

3-1-1986

The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust

Monica Kivel Kalo

Joseph J. Kalo

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Monica K. Kalo & Joseph J. Kalo, *The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust*, 64 N.C. L. REV. 565 (1986).

Available at: <http://scholarship.law.unc.edu/nclr/vol64/iss3/3>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

THE BATTLE TO PRESERVE NORTH CAROLINA'S ESTUARINE MARSHES: THE 1985 LEGISLATION, PRIVATE CLAIMS TO ESTUARINE MARSHES, DENIAL OF PERMITS TO FILL, AND THE PUBLIC TRUST

MONICA KIVEL KALO†

JOSEPH J. KALO††

In recent years the ecological and economic importance of North Carolina's estuarine marshes has been recognized. Landowners' claims of private ownership of these marshes, however, challenge the public's right to use these rich coastal wetlands for commercial and recreational purposes. Professors Monica Kalo and Joseph Kalo examine the North Carolina General Assembly's attempt to resolve these claims through a series of statutes enacted in May 1985. First, the authors explore the history of protected public commercial and recreational uses of North Carolina's estuarine complex. Second, they determine the validity of private ownership claims by focusing on the sources of the asserted private rights: Board of Education deeds, the Marketable Title Act, adverse possession, and the Torrens Act. The authors conclude that although many valid claims of private ownership exist, until a landowner fills the land the public can use such land consistent with public trust rights. Furthermore, the authors contend that in most situations the State may legitimately prevent the destruction of public trust rights by denying private landowners permits to fill.

† Professor of Law, North Carolina Central University School of Law. A.B. 1969, University of North Carolina at Greensboro; J.D. 1975, University of North Carolina.

†† Professor of Law, University of North Carolina School of Law. A.B. 1966, Michigan State University; J.D. 1968, University of Michigan.

We would like to express deep appreciation to our research assistants, especially Tim Nifong, a Ph.D. candidate in Biology and a joint degree student in the Law-City and Regional Planning program at the University of North Carolina at Chapel Hill. Tim's thorough research, editorial suggestions, breadth of ecological knowledge, and familiarity with coastal North Carolina's natural environment, people, and politics, were essential in developing and writing this Article. We also express thanks to the University of North Carolina Law Center for providing a summer grant that helped make this Article possible.

Finally, we express deepest thanks to Daniel F. McLawhorn, Assistant Attorney General for the State of North Carolina, Environmental Section, for taking the time to discuss the issues presented by the problem of claims to coastal submerged land, for reading a draft of this Article, and for offering helpful criticisms. We and Mr. McLawhorn did not always agree on the interpretation of statutes or cases, but discussions with him led us to a deeper appreciation of the complexity of the problems involved.

I. INTRODUCTION

The chain of barrier islands—the famed Outer Banks—that flanks North Carolina's eastern shore encloses a vast estuarine system of bays, sounds, and river mouths with an estimated area of 2500 to 3500 square miles.¹ Within the United States only Louisiana and Alaska have more extensive estuarine waters.² Depending largely on the proximity of a particular estuarine area to an inlet from the Atlantic Ocean, and thus to tidal influence, the waters within North Carolina's estuarine complex vary from nearly fresh to saline.³ A large portion of these waters are extremely shallow; consequently, they are covered with aquatic or wetland plant communities that range from brackish marshes in the northeastern portion of the State, dominated by the cattail and various aquatic plant species, to the true salt marshes of southeastern North Carolina, covered by smooth cordgrass.⁴

A vast amount of the estuarine marsh complex within North Carolina has already been destroyed.⁵ It is estimated that between 1952 and 1969 over 45,000 acres—about 28.5 percent of the State's estuarine marshland—was filled or otherwise lost.⁶ Much of the almost continuous marsh of 58,000 acres⁷ that stretched between North Carolina's barrier islands and mainland from Beaufort to Sunset Beach has disappeared. Nevertheless, one can experience a sense of what once existed by looking to the west while driving over the bridge between the North Carolina mainland and Emerald Isle. There in the summer one can see the lush, yellow-green expanse of estuarine marsh cut by numerous channels and sloughs.

Most people look briefly at this marsh as they travel to the attractions of the oceanfront with little appreciation of its ecological significance, its economic importance, or the gathering legal storm over its ownership and potential loss. Too wet for cultivation and unfit for human habitation, coastal estuarine marshes were traditionally considered to have little, if any, economic value in their natural state.⁸ Ecologically, however, these marshes are among the most productive

1. Estimates vary, depending on the source. However, most sources place the estimate in the upper end of this range, at just over 9000 hectares (2.2 million acres). See, e.g., Adams, *Interest in Estuarine Ecology*, in PROCEEDINGS, SYMPOSIUM ON ESTUARINE ECOLOGY 2, 3 (U.N.C. Water Resources Research Inst. 1966); Cooper, *Extent and Distribution of Areas of Environmental Concern in North Carolina*, in COASTAL DEVELOPMENT AND AREAS OF ENVIRONMENTAL CONCERN 16, 17 (S. Baker ed. 1975).

2. Rice, *Estuarine Land of North Carolina: Legal Aspect of Ownership, Use and Control*, 46 N.C.L. REV. 779, 779 (1968).

3. W. CLAPHAM, NATURAL ECOSYSTEMS 167 (1973); Adams, *supra* note 1, at 3.

4. K. WILSON, NORTH CAROLINA WETLANDS: THEIR DISTRIBUTION & MANAGEMENT 19-20 (1962).

5. Davis, *Waves of Development Threaten the Tidewater*, in ESTUARINE RESOURCES 37, 38 (T. Jackson ed. 1969).

6. Harrison, *Where to Now for Wetlands?*, WILDLIFE IN NORTH CAROLINA, Nov. 1968, at 6; see also G. SPINNER, A PLAN FOR THE MARINE RESOURCES OF THE ATLANTIC COASTAL ZONE 4 (1969) (table showing extent of coastal wetlands in 14 Atlantic states and estimating acres destroyed from 1954 to 1968).

7. K. WILSON, *supra* note 4, at 9, 12.

8. For example, in his 1932 treatment of the natural plant communities of North Carolina, the ecologist B.W. Wells described the coastal vegetation of the state as follows:

lands in the world.⁹ Except for rice and sugar cane, no common agricultural crops approach the biological productivity levels attained in estuarine marshes.¹⁰ Coastal estuarine marshes support a myriad of marine animals, including numerous finfish and shellfish species that use these marsh areas as hatcheries and nurseries for fry which ultimately migrate to the coastal fishing waters.¹¹ More than ninety percent of the marine fish harvested by American fishermen come from the continental shelf,¹² and over two-thirds of these fish spend either their larval years or some period between spawning and adulthood in these estuarine waters.¹³ Further, many commercially valuable shellfish are almost wholly estuarine inhabitants.¹⁴ Thus, estuarine marshes are the very heart of North Carolina's fisheries.

Loss of these marshlands would have a catastrophic impact on coastal commercial and recreational fishing. Although economic data concerning the State's commercial fisheries and fish processing industries are incomplete, it is safe to say that millions of dollars and the livelihoods of thousands of coastal residents are involved.¹⁵ Moreover, although perhaps even more difficult to assess in terms of real dollars, the economic value of tourist and recreational uses of North Carolina's estuarine waters comprises a significant contribution to the State's economy.¹⁶

Intimately tied to the protection and preservation of this important resource are complex questions of legal ownership and state governmental power. Most residents assume that North Carolina's coastal marshes and waters are public property, available for recreational use by all. In legal parlance, the phrase "public trust rights" has been used to articulate this perception—that anyone may boat, fish, or swim in the estuarine waters or navigate, hunt, or fish in the adjoining marsh areas.¹⁷ However, it has also long been true that many

North Carolina's coast is rich (or shall we say poor) in salt marshes. If one has something of the tastes of the naturalist or an artist he will feel very sure that these vast salt-water grass and rush-covered areas have much wealth in them, whereas to the economist's mind they are but waste land.

B. WELLS, *THE NATURAL GARDENS OF NORTH CAROLINA* 18-19 (1967). Although Wells was incorrect in his assessment of the economic status of coastal marshlands at that time, the aesthetic magnificence that he perceived in these areas is self-evident. Even the most casual visitor to the seashore cannot help but be impressed by the broad, flat, uninterrupted expanse of the yellow-green smooth cordgrass (*Spartina alterniflora*) contrasting with the intense blues of the estuarine waters, or by the sunlit gold of sea oats (*Uniola paniculata*) dancing along the dunes in the onshore breeze. The closer observer who pursues the wonders of the marshlands can scarcely overlook the delicate, lilac autumn blooms of the sea lavender (*Limonium*), nor forget the graceful form of a marsh-feeding heron returning to its roost at day's end, silhouetted against a darkening sky.

9. J. TEAL & M. TEAL, *LIFE AND DEATH OF THE SALT MARSH* 196-98 (1969); Odum, *The Role of Tidal Marshes in Estuarine Protection*, in *ESTUARINE RESOURCES*, *supra* note 5, at 15.

10. J. TEAL & M. TEAL, *supra* note 9, at 198.

11. Adams, *supra* note 1, at 3.

12. W. CLAPHAM, *supra* note 3, at 169.

13. *Id.*

14. Adams, *supra* note 1, at 3.

15. See Cooper, *Salt Marshes and Estuaries: Cradle of North Carolina Fisheries*, in *ESTUARINE RESOURCES*, *supra* note 5, at 11, 12; Thayer, *The Estuary—An Area of Environmental Concern*, in *COASTAL DEVELOPMENT AND AREAS OF ENVIRONMENTAL CONCERN*, *supra* note 1, at 59, 62.

16. See, e.g., Thayer, *supra* note 15, at 62-63.

17. See, e.g., Act of May 30, 1985, ch. 277, 1985 N.C. Adv. Legis. Serv. 7 (codified at N.C.

individuals and corporations have claimed private ownership of both marsh and open water areas within the State's estuarine complex.¹⁸ Furthermore, the assertion is often made that this private ownership is not encumbered by "public trust rights"¹⁹ and that the public, therefore, may be excluded.²⁰ In an effort to determine the extent of these private claims, the North Carolina General Assembly enacted a 1965 statute that required anyone claiming title to marshland or other "submerged lands" to file notice of the claim with the State by January 1, 1970. Failure to do so would extinguish such claims.²¹ It was intended that the State, having received notice of a claim, would seek a determination of its validity;²² however, the number and extent of the claims surprised most people. In all, over 10,000 claims were filed.²³ The heaviest concentration of claims pertained to the waters and marshland south of Morehead City, where seventy percent of the estuarine submerged lands are claimed by private interests.²⁴ Given the resources the State was willing or able to allocate to a task of such magnitude, a timely judicial or case-by-case resolution of the validity of these claims began to appear highly unlikely.²⁵ In May of 1985 the North Carolina General Assembly passed a series of statutes²⁶ in an attempt to resolve claims and attendant legal issues.²⁷ Some issues are resolved by the legislation; most are not.

The authors of this Article are greatly concerned about the debate over property ownership within the State's estuarine complex. The dispute may spawn a legal war of immense proportions, in which private interests and resources may overwhelm the public and the outcome of which may be determined by common-law rules that were shaped at a time much removed in terms of the present-day understanding of the ecological and economic significance of these areas. For these reasons, more public debate is needed on the issues involved. With this need in mind, this Article examines a series of related topics: (1) the 1985 legislation; (2) the history of protected public commercial and rec-

GEN. STAT. § 1-45.1 (Supp. 1985)); see also Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 478-91 (1970) (explaining the public trust doctrine); Comment, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C.L. REV. 159, 175-91 (1985) (discussing application of public trust doctrine to North Carolina beaches).

18. NORTH CAROLINA LEGISLATIVE RESEARCH COMM'N, COASTAL SUBMERGED LANDS: REPORT TO THE 1985 GENERAL ASSEMBLY OF NORTH CAROLINA 6 (1984) [hereinafter cited as LEGISLATIVE RESEARCH COMM'N]; see also Comment, *Defining Navigable Waters and the Application of the Public-Trust Doctrine in North Carolina: A History and Analysis*, 49 N.C.L. REV. 888, 897-99 (1971) (land under navigable water conveyed out following Civil War).

19. LEGISLATIVE RESEARCH COMM'N, *supra* note 18, at 9-10; Raleigh News & Observer, Dec. 9, 1984, at A1, col. 2.

20. Raleigh News & Observer, Dec. 9, 1984, at A1, col. 2.

21. N.C. GEN. STAT. §§ 113-205 to -206 (1983); see also Comment, *supra* note 18, at 899-900 (suggesting that § 113-205 fails to adequately define navigable waters).

22. LEGISLATIVE RESEARCH COMM'N, *supra* note 18, at 2.

23. *Id.* at 2-3.

24. *Id.* at 6.

25. See *id.* at 4-7.

26. Acts of May 30, 1985, chs. 276-279, 1985 N.C. Adv. Legis. Serv. 6-9 (codified at N.C. GEN. STAT. §§ 1-45.1 & 105-151.12(f) (1985) (amending N.C. GEN. STAT. §§ 105-151.12, 113-206(a1), 146-6(1)(b), 146-6(2)(f)).

27. LEGISLATIVE RESEARCH COMM'N, *supra* note 18, at 18-24.

reational uses of North Carolina's navigable waters, of which estuarine marshes are a part; (3) the most important sources of private ownership claims in North Carolina—Board of Education deeds,²⁸ the Marketable Title Act,²⁹ adverse possession,³⁰ and the Torrens Act³¹—and the relationship between these claims and public rights in navigable waters, estuarine marshland, and other submerged lands; and (4) the relationship between the potential legal resolutions of these claims and the power of the State to protect estuarine marsh from dredging and filling activities.

The Article concludes that many claims of private ownership of estuarine marshes are valid. Nevertheless, until these estuarine marshes and submerged lands are filled, the public is entitled to make use of them and the waters overlying them in any manner consistent with public trust rights. Furthermore, in most situations the State may legitimately prevent the destruction of such public trust rights by denying a private landowner a permit to fill estuarine marshland, without engaging in an unconstitutional taking without compensation.

II. THE 1985 LEGISLATION

In an attempt to address the legal status of many of the private claims to estuarine marshland,³² the North Carolina General Assembly enacted a series of statutory additions and amendments in May 1985. Unfortunately, the new legislation resolves only the issue of the validity of title to marshland and other submerged land raised above the high water mark; the extent and validity of claims to other estuarine marshland and submerged land are left unresolved.

Many claims to estuarine marshland are based on deeds from the State Board of Education (Board) or its forerunners, the Literary Fund and the North Carolina Literary Board. Two new legislative provisions are directed at such claims—the first applies to land that has already been filled, the second to land that has not.

With respect to land that has been filled, an amendment to section 146-6(b) of the North Carolina General Statutes states that title to land reclaimed through private efforts and within the bounds of a Board deed is vested in the deed holder and not in the State, even if the Board deed included "regularly flooded estuarine marshlands or lands beneath navigable waters."³³ Thus, the

28. See *infra* notes 139-238 and accompanying text.

29. See *infra* notes 239-65 and accompanying text.

30. See *infra* notes 266-90 and accompanying text.

31. See *infra* notes 291-303 and accompanying text.

32. See, e.g., LEGISLATIVE RESEARCH COMM'N, *supra* note 18, at 4-6, 19-23. "Additional laws are in fact needed to address and resolve the claims." *Id.* at 20.

33. The 1985 amendment to N.C. GEN. STAT. § 146-6(b) (Supp. 1985) states:

Title to land so raised, however, does not vest in the State if the land was raised within the bounds of a conveyance made by the State Board of Education, which included regularly flooded estuarine marshlands or lands beneath navigable waters, or if the land was raised under permits issued to private individuals pursuant to G.S. 113-229, G.S. 113A-100 through -128, or both.

This amendment conforms with the action of the Maine legislature, which in 1981 relinquished all State interest in submerged lands filled prior to 1975. ME. REV. STAT. ANN. tit. 12, § 559 (1981).

statute confirms the title to such land raised above the high water mark free of any public trust rights.

With respect to land that has not been raised above the high water mark by filling, North Carolina General Statutes section 146-20.1(a)³⁴ purports to validate³⁵ titles to "swamplands, including regularly flooded estuarine marshlands"³⁶ if such titles were premised on Board deeds. However, subsection (b) of the statute provides that "[a]reas of regularly flooded estuarine marshlands within conveyances validated by subsection (a) remain subject to all public trust rights."³⁷ It has been asserted that despite the title of this section—"An Act To Validate Conveyances of Certain Marshlands by the State"³⁸—the general assembly merely intended to confirm allegedly existing validity of Board of Education deeds to estuarine marshes and to restate the existing law that title to regularly flooded estuarine marshland is permanently encumbered by public trust rights.³⁹ This position presents two problems. First, this position interprets the provision as meaning that the general assembly believed titles to regularly flooded estuarine marshland, predicated on Board deeds, were invalid;⁴⁰ thus, it was free to condition deed validation on a reservation of public trust rights. Yet, as this Article will show, the Board of Education had the power to

34. The pertinent portion of the amendment to N.C. GEN. STAT. § 146-20.1(a) (Supp. 1985) reads:

All conveyances of swamplands, including regularly flooded estuarine marshlands, that have previously been made by the Literary Fund, the North Carolina Literary Board, or the State Board of Education are declared valid, and the person to whom the conveyance was made or his successor in title is declared to have title to the marshland.

35. See *infra* note 39.

36. N.C. GEN. STAT. § 146-20.1 (Supp. 1985).

37. *Id.*

38. Act of May 30, 1985, ch. 278, 1985 N.C. Adv. Legis. Serv. 8.

39. The North Carolina Attorney General's Office asserts that the Board of Education had the power to convey a valid title to regularly flooded estuarine marshland but that such title was permanently encumbered by public trust rights. LEGISLATIVE RESEARCH COMM'N, *supra* note 18, at 9, 11-12. The draft statute prepared by the legislative research commission conformed with this view. This draft statute was entitled "An Act To Confirm The Title To Certain Marshlands Should [sic] By The State Board Of Education." *Id.* at G-8; see also *id.* at 22 (recommending legislation to "confirm and validate title"). The draft statute also states that "the title [sic] to all marshland, including regularly flooded estuarine marshlands . . . are hereby validated, ratified and confirmed." *Id.* at G-8. The House Committee sent the draft to legislative drafting, where it appears the Act was retitled "An Act To Validate Conveyances Of Certain Marshlands By The State." Telephone conversation with Daniel McLawhorn, Assistant Attorney General of the State of North Carolina, Environmental Section (Nov. 24, 1985). Certain language in the body of the statute was also changed and all references to confirming titles were eliminated. N.C. GEN. STAT. § 146-20.1(a) (Supp. 1985) was revised to read: "(a) Validation.—All conveyances of swamplands, including regularly flooded estuarine marshlands . . . are declared valid." Arguably, the language change was cosmetic and did not represent any underlying assumption of the general assembly that the titles were invalid and required validation. The change from "validated, ratified, and confirmed" to "declared valid" may have been based on the incorrect assumption that "ratified" and "confirmed" were redundant. *But see infra* note 40.

40. The changes in the statutory title and body, discussed *supra* note 39, as the legislation progressed from the Legislative Research Commission to actual passage can be construed as evidence that the statute as passed by the general assembly represents a judgment that Board of Education deeds to estuarine marshlands are invalid. The elimination in the enacted statute to all references to *ratification* or *confirmation* can reasonably be interpreted as the General Assembly's rejection of the Legislative Research Commission's underlying assumption that the Board of Education deeds to estuarine marshlands were valid conveyances. The statute, therefore, acts to validate the previously invalid deeds.

grant a valid title to some regularly flooded estuarine marshes.⁴¹ Second, even if the general assembly believed that Board deeds were valid,⁴² the legislation assumes any title granted by the Board was permanently encumbered by public trust rights. This assumption, however, is arguably incorrect. We contend that a valid conveyance by the Board of Education carried with it the right to extinguish any public trust rights by filling the marsh.⁴³ If our contention is correct, the new statute cannot recapture extinguishable public trust rights by retroactively limiting the property rights of the present owners of such lands.⁴⁴ Any recapturing of public trust rights will require that current Board deed holders be compensated for the loss of the vested right to extinguish the public trust.⁴⁵

A substantial number of the claims to estuarine marshland may be predicated upon adverse possession; however, because no comprehensive legal inventory of the thousands of claims exists, the extent to which adverse possession may be the source of title is unknown.⁴⁶ Nonetheless, to meet this contingency, newly enacted section 1-45.1 expressly provides that "[t]itle to real property held by the State and subject to public trust rights may not be acquired by adverse possession."⁴⁷ The statute also contains the first legislative definition of "public trust rights" and provides that they "include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State."⁴⁸ Although this provision purports to be a declaration of existing State policy,⁴⁹ persons whose claims are based on adverse possession will undoubtedly argue that prior to 1985 the North Carolina adverse possession statute covering State-owned lands⁵⁰ was applicable to public trust land. If this argument is successful, an attempt by the State to terminate rights that had accrued prior to the passage of section 1-45.1 might constitute an unconstitutional "taking" of private property without adequate compensation. As a result, the statute would operate prospectively, barring only future claims.⁵¹

41. See *infra* text accompanying notes 144-57.

42. See *supra* note 40.

43. See *infra* note 304 and accompanying text.

44. See, e.g., *Bolick v. American Barmag Corp.*, 306 N.C. 364, 371, 293 S.E.2d 415, 420 (1982) (when retroactive application of statute would have effect of destroying vested right, statute will be viewed as operating prospectively only).

45. See *infra* note 339 and accompanying text.

46. Telephone conversation with Daniel F. McLawhorn, Assistant Attorney General of the State of North Carolina, Environmental Section (Nov. 24, 1985).

47. N.C. GEN. STAT. § 1-45.1 (Supp. 1985).

48. *Id.*

49. The short title of House Bill 112 is "Public Trust Land Ownership"; however, the bill's full title is "An Act to Declare the Existing Policy of the State that Title to Land Subject to Public Trust Rights May Not Be Acquired By Adverse Possession." Act of May 30, 1985, ch. 277, N.C. Adv. Legis. Serv. 7 (codified at N.C. GEN. STAT. § 1-45.1 (Supp. 1985)).

50. N.C. GEN. STAT. § 1-35 (1983).

51. See, e.g., *Board of Trustees v. Paradise Fruit Co.*, 414 So. 2d 10 (Fla. Dist. Ct. App. 1982) (1978 amendment to Florida Marketable Act exempting state sovereignty lands under navigable waters held not to apply retroactively); see also *Bolick v. American Barmag Corp.*, 306 N.C. 364, 371, 293 S.E.2d 415, 420 (1982) (the North Carolina General Assembly did not intend for sections of the Products Liability Act to be applied retroactively); *infra* note 241 (discussing judicial decisions applying Marketable Record Title Act to state sovereignty lands absent prior reservation of State's rights by deed).

Any hope that the general assembly, the public, private claimants of estuarine marshland and other submerged lands, and title insurance companies may have had that the 1985 legislation would lead to the expeditious resolution of controversies regarding the extent and validity of claims based on Board deeds and adverse possession to estuarine marshland and other submerged land appears unwarranted. The new legislation leaves a number of legal questions unresolved and, perhaps, has spawned a few issues of its own. Even if the 1985 legislation has resolved the issues to which it was directed, other significant questions relating to the allocation of public and private property rights to estuarine lands remain unanswered.

III. THE RELATIONSHIP BETWEEN THE PUBLIC TRUST AND NAVIGABLE WATERS

A. *Overview of Development of the Public Trust Doctrine*

1. In General

Looming over any discussion of the ownership of estuarine marshes is the "public trust" doctrine—a tool for judicial review of state action affecting State-owned submerged land underlying navigable waters, including estuarine marshland, and a concept embracing asserted inherent public rights in these lands and waters. This American common-law doctrine, from its roots in English law⁵² through its development in federal and state courts in the United States,⁵³ is the subject of many books and articles.⁵⁴ Rarely does a law review article discussing any aspect of the public trust doctrine fail to repeat its history or to discuss whether the American courts correctly interpreted and applied the English precedents.⁵⁵ The judicial and legislative history of the doctrine in North Caro-

52. For a thorough review and analysis of the development of public and private proprietary rights in submerged land under English common law, see Jampol, *The Questionable Renaissance of the Tidelands Trust Doctrine in California*, 13 SW. U.L. REV. 1, 19-23 (1982); Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. FLA. L. REV. 561, 564-69 (1982).

