January 1989

The Pearl in the Oyster: The Public Trust Doctrine in North Carolina

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I. INTRODUCTION

"On the sunburned edge of Onslow County where the shimmering New River dances under the summer sun, shellfish harvesters . . . dropped their oyster rakes and clenched their hands in anger." They were reacting to a recent North Carolina Supreme Court decision which held that lands under navigable waters be-

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2. State ex rel. Rohrer v. Credle, 322 N.C. 522, 369 S.E.2d 825 (1988) [herein-
longed to the state in "public trust." Environmentalists and state attorneys, on the other hand, hailed the ruling as a victory.³

Although the legal literature on the subject of the public trust doctrine in the United States is voluminous,⁴ the *State v. Credle* after "State v. Credle").


decision deserves attention because it has had, and will continue to

have, major ramifications in the area of environmental law in North Carolina. It is the most significant public trust opinion from the North Carolina Supreme Court in eighty-five years.\(^5\)

\(^5\) Raleigh News and Observer, July 15, 1988, at 1A, col. 2 (comment from J. Allen Jernigan, assistant attorney general).
The first part of this article will trace the history of the public trust doctrine from Roman times, through its application in England, and thence to its development in the United States to the present. The more important issues associated with the doctrine, such as the constitutional "takeings clause" argument, will be discussed. The second part of the article will trace the public trust doctrine in North Carolina and explore the underpinnings and rationale of the State v. Credle decision. It will also discuss the issues raised in part one with regard to their application in North Carolina. Finally, the article will consider the practical effects of the opinion upon the environment and the people of this state.

II. HISTORY OF THE PUBLIC TRUST DOCTRINE

A. Roman Beginnings

The public trust doctrine, which began at the edge of the sea, is two thousand years old. The doctrine derived from Roman law, which in turn derived from the Greeks. The Roman economy relied heavily on free trade and commerce, so that public access to the sea and freedom of navigation were essential. In Roman jurisprudence, public rights in the sea and the seashore were justified by a "natural law" concept, which held that some things, by their very nature, are common to all people.

Things common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea; no man therefore is prohibited from approaching any part of the seashore, whilst he abstains from damaging farms, monuments, edifices, etc., which are not in common as the sea is.

7. Comment, The Public Trust Doctrine Expansion and Integration: A Proposed Balancing Test, 23 SANTA CLARA L. REV. 211 (1983). The author comments that the doctrine "is imbued with as much lore and confusion as were the sea dragons once rumored to exist in the [Greek, Roman, and English] waters." Id. at 212.
9. Id. See also Butler, The Commons Concept: An Historical Concept with Modern Relevance, 23 WM. & MARY L. REV. 835 (1982); Deveney, Title, Jus Publicum, and the Public Trust: An Historical Analysis, 1 SEA GRANT L.J. 13 (1976).
10. Tannenbaum, supra note 8, at 108.
11. THE INSTITUTES OF JUSTINIAN, 2.1.1, quoted in Butler, supra note 9, at
The philosophic rationale of this concept was that the sea, the seashores, and their resources are a "vast, inexhaustible commons whose wealth can and should be shared by all." 12 The Institutes of Justinian, a principal source of Roman law, stated that the rights to which the public was entitled included those of navigation and fishing in all waters navigable in fact, as well as access to the seashore and its use for unloading cargo, fastening boats, and drying fishing nets. 13 All these rights could be eliminated by acquisition of exclusive private ownership either by occupation or by direct state grants. 14 In addition, littoral owners had the right to exclusive occupancy of waterfront improvements for as long as the improvements remained standing. 15 In time, however, the sophisticated Roman legal system fell into decline, as did the Empire itself. The idea of common ownership of the sea was replaced as feu-

849-50.

13. All rivers and harbors, moreover, are public, and therefore there is a right of fishing, common to all, therein. The seashore extends as far as the highest winter waves. The public use of the banks [of a river] is also governed by the law of nations, just as the rivers themselves are, and therefore everyone is free to bring his ship to the banks, to tie lines to the trees growing there, and to rest his cargo on them, just as he is free to navigate on the river itself. The banks themselves, however, are the property of the owner of the adjacent estate, and therefore the trees growing on the banks are also his. The public use of the beaches is also governed by the law of nations, just as is the public use of the sea itself, and therefore anyone is free to build thereon a cottage [for retreat] as well as to dry his nets thereon and to draw them out of the sea. If [sic] may be said that the ownership of the beaches is in no one, but that they are governed by the same law as the sea and the soil and sand which lie beneath it.

The Institutes of Justinian, 2.1.1-5, quoted in Tannenbaum, supra note 8, at 108. One commentator suggests that this declaration more probably reflects Justinian's idealization of a legal regime than the true nature of public rights during the Roman Empire, since Justinian intended The Institutes as an elementary textbook for first-year law students. Lazarus, Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine, 71 Iowa L. Rev. 631, 634 (1886).

14. Tannenbaum, supra note 8, at 108. See also L. Butler & M. Livingston, Virginia Tidal and Coastal Law (1988). The Roman government was not averse to conveying private rights in coastal resources, in order to promote their commercial exploitation. Lazarus, supra note 13, at 634.

Tidelands and navigable waters became subject to feudal ownership. The feudal lords claimed the right to control navigation, fishing, and other water-based activities.

Prior to its collapse, the Roman Empire's concept of the "commons" spread along the European shorelines in civil law jurisdictions. For example, the legal principle found its way into French law (thence to Louisianian law) and into Spanish law (thence to Mexican law and, ultimately, to Californian law). It then crossed the English Channel, bridging a contrary language and property concept in the process.

B. English Development

In England, the King claimed private ownership of all coastal lands and water, with the right to alienate them to his subjects without restriction. Over time, the King granted a great proportion of England's coastal waterways to the lords who were loyal to him. Sovereign lands were thus divested in the same way as private property. This resulted in abuses and inconveniences. Although

16. Tannenbaum, supra note 8, at 108.
18. Reed, supra note 6, at 109-10.
19. In Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576, 581-82 n.2 (La. 1975), the Louisiana Supreme Court cited several provisions of the state civil code mandating that air, running water, and the sea are held in common for the use and benefit of all people. The court stated that these provisions could be traced back to The Institutes of Justinian, the Napoleon Code, and Toullier, Le droit civil françois (Tome Troisième 1839).
22. Reed, supra note 6, at 107. See also H. Althaus, PUBLIC TRUST RIGHTS 1-70 (1978), for a discussion of the early history and movement of the public trust doctrine.
the English economy was dependent on the sea, the magnitude of private ownership of the shores was such that the lack of public access to them resulted in a detrimental impact on local commerce. This impact was one of the factors which led to the adoption of the Magna Carta in 1215.

The Magna Carta brought the alienation and thus the privatization of public lands to a halt. Although the Magna Carta did not itself expressly grant rights to the public, it established the roots of the law of public trust in modern times. The document impressed a narrow set of restrictions upon the power of the King and the lords to obstruct navigation and claim exclusive fisheries. It permitted the King to retain his sovereign rights in tidal lands and resources up to the high water mark, while at the same time prohibiting exclusive alienation to private parties (usually the nobility) for private use. In spite of the narrow restrictions in the Magna Carta, the document was always broadly interpreted to increase their scope, so that eventually it developed into one of the major sources of authority on the question of public rights in England’s navigable waters. The rights included navigation and fishing in tidal waters below the natural high tide line. Over time, the English common law split the title to tidelands into the jus

25. Tannenbaum, supra note 8, at 109.
26. The question is not free from doubt, and the authorities referred to in the English books cannot, perhaps, be altogether reconciled. But... the question must be regarded as settled in England against the rights of the king since the Magna Charta to make such a grant [of submerged lands].
But the existence of a doubt as to the right of the king to make such a grant after Magna Charta, would of itself show how fixed has been the policy of that government on this subject for the last six hundred years; and how carefully it has preserved this common right for the benefit of the public.

