrine and the doctrine of navigable waters in North Carolina in an attempt to establish some criteria for workable boundaries in land-title problems with respect to estuarine lands. Also considered is the potential validity of various types of private interests in submerged lands and the possible application of the public-trust doctrine to submerged lands which are found to be owned privately.

COMMON LAW ORIGINS AND APPLICATION OF THE PUBLIC-TRUST DOCTRINE BY THE UNITED STATES SUPREME COURT

The public-trust doctrine has deep roots in the English common law. In order to understand this doctrine as applied in North Carolina, it is necessary to know its history in England.²³ Before the Magna Carta the King of England held title to all tidelands and territorial seas as the personal property of the Crown. Even though it was personal property, or *jus privatum*, it is unlikely that it was treated as such to the exclusion of the populace. Around the time of the Magna Carta,

²²W. Griffin, *Legal Bases of State Coastal Zone Regulation* 1, Dec. 10, 1969 (unpublished paper from Institute of Ocean Law, University of Miami) [hereinafter cited as Griffin].

²³For a more historical discussion see *State v. Glen*, 52 N.C. 321, 324-26 (1859); Rice 781-86.

lands under coastal waters could be separated into two distinct categories, *jus privatum* and *jus publicum*.²⁴ Those classified as *jus privatum* lay under the inland rivers and lakes, *whether navigable or not*, where the waters were not affected by the ebb and flow of the tide. Such lands were freely alienable by the Crown, and the persons holding title to lands surrounding these waters owned the soil underneath and all fishing and other rights thereon.²⁵ There was, however, a common presumption that private waters of sufficient depth for valuable "flotage" were public highways, with an easement for navigation vested in the public.²⁶

Lands categorized as *jus publicum* included all tidelands and lands under territorial seas to the high-tide line.²⁷ These were the public-trust lands which the Crown held for navigation and other uses by all English subjects. There was not, however, an absolute prohibition against the granting of such trust lands. "[I]t has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage"²⁸ As trustee, the sovereign could convey these lands only *on behalf* of the people who were the beneficiaries of the public trust and not on his own behalf as he could with *jus privatum* lands.

It should be emphasized that the common law ebb-and-flow rule was used *only* to determine the capacity in which lands were held by the Crown.²⁹ Ebb and flow did not mean *prima facie* that waters were navigable. Thus ebb and flow, and not flotability, was the test used to determine title to submerged land.

When England began establishing colonies in the New World, the common law and its ebb-and-flow doctrine also came to America. Just as the King was limited under the public-trust doctrine, the early colonial Proprietors were also restricted in their ability to alienate trust lands. In 1702 the Proprietors formally surrendered to the Crown all their rights and powers of government but retained the rights to private

²⁴Rice 782.

²⁵State v. Glen, 52 N.C. 321, 324-25 (1859).

²⁶*Id.* at 325.

²⁷Snively v. Bowlby, 152 U.S. 1, 13 (1894). For a discussion of the various meanings of "high tide" see Porro, *Invisible Boundary—Private and Sovereign Marshland Interest*, 3 NATURAL RESOURCES LAW. 512, 516 (1970).

²⁸152 U.S. at 13.

²⁹See 152 U.S. at 11; Rice 784.

property under their original grants. In 1842 the Supreme Court held in *Martin v. Waddell*³⁰ that this relinquishment had resulted also in the relinquishment of title to lands under tidal waters.³¹ The Court added that with independence and statehood all title passed to the states as an incident of sovereignty and thus held void all titles to lands under navigable waters based on proprietary grants. Later Supreme Court decisions have confirmed the holding in *Martin* that title to land under navigable waters lies in the individual state.³²

Before the various federal territories became states, lands under their navigable waters to the high-tide line were held in trust for them by the federal government.³³ However, Congress did have the power to grant submerged lands in these territories before statehood.³⁴ Under federal court decisions there was no general prohibition against the distribution of trust properties, even on a very large scale.³⁵ Many states, with Supreme Court approval, have sold large portions of public trust lands.³⁶ Some states seem to have had relatively weak legislative or judicial policies prohibiting the alienation and use of trust lands.³⁷

With the problems of development and settlement in a growing young nation occupying the time and energy of government, and with vast expanses of yet unexplored land and water, it is not surprising that it was not until the late nineteenth century that the Supreme Court established some standards by which a state's actions as trustee for the people could be judged. The initial attempt came in *Illinois Central Railroad Co. v. Illinois*,³⁸ which one writer has called the "lodestar" of American public-trust law.³⁹

In 1869 the Illinois Legislature had granted to the Illinois Central Railroad virtually all of the commercial waterfront and the submerged lands of Lake Michigan adjacent to the city of Chicago. After realizing the ramifications of their earlier decision, the members of the 1873

³⁰41 U.S. (16 Pet.) 367 (1842).

³¹*Id.* at 410.

³²See, e.g., *James v. Dravco Contracting Co.*, 302 U.S. 134, 140 (1937).

³³*Pollard's Lessee v. Hagen*, 44 U.S. (3 How.) 212 (1845).

³⁴*Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471 (1850).

³⁵Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 486 (1970) [hereinafter cited as Sax].

³⁶*Appleby v. City of New York*, 271 U.S. 364 (1926). This case dealt with many acres of submerged lands under the Hudson River. See also Sax 486.

³⁷See generally Nelson, *supra* note 2, at 499-501.

³⁸146 U.S. 387 (1892).

³⁹Sax 489.

Illinois Legislature sought to invalidate the 1869 grant. In holding that this express grant of land in 1869 was *beyond the power* of the Illinois Legislature, Justice Field said:

[T]he state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, *in the same manner that the State holds title to soils under tide water, by the common law*, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold [sic] in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of submerged lands; and so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining⁴⁰

The message the Court seemed to be conveying was that a state government cannot abdicate its authority as trustee unless the grant will benefit the public or will not significantly impair public rights. This decision left the door open for future courts, both state and federal, to decide what is meant by the term "substantially impair the public interest in the lands and waters remaining."⁴¹ Unfortunately, a loose interpretation of this substantial-impairment concept has allowed many large areas to be taken out of the public trust in many states. Earlier Supreme Court decisions had created a great deal of confusion which found its way into state cases concerning title to submerged land. In 1851 the Court in *The Propeller Genesee Chief v. Fitzhugh*⁴² held that the rule of English courts of admiralty which confined jurisdiction to

⁴⁰146 U.S. at 452 (emphasis added).

⁴¹*Id.*

⁴²53 U.S. (12 How.) 443 (1851).

the lands where the tide flowed was not applicable in the United States with its Great Lakes and large rivers. In 1870 Justice Field in *The Danial Ball* relied on *Genesee Chief* when he stated:

The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters.⁴³

With these decisions many state courts⁴⁴ began using the admiralty test or navigability (*i.e.*, the flotability by ships) instead of the ebb-and-flow test to determine which lands were to be considered trust property, the *jus publicum*. This led to a variety of tests and to the promulgation of confusing definitions of navigable waters in an effort to determine whether activities such as hunting and bathing could be considered incidents of navigation and thus protected by the public-trust doctrine.⁴⁵

It is hoped that by understanding the trust doctrine as it applied to English waters and how it was blended into the law of this nation, it might become easier to understand the problems with which North Carolina courts have had to deal. Finally, it must be emphasized that under the federal decisions discussed in the preceding pages, and those to be discussed subsequently,⁴⁶ the question of what constitutes "public interest in navigable waters" under the public-trust doctrine is still unanswered in the eyes of the Supreme Court.