53. See, e.g., *Shively v. Bowlby*, 152 U.S. 1, 47-50 (1894) (submerged land under navigable waters located within a territory of the United States is held by the United States government in trust for future states); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 435-36, 452-56 (1892) (general language in earlier Supreme Court opinions that state has absolute ownership and power to dispose of lands under navigable waters irrespective of any trust is qualified; Court limits state's power to dispose of lands under any navigable waters to cases in which disposal will not impair the public's interest in remaining lands and waters); *Hardin v. Jordan*, 140 U.S. 371, 381-82 (1891) (submerged lands belong to state in its sovereign capacity; disposition of such lands is a question of state law); *Packer v. Bird*, 137 U.S. 661, 671 (1891) (state law determines ownership rights in lands under navigable waters); *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 406-18 (1842) (discussing the differences between the manner in which the Crown and English proprietors held title to submerged land and the manner in which a state held title; suggesting that the power of a state legislature, as a representative of the people, to dispose of submerged lands is limited only by the state and federal constitutions); *Arnald v. Mundy*, 6 N.J.L. 1 (N.J. 1821) (origin of the public trust doctrine in the United States).

54. E.g., Jampol, *supra* note 52, at 19-23, 34-38, 63-74; MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U.L. REV. 511, 545-68 (1975); Rosen, *supra* note 52, at 563-80; Sax, *supra* note 17, at 475-78.

55. E.g., Jampol, *supra* note 52, at 34-38, 63-74; Rosen, *supra* note 52, at 569-80; Comment,

lina is explored in several excellent articles.⁵⁶ This evolution and history will not be repeated here. Instead, drawing on this wealth of judicial and academic scholarship, this section offers a number of observations about the general nature of the public trust doctrine and its impact on the alienability of submerged land.

At the time of independence and formation of the United States, title to all lands underlying navigable waters vested in the individual states unless the English Crown or the colonial governments had previously issued valid grants to such lands.⁵⁷ The concept of state ownership flowed from the assumption that public ownership was essential to prevent private individuals from asserting monopolistic rights that would inhibit economic growth.⁵⁸ This assumption is easily understood when placed in its historical context—America was a developing country huddled on the shore of the Atlantic Ocean; lacking roads, it depended heavily on water routes for the transportation of its people and goods.⁵⁹ Fishing

The Public Trust Doctrine in Maine's Submerged Lands: Public Rights, State Obligation and the Role of the Courts, 37 ME. L. REV. 105, 120-26 (1985).

56. *E.g.*, Rice, *supra* note 2; Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C.L. REV. 1 (1972); Comment, *supra* note 18.

57. *See, e.g.*, Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 410, 416 (1842) (at outset of American Revolution, people of each state became sovereign and in that character held absolute title to all navigable waters and soils under them); Rosen, *supra* note 52, at 572-75.

58. *See, e.g.*, Shively v. Bowlby, 152 U.S. 1 (1894). In *Shively* the Court discussed the common-law public and private rights in lands underlying navigable waters, stating:

[S]uch waters, and all the lands which they cover . . . are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, . . . and for the purpose of fishing by all the King's subjects. Therefore the title, *jus privatum*, in such lands, . . . belongs to the . . . sovereign; and the dominion thereof, *jus publicum*, is vested in [the sovereign] . . . for the public benefit.

Id. at 11. Another example is *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892). In *Illinois Central* the Supreme Court described the state's title to submerged lands under navigable waters as "different in character from that which the State holds in lands intended for sale," in that title to such submerged land "is a title held in trust for the people of the State" for the purposes of unimpeded navigation, commerce, and fishing. *Id.*; *see also* Packer v. Bird, 137 U.S. 661, 666-67 (1891) (susceptibility to use as highways of commerce is basis for public control over waters and exclusion of private ownership of either waters or soils underlying them); Barney v. Keokuk, 94 U.S. 324, 338 (1877) ("[P]ublic authorities ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience."); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 229-31 (1973) (as the population moved inland, lakes and rivers were as important as turnpikes and roads as arteries of commerce and economic development; development necessitated that these navigable waters be free of monopolistic control).

To encourage people to build wharves, some colonial governments allowed owners of land bounded by navigable waters greater rights in the shore below the high water mark. Such rights, however, were subordinate to the general public right of navigation and fishing. *Shively*, 152 U.S. at 11-18; Comment, *supra* note 55, at 110-11 (1985). *See generally* Rosen, *supra* note 52, at 563-72, 575 (discussing development of the public trust doctrine in the United States and the peculiarly American notion that protection of public rights in navigable waters requires public ownership of the underlying lands in an inalienable public trust).

59. *E.g.*, H. LEFLER & A. NEWSOME, NORTH CAROLINA 103 (3d ed. 1973). The authors noted, "[T]hough North Carolina has few good outlets for ocean commerce, it had an excellent system of inland waterways—sounds, rivers, and creeks. These waterways were adapted to small craft and became the chief arteries of trade and travel." *Id.* As inland North Carolina became settled, the inland waterways gradually ceased to be of major importance.

Crooked and uncharted channels, sand bars, logs, fish dams, and other obstructions in streams caused many accidents and led to legislation making it the duty of overseers of roads . . . to clear streams of obstructions and otherwise improve river channels. These

was a major economic activity. Unlike uplands and other vacant and unappropriated state lands where the promotion of commerce required the selling or giving of the lands to individuals for settlement and development, promotion of coastal commerce required keeping the waters unobstructed and open as public highways for the movement of people and goods.⁶⁰

The important role of this limited resource—navigable waters—in the economic development of this country was reflected in the common-law concept that the navigable waters and submerged lands were held by the state government in trust for the benefit and use of all the people of the state.⁶¹ Any assertion of private title to submerged lands or of special private rights superior to the public rights in navigable waters was suspect. Consequently, the courts carefully scrutinized legislative grants purporting to convey such titles or rights.⁶² Frequently, by applying rules of statutory interpretation and legislative intent, the courts were able to avoid delicate questions of the separation of powers and extra-constitutional limits to legislative authority.⁶³ The courts often reached the conclusion that the purported grant did not convey fee title to submerged lands or special rights in the waters, but instead conveyed either a more limited right or interest, or granted rights only to riparian⁶⁴ or littoral⁶⁵ uplands and not to adjacent waters and submerged lands.⁶⁶ Occasionally the facts of a case precluded this avenue of escape, and when confronted with purported grants of submerged land that might have the potential to impair the government's immediate or long-term ability to promote water commerce and related activities, the court held the grants void as beyond the scope of the legislative power.⁶⁷ None-

laws were never effectively enforced, and difficulties of trade and travel became so serious that inland waterways ceased to be of major importance by the time of the Revolution.

Id. But see *infra* notes 99-108 and accompanying text (discussing the economic importance of inland rivers for the transportation of logs to mills and the corresponding inclusion of floatable waters into *Glen* class two navigable waters).

60. *Supra* note 59. The importance of water commerce during the formative period of the United States is reflected in the grant of admiralty and maritime jurisdiction to the federal government. U.S. CONST. art. III, § 1; L. FRIEDMAN, *supra* note 58, at 228-32.

61. See *supra* note 53.

62. *E.g.*, *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452-54 (1892); *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 527-28, 606 P.2d 362, 369, 162 Cal. Rptr. 327, 334, *cert. denied*, 449 U.S. 840 (1980); *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 44 S.E. 39 (1903); *Tatum v. Sawyer*, 9 N.C. (2 Hawks) 226, 229 (1822); *State v. Forehand*, 67 N.C. App. 148, 150, 312 S.E.2d 247, 249, *disc. rev. denied*, 311 N.C. 307, 317 S.E.2d 904 (1984).

63. See generally Comment, *supra* note 55, at 128-30 (discussion of improper use of public trust as extra constitutional check on legislative action).

64. Riparian uplands are those bounded by a river, stream, or similar watercourse. The term "riparian" is sometimes erroneously used in reference to the seashore or to the shore of a lake or other large body of water not having the character of a stream. The proper term to be employed in the latter context is "littoral." See BLACK'S LAW DICTIONARY 1192 (5th ed. 1979).

65. "Littoral" means literally "of the seashore." A littoral property owner holds land abutting the ocean or other large body of water.

66. *E.g.*, *Shively v. Bowlby*, 152 U.S. 1 (1893) (federal grant did not extend below high water mark); *Atlantic & N.C. R.R. v. Way*, 169 N.C. 1, 4-5, 85 S.E. 12, 14-15 (1915) (statute strictly construed to limit grant to wharf easement); *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 541, 44 S.E. 39, 47 (1903) (grant to riparian owner of land covered by navigable water conveys only an easement); *State v. Forehand*, 67 N.C. App. 148, 150, 312 S.E. 247, 249 (1984) (grant conveys easement to erect wharf and not fee ownership).

67. In the polestar case of *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892), the United States Supreme Court held invalid an Illinois legislative grant to a railroad purporting to convey title to

theless, no court has held that the public trust doctrine constitutes an absolute prohibition on the legislature's power to alienate title to submerged land. In fact, when a grant of submerged land has been perceived as consistent with the public interest, courts have declared the grant valid.⁶⁸ Thus, the public trust doctrine is a device through which courts have attempted to circumvent or, in light of increased public awareness, force reconsideration of legislative enactments that do not appear to have adequately identified and considered the interests of the public.⁶⁹

most of the submerged land in Chicago's harbor. *Id.* at 460. Although the authority and underlying rationale for the holding remains unclear, the Court suggested that divestment of title to submerged lands was akin to an attempt by the legislature to convey state police powers to private citizens. *Id.* at 454-55.

Indeed, the Supreme Court, speaking of its holding that the legislative grant of all submerged lands along the Chicago waterfront was invalid, stated: "[W]e cannot, it is true, cite any authority where a grant of this kind has been held invalid," *id.* at 455, but stated that, at any rate, such a grant was "hardly conceivable." *Id.* at 454. The decision in *Illinois Central* has been criticized as result oriented, short on analysis, and limited in applicability by its unique factual content. Jampol, *supra* note 52, at 36-37; Rosen, *supra* note 52, at 578-79.

In other cases, however, the Supreme Court and the courts of several states have upheld legislative grants of submerged land on the theory that state legislatures, the elected representatives of the people, have the power to determine whether submerged lands should remain in public or private control. *See, e.g.,* Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651, 655-56 (1927) ("nature and extent of rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law"); New York v. New York & Staten Island Ferry Co., 68 N.Y. 71, 78 (1877) ("[T]he legislature may, as representative of the people, grant the soil, or confer an exclusive privilege in tidewaters, or authorize a use inconsistent with the public right."); *cf.* International Paper Co. v. State Highway Dep't, 271 So. 2d 395, 400-01 (Miss. 1972) (Smith, J., dissenting) (public is free to act through freely chosen representatives to dispose of submerged lands), *cert. denied*, 414 U.S. 827 (1973).

68. In *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 460 (1892), the Supreme Court qualified its statement that a legislative grant of fee title to submerged lands is invalid. The Court stated that the legislature had the power to grant title to submerged land when the grant was for a purpose consistent with the public interest in the land and waters or when the transfer of the particular tract did not substantially impair the public interest in the remaining lands and waters. *Id.* at 452, 455-56. These qualifications are a recognition that some submerged land must be sold to private parties if the development of facilities necessary to conduct or expand water commerce is to occur and that some submerged land may be so marginally related to water commerce that any potential for aiding in the state's development lies outside of water commerce. Thus, continued state ownership and control is unnecessary. Considerable deference would be granted to the legislature in making a determination that a sale of submerged land for the purpose of constructing wharfs and similar facilities was necessary to develop water commerce or that parcels of submerged land were of marginal value to any water commerce activity and thus could be sold and developed, if possible, as private enterprise saw fit. Rosen, *supra* note 52, at 580; Comment, *supra* note 55, at 110-11. Shallow estuarine marshes, whose ecological value was not fully appreciated at the time of the decision, appeared to be land of such marginal utility for water commerce that disposal would not adversely affect the public interest. *See, e.g.,* Kelly v. King, 225 N.C. 709, 713, 36 S.E.2d 220, 222 (1945) (salt marsh); Home Real Estate Loan & Ins. Co. v. Parmele, 214 N.C. 63, 70, 197 S.E. 714, 718 (1938) (mud flats and marshes). The value of estuarine marshes was perceived in terms of the funds their sale might generate for other public purposes such as public education. *See, e.g.,* State v. Brooks, 279 N.C. 45, 54, 181 S.E.2d 553, 558-59 (1971) (Board of Education vested with title to all swamp lands owned by State of North Carolina as public fund for education and establishment of public schools). In *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842), the Supreme Court held that a proprietor's grant to tidelands was invalid, but upheld the validity of the claim of a state oyster fishery grantee.

69. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 460 (1892); Sax, *supra* note 17, at 488-89.

The legislature's mandate is to act in the public interest for the public good and welfare. *Id.* at 490-91; Comment, *supra* note 55, at 130-31. To a considerable extent, the determination of what is or is not in the public interest is left to the legislature on the assumption that elected representatives are the best judges of what those represented believe to be in their interest. However, when the courts conclude that the legislature has not given careful consideration to the identification and

2. In North Carolina

North Carolina has long recognized the concept that navigable waters and underlying submerged land are held by the state in trust for public use.⁷⁰ The origin of the public trust doctrine in North Carolina can be traced at least to the 1822 case of *Tatum v. Sawyer*⁷¹ in which the North Carolina Supreme Court stated:

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 presumed not to have been within the intention of the legislature.⁷²

The idea that navigable waters and underlying submerged land are presumed to be reserved for public use and not subject to private appropriation has continued to the present day.⁷³

Some North Carolina cases contain dicta⁷⁴ and citations⁷⁵ that suggest a limit on the legislative power to dispose of submerged lands; either all conveyances of submerged lands would be subject to the public trust uses⁷⁶ or, at the very least, the general assembly could never cede the power to regulate the development and use of submerged land to protect the navigability of waters useful for commerce, trade, and transportation.⁷⁷ The North Carolina courts, however, have never expressly held that the general assembly was unable to enact legislation which would permit submerged land underlying navigable waters to

weighing of the public interests and, perhaps, has too readily succumbed to the pressures of private interests, they force the legislature to reconsider its enactments in light of an increased public awareness of the stakes involved. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 460 (1892); Sax, *supra* note 17, at 488-89. It is in this way that the public trust doctrine operates as a means of reviewing legislative action to ensure that the public interests have been adequately considered. In a democratic society the legislature, the elected representatives of the people, should have the ultimate power to determine whether the alienation of State-owned submerged lands is in the public interest. See *supra* note 67; Berland, *Toward the True Meaning of the Public Trust*, 1 SEA GRANT L.J. 83 (1976); Jampol, *supra* note 52; Comment, *supra* note 55, at 123, 128-30.

70. See *McKenzie's Ex'rs v. Hulet*, 4 N.C. 613, 615, Taylor 442, 443 (1817) (navigation may not be obstructed by works or fixtures placed on oyster rocks covered at high tide by water); cf. *Jones v. Jones*, 2 N.C. 488, 1 Hayw. 392 (1797) (rocks above surface of river water, but not river bed, are subject to entry and grant as vacant property).

71. 9 N.C. (2 Hawks) 226 (1822).

72. *Id.* at 229.

73. E.g., *Swan Island Club v. White*, 114 F. Supp. 95, 98-99, 103-05 (E.D.N.C. 1953), *aff'd sub nom.* *Swan Island Club v. Yarbrough*, 209 F.2d 698 (4th Cir. 1954); *Bell v. Smith*, 171 N.C. 116, 118, 87 S.E. 987, 989 (1916); *State v. Twiford*, 136 N.C. 603, 607, 48 S.E. 586, 587-88 (1904); *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 526, 44 S.E. 39, 42 (1903); *Hutton v. Webb*, 126 N.C. 897, 900, 36 S.E. 341, 342 (1900); *State v. Forehand*, 67 N.C. App. 148, 150-51, 312 S.E.2d 247, 249 (1984).

74. E.g., *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 525-28, 44 S.E. 39, 41-42 (1903) (extensively quoting with approval Justice Field's majority opinion in *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892)); *Ward v. Willis*, 51 N.C. (6 Jones) 183, 185-86 (1858) (general assembly may dispose of tidelands for "the promotion of trade and the growth of a commercial town").

75. See *supra* note 74.

76. *Hutton v. Webb*, 126 N.C. 897, 901, 36 S.E. 341, 342 (1900).

77. *Town of Shelby v. Cleveland Mill & Power Co.*, 155 N.C. 196, 201, 71 S.E. 218, 220 (1911) (State cannot divest itself of the right to exercise police power for general good).

be privately appropriated.⁷⁸ Thus, in determining title to submerged lands, the two major questions in North Carolina are whether the general assembly authorized the conveyance of the submerged lands and, if it did, what effect the conveyance has on the existing public trust uses. Subsequent sections of this Article explore these questions.

Before examining the effect of any State conveyances on the public trust uses, it is necessary to identify what activities constitute public trust uses. As have most state courts, North Carolina courts have recognized the concept of the public trust as open-ended, thereby encompassing extant water uses. In early North Carolina history the important uses were commerce, travel, and fishing.⁷⁹ Over the years other uses, now reflected in the new North Carolina legislation,⁸⁰ were recognized.⁸¹ At the turn of the century, the North Carolina Supreme Court stated that trust uses included both pleasure and commercial

78. In fact, the North Carolina Supreme Court has stated that the State, if it wished, could grant title to submerged land to private parties. *See, e.g.,* Home Real Estate Loan & Ins. Co. v. Parmele, 214 N.C. 63, 68-69, 197 S.E. 714, 718 (1938) (The State may sell lands below the highwater mark; however, North Carolina statutory law provides only two methods by which the State may part with title to public lands.); *Hutton v. Webb*, 126 N.C. 897, 904-07, 36 S.E. 341, 343-44 (1900) (Clark, J., dissenting) (bed of floatable stream may be granted to riparian owners for uses not in conflict with public's floatage rights); *Hatfield v. Grimsted*, 29 N.C. (7 Ired.) 139, 140-41 (1846) (holding an 1839 grant of nontidal sound shoal land valid); *cf. State v. Glen*, 52 N.C. (7 Jones) 321, 333 (1859) (tideland may be subject of direct, special legislative grant). *But see* *Ward v. Willis*, 51 N.C. (6 Jones) 183, 186 (1858) (per curiam) (general assembly may dispose of submerged lands for "the promotion of trade and the growth of a commercial town, accessible to vessels").

Language to the effect that the State cannot convey submerged lands is frequently followed by a citation to a statutory restriction on such conveyances. *See, e.g.,* Home Real Estate Loan & Ins. Co. v. Parmele, 214 N.C. 63, 69, 197 S.E. 714, 718 (1938); *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 530-31, 44 S.E. 39, 44 (1903). It appears that, in this context, the word "State" does not refer to the general assembly and its powers, but merely to the lack of legislation authorizing any agency in the State to dispose of such lands. This interpretation would be consistent with the general philosophy of the North Carolina courts that the only restrictions on legislative power are those expressly stated in the North Carolina Constitution or contained in provisions of the federal constitution made applicable to the states, *see Gregory v. Forbes*, 96 N.C. 77, 81 (1877); *State v. Glen*, 52 N.C. (7 Jones) 321, 324 (1859), a philosophy which for the most part has been adhered to by the courts.

It is interesting that in *Glen*, the court stated that "it has become a settled and invariable rule with the courts of this State, never to pronounce an act of the Legislature unconstitutional and void, unless there is a clear repugnance between its provisions and the Constitution." *Id.* at 324. The court then held that the specific legislation constituted an unconstitutional taking without compensation even though there is no express provision in the North Carolina Constitution requiring compensation for governmental takings of private property. *Id.* at 330-31. The constitutional prohibition against such takings is implied by the courts under the provision that "no person shall be . . . deprived of his . . . property . . . but by the law of the land." N.C. CONST. of 1789 declaration of rights 12 (current version at N.C. CONST. art. 1, § 19). The Bill of Rights of the United States Constitution includes an express prohibition against takings. U.S. CONST. amend. V.

79. *See, e.g., Collins v. Benbury*, 25 N.C. (3 Ired.) 277 (1842) (fishing); *Tatum v. Sawyer*, 9 N.C. (2 Hawks) 226 (1822) (common highways).

80. N.C. GEN. STAT. § 1-45.1 (1985) provides:

"[P]ublic trust rights" means those rights held in trust by the State for the use and benefit of the people of the State in common. They are established by common law as interpreted by the courts of this State. They include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State.

81. *E.g., Swan Island Club v. White*, 114 F. Supp. 95, 103-04 (E.D.N.C. 1953), *aff'd sub nom. Swan Island Club v. Yarbrough*, 209 F.2d 698 (4th Cir. 1954); *State v. Twiford*, 136 N.C. 603, 48 S.E. 586 (1904).

navigation.⁸² More recently, hunting and swimming rights have been included.⁸³ For purposes of this Article, all of these uses are presumed to be part of the public trust unless otherwise stated.

B. *The Definition of Navigable Waters in North Carolina*

The definition of "navigable waters" was a crucial part of the common-law doctrine⁸⁴ that purported to limit the State's power to sell or otherwise dispose of submerged lands. Any limitation on the power to convey submerged lands was restricted to lands under navigable waters. The North Carolina law defining the waters over which the public had the right of free, unobstructed navigation evolved over a period of 100 years.

The North Carolina Supreme Court initially adhered to the English common-law⁸⁵ definition of navigable waters as those waters subject to the ebb and flow of the tide—the "ebb and flow rule."⁸⁶ The common-law rule, however, was unsuitable to North Carolina. Portions of the State's massive sounds and extensive network of rivers, although nontidal, nonetheless served as major arteries of travel and transportation and were traditionally areas of extensive public fishing.⁸⁷ Consequently, the North Carolina Supreme Court was faced with

82. *E.g.*, *State v. Baum*, 128 N.C. 600, 38 S.E. 900 (1901). In *Baum* the North Carolina Supreme court stated that "the public have the right to the unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are in their natural condition capable of such use." *Id.* at 604, 38 S.E. at 901.

83. N.C. GEN. STAT. § 1-45.1 (Supp. 1985); *Swan Island Club v. White*, 114 F. Supp. 95 (E.D.N.C. 1953), *aff'd sub nom. Swan Island Club v. Yarbrough*, 209 F.2d 698 (4th Cir. 1954).

84. *E.g.*, *State v. Baum*, 128 N.C. 600, 602-05, 38 S.E. 900, 900-01 (1901) (common law, rather than statute, controls nuisance prosecution for obstructing navigable stream).

85. The common-law definition of navigable waters was set out in *Shively v. Bowlby*, 152 U.S. 1, 11 (1894), as follows:

By the common law, both the title and dominion of the [waters] . . . where the tide ebbs and flows, and of all lands below high water mark . . . are in the King. Such waters, and the lands which they cover . . . at least when the tide is in, are incapable of ordinary and private occupation . . . and their natural and primary uses are public in their nature, for highways of navigation and commerce . . . and for the purpose of fishing by all the King's subjects.

86. *See, e.g.*, *Hatfield v. Grimsted*, 29 N.C. (8 Ired.) 139, 140 (1846) (application of common-law ebb and flow rule); *Tatum v. Sawyer*, 9 N.C. (2 Hawks) 226, 229 (1822) (when tide ceased, land no longer within exemption from entry and grant).