29. Jarman, supra note 12, at 132. For a discussion of the Magna Carta’s specific restrictions, such as prohibiting fish weirs in inland waterways, see Butler, The Commons Concept: An Historical Concept with Modern Relevance, 23 WM & MARY L. REV. 835 (1982); Deveney, Title, Jus Publicum, and the Public Trust: An Historical Analysis, 1 SEA GRANT L.J. 13 (1976).
31. Tannenbaum, supra note 8, at 109.
regium, the sovereign's police power to manage the King's coastal resources for the people's welfare;\(^{32}\) the jus privatum, the alienable private right of the King;\(^{33}\) and the jus publicum, the inalienable public rights of navigation and fishery.\(^{34}\) The latter rights were held by the King in trust for the benefit of all his subjects.\(^{35}\) Eventually, Parliament took responsibility for the jus publicum.\(^{36}\) Public easements of use were thus guaranteed for navigation, fishing, and commerce and, although subject to Parliamentary restraint and modification, were paramount to any private ownership of the shoreline or waters.\(^{37}\) The rights derived from the Magna Carta applied only to salt water,\(^{38}\) but they nevertheless are generally agreed to have formed one of the bases of the public trust doctrine as we know it in the United States today.\(^{39}\)

32. Id. at 120.
33. Any such conveyance, however, could not affect the jus publicum, which the King had no power to abolish. Id.
34. Only the properties of the "ancient desmesne" were historically inalienable under the English law. These lands were the "original endowment of the kingship" designated at the time that "settlement of the Conquest was completed and was registered in the Domesday Book." F. Pollock & W. Maitland, History of English Law 383-84 (2d rev. ed. 1968).
35. "The king, by virtue of his proprietary interest, could grant the soil, so that it should become private property, but his grant was subject to the... right of public use of navigable waters, which he could neither destroy nor abridge." People v. New York and Staten Island Ferry Co. 68 N.Y. 71, 76 (1877). In De Jure Maris et Brachiorum Ejusdem, Lord Hale accepted that England's title lands were prima facie held by the King, but the ownership was not absolute because he could not infringe on the public's protected rights. M. Hale, id. (circa 1667).
38. Reed, supra note 6, at 107.
39. One of the writers on the public trust doctrine maintains that the public trust came into our English common law heritage through the mid-thirteenth century writings of Bracton, who borrowed the Roman notion of "commons." Lazarus, supra note 13 at 635. Professor Sax, however, suggests that eleventh-century French law may offer the best historical precedent for the modern public trust doctrine. "[T]he public highways and byways, running water and springs, meadows, pastures, forests, heaths and rocks... are not to be held by lords... nor are they to be maintained... in any other way than that their people may always be able to use them." Sax, Liberating the Public Trust Doctrine from its Historical
C. American Adaptation

English common law arrived in this country with the colonists. The notion of reserved public rights in tidelands and navigable waters entered into the law through various colonial enactments which granted title to the foreshore in the owner of the adjacent upland, subject to the public rights.\textsuperscript{40} American topography, however, is entirely different from the English seas and shores. Unlike England, this country contains numerous large rivers and lakes which are not subject to the tides but are nevertheless important for navigation, commerce, and fishing.\textsuperscript{41} Because an individual's ability to use water resources for navigation, commerce, and fishing is an important indicia of a free society,\textsuperscript{42} the public's rights were changed here, too, in order to meet the differing conditions.\textsuperscript{43} In the nineteenth century, commerce was primarily waterborne; the rivers were highways for pioneers and power sources for fledgling industries. Cities and towns developed along the major waterways, since natural ports were a prerequisite to their development.\textsuperscript{44} American judicial decisions expanded the public trust doctrine to include upstream and inland waters which were fresh rather than salt and were not subject to the ebb and flow of the tides.\textsuperscript{45}

The three distinctions in the English public trust doctrine also prevailed in pre-Revolutionary America: (1) \textit{jus publicum}, the rights of the general public; (2) \textit{jus regium}, the royal right to manage resources for the public safety and welfare; and (3) \textit{jus


\textsuperscript{40} Kiefer, \textit{supra} note 15, at 148. The earliest colonial enactment occurred in the Massachusetts Bay Colony. \textit{The Colonial Ordinance of 1641-1647} extended private property ownership to the low tide line, subject to the reserved public rights of fishing, fowling, and navigation. \textit{Id.}

\textsuperscript{41} Tannenbaum, \textit{supra} note 8, at 109.

\textsuperscript{42} Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367 (1842).

\textsuperscript{43} Shively v. Bowlby, 152 U.S. 1 (1894); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).

\textsuperscript{44} Lazarus, \textit{supra} note 13, at 636.

\textsuperscript{45} Reed, \textit{supra} note 6, at 107; Note, \textit{Water Law: Public Trust Doctrine}, 24 \textit{Nat. Resources J.} 809 (1984). In this century, many jurisdictions have also expanded the traditional public trust rights to include recreational uses and conservation, although the specific uses vary with the jurisdictions. \textit{See, e.g.}, Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); Neptune City v. Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972); Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952); Diana Shooting Club v. Hustling, 156 Wis. 261, 145 N.W. 816 (1914).
privatum, the private right of title. At the time of independence, the public trust doctrine was adopted in the United States on the theory that the rights held by the English Crown accrued to the states. The original states, therefore, acquired sovereign ownership in trust of all the tidelands previously held by the King, with the exception of those previously granted to private parties by the Crown or under the authority of colonial charters. As each new state entered the Union, it did so on an equal footing with the original thirteen states and succeeded to the same quantum of ownership.

The first American case to recognize the public trust doctrine was the 1821 case of Arnold v. Mundy. The New Jersey Supreme Court addressed the issue of whether a conveyance of land that included oyster beds below the high water mark could operate to exclude the public. The court held that, as successors to the interests previously held by the Crown, the states held rights to the beds of navigable waters in trust for their citizens. Any grant purporting to divest the citizens of these rights was void. Subsequently, in 1842, in Martin v. Lessee of Waddell, the United States Supreme Court held that Waddell’s title to submerged lands below the high water mark did not give him the exclusive right to take oysters from Raritan Bay. The Court reasoned that if

47. Fahmy, supra note 21, at 588.
49. Martin 41 U.S. at 367; Arnold v. Mundy, 6 N.J.L. 1 (1821).
50. 6 N.J.L. 1 (1821).
51. Id. at 13.
52. Id.
53. 41 U.S. at 367.
the surrender of lands from the Crown to the Duke of York, the source of Waddell's title, had been intended to sever the "right of dominion and ownership in the rivers, bays, and arms of the sea, and the soils under them" from the sovereign, such a conveyance would have been express and could not be implied. However, in City of Hoboken v. Penn. R.R. Co., in 1888, the Court held that state legislatures could sell public trust lands free of all trust obligations. As a result, some legislatures saw a fast route to solvency in their shorelines and tidelands. In 1892, the United States Supreme Court was forced to reevaluate state power to convey absolute title to trust resources in Illinois Central R.R. v. Illinois. This decision is the seminal public trust case in the United States and may be said to have begun the modern formulation of the public trust doctrine.

In Illinois Central, the Illinois legislature had granted a 1,000-acre tract of reclaimed tidal and submerged land under Lake Michigan on Chicago's waterfront to the railroad. The area comprised most of Chicago Harbor. Four years later, the legislature rescinded the grant and brought suit seeking a declaration of the rights of the railroad company, the city, and the state. Citing limitations upon the Illinois legislature derived from the public trust, the United States Supreme Court held the conveyance to be either inoperative ab initio or subject to repeal.

The Court framed the issue in terms of the Illinois legislature's competency to make the grant to the railroad company. The Court explained that state ownership of its submerged lands was not comparable to a private proprietorship but, rather, entailed a sovereign obligation, which could not be forsaken, to control and manage the lands for the public benefit. The four-justice majority

54. Id. at 416. The rights included the "right of common fishery for the common people." Id. See also Hardin v. Jordan, 140 U.S. 371, 381 (1891) (title to the shore and lands under water is incidental to the sovereignty of the state and is held in trust for the public purposes of navigation and fishery).
55. 124 U.S. 656 (1888).
57. 146 U.S. 387 (1892) [hereinafter "Illinois Central"].
58. Professor Sax describes it as the "lodestar" of the public trust doctrine. Sax, supra note 23, at 489; Kiefer, supra note 15, at 149.
60. Id. at 460.
61. Id. at 453.
expounded at length on the special nature of sovereign ownership of navigable waters to support its conclusion that the state grant had been revocable, and was at pains to stress the special "trust" nature of the state's title to the tidelands and submerged soil:

[State title to the lands under navigable waters] is a title different in character from that which the State holds [in] lands intended for sale. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . . The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them[,] . . . than it can abdicate its police powers in the administration of government and the preservation of the peace . . . .