THE HISTORICAL APPLICATION OF THE PUBLIC-TRUST DOCTRINE IN NORTH CAROLINA AND ITS RELATION TO A CHANGING DOCTRINE OF NAVIGABILITY

The total ecosystem on North Carolina's coast includes not only navigable open water, shoal waters, and salt marshes of the estuaries, but also lands known as "pocosin," "swamp," "savanna," and other lands too wet for cultivation except by drainage.⁴⁷ These latter lands,

⁴³77 U.S. (10 Wall.) 557, 563 (1870).

⁴⁴The effect of these decisions on state courts is discussed in Clineburg & Krahmer, *The Law Pertaining to Estuarine Lands in South Carolina*, 23 S.C.L. REV. 7, 16-20 (1971).

⁴⁵See Griffin 7. This confusion is illustrated by the attempts of the North Carolina Supreme Court to define what constitutes land under navigable water. See text accompanying notes 66-100 *infra*.

⁴⁶See *Swan Island Club, Inc. v. Yarbrough*, 209 F.2d 698 (4th Cir. 1954), and *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), discussed at notes 99-152 *infra*.

⁴⁷These common names for swamplands are listed in N.C. GEN. STAT. § 146-64(8)(a) (1964).

the fringe lands of our estuaries, are an integral part of coastal ecology and must be considered as such in any comprehensive plan for estuarine protection. However, these areas do not fall under traditional concepts of submerged lands and require separate treatment which is not possible within the scope of this comment. Much of this coastal terrain comes within the definition of "state lands" found in section 146-64(6) of the North Carolina General Statutes:

"State lands" means all land and interests therein, title to which is vested in the State of North Carolina, or in any State agency, or in the State to the use of any agency, and specifically includes all vacant and unappropriated lands, swamp lands, submerged lands, lands acquired by the State by virtue of being sold for taxes, escheated lands, and acquired lands.⁴⁸

The public-trust doctrine has its most direct application to the submerged lands mentioned in section 146-64(6). "Submerged lands" are defined later in the same chapter as state lands which lie beneath "[a]ny navigable waters within the boundaries of this state [or beneath the] Atlantic Ocean to a distance of three geographical miles seaward from the coastline of this state."⁴⁹ However, this definition of submerged lands is of little use in distinguishing between navigable and non-navigable waters and therefore between trust and non-trust lands. The General Assembly has said that "'[n]avigable waters' means all waters which are navigable in fact."⁵⁰ This definition is functionally useless, however, in land-title determinations because it makes no reference to the kind of craft, the season, the level of the tide, and other important factors which determine flotability in a particular area.

As one studies the statutory and judicial history of navigable waters in North Carolina, it soon becomes apparent that two competing policies have existed almost since statehood. One has been the sale and distribution of state-owned lands with little regard as to topographical character, and the other has been the prohibition of the sale of fee title to state lands under navigable water.

When the transformation from colonial status to statehood was made, vast areas of North Carolina were still unsettled. The 1777

⁴⁸N.C. GEN. STAT. § 146-64(6) (1964).

⁴⁹*Id.* § 146-64(7).

⁵⁰*Id.* § 146-64(4).

General Assembly set forth a system of entry and grant which remained basically unchanged until recently.⁵¹

[I]t is expedient that the Lands within this State should be parcelled out to industrious People, for the Settlement thereof, and increasing the Strength and Number of the People of the Country, by affording an easy and comfortable Subsistence for Families⁵²

At first the office of the Secretary of State was charged with the granting of lands. Neither the statute nor the Secretary's office, however, distinguished between estuarine and other types of land.

In 1825 marsh and swamplands were set aside from other state-owned lands and put under the control of the Literary Board, which was to use proceeds from the sale of such lands for the common schools.⁵³ After the Civil War the control and distribution of these lands were vested in the newly created State Board of Education for the maintenance of a public school system.⁵⁴ Once again, however, there were no clear guidelines restricting the alienation of submerged lands. Consequently, many thousands of acres of prime estuarine marsh were conveyed under the entry-and-grant policy of the state. Moreover, some of the lands claimed under state grants would be classified as lands under navigable water no matter what test of navigability is used.⁵⁵

While the state was busy distributing its land, the concept of the public-trust doctrine was also becoming recognized; that is, no lands under navigable waters could be granted in fee. The entry-and-grant provisions of the Laws of 1777 required in surveys of land on navigable waters that "the Water shall form one Side of the Survey."⁵⁶ In *Tatum v. Sawyer*,⁵⁷ a case dealing with the entry and grant of lands in the Currituck Sound area, the North Carolina Supreme Court introduced the concept of public trust into case law in its interpretation of the above statutory language.

⁵¹The old land policies of the state, including entry and grant, were changed significantly in the 1959 State Land Acts. See N.C. GEN. STAT. §§ 146-37 to -63 (1964).

⁵²Ch. 1, [1777] N.C. Sess. L. 43. This quote is taken from the introduction to chapter one.

⁵³Ch. 1, § 1, [1825] N.C. Sess. L. 3.

⁵⁴N.C. CONST. art. IX, § 4 (1868).

⁵⁵Interview with Dr. Thomas Linton, Director of North Carolina Division of Commercial and Sports Fisheries, concerning N.C. GEN. STAT. § 113-20 (1966), Nov., 1970 [hereinafter referred to as Linton Interview].

⁵⁶Ch. 1, § IX, [1777] N.C. Sess. L. 46.

⁵⁷9 N.C. 226 (1822).

Lands covered by navigable waters are not subject to entry, under the entry law of 1777, not by any express prohibition in that act, but being necessary for [public] purposes as common highways for the convenience of all, they are fairly presumed not to have been within the intention of the Legislature.⁵⁸

This basic holding, that lands under navigable waters are generally deemed *publici juris*, has been reaffirmed in numerous decisions over the years⁵⁹ and has also become part of the statutory law of this state.⁶⁰

Like many other states, North Carolina has chosen the mean high-tide line as the boundary beyond which no lands can be granted. This means that lands between the mean high-tide and mean low-tide lines (known as foreshore) are generally not subject to private ownership. The North Carolina Supreme Court's recognition of the "high-tide" boundary for entry-and-grant purposes goes back as far as 1817 in *McKenzie's Executors v. Hulet*.⁶¹ In 1970 the court affirmed the long line of decisions beginning with *McKenzie* in holding that North Carolina is and always has been a high-tide state,⁶² thus assuring that the foreshore will remain part of the public trust.

These two competing policies—the wholesale granting of coastal wetlands on the one hand and the prohibition of entry and grant of lands below the mean high-tide line on the other—have created an unresolved dilemma. In an attempt to establish which submerged lands are state-owned and which are subject to claims of private entitles, the General Assembly enacted North Carolina General Statutes section 113-205. This statute required those persons claiming title to lands under navigable waters and those persons claiming an interest in navigable waters which was greater than that of the general public to register their grant, charter, or authorization by January 1, 1970. After that date claims not registered were to be declared null and void.⁶³ Although the statute is not entirely clear, it would appear that the filing of a claim

⁵⁸*Id.* at 229.

⁵⁹*E.g.*, *Resort Development Co. v. Parmele*, 235 N.C. 689, 71 S.E.2d 474 (1952); *Bell v. Smith*, 171 N.C. 116, 87 S.E. 987 (1916); *State v. Twiford*, 136 N.C. 603, 48 S.E. 586 (1904); *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 46 S.E. 748 (1903); *State v. Baum*, 128 N.C. 600, 38 S.E. 900 (1901); *Bond v. Wood*, 107 N.C. 139, 12 S.E. 281 (1890); *State v. Narrows Island Club*, 100 N.C. 477, 5 S.E. 411 (1888).