87. *E.g.*, *Resort Dev. Co. v. Parmele*, 235 N.C. 689, 694, 71 S.E.2d 474, 479 (1952); *State v. Baum*, 128 N.C. 600, 602-03, 38 S.E. 900, 900-01 (1901); *Broadnax v. Baker*, 94 N.C. 675, 681 (1886); *State v. Glen*, 52 N.C. (7 Jones) 321, 325 (1859); *Ward v. Willis*, 51 N.C. (6 Jones) 183, 185 (1858); *State v. Dibble*, 49 N.C. (4 Jones) 107, 110 (1856); *Collins v. Benbury*, 25 N.C. (3 Ired.) 277, 281 (1842); *Ingram v. Threadgill*, 14 N.C. (3 Dev.) 59, 61 (1831); *Wilson v. Forbes*, 13 N.C. (2 Dev.) 30, 34-35 (1828); *see R. CONNOR, 1 NORTH CAROLINA: REBUILDING AN ANCIENT COMMON-WEALTH 1584-1925*, at 28-29 (1929); *C. CRITTENDEN, THE COMMERCE OF NORTH CAROLINA: 1763-1789*, at 20 (1936). The importance of fishing in the sounds and coastal waters is illustrated by the history of Beaufort, North Carolina. "Beaufort, founded in 1719 and one of the oldest cities in North Carolina, was first known as 'Fishtown' because so many of its early colonists turned to Pamlico, Core, and Bogue Sounds and the Atlantic Ocean for their living and food." J. FRYE, *THE MEN ALL SINGING* 84 (1978). Most of the early litigation involving titles to submerged land centered on conflicts between fishermen and oystermen. *See, e.g.*, *Collins v. Benbury*, 25 N.C. (3 Ired.) 277, 281 (1842) (fishing); *Ingram v. Threadgill*, 14 N.C. (3 Dev.) 60, 61 (1831) (fishing); *McKenzie's Ex'rs v. Hulet*, 4 N.C. (Taylor) 613, 614 (1817) (oyster fishing); *Jones v. Jones*, 2 N.C. (1 Hayw.) 488, 489 (1797) (fishing); *see also Carson v. Blazer*, 2 Binn. 475, 477-78 (Pa. 1810) (first court in the United States to reject the tidal rule for determining the navigability of waters).

the delicate question whether those holding State grants to riparian land on these nontidal sounds, rivers, and creeks owned only to the high water mark or whether ownership rights extended to the submerged land adjacent to the upland property.⁸⁸ The application of the ebb and flow rule, which would classify nontidal waters as nonnavigable, thereby giving riparian owners title to adjacent submerged land, raised the prospect that riparian owners would assert rights inconsistent with the public right to navigate or fish in these waters.⁸⁹ Like other coastal jurisdictions in which these conditions existed, and in which precedent and custom were not viewed as prior constraints,⁹⁰ North Carolina adjusted its definition of navigable waters.

The "sea vessel test" was the first modification of the common-law rule equating navigable waters with tidal waters.⁹¹ In the 1828 case of *Wilson v. Forbes*⁹² the North Carolina Supreme Court stated that "a creek or river, . . . wide and deep enough for sea vessels to navigate, and without any obstruction to this navigation from its mouth to the ocean, . . . is a navigable stream . . ." ⁹³ Although there is contrary dicta in a few North Carolina cases⁹⁴ and some disagreement among commentators,⁹⁵ the sea vessel test is arguably a companion

88. *E.g.*, *Wilson v. Forbes*, 13 N.C. (2 Dev.) 30 (1828).

89. *See, e.g.*, *State v. Twiford*, 136 N.C. 603, 604-05, 48 S.E. 586, 587 (1904) (placing posts in stream and charging public to fish); *Skinner v. Hettrick*, 73 N.C. 53, 54-55 (1875) (claim of exclusive fishery); *Collins v. Benbury*, 27 N.C. (5 Ired.) 118 (1844) (claim of exclusive fishery); *Collins v. Benbury*, 25 N.C. (3 Ired.) 277, 277-80 (1842) (claim of exclusive right of fishery to a portion of Albemarle Sound).

90. Even those jurisdictions that for other reasons limited the extent of navigable waters to those subject to the ebb and flow of the tide or to those navigable by certain vessels, recognized the need to maintain public access and use of any waterway that could sustain any type of water commerce. These jurisdictions held that, although the submerged land could be privately owned, if the waters were navigable by any type of vessel there was, at a minimum, a public navigation easement through the waters. Comment, *supra* note 55, at 113-15.

91. *See Wilson v. Forbes*, 13 N.C. (2 Dev.) 30, 35, 38 (1828). The *Wilson* court did *not* hold that navigability of a sea vessel was the sole criterion for determining whether nontidal sounds, rivers, and streams were navigable waters not subject to appropriation. Rather, Justice Henderson wrote:

I think it must be admitted, that a creek or river, such as this appears to be, wide and deep enough for sea vessels to navigate, and without any obstruction to this navigation from its mouth to the ocean, and the limit of whose waters is not higher, nor as high as the flowing of the tides upon our sea-coasts, is a navigable stream, within the general rule.

Id. at 35.

In his concurring opinion, Justice Hall wrote: "It may be asked of what size a creek must be to make it navigable? . . . The decision of this case does not call for [the solution of this question]." *Id.* at 38 (Hall, J., concurring).

The sea vessel test as the criterion for navigability for nontidal waters in title determination cases was not adopted until 1842 when the supreme court stated that "any waters, which are sufficient in fact to afford a common passage for all people in sea vessels, are to be taken as navigable." *Collins v. Benbury*, 25 N.C. (3 Ired.) 277, 282 (1842).

92. 13 N.C. (2 Dev.) 30 (1828).

93. *Id.* at 35.

94. *E.g.*, *Parmelee v. Eaton*, 240 N.C. 539, 548, 83 S.E.2d 93, 99 (1954) (ebb and flow rule is not criterion for determining navigability); *Home Real Estate Loan & Ins. Co. v. Parmelee*, 214 N.C. 63, 68, 197 S.E. 714, 717 (1938) (common-law rule discarded in this country); *State v. Dibble*, 49 N.C. (4 Jones) 107, 110 (1856) (the rule adopted in England is entirely inapplicable to North Carolina's situation and has been abrogated); *Wilson*, 13 N.C. at 34 (English common-law rule entirely inapplicable to North Carolina's situation).

95. Compare *Rice*, *supra* note 2, at 801-02 (ebb and flow test and sea vessel test abandoned in favor of single navigability in fact test) with Comment, *supra* note 18, at 906-07 (contending that it is

test to the common-law ebb and flow rule, rather than a substitute.⁹⁶ Under this interpretation the sea vessel test would apply to those waters not subject to tidal influence but nevertheless capable of navigation by sea vessels and thus suitable for public commercial use.⁹⁷

As settlement occurred further upriver⁹⁸ adjacent to waters unsuitable for use by sea vessels but suitable for the movement of goods and people between upriver communities and downriver ports, the supreme court once again confronted the issue of what control upriver riparian owners held over adjacent waters and submerged lands. Once again the court acted to protect the public interest in free navigation and movement of people and goods up and down rivers. In *State v. Glen*⁹⁹ the supreme court created three "classes" of North Carolina waters, two of which were open to free, unobstructed, public navigation. The three classes were: (1) coastal tidewaters, and all other waters that are navigable by sea vessels, the underlying land of which is not subject to entry and grant pursuant to the general entry and grant laws; (2) all watercourses not described above which are sufficiently wide and deep to be navigable by boats, rafts, and flats, the lands under which may be subject to private appropriation but over which there exists a public right of free navigation, and (3) small streams not usable for public intercommunication by inland navigation, the waters and underlying land of which are entirely subject to private appropriation and not subject to any rights of free public use.¹⁰⁰ The primary differences between *Glen* class one and class two waters are that only submerged land underly-

premature to say that North Carolina has arrived at single test for navigability, thereby rejecting the ebb and flow or sea vessel tests).

96. *E.g.*, *Collins v. Benbury*, 25 N.C. (3 Ired.) 277, 282-83 (1842) (common-law rule extended by statute). In a subsequent appeal of this same case the court stated:

[A]t common law, *the land* covered by navigable water, that is to say, an arm of the sea, or a river in which there is a flow and ebb of the tide, *could not be granted*, and that by the statute law of North Carolina, *the same rule* [of nongrantability] *was enacted* in respect to streams that were actually navigable by sea vessels, though they might not have a tide . . . Tide is the ebb and flow of the sea; then as high as salt water is found, so high the tide, the flow of water from the sea, ascends.

Collins v. Benbury, 27 N.C. (5 Ired.) 118, 126-27 (1844).

97. *E.g.*, *Collins v. Benbury*, 25 N.C. (3 Ired.) 277, 282 (1842) (nontidal Albemarle Sound); *Ingram v. Threadgill*, 14 N.C. (3 Dev.) 59, 61 (1831) (common-law rule not applicable to rivers); *Wilson*, 13 N.C. at 30, 35 (nontidal stream).

98. Although the earliest settlements were located along the sounds and rivermouths of North Carolina,

[t]he region was mostly settled from the *inside out* by people coming down from other colonies to the north. They followed the river valleys leading to the coastal sounds. . . . In the early eighteenth century the principal towns of the coast—Bath, Edenton, New Bern, and Wilmington—were founded by people who came to North Carolina from or through more settled colonial regions.

T. SCHOENBAUM, *ISLANDS, CAPES AND SOUNDS* 28 (1982).

99. 52 N.C. (7 Jones) 321 (1859). *Glen* was an obstruction of navigation case, not a title determination case.

100. *Id.* at 333-34. It is difficult to reconcile *Glen's* test for class two waters with *Ingram v. Threadgill*, 14 N.C. (3 Dev.) 59 (1831), in which the court held that the riparian owner had rights to the middle of the Pee Dee river despite the fact that the river, although not currently used, was navigable by batteaux and rafts. The distinction appears to be that the right of navigation was not at issue in *Ingram*; rather, the court considered only the right to fishing. *Id.* at 61-62. If this assumption is correct, *Ingram* may be interpreted as consistent with *Glen*.

ing class two waters were appropriable under the general entry and grant laws¹⁰¹ and that the riparian owner of uplands adjacent to class two waters possessed certain incidental rights unavailable to riparian owners on class one waters.¹⁰² In both class one and two waters, however, there existed a public right of free navigation.¹⁰³

As the timber industry became an increasingly significant aspect of North Carolina's economy, the court, in a series of obstruction of navigation cases,¹⁰⁴ made a final adjustment to the law governing the public navigation of rivers. Many North Carolina rivers not readily navigable by batteaux or rafts nonetheless could be used, on at least a seasonal basis,¹⁰⁵ to float logs to mills for cutting.¹⁰⁶ In *Commissioners of Burke County v. Catawba Lumber Co.*¹⁰⁷ waterways that could be used by the logging industry to float logs to mill sites or other markets were deemed to be class two waters in which the public right of navigation is paramount.¹⁰⁸

101. *Glen*, 52 N.C. at 333-34.

102. See, e.g., *State v. Eason*, 114 N.C. 787, 790-91, 19 S.E. 88, 89 (1894) (grant to riparian proprietor along a navigable stream extends only to low water mark and consequently, adjacent submerged land is not incident to riparian ownership).

103. E.g., *Commissioners of Burke County v. Catawba Lumber Co.*, 116 N.C. 731, 732, 21 S.E. 941, 942 (1895); *State v. Eason*, 114 N.C. 787, 791, 19 S.E. 88, 89 (1894); *State v. Narrows Island Club*, 100 N.C. 477, 481-82, 5 S.E. 411, 412 (1888) (explaining some seemingly inconsistent language in *Glen*); *Broadnax v. Baker*, 94 N.C. 675, 680-81 (1886). In *Hodges v. Williams*, 95 N.C. 331, 335 (1886), the court stated:

The principal . . . is, that whenever a watercourse has a capacity to float freight and passenger boats, whereby they become highways or channels of commerce, the right to use them as such becomes paramount to any rights of a riparian proprietor, or even the owner of the soil over which the waters flow.

Id. at 335 (emphasis added).

104. See *infra* notes 105-15 and accompanying text.

105. *Commissioners of Burke County v. Catawba Lumber Co.*, 116 N.C. 731, 733-34, 21 S.E. 941, 942 (1895) (Catawba and Johns Rivers).

106. *Id.*; *Gwaltney v. Scottish Carolina Timber & Land Co.*, 111 N.C. 547, 553-60, 16 S.E. 692, 693-94 (1892) (MacRae, J., concurring) (discussing the growth of the western North Carolina timber industry and whether streams floatable for logs are within the *Glen* class two waters); *id.* at 560-71, 16 S.E. at 695-98 (Avery, J., dissenting) (expressly endorsing the concept that floatable waters constitute navigable waters).

107. 116 N.C. 731, 21 S.E. 941 (1895).

108. *Id.* at 742, 21 S.E. at 945. *Glen* is generally regarded as the seminal case on navigable waters within this State. Some years after the *Glen* decision, the North Carolina Supreme Court, in a series of cases involving the right to float logs down streams, held that there was a public right to use waters for the transportation of logs in waters that were capable of sustaining such movement even if only on a seasonal basis. E.g., *Commissioners of Burke County v. Catawba Lumber Co.*, 116 N.C. 731, 21 S.E. 941 (1895); *State v. White Oak River Corp.*, 111 N.C. 661, 16 S.E. 331 (1892); *Gwaltney v. Scottish Carolina Timber & Land Co.*, 111 N.C. 547, 16 S.E. 692 (1892). The conclusion that *Commissioners of Burke County* places waterways that can be used to float logs to mill sites or other markets into *Glen* class two waters is based upon a reading of preceding and subsequent "floatability" cases.

The term "floatable waters" first appeared in *McLaughlin v. Hope Mills Mfg. Co.*, 103 N.C. 100, 9 S.E. 307 (1889). In *McLaughlin* Hope Mills Manufacturing Company constructed a dam with a lock across Big Rockfish Creek in Cumberland County. Prior to constructing the dam, the company had petitioned for and received permission from the Cumberland County Board of Commissioners to build the dam. The commissioners had been authorized by the general assembly to "clear out and render navigable Big Rockfish Creek." *Id.* at 102, 9 S.E. at 307. The legislation further provided that "it is made unlawful . . . to obstruct the free navigation of [Big Rockfish Creek] and all owners of dams . . . shall cause to be constructed and kept open . . . good and sufficient slopes for the free passage of all rafts of lumber, timber, turpentine, and other products."

Thus, by the end of the nineteenth century the test for determining whether a particular waterway was open to free and unobstructed public navigation had

Id. Plaintiffs objected to the dam as an obstruction to navigation and sought an injunction. The North Carolina Supreme Court affirmed the trial court's determination that plaintiff was not entitled to an injunction. Therefore, the dam could be constructed, as authorized by the county commissioners. The court stated that "[t]he authority of the Board of County Commissioners, while it stands, and is unimpeached by allegations of fraud or other illegal conduct, is a bar to the remedy sought by the plaintiff in this action." *Id.* at 109, 9 S.E. at 309. The court went on to say: "No special damages is [sic] alleged, and whether, if the dam be a nuisance to the public, the action could be maintained by the plaintiff, as insisted by his counsel and denied by the defendant, is not necessary for us to determine." *Id.* Thus, the decision appears to be grounded in the authority of the county commissioners to authorize the construction of the dam.

In the *McLaughlin* opinion, however, the court suggested that Big Rockfish Creek was a non-navigable stream. According to the court: "Rockfish Creek has not been used for navigation by boats, but only for rafting timber, turpentine, etc., down the stream and it would seem to come within the third class of [Glen waters]." *Id.* (emphasis added). However, the court did not ground its decision on the navigability or nonnavigability of the stream. Finally, near the end of its opinion, the court mentioned H. WOOD, *THE LAW OF NUISANCES* § 462, at 532-33 (2d ed. 1883), stating that Wood

concludes that in this country there are three classes of *navigable streams*: "(1) Tidal streams that are navigable in law; (2) [t]hose that, although non-tidal, are yet navigable in fact for 'boats or lighters,' and susceptible of valuable use for commercial purposes; and (3) [t]hose which are floatable, or capable of valuable use in bearing the products of mines, forest, and tillage of the country it traverses to mills or markets."

McLaughlin, 103 N.C. at 108, 9 S.E. at 309 (emphasis added). The court concluded by saying that there are a number of interesting issues connected with the rights of riparian owners to erect dams and the State to authorize obstructions, but none of the questions were necessary for the determination of the case before it. Based upon *McLaughlin*, one could conclude that floatable streams are *Glen* class three waters, the beds of which are subject to private ownership and the waters of which are under the control of the riparian or bed owners.

In the next floatability case, *State v. White Oak River Corp.*, 111 N.C. 661, 16 S.E. 331 (1892), the supreme court reversed a lower court decision that found the White Oak River Corporation not guilty of obstructing the White Oak River. The company used the river to float logs to its mill, but failed to promptly remove logs that sank during the process. The court found the "stream was capable of being used at all seasons, except in summer, for the purpose of transporting logs to points where they could be sawed into plank or boards, and was therefore a floatable stream, or water-highway of the third class, affording a channel for useful commerce." *Id.* at 613, 16 S.E. at 332. As authority for this statement the court cited *McLaughlin* and H. WOOD, *THE LAW OF NUISANCES*. The court then held that the State had the power to prevent such nuisances by making indictable any act amounting to an obstruction.

In the next case, *Gwaltney v. Scottish-Carolina Timber & Land Co.*, 111 N.C. 547, 16 S.E. 692 (1892), the court reversed a dismissal of a nonsuit for damages caused by defendant's logs to plaintiff's dam. The court reversed because at the point where plaintiff's dam was located, the stream was not floatable. The court granted a new trial for a determination whether the upstream riparian owner's use of the stream to float logs was unreasonable and whether the owner was thus liable for damages to the dam.

In a concurring opinion, Justice MacRae examined how streams useable for floating logs are to be classified. He first quoted Justice Battle's *Glen* water classifications and then stated:

In the third class [Justice Battle] places all rivulets, brooks and other streams which for any cause cannot be used for intercommunication by inland navigation, and these, he says, are entirely the subjects of private ownership.

While it will be noticed that the second class is by definition confined to such as are sufficiently wide and deep to be navigable by "boats, flats and rafts," no mention is made of logs. The timber interests had not then assumed the proportions which they have at this day in North Carolina . . . [I]t may well be that logs would have been included in the list with boats, flats and rafts, if the attention of the learned judge had been called to it.

Id. at 556, 16 S.E. at 693 (MacRae, J., concurring).

Finally, Justice Avery in a dissenting opinion stated: "The best criterion of the navigability of a water course . . . is unquestionably its adaptability for the purposes of useful commerce." *Id.* at 562, 16 S.E. at 695 (Avery, J., dissenting). Justice Avery, who espoused a broad definition of navigability, is an important source because he is the author of the majority opinions in a number of

become one of "floatability."¹⁰⁹ If the waterway in its natural state could be used to transport logs downstream¹¹⁰ or could be navigated by any commercial or recreational craft ("customary craft") capable of transporting people or goods from one point to another,¹¹¹ the waterway was open to public recreational and commercial navigation.¹¹² Although the soil underlying waters that were

subsequent obstruction of navigation cases, including *Commissioners of Burke County v. Catawba Lumber Co.*, 116 N.C. 731, 21 S.E. 941 (1895).

In *Commissioners of Burke County*, Justice Avery wrote, "It seems to be settled law in North Carolina . . . that navigable streams of every class, however defined or distinguished from other water courses, are natural highways, and that the public easement, whatever may be its extent, is paramount to the private right of the riparian proprietor." *Id.* at 732, 21 S.E. at 942. "If these rivers are floatable they are natural highways in which the public have, as in other water highways, an easement—the reasonable use of which is paramount to the rights of all others." *Id.* at 741, 21 S.E. at 945. Admittedly, the court in *Commissioners of Burke County* was concerned only with the relative rights of riparian owners and the public to float logs and did not cite directly to *Glen*. Nonetheless, early in the opinion Justice Avery cited to *McLaughlin* and stated that the *McLaughlin* court adopted the classification of navigable streams set forth in H. WOOD, *THE LAW OF NUISANCES*. Wood's three classifications are only of navigable streams. In *Glen*, also cited in *McLaughlin*, Justice Battle's classifications encompass both navigable and nonnavigable waters. Thus, a reasonable inference is that *Wood* class three navigable waters must fall within the second class of *Glen* waters and not the third class because the third *Glen* class refers to nonnavigable waters. See also *State v. Baum*, 128 N.C. 600, 38 S.E. 900 (1901) (obstruction of a portion of a cove in Currituck Sound).

Subsequently in *State v. Twiford*, 136 N.C. 603, 48 S.E. 586 (1904), the court stated: "The capability of being used for purposes of trade and travel in the usual and ordinary modes is the test [for navigability in fact], and not the extent and manner of such use." *Id.* at 606, 48 S.E. at 587. Thus, we conclude that if waters are floatable the public easement in the waters is not limited to the right to float logs but permits the use of the water for the movement of people and products in any reasonable manner which is suitable to the time and place. See, e.g., *Rice*, *supra* note 2, at 799; Comment, *supra* note 18, at 903-04. Earlier cases may have focused upon the floatage of logs, but the only significant public use of "floatable" waters at that time was for movement of logs. Rivers formerly useable only to float logs may be suitable today for white water rafting and similar activities. Therefore, the easement that exists is an easement to use the waters, not an easement to float logs. See Comment, *supra* note 55, at 113-14 (public has right to use any Maine river capable of floating vessels, rafts or logs, in any manner related to navigation).

109. *E.g.*, *Commissioners of Burke County*, 116 N.C. at 741-42, 21 S.E. at 945; see *Hutton v. Webb*, 126 N.C. 897, 900, 36 S.E. 341, 342 (1900) (public has inherent right to use floatable stream as natural highway); *Broadnax v. Baker*, 94 N.C. 675, 681 (1886) (waters characterized as navigable according to their capacity to float boats used as instruments of commerce).

110. *E.g.*, *Commissioners of Burke County*, 116 N.C. at 741, 21 S.E. at 945 ("If these rivers are floatable they are natural highways in which the public have, as in other water-highways, an easement—the reasonable use of which is paramount to the rights of all others.").

111. In *State v. Twiford*, 136 N.C. 603, 48 S.E. 586 (1904), the North Carolina Supreme Court declared that the "capability of being used for purposes of trade and travel in the usual and ordinary modes is the test and not the extent and manner of such use." *Id.* at 606, 48 S.E. at 587 (emphasis added); see also *State v. Baum*, 128 N.C. 600, 604, 38 S.E. 900, 901 (1901) (public has right to unobstructed navigation in all watercourses capable of such use); *Broadnax v. Baker*, 94 N.C. 675, 681 (1886) (waters do not lose their navigability if intercepted by falls when above and below falls the waters can be used for long distance commerce). But see *McLaughlin v. Hope Mills Mfg. Co.*, 103 N.C. 100, 107, 9 S.E. 307, 309 (1889) (court held that a stream useable for rafting timber, turpentine, and other materials was not navigable). However, in *McLaughlin* the issue involved an obstruction authorized by the county commissioners pursuant to powers granted by State legislation. *Id.* at 107-08, 9 S.E. at 309.

112. *State v. Twiford*, 136 N.C. 603, 607-08, 48 S.E. 586, 588 (1904); *State v. Baum*, 128 N.C. 600, 38 S.E. 900, 901 (1901). Those public rights other than navigation that may exist in class two waters is beyond the scope of this Article; however, *State v. Twiford*, 136 N.C. 603, 608, 48 S.E. 586, 588 (1904), suggests fishing and anchorage, and *Swan Island Club, Inc. v. White*, 114 F. Supp. 95, 104 (E.D.N.C. 1953), *aff'd sub nom.* *Swan Island Club, Inc. v. Yarbrough*, 209 F.2d 698, 702 (4th Cir. 1954), would include fishing and hunting. Although *Glen* recognized that riparian owners on class two waters have certain rights, the court also stated that "the riparian [sic] proprietors paid nothing into the public [sic] treasury for [the soil of the bed of class two waters] . . . , the soil . . . may be granted to others, and the Legislature may, perhaps, resume the incidental rights, for public

neither navigable by sea vessels nor regularly flooded by the tides could be privately owned, any unauthorized obstruction of the public right of navigation constituted a public nuisance.¹¹³ Furthermore, the right of any riparian owner to fish in the waterway or to place structures in it was subordinate to the paramount right of public navigation.¹¹⁴

C. *The Definition of Navigable Waters and State Grants*

During the same time and in some of the same cases in which the North Carolina Supreme Court defined the public right of navigation, the court also addressed the validity of claims to submerged land based on State grants issued pursuant to the general entry and grant laws. Under these laws a person could acquire title to any vacant and unappropriated land that belonged to the State by following the applicable legal requirements.¹¹⁵

In the 1822 case of *Tatum v. Sawyer*¹¹⁶ the court first was confronted with determining whether submerged land under navigable waters was subject to appropriation under the general entry and grant laws. If not, the court would have to decide which test was to be used to determine whether the waters were navigable. In *Tatum* plaintiff claimed title to a parcel of land near Currituck Inlet, basing his claim on a State grant issued in 1819 pursuant to the 1777 entry and grant laws.¹¹⁷ Prior to 1802 the tract covered by plaintiff's grant had been a sandy beach subject to the ebb and flow of the tide, but since 1802, due to the effects of wind and water erosion, high marsh had gradually formed on that tract above the original high water mark.¹¹⁸ Defendant, who claimed title to the disputed parcel, contended that plaintiff's grant was invalid because at the time the entry and grant statute was enacted the land was under navigable water; under the 1777 Act, land under navigable water was not subsequently appropriable.¹¹⁹ However, the court held that "lands covered by navigable waters are not subject to entry But when the cause of that exemption ceased to operate, the exemption itself ceased; and they, like the other vacant lands of the State, be-

use, without making compensation for them." *Glen*, 52 N.C. (7 Jones) at 333-34 (emphasis added except for "perhaps," which is emphasized in original).