The thrust of the opinion is unmistakable. At some level, a state legislature is powerless to convey into private hands a natural resource as important as Chicago's harbor because of its "trust" obligations.

The Illinois Central decision remains the "lodestar" case. State courts have repeatedly turned to it to justify careful scrutiny and, in many instances, outright rejection of legislative attempts to convey critical coastal or inland waterway resources into private hands. The decision, however, did note that a state's trust obligations do not prevent the alienation of submerged lands when the public interest is enhanced or when the conveyance does not impair public uses of the remaining lands.

After Illinois Central, the general view seemed to be that the public trust approved and applied therein applied universally to all the states. This view has been weakened by subsequent Supreme Court decisions in which the Court has emphasized that public rights in submerged lands are a matter of state law and that the management of trust lands is for the individual state to deter-

62. Id. at 452-53.
mine.65 The states have proceeded to interpret and apply the public trust doctrine in a variety of ways,66 as evidenced by the more than one hundred cases involving the public trust doctrine reported in the last twenty years.67

65. See, e.g., Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651, 655-56 (1927) ("If a state chooses to resign . . . sovereign rights over navigable rivers which it acquired upon assuming statehood, it is not for others to raise objections."); Appleby v. City of New York, 271 U.S. 364 (1926) (conclusion reached in Illinois Central necessarily a statement of Illinois law); Port of Seattle v. Oregon & Wash. R.R., 255 U.S. 56 (1921) (state may dispose of submerged land as it sees fit); Shively v. Bowlby, 152 U.S. 1, 43 (1894) (individual states have authority to allot their resources); Hardin v. Jordan, 140 U.S. 371, 380 (1891) (public rights are a matter of state law).


67. Some of the more important cases include: Alaska, State Dep't of Natural Resources v. City of Haines, 627 P.2d 1047 (Alaska 1981); California, National
A few general rules may be gleaned from the decisions. All lands beneath waters subject to the tides, whether navigable or not, and all lands beneath nontidal but navigable waters are subject to the public trust doctrine. Each state has established its own definition of the term “navigable water.” Most states own


69. E.g., Connecticut, “[E]very river, where the sea ebbs and flows, is by the common law considered as navigable and all rivers not thus distinguished are not navigable,” Adams v. Pease, 2 Conn. 481, 484 (1818); Massachusetts, public trust is applied to “great ponds” with an area of more than ten acres, in their natural state, and to all waters that are navigable-in-fact, Commonwealth v. Tiffany, 119 Mass. 300 (1876); Commonwealth v. Inhabitants of Charlestown, 18 Mass. (1 Pick.) 180 (1822); North Carolina, public trust ownership of lands covered by waters, whether tidal or nontidal that are “wide enough and deep enough for sea vessels to navigate, and without any obstruction to this navigation from its mouth to the ocean,” Wilson v. Forbes, 13 N.C. (2 Dev.) 30 (1828); Oregon, navigable
the bottoms of rivers and lakes, although several provide for some private ownership. For lands bordering tidal waters, the mean high tide line forms the upper boundary of both sovereign-owned tideland and the upper boundary of tideland subject to the public trust servitude, whether state-owned or privately held. For lands bordering nontidal, navigable waters, the upper boundary is the ordinary high water mark. Although the public trust doctrine does not provide the public with rights of access along the dry sand area above public trust shorelands, a growing number of states are deciding that the public's full exercise of their public trust rights requires limited access to the dry sand beach immediately shoreward of a sandy beach.

D. Modern Interpretation

The most recent case to come from the United States Supreme Court is Phillips Petroleum Company v. Mississippi. At issue were forty-two acres of land underlying the north branch of Bayou LaCroix and eleven small drainage streams in southwestern Mississippi. Although the waters over the lands lie several miles north of the Mississippi Gulf Coast and are not navigable, they are nonetheless tidally influenced as a result of adjacency to the Jourdan River which in this area is affected by the ebb and flow of
the tide.\textsuperscript{75} Phillips Petroleum Company and the Cinque Bambini Partnership held record title to the lands, tracing their claims back to prestatehood Spanish land grants. The State of Mississippi issued oil and gas leases that included the disputed lands, claiming that at time of statehood it acquired and held in public trust "all land lying under any waters influenced by the tide, whether navigable or not."\textsuperscript{76}

The United States Supreme Court first pointed to the "seminal case in American public trust jurisprudence"\textsuperscript{77} in which it had concluded:

At common law, the title and dominion inlands flowed by the tide water were in the King for the benefit of the nation . . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States.\textsuperscript{78}

According to the Court, Shively was simply a reiteration of prior decisions incorporating "similar, sweeping statements of States' dominion over lands beneath tidal waters."\textsuperscript{79} Not only are the rights of navigation reserved to the public in these waters, but also fishing,\textsuperscript{80} reclamation for urban expansion,\textsuperscript{81} and oyster planting and harvesting.\textsuperscript{82} The Court then reaffirmed its longstanding precedents "which hold that the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide."\textsuperscript{83}

Phillips Petroleum and Cinque Bambini Partnership argued that the test for state ownership should be whether the waters over the claimed lands were navigable in fact, and pointed to the fact that in England, practically all navigable rivers are influenced by the tide. Thus, they argued, the terms "tidewater" and "navigability" were synonymous at common law, and consequently, the King's ownership of lands beneath tidewaters actually rested on the navigability of those waters rather than the tidal ebb and

\begin{thebibliography}{99}
\bibitem{75} \textit{Id.} at ____, 108 S. Ct. at 793.
\bibitem{76} \textit{Id.}
\bibitem{77} Shively v. Bowlby, 152 U.S. 1 (1894).
\bibitem{78} \textit{Id.} at 57.
\bibitem{79} \textit{Phillips Petroleum}, ____ U.S. at ____, 108 S. Ct. at 794.
\bibitem{80} Smith v. Maryland, 59 U.S. (18 How.) 71 (1855).
\bibitem{81} Hardin v. Jordan, 140 U.S. 371 (1891).
\bibitem{82} McCready v. Virginia, 94 U.S. 391 (1876).
\bibitem{83} \textit{Phillips Petroleum}, ____ U.S. at ____, 108 S. Ct. at 795.
\end{thebibliography}
flow. The Court declined to debate "what the English law was," since it had "consistently interpreted the common law as providing that the lands beneath waters under tidal influence were given States upon their admission into the Union." Although the Court acknowledged that it had criticized the "ebb and flow" test in The Genesee Chief, it stated that the settled law of this country was recognized in Barney v. Keokuk: lands under navigable freshwater lakes and rivers were within the reach of the public trust, subject to the federal navigation easement and Congress’ power to control navigation under the Commerce Clause. However, the Court stated:

That States own fresh water river bottoms as far as the rivers are navigable . . . does not indicate that navigability is or was the prevailing test for state dominion over tidelands. Rather, this rule represents the American decision to depart from what it understood to be the English rule limiting Crown ownership to the soil under tidal waters.

The Court pointed out that in Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., it had stated that Barney v. Keokuk had "extended the doctrine to waters which were nontidal but nevertheless navigable, consistent with [the Court's] earlier extension of admiralty jurisdiction." The Genesee Chief and Barney v. Keokuk extended admiralty jurisdiction and the public trust doctrine to navigable fresh waters and the lands beneath them, but the Court did not read these decisions as "simultaneously withdrawing from public trust coverage those lands which had been consistently recognized in [its] cases as being within [the] doctrine's scope: all lands beneath waters influenced by the ebb and flow of the tide."