⁶⁰*See* N.C. GEN. STAT. § 146-3(1) (1964).

⁶¹4 N.C. 613 (1817). *See also, e.g.*, *Ward v. Willis*, 51 N.C. 183 (1858).

⁶²*Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 177 S.E.2d 513 (1970).

⁶³N.C. GEN. STAT. § 113-205 (1966).

is only the mere assertion of a right in specified lands and does not assure recognition of such rights by the state. This act and the thousands of claims registered under it have confirmed the confusion which has existed and which still exists in North Carolina with regard to the question of which waters are navigable. Claims have been filed for every conceivable type of coastal terrain such as swamps, farm ponds, drainage ditches, salt marshes, oyster beds, shoal water, and unquestionably navigable water.⁶⁴ It is apparent that a realistic, workable definition of navigable waters for *title-determination purposes* is needed before precise boundaries between navigable and non-navigable waters can be established.

The North Carolina Supreme Court has addressed the problem of defining navigable waters numerous times over the last hundred and fifty years, and at first glance the decisions appear contradictory and confusing. However, certain threads of continuity appear from the tests that have been set forth which could provide the basis for a sound court-made definition in land-title cases. Such a definition would be of benefit in sorting out the deluge of submerged-land claims under section 113-205. The problem of planning for the future protection and use of these lands—whether through zoning, condemnation, or title litigation—cannot be readily accomplished until conclusive boundaries and ownership are established.

The first rule adopted by the North Carolina courts in submerged-land title cases was the common law ebb-and-flow test. One of the earliest applications of this rule was in *Tatum v. Sawyer*,⁶⁵ in which the plaintiff and defendant both claimed the same land under the entry-and-grant laws. When the defendant's land was granted in 1807, "it was a sandy beach, always covered at flood tide and dry at ebb."⁶⁶ At the time the plaintiff's grant was made in 1819, the beach had been changed into land and marsh by wind and erosion. The court held that the lands in question were not subject to entry and grant when the defendant's grant was received, "[b]ut when the cause of that exemption [the ebb and flow over the land] ceased to operate, the exemption itself ceased; and they, like the other vacant lands of the State, became the

⁶⁴Linton Interview.

⁶⁵9 N.C. 226 (1822). Note that at the time of this decision there was an ocean inlet to Currituck Sound where the locus in quo was situated which created the ebb and flow. It was closed a few years later by storm and tidal action.

⁶⁶*Id.* at 227.

subject of entry.”⁶⁷ This decision, although not expressly mentioning the ebb-and-flow test for determining whether the lands in question were *publici juris*, seems to indicate that this test was used.

At first the North Carolina Supreme Court seemed to have difficulty in understanding the application of the common law ebb-and-flow test. As has already been mentioned, in England ebb and flow was used *only* to determine the capacity in which the Crown held certain lands. Some North Carolina decisions show an attempt on the part of the court to make ebb and flow a test of “flotability.” For example, in *Wilson v. Forbes*⁶⁸ the court said that

[i]t is clear that by the rule adopted in England, navigable waters are distinguished from others by the ebbing and flowing of tides. But this rule is entirely inapplicable to our situation, arising both from the great lengths of our rivers, extending far into the interior, and the sandbars and other obstructions at their mouths. *By that rule Albemarle and Pamlico Sounds, which are inland seas, would not be deemed navigable waters, and would be the subject of private property.*⁶⁹

In this case the judge was correct when he said that under the English ebb-and-flow rule, Pamlico and Albemarle Sounds would be subject to private ownership, but what he failed to realize was that the English, too, would have regarded these sounds as *navigable by boats* under common law.⁷⁰ This case is very significant, however, in that it marked the first clear extension of the public-trust doctrine to include lands under non-tidal waters as well as those included under the ebb-and-flow rule. Thus, as of 1828 the state broadened its base of ownership of submerged land by extending the common law concept of trust lands to include lands under waters not subject to ebb and flow but navigable by boats.

In 1842 the court in *Collins v. Benbury*,⁷¹ which like *Wilson* dealt with a land-title dispute in non-tidal waters, also held that the issue of whether waters are navigable by ships does not depend on the common law ebb-and-flow doctrine. Thus, “any waters, which are sufficient in fact to afford a common passage for all people in sea vessels, are to

⁶⁷*Id.* at 229.

⁶⁸13 N.C. 30 (1828).

⁶⁹*Id.* at 34-35 (emphasis added).

⁷⁰See notes 23-29 and accompanying text *supra*.

⁷¹25 N.C. 277 (1842).

be taken as navigable"⁷² Again, it would appear that the test for defining public-trust land was extended to include navigability by ships in non-tidal countries.

A few changes were made in the entry-and-grant laws in the first half of the nineteenth century. In 1825 the power to make grants based on entry was passed from the office of the Secretary of State to the North Carolina Literary Board.⁷³ The most significant change, however, occurred in 1937.⁷⁴ The result was that from 1837 until 1847 the requirement for surveying lands adjacent to navigable waters that "water shall form one side of the survey"⁷⁵ was omitted.

The first case to deal with submerged lands granted during this period was *Hatfield v. Grimsted*.⁷⁶ This case has caused as much confusion as any in the field. Although *Hatfield* also concerned non-tidal waters, the court seemed to ignore *Wilson* and *Collins* completely. In fact, they were not even mentioned in the *Hatfield* opinion. The court held that the 1837 omission regarding survey methods meant that there was no longer an explicit prohibition of entry and grant of lands under navigable waters and that the common law ebb-and-flow test would be applied. The court found that the disputed lands lying under non-tidal water were subject to entry and grant. In its ruling the court interpreted the common law ebb-and-flow test correctly, but it completely overlooked its apparent extension in *Collins* and *Wilson*.

Two years later in *Fagan v. Armistead*⁷⁷ the Supreme Court again recognized the two-part test of *Wilson* and *Collins* for submerged-land title cases and made no reference to *Hatfield*. It is arguable that under the holding in *Tatum v. Sawyer* the public-trust doctrine exists apart from any statutory prohibition and that the change in the law was irrelevant as to whether submerged lands were subject to entry and grant. The *Tatum* court had said that entry was prohibited under the 1777 statute—"not by any express prohibition in that act, but being necessary for public purposes."⁷⁸

No other early decision in the area possesses the clarity of *State*

⁷²*Id.* at 282.

⁷³Ch. 1, § 2 [1825] N.C. Sess. L. 3. After the Civil War the great powers of the Literary Board were turned over to the Board of Education.

⁷⁴Ch. 23, [1836-37] N.C. Sess. L. 131.

⁷⁵See note 56 *supra*.

⁷⁶29 N.C. 139 (1846).

⁷⁷33 N.C. 434 (1850).

⁷⁸9 N.C. at 229 (emphasis added).

v. *Glen*, the first case in which the North Carolina Supreme Court was very explicit in adopting the two-test rule of *Collins* and *Wilson* for determining what waters are navigable. In *Glen* the court said that

[a]ll the bays and inlets on our coast, *where the tide from the sea ebbs and flows*, and all other waters, whether sounds, rivers, or creeks, *which can be navigated by sea vessels*, are called navigable, in a technical sense, are altogether *publici juris*, and the soil under them cannot be entered and a grant taken for it under entry law.⁷⁹

This two-part test was not the ultimate solution because questions concerning the size of the vessel and the depth of the water created new problems.⁸⁰ It is clear, however, that *Glen* was excluding small craft such as flats and rafts from the sea-vessel test, even though such boats had an easement to navigate if a river or stream was deep enough to afford passage.⁸¹ Thus, in non-tidal waters the more rigorous sea-vessel test was used in land-title cases while a small-craft test was applied in cases dealing simply with the right of passage.