113. *E.g.*, *State v. Twiford*, 136 N.C. 603, 48 S.E. 586 (1904) (posts and gate in creek); *Commissioners of Burke County v. Catawba Lumber Co.*, 116 N.C. 731, 21 S.E. 941 (1895) (mill dam); *State v. Narrows Island Club*, 100 N.C. 477, 5 S.E. 411 (1888) (iron posts placed in "Big Narrows," part of Currituck Sound). *But see* *McLaughlin v. Hope Mills Mfg. Co.*, 103 N.C. 100, 9 S.E. 307 (1889) (distinguishable on the ground that the obstruction, a mill dam, was authorized by county board of commissioners pursuant to State legislative grant of authority).

114. *E.g.*, *Commissioners of Burke County*, 116 N.C. at 732, 21 S.E. at 942; *State v. Dibble*, 49 N.C. (4 Jones) 107, 111 (1856).

115. 1777 N.C. Sess. Laws ch. 1.

116. 9 N.C. (2 Hawks) 226 (1822); *see also* *McKenzie's Ex'rs v. Hulet*, 4 N.C. (Taylor) 613 (1817) (rocks and marshes covered by water at flood tide and bare at ebb tide may be subject of a grant pursuant to the entry laws, but any rights are held subject to the public right of navigation); *Jones v. Jones*, 2 N.C. (1 Hayw.) 488 (1797) (rocks above surface of the water appropriable; river bed not appropriable).

117. *Tatum*, 9 N.C. (2 Hawks) at 226-27.

118. *Id.* at 227.

119. *Id.* at 228.

came the subject of entry."¹²⁰ Thus, the critical factor in the court's decision seems to have been the presence or absence of tidal influence at the time the grant was issued. Land under tidal waters at the time of the conveyance was not subject to appropriation, while land not under tidal waters was subject to appropriation.

Six years later, in *Wilson v. Forbes*,¹²¹ the court faced the question whether submerged land under nontidal coastal rivers and streams was appropriable under the general entry and grant laws. Acceptance of the ebb and flow test as the measure of navigable waters for entry and grant purposes presented the possibility of private appropriation of the land underlying the now nontidal Albemarle and Currituck Sounds and portions of Pamlico Sound, and of the beds of all coastal rivers above the tidewater region even though these waters were potentially useable and, in fact, were used by sea vessels moving between the open sea and port facilities.¹²² The court, however, held that a nontidal stream navigable by sea vessels was a navigable water for purposes of the entry and grant laws; thus, the stream's bed was not appropriable.¹²³ Although the *Wilson* court did not specify use or potential use by sea vessels as the only measure of navigability of nontidal waters, later courts focused on the sea vessel language and adopted it as the test of navigability in title determination cases involving nontidal waters.¹²⁴

One commentator has argued that the sea vessel test is the sole test of navigability for title determination purposes.¹²⁵ This argument is supported by citations to statements by the North Carolina Supreme Court that the ebb and flow rule is not the test of navigability for title determination purposes.¹²⁶ However, the court has *never* made such a statement in a general entry and grant title determination case. Furthermore, at least two North Carolina cases support the continued vitality of the ebb and flow test as a companion to the sea vessel test for general entry and grant title determination cases.¹²⁷

The first case, *Hatfield v. Grimstead*,¹²⁸ involved an instance of legislative oversight. When the North Carolina General Statutes were revised in 1839, the general assembly neglected to include in the entry and grant provisions language that the court had previously interpreted as prohibiting the entry and grant of submerged lands under navigable waters,¹²⁹ an omission that was corrected in

120. *Id.* at 229.

121. 13 N.C. (2 Dev.) 30 (1828).

122. *Id.* at 34-35.

123. *Id.* at 35, 38.

124. *See, e.g.,* *Collins v. Benbury*, 25 N.C. (3 Ired.) 277, 282 (1842) (no person has exclusive right of fishery in any navigable waters of the State).

125. Rice, *supra* note 2, at 802.

126. *Id.* at 801-02.

127. *See supra* notes 116-24 and accompanying text.

128. 29 N.C. (7 Ired.) 139 (1846).

129. 1715 N.C. Sess. Laws ch. 6, § 3; 1777 N.C. Sess. Laws ch. 114, § 10 (both as codified in LAWS OF NORTH CAROLINA Potter's Revisal (1821)) (requiring that grants under the general entry and grant statutes be set off from the edge of navigable waters).

1849.¹³⁰ During the hiatus, plaintiff had received a grant to shoal land near Currituck Inlet.¹³¹ The inlet, however, had closed prior to the issuance of the grant. Consequently, at the time the grant was issued, plaintiff's tract comprised submerged land underlying Currituck Sound which, although under water, was no longer subject to tidal influence.¹³² The court upheld plaintiff's grant, reasoning that the removal of the statutory prohibition left only the common-law ebb and flow test in force.¹³³ Under the common law, only submerged land under tidal waters was not subject to general appropriation; the waters of Currituck Sound were no longer tidal. Because the court held that repeal of the statutory prohibition left only the common law in force and because it did not hold that the repeal revived the common-law rule, the court apparently viewed the statutory prohibition as supplemental to the common-law prohibition on alienation of certain submerged lands.

In the second case, *State v. Glen*,¹³⁴ an examination of the court's delineation of class one waters¹³⁵ reveals that the court retained the ebb and flow test for all bays and inlets.¹³⁶ Furthermore, the *Glen* court stated that tidelands are within the prohibition against appropriation under the general entry and grant laws.¹³⁷ Presumably this prohibition includes *all* tidelands, whether or not located in waters navigable by sea vessels. The sea vessel test, therefore, is linked to bodies of water that are nontidal but which, nevertheless, might be useful highways of commerce.

Examination of the cases concerning the validity of titles premised on State grants leads to two conclusions. First, on the basis of both statutory interpretation and public policy, the general rule in North Carolina has long been that land under navigable waters is excluded from the definition of "vacant and unappropriated land" and therefore is not subject to private appropriation under the general entry and grant laws. Second, in determining whether the waters covering the land in question are "navigable," either the ebb and flow test or the sea vessel test may be applied, depending on whether the waters are tidal or nontidal.¹³⁸

130. 1847 N.C. Sess. Laws ch. 36.

131. *Hatfield*, 29 N.C. at 140-41.

132. *Id.* at 139-40.

133. *Id.* at 140. The *Hatfield* court's holding that the legislative omission in the act of 1836 permitted the entry and grant of nontidal submerged lands appears to have been overruled in *Resort Dev. Co. v. Parmele (Parmele II)*, 235 N.C. 689, 71 S.E.2d 140 (1952). An alternate view of *Parmele II* suggests that it reaffirms that part of the *Hatfield* holding which said that in the absence of any broader legislative mandate, the common-law rule is that lands under tidal waters are not subject to entry. The waters involved in *Hatfield*, however, were nontidal, that is, nonnavigable under the common-law ebb and flow rule, so were nevertheless subject to entry and grant. The waters involved in *Parmele II* were both tidal and part of a body of water navigable by sea vessels and thus neither subject to grant under the general entry and grant laws, even though entry and grant occurred during the same period as the *Hatfield* grant, nor subject to grant by the Board of Education.

134. 52 N.C. (7 Jones) 321 (1859).

135. See *supra* notes 99-100, 108 and accompanying text.

136. *Glen*, 52 N.C. (7 Jones) at 333.

137. *Id.*

138. See Comment, *supra* note 18, at 900-07; Schoenbaum, *supra* note 56, at 11-15. But see Rice, *supra* note 2, at 801-02.

IV. SOURCES OF PRIVATE CLAIMS

This section of the Article examines the major sources of private ownership claims to submerged land in North Carolina—Board of Education deeds, the Marketable Title Act, claims of adverse possession, and the Torrens Act—and the relationship between these claims and public rights in navigable waters, estuarine marshes, and other submerged lands.

A. *Board Deeds*

1. The Distinction Between Marshland and Lands Under Navigable Waters

Prior to 1822 North Carolina freshwater swamps and marshland were open to entry and grant pursuant to the general entry and grant laws.¹³⁹ In 1822 the general assembly closed all State-owned swampland and marshland to entry and grant.¹⁴⁰ Three years later a process began through which title to all large tracts of marshland was vested in the State Literary Fund "in trust as a public fund for education and the establishment of common schools."¹⁴¹ Since that time State-owned swampland and marshland have been separated from upland "vacant and unappropriated" State lands. Until 1959, when all remaining State-owned marshland was placed under the control of the Department of Administration (DOA),¹⁴² title to swamps and marshes remained in the Literary Fund or its successors, including the Board of Education, unless sold to private individuals or corporations.

Prior to the turn of the century, private interest in State-owned wetlands pertained primarily to the valuable timber covering the coastal river bottom; little interest was expressed in estuarine marshland. As a result, the Board disposed of only inland freshwater marshes and swamps.¹⁴³ Early in the twentieth century, however, the Board began the process by which it ultimately sold large tracts of estuarine marshland¹⁴⁴ and, in its enthusiasm to raise money for public

139. LAWS OF NORTH CAROLINA POTTER'S REVISAL ch. 202 (1821). The extent to which salt water marshes were subject to entry and grant depended upon whether the marsh was deemed land under navigable waters. *E.g.*, *Tatum v. Sawyer*, 9 N.C. (2 Hawks) 226, 229 (1822).

140. 1822 N.C. Sess. Laws ch. 30, § 1.

141. 1825 N.C. Sess. Laws ch. 1268, § 1. The total prohibition against entry and grant of swamplands was relaxed in 1825 N.C. Sess. Laws ch. 1271, § 1 (as codified in LAWS OF NORTH CAROLINA TAYLOR'S REVISAL (1827)), to allow entry by private persons and grant by the State—not the Literary Fund—of swamp and marshlands that were less than 50 acres and situated between lines of tracts previously granted. The prohibition was further relaxed in 1830, 1830 N.C. Sess. Laws ch. 12, to allow entry and grant of swamps and marshes of less than or equal to 2000 acres in total area that had not been surveyed by the State Board of Internal Improvement with a view toward draining the tract to increase its usefulness and productivity. The effect of the 1830 legislation was to take control of marshes of less than or equal to 2000 acres in total area from the Literary Fund.

142. N.C. GEN. STAT. § 146-2 (1983).

143. Conversations with Daniel F. McLawhorn, Assistant Attorney General for the State of North Carolina, Environmental Section (July 1985).

144. Beginning with *Board of Educ. v. Makely*, 139 N.C. 31, 51 S.E. 784 (1905), the Board went on the offensive and aggressively sought to protect its title interest in the State's swamplands against those who claimed these areas under the general entry and grant statutes. *See also* *Board of Educ. v. Roanoke R.R. & Lumber Co.*, 158 N.C. 313, 317, 73 S.E. 994, 995 (1912) (grants of swampland made pursuant to general entry and grant laws are unauthorized and invalid; Board of Education is

education, occasionally included within its grants large areas of submerged land lying under open water.¹⁴⁵ Although it has always been clear that the Board had no power to dispose of submerged land lying under open navigable water,¹⁴⁶ two questions were left unanswered by the legislation that granted the power to control and dispose of State-owned marshland. First, did the Board have title to both inland freshwater and estuarine marshland? Second, if the Board controlled estuarine marshes but not State-owned land beneath navigable water, how was the dividing line between marshland and such submerged land to be drawn? The first question is easily answered; the second remains the subject of considerable uncertainty and debate.

An examination of pertinent legislation, activities of the Board, North Carolina Attorney General opinions, and North Carolina Supreme Court decisions leaves little doubt that the Board controlled both State-owned freshwater and estuarine marshland. In 1891 the general assembly reorganized the statutes governing the Board and the general entry and grant laws. In so doing, the general assembly not only failed to prohibit expressly the sale of estuarine marshland, but also included in the statutes a broad definition of "swamplands." "Swamplands" was defined, in pertinent part, as "all those lands which have been or may now be known and called 'swamp' or 'marsh' lands, 'pocosin bay,' 'briary bay' and 'savanna.'" ¹⁴⁷ This definition has been retained in substantially the same form to the present day.¹⁴⁸ Even after the general assembly became aware of the Board's sale of estuarine marshland, no attempt was made to modify the definition to exclude estuarine marshland.¹⁴⁹ The failure to prohibit the sale of estuarine marshland and the continued presence of a broad statutory definition of "swamplands" implicitly support the Board's claim to estuarine marshland.

The Board's assertion of control over estuarine marshes was also supported

presumptive owner of swampland tracts larger than 2000 acres). Realizing that it had a virtual "goldmine" of potentially conveyable acreage in the estuarine marshes of the State, the Board asserted title to these areas early in the 1920s. The Board's claim was bolstered by a State Attorney General's opinion that title to such marshlands was in the Board. See *infra* note 150 and accompanying text.

145. See Comment, *supra* note 18, at 898 & n.55.

146. Title to vacant and unappropriated swamplands of the State was vested in the Literary Fund in 1825. 1825 N.C. Sess. Laws ch. 1268, § 1 (as codified in LAWS OF NORTH CAROLINA TAYLOR'S REVISAL (1827)). Three years earlier, in *Tatum v. Sawyer*, 9 N.C. (2 Hawks) 226 (1822), the North Carolina Supreme Court had read into existing statutes on private entry and grant a legislative intent not to allow private appropriation of lands underlying navigable waters. *Id.* at 229. Nothing in the 1825 Act indicates any intent on the part of the general assembly to permit such conveyances by the Literary Fund. In 1855 the general assembly expressly distinguished lands beneath navigable waters from swampland, which was under the control of the Board of Education, as successor to the Literary Fund. Act of Feb. 2, 1855, ch. 18, § 1, 1855 N.C. Sess. Laws 37, 37.

147. Act of Mar. 4, 1891, ch. 302, § 1, 1891 N.C. Sess. Laws 254, 254.

148. The current statutory definition of "swamplands" reads in pertinent part: "Swamplands means . . . [a]ll State Lands which have been or are known as 'swamp' or 'marsh' lands, 'pocosin bay,' 'briary bay' or 'savanna.'" N.C. GEN. STAT. § 146-64(8)(a) (1983).

149. The Act of Apr. 23, 1953, ch. 966, 1953 N.C. Sess. Laws 869, was apparently the legislative response to the North Carolina Supreme Court's failure to uphold the validity of the Board title to estuarine marshland in *Resort Dev. Co. v. Parmele (Parmele II)*, 235 N.C. 689, 71 S.E.2d 140 (1950). See *infra* notes 177-216 and accompanying text. As such it serves as evidence that the general assembly was not only aware of the Board's sale of some estuarine marsh but, at least at that time, approved of such actions.

by the North Carolina Attorney General who, in a 1920 opinion, stated that "[t]he Legislature . . . in defining swamplands which are to be the property of the State Board of Education, intends to include in that definition all lands . . . whether they are *salt or fresh*, whether they are caused by the *tides* or by overflow from highlands."¹⁵⁰

The North Carolina Supreme Court has supported the Board of Education's claim of authority to sell estuarine marshland both indirectly and directly. This support has been manifested in three ways. First, relevant decisions distinguish State-owned conveyable estuarine marshland from unappropriable, unconveyable State lands under navigable water.¹⁵¹ For example, in *Home Real Estate Loan and Insurance Co. v. Parmele (Parmele I)*,¹⁵² the court stated:

To some extent . . . [the] conflict [in other states' judicial opinions] may be explained by noting the distinction between the titles to flats and marshes over which the tide ebbs and flows, but which are not in any correct sense of the term navigable waters, and . . . land . . . covered by navigable water.¹⁵³

Second, in three separate opinions—*Parmele I*, *Kelly v. King*,¹⁵⁴ and *Parmele v. Eaton (Parmele III)*¹⁵⁵—the court upheld the validity of Board deeds to tracts of estuarine marshland against claims that the deeds were invalid conveyances of "lands under navigable waters" and not "marsh." Last, in the three most significant Board deed decisions—*Parmele I*, *Resort Development Co. v. Parmele (Parmele II)*,¹⁵⁶ and *Parmele III*—the court rejected the contention that the ebb and flow or "tidal" test was the measure of "navigable waters" when determining whether a Board deed successfully conveyed estuarine marshland or attempted to convey unconveyable "lands under navigable waters."¹⁵⁷ Rejection of the

150. 1918-1920 N.C. ATT'Y GEN. BIENNIAL REP. 114 (emphasis added). The Attorney General's office also filed an amicus brief in *Parmele v. Eaton (Parmele III)*, 240 N.C. 539, 83 S.E.2d 93 (1954), supporting the validity of title in the Board to the estuarine marsh at issue in that case. In the brief the Attorney General's Office argued:

[E]ven though . . . generally speaking, land lying between the high water mark and the low water mark of a navigable stream is, within the meaning of the statute [prohibiting the conveyance of land beneath navigable waters], land covered by navigable waters, a distinction exists where such land consists of mudflats and marshlands. . . . [They] are not 'lands covered by navigable waters' within the meaning of the statute unless such marshlands are themselves navigable in fact.

Brief of Amicus Curiae at 10-11, *Parmele III*. The Attorney General's Office's position now is "that all of the Board of Education deeds conveying marshlands were valid, however, remedial legislation is desired in this area. The legislation should provide that for the flooded marshlands, any public trust rights that applied before they were outconveyed continued in place." LEGISLATIVE RESEARCH COMM'N, *supra* note 18, at 12.

151. *Parmele v. Eaton (Parmele III)*, 240 N.C. 539, 83 S.E.2d 93 (1954); *Resort Dev. Co. v. Parmele (Parmele II)*, 235 N.C. 689, 71 S.E.2d 474 (1952); *Kelly v. King*, 225 N.C. 709, 36 S.E.2d 220 (1945); *Home Real Estate Loan & Ins. Co. v. Parmele (Parmele I)*, 214 N.C. 63, 197 S.E. 714 (1938).

152. 214 N.C. 63, 197 S.E. 714 (1938).

153. *Id.* at 69, 197 S.E. at 718.

154. 225 N.C. 709, 36 S.E.2d 220 (1945).

155. 240 N.C. 539, 83 S.E.2d 93 (1954).

156. 235 N.C. 689, 71 S.E.2d 474 (1952).

157. The court emphatically rejected the ebb and flow test as a measure of the validity of Board of Education deeds to estuarine marshes in *Parmele I* and *Parmele III*. See *Parmele I*, 214 N.C. at 68, 197 S.E. at 717; *Parmele III*, 240 N.C. at 548, 83 S.E.2d at 99. Despite some confusing language

tidal test logically suggests that the Board had the power to convey at least some estuarine marshes when the only indicia of "navigable waters" was the presence of tidal flow over the marsh.

If the Board had the authority to sell estuarine marshes but not lands under navigable waters, the test by which a marsh was legally distinguishable from such lands is crucial. Unfortunately, the general assembly failed to provide a workable definition of either "marsh" or "lands under navigable waters" for title determination purposes.¹⁵⁸ In the absence of statutory definitions of these terms, the line between marsh and lands under navigable waters was, of necessity, subsequently drawn by the supreme court. This was no easy task for the court. If it used tests developed in other contexts¹⁵⁹ for determining what were "navigable waters," many estuarine marshes logically and legally could be classified as either "marsh" or "lands under navigable waters." Some estuarine marshes are subject to tidal flow; some are not. Strictly defined, no marsh can be navigated by a sea vessel and few are readily navigable by most other commercial or recreational craft. Many marshes, however, may be navigable by modern canoes, "air-boats," flat-bottomed "johnboats," or similar craft. Some marshlands are adjacent to waters navigable by sea vessels, other commercial and recreational craft, or canoes; other marshes are not adjacent to such waters. If *navigability in fact* of the marsh is the criterion chosen to determine its conveyability, no marsh would comprise unconveyable "land under navigable waters" using the sea vessel test; few would be unconveyable using the other tests. However, in *Ward v. Willis*,¹⁶⁰ a general entry and grant case, the North Carolina Supreme Court applied the "full breadth test" for navigable waters and held that tidelands adjacent to fully navigable waters were lands under navigable waters. According to the *Ward* court, "whatever soil is *at any time* covered by a navigable water in its natural state is deemed to be in the same state as if it were in the bed of the water."¹⁶¹ Application of the *Ward* rule to estuarine marshes adjacent to and flooded at high tide by waters from channels navigable by sea vessels would render those marshes "lands under navigable waters," thereby equating them with the submerged land that is constantly covered by such wa-

in *Parmelee II* that has lead to disagreement among commentators as to whether the ebb and flow test has been rejected in Board deed cases (compare *Rice*, *supra* note 2, at 800-02 (North Carolina courts abandoned ebb and flow test) with *Comment*, *supra* note 18, at 904-06 (ebb and flow test still valid in North Carolina)), a careful reading of the opinion and the briefs of the parties leaves little doubt that *Parmelee II* also rejected the ebb and flow test as the measure of navigable waters in Board deed cases. See *infra* notes 177-92 and accompanying text.

158. See *infra* text accompanying notes 234-35. Before 1959 North Carolina statutes defined "swamplands," in pertinent part, as "all those lands which have been or may now be known and called 'swamp' or 'marsh' lands, 'pocosin bay,' 'briary bay' and 'savanna.'" Act of Mar. 4, 1891, ch. 302, § 1, 1891 N.C. Sess. Laws 254, 254. N.C. GEN. STAT. § 146-64(8) (1983) carries forward the essence of the definition of "swampland." Even the current statutes fail to provide a workable distinction between estuarine marshland and submerged land under navigable waters for purposes of applying statutes controlling the disposition and sale of State-owned lands. See *id.* §§ 146-1 to -83.

159. For examples of tests developed in other contexts, see *supra* notes 105-10 and accompanying text (discussing the floatability test developed in the obstruction of navigation cases); see also *supra* notes 115-38 and accompanying text (discussing the ebb and flow and sea vessel tests used by the supreme court in the general entry and grant cases).

160. 51 N.C. (6 Jones) 183 (1858).

161. *Id.* at 185 (emphasis added).

ters.¹⁶² If a "customary craft" or floatability test for navigable waters is used, then, applying *Ward*, the marshes adjacent to such waters would also be "lands under navigable waters" and not "marsh."

The long-standing prohibition against disposal of State-owned submerged land under navigable waters conflicted with the obvious legislative intention of placing large tracts of State-owned estuarine marsh within the control of the Board for the express purpose of sale to raise money for public education. Absent the development of a new test¹⁶³ that would have reconciled these conflicting interests, the court was left with two choices: Applying the sea vessel test developed in the general entry and grant cases¹⁶⁴ or the customary craft and floatability tests developed in the obstruction of navigation cases.¹⁶⁵ In addition, the court had to resolve the very significant question whether the *Ward* full breadth rule applied to Board deeds. Often cryptic, frequently confusing and contradictory, the trilogy of *Parmelee* decisions constitutes the supreme court's attempts to resolve these questions. Therefore, the *Parmelee* decisions deserve close scrutiny.

2. *Parmelee I, II, and III*

In each of the *Parmelee* cases the plaintiff received a deed to estuarine marshland from the Board and entered into a contract for its resale. Plaintiff's ability to convey good title was subsequently questioned by the prospective vendee, requiring the North Carolina Supreme Court to determine whether a refusal to complete the purchase would be justified on the ground that the Board deed was an invalid attempt to convey "land under navigable waters."¹⁶⁶

162. In *Parmelee III* the North Carolina Attorney General's Office argued against the application of the *Ward* rule in such a context and filed an amicus brief supporting the authority of the Board of Education to dispose of tidally inundated marshland in fee simple. See *supra* note 150. The brief sought to distinguish tidally exposed marshland and mudflats (conveyable) and the mainland shore—also exposed at low tide—from permanently submerged lands (unconveyable under statutory law). The brief stated, "Many are the cases holding that land lying between the high and low water marks of navigable bodies is not subject to grant." Brief of Amicus Curiae at 8, *Parmelee III* (citing *Ward*, 51 N.C. (6 Jones) at 183). The brief goes on to say, "The case of *Ward v. Willis* . . . is distinguishable from the present . . . [because] [i]n that case it appears that only the title to the shore line was in question and that no mud flats or marshlands were involved." *Id.* at 10. As noted earlier, the Attorney General's office now maintains that the Board did not have the power to dispose of tidal marshlands in fee, but rather, had only the power to convey a limited interest, subject to the public trust rights.