Phillips Petroleum and the Cinque Bambini Partnership weakened their argument by conceding that states own the tidelands bordering the oceans, bays, and estuaries, even where the wa-

84. Id. at __, 108 S. Ct. at 796.
85. Id. (emphasis in original).
86. Id.
87. 53 U.S. (12 How.) 443 (1851).
88. 94 U.S. 324 (1876).
90. Id. at __, 108 S. Ct. at 797.
93. Id. at __, 108 S. Ct. at 797.
ters cannot be considered navigable. The Court stated:

It is obvious that these waters are part of the sea, and the lands beneath them are State property; ultimately, though, the only proof of this fact can be that the waters are influenced by the ebb and flow of the tide. This is undoubtedly why the ebb-and-flow test has been the measure of public ownership of tidelands for so long.\textsuperscript{94}

The Court noted that all tide waters are connected to the sea, and that although the lands in this case differed in some ways from lands directly adjacent to the sea, they nonetheless shared the "geographical, chemical and environmental" qualities that make lands beneath tidal waters unique.\textsuperscript{95} The Court held that the lands became the property of Mississippi at the time of its admission to the Union in 1817. Further, it declined to set aside the Mississippi supreme court's state-law determination that subsequent developments had not divested the state of its ownership.\textsuperscript{96} 

\textit{Phillips Petroleum} does not vitiate the "navigability" test. Instead, the thrust of the decision is that the public trust doctrine casts its mantle over all submerged lands whose waters are subject directly or indirectly to the ebb and flow of the tide, no matter how far from the sea they may be. This rule is subject to the caveat that the states are free to determine for themselves the extent to which they will allow private encroachment on public trust lands.

\textbf{E. Recurring Property Issues}

Several issues exist which may universally arise to plague state courts in their particular interpretation and application of the public trust doctrine. The extent of public rights in tidelands varies from state to state.\textsuperscript{97} The property issues which courts may have to resolve are: (1) What is the geographical boundary between private and public trust land? (2) To what extent can the state alienate public trust lands in fee? (3) What private and public uses

\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
are protected by the public trust doctrine? and (4) What public rights are impressed upon owners whose property lies upland from public trust tidelands? Additionally, the constitutional “takings” issue may arise when a state attempts to regain ownership and control of land previously considered to be privately held.

As stated earlier, traditionally, all lands covered by the sea, including lands subject to the ebb and flow of the tides as well as navigable nontidal waterways, are subject to the public trust doctrine. Although most states have established the high water mark as the inland geographic boundary of public trust lands,98 a few eastern-seaboard states extend private ownership of oceanfront property to the low water line, subject to reserved rights of the general public for navigation, commerce, and fishing. In some states, these reserved public rights can be extinguished by lawful wharfing or filling, provided it does not interfere with navigation.99 Coastal tidelands are a constantly changing ecosystem with mobile geographic boundaries. Wetlands are created and destroyed on a regular basis, forcing states to deal with the question of the boundaries of trust lands with regard to accretion, reliction, and avulsion.100

Furthermore, the reach of the public trust doctrine has expanded during the past two decades to include not only fishing, navigation, and commerce, but also dry sand areas of private beaches,101 nonnavigable tributary streams,102 park land,103

98. See, e.g., Martin v. O'Brien, 34 Miss. 21 (1857).
100. See, e.g., H.K. Porter Co. v. Bd. of Supervisors, 324 So. 2d 746 (Miss. 1975). See also Slade, supra note 68, at 26.

Gradual and imperceptible changes in the shoreline produced solely by the forces of nature (e.g. erosion, accretion, reliction) inure to the benefit or loss of the upland owner. That is, the seaward boundary of the upland owner changes with the naturally occurring gradual and imperceptible changes in the shoreline. Sudden changes in the shoreline produced by natural forces (e.g. avulsion), however, do not act to change boundary lines. Changes in the shoreline due to man induced forces (e.g. filling, piers, jetties) also do not act to change boundary lines.

The public's trust rights to the use of the “new” shoreland resulting from the erosion, accretion or reliction remain unchanged. The public's trust rights to shoreland within the boundaries of the upland owner due to avulsion, however, remain unclear. The public's trust rights to use filled land, also is unclear, with either variation between states' laws on the point, or no law.

102. National Audubon Soc'y., v. Superior Ct., 33 Cal. 3d 419, 658 P.2d 709,
streambeds, marine life, sand and gravel in water beds, an historic battlefield, wildlife, archeological remains, and even a downtown area. In short, the geographic boundaries of the doctrine are sufficiently elastic to cover the lands that each particular state court or legislature determines should be protected for its citizens.

The United States Supreme Court has stated, however, that the extent to which a state can alienate public trust lands in fee is a matter of state law, in that a state's trust obligations do not prevent the alienation of public trust lands when the public interest is enhanced or when the conveyance does not impair the public's use of the remaining lands. This is known as the "public purpose" exception. Perusal of the recent case law suggests that this test would be hard to meet in most state courts.


109. Id.


111. Illinois Central, supra note 57.

112. The factors considered by the courts in determining whether specific grants fit within the public purpose exception are: (1) whether the lands are capable of serving any public purpose in their natural state; (2) whether the private grantees will dedicate all or any portion of the land to actual public use; (3) whether indirect public benefits, such as the promotion of commerce and navigation, will be derived from private use; and (4) whether the private grantees have paid sufficient consideration. Kiefer, supra note 15.

113. See, e.g., People v. Chicago Park Dist., 66 Ill. 2d 65, 360 N.E.2d 773
With regard to private rights and public uses, at least one court has held that the rights incidental to littoral ownership include the privileges of landing boats, hauling nets, gathering seaweed and shells, and taking sand from the beach between the high and low water marks. The littoral owner may also build a wharf or pier. If the submerged land has been declared subject to the public trust doctrine, the public would retain its common law rights to fish and navigate in the waters. The combination of these private and public rights may create an uneasy tension in protected near-shore waters.

In the early 1970s, a national movement developed to reduce the growing loss of coastal wetlands to the pressures of developers. Congress responded by passing the Coastal Zone Management Act of 1972, which provides coastal states with incentives to manage their coastal areas through implementation of federally approved coastal zone management programs. Many states passed coastal wetlands protection laws that impact littoral owners by requiring permits for certain activities. Although private littoral rights are subordinate to public rights, the laws recognize and accommodate these rights by exempting some activities for littoral owners. However, if a littoral owner’s activity adversely affects tidelands, it will be subject to a review procedure.

Finally, littoral and riparian owners have often argued that the enforcement of public trust rights constitutes a taking of private property for public use, which requires that just compensation be paid. The issue cannot be decided by reference to the law of

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114. Littoral owners are those whose property borders on an ocean, sea, or lake. Riparian owners are those whose land borders on a water course. BLACK'S LAW DICTIONARY 842 (5th ed. 1979).

115. Barataria Canning Co. v. Ott, 84 Miss. 737, 37 So. 121 (1904).

116. See supra note 100, para. 1.


119. Id. and supra note 117.

120. Id.
takings in general, since the scope of regulation of tidelands is distinct from land use regulation of dry lands. In the case of dry lands, the state holds no property interest, so that the reach of the police power does not extend beyond reasonable regulation for the benefit of the general public. In the case of submerged lands, however, the state has a retained property interest for the benefit of the public. Therefore, the state has merely increased its power to mandate the public purposes which must be served by the use of lands subject to the public trust without running afoul of the takings clause. Accordingly, one may conclude that the public trust doctrine reflects the assertion of public rights that preexist any private property rights in lands or resources at issue. Logically, then, such an assertion of rights cannot be deemed a taking of private property.

This conclusion is buttressed by the Phillips Petroleum decision. The Court "recognized the importance of honoring reasonable expectations in property interests." But it noted that "such expectations can only be of consequence where they are 'reasonable.'" Since Mississippi law had consistently held that the public trust in submerged lands included "title to all the land under tidewater," the Court stated that this was "ample indication of the State's claim to tidelands." Mississippi's cases had also referred to uses such as bathing, swimming, recreation, fishing, and mineral development, which gave notice that the "State's claims were not limited to lands under navigable waterways." The Court held that any contrary expectations could not be considered reasonable. A challenge grounded on a takings issue, then, would probably not survive in the face of state case law indicating a state's claim to tidelands or any other property or resource protected by the public trust doctrine.