Around the turn of the century in a series of "obstruction-of-navigation" cases the North Carolina Supreme Court set forth several tests which were used to determine the right of passage, even over lands and waters subject to ownership under the sea-vessel test. Although these cases are not directly related to the problem of identifying lands within the public trust, they play a very important role in later land-title cases. The first case, *Broadnax v. Baker*,⁸² held that water capable of floating boats used in commerce is navigable. In 1888, *State v. Narrows Island Club*⁸³ stated essentially the same test as *Broadnax* when it set forth "capacity for substantial use" as the test of navigability of a particular body of water. The court in *State v. Baum*⁸⁴ introduced a change in this rule which was to appear in later land-title cases. There the court held that "those rivers are public and navigable in law which are navigable in fact."⁸⁵ Three years later in *State v. Twiford*⁸⁶ the court adopted the most liberal test of all: "The capability of being used for

⁷⁹52 N.C. 321, 333 (1859) (emphasis added).

⁸⁰See *Hodges v. Williams*, 95 N.C. 331 (1886).

⁸¹52 N.C. at 333.

⁸²94 N.C. 675 (1886).

⁸³100 N.C. 477, 480, 5 S.E. 411, 412 (1888).

⁸⁴128 N.C. 600, 38 S.E. 900 (1901).

⁸⁵*Id.* at 604, 38 S.E. at 901.

⁸⁶136 N.C. 603, 48 S.E. 586 (1904).

purposes of trade and travel in the usual and ordinary modes is the test and not the extent and manner of such use."⁸⁷ Thus, at the turn of the century there were three possible tests in land-title and navigation cases. The ebb-and-flow test could be used only in land-title ownership problems; the sea-vessel test was used in non-tidal waters for land-title determination; and the more lenient "any craft" test had developed in obstruction-of-navigation cases.

It is clear that North Carolina is a high-tide state and that, depending on the test used, lands under navigable water are generally not sold by the state. However, perhaps the most difficult problem is determining tidal-marsh⁸⁸ ownership. Although the foreshore is considered part of the public trust, the North Carolina Supreme Court has never specifically answered the question of whether tidal marsh between the mean high-tide and mean low-tide lines is subject to private appropriation. Three of the most famous cases in North Carolina's public-trust law, the *Parmelee* decisions, touched on the marshlands problem but avoided the issue of whether tidal marsh could be protected in the same way as foreshore under the common law ebb-and-flow test. The first case, *Home Real Estate Loan & Insurance Co. v. Parmelee*,⁸⁹ rejected—though not by explicit reference—the two-part sea-vessel and ebb-and-flow test recognized by *Wilson*, *Collins*, and *Glen*. There the court held that a tidal marsh covered by twenty inches of water at high tide was subject to entry and grant because the waters were not navigable by sea vessels. The court explained that "[t]he term 'navigable waters' has reference to commerce of a substantial and permanent character to be, or which may be, conducted thereon."⁹⁰ Water covering a marsh at high tide, the court added, was not the correct sense of the term "navigable waters."⁹¹ Thus, the first *Parmelee* decision laid down a hard-line, single-test approach for determining the validity of grants of submerged lands.⁹²

⁸⁷*Id.* at 606, 48 S.E. at 587. The *Twiford* test was later used as justification for the "floating log test" in *Taylor v. West Virginia Pulp & Paper Co.*, 262 N.C. 452, 137 S.E.2d 833 (1964). This case also mentioned pleasure boating as a legitimate activity in determining navigability.

⁸⁸N.C. GEN. STAT. § 113-229(n)(3) (Supp. 1969) states that "'[m]arshlands' means marshes or swamps in or adjacent to estuarine waters, which marshes or swamps are regularly or periodically flooded by the tides."

⁸⁹214 N.C. 63, 197 S.E. 714 (1938).

⁹⁰*Id.* at 68, 197 S.E. at 717.

⁹¹*Id.* at 69, 197 S.E. at 718.

⁹²This hard-line test was affirmed in *Kelley v. King*, 225 N.C. 709, 36 S.E.2d 220 (1945).

The second *Parmelee* decision, *Resort Development Co. v. Parmelee*,⁹³ was handed down in 1952. It, too, dealt with the sale of marsh which was covered at high tide. The most significant aspect of this decision is the apparent revival of the double test for public-trust lands as stated in *Collins, Wilson, and Glen*.⁹⁴ The court in *Development Co.* held that where the *locus in quo* is covered by navigable waters at high tide and the lands in question are not swamp as defined by the legislature (lands too wet for cultivation except by drainage⁹⁵), the lands are not subject to entry and grant.⁹⁶ *Development Co.* implies through its facts and holding that where waters adjoining marshlands are navigable in fact and the marshlands themselves are covered at high tide, the waters covering the marsh shall also be deemed navigable in fact.

The remarkable thing about this decision, aside from its seeming reversal of the *Insurance Co.* holding and its resurrection of the ebb-and-flow test, is that absolutely no distinction was made between land-title and obstruction-of-navigation cases. Instead, the two lines of cases were cited freely for the same propositions. The case introduced new confusion for lawyers and judges and has proved to be a source of hope for conservationists interested in saving the tidal salt marshes.

The third *Parmelee* decision, *Parmelee v. Eaton*,⁹⁷ came less than two years after *Development Co.* The case cited both *Insurance Co.* and *Development Co.* but made no attempt to distinguish them. The court held that the marsh in question, some of which was the same marsh discussed in *Development Co.*, was not covered by navigable waters and that the land could be conveyed by the Board of Education. The court also said, "With us the ebb and flow of the tide is not the criterion for determining navigability."⁹⁸

In spite of the fact that at least two of the three *Parmelee* decisions were decided exclusively on the basis of whether or not the tidal marsh in question was navigable in fact, they should not be interpreted as overruling previous decisions which upheld the validity of the ebb-and-

⁹³235 N.C. 689, 71 S.E.2d 474 (1952).

⁹⁴The court stated specifically that the salt marsh in question "is covered by waters which come within the common law tidal rule, and the rule of navigability in fact applied in North Carolina." *Id.* at 695, 71 S.E.2d at 479.

⁹⁵N.C. GEN. STAT. § 146-64(8) (1964).

⁹⁶235 N.C. at 697, 71 S.E.2d at 480. It should be noted that in this decision *Insurance Co.* was not even mentioned. It appears that the court simply chose to ignore its existence.

⁹⁷240 N.C. 539, 83 S.E.2d 93 (1954).

⁹⁸*Id.* at 548, 83 S.E.2d at 99.

flow test. In none of these cases has the separate issue of whether the ebb-and-flow test is applicable to tidal marsh been answered directly by the court. It is, therefore, submitted that the *Parmelee* decisions should in no way be viewed as determinative in the marshlands-ownership cases.

No subsequent state case has attempted to resolve the confusion created by the *Parmelee* decisions. However, *Swan Island Club, Inc. v. White*,⁹⁹ a federal case which was decided after *Development Co.* and before *Eaton*, followed the lead of *Development Co.* and did not attempt to distinguish between the land-title and obstruction-of-navigation cases. *Swan Island Club* dealt with the validity of a state grant of a large tract of shoal water in Currituck Sound, which was so shallow that even the smallest boats used by duck hunters and fishermen could not pass over the shoals in northeasterly winds. Yet the court found these waters to be "navigable in fact" and, therefore, not subject to entry and grant. The court relied heavily on the tests formulated in the obstruction-of-navigation cases such as *Twiford*,¹⁰⁰ which had held that the capacity for navigation in the usual modes of the area was the test of navigability. Apparently the court felt that hunting in small boats was an important incident of navigation.