163. An example of such a test would be an ecological test such as that found in the North Carolina dredge and fill statute, N.C. GEN. STAT. § 113-229(n)(3) (1983), which defines "marshland" as

any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides Salt marshland or other marsh shall be those areas upon which grow some, but not necessarily all, of the following salt marsh and marsh plant species: Smooth or salt water Cordgrass (*Spartina alterniflora*), Black Needlerush (*Juncus roemerianus*), Glasswort (*Salicornia* spp.), Salt Grass (*Distichlis spicata*), Sea Lavender (*Limonium* spp.), Bulrush (*Scirpus* spp.), Saw Grass (*Cladium jamaicense*), Cattail (*Typha* spp.), Salt-Meadow Grass (*Spartina patens*), and Salt Reed-Grass (*Spartina cynosuroides*).

164. See *supra* notes 121-25 and accompanying text.

165. See *supra* notes 104-12 and accompanying text.

166. *Parmelee III*, 240 N.C. at 540, 83 S.E.2d at 93; *Parmelee II*, 235 N.C. at 692, 71 S.E.2d at 477; *Parmelee I*, 214 N.C. at 65, 67, 197 S.E. at 715-17.

In *Parmelee I* the *locus in quo*, a large tract of estuarine marsh located in Myrtle Grove Sound near Carolina Beach, was described in the agreed facts of the case as

covered by water at high tide, upon which small fish boats, pleasure boats, batteaus and skiffs, none drawing more than twenty inches, had been operated for a number of years, but none of said boats so used in the sound could be classified as vessels engaged in transportation or commerce.¹⁶⁷

In affirming the trial court's determination¹⁶⁸ that the Board's deed to plaintiff was valid because the marsh was at "no stage of the tide covered by navigable waters,"¹⁶⁹ the North Carolina Supreme Court declared:

[T]he term "navigable waters" has reference to commerce of a substantial and permanent character to be, or which may be, conducted thereon. . . . By "navigable waters" are meant such as are navigable in fact and which by themselves or their connection with other waters, form a continuous channel for commerce with foreign countries or among the states.¹⁷⁰

Although the court stated that the standard of "navigable in fact" was applicable to the question of what constitutes navigable waters for Board deed purposes,¹⁷¹ it was far from explicit with regard both to the criteria by which waters were to be deemed navigable in fact and to whether the *Ward* full breadth rule applied to Board deeds. As a result, *Parmelee I* is subject to two interpretations on these issues.

The court used the term "commerce" in its opinion; therefore, it might have been equating potential use by any "commercial craft" with "navigable in fact." The case revealed that "small fish boats, pleasure boats, batteaus and skiffs" were used in the sound.¹⁷² Vessels of this size could be used for commercial navigation even though such vessels were not at that time being used for such purposes in the sound. Thus, if "navigable in fact" includes waters that either are being used or potentially could be used for commercial navigation, and the customary craft or "floatability" test is applied, the waters of Myrtle Grove Sound, as described in the agreed facts, would be navigable in fact. Viewed from this perspective, the decision that the *locus in quo* was not covered by navigable waters would constitute an implicit rejection of the *Ward* full breadth rule. The capacity for navigation of the waters covering the marsh, rather than the capacity for navigation in the adjacent sound, would have been the focus of the case.

An alternate and arguably better interpretation of *Parmelee I* is that the court equated use by sea vessels with navigability. Although the court stated

167. *Parmelee I*, 214 N.C. at 66, 197 S.E. at 716.

168. *Id.* at 67, 197 S.E. at 717.

169. *Id.*

170. *Id.* at 68, 197 S.E. at 717.

171. *Id.*

172. *Id.* at 66, 197 S.E. at 716.

that "the term 'navigable waters' has reference to commerce,"¹⁷³ it then referred to "commerce with foreign countries or among the states"¹⁷⁴—commerce that is conducted by means of sea vessels. After quoting the *Glen* sea vessel test,¹⁷⁵ the court stated: "Following *these decisions* it appears that the court below properly concluded that the *locus in quo* is not covered by navigable waters."¹⁷⁶ Because the facts of *Parmelee I* clearly indicated that Myrtle Grove Sound was not navigable by sea vessels, a determination that the *locus in quo* was not covered by navigable waters was not inconsistent with the *Ward* full breadth rule.

In *Parmelee II* plaintiff had entered into a contract for the sale of a large tract of estuarine marsh near Wrightsville Beach.¹⁷⁷ Plaintiff based its claim of title to the tract on a State grant issued in 1841¹⁷⁸ and on a Board deed issued in 1944.¹⁷⁹ When the prospective buyer refused to accept a deed to the property on the ground that plaintiff could not convey an indefeasible fee title, the question of the validity of plaintiff's title was submitted to the trial court.¹⁸⁰ The agreed facts stated that the *locus in quo*, which lay in Wrightsville Sound, "at high tide is covered entirely by the waters of the sound; at low tide portions of said land, consisting of sand bars and marshland are above water, while other portions are covered with shallow water."¹⁸¹ The parties also agreed that Banks Channel, whose waters formed part of the tract's boundary,¹⁸² was "used by pleasure and commercial vessels, including seagoing vessels."¹⁸³ Defendant contended that "all of the land at high tide is covered by the waters of Banks Channel, a navigable stream."¹⁸⁴ After examining the agreed facts, the trial court ruled that plaintiff's title was valid.¹⁸⁵

The North Carolina Supreme Court reversed on the ground that the *locus in quo* constituted land under navigable waters.¹⁸⁶ This opinion has been the source of considerable confusion and controversy.¹⁸⁷ The decision briefly traces the evolution of the definition of navigability in North Carolina from its common-law "ebb and flow" origins to the adoption of a "navigable in fact test,"¹⁸⁸ noting that in North Carolina "all waters that are actually navigable for sea

173. *Id.* at 68, 197 S.E. at 717.

174. *Id.*

175. *Id.* at 68, 197 S.E. at 717-18.

176. *Id.* (emphasis added) (referring to *Leovy v. United States*, 177 U.S. 621 (1900); *Miller v. Mayor of New York*, 109 U.S. 385 (1883); *United States v. The Montello*, 78 U.S. (11 Wall.) 411 (1871); *State v. Glen*, 52 N.C. (7 Jones) 321 (1859)).

177. *Parmelee II*, 235 N.C. at 690, 71 S.E.2d at 475-76.

178. *Id.* at 691-92, 71 S.E.2d at 476-77.

179. *Id.* at 692, 71 S.E.2d at 477.

180. *Id.* at 689, 71 S.E.2d at 475.

181. *Id.* at 690, 71 S.E.2d at 476.

182. *Id.* at 690-91, 71 S.E.2d at 476.

183. *Id.* at 691, 71 S.E.2d at 476.

184. *Id.* at 692, 71 S.E.2d at 477.

185. *Id.* at 693, 71 S.E.2d at 478.

186. *Id.* at 697, 71 S.E.2d at 480.

187. Rice, *supra* note 2, at 800-02; Schoenbaum, *supra* note 56, at 14-15; Urban, *Navigating North Carolina's Wetlands Statutes*, 59 TITLE NEWS, Apr. 1980, at 23; Comment, *supra* note 18, at 904-07.

188. *Parmelee II*, 235 N.C. at 694-95, 71 S.E.2d at 479.

vessels are to be considered navigable waters under the laws of this State."¹⁸⁹ The opinion mixes citations to obstruction of navigation decisions, which use the customary craft and floatability tests, with citations to State entry and grant title determination decisions, which use the sea vessel test.¹⁹⁰

Part of the confusion generated by the *Parmelee II* decision was due to the fact that plaintiff's claim of title was based on two different instruments issued by different authorities over one hundred years apart. This fact led the court to apply more than one test of navigability in deciding whether plaintiff had a valid title. Unfortunately, in so doing, the court wandered through various tests of navigability without stating specifically which test was being applied to which instrument.

The heart of the opinion concentrates on plaintiff's 1841 grant. This instrument was issued during the period between 1836 and 1849 in which the 1777 statutory provision,¹⁹¹ which the court in *Tatum v. Sawyer*¹⁹² held to have prohibited conveyances of lands under navigable waters was not part of the North Carolina statutes.¹⁹³ However, in the 1846 case of *Hatfield v. Grimes*,¹⁹⁴ the court had held that the omission in 1836 of that statutory provision did not repeal the common-law rule prohibiting the conveyance of State-owned land under navigable water.¹⁹⁵ Thus, in the absence of the 1777 provision, the validity of a State grant to submerged land was determined by the common law, which included the ebb and flow test of navigability.¹⁹⁶ As a result, in *Parmelee II* the court concluded that the validity of the 1841 grant similarly had to be determined solely based on common-law principles.¹⁹⁷ After noting that the common-law rule prohibiting the granting of lands under navigable waters was

189. *Id.* at 695, 71 S.E.2d at 479.

190. The court mentioned the navigable in fact test—citing a number of obstruction of navigation cases—the ebb and flow test, and the sea vessel test. *Id.* at 694-95, 71 S.E.2d at 479.

For example, the court cited *State v. Baum*, 128 N.C. 600, 38 S.E. 900 (1901), and *State v. Narrows Island Club*, 100 N.C. 477, 5 S.E. 411 (1888), two obstruction of navigation cases involving attempts to block different portions of Currituck Sound so that boats and canoes, which customarily used the waters, could not pass, and *State v. Twiford*, 136 N.C. 603, 48 S.E. 586 (1904), another obstruction of navigation case in which the court stated that a stream was navigable in fact if it was capable of "being used for purposes of trade and travel in the usual and ordinary modes." *Id.* at 606, 48 S.E. at 587.

The court also cited *Farmers Coop. Mfg. Co. v. Albemarle & Raleigh R.R.*, 117 N.C. 579, 23 S.E. 43 (1895), a floatability case. *Parmelee II*, 235 N.C. at 695, 23 S.E. at 44.

191. See *supra* notes 116-20 and accompanying text.

192. 9 N.C. (2 Hawks) 226 (1822). Because the tract involved in *Tatum* had been subject to tidal fluctuations, but had been naturally raised above the high water mark, it did not matter whether the court applied the common-law ebb and flow test or the 1777 statute. See *supra* notes 116-20 and accompanying text. *Wilson v. Forbes*, 13 N.C. (2 Dev.) 30 (1828), is the first case to hold that land underlying waters not subject to the ebb and flow of the tide, but nonetheless navigable by sea vessels, may not be granted under the general entry and grant laws. See *supra* notes 121-24 and accompanying text. Thus, *Wilson*, not *Tatum*, is the first case to hold that the implicit 1777 statutory prohibition against conveyance of lands under navigable waters extends beyond the common-law prohibition.

193. See *supra* notes 128-31 and accompanying text.

194. 29 N.C. (7 Ired.) 139 (1846).

195. *Id.* at 240-41.

196. *Id.*; see also *Parmelee II*, 235 N.C. at 694, 71 S.E.2d at 479 (citing *Hatfield* in association with the ebb and flow test).

197. *Parmelee II*, 235 N.C. at 696-97, 71 S.E.2d at 480.

in effect when the grant was made in 1841,¹⁹⁸ the court held the grant invalid under the common-law test of navigability—the old “ebb and flow test.”¹⁹⁹

In discussing the 1944 Board deed, the *Parmelee II* court stated simply “the *locus in quo* . . . is covered by navigable waters, and is not swamp lands within the meaning of [the statutes authorizing the Board to convey swamp land].”²⁰⁰ The court appears to have applied a test of navigability in fact, using the sea vessel test and the *Ward* full breadth rule, with respect to the Board deed. This conclusion is predicated on several facts. First, early in its opinion the court stated: “Tested by these rules the land 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.”²⁰¹ Second, the court had already applied the common-law tidal test to determine the validity of the 1841 State grant. Third, immediately preceding the portion of the opinion quoted above, the court stated that “all waters which are actually navigable for sea vessels are to be considered navigable waters under the laws of this State.”²⁰² Fourth, the parties agreed that the waters of Banks Channel, a portion of which was navigable by sea vessels, formed one boundary of the *locus in quo* and that at high tide the tract was covered by the waters of Banks Channel.²⁰³ Finally, because the marsh itself was not navigable by sea vessels, the *Parmelee II* court appears to have applied the *Ward* full breadth rule in conjunction with the sea vessel test to decide that the *locus in quo* was land covered by navigable waters.

Although this approach is arguably identical to the one used by the court in *Parmelee I*, the *Parmelee II* holding apparently alarmed many Board deed holders. The court had stated that, “[I]t is pertinent to ascertain what are navigable waters *both* at common law, and under the laws of this State.”²⁰⁴ The court ultimately concluded that, “Tested by these *rules* the land 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.”²⁰⁵ When the court combined these two tests, it created the misperception that the validity of Board deeds was to be determined by an “either/or” application of the common-law tidal rule and the navigability in fact rule—a “one-two punch” which would greatly increase the amount of estuarine marshland in southeastern North Carolina that could be considered flooded by navigable waters. Holders of Board deeds sought protection from the general assembly, which responded in 1953 by passing a local public act stating:

The titles to all marsh lands and all swamp lands which have heretofore been conveyed by . . . the State Board of Education of North Carolina, or granted by the State of North Carolina are hereby vali-

198. *Id.* at 696, 71 S.E.2d at 480.

199. *Id.* at 696-97, 71 S.E.2d at 480.

200. *Id.* at 697, 71 S.E.2d at 480.

201. *Id.* at 695, 71 S.E.2d at 479.

202. *Id.*

203. *Id.* at 690-92, 71 S.E.2d at 475-77.

204. *Id.* at 694, 71 S.E.2d at 479 (emphasis added).

205. *Id.* at 695, 71 S.E.2d at 479 (emphasis added).

dated, ratified and confirmed. . . . This act shall apply only to New Hanover, Pender and Onslow Counties.²⁰⁶

This local act raised a new set of issues. Was the local act valid local legislation under the North Carolina Constitution?²⁰⁷ Was the general assembly confirming title free of any public trust rights?²⁰⁸ Was the confirmation extended by the act applicable to any marsh or swamp lands or was it applicable only to those lands not covered by navigable waters?²⁰⁹ These and other issues, which will probably clog the lower courts and come back to haunt the North Carolina Supreme Court, could have been avoided if the court had written a lucid opinion in *Parmelee II*.

Parmelee III involved a suit for specific performance of a contract for the sale of a portion of the same estuarine marsh as was involved in *Parmelee II*.²¹⁰ Apparently emboldened by the 1953 Local Public Act to Validate and Confirm Titles to Marsh and Swamp Lands,²¹¹ the formerly reluctant purchaser in *Parmelee II* went ahead with the transaction.²¹² After obtaining a permit from the United States Corps of Engineers, plaintiff filled a portion to the tract by dredging from the surrounding area and entered into a contract to convey the filled portion to defendant.²¹³ Defendant subsequently refused tender of the deed on the grounds that: (1) the land was covered by navigable waters and therefore was not subject to grant by the State or to sale and conveyance by the Board, and (2) plaintiff was estopped from asserting title to the property on the basis of the holding in *Parmelee II*.²¹⁴

The North Carolina Supreme Court directed defendant to accept the deed and to comply with the contract terms, affirming a decision by the court of appeals.²¹⁵ The lower court's decision was predicated on its conclusion that "no part of the locus is or was covered at any state of the tide by waters which are navigable in fact";²¹⁶ thus, plaintiff's title was based on a valid Board deed.

The key to understanding the supreme court's ruling in *Parmelee III* may be a recognition of the critical differences in the trial court's factual findings in *Parmelee II* and *Parmelee III*. At issue in *Parmelee II* was the validity of the seller's title to the whole tract, which was bordered by Banks Channel and flooded by the waters of Banks Channel at high tide. The purchase contract

206. Act of Apr. 23, 1953, ch. 966, § 1, 1953 N.C. Sess. Laws 869, 869-70. Without a citation to this statute in *Parmelee III*, it would be almost impossible to locate. The statute, a local public law, does not appear in the North Carolina General Statutes. No readily accessible compilation of existing local public laws or index for those that are available exists.

207. See N.C. CONST. art. II, § 24. Interestingly, the North Carolina Constitution prohibits specifically only local laws affecting "non-navigable streams." *Id.* § 24 (1)(e).

208. See Comment, *supra* note 18, at 911 (suggesting the answer is "no").

209. *Id.* ("Nowhere in the statute is it stated that grants of land under navigable waters are validated and ratified.")

210. *Parmelee III*, 240 N.C. at 540, 544, 83 S.E.2d at 93, 96.

211. 1953 N.C. Sess. Laws ch. 966, § 1; see *supra* note 206.

212. *Parmelee III*, 240 N.C. at 540, 83 S.E.2d at 93.

213. *Id.* at 543, 83 S.E.2d at 96.

214. *Id.*

215. *Id.* at 545, 83 S.E.2d at 97.

216. *Id.* at 544, 83 S.E.2d at 97.

required that the seller have marketable title to the whole tract. If the seller lacked marketable title to any portion, the purchaser could refuse to close the transaction. However, only the northeast portion of the *Parmelee II* tract was the subject of the *Parmelee III* contract. That portion of the marsh, before being filled, was bordered by the waters of Sunset Lagoon, an artificially dredged body of water connecting with Banks Channel,²¹⁷ and the waters of Spring Landing Channel, a slough located approximately 1000 feet from the *locus in quo*,²¹⁸ which formed a portion of the border of the tract involved in *Parmelee II*.²¹⁹ If neither Sunset Lagoon nor Spring Landing Channel were "navigable waters," and if the tract were flooded at high tide by either of their waters and not by the waters of Banks Channel, the *Parmelee III* tract of estuarine marsh was not "land under navigable waters." Although the court emphasized this critical factual finding and devoted most of its opinion to reciting testimony to support it,²²⁰ the opinion still raises more questions than it resolves.²²¹

First, although the *Parmelee III* court held that plaintiff was not estopped from asserting and proving marketable title because the *locus in quo* related to only a small portion of the land involved in the prior *Parmelee II* case and because the tract was purchased by plaintiff after passage of the 1953 legislation,²²² it failed to address directly the scope and validity of the 1953 legislation. At the beginning of its opinion the supreme court stated that the trial court had found that no part of the marsh was covered by navigable waters, thus bringing "the conveyances . . . within the purview of the statutes *authorizing and validating* sales and conveyances of marsh or swamp lands."²²³ At first reading, this language suggests that the conveyance, otherwise void, was validated. The court, however, noted two factors which suggest that the conveyance was valid irrespective of the 1953 legislation. First, the court stated that the conveyance was within the statute "*authorizing*" the Board to sell marshland. Second, the court also stated that "no part of the *locus* is or was covered by waters which are navigable in fact."²²⁴ If no part of the tract was covered at any time by waters that were navigable in fact, the Board had statutory authorization to sell the tract;²²⁵ therefore, the 1953 legislation was unnecessary to the decision.

A second major area of uncertainty created by *Parmelee III* results from the

217. *Id.* at 543, 83 S.E.2d at 96.

218. *Id.* at 544, 83 S.E.2d at 96.

219. *Parmelee II*, 235 N.C. 691, 71 S.E.2d at 476 (stipulated fact no. 7).

220. *Parmelee III*, 240 N.C. at 546-48, 83 S.E.2d at 98-99.

221. Part of the uncertainty in *Parmelee III* may arise from the court's apparently unwitting inconsistency in its treatment of the source of the waters flooding the tract at issue. The *Parmelee III* court clearly noted that witnesses at the original trial established to the satisfaction of the lower court that the *locus in quo* was covered by waters from two adjacent nonnavigable bodies of water—Sunset Lagoon and Spring Landing Channel; this finding of fact was critical to the ultimate disposition of the case. *Supra* note 220 and accompanying text. However, in the opening paragraph of the opinion, the court, apparently through inadvertence, stated that the tract at issue "[a]t low tide . . . is completely exposed, but at high tide . . . is covered by tidal waters from *Banks Channel*." *Parmelee III*, 240 N.C. at 540, 83 S.E.2d at 93 (emphasis added).

222. *Id.* at 548, 83 S.E.2d at 99.

223. *Id.* at 545, 83 S.E.2d at 97 (emphasis added).

224. *Id.* at 548, 83 S.E.2d at 99.

225. *Parmelee I*, 214 N.C. at 63, 69, 197 S.E. at 714, 718. The pertinent statutory restrictions on

court's failure to articulate clearly which test it had applied in concluding that the waters covering the locus were not "navigable in fact." Citing *Parmelee I*, the court stated that the test for "navigable in fact" is "whether, in its ordinary state, a body of water has capacity and suitability for the usual purpose of navigation by vessels or boats such as are employed in the ordinary course of water commerce, trade, and travel."²²⁶ The court then cited *Parmelee II*, implying that it had used the same test for navigable in fact in all three cases. Although both *Parmelee I* and *II* might be interpreted as applying a sea vessels test, the court in *Parmelee III* did not limit "navigable in fact" to those waters capable of being used by sea vessels. The court's reference to "vessels or boats such as are employed in the ordinary course of water commerce, trade, and travel" suggests a customary craft test for navigability. The uncertainty as to which test for navigability is applicable to Board deed cases is further compounded by the supreme court's failure to define what is a "sea vessel" or a "customary craft."²²⁷

Presently, the North Carolina Supreme Court could expressly adopt a sea vessel test, a customary craft test, or a floatability test for Board deed cases and arguably be consistent with its past decisions. Use of the sea vessels test would also be consistent with the long line of title determination cases decided pursuant to the general entry and grant laws, which have protected from private appropriation any land under waters navigable by sea vessels.²²⁸ Use of a customary craft or a floatability test would be consistent with the traditional protection of free passage over waters capable of use for navigation by the public.²²⁹

Regardless of which test the court intended to apply for determining navigability in fact, *Parmelee III* fails to address clearly whether the *Ward* full breadth rule is applicable to Board deeds. Early in the *Parmelee III* opinion the court described the tract in question as being covered at high tide "by tidal waters from Banks Channel";²³⁰ that particular body of water is never again mentioned. Rather, the court focused on whether the waters of Sunset Lagoon or Spring Landing Channel were navigable.²³¹ The court quoted the testimony of original trial witnesses, who attempted to show that Sunset Lagoon and Spring Landing Channel were not navigable by sea vessels or by commercial craft.²³² This testimony was apparently the basis for the supreme court's affir-

the Board's power to convey unappropriated swamp and marsh land were codified at the time of the *Parmelee* decisions at N.C. GEN. STAT. §§ 146-94 to -102, 146-108 to -113 (1958).

226. *Parmelee III*, 240 N.C. at 548, 83 S.E.2d at 99.

227. The court would have to determine the point in history at which sea vessel and customary craft are to be defined. Does customary craft include the very shallow draft boats used by some commercial clammers? Small pleasure craft? Windsurf boards? In *State v. Baum*, 128 N.C. 600, 604-05, 38 S.E. 900, 901 (1901), the court stated: "We are not prepared to say that a landowner would be liable to criminal prosecution because he happened to put a watergate across a creek up which . . . an idle hunter might be able to pole a canoe."

228. See *supra* notes 121-38 and accompanying text.

229. See *supra* notes 104-14.

230. *Parmelee III*, 240 N.C. at 540, 83 S.E.2d at 93.

231. *Id.* at 546-48, 83 S.E.2d at 98-99.

232. *Id.*

mation of the trial court's finding that the waters covering the locus were not navigable in fact. If the supreme court viewed the waters covering the locus as emanating from Sunset Lagoon and Spring Landing Channel, which were adjacent bodies of water the trial court found not to be navigable in fact, its decision is not incompatible with an application of the full breadth rule. In fact, the court's interest in the status of the waters adjacent to the locus would be inexplicable unless it deemed the full breadth rule to be applicable. The court could resolve the uncertainty, however, by explicitly affirming the applicability of the *Ward* rule to Board deed cases. Such a resolution would best enable the court to continue to adhere to North Carolina's long-standing policy of protecting the public's right in navigable waters and submerged land.