122. See supra note 74.
123. Id. at ___, 108 S. Ct. at 798.
124. Id.
125. Id.
126. Id.
127. Id.
128. The Phillips Petroleum dissenters (O'Connor, Stevens, and Scalia, JJ.) were distressed that the Court's decision would break a chain of title reaching back more than 150 years. The dissenters found "settled expectations" to exist even in the absence of a state grant and in the face of many state and federal
III. THE PUBLIC TRUST DOCTRINE IN NORTH CAROLINA

A. Historical Law

North Carolina has more than 2,200,000 acres of coastal sounds, salt marshes, and broad river mouths.129 As one of the thirteen original states,130 North Carolina was governed by the English Lords Proprietor during its colonial period.131 Naturally, the common law public trust doctrine was applied to ensure the free use of the coastal waterways for public navigation, fishing, and commerce.132 As early as 1711 and 1719, the first representative government ensured the continuity of the common law by enacting laws which precluded any grant of exclusive rights in navigable waters or the lands beneath them.133 Those rights under the public trust doctrine have survived to the present day and are defined as "the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State."134

An examination of the case law demonstrates that North Carolina held its shorelands at the time of the adoption of the United States Constitution and continues to hold title in its trust capacity to the beds of tidal waters, whether the waters above such lands are navigable or nonnavigable, including mudflats and other areas exposed at low tide.

Note also that although the question of whether a state may be estopped from asserting ownership of public trust lands because of earlier actions will usually be decided under state law, the United States Supreme Court could find that the state action constituted a taking under Kaiser Aetna v. United States, 444 U.S. 164 (1978) (state's failure to act to assert ownership or control at an earlier stage created property interests for which compensation must be made). See Smith, Reclaiming the Public Trust (paper presented at the Seventh Annual Submerged Lands Management Conference 1988).

131. 1663-1728. Cauffman, supra note 129.
132. In a 1667 set of instructions for Albemarle County, the Lords Proprietor declared that all residents should have "free passage through, or by any Seas, Sounds, Creeks, Rivers, Riverlets, etc. in the said Providence of Carolina. Id. at 3-4 (quoting Saunders, I The Colonial Records of North Carolina at X (1886)).
133. Id. at 4.
As discussed earlier in this article, the original test for lands \textit{jus publicum} was whether the waters above them were subject to the ebb and flow of the tide.\textsuperscript{135} In \textit{Wilson v. Forbes},\textsuperscript{136} the North Carolina Supreme Court determined that the ebb-and-flow test was inapplicable to North Carolina because of the "great length of [its] rivers, extending far into the interior, and the sand-bars and other obstructions at their mouths."\textsuperscript{137} The court substituted a test more suitable to the state's topography:

\begin{quote}
[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, 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.\textsuperscript{138}
\end{quote}

This test was affirmed in \textit{Collins v. Benbury}.\textsuperscript{139} There, plaintiff brought an action to recover damages allegedly sustained as a result of defendant's interference with plaintiff's seine "whilst he was enjoying his exclusive right of fishing in the waters of Albemarle Sound."\textsuperscript{140} The court framed the issue in terms of whether plaintiff was the owner of the submerged land over which he hauled his fishing seine, by virtue of his ownership in the shore.\textsuperscript{141} It held that plaintiff was not the owner (1) because the "common law forbade the grant of property in land covered by a stream of water which in that law was called navigable,"\textsuperscript{142} (2) because North Carolina's statutes similarly forbade "a grant of land covered by water . . . denominated navigable,"\textsuperscript{143} and (3) because Albemarle Sound "must certainly be deemed navigable in the sense of either the one or the other of those laws, if not both of them."\textsuperscript{144} The court

\begin{itemize}
\item \textsuperscript{136} 13 N.C. (2 Dev.) 21 (1828).
\item \textsuperscript{137} Id. at 34. The court pointed out that if the English rule were strictly followed, both Albemarle and Pamlico Sounds, which are inland seas, would not be classified as navigable and would thus be subject to private ownership. Id.
\item \textsuperscript{138} Id. at 35.
\item \textsuperscript{139} 27 N.C. (5 Ired.) 118 (1844).
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Id. at 95.
\item \textsuperscript{142} Id. at 95-96.
\item \textsuperscript{143} Id. at 96.
\item \textsuperscript{144} Id.
\end{itemize}
pointed out that no one could be entitled to the exclusive right of fishing in any navigable water unless such right was derived from an express grant by the sovereign power, or by such length and type of possession as would cause a presumption of a grant to arise.\textsuperscript{145} Plaintiff had no exclusive rights to fish as he claimed, because in fishing the sound, he only exercised a right which belonged to him in common with the rest of the public.\textsuperscript{146}

An interesting little case came before the supreme court in 1846. In \textit{Hatfield v. Grimstead},\textsuperscript{147} a $10.00 penalty against defendant for hunting geese on plaintiff’s land was at issue. Defendant’s argument was that plaintiff’s claim of ownership to the Currituck Inlet shoal on which the hunting blind defendant had used was located was void under Laws 1715, Rev. Code, ch. 6, sec. 3 and 1777, ch. 114, sec. 10. These laws directed how land lying on navigable water could be entered and surveyed.\textsuperscript{148} The court stated that since the inlet had been closed, the shoals were not fit for any purpose except as hunting grounds for wild fowl; but whether the land would have been subject to the laws was irrelevant, because they had inadvertently been omitted from the Revised Statutes of 1836.\textsuperscript{149} The issue was therefore decided under the common law, which permitted the land to be alienated by the sovereign because it was not subject to the ebb and flow of the tide after the inlet had been closed.\textsuperscript{150} Plaintiff’s deed was valid.\textsuperscript{151}

In \textit{Ward v. Willis},\textsuperscript{152} the charter of the Town of Beaufort expressly extended the town’s boundaries to the low water mark on Core Sound, thus vesting the land between the high and low water marks in the town commissioners to convey in fee simple. Plaintiff therefore claimed his property under a specific legislative grant.\textsuperscript{153} Defendant also claimed it under an entry.\textsuperscript{154} The Supreme Court discussed the English law and stated:

\textsuperscript{145} \textit{Id.} at 94. This latter comment appeared in defendant’s argument in \textit{State v. Credle}, see text accompanying notes 222 and 223 infra.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} 29 N.C. 103, 7 Ired. 139 (1846).
\textsuperscript{148} \textit{Id.} at 104.
\textsuperscript{149} \textit{Id.} at 105. They were later reenacted.
\textsuperscript{150} \textit{Id.} at 104. Before the inlet was closed, boats could pass at high tide, but it had become much shallower since and therefore was not subject to the “navigable by sea vessel” test.
\textsuperscript{151} \textit{Id.} at 105.
\textsuperscript{152} 51 N.C. (6 Jones) 183 (1858).
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.} at 184.
It seems, thus, to be clear, that 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; in other words, that it is all one, whether it be under the channel or be the margin between the high and low water lines.\textsuperscript{165}

The court concluded:

The same public purposes require that, here, as in England, the State should reserve lands in that situation from private appropriation; and although it may please the Legislature [sic] to dispose of them by special grant for the promotion of trade and the growth of a commercial town, accessible to vessels, it rationally accounts for the restriction upon the common mode of granting other public land \ldots \textsuperscript{166}

\textit{Ward v. Willis} makes two important points: first, the public trust in submerged lands extends to the line of ordinary high water, and second, the legislature may grant such land to private ownership where a sufficient public purpose exists.\textsuperscript{157}

In 1857, Tyre Glen built a milldam across the Yadkin River, from bank to bank, in order to supply his grist and sawmills with water; but as a result, shad and other fish were prevented from passing up the channel of the river above the dam.\textsuperscript{158} Glen owned the bed of the river at the time he erected the milldam under a 1794 grant from the state, as well as the land on both sides of the river under earlier grants from the state.\textsuperscript{159} Chapter 244 of the Laws of 1858 directed that the Yadkin River was to be kept open for the passage of fish and that anyone failing to remove obstructions from the watercourse would be subject to a fine of $15.00.\textsuperscript{160} Glen was indicted under this statute. The case gave the North Carolina Supreme Court a chance to review its prior decisions and to reaffirm its recognition of the classification of the waters in this state.