Almost parenthetically, the judge in *Swan Island Club* posed another possible test for title-determination purposes which seems worthy of future consideration:

While I do not rest my finding on such conclusion, it might be reasonably held as a practical solution that a navigable body of water such as Currituck Sound is navigable to the farthest reaches of water under normal conditions.¹⁰¹

In his work on estuarine lands in North Carolina, David Rice concluded from a review of case law and statutes that

[i]t may be that, by a combination of the enactment of this statute [North Carolina General Statutes section 146-64(4)¹⁰²] and the gradual evolution of judicial decisions, a single test of navigability in North Carolina has now become the law: navigability in fact by any form of vessel or water transport common to the times. In its most recent decision the court may have sounded the death knell of the seagoing

⁹⁹114 F. Supp. 95 (E.D.N.C. 1953), *aff'd sub nom.* *Swan Island Club, Inc. v. Yarbrough*, 209 F.2d 698 (4th Cir. 1954).

¹⁰⁰See note 86 and accompanying text *supra*.

¹⁰¹114 F. Supp. at 98.

¹⁰²N.C. GEN. STAT. § 146-64(4) (1964). See text accompanying note 50 *supra*.

vessel test for all practical purposes, just as it previously abandoned the ebb and flow rule—albeit, in its customary reluctance to expressly overrule prior decisions, it has not explicitly abandoned the seagoing test.¹⁰³

Judging from the confusion and contradiction of the *Parmelee* cases, Rice's conclusion must be rejected at least partially. He is correct when he says that a gradual evolution of judicial decision in the area has taken place, but it is premature to say that the supreme court has arrived at a single test of navigability, much less a workable one for determining title to submerged land. Moreover, because of the long history of the common law ebb-and-flow rule, the current acceptance of the mean high-tide line as the boundary for public-trust lands, and the lack of direct confrontation with the ebb-and-flow issue in the *Parmelee* decisions, Rice's conclusion that the ebb-and-flow rule has been abandoned would appear to be similarly premature. If the ebb-and-flow test is dead and not applicable to marshland-title disputes, it should at least be given a proper burial by way of a decision dealing directly with the issue.

THE BASES FOR CLAIMS OF PRIVATE OWNERSHIP OF LANDS UNDER NAVIGABLE WATERS

For purposes of clarity it will be assumed *arguendo* that there is agreement as to what constitutes navigable waters. As has already been stated, North Carolina's recognition of the public-trust doctrine was never intended to serve as an absolute prohibition of private ownership of lands under navigable waters. Judging from the thousands of claims filed under North Carolina General Statutes section 113-205, it is obvious that many people believe that they own good title to lands under navigable waters. In the pages ahead the potential validity of six possible bases for such claims will be examined.

(1) *King's Grant or Proprietor's Grant*

It is not likely that many titles will be based on grants issued by the Crown or a Proprietor during the colonial and pre-colonial period. However, the potential questions which are raised by such grants should not be ignored.

¹⁰³Rice 802.

The validity of a title based on a King's grant presents a very difficult question. As has been stated, at common law the ebb-and-flow test was used to determine what lands were *jus publici*; therefore, prior to independence it is conceivable that some submerged lands in the sounds or rivers not subject to ebb and flow could have been conveyed by the King, subject only to the public's right of navigation.¹⁰⁴ However, to be recognized by the state such a grant would have to describe with extreme specificity the submerged lands which were conveyed.¹⁰⁵ A grant of a very large area of submerged land would probably not be recognized at all, except perhaps as an easement which runs with the adjoining high ground.¹⁰⁶ Lands under tidal water—including tidal marsh—were part of the public trust, although even at common law there was no absolute prohibition of their sale. However, the same arguments used above with respect to non-tidal waters would also apply¹⁰⁷ in the event that a King's grant were produced which purported to convey title to trust land.

The validity of a title based on a Proprietor's grant is an easier question. It is likely that a grant by a Proprietor of submerged lands would be invalid under the United States Supreme Court's ruling in *Martin v. Waddell*.¹⁰⁸

(2) *Claims Based on Statute and Judicial Determination*

The statutory law of this state has generally prohibited the granting of lands under navigable waters. At various times, however, "loopholes" in the statutory framework have appeared which have given rise to claims involving public-trust lands. The first such loophole came in 1836 when the North Carolina General Assembly, while amending the 1777 entry-and-grant statute, omitted reference to certain entry-and-grant land-survey provisions of the Act of 1777. It will be remembered that under those provisions the water was to form one side of a survey of lands on navigable water.¹⁰⁹ The omission was not corrected until the

¹⁰⁴State v. Glen, 52 N.C. 321, 325 (1859).

¹⁰⁵Rice 806. Grants even below the high water mark were recognized very early in North Carolina where the deed expressed a clear intention to convey such land.

¹⁰⁶See Shepard's Point Land Co. v. Atlantic Hotel, 132 N.C. 517, 535-36, 44 S.E. 39, 44-45 (1903).

¹⁰⁷See text following note 68 *supra* for a discussion of Wilson v. Forbes, 13 N.C. 30 (1828), which marked the extension of the public-trust doctrine to non-tidal water in North Carolina.

¹⁰⁸41 U.S. (16 Pet.) 367 (1842). See the discussion of that case at note 30 *supra*.

¹⁰⁹See note 56 and accompanying text *supra*.

1846-47 session of the General Assembly, which re-enacted the omitted portions of the original Act:

That it shall not be lawful to enter any land covered by any navigable sound, river or creek; and that entries of land lying on any navigable water shall be surveyed in such manner, that the water shall, [sic] form one side of the survey, and the land be laid off back from the water.¹¹⁰

Disregarding previous cases to the contrary which had broadened the base of state ownership is submerged lands, the court in *Hatfield*¹¹¹ ruled that during the ten-year period of omission the common law ebb-and-flow doctrine was to be the only test of navigability. Since Currituck Sound had no ebb and flow due to the closing of Currituck inlet by storm, the court held that the waters covering the lands in question were not navigable and, therefore, that the lands were subject to valid entry and grants.

Recent decisions, however, indicate that *Hatfield* has been overruled or explained. In *Development Co.* the court stated quite correctly that even at common law navigable waters—whether affected by tidal flow or not—were regarded as common highways.¹¹² The court then held that

the provision of the Revised Statutes of (1836), Chapter 42, Sec. 1, did not have the effect of abrogating, or repealing the common law that navigable waters were then *publici juris*, and hence not subject to entry and grant.¹¹³

In *Swan Island Club, Inc. v. Yarbrough*,¹¹⁴ the Fourth Circuit Court of Appeals cited with favor the above language from *Development Co.*

Another loophole in the entry-and-grant system appeared in 1854 with the enactment of section 2751 of the North Carolina Code:

Persons owning lands on any navigable sound, river, creek or arm of the sea, for the purposes of erecting wharves on the side of the deep waters thereof, next to their lands, may make *entries* of the lands covered by water, adjacent to their own, as far as deep water . . . and shall in no respect obstruct or impair navigation.¹¹⁵

¹¹⁰Ch. 26, § 1 [1846-47] N.C. Sess. L. 97.

¹¹¹29 N.C. 139 (1846).

¹¹²235 N.C. at 695, 71 S.E.2d at 479.

¹¹³*Id.* at 697, 71 S.E.2d at 480.

¹¹⁴209 F.2d 698 (4th Cir. 1954).