3. The Department of Administration, Marsh Lands, and Navigable Waters

The preceding discussion focused on the legal definitions of marshland and navigable waters for purposes of determining the validity of Board deeds. The distinction to be drawn between marsh and submerged land under navigable waters for State deeds issued today may be different from that drawn for Board deeds. Since 1959 the Department of Administration (DOA) has exercised control over all state-owned lands. The pertinent governing legislation provides a broad definition of "navigable waters." North Carolina General Statutes section 146-64 specifies that "'State lands' . . . specifically includes all vacant and unappropriated lands, swamplands, [and] submerged lands"; that "'[s]ubmerged lands' means State lands which lie beneath [a]ny navigable waters within the boundaries of this State"; and that "'[n]avigable waters' means all waters which are navigable in fact."²³³ According to the North Carolina Supreme Court, waters that are navigable in fact have "[t]he capability of being used for purposes of trade and travel in the usual and ordinary modes."²³⁴ "If water is navigable for pleasure boating, it must be regarded as navigable water. . . . The purpose of navigation is not the subject of inquiry."²³⁵

In the obstruction of navigation cases, the court has also emphasized that streams which are capable of floating logs are navigable.²³⁶ This determination, when tied to the legislative definition of navigable waters, would support the conclusion that the present-day distinction between marshlands and submerged lands is based on the application of a floatability test to determine whether the waters covering a particular marsh are navigable and whether the marsh is to be classified as "submerged land" rather than "marsh" for purposes of Chapter 146 of the North Carolina General Statutes.

Even if a narrower test is used in Board deed title determination cases, it would not be inconsistent to apply a floatability test in interpreting section 146-

233. N.C. GEN. STAT. § 146-64(6), -64(7), & -64(4) (1983).

234. *State v. Twiford*, 136 N.C. 603, 606, 48 S.E. 586, 587 (1904).

235. *Id.* at 608-09, 48 S.E. at 588 (quoting with approval *Attorney General v. Woods*, 108 Mass. 436, 440 (1871)).

236. *E.g.*, *Commissioners of Burke County v. Catawba Lumber Co.*, 116 N.C. 731, 733, 21 S.E. 941, 941 (1895).

64 or the validity of any deed issued by the DOA. The Board of Education decisions must reconcile the authority given the Board over marshlands with the traditional prohibition against disposal of submerged lands. The general assembly failed to define either "submerged lands" or "navigable waters," but probably intended to give the Board the power to dispose of some part of the State's estuarine marshes. By the time section 146-64 was enacted, however, disposals of such marshland had ceased. At that time the general assembly could have intended to place all submerged land underlying *Glen* class one and two waters²³⁷ and still owned by the State within the class of "submerged land under navigable waters," and to place within the same class any marshland still owned by the State and covered by any waters that were navigable in fact.²³⁸

B. Marketable Title Act

In 1973 North Carolina joined those states that have enacted marketable title legislation in an attempt to increase the alienability of land and to simplify title transactions.²³⁹ Under the provisions of Chapter 47B of the North Carolina General Statutes—the Real Property Marketable Title Act (the Act)—the owner of title to land that has been of record for thirty years has a title which is marketable subject only to claims that are excepted from the operation of the Act, encumbrances inherent in or arising after the instrument constituting the root of title, and claims that have been preserved by re-recording.²⁴⁰ All other conflicting claims are extinguished by the Act. Two questions pertinent to this Article are raised: (1) whether the Act can be invoked to divest the State of title to submerged land under navigable waters, and (2) whether the Act can be invoked to terminate the public's rights of commercial and recreational navigation, fishing, and related activities in such lands and waters.²⁴¹

237. See *supra* notes 99-114 and accompanying text.

238. Discussion with individuals at the State Land Office gave the authors the clear impression that these officials believe that estuarine marshland is not "swamp" to be conveyed to private individuals.

239. N.C. GEN. STAT. §§ 47B-1 to -9 (1984).

240. *Id.* §§ 47B-2(c), -(3).

241. The struggle of the Florida courts and legislature to deal with this problem has lasted for over a decade. The Florida Marketable Record Title Act (MRTA), FLA. STAT. § 712.01-10 (1979), was enacted in 1963. In *Sawyer v. Modrall*, 286 So. 2d 610 (Fla. Dist. Ct. App.), *cert. denied*, 297 So. 2d 562 (Fla. 1974), the statute was interpreted to apply to sovereignty lands (lands under navigable waters) unless the State's right or interest in such lands was expressly reserved in the deed. *Sawyer* was followed by a series of cases, including *Odom v. Deltona Corp.*, 341 So. 2d 977, 989 (Fla. 1976) (MRTA applied to fresh water lakes) and *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 443 (Fla. 1978) (MRTA held constitutional as applied to bar city's claim to submerged lands granted to the city by the State "for municipal purposes" even though the defendant's root of title was a "wild" deed), *appeal dismissed*, 441 U.S. 939 (1979). In 1978, Governor Askew called a special session of the Florida Legislature to deal with the problem of the State's being divested of sovereignty lands under MRTA. The legislature responded by enacting an additional exception to the Act. Under FLA. STAT. § 712.03(7) (1979), the State's title to "lands beneath navigable waters acquired by virtue of sovereignty" is excepted from the provisions of the Act. Enactment of this section, however, did not end the controversy even with regard to this type of State land. In *Board of Trustees of the Internal Improvement Fund v. Paradise Fruit Co.*, 414 So. 2d 10 (Fla. Dist. Ct. App. 1982), the court held that the 1978 exception for sovereignty lands could not be applied retroactively. In May 1985 the Florida Supreme Court heard oral arguments in a case that many believe "is likely to determine whether the vast majority of Florida's river system remains in state ownership

Unlike marketable title legislation adopted in many states,²⁴² North Carolina's Act does not expressly exempt the title or interests owned by the State or its political subdivisions. On the contrary, section 47B-2 of the North Carolina General Statutes provides that, subject to the exceptions enumerated in section 47B-3, the marketable title established pursuant to the Act is free and clear of the rights, interests, or claims held or asserted by a person "whether such person . . . is private or governmental."²⁴³ Section 47B-8(1) defines "person" to include "the State and any political subdivision or agency thereof."²⁴⁴

Despite the express language of the Act, an annotation to Chapter 47B appears to have engendered a belief among some members of the legal community that the operation of the Act is subordinate to the presumption of title in the State established by North Carolina General Statutes section 146-79; therefore, the Act does not apply to extinguish interests claimed by the State or its agencies.²⁴⁵ The annotation states, "This Chapter does not affect the presumption in favor of the State set forth in § 146-79, relating to land controversies wherein the State is a party. *Taylor v. Johnson*, 289 N.C. 690, 224 S.E.2d 567 (1976)."²⁴⁶ A careful reading of *Taylor* does not support the notion that the Act does not operate against the State but, rather, suggests that when a party cannot establish that an interest claimed by the State or one of its agencies has been extinguished by the operation of the Act, the State will be deemed to have title under section 146-79.²⁴⁷ Thus, section 146-79 does not contravene what appears to be the

as sovereignty trust lands, or will become titled in private hands." Kevin X. Crowley, General Counsel, Florida Dep't of Natural Resources, A Report to the Board of Trustees of the Internal Improvement Trust Fund Regarding *Board of Trustees v. Mobil Oil Corporation* Case No. 65,913, Florida Supreme Court at 1 (April 16, 1985) (available from Kevin X. Crowley, General Counsel, Florida Department of Natural Resources, 3900 Commonwealth Boulevard, Tallahassee, Florida 32303). In addition, legislation is currently being proposed to amend MRTA "to make it clear that the Legislature did not intend for MRTA to divest the state of title to sovereignty lands." *Id.* at 8.

242. See, e.g., CONN. GEN. STAT. § 47-33h (Supp. 1985); MICH. COMP. LAWS § 565.104 (1967); NEB. REV. STAT. § 76-298 (1981); N.D. CENT. CODE § 47-19.1-11 (1978); OHIO REV. CODE ANN. § 5301.53 (Page 1981); VT. STAT. ANN. tit. 27, § 601(b) (1975); WYO. STAT. §§ 34-10-104(a)(v), 34-10-108(a)(v) (1977); see also FLA. STAT. § 712.03(7) (1979) (added in 1978 to provide an exception for "State title to lands beneath navigable waters acquired by virtue of sovereignty").

243. N.C. GEN. STAT. § 47B-2(c) (1984).

244. *Id.* § 47B-8(1).

245. The belief that N.C. GEN. STAT. § 146-79 prevents the Marketable Title Act from extinguishing any interest in land claimed by the State or its agencies is widespread enough to have resulted in an attempt to amend § 146-79 during the 1985 general assembly session. Although it was ultimately defeated on the third reading, substitute House Bill 913 sought to amend § 146-79 by specifically providing: "The other party may show good and valid title to such lands in himself and overcome the presumption of title in the State by employing various methods, including but not limited to . . . [showing] marketable record title to the land pursuant to Chapter 47B of the North Carolina General Statutes." H.B. 913, 1985 N.C. General Assembly.

246. N.C. GEN. STAT. § 47B-1 annot. (1984) (emphasis added).

247. In *Taylor* petitioner instituted a proceeding to register the title to a large tract of land, a portion of which the State Wildlife Commission claimed to own. The court decided that petitioner was the owner of a one-fifth undivided interest in the portion of the tract in dispute and that the Commission was the owner of the other four-fifths. In reaching this conclusion the court had to confront petitioner's argument that the Marketable Title Act cured any technical defect in his record title, vesting him with sole ownership. The court, however, did not hold that the Act was inapplicable to extinguish any claims of the State but, rather, that the Commission's possession of the land in dispute was sufficient to preserve its interest from being extinguished under § 47B-3(3) of the Act. Section 47B-3(3) provides that a marketable record title does not affect or extinguish the estate or claims of "any person who is in present, actual and open possession . . . so long as such person is in

clear intent of the general assembly; the Act does apply to titles and claims of the State of North Carolina. One commentator has expressed the rationale for not exempting the interests of the State as follows: "If the purpose of the statute to make land more easily marketable is meritorious, then the state, of all persons and legal entities, should not wish to frustrate the purposes and policy of the statute."²⁴⁸ Although this argument is not without merit when applied to land owned by the State in its proprietary capacity, the objectives of increasing alienability and marketability would seem to be inapplicable if the land in question is submerged land that the State holds subject to the public trust to preserve navigation, fishing, and commerce. In light of the general assembly's long history of retaining title to submerged land by removing it from the normal mechanism of entry and grant,²⁴⁹ an interpretation that the Act was intended to apply to such land, invalidating the State's title by the mere passage of time, is open to dispute.

Even if the Act is interpreted to apply to submerged lands under navigable waters, thereby allowing the State's title to be divested, the question remains whether the Act would also extinguish the public rights of navigation, fishing, and commerce or whether the provisions of the Act exempt such rights either expressly or by implication. Section 47B-3 lists thirteen groups of rights that are not affected or extinguished by the Act. Although the section does not specifically mention public trust rights, three of the exceptions are at least peripherally relevant and should be examined.

First, section 47B-3(1) exempts "[r]ights, estates, interests, claims or charges disclosed by and defects inherent in the muniments of title of which such 30-year chain of record title is formed."²⁵⁰ The Board of Education could not convey valid title to submerged land under navigable waters;²⁵¹ thus, it is arguable that when an instrument constituting a link in the chain of title is a Board deed or refers to the fact that the title being conveyed is founded on a Board deed, there is a defect inherent in the claimant's muniment of title or a disclosure of the rights or interests of the public in such land. The primary weakness of this argument, however, is that section 47B-3(1) also provides that

a general reference . . . to rights, estates, interests, claims or charges created prior to such 30-year period shall not be sufficient to preserve them unless specific identification by reference to book and page or record be made therein to a recorded title transaction which imposed, transferred or continued such rights, estates, interests, claims or

such possession." The court then said, "Neither does the act affect the provisions of G.S. § 146-79," *Taylor*, 289 N.C. at 712, 224 S.E.2d at 580. Although the court might have been clearer in the way in which it juxtaposed § 146-79, it appears that it was merely citing the statute to explain that once it found that § 47B-3(3) preserved the Commission's interest from being extinguished, the Commission would be deemed to have title. If the court had interpreted the presumption of title in § 146-79 as sufficient to render the Act inoperative against the State or its agencies, it would not have needed to apply § 47B-3(3) of the Act to preserve the Commission's interest.

248. Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina via Marketable Title Legislation*, 44 N.C.L. REV. 89, 112 (1965).

249. See *supra* text accompanying notes 115-50.

250. N.C. GEN. STAT. § 47B-3(1) (1984).

251. See *supra* text accompanying note 146.

charges.²⁵²

Thus, the mere fact that a deed identifies the Board of Education as grantor or contains a vague reference to a deed from the Board might be insufficient to create a defect in the muniment of title.

Second, section 46B-3(3) exempts "[r]ights, estates, interests, claims or charges of any person who is in present, actual and open possession of the real property so long as such person is in such possession."²⁵³ Therefore, it is arguable that as long as any member of the public engages in navigation, fishing, or commerce over the submerged land, the rights and interests of the public are preserved. According to the late Professor James A. Webster, Jr., whose draft formed the basis of the North Carolina Marketable Title Act, section 47B-3(3) was designed to preserve both the interest of an adverse possessor who is still in possession when another party asserts a marketable record title to the property and the interest of a person who is in possession under a marketable record title when another party attempts to assert a marketable record title to the same property premised on a "wild deed."²⁵⁴ Thus, an attempt to invoke section 47B-3(3) to preserve public trust rights is vulnerable to the argument that the section was not intended to preserve interests not premised on adverse possession or a marketable record title.

Third, section 47B-3(8)(a) exempts easements or interests in the nature of an easement whose purpose is "[f]lowage, flooding or impounding of water, provided that the watercourse or body of water, which such easement or interest in the nature of an easement serves, continues to exist."²⁵⁵ This exception might protect the public's interests in the use and enjoyment of navigable waters covering submerged land because public trust rights can be exercised as long as the water continues to flow.

Even if the courts conclude that none of the specific exceptions enumerated by the Act were intended to apply to the public trust rights in question, a strong argument remains: The Act never was intended to extinguish public trust rights. Section 47B-2(c) provides that a record marketable title established under the Act "shall be free and clear of all rights, estates, interests, claims or charges whatsoever *the existence of which depends upon any act, title transaction, event or omission* that occurred prior to such 30-year period."²⁵⁶ Public trust rights, however, were not created by and are not dependent on any act, title transaction, event, or omission; rather, such rights are an inherent and incidental consequence of the navigability of certain waters.²⁵⁷ This interpretation comports with the notion that the Act was never intended to extinguish public trust rights because the public interest in preserving such rights outweighs the State's interest in promoting the alienability and marketability of the land.

252. N.C. GEN. STAT. § 47B-3(1) (1984).

253. *Id.* § 47B-3(3) (1984).

254. See, e.g., Webster, *supra* note 248, at 108.

255. N.C. GEN. STAT. § 47B-3(8)(a) (1984).

256. *Id.* § 47B-2(c) (emphasis added).

257. See *supra* text accompanying notes 52-69.

An examination of the section of the Act dealing with rights that are not affected or extinguished further supports an interpretation of the Act that recognizes continuing public trust rights. Unlike the Model Marketable Title Act,²⁵⁸ which contains only three exemptions,²⁵⁹ North Carolina General Statutes section 47B-3 lists thirteen categories of exempted interests. This profusion of exemptions has been severely criticized; opponents contend that such legislation becomes less effective as the number of exemptions increases.²⁶⁰ Among the exemptions most often criticized are subsections (5) through (8), which "exempt interests, primarily easements in favor of mining and railroad enterprises and water, sewage, gas, electrical and telephone utilities, from the operation of the act."²⁶¹ Two basic justifications have been advanced for these exemptions: (1) the burden and expense that would accrue to the holders of these interests if they were forced to re-record them every thirty years would be substantial, and (2) the benefits of the public services provided by the exempted entities justify special treatment.²⁶² Viewed against this background, it seems reasonable to infer that the general assembly never intended the Act to apply to public trust rights. Any other reading would suggest that the general assembly intended to impose on the State a burden that it deemed too onerous to be placed on railroad and utility companies—commercial entities that are "financially equipped to integrate the notice filing system into their business operation."²⁶³

Finally, subsection (13), which exempts covenants restricting land to residential use, was included in response to the perception that preserving residential uniformity is more in the public interest than is freeing titles from such encumbrances.²⁶⁴ This exemption further demonstrates the general assembly's belief that the benefit of promoting land alienability and marketability was not so compelling that achieving it should result in the deprivation of other public interests or benefits. Because the general assembly has long accorded special status to submerged land underlying navigable waters, a court would be justified in interpreting the Act as not having been intended to extinguish public trust rights.²⁶⁵

258. MODEL MARKETABLE TITLE ACT, published in L. SIMES & C. TAYLOR, *THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION* 6-10 (1960).

259. L. SIMES & C. TAYLOR, *supra* note 258, at 9 (MODEL MARKETABLE TITLE ACT § 6).

260. See *id.* at 365; Aigler, *A Supplement to "Constitutionality of Marketable Title Acts"—1951-1957*, 56 MICH. L. REV. 225, 235 (1957); Comment, *Marketable Title Acts*, 10 ALA. L. REV. 415, 426 (1958); Note, *Promoting the Marketability of Land Titles*, 46 KY. L.J. 605, 611 (1958); Note, *North Carolina's Marketable Title Act—Will the Exceptions Swallow the Rule?*, 52 N.C.L. REV. 211 (1973) [hereinafter cited as Note, North Carolina's MTA].

261. Note, North Carolina's MTA, *supra* note 260, at 218.

262. Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 72 (1967); Note, North Carolina's MTA, *supra* note 260, at 218.

263. Note, North Carolina's MTA, *supra* note 260, at 219.

264. *Id.* at 220. The author notes that "Mecklenburg County was influential in the exception of equitable servitudes from the operation of the act since large residential areas surrounding Charlotte fall outside the city limits and beyond the jurisdiction of city zoning ordinances. Residential uniformity is maintained by incorporating restrictions in individual deeds." *Id.* at 220 n.63.

265. North Carolina courts have a venerable history of engaging in painstaking analysis of legislative intent when the question arises whether a particular statute was intended to abrogate a legal rule or principle of longstanding application. For example, in *Starnes v. Hill*, 112 N.C. 1, 16 S.E.

C. *Adverse Possession*

Some claims to submerged land arise from title assertions based on adverse possession. The threshold question in these cases is whether North Carolina law sanctions adverse possessors to divest the State of title to land subject to public trust rights. As noted in an earlier section of this Article,²⁶⁶ in May 1985 the general assembly enacted section 1-45.1 of the North Carolina General Statutes, which expressly provides that no claim of ownership to State-owned property subject to public trust rights may be based on the adverse possession statutes. Although this statute perhaps does not constitute a change in the law, but merely codifies an already accepted legal principle,²⁶⁷ many would contend that this statute represents a change and may operate only prospectively. If the latter interpretation prevails, it will become necessary to explore whether claims of title to submerged lands that are premised on adverse possession antecedent to May 1985 may be asserted successfully.

Like a number of other states, North Carolina has abrogated the ancient maxim "*nullum tempus occurrit regi*."²⁶⁸ Under section 1-35,²⁶⁹ title to land owned by the State may be acquired by one who adversely possesses it for thirty years without color of title or twenty-one years with color of title. Although such legislation opens the door to a claim of title by adverse possession, it does not automatically dispose of the issue when the land in question is subject to the public trust.

Three arguments may be advanced to refute claims of title by adverse possession. First, when public trust rights are at stake, the State should not be estopped by the unauthorized acts of its agents who either fail to detect, or ac-

1011 (1893), the court interpreted what is now N.C. GEN. STAT. § 41-6 (1984) as not having been intended to abrogate the Rule in Shelley's Case. In reaching its decision, the court stated:

It is impossible to suppose that the gentlemen who prepared the Revised Code and incorporated this section, should have been inattentive to this defect if it had been their purpose to abrogate the rule. Their abilities and learning need no eulogy from us; they are a part of the heritage of the legal profession of this State, of which we may be justly proud. And this is a point which may be very strongly insisted upon, that if these Commissioners had intended to abolish the rule, they could have done it and would have done it in such a manner as to leave no doubt upon the subject. That there is a doubt is the most powerful reason for sustaining the rule. Acts abridging the common law must be strictly construed . . . "for it is not to be presumed that the Legislature intended to make any innovation of the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced."

Starnes, 112 N.C. at 20, 16 S.E. at 1016-17 (quoting P. POTTER, DWARRIS ON STATUTES AND CONSTITUTIONS 185 (1871)).

266. See *supra* notes 47-51 and accompanying text.

267. See *supra* note 49 and accompanying text.

268. "*Nullum tempus occurrit regi*," or "time does not run against the king" is the phrase commonly used to denote that no lapse of time bars the title held by a sovereign. Thus, title to state land cannot be acquired by adverse possession in the absence of a statute of limitations that evidences an intent to subject the state to the running of the statute. "[B]y a rule of statutory construction originating in the king's prerogative the sovereign is not bound by any general statutes [of limitation] unless the intent be manifest by express words or by necessary implication." Note, *The Effect of Prescriptive Possession of Land on the Title of a Sovereign*, 23 VA. L. REV. 58, 58 (1936).

269. N.C. GEN. STAT. § 1-35 (1983).

quiesce in, unlawful trespass to such lands.²⁷⁰ Although landowners need not receive actual notice that their rights are in jeopardy to trigger the running of the statute of limitations, the requirements that possession be actual, exclusive, open and notorious, and continuous and uninterrupted are designed to ensure that landowners have a reasonable opportunity to detect the unlawful possession and to take action to protect their interests.²⁷¹ Given the vast amounts of estuarine marshland and other submerged land in North Carolina, an effective system of inspection and protection would require an allocation of resources that far exceeds any present funding appropriated by the general assembly for these purposes. Although some instances of unauthorized possession are brought to the attention of local officials, many are not. Even when they are made aware that a problem may exist, many local officials do not give investigation and protection of the public rights in such lands a very high priority. Often these officials do not take any effective action, failing even to report such instances to the Attorney General's office.²⁷²

Second, the title that the State holds to submerged lands under navigable waters "is a title of a different character than that which it holds in other lands. It is a title held in trust for the people of the state so that they may navigate, fish, and carry on commerce in the waters involved."²⁷³ This difference has led courts in a number of states that have adverse possession statutes applicable to the state or a municipality, to interpret such statutes as inapplicable to land held in trust for a public purpose.²⁷⁴ Such an interpretation would be consistent with

270. The New York Supreme Court has stated:

To acquire such title by adverse possession, the claimant must openly and notoriously hold against the sovereign, the people of the state. The question would be aptly asked: Who represents the sovereign in this respect? Whose duty on behalf of the sovereign is it to watch the public waters of the state, to detect unlawful trespasses? The state is not estopped by the unauthorized acts of its agents, and who by authority could acquiesce in the unlawful adverse possession?

People v. New York & Ontario Power Co., 219 A.D. 114, 117, 219 N.Y.S. 497, 502 (Sup. Ct. 1927).

In holding that defendant was not entitled to obstruct a navigable stream despite his claim that the county commissioners had not previously objected to the obstruction, the North Carolina Supreme Court concluded:

The county commissioners, in many cases, might not have their attention called to an encroachment of this kind upon the public rights, or they might not be properly advised as to the injurious effect. Certainly the public cannot lose their rights by the want of vigilance in the temporary occupants of their office.

Lenoir County v. Crabtree, 158 N.C. 357, 360-61, 74 S.E. 105, 106 (1912).

271. The United States Court of Appeals for the Fourth Circuit, commenting on the duty of landowners, has stated:

North Carolina adverse possession decisions stringently impose upon landowners the continuing duty to remain informed of activities and events occurring on their property at peril of finding their titles divested by adverse possessors. If the adverse possessor occupies property in such a manner that the true owner by reasonable diligence could know of the adverse claim the true owner will be deemed to have knowledge of this factual predicate for an ejectment action.

Fulcher v. United States, 696 F.2d 1073, 1077 (4th Cir. 1982).

272. Conversations with Daniel F. McLawhorn, Assistant Attorney General for the State of North Carolina, Environmental Section (July 1985).

273. *State v. Forehand*, 67 N.C. App. 148, 151, 312 S.E.2d 247, 249 (1984) (quoting Schoenbaum, *supra* note 56, at 17).