The court framed the issue in terms of whether the legislature had the power under the North Carolina and Federal Constitutions to force Glen to take part of his dam away to make passage for fish

\textsuperscript{155} \textit{Id.} at 185.
\textsuperscript{156} \textit{Id.} at 185-86.
\textsuperscript{157} \textit{See supra} note 112.
\textsuperscript{158} State v. Glen, 52 N.C. 248, 7 Jones 321 (1859).
\textsuperscript{159} \textit{Id.} at 249.
\textsuperscript{160} \textit{Id.}
at his own expense without indemnification. The court first undertook to ascertain the nature of the river at the point where Glen had erected the milldam. In its review of the English common law, the court stated the general rule that

[all] rivers above the flow of tidewater are, by the common law, prima facie private; but when they are naturally of sufficient depth for valuable flotage, the public have an easement therein for the purposes of transportation and commercial intercourse; and, in fact, they are public highways by water. They are called public rivers, not in reference to the property of the river, for that is in the individuals who own the land, but in reference only to the public use.

The court concluded that the Yadkin River was not a navigable stream at the milldam location, since it was not navigable by sea vessels; and further, the existence of a public easement in it was doubtful, since only on a few occasions in the past twenty years had commodities been carried down it in "flats." Moreover, Glen was much more than a riparian owner because he claimed the riverbed under a direct state grant. The court held that the state could not take Glen's property from him or materially impair its

161. Id. at 250.
162. For this purpose, the court went "to the highest authority on the subject, Lord Hale's treatise [D]e [Jure [M]aris et [B]rachiorum [E]jusdem":

There may be some streams or rivers that are private, not only in propriety or ownership, but also in use, as little streams or rivers that are not a common passage for the King's people. Again, there be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters, and these, whether they are fresh or salt, whether they flow and reflow or not, are prima facie publici juris, common highways for a man or goods, or both, from one inland town to another.

Id. at 250 (quoting De Jure Maris et Brachiorum Ejusdem, (Hargrave translation at 809)) (emphasis in original). The court also noted:

Fresh rivers, of what kind soever, do of common right belong to the owners of the soil adjacent, so that the owners of one side have, of common rights, the propriety of the soil, and consequently the right of fishing usque ad filum aquae, and owners of the other side the right of soil or ownership and fishing unto the filum aquae on their side; and if a man be owner of the land on both sides, in common presumption, he is the owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience.

Id. at 251 (quoting Hargrave at 5).
163. Id. (quoting Angell, Watercourses § 535 (1877)) (emphasis in original).
164. Id. at 252.
value without compensating him. The statute was therefore repugnant to both Constitutions.

The court then took this opportunity to summarize "the law of North Carolina in relation to the watercourses of the State":

1. All the bays and inlets on our coast, where the tide from the sea ebbs and flows, and all other waters, whether sounds, rivers, or creeks, which can be navigated by sea vessels, are called navigable, in a technical sense, are altogether publici juris, and the soil under them cannot be entered and a grant taken for it under the entry law. In them, too, the right of fishing is free.

Where the tide ebbs and flows, the shore, between the high and low water, is also within the prohibition of private appropriation, under the general entry law, but may be the subject of a direct, special legislative grant.

2. All the rivers, creeks, and other watercourses not embraced in the above description, but which are, in fact, sufficiently wide and deep to be navigable by boats, flats and rafts, are technically styled unnavigable, and are open to be appropriated by individuals, by grants from the State, under the entry laws. When the bed of the watercourse is not included in the grant, but the stream is called for as one of the boundaries, the grantee is entitled as an incidental easement, to go to the middle of the stream, and may exercise and enjoy that easement for the purpose of catching fish, or in any other manner not incompatible with the right which the public have in the stream, for water communication, between different points on it. . . . [T]he Legislature may, perhaps, resume the incidental rights, for the public use, without making compen-

165. Id. at 253. "It is established by the greatest weight of authority that [the state] cannot [take property given under a state grant] for any other than a public purpose, either with or without compensation." Id. See also Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 177 S.E.2d 513 (1970) (fishing pier operator whose seashore lots had been completely eroded by Atlantic Ocean not entitled to compensation from municipality on theory that latter's construction of beach erosion seawall constituted a taking, where ocean's erosive action had effectively divested operator of title prior to seawall construction and had vested title in municipality); Dodge v. State Highway Comm'n, 221 N.C. 4, 18 S.E.2d 706 (1942) (petitioner could not recover compensation where State Highway Commission constructed canal bridge under which petitioner could not float his barge). But see Shelby v. Power Co., 155 N.C. 160, 71 S.E. 218 (1911) (state cannot divest itself of right to exercise police power for the general good; prescription cannot run against public rights).

sation for them . . . .  

3. All the rivulets, brooks, and other streams which . . . cannot be used for intercommunication for inland navigation are entirely the subjects of private ownership . . . . Rights acquired in streams of this class by grants from the State, or, in watercourses of the second class, cannot be taken from the owners by the Government except in the exercise of the power of eminent domain, and then only for public use, with a provision for . . . just compensation.\(^{167}\)

In short, the *Glen* court recognized two classes of waters: public trust beds and private beds. The public trust ownership of the bed extends both to all lands subject to the ebb and flow of the tides to the farthest influx of salt water and to all waters navigable by sea vessels.\(^{168}\)

In the years that followed, a line of cases reaffirmed and refined the law set forth in *Glen*.\(^{169}\) The first harbinger of the issues

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\(^{167}\) State v. Glen, 52 N.C. at 257-58 (citations omitted) (emphasis in original).

\(^{168}\) See Collins v. Benbury, 25 N.C. (3 Ired.) 277 (1842); Ingram v. Threadgill, 14 N.C. (3 Dev.) 59 (1831); Wilson v. Forbes, 13 N.C. (2 Dev.) 30 (1828). For the law in the other original states, see generally Phillips Petroleum v. Mississippi, brief *amicus curiae* of the Thirteen Original States, joined by the Coastal States Organization (Oct. Term, 1986).

\(^{169}\) 52 N.C. 371. In Skinner v. Hettrick, 73 N.C. 53 (1875), the court held that since Albemarle Sound was a navigable water, it was not subject to entry although every citizen had fishing privileges in the waters. Therefore, while a beach owner could draw his seine to the beach to the exclusion of others, he could not acquire the sole right of fishing in the waters of the sound because to constitute a several fishery there must be a right of soil. Such right could not be had in Albemarle Sound. The court also pointed out that regulation of the right to fish in navigable waters is a proper subject of legislation. *See also* Bell v. Smith, 171 N.C. 116, 87 S.E. 987 (1916) (grant of land bordering upon or partly under navigable waters cannot confer upon the grantee sole or exclusive right of fishing in such waters).

In Bond v. Wool, 107 N.C. 126, 12 S.E. 281 (1890), the court held that persons owning lands on navigable streams may erect wharves next to their lands up to deep water but are confined to straight lines out from their waterfronts. Defendant was therefore not a trespasser since, in order to gain access to deep water, he had erected a pier on his own natural waterfront even though it stood between plaintiff's fish-houses and deep water. Plaintiff was only entitled to access to deep water at his immediate waterfront.

In Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968), the court noted that Congress had relinquished to the states the entire interest of the United States in all lands beneath navigable waters within state boundaries, inclusive of submerged lands within three geographical miles seaward from the coast of each
facing the North Carolina Supreme Court in *State v. Credle* in 1988 appeared in 1894. In *State v. Spencer*, a case from Hyde County, defendant was alleged to have made entry under a state-granted franchise to take oysters from a natural oyster bed in Pamlico Sound rather than a cultivated one, as the applicable state. In *Robbins*, the court held that although a littoral owner has the right to construct a pier in order to provide access to ocean waters of greater depth, he may not lawfully prohibit the use of the ocean waters beneath the pier as a passage to water craft, nor may he obstruct the rights of the public to use the ocean waters seaward from the strip of land constituting the foreshore.

In *Commissioners v. Lumber Co.*, 116 N.C. 420, 21 S.E. 941 (1895), floatable rivers were deemed navigable highways, in which the public has an easement paramount to the rights of riparian owners. The court held that in order to establish such an easement, it is unnecessary to show that the watercourse is susceptible of use continuously during the whole year. One need only show that the water will rise and remain at such height as to make it profitable as a highway for transporting logs to mills or markets lower down the watercourse. And in *State v. Twiford*, 136 N.C. 603, 48 S.E. 586 (1904), the court reiterated that where a stream is navigable in fact, it is navigable in law. The test is whether the stream is capable of being used for trade and travel, rather than the extent and manner of such use.