¹¹⁵Ch. 21, § 1 [1854-55] N.C. Sess. L. 45 (emphasis added).

Section 2751 was amended in 1889¹¹⁶ so that no land could be "entered" within thirty feet of any wharf or pier. Another amendment in 1891¹¹⁷ provided that a pier could not be "entered" more than one-fifth the distance across a stream. Finally, in 1893 section 2751 was amended so that the phrase "to which entry may be made" was changed to the wording "to which wharves may be built."¹¹⁸ Thus, from 1854 to 1893 the wording of the above statute allowed "entry" for wharf and pier building by the riparian owner. The question arises, however, whether submerged lands which were entered by riparian owners during this period are subject to ownership.

The possibility of a valid claim based on section 2751 was probably destroyed in *Shepard's Point Land Co. v. Atlantic Hotel*.¹¹⁹ The plaintiffs in that case had once owned two tracts of land, one dry and the other submerged. The title to the land came from the state during the period when the "entry" language of 2751 was in effect. The plaintiffs sold the dry-land tract to the defendants and kept the submerged lands. When the defendants built a pier out into the water on the plaintiff's tract, ownership of the submerged lands became the issue at trial. The court held that the sale of the dry land by the plaintiff had conferred on the defendants "an exclusive right or easement therein as riparian owners and proprietors to erect wharves . . . [and] that such easement passed to the defendant company, and the plaintiff [had] no such title to the soil under the navigable water as [entitled] it to maintain this action."¹²⁰ The court also stated that it was aware of contrary decisions outside the state allowing ownership of submerged lands, but that such ownership was inconsistent with "the well-settled policy of this state."¹²¹ This decision is very strong proof that North Carolina is a staunch defender of the public trust and perhaps is to North Carolina's public-trust law what *Illinois Central* is to national public-trust law.

The question of whether judicial determination of title to submerged lands under the Torren's Land Act could vest fee title in a private entity

¹¹⁶Ch. 555, § 1 [1889] N.C. Sess. L. 517.

¹¹⁷Ch. 532, § 1 [1891] N.C. Sess. L. 585.

¹¹⁸Ch. 17, § 1 [1893] N.C. Sess. L. 41.

¹¹⁹132 N.C. 517, 44 S.E. 39 (1903).

¹²⁰*Id.* at 541, 44 S.E. at 47.

¹²¹*Id.*

was considered in *Swan Island Club, Inc. v. White*¹²² and on appeal in *Swan Island Club, Inc. v. Yarbrough*.¹²³ The courts held that

[t]he purpose of a proceeding under the Torrens law is to remove clouds from title and resolve controversies with regard thereto, not to validate title to lands which . . . are not subject to private ownership.¹²⁴

Finally, a 1953 session law will probably be used as the basis of claims to submerged lands in three coastal counties. Chapter 966 of the 1953 Session Laws appears to have been the result of pressure from coastal developers in Onslow, Pender, and New Hanover Counties who wanted to secure title to marshlands and shoal water when their titles to such lands were placed in jeopardy by the holding in *Development Co.* The session law reads in part:

The titles to all marsh lands and all swamp lands which have heretofore been conveyed by the Literary Fund, the Literary Board of North Carolina, or the State Board of Education of North Carolina, or granted by the State of North Carolina, are hereby validated, ratified and confirmed, . . . This act shall apply only to New Hanover, Pender and Onslow Counties.¹²⁵

Although this law was mentioned in *Eaton*, no questions concerning its applicability appear to have been raised. Claims based on the 1953 law appear subject to attack. Nowhere in the statute is it stated that grants of land under navigable waters are validated and ratified. Therefore, if the courts decide that waters covering certain marshlands and shoals are "navigable in fact" (such as in *Development Co.*), the language of the statute clearly does not apply.

(3) *Special Grants by the State*

Although it has been said in many cases that lands under navigable water are not subject to entry and grant, there does seem to be a possible exception in the area of "specific grants" or "express grants" from the state. Such grants are made when the state decides legislatively to dispose of particular submerged lands by sale. Thus, a specific grant

¹²²114 F. Supp. 95 (E.D.N.C. 1953). See text at note 99 *supra* for a previous discussion of this case.

¹²³209 F.2d 698 (4th Cir. 1954).

¹²⁴*Id.* at 702.

¹²⁵Ch. 966, § 1 [1953] N.C. Sess. L. 869.

could not be acquired by following the entry-and-grant procedures as set forth by statute. Clearly the state has the power to make such grants. In *Tatum* the North Carolina Supreme Court held that there is no specific prohibition against the granting of submerged lands. More recent decisions have affirmed this power of the state. In *Insurance Co.* the court stated that the state "may either sell or convey its title to lands below high water mark to a riparian owner . . . or . . . to a stranger" ¹²⁶ It should be emphasized that such grants can be made only by the legislature, since it has been held that even the governor has no power by reason of his office to agree to the boundaries of lands under navigable waters. ¹²⁷

Even special grants, however, appear to be limited to specific purposes. *Ward v. Willis* ¹²⁸ and *Land Co.* ¹²⁹ imply that if special grants are made they must be for the promotion of trade, the growth of a town, or other similar purposes beneficial to the public. It is not clear whether absolute fee title has ever been granted by the state in submerged lands. In *McKenzie* it was held that a grant specifically including an area containing a large oyster bed which was flooded at high tide would support an action by the owner in trespass and damages if a defendant took oysters from the premises. ¹³⁰ The court referred to the interest in the submerged land as both a "grant" and a "patent." It cannot be concluded from the court's language that the grantee's interest was an absolute fee title rather than simply an interest greater than that of the general public. Even in the hypothetical situations where the land between high and low-tide lines is owned by virtue of a special grant, though, the public retains a right of navigation at high tide without liability for trespass. ¹³¹

The number and purposes of specific or express grants, if any, which the state has made are not known at present. It seems clear, however, that when specific grants are proven to be in strict compliance with the law and in the absence of fraud or mistake, the state can assert no valid claim to the subject land except after compensation and under the principle of eminent domain. ¹³²

¹²⁶214 N.C. at 68, 197 S.E. at 718.

¹²⁷*Swan Island Club, Inc. v. White*, 114 F. Supp. 95, 101 (E.D.N.C. 1953).

¹²⁸51 N.C. 183 (1858).

¹²⁹132 N.C. at 525, 44 S.E. at 41.

¹³⁰*McKenzie's Executors v. Hulet*, 4 N.C. 613, 615 (1817).

¹³¹*Lenoir County v. Crabtree*, 158 N.C. 358, 74 S.E. 105 (1912).

¹³²*State v. Spencer*, 114 N.C. 770, 780, 19 S.E. 93, 96 (1894).

(4) *Confusion of "Special Privilege" with Fee Title*

Undoubtedly, more title confusion has arisen in the area of "special privilege" than in any other. Special privileges are not to be confused with specific or express grants, which relate to the ownership of the land. A privilege is simply a right greater than that of the general public in a particular area. Yet, many who possess a special privilege for the use of submerged lands have contended that their privilege entitled them to an interest in the land.

A number of problems have arisen concerning actual ownership of oyster and clam beds. In *State v. Young*¹³³ the court stated that a license to cultivate oysters in a particular area does not confer any interest in the land. The court in *State v. Spencer*¹³⁴ classified a grant of oyster bottom under navigable waters as "a perpetual franchise to cultivate oysters." Regardless of the name of the special interest in shellfish bottoms, no title is conveyed.