274. See, e.g., *City of Los Angeles v. Anderson*, 206 Cal. 662, 668, 275 P. 789, 791 (1929)

cases in which the North Carolina Supreme Court has refused to recognize the private acquisition of prescriptive rights in derogation of the public trust doctrine.²⁷⁵ North Carolina's commitment to preventing land under navigable waters from being acquired under the usual entry and grant laws²⁷⁶ reinforces the argument that North Carolina General Statutes section 1-35 was never intended to allow the State to be divested of title to land that it was prohibited from granting voluntarily. This argument, however, is subject to one major complication. In 1959, when the general assembly revised and recodified the statutes dealing with State lands, it enacted section 146-68, which states: "The provisions of G.S. 1-35, 1-36 and 1-37 are made applicable to *this Chapter*."²⁷⁷ Because Chapter 146 applies to all State lands and includes a subchapter on submerged lands, this section opens the door to the argument that, at least since 1959, title may be acquired by adverse possession to all categories of State-owned land.

Third, section 1-45 of the North Carolina General Statutes bars any person or corporation from acquiring an "exclusive right to any part of a public road, street . . . or public way of any kind"²⁷⁸ by reason of any occupation, encroachment, or obstruction of it. This statute was intended to take precedence over and to qualify the operation of any statute that bars the State from asserting its right and title to such public land.²⁷⁹ A number of cases have referred to navigable waters as constituting "public highways";²⁸⁰ thus, lands underlying such waters arguably come within the purview of section 1-45.

Assuming that it was or has become theoretically possible to acquire title to estuarine marshes and other submerged land by adverse possession, it does not necessarily follow that persons asserting titles based on adverse possession will be successful. Section 146-79 provides:

In all controversies and suits for any land to which the State . . . shall be a party, the title to such lands shall be taken and deemed to be in the State . . . until the other party shall show that he has a good and valid title to such lands in himself.²⁸¹

When claimants assert title based on adverse possession, they bear the burden of

("[P]roperty held by the state or any political subdivision in trust for public use cannot be gained by adverse possession."); *O'Neill v. State Highway Dept.*, 50 N.J. 307, 320, 235 A.2d 1, 8 (1967) ("[T]he State's title in Tidelands cannot be lost by adverse possession or prescription."); *People v. Baldwin*, 197 A.D. 285, 288, 188 N.Y.S. 542, 544 (1921) ("[S]uch lands only as the state holds as a proprietor may be lost to the state; it cannot lose such lands as it holds for the public, in trust for a public purpose."), *aff'd*, 233 N.Y. 672, 135 N.E. 964 (1922).

275. See, e.g., *Bell v. Smith*, 171 N.C. 116, 117, 87 S.E. 987, 988 (1916) (no prescriptive right to an exclusive fishery); *Town of Shelby v. Cleveland Mill & Power Co.*, 155 N.C. 196, 200, 71 S.E. 218, 219-20 (1911) (no prescriptive right to discharge sewage into river).

276. See *supra* notes 116-38 and accompanying text.

277. N.C. GEN. STAT. § 146-68 (1983) (emphasis added).

278. *Id.* § 1-45.

279. *Gault v. Town of Lake Waccamaw*, 200 N.C. 593, 594, 158 S.E. 104, 108 (1931); *Threadgill v. Town of Wadesboro*, 170 N.C. 641, 643-44, 87 S.E. 521, 522 (1916).

280. See, e.g., *Taylor v. West Virginia Pulp & Paper Co.*, 262 N.C. 452, 457, 137 S.E.2d 833, 836 (1964); *Gaither v. Albemarle Hosp.*, 235 N.C. 431, 444, 70 S.E.2d 680, 691 (1952); *Tatum v. Sawyer*, 9 N.C. (1 Hawks) 226, 229 (1822).

281. N.C. GEN. STAT. § 146-79 (1983).

proof;²⁸² they must prove that their possession was actual, exclusive, hostile, open, and notorious and that this possession continued uninterrupted for the requisite statutory period.²⁸³ One commentator who has examined the issue of adverse possession of submerged land and regularly flooded marshland has noted an additional difficulty confronting claimants to these lands. Because such lands usually lack natural monuments such as trees and large rocks,²⁸⁴ a claimant must show the placement and maintenance of visible artificial monuments or markers to establish that possession was "ascertained and identified under known and visible lines or boundaries."²⁸⁵

An equally significant difficulty for one who seeks to adversely possess submerged land is the claimant's ability to establish that possession was hostile or adverse. North Carolina courts presume that possession by one other than the true owner is permissive;²⁸⁶ a successful assertion of hostile possession would be even more difficult with respect to land owned by the State on which the claimant, like any other member of the public, has a right to navigate, fish, and carry on commerce. Thus, the claimant's possession and activities are not indicative of an assertion of any right that is hostile to, or in derogation of, the rights of the public.²⁸⁷ Therefore, to trigger the running of the statute of limitation there must be some unequivocal action by the claimant—an interference with, or an exclusion of, others entitled to engage in such activities. Claimants, however, may have been given an inadvertent but nonetheless potentially effective means to establish the requisite hostility. In 1965 the general assembly enacted North Carolina General Statutes section 113-205(a),²⁸⁸ which requires that every person who claims any part of the bed lying under the navigable waters of any coastal county register the grant, charter, or other authorization under which the claim is made along with a survey of the claimed area with the Secretary of Administration. The statute also declares that all rights and titles not so regis-

282. *Thomas v. Hipp*, 223 N.C. 515, 27 S.E.2d 528 (1943); *Crisp v. Benfield*, 64 N.C. App. 357, 307 S.E.2d 179 (1983).

283. *Barfield v. Hill*, 163 N.C. 262, 265, 79 S.E. 677, 679 (1913).

284. Comment, *supra* note 18, at 914-15.

285. N.C. GEN. STAT. § 1-35 (1983). The North Carolina Supreme Court has noted, "There must be known and visible boundaries such as to apprise the true owner and the world of the extent of the possession claimed." *McDaris v. Breit Bar "T" Corp.*, 265 N.C. 298, 303, 144 S.E.2d 59, 63 (1965).

286. *Brewer v. Brewer*, 238 N.C. 607, 611, 78 S.E.2d 719, 721 (1953); *Gibson v. Dudley*, 233 N.C. 255, 257, 63 S.E.2d 630, 631 (1951); *Pinner v. Southern Bell Tel. & Tel. Co.*, 60 N.C. App. 257, 261, 298 S.E.2d 749, 752, *cert. denied*, 308 N.C. 387, 302 S.E.2d 253 (1983).

287. The notion that a use or occupancy which is referable to the exercise of a public right fails to meet the requisite element of hostility is frequently noted in prescriptive easement cases in which the claimant is asserting that he or she has acquired exclusive fishing rights in a navigable river.

[S]tarting with the presumption that the right of fishing in the navigable part of the river is common to all, then the plaintiff is met with the difficulty that every time he and his grantors fished in these waters they simply exercised a right common to all, and in subordination to the legal title of the state If the plaintiff excluded any fisherman from these waters, that might be notice to such fisherman, but it would not be notice to the state. The state should not be presumed to have lost its title unless the circumstances charged it with notice of the necessity of protecting it.

Slingerland v. International Contracting Co., 43 A.D. 215, 223, 60 N.Y.S. 12, 17 (1899).

288. N.C. GEN. STAT. § 113-205 (1983).

tered on or before January 1, 1970, are null and void. Although the statute was not enacted to help persons assert title by adverse possession to submerged lands, it may have done so. Registering a claim under section 113-205(a) may constitute notice of hostility sufficient to trigger the running of the statute of limitations.

Even if a claimant can successfully assert the acquisition of title to marshland or submerged land by adverse possession, the significant question remains whether the title acquired is free of public trust rights. Under general principles of adverse possession law, a title acquired by adverse possession remains subject to nonpossessory interests such as restrictive covenants and easements. These nonpossessory interests may be extinguished by prescription only if the possession that gave rise to the acquisition of the fee title was inconsistent with their continued existence.²⁸⁹ Therefore, if title to marshland and other submerged land is acquired by adverse possession, as long as the land remains unfilled it remains subject to public trust rights. Under this analysis, the adverse possessor who wishes to own the land free of public trust rights must fill the land and then remain in adverse possession for the full statutory period. Presumably, the State would have the full statute of limitations period²⁹⁰ from the time the claimant interfered with the public easement by filling in which to bring an action seeking restoration of the land to its original state. Thus, the State could preserve the public trust rights of navigation and fishing.

D. *Torrens Act*

In 1913 North Carolina enacted a Torrens system for the registration of land titles.²⁹¹ Although as early as 1932 one commentator labelled the system "practically a dead letter,"²⁹² its existence in North Carolina gives rise to the question whether a decree rendered in a Torrens proceeding can result in vesting a private party with title to lands held by the State subject to the public trust. The system allows the acquisition of a judicial decree of title which, with certain exceptions mentioned in the statute,²⁹³ is free from adverse claims.

Because the Torrens system is not mandatory and merely constitutes an alternate method of registering land titles, it has only been used sporadically in

289. See generally 3 AMERICAN LAW OF PROPERTY § 15.13, at 824-25 (A.J. Casner ed. 1952) (public policy forbids using adverse possession to bar actions in cases involving State-owned tidelands or underwater lands); 7 R. POWELL, THE LAW OF REAL PROPERTY § 1017, at 91-79 (1984) (continuance of easements depends on consistency of possession).

290. N.C. GEN. STAT. § 1-35 (1983) requires 21 years possession with color of title and 30 years without it.

291. Torrens Law, ch. 90, 1913 N.C. Sess. Laws 147 (codified as amended at N.C. GEN. STAT. §§ 43-1 to -64 (1984)).

292. McCall, *The Torrens System—After Thirty-Five Years*, 10 N.C.L. REV. 329, 335 (1932).

293. N.C. GEN. STAT. § 43-18 (1984) lists three types of adverse claims or encumbrances which, although not noted on the certificate of title, may nonetheless affect title to registered land: (1) liens or claims that the State cannot require to appear of record and that arise or exist under the laws or Constitution of the United States; (2) taxes and assessments on the property due the State or county; and (3) leases that do not exceed three years in length under the terms of which the land is actually occupied.

North Carolina²⁹⁴ and in other states.²⁹⁵ Although the Torrens system was used to register titles primarily in the eastern coastal counties of the State,²⁹⁶ North Carolina courts have never addressed directly the validity of a Torrens decree with respect to lands under navigable waters.²⁹⁷ In *Swan Island Club, Inc. v. Yarbrough*,²⁹⁸ however, the United States Court of Appeals for the Fourth Circuit affirmed the decision of a district court and held that a state court proceeding under the Torrens statute did not have the effect of vesting title

294. Professor McCall reported on the results of inquiries sent to attorneys and registration officials in each of North Carolina's 100 counties. According to Professor McCall, the

[r]eplies received indicated that the system has been used more or less in 32 counties. Of these 32 counties 13 have registered only one title since the act was passed; the others have registered from 2 to 300 titles A generous estimate would place the total number of tracts of land registered in North Carolina at 500.

McCall, *supra* note 292, at 335. Almost 40 years later, of the attorneys who responded to a similar questionnaire, only five percent had ever registered title under the Torrens system and only one percent or 1 person had registered as many as eight titles. Whitman, *Transferring North Carolina Real Estate Part I: How the Present System Functions*, 49 N.C.L. REV. 413, 461 (1971).

295. The Torrens system has had limited use in the United States.

The United States has had a unique and rather disappointing experience with the Torrens system of title registration. . . . Of the 22 states which initially adopted title registration, only 11 have retained their registration statutes. Yet even those states which use title registration only sporadically employ it for certain areas or for individuals with specific economic interests.

Comment, *The Torrens System of Title Registration: A New Proposal for Effective Implementation*, 29 UCLA L. REV. 661, 676 n.85 (1982).

296. The more frequent use of Torrens registration in the eastern counties of North Carolina has been attributed to the presence of large timber and mineral firms. The impetus for usage by these entities was both the desire to establish definitely the boundary lines of large tracts derived from State grants, which were either not surveyed at all or were poorly surveyed because of the physical obstacles posed by the terrain, and to prevent the acquisition of title to these tracts by adverse possession because, under N.C. GEN. STAT. § 43-21 (1984), adverse possession cannot run against a Torrens title. See McCall, *supra* note 292, at 337; Whitman, *supra* note 294, at 461.

As early as 1932, Professor McCall noted that

[t]he Torrens system has been used also by another particularized class of land-owners in North Carolina. Some years ago, the Swan Island Club, a Massachusetts corporation composed of wealthy Boston sportsmen, acquired as a hunting preserve nearly one thousand acres of small islands and marsh lands lying between Currituck Sound and the Atlantic Ocean. They had the title to this land registered under the Torrens law, but have had considerable difficulty in defining one of their boundaries which extends for two or three miles out into the open waters of the Sound.

McCall, *supra* note 292, at 338. This observation is especially interesting in light of a lawsuit subsequently initiated by the Swan Island Club, which resulted in a federal court holding that the registration of a deed under the North Carolina Torrens Act did not have the effect of vesting title to lands covered by navigable water. See *infra* notes 298-301 and accompanying text.

297. The supreme court indirectly addressed the validity of a Torrens decree with respect to lands under navigable water in *Perry v. Morgan*, 219 N.C. 377, 14 S.E.2d 46 (1941). In *Perry* respondents appealed from the lower court's determination that plaintiffs were entitled to have their title registered because respondents' predecessors in title had received a grant from the State of the land in question more than 50 years prior to the State grants on which plaintiffs based their title. There was evidence that after the issuance of the earlier grant the federal government had dredged an adjacent channel and deposited material on the *locus in quo*. Plaintiffs appeared to be contending that until the fill material raised the level of the land above the tide, the *locus in quo* was land under navigable waters and, therefore, the grant to respondents' predecessors in title could not have been valid. Because the court concluded that there was sufficient evidence from which it could be inferred that the *locus in quo* had never been land under navigable waters and because it was clear that it presently could not be so classified, the court never had to address whether registration under the Torrens statutes could have the effect of conferring a valid title to land under navigable waters.

298. 209 F.2d 698 (4th Cir. 1954), *aff'g* *Swan Island Club, Inc. v. White*, 114 F. Supp. 95 (E.D.N.C. 1953).

to lands covered by navigable waters. Furthermore, the court noted that even if the plaintiff had title to such land, the land was held subject to the hunting, fishing, and navigation rights of the public.²⁹⁹ In affirming the district court decision, the court of appeals first noted that grants of lands under navigable waters "have been forbidden throughout the state's history,"³⁰⁰ and then stated:

While the language of the Torrens Act is general in its terms, it is but reasonable to read into it an exception with respect to lands lying under navigable waters. . . . The 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 under the law of the state, which everyone is presumed to know, are not subject to private ownership.³⁰¹

Although the court in *Swan Island Club* based its decision on policy grounds and legislative intent, an alternative analysis keyed directly to specific language in the Act is also available. Section 43-12 addresses the effect of a decree rendered in a Torrens proceeding and states that the decree "shall bind the land and bar all persons and corporations claiming title thereto."³⁰² However, this section also provides that the decree "shall not be binding on and include the State of North Carolina or any of its agencies unless the State of North Carolina is made a party to the proceeding and notice of said proceeding and copy of petition . . . are served upon the State . . . as provided in this Chapter."³⁰³ Thus, the State may assert that decrees affecting lands deemed to belong to it, including land under navigable waters, entered in a Torrens proceeding to which it was not made a party are ineffective.

V. THE PUBLIC TRUST AND ESTUARINE MARSHES

Before a claim to any of the State's estuarine marshes matured, these marshes were regarded as available for the public uses of commercial and pleasure navigation, fishing, hunting, and swimming. In marshlands underlying navigable waters, no unauthorized obstruction or interference with the exercise of these rights was permissible. Because raising the level of the land above the highwater mark by filling can result in the loss of all public trust rights, a significant question remains unresolved: whether the State has the power to prevent or to regulate the filling of these areas without its action being deemed an unconstitutional "taking" of private property. It is this "takings" issue that will constitute the major legal battleground for the control of estuarine marshland. Thus, although a complete analysis of this complex issue would greatly exceed the scope of this Article, this section offers some observations on the relationship of the "takings" issue to the previously discussed claims of private ownership of estuarine marshland.

299. *Id.* at 702.

300. *Id.* at 700.

301. *Id.* at 701-02.

302. N.C. GEN. STAT. § 43-12 (1984).

303. *Id.*

If a person claiming fee title to an estuarine marsh fills the marsh and raises the level of the land above the ordinary highwater mark, all public trust rights in the marsh may be lost. This result will certainly occur if the person filling the marsh has a valid Board of Education deed because one of the rights acquired under the deed is the right to fill the marsh and to extinguish any public trust rights.³⁰⁴ Even if the marsh were filled pursuant to a Board of Education deed that was initially invalid, the 1985 amendment to North Carolina General Statutes section 146-6(b) now confirms the title, free of the public trust rights.³⁰⁵ In addition, if a person who fills such land does not have a Board of Education deed, title nevertheless will vest in that person, free of the public trust, if the land is "raised under permits issued to private individuals"³⁰⁶ in accordance with applicable State dredge and fill permit statutes. Finally, any State-owned submerged land "raised above the high watermark . . . by filling"³⁰⁷ becomes "vacant and unappropriated lands of the State"³⁰⁸ subject to adverse possession under section 1-35.³⁰⁹ Thus, once submerged land under navigable waters is raised above the highwater mark, all public rights of access and use either are extinguished or are in the process of being extinguished.

Not all privately claimed submerged land has been filled. Much of it still is covered by navigable waters and thus remains open to public use. Only the actual filling of the submerged land terminates public rights of access and use. This conclusion is supported by *Parmelee I*,³¹⁰ in which the North Carolina Supreme Court stated:

Before flats lying between high watermark and the channel of nav-

304. *Parmelee I*, 214 N.C. at 68, 197 S.E. at 718 (discussed *supra* notes 166-76); see *Parmelee III*, 240 N.C. 539, 83 S.E.2d 93 (discussed *supra* notes 216-32). Both *Parmelee I* and *Parmelee III* involved land filled by the Board deed holder and an implicit finding that public trusts rights had been extinguished by the filling of the marshland. See also *Kelly v. King*, 225 N.C. 709, 36 S.E.2d 220 (1945) (by virtue of purchase from Board of Education defendants have right to deprive public of access to and use of certain waters by filling marshlands). It is also important to note that the 1836 rewrite of the Literary Fund Chapter, ch. 23, 1836 N.C. Sess. Laws 131, contemplated that the Literary Fund itself would drain swampland to make it suitable for cultivation. Presumably the drained land then would be sold for a markedly higher price than the undrained swampland. Unfortunately, when the Fund attempted to drain certain swampland in Hyde County, the project was a financial disaster. Neither the Fund nor its successors attempted any similar projects. Instead, the land was sold for whatever it would bring. Telephone conversation with Daniel F. McLawhorn, Assistant Attorney General for the State of North Carolina, Environmental Section (Nov. 24, 1985). This history supports the contention that purchasers of marshland from the Board acquired the same right to drain, fill, and otherwise alter the lands that the Board itself had.

305. N.C. GEN. STAT. § 146-6(b) (1985).

306. *Id.*

307. *Id.*

308. *Id.* § 146-64(9).

309. *Id.* § 1-35 (1983); see also *supra* notes 266-67 and accompanying text (discussing the inapplicability of adverse possession statutes to public trust lands). But see N.C. GEN. STAT. § 1-45.1 (1985), which raises the issue whether filled public trust land remains subject to the public trust and therefore may not be acquired by adverse possession.

310. *Parmelee I*, 214 N.C. at 63, 197 S.E. at 714; see *Kelly v. King*, 225 N.C. 700, 36 S.E.2d 220 (1945). *Kelly* involved a suit by owners of land adjacent to a portion of Myrtle Grove Sound that was filled by the Board deed owner and was the subject of the litigation in *Parmelee I*. Plaintiffs sued, claiming defendant's filling of that portion of the Sound deprived plaintiffs of access to the Sound's deep waters. The court rejected the claim, stating: "under the circumstances here disclosed, the loss of access to the waters . . . must be regarded as *damnum absque injuria*." *Id.* at 715, 36 S.E.2d at 223.

igable waters are reclaimed by the owner, the public and adjoining owners may exercise paramount right of navigation over them, but if the owner elects to reclaim them he has a right to do so, and if the result is less beneficial to the adjoining owners they cannot complain.³¹¹

Therefore, if public trust rights continue in a privately owned estuarine marsh until the marsh is filled, the critical question is whether the State has the power to prevent or regulate the filling of these areas.

In determining the extent of a claimant's right to fill the marsh and the State's power to regulate or prevent the exercise of that right, the claims asserted to estuarine marshes can be grouped into three categories. The first category consists of claims by those who have no legal title to the marshland. Within this category are claims by (1) individuals with Board of Education deeds to land that underlies waters navigable by sea vessels³¹² or, perhaps, customary craft; (2) individuals claiming title under the Marketable Title Act, if the courts find that no title to estuarine marshes could be acquired under the Act; and (3) individuals claiming rights by adverse possession, if the courts find the North Carolina adverse possession statutes inapplicable to public trust lands.

The second category consists of claims by those who have title to estuarine marshes but whose title and rights are permanently burdened by public trust rights. Within this category are (1) individuals with a Board of Education deed to marshland flooded by waters navigable by sea vessels or, perhaps, customary craft, and whose deed is thereby validated, subject to the public trust, by section 146-20.1;³¹³ (2) individuals claiming under the Marketable Title Act, if the courts find that title to submerged land or marshland may be acquired under the Act, but that such land remains subject to the public trust rights; and (3) individuals claiming under the adverse possession statutes, if the courts find that the statutes apply to State-owned estuarine marshland and other submerged land, but that adverse possession of the marshland or submerged land does not extinguish the public trust rights.

The third category consists of claims by persons having valid claims to marshland or other submerged land with the potential to extinguish the public trust rights by filling. In this category are (1) individuals with valid Board of Education deeds to as yet unfilled marshes; (2) individuals claiming under the Marketable Title Act, if the courts find the title acquired under the Act is free of the public trust rights; and (3) individuals claiming title by adverse possession, if the courts find that a person may adversely possess against the public trust rights.

One who wishes to fill estuarine marshes must obtain a permit from the State. Issuance of the permit is governed by three statutes: (1) North Carolina General Statutes section 113-229, entitled "Permits to dredge or fill in or about

311. *Parmele I*, 214 N.C. at 68, 197 S.E. at 718.

312. The Board of Education issued deeds covering both estuarine marshes and land under open navigable waters. See *supra* notes 144-45 and accompanying text.

313. N.C. GEN. STAT. § 146-20.1 (1985).

estuarine waters or state-owned lakes";³¹⁴ (2) North Carolina General Statutes section 113-230, dealing with the issuance of orders regulating or prohibiting the dredging, filling, or alteration of coastal wetlands by the Secretary of Natural Resources and Community Development;³¹⁵ and (3) North Carolina General Statutes section 113A-120, dealing with the granting or denial of Coastal Area Management Act permits to fill estuarine waters, coastal wetlands, and other environmentally important areas.³¹⁶ The centerpieces of this legislation are sections 113-229 and 113-230. Section 113-229(e) states that a permit to dredge and fill may be denied

upon finding: (1) that there will be significant adverse effect of the proposed dredging and filling on the use of the water by the public; or (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners; or (3) that there will be significant adverse effect on public health, safety, and welfare; or (4) that there will be significant adverse effect on the conservation of public and private water supplies; or (5) that there will be significant adverse effect on wildlife or fresh water, estuarine or marine fisheries. In the absence of such findings, a permit shall be granted.³¹⁷

Section 113-230 permits the issuance of an order prohibiting or regulating the filling or alteration of coastal wetlands "for the purpose of promoting the public safety, health, and welfare, and protecting public and private property, [and] wildlife and marine fisheries."³¹⁸ Each of these statutes is subject to the constitutional³¹⁹ and statutory³²⁰ limitation that the State may not take private property through the denial of a permit or the issuance of such an order without compensating the property owner.

In assessing whether a particular regulatory statute is an invalid exercise of the State's police power and thereby constitutes a "taking" of private property in violation of the North Carolina Constitution,³²¹ the North Carolina Supreme Court uses an "ends-means" analysis:

The court first determines whether the ends sought, *i.e.*, the object of the legislation, is within the scope of the power. The court then determines whether the means chosen to regulate are reasonable. . . . [T]his second inquiry is really a "two-pronged" test. That is, in determining if the means chosen are reasonable the court must answer the following: "(1) Is the statute in its application reasonably necessary to promote the accomplishment of a public good and (2) is the interference with the owner's right to use his property as he deems appropriate

314. *Id.* § 113-229 (1983). "Estuarine waters" and "marshland" are defined in § 113-229(n)(2) and § 113-229 (n)(3), respectively.