An important rule was laid down in *Shepard’s Point Land Co. v. Atlantic Hotel*, 132 N.C. 366, 44 S.E. 39 (1903). There, the court held that a grant to a riparian owner of land covered by navigable water conveys only an easement therein, and a deed of the land adjoining the navigable water conveys the easement in the land covered by the water. The court stated that “[t]he policy of the State from 1777 until 1854 was . . . to preserve its title to the navigable waters, as the same had been held by the King of England, in trust for the free use of all of its citizens.” *Id.* at 376, 44 S.E. at 44. The court could not agree that this policy was to be reversed so that the growth of a prospective seaport was to be hampered by the grant of the entire waterfront to private owners. *Id.* at 377, 44 S.E. at 44. *See also*, *State v. Twiford*, 136 N.C. 438, 48 S.E. 586 (where the court held that control of navigable water belongs to the public and is not appurtenant to ownership of the shore).

In *Home Real Estate Loan & Ins. Co. v. Parmele*, 214 N.C. 63, 197 S.E. 714 (1938), the court held that the State Board of Education, as successor to the Literary Fund of North Carolina is vested with title to all public lands, including marshlands, which were owned by the fund at the time of adoption of article IX, section 10 of the North Carolina Constitution. The board had sold large tracts of land in order to fund the public school system. Since the marshlands were not navigable, the State Board of Education could sell and convey the fee in any marshland tract of more than two thousand acres. *See also* *Parmele v. Eaton*, 240 N.C. 539, 83 S.E.2d 93 (1954) (same); *Resort Dev. Co. v. Parmele*, 235 N.C. 689, 71 S.E.2d 474 (1952) (same). In 1953, the General Assembly passed a local public act which provides that all marshlands and swamplands conveyed or granted by the State Board of Education for New Hanover, Pender, and Onslow Counties are valid. 1953 N.C. Sess. Laws ch. 966, § 1.

170. 114 N.C. 473, 19 S.E. 93 (1894).
ute provided. The case is notable for its detailed discussion of chapter 119 of the Laws of 1887, which set up an elaborate system to encourage oyster culture, as well as to preserve public rights in the use of natural oyster beds in the sound. Under the statute, entry "might be made of any ground which had not been designated as public ground, and after payment therefor, grants were to issue, to the enterer, of a perpetual franchise to cultivate oysters within a certain limit and upon a certain condition." The court concluded that no cause of action had been stated against defendant, because if the grant had been issued under the provisions of and in strict accordance with the statute, "rights of property [had] been acquired which the state itself [could not] take away, except after compensation and under the principle of eminent domain."

In State v. Sermons, defendant had sold oysters without a license to persons in Swan Quarter, Hyde County. He had obtained the oysters from a privately owned oyster bed known as Judith Narrows which had been granted out by the state twenty years previously. The case is interesting for its origin and for the court's statement that fish, including oysters and other shellfish, are a valid source of food supply which come within the police power of the state and are therefore subject to the rules and regulations reasonably designed to protect them and to promote their increase and growth. Such rules and regulations may not be set aside and ignored simply because they indirectly affect private rights that would ordinarily be recognized. And in Bell v. Smith, the court held that the exclusive right to fish in navigable waters could not be acquired by prescriptive use.

B. Modern Reaffirmation—State v. Credle

In 1919, Sidney Arthur Credle and his father began to plant,

171. The statute makes a reappearance in State v. Credle.
173. Id. at 476-77, 19 S.E. at 95.
174. 169 N.C. 344, 84 S.E. 337 (1915).
175. Id. at 346, 84 S.E. at 338.
176. Id.
177. 171 N.C. 116, 87 S.E. 987 (1916).
178. Id. at 118. This issue reappeared in State v. Credle in an ingeniously crafted argument to both the court of appeals and the supreme court. See Defendant Appellant's Brief to the Court of Appeals at 7 and Defendant Appellant's New Brief to the Supreme Court at 6.
179. Pronounced "Cradle".
cultivate, and harvest oysters in a forty-acre tract of land sub-
merged under the waters of Swan Quarter Bay in Hyde County.\textsuperscript{180} These waters are part of Pamlico Sound and are affected by the ebb and flow of the tide and the influx of salt water.\textsuperscript{181} Credle's father, A.C. Credle, purchased the submerged land in 1918 and 1919 and placed posts, pilings, and railroad irons near or at the corners of the oyster bed to mark the property.\textsuperscript{182} A.C. Credle deeded the property to Credle in 1972. Both men paid taxes on the oyster bed from the date of its purchase. Over the years, they planted thousands of bushels of oysters on the submerged prop-
erty.\textsuperscript{183} Credle, however, dredged for the oysters without a per-
mit,\textsuperscript{184} prompting the state to initiate criminal proceedings against
him. Because Credle produced a compilation of old land grants
purportedly showing his predecessors in title, the local district at-
torney was persuaded to stipulate to Credle's ownership of the oys-
ter bed.\textsuperscript{185} Credle won his case.\textsuperscript{186}

The state then brought an action to quiet title against Credle
in 1982.\textsuperscript{187} In his answer, Credle asserted that he owned the land,

\begin{enumerate}
\item Petition for Discretionary Review to the North Carolina Supreme Court
at 2 (filed Sep. 4, 1987).
\item Pamlico Bay is a navigable body of water. State \textit{ex rel.} Blount v.
Spen-
cer, 114 N.C. 779, 19 S.E. 93 (1894). \textit{See also} map of Swan Quarter, North Caro-
\item \textit{Id.} \textit{See also} Cauffman, \textit{supra} note 129, at 20-21.
\item \textit{Id.}
\item Only the tonging method is permitted in this area. Interview with Geo.
Thomas Davis, Jr., Credle's attorney (Mar. 25, 1989).
\item The district attorney apparently did so without making a title check.
\textit{See} Cauffman, \textit{supra} note 129, at 21.
\item State \textit{v.} Credle, Superior Court, Hyde County, 82CVS23 (Oct. 26, 1984).
\item State \textit{ex rel.} Rohrer \textit{v.} Credle, 86 N.C. App. 633, 634, 359 S.E. 2d.
45, 46 (1987). The state began its program of reclamation of submerged public trust
lands in 1965 with passage of N.C. \textit{GEN. STAT.} \textsection{} 113-205, which requires all
persons who claim ownership of submerged lands beneath navigable waters in the
twenty-five coastal counties to register their claims with the Secretary of the
North Carolina Department of Natural Resources and Community Development.
The coastal counties include Beaufort, Bertie, Bladen, Brunswick, Camden, Car-
teret, Chowan, Columbus, Craven, Currituck, Dare, Gates, Halifax, Hertford,
Hyde, Martin, New Hanover, Northampton, Onslow, Pamlico, Pasquotank,
Pender, Perquimans, Tyrrell, and Washington. N.C. \textit{GEN. STAT.} \textsection{} 113-205(a)
(1987). All claims were to be registered on or before January 1, 1970. \textit{Id.} Claim-
ants were required to provide:
\begin{enumerate}
\item a source instrument, issued: (a) by the sovereign, i.e., the King of
England, the Lords Proprietor, or the State, (b) under valid statutory
authority, and (c) specifically describing the claimed area; and (2) an un-
\end{enumerate}

\textit{Spalding: The Pearl in the Oyster: The Public Trust Doctrine in North Carol}
"either by grant or adverse possession, and in any event, owned the exclusive right to take oysters from it by prescriptive use." 188 Credle's ownership claims were based on

(1) two deeds to his father, [A.C. Credle,] one from S.S. Mann and the other from Zeb Hayes, which purported to convey portions of a 640-acre grant that the State had made to one Joseph Hancock in 1786, (2) a perpetual franchise to take oysters from ten described acres that the State had granted to one J.W. Hayes in 1889 and (3) an application filed in 1891 by S.S. Mann for a perpetual franchise to cultivate shellfish in 640 described acres. 189

Credle's claim to prescriptive use was grounded on the assertion that he and his father possessed the land and had been harvesting oysters from the bottom under a claim of right continously from 1917. 190

In superior court, the claim relying on the 1786 land grant to Joseph Hancock was dismissed because Credle had failed to answer interrogatories concerning that particular chain of title. The state was then granted a partial summary judgment which dismissed Credle's claims that he owned the land by adverse use or prescriptive use. The trial court concluded that the exclusive right to harvest oysters from the state's submerged lands could not be acquired by prescriptive use. 191 In May 1986, the state was granted final summary judgment. The trial court ruled as a matter of law that (1) Credle admitted that he could not bring his chain of title forward from the 1889 Hayes franchise, 192 and (2) he could not

broken chain of title between the source instrument and the claimant's title by: (a) an attorney's abstract, and/or (b) a copy of each deed, will or other document showing each link in the chain of title; and (3) a map illustrating the claimed area.