Another situation where privilege is often confused with title is the question of title to lands under piers and wharves. Again, however, in the absence of a specific grant covering the lands under the pier, no title can be acquired. A person owning land under navigable waters can enter for pier or wharf building, but his entry entitles him only to the privilege of an easement.¹³⁵

Thus, it appears that the vast majority of recognized claims to submerged lands under North Carolina General Statutes section 113-205 will involved "special privilege" in the form of easements, licenses, and franchises, all of which are given for a limited purpose. The method by which an individual gets an easement to build a pier or to plant oysters is and has been basically statutory. No attempt will be made in this comment to run through the applicable statutes. What is important, however, is that a privilege once granted by the state is not easily regained unless the holder violates terms of the agreement.¹³⁶

Special privileges are protected in much the same way as property

¹³³138 N.C. 571, 50 S.E. 213 (1905).

¹³⁴114 N.C. 770, 777, 19 S.E. 93, 95 (1894).

¹³⁵*Capune v. Robbins*, 273 N.C. 581, 160 S.E.2d 153 (1968). See also N.C. GEN. STAT. § 146-12 (1964).

¹³⁶For example, for many years the state has leased submerged lands for the cultivation of oysters and clams. In *Oglesby v. Adams*, 268 N.C. 272, 150 S.E.2d 383 (1966), a 1965 Act of the General Assembly was held an unconstitutional impairment of contract when applied to alter the terms of a lease which was in existence on the date of enactment.

rights and can generally be sold. Licenses and easements can be as permanent as fee title, but because of the limited uses for which they are given, they do not present the same dangers to the public trust as do claims of private ownership in navigable waters.

(5) *Adverse Possession and Color of Title*

Under the general rules of property in North Carolina, title may be acquired as against the state by thirty years of adverse possession or by twenty-one years of possession under color of title if possession is known and boundaries are ascertainable. In lands subject to the public-trust doctrine, however, it is arguable that the general rules of property do not apply. In *Shelby v. Cleveland Mill & Power Co.*¹³⁷ the court held that

[i]t is well settled that, unless by legislative enactment, no title can be acquired against the public by user alone, nor lost to the public by non-user. . . . Public rights are never destroyed by long-continued encroachments or permissive trespasses.¹³⁸

Although the issue in *Shelby* was whether long-established use of a river as a sewage receptacle could by prescription vest in the user rights greater than those of the general public, the principle enunciated above would appear applicable to all lands and waters where public rights are involved.

Even if the general rules of adverse possession and adverse possession by color of title apply, it would appear from a recent decision of the North Carolina Supreme Court that claims made on those bases in estuarine areas will be difficult to prove. In *State v. Brooks*¹³⁹ the court borrowed language from earlier cases in summarizing the state's long-established policy regarding adverse possession:

[Adverse possession] consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land. . . . It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner.¹⁴⁰

¹³⁷155 N.C. 196, 71 S.E. 218 (1911). See also *Bell v. Smith*, 171 N.C. 116, 87 S.E. 987 (1916).

¹³⁸55 N.C. at 199, 71 S.E. at 219.

¹³⁹275 N.C. 175, 166 S.E.2d 70 (1969).

¹⁴⁰*Id.* at 187, 166 S.E.2d at 73. The court quoted from *Locklear v. Savage*, 159 N.C. 236, 74 S.E. 347 (1912).

The stipulated facts in *Brooks* showed that some of the lands claimed bordered on navigable waters, and because of those stipulations the court held that the "possession . . . by the defendants lacked the essential element that possession was hostile, which is an essential element to ripen title by adverse possession."¹⁴¹ Thus, it appears that it will be exceedingly difficult to establish title to trust lands by adverse possession. The difficulty lies in establishing recognizable boundaries in marsh or open water.

In adverse possession by color of title, claimants "must locate the land they claim title to by fitting the description contained in the paper-writing offered as evidence of title to the land's surface."¹⁴² Because of the frequent absence of iron stakes, monuments, or other permanent identifiable features in marshlands or submerged lands, the burden of proof on claimants will usually prove insurmountable.

(6) *Claims to Remaining Submerged Lands after Erosion of High Ground*

Because of the changing nature of the coastal region, the situation will often arise where land is washed away by storm or erosion. *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*¹⁴³ is a recent case involving ownership of lots which had been gradually eroded away by the Atlantic Ocean. In affirming North Carolina's long established high-tide rule, the court quoted from Herman Melville's *Moby Dick* when it held that the claimant's "title was divested by 'the sledgehammering seas . . . the inscrutable tides of tide.'¹⁴⁴ Thus, in situations where the erosion is natural and gradual, title will be lost to the state, and reclamation will not be allowed.¹⁴⁵ However, erosion by sudden or violent storms does not automatically divest title or prevent reclamation.

Lands raised from navigable waters are dealt with in North Carolina General Statute sections 146-6(a), (b), and (c). Generally, the statute provides that land raised by any process of nature will vest in the owner of the adjoining high ground, as will reclaimed lands lost by storm and those raised with the approval of the state.

¹⁴¹275 N.C. at 187, 166 S.E.2d at 73.

¹⁴²*Id.*

¹⁴³277 N.C. 297, 177 S.E.2d 513 (1970).

¹⁴⁴*Id.* at 304, 177 S.E.2d at 517.

¹⁴⁵*Jones v. Turlington*, 243 N.C. 681, 684, 92 S.E.2d 75, 77 (1956).

The public-trust doctrine is very strong in North Carolina. The presumption of title in the state to submerged lands raises a very difficult barrier for claimants of submerged lands. This is not to say that submerged lands will never be found to be vested in private individuals, but only that most claimants of fee title will have great difficulty in establishing their claims. As has been pointed out, however, there are numerous ways in which individuals can acquire rights and interests greater than that of the general public.

THE PUBLIC-TRUST DOCTRINE IN A MODERN CONTEXT

The general understanding of the public-trust doctrine which most writers convey is that it applies principally to those submerged lands owned by the state and held in trust for its citizens. However, many are adopting the view that when public-trust lands are sold, the rights and privileges which the public enjoys in such areas run with the land. In a paper prepared for the Institute of Ocean Law at the University of Miami, William L. Griffin¹⁴⁶ stated it this way:

Private ownership of interests in tidal submerged land makes use and regulation more complicated, and more expensive where it is necessary to use the condemnation power. But such private ownership does not preclude applicability of the trust doctrine to the submerged land or the superjacent water.¹⁴⁷

Griffin also enumerates a number of activities which are protected under the public-trust doctrine according to the case law of other states. The taking of seaweed and seashells, fowling, hunting, camping, swimming, and "recreation in general" are listed as expansions of the general rights of navigation and fishery.¹⁴⁸ Griffin feels that applying the trust doctrine in this way offers great "promise as a tool for affirmative coastal zone regulation."¹⁴⁹ He feels that condemnation and the exercise of police powers—for example, through dredge-and-fill laws and dumping ordinances—should not be relied on for coastal lands regulation.

¹⁴⁶Attorney at Law; Visiting Professor of Law, 1969-70, George Washington University Law School, Washington, D.C.

¹⁴⁷Griffin 7. Professor Joseph Sax offers essentially the same view that when the state conveys trust lands to an individual the title is impressed with the trust and must be viewed with the trust in mind. Sax 487.

¹⁴⁸Griffin 13.

¹⁴⁹*Id.* at 14.

Condemnation is considered too expensive, and the exercise of police power can be attacked as a "taking" in disguise.¹⁵⁰

Two federal cases point the way toward application of the trust doctrine to privately owned submerged lands. In *Swan Island Club, Inc. v. Yarbrough*,¹⁵¹ Chief Judge Parker stated that

[e]ven if title were held to have been vested in plaintiff to the lands beneath navigable waters, we think that the District Judge was correct in holding that they would be subject to the same trust in behalf of the public that would affect them if title were held by the state.