315. *Id.* § 113-230.

316. *Id.* § 113A-120.

317. *Id.* § 113-229(e).

318. *Id.* § 113-230(a).

319. U.S. CONST. amend. V; N.C. CONST. art. I, § 19.

320. N.C. GEN. STAT. §§ 113-229 to -230, 113A-120 (1983).

321. N.C. CONST. art. I, § 19.

reasonable in degree?"³²²

Using this approach, the North Carolina Supreme Court in *In re Community Association*³²³ rejected a claim that the denial of a permit to fill an estuarine marsh constituted an unconstitutional exercise of the State's police power and upheld the constitutionality of section 113-229 both on its face and in its particular application.³²⁴ In accord with many other state³²⁵ and federal courts,³²⁶ the supreme court stated:

To the extent that the permits may be denied due to significant adverse effect on (a) the use of the water by the public, (b) the wildlife or fresh water, estuarine or marine fisheries, (c) the conservation of water supplies, or (d) the public health, safety, and welfare . . . the object of . . . [section 113-229] is obviously within the police power.³²⁷

The court went on to hold specifically that section 113-229(e)(2), which authorizes the denial of a permit when "there will be significant adverse effect on the value and enjoyment of the property of any riparian owners,"³²⁸ represents a legitimate concern of the State.³²⁹

Application of the criteria set forth in *Community Association* to the first two categories of claims outlined above—claimants whose title is invalid and claimants whose title, although valid, is encumbered with public trust rights—would lead to the conclusion that a denial of a permit to fill would not constitute a prohibited "taking" under the North Carolina Constitution. Claimants within the first category do not have valid title to any of the land that they are seeking to fill because the land is State-owned. Absent a constitutional provision declaring a right to fill State-owned land, neither the State nor the general assembly is obligated to grant permission to do so; the failure to grant permission cannot be a "taking" of any private citizen's property because the citizen has no private property right or reasonable investment-backed expectation to dredge or fill State-owned lands. When, as in North Carolina, the general assembly has passed statutes such as section 113-229 that permit the filling of State-owned

322. *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 261-62, 302 S.E.2d 204, 208 (1983) (quoting *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 214, 258 S.E.2d 444, 448-49 (1979)).

323. 300 N.C. 267, 266 S.E.2d 645 (1980).

324. *Id.* at 279, 266 S.E.2d at 654. In *Community Association* neither the North Carolina Supreme Court nor the court of appeals expressly stated that it was discussing the question of an unconstitutional taking without adequate compensation. The issue was presented as a question of "an unconstitutional exercise of police power to the extent it allows the State to favor private interests over public interests." *Id.* at 276, 266 S.E.2d at 652. However, the test applied by both the supreme court and the court of appeals was the test applied to determine whether governmental action constitutes a "taking," and the cases cited by both courts involved "taking" questions. *Id.* at 277-79, 266 S.E.2d at 652-54; *In re Community Ass'n*, 44 N.C. App. 554, 557-59, 261 S.E.2d 510, 511-13, *rev'd*, 300 N.C. 267, 266 S.E.2d 645 (1980).

325. *E.g.*, *Graham v. Estuary Properties*, 399 So. 2d 1374, 1381 (Fla.), *cert. denied*, 454 U.S. 1083 (1981); *Sibson v. New Hampshire*, 115 N.H. 124, 126, 129, 336 A.2d 239, 240, 243 (1975); *Just v. Marinette County*, 56 Wis. 2d 7, 20-23, 201 N.W.2d 761, 768-69 (1972).

326. *E.g.*, *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); *United States v. Moretti, Inc.*, 331 F. Supp. 151 (S.D. Fla. 1971), *vacated in part*, 478 F.2d 418 (5th Cir. 1973).

327. *Community Ass'n*, 300 N.C. at 277, 266 S.E.2d at 653.

328. N.C. GEN. STAT. § 113-229(e)(2) (1983).

329. *Community Ass'n*, 300 N.C. at 278-79, 266 S.E.2d at 653-54.

land in certain situations and set standards for the granting or denial of that permission, a denial of permission does not raise any issue of the taking of private property without just compensation.

The second category of claimants—those who have title to estuarine marshes subject to public trust rights—should be treated like those in the first category. Although an applicant in the second category is seeking a permit to fill land to which a valid title is held, the applicant's ownership rights are encumbered by the rights of the public. The State is under no obligation to permit such a person to fill marsh or other submerged land under navigable waters and extinguish public trust rights; no such right was acquired when the applicant obtained title to the submerged land. The separation of private and public rights in such a situation is similar to the separation of mineral and surface rights in land or the existence of an easement over private property. Ownership of the submerged land or marsh does not allow the landowner to control the waters, to prohibit any public use consistent with the public trust, or to fill and thereby eliminate the public trust rights. Consequently, a denial of a permit for any reason sanctioned by section 113-229 or any similar North Carolina statute would not constitute an interference with any right of the applicant; thus, the applicant could not raise a successful "taking without compensation" argument based on the North Carolina Constitution.

What is troubling about *Community Association* is that the applicant sought a permit to fill *State-owned* submerged land to construct a private boat launching ramp;³³⁰ yet, the supreme court applied the "ends-means" analysis developed in a zoning case in which a landowner challenged restrictions on the development of *privately-owned* property as an unconstitutional taking.³³¹ Thus, although the court correctly upheld the denial of the permit in the face of the applicant's assertion that it constituted an unconstitutional exercise of the State's police power,³³² its analysis appeared to equate the State's broad power to deny a permit to fill State-owned land with its more limited power to deny a permit to fill privately owned land. This approach is incorrect; when the State denies permission to fill State-owned estuarine waters or marshes, the applicant has no property right that might be taken without compensation. The general assembly did not have to give anyone permission to fill State-owned submerged lands. Although it did authorize the granting of permits for such a purpose, a person denied such a permit should be able to question only (1) whether the statute is an unconstitutional delegation of legislative power to an administrative agency;³³³ (2) whether the statute is unconstitutional because it discriminates in

330. *Id.* at 267-69, 266 S.E.2d at 645-48.

331. *Id.* at 277-79, 266 S.E.2d at 652-54. The *Community Association* court used the "ends-means" analysis of *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 213-14, 258 S.E.2d 444, 448-49 (1979), an action brought by private landowners seeking a declaratory judgment invalidating the creation of a historic preservation district. See also *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 261-66, 302 S.E.2d 204, 208-11 (1983) ("ends-means" analysis of land-use regulations for private property in flood hazard district).

332. *Community Ass'n*, 300 N.C. at 279, 266 S.E.2d at 654.

333. *E.g., id.* at 273-76, 266 S.E.2d 650-52 (court rejected claim that N.C. GEN. STAT. § 133-229

some way against certain classes of applicants;³³⁴ (3) whether the agency, in denying a permit, acted in a discriminatory manner;³³⁵ (4) whether the agency, in denying the permit, applied the standards established by the general assembly;³³⁶ and (5) whether there is substantial evidence to support the agency's findings in support of the denial.³³⁷ Whether the denial of the permit to fill public land interferes with the owner's right to use his or her property is irrelevant if the application is for a permit to fill State-owned submerged land or privately-owned land subject to public trust rights. In such cases, a denial based on any of the reasons specified in section 113-229 and supported by substantial evidence would not be an unconstitutional taking of private property without compensation.³³⁸

Claimants of the third category—individuals seeking permits to fill submerged land or marshland to which they have obtained a title that is unencumbered by public trust rights—have a more compelling “taking without compensation” argument when a permit to fill is denied. In many cases, filling the marsh or other submerged land is a necessary prerequisite to any significant use of the land. Thus, denying a permit in this situation may constitute a taking of private property because it restricts the applicant's reasonable use of the property.³³⁹

Because applicants within the third category are seeking a permit to fill

(1983) was an unconstitutional delegation of legislative power in violation of N.C. CONST. art. I, § 6).

334. See generally 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING §§ 8.01-.07 (1985) (discussing how zoning ordinances may violate equal protection clauses of federal and state constitutions).

335. See generally *id.* § 8.05 (examining the permissible level of discretion that may be given to an administrative body reviewing special permits).

336. *E.g.*, *Community Ass'n*, 300 N.C. at 279-82, 266 S.E.2d at 654-56.

337. *Id.* at 282-83, 266 S.E.2d at 656.

338. If in the past the State had freely permitted owners of adjacent riparian or littoral lands to fill State-owned estuarine marshes, such State conduct might have led “to the fruition of a number of expectancies embodied in the concept of ‘property’—expectancies that, if sufficiently important, the Government must condemn and pay for.” *Kaiser-Aetna v. United States*, 444 U.S. 164, 179 (1979). The State of North Carolina, however, has a long history of limiting the right to use or fill State-owned estuarine marshland and other State-owned submerged land. See, *e.g.*, *Tatum v. Sawyer*, 9 N.C. (2 Hawks) 226, 229 (1822) (lands covered by navigable waters not subject to entry under the general entry and grant statutes); *supra* notes 70-73 and accompanying text; *cf.* 1783 N.C. Sess. Laws ch. 20, § 18 (“no . . . persons . . . shall cast or throw overboard into any channel or rivers within this state, any stones or other ballast whatsoever, any oysters or oyster-shells, under . . . penalty”); 1796 N.C. Sess. Laws ch. 17, § 2 (as codified in LAWS OF NORTH CAROLINA POTTER'S REVISAL ch. 460, § 2 (1821)) (“Any person or persons [who] shall thereafter obstruct the free passage of boats [on any inland river or creek], by . . . any means whatsoever . . . shall forfeit and pay [a fixed sum to be] . . . applied to the purposes of clearing out and making easy the navigation.”). In addition, the North Carolina Supreme Court has intimated that a riparian owner's rights to use the waters and bed of a navigable stream may be terminated by the State without compensation because such rights are permissive. *Glen*, 52 N.C. (7 Jones) at 257-58.

339. See, *e.g.*, *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 263-64, 302 S.E.2d 204, 209-10 (1983); *Potomac Sand & Gravel Co. v. Governor of Maryland*, 266 Md. 358, 293 A.2d 241, *cert. denied*, 409 U.S. 1040 (1972); *Spiegle v. Borough of Beach Haven*, 46 N.J. 479, 218 A.2d 129, *cert. denied*, 385 U.S. 831 (1966); *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 465 U.S. 1017 (1982). See generally 1 A. RATHKOPF, *supra* note 334, § 6.02 (a complete governmental restriction on the right to use private property is a taking, although not every diminution in property value is confiscatory).

privately-owned land held free of the public trust, the ends-means analysis is appropriate in resolving any "takings" issue asserted in connection with the denial of a permit. The threshold question under this analysis—whether the "ends" or objectives of section 113-229 constitute a valid exercise of the police power—was answered in the affirmative in *Community Association*.³⁴⁰ Consequently, the central question in these cases is whether the means used to accomplish the objective, denial of the permit to fill, is an unreasonable interference with applicants' rights to use their property as they deem appropriate.

Whether the denial of a permit pursuant to sections 113-229(e)(3), (4), and (5) or for the reasons specified in section 113-230(a) would constitute an unconstitutional taking under the State constitution is unclear. The North Carolina Supreme Court, in *Community Association*, stressed that:

[T]he restriction placed on the landowners is reasonable because the owner's right to use his own property has not been interfered with. The restriction relates *only* to dredging and filling activities and is a restriction on what the owner may do in the State's estuarine resources that are adjacent to his property.³⁴¹

Thus, one question that needs to be resolved is whether the denial of permits to fill estuarine marshland or other submerged land constitutes interference with the right of the owners to use *their* property rather than *State* property.³⁴² Even assuming that the denial of a permit to fill constitutes an interference with the applicants' right to use their property, the reasonableness of such interference was not resolved in *Community Association*.

The "interference" in such cases is that, absent a permit, the area must remain in its natural state as marsh or open water. Some states have considered whether this type of interference with the use of privately-owned property is unreasonable and have taken the position that:

[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to

340. See *supra* notes 323-24 and accompanying text.

341. *Community Ass'n*, 300 N.C. at 279, 266 S.E.2d at 654.

342. The titleholder to estuarine marshland does not own the water covering, or the marine and animal life in, the marsh. Filling the marsh, however, will eliminate the waters and destroy this marine biota and the complex food chain that depends on it. Is the elimination of the waters and destruction of the marine and animal life a use of State property? Must the estuarine marsh owner continue to provide a haven for marine and animal life and for the flowage of waters? Although the State did not reserve such rights, *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E.2d 204 (1983), would support reasonable restrictions on the use of privately-owned estuarine marshland when necessary to protect State waters and the tidal movement of those waters. However, preservation of an estuarine marsh as a haven for wildlife, even though it provides a public benefit and serves a public purpose, may constitute an unconstitutional taking of property without adequate compensation. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 651-53 (1980) (Brennan, J., dissenting) (taking occurs if property owner restricted by regulation to use property in its natural state if effect is to deprive him or her of all beneficial use); see also text accompanying notes 325-35 (North Carolina Supreme Court uses an "ends-means analysis" to determine whether denial of permit constitutes a "taking" of private property).

prevent harm to public rights by limiting the use of private property to its natural uses.³⁴³

A number of courts, however, have held that the cost of preserving wetlands cannot be imposed on the individual property owner by requiring the landowner to leave the land in its natural state; such a requirement, therefore, is an unconstitutional taking.³⁴⁴ It is unclear which position the North Carolina Supreme Court will adopt.

An indication of the North Carolina Supreme Court's position on the issue, however, may be found in its rejection of a takings challenge to floodplain ordinances. The constitutional validity of such an ordinance, which restricted the manner and type of development in designated flood hazard areas, was upheld in *Responsible Citizens v. City of Asheville*.³⁴⁵ The court stated: "The regulations do not affect in any way the current use of each plaintiff's property; each plaintiff thus continues to have a 'practical' use for his property of 'reasonable value.'"³⁴⁶

The court's position in *Responsible Citizens*, however, cannot be taken as a sure indication that the court would characterize the denial of a permit to fill based on the reasons given in sections 113-229(e)(2), (3), (4), or (5)³⁴⁷ as a reasonable interference with private property rights. The floodplain ordinances would not have prohibited all development in the flood-prone land and would not have required the land to remain in its natural state.³⁴⁸ Denial of a permit to fill estuarine marshes and other submerged land, as a practical matter, would have such a consequence in most cases. This significant difference could easily elevate a denial of a permit to fill to the level of an unconstitutional taking under both the North Carolina and the federal constitutions.³⁴⁹

343. *Just v. Marinette County*, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972).

344. *E.g.*, *Florida Rock Indus., Inc. v. United States*, 8 Ct. Cl. 160, 166-67, 179 (1985) (no economically viable use of property without permit to fill and no showing that activities of landowner would injure public health or welfare or other property owners); *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 554-56, 193 A.2d 232, 241-42 (1963) (township zoning ordinance which restricted use of swampland in order to preserve its natural state ruled an unconstitutional taking); *State v. Johnson*, 265 A.2d 711 (Me. 1970) (rejection of reasonable development scheme for coastal wetland is an unconstitutional taking). *But see, e.g.*, *Potomac Sand & Gravel Co. v. Governor of Maryland*, 266 Md. 358, 293 A.2d 241 (no taking when state exercises police power to protect exhaustible natural resources), *cert. denied*, 409 U.S. 1040 (1972).

345. 308 N.C. 255, 302 S.E.2d 204 (1983).

346. *Id.* at 264, 302 S.E.2d at 210.

347. N.C. GEN. STAT. § 113-229(e)(2) to -229(e)(5) (1983); *see supra* note 317 and accompanying text.

348. *Responsible Citizens*, 308 N.C. at 257-60, 264-65, 302 S.E.2d at 206-08, 210.

349. Only one federal case has held that a denial of a state permit, a federal Clean Water Act § 404 permit, 33 U.S.C. § 1344 (1982), or a Rivers and Harbors Act § 10 permit, 33 U.S.C. § 403 (1982), constituted an unconstitutional taking of property without adequate compensation. In *Florida Rock Indus., Inc. v. United States*, 8 Ct. Cl. 160, 166-67, 179 (1985), the Court of Claims held that the denial of a § 404 permit to fill a portion of a wetland area and to engage in other activities covered by the Clean Water Act constituted a taking of plaintiff's property without compensation. According to the court, the property could be put to no economically viable alternative use without the permit, and the government failed to show plaintiff's activities would have an adverse effect upon public health or welfare or upon the property of others.

Most of the other federal cases in which the takings issue has been raised, however, did not involve a situation in which the denial of the permit precluded development of the applicant's prop-

If the denial of a permit to fill were premised on section 113-229(e)(1),³⁵⁰ rather than on sections 113-229(e)(2), (3), (4), or (5)³⁵¹ or section 113-230,³⁵² the likelihood that it would be held to be an unconstitutional "taking" appears to be much greater. Subsection (e)(1) allows the denial of a permit if there would be a "significant adverse effect . . . on the use of the water by the public."³⁵³ Filling estuarine marshland or submerged land would eliminate the ability of the public to use the water overlying it. If preventing this "adverse effect" is the sole reason for the State's denial of a permit to fill, it appears very similar to the United States' attempt to impose a right of public access to private waters, which was held to be an unconstitutional taking without compensation in *Kaiser-Aetna v. United States*.³⁵⁴ The only difference here is that instead of creating a right of public access, the State would be trying to maintain the right of access, even though one of the rights acquired by the owner of land in the third category was the right to eliminate the public's use of the water and submerged land by filling.³⁵⁵ Thus, denial of the permit to fill on the ground that the public use of the water over the land to be filled would be adversely affected appears to be an unconstitutional taking without just compensation of a property right granted by the State to the applicant.³⁵⁶ This conclusion does not mean, however, that the same permit may not be constitutionally denied for the reasons specified in section 113-229(e)(2), (3), (4), and (5).

Much of the potential concern over the granting or denying of a State permit to fill may be rendered moot by the denial of a federal permit to fill under section 404 of the Clean Water Act or section 10 of the Rivers and Harbors

erty. In these cases, the property to be developed consisted of both upland and wetland. Denial of the permit did not preclude the use and development of the upland portion of the property although the denial may have influenced the nature and extent of such use and development. *E.g.*, *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982). Denial of a permit to fill an estuarine marsh, however, may effectively preclude any development of the applicant's property. *See, e.g.*, *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 651-53 (1980) (Brennan, J., dissenting) (taking may occur when property owner compelled by regulation to leave property in its natural state).

350. N.C. GEN. STAT. § 113-229(e)(1) (1983).

351. *Id.* § 113-229 (e)(2) to -229(e)(5).

352. *Id.* § 113-230.

353. *Id.* § 113-229(e)(1).

354. 444 U.S. 164 (1979). The Court held that the granting of a federal permit to connect private waters to public waters did not create a public right of access to the private waters. The assertion of such a public right of access, in the Court's view, was akin to an attempt to establish a public aquatic park without paying for it and amounted to an unconstitutional taking without compensation. *See also supra* note 338 (discussing limits placed on right to fill estuarine marshland and other submerged land in North Carolina).

355. *See Parmele I*, 214 N.C. at 68-71, 197 S.E. at 717-19.

356. *See, e.g.*, *Zabel v. Pinellas County Water & Navigation Control Auth.*, 171 So. 2d 376, 379-81 (Fla. 1965) (permit to fill submerged land acquired from a state agency cannot be denied when state conveyance carries with it the right to bulkhead and fill); *Askew v. Gables-By-The-Sea, Inc.*, 333 So. 2d 56, 61 (Fla. Dist. Ct. App. 1976) (denial of permit to fill portion of Biscayne Bay purchased from state constitutes denial of use of property requiring just compensation), *cert. denied*, 345 So. 2d 420 (1977). Imposition of an easement over privately owned submerged land or through private waters, however, is not a taking per se. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). Nevertheless, it constitutes a governmental intrusion of an unusually serious character and would be a significant factor in determining whether a taking had occurred. *Id.*

Act.³⁵⁷ Nevertheless, the issue is still an important one for at least two reasons. First, federal law may change, making federal permits easier to obtain in the future. Second, to obtain a federal permit for activities within the coastal zone,³⁵⁸ the applicant must provide a State certification that the proposed activities are consistent with the North Carolina Coastal Zone Management Act.³⁵⁹ Normally, North Carolina does not provide this required certification³⁶⁰ until all necessary State permits are approved. Thus, the issue of when the State may constitutionally deny a permit to fill will continue to be a concern to the State of North Carolina, developers, environmentalists, coastal residents, and the general saltwater-loving public.

VI. CONCLUSION

The first phase in the continuing battle to protect North Carolina's rich coastal wetlands must be to determine the validity of the many claims to private ownership of these ecologically important areas. Of the four most likely sources of the asserted private rights, only titles traceable to Board of Education deeds may grant private claimants title to estuarine marshland free of any public trust rights. Any titles asserted through the Marketable Title Act or the adverse pos-

357. These acts are discussed *supra* at note 349.

358. 16 U.S.C. § 1453(1) (1982).

359. The federal Coastal Zone Management Act of 1972, *id.* §§ 1451-1454, provides that:

[A]ny applicant for a federal . . . permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the . . . permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program.

Id. § 1456(c)(3)(A). In regard to this provision of the federal act, 33 C.F.R. § 320.4(h) (1985) states,

Application for Department of Army permits for activities affecting the coastal zones of those states having a coastal zone management program . . . will be evaluated with respect to compliance with that program. No permit will be issued to a non-Federal applicant until certification has been provided that the proposed activity complies with the coastal zone management program and the appropriate state agency has concurred with the certification [unless the Secretary of Commerce, on his own initiative or upon appeal by the applicant, finds the proposed activity consistent with the federal Coastal Zone Management Act of 1972 or vital to national security interests].

North Carolina's Coastal Area Management Act of 1974 (CAMA), codified at N.C. GEN. STAT. §§ 113A-100 to -128 (1983), in turn, requires that "every person before undertaking any development in any [designated] area of environmental concern shall obtain (in addition to any other required State or local permit) a [CAMA permit] pursuant to the provisions of this Part." *Id.* § 113A-118(a). Under CAMA, areas of environmental concern include, *inter alia*, estuarine marshland, estuarine waters, and other lands underlying navigable waters. *Id.* § 113A-113(b)(1), -113(b)(2), -113(b)(5). Thus, in essence, an applicant for a federal Clean Water Act permit to dredge and fill within estuarine marshlands and adjacent waters must provide the Army Corps of Engineers with certification that the applicant has obtained all necessary State permits for the proposed activity.

360. CAMA requires that persons proposing to "develop" within an area of environmental concern obtain both a permit under applicable CAMA provisions and "any other required State or local permit(s)." N.C. GEN. STAT. § 113A-118(a) (1983). According to Mr. Steve Benton, Consistency Coordinator of the North Carolina Division of Coastal Management, when other state and local requirements have been met and CAMA provisions complied with, then the CAMA permit issued serves as the certification of consistency with the State program required under the federal Coastal Zone Management Act and pertinent federal regulations. If the proposed activity does not require a CAMA permit, then "consistency" certification is made separately by the North Carolina Division of Coastal Management. Telephone Interview with Steve Benton (Feb. 25, 1986).

session statutes are permanently encumbered by public trust rights. Any title predicated on the Torrens Land Act is invalid.

The second phase of the battle will be to improve the ability of North Carolina and the federal government to restrict effectively the filling of estuarine marshes. The central issue is whether the denial of permits to dredge and fill estuarine marshes constitutes a "taking" of private property without just compensation in violation of either North Carolina's constitution or the federal constitution. No serious "taking" issue arises when permits are denied to those who lack a valid title or to those whose title is encumbered by public trust rights that could be adversely affected by dredging and filling estuarine marshland. Because the State of North Carolina, through its Board of Education, failed to reserve public trust rights when granting deeds to certain estuarine marshlands, a denial of the right to dredge and fill areas covered by such deeds on the ground that such dredging and filling would have an adverse effect on public trust rights would constitute an unconstitutional taking. However, such permits may be denied without constituting an unconstitutional taking if the permits are denied on the ground that dredging and filling of the estuarine marsh will have an adverse effect on the public health, safety and welfare, conservation of public and private water supplies, or on wildlife, estuarine, or marine fisheries. These public interests justify limiting the right to destroy the natural productivity and functions of estuarine marshes by dredging and filling activities.