In *Zabel v. Tabb*¹⁵² an owner of submerged lands wanted to fill them and make a trailer park. The permit for dredge and fill was denied by the Army Corps of Engineers for substantial ecological reasons under the National Environmental Policy Act of 1969. The landowner contended that the land in question was useful only as a breeding ground for wildlife and that the denial of the permit amounted to a taking for public use, which required just compensation. The court, on the other hand, held that there was no taking.¹⁵³ Although this was not a public-trust case per se, the court agreed with the Corps that the lands were too valuable in their natural state and, thus, should be preserved for the benefit of all citizens.

Whether the public-trust doctrine will be used to preserve privately owned submerged lands in their natural state is a question which the North Carolina Supreme Court has not yet addressed. It is likely that in the near future the court will be faced with the issue. Based on these two federal precedents it would appear that North Carolina could deny dredge-and-fill permits¹⁵⁴ regarding submerged lands claimed by private entities for substantial ecological reasons and that such a denial would not constitute a taking without due process and just compensation.

In describing the role of the courts in dealing with trust lands, Joseph Sax¹⁵⁵ has said: "Courts have been both misunderstood and underrated as a resource for dealing with resources. . . . [T]he judiciary can be expected to play an increasingly important and fruitful role in

¹⁵⁰*Id.* at 3.

¹⁵¹309 F.2d 698, 702 (4th Cir. 1954).

¹⁵²430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

¹⁵³*Id.* at 215.

¹⁵⁴N.C. GEN. STAT. § 113-229(a) (Supp. 1969).

¹⁵⁵Professor of Law, University of Michigan. Professor Sax is the author of numerous books and articles on environmental law.

safeguarding the public trust.”¹⁵⁶ Such a statement is applicable in describing the potential role of the courts in North Carolina.

CONCLUSION

North Carolina is blessed with more good remaining estuarine habitat than any other state on the East Coast. Although some estuarine lands have slipped into private hands over the years, the overall policy of the state prohibiting entry and grant in navigable waters has prevented the wholesale alienation and destruction of these lands which has occurred in so many states. Because it is becoming evermore apparent that our remaining estuarine habitat must be maintained in its natural state, action must begin immediately to assure its preservation. As has been stated, however, action by the state or conservation organizations will be severely hindered until the questions of title and boundary are resolved. Application of the public-trust doctrine to private lands is possible, but it is only one of many tools which must be utilized in order to plan properly for the future use and protection of these lands. The problems cannot be dealt with directly through zoning, the establishment of parks, police power regulation, or condemnation until ownership disputes are settled and conclusive boundaries are established.

For a number of reasons it appears that the North Carolina Supreme Court can provide the surest and best remedy for the above dilemma. All the elements for an effective definition and workable guidelines for navigable waters are present in the decisions of the past—decisions which have never been explicitly overruled. All recent cases would appear to agree that water which will float a fishing boat, seagoing vessel, or even small pleasure craft is navigable in fact. The confusion revolves around those areas where the water is too shallow or too grassy for most boats or where it is completely uncovered at low tide or during certain winds, yet navigable by small craft at high tide or during normal winds. These are the primary areas in dispute, and unfortunately it is in these areas that the food chain for much ocean life begins. For decades hunters of waterfowl and marshbirds have poled flat-bottom boats through the marsh grasses of the sounds and in the tidal marshes next to the sea. Fishermen often take tiny flat-bottom boats through marsh grasses at high tide to get to remote tidal ponds and back bays inaccessible by more easily definable navigable waters,

¹⁵⁶Sax 565-66.

such as deep sloughs or canals. The court must decide whether these marshlands and shoal waters are navigable in fact and whether the ebb-and-flow test of *jus publicum* still survives as a valuable remnant of our common law heritage.

For illustration the following definition is proposed as an example of what is currently needed from the court:

All lands, including foreshore¹⁵⁷ and salt marsh, over which the tide ebbs and flows,¹⁵⁸ regardless of its depth at high tide, and lands covered by waters having the capacity for navigation by water craft of the day, whether they be used for commercial,¹⁵⁹ recreational,¹⁶⁰ or sporting purposes,¹⁶¹ are submerged lands and the waters covering them are deemed to be navigable.

Although no such definition will completely answer all questions which might be raised, it can provide a starting point which can be more easily understood than the present statutory test of navigable waters.¹⁶² A definition such as the one above would go a long way toward answering the question of what waters are "navigable in fact" for the purpose of determining land titles. Also, such a definition would in no way be a departure from the past, but rather would be a clearer, more useful statement of which has in fact been the state's policy as evolved through the years.

If the legislature were to pass a more detailed definition of navigable waters, certain problems might arise. For example, a challenge to a deed issued by the state based on a new legislative definition of navigable waters could make the legislation itself subject to constitutional attack. Article one, section ten of the United States Constitution provides that no law can be passed impairing the obligation of contracts. If the application of a new legislature definition has an adverse retroactive effect on a particular title, the contract of sale between the state and

¹⁵⁷Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 513 (1970).

¹⁵⁸See Resort Dev. Co. v. Parmele, 235 N.C. 689; 71 S.E.2d 474 (1952); State v. Glen, 52 N.C. 321 (1859).

¹⁵⁹See State v. Narrows Island Club, 100 N.C. 477, 5 S.E. 411 (1888); Broadnax v. Baker, 94 N.C. 675 (1886).

¹⁶⁰See State v. Twiford, 136 N.C. 603, 48 S.E. 586 (1904) (pleasure boating mentioned as a test of navigability).

¹⁶¹See Swan Island Club, Inc. v. Yarbrough, 209 F.2d 698 (4th Cir. 1954).

¹⁶²N.C. GEN. STAT. § 146-64(4) (1964). "'Navigable waters' means all waters which are navigable in fact."

grantee would obviously be impaired. Also, a legislative definition of navigable water which had the effect of invalidating previous grants might be attacked as a "taking" in disguise.

It is clear that under the entry-and-grant laws many acres of submerged lands, largely in the form of tidal marsh, found their way into private hands. No decision and, therefore, no definition can be rendered by North Carolina's courts until test cases are brought for the purpose of having dubious claims to the most important of our submerged lands declared void. At present only the North Carolina Attorney General is empowered to challenge titles in the name of the state.¹⁶³ Action by the Attorney General to vacate grants may be brought under North Carolina General Statutes section 146-63. The action can be based on fraud on the part of the grantee, mistake or ignorance of material act,¹⁶⁴ or violation of the terms of the grant by the grantee.

As has been pointed out, two competing policies have been basically responsible for the title dilemma. From the entry-and-grant policy on the one hand and the desire to preserve submerged lands on the other, certain threads of continuity exist which have given North Carolina an impressive record as a defender of public-trust lands. The probable viability of the common law ebb-and-flow rule, the current acceptance of the mean high tide as the boundary for trust lands, and the vast majority of court decisions in the area all raise a presumption of title in the state to submerged lands which private claimants to those lands will have difficulty in overcoming. As with other threats to our environment, our estuaries will not maintain their productive role in the ocean's food chain unless man takes the steps necessary to reverse the current disastrous trend. If North Carolina's Attorney General and courts take the active, positive role of which they are capable, they can provide a model for the future for all coastal states of this nation.

THOMAS W. EARNHARDT

¹⁶³N.C. GEN. STAT. § 146-63 (1964).

¹⁶⁴The state could assert in many cases that when the grants were made it did not know that the water covering the land was "navigable in fact," and thus the lands under them would not have been subject to entry and grant.