N.C. GEN. STAT. § 113-205(a) (1987). More than ten thousand claims were registered, claiming ownership of 70% of the estuarine area along the southern half of the North Carolina coast. See Cauffman, supra note 129, at 17. The Division of Marine Fisheries is responsible for resolving the claims by December 31, 1990 (the twenty-one-year adverse possession period). N.C. GEN. STAT. § 113-206(f) (1987).


190. Id. at 524, 369 S.E.2d at 826.

191. Id.

192. Id. This franchise had a break in the chain of title between the original grantee from the state, J.W. Hayes and Zeb Hayes, who sold the property to A.C.
prove that the state had issued a perpetual franchise from the 1891 Mann franchise application. Credle had therefore failed to rebut the presumption of title in the state under N.C. GEN. STAT. § 146-79. The state was declared the owner of the submerged land. Credle appealed.

In the court of appeals, Credle expressly abandoned "all his assignments of error except those relating to the claim that he [had] acquired by prescriptive use the exclusive right to take shellfish from the submerged lands involved." Under the doctrine of the law of the case, therefore, Credle did not own the lands, either by grant or adverse possession, and had no exclusive right to take shellfish from them under a franchise. The court of appeals framed the issue as, "Can the exclusive right to take oysters from lands under navigable waters in this State be acquired by prescriptive use?" The court held that it could not. Relying on the cases previously discussed in part two of this article, the court stated:

Lands under navigable waters can neither be appropriated by private persons nor conveyed to them by the State except for a public purpose when authorized by statute; and that . . . such lands and the waters above them are held in trust for the use and benefit of all our people, each of whom, subject to reasonable legislative regulation in the public interest, has a right to navigate, fish and carry on commerce in such waters as he sees fit. . . . Grants of such lands not so authorized have been adjudged not to convey title, but only an easement; . . . and it has been held that there can be no exclusive right to fish in navigable streams.

The court of appeals went on to discuss the theory on which Credle based his claim of prescription—the common law right of piscary, which is the right to fish in another man's waters. Al-
though Credle acknowledged that North Carolina cases\textsuperscript{200} state that, as a general rule, no exclusive right to fish in the waters of the state exists, he argued that the crucial difference in his case was the fact that he was cultivating and harvesting oysters, not fin fish.\textsuperscript{201} He contended that "[t]he difference between the locomotive powers of swimming fish and shellfish, such as oysters and clams, justifie[d] the law in making a distinction as to their ownership."\textsuperscript{202} The court of appeals described this argument as "interesting and ingenious" but determined that it did not support a claim of exclusive right because profits a prendre, such as the right of piscary, are not exclusive to the holder and because exclusive fishing rights can only be acquired either by a grant of the soil under the water or by a grant of fishing distinct from the soil. Under the law of the case, Credle had neither.\textsuperscript{203}

Credle then petitioned the North Carolina Supreme Court for discretionary review, which was allowed.\textsuperscript{204} At the supreme court, Credle pointed out that he was asking the court "to hold that he [had] the right to a trial to determine whether he [had] a prescriptive profit a prendre (or other similar right) to take oysters from the oyster bottoms he and his father [had] cultivated for nearly 70 years."\textsuperscript{205} Since the state could grant exclusive rights of fishery, Credle argued that he should be able to acquire through prescription what he could acquire through grant, even though, in his case, his chain of title had been adjudged as broken.\textsuperscript{206} Credle himself did not concede that his chain of title was imperfect; rather, he

\textsuperscript{200} Bell v. Smith, 171 N.C. 116 (1916), and Daniels v. Homer, 139 N.C. 219 (1905).

\textsuperscript{201} Defendant Appellant's brief to the Court of Appeals at 5-6.

\textsuperscript{202} Id. (quoting 35 AM. JUR. 2d, \textit{Fish and Game} § 5 (1967)). Credle argued:

Fin fish do not lend themselves to cultivation as do oysters and clams. Fin fish can swim about anywhere. Any method that can be devised to keep them penned in would be a hinderance [sic] to navigation and other customary uses of the open water. Oysters do not move about of [sic] their own power to any appreciable extent; they do not need pens to keep them contained. It is feasible to raise oysters and at the same time keep the waters above the bottom open to the public for fin fishing, navigation and other customary uses; whereas, it is not feasible to cultivate fin fish without substantial imposition on the free enjoyment of navigable waters by the general public.

\textit{Id.}

\textsuperscript{203} State v. Credle, 86 N.C. App. at 636, 359 S.E.2d at 47.

\textsuperscript{204} 321 N.C. 300, 363 S.E.2d 183 (1987).

\textsuperscript{205} Defendant Appellant's New Brief at 3-4.

\textsuperscript{206} Id. at 5.
used the trial court's conclusion that it was to argue that, because some of the records, in the Hyde County Register of Deeds Office had been removed or destroyed, his case for acquisition by prescription was stronger.\textsuperscript{207}

The supreme court first briefly traced the emergence of the public trust doctrine in England and its development in this country.\textsuperscript{208} The court then turned to North Carolina, acknowledging that it had recognized the public trust doctrine in \textit{Land Co. v. Hotel}\textsuperscript{209} and other cases.\textsuperscript{210} The court pointed out that “[o]ne of

\begin{quotation}

Credle’s lawyer demonstrated a sense of humor by adding the following to the conclusion of his brief to the supreme court.

“The time has come”, the Walrus said,
“To talk of many things:
Of shoes—and ships—and sealing wax—
Of cabbages—and kings—
And why the sea is boiling hot
And whether pigs have wings.”
“But wait a bit”, the Oysters cried,
“Before we have our chat;
For some of us are out of breath,
And all of us are fat!”
“No hurry”, said the Carpenter.
They thanked him much for that.
“A loaf of bread”, the Walrus said,
“Is what we chiefly need:
Pepper and vinegar besides
Are very good indeed—
Now, if you’re ready, Oysters dear,
We can begin to feed.”
“But not on us!”, the Oysters cried,
Turning a little blue.
“After such kindness, that would be
A dismal thing to do!”
“The night is fine,” the Walrus said.
“Do you admire the view?”

\textit{Lewis Carroll, Through the Looking Glass.} Defendant Appellant’s New Brief at 8.


209. 132 N.C. 517, 44 S.E. 39 (1903).

\end{quotation}
the exceptions to the rule that the benefit and enjoyment of North Carolina's submerged lands is available to all its citizens, subject to reasonable legislative regulation, for navigation, fishing and commerce, relates specifically to shellfish." The exception was to be found in "a series of statutes designed to encourage the cultivation of oysters, while at the same time providing that natural oyster beds were not subject to exclusive entry." In 1887, the legislature adopted an act to promote shellfish cultivation in North Carolina, which consisted of a system to grant perpetual franchises upon application and issuance of a certificate from the engineer of the commissioners of shell fisheries as to the area, limits, and location of the proposed oyster bed. The act specifically provided that no franchise could be issued for shellfish cultivation in "any of the public grounds." However, in 1909, the legislature passed another act specifically "to promote the cultivation of the oyster in North Carolina." This statute instituted a system of renewable leases. It also repealed the act of 1887. The court then reviewed N.C. GEN. STAT. §§ 113-205-06 which were enacted in 1965 "in an effort to clear title to lands claimed under perpetual franchises or rights of fishery pursuant to the 1887 Act." The court noted that under the statute, public ownership of submerged lands and public trust rights are to be favored. Finally, the court pointed out that article IX, section 5 of the North Carolina Constitution "mandates

(1858); Wilson v. Forbes, 13 N.C. (2 Dev.) 30 (1828).
211. State v. Credle, 322 N.C. at 527, 369 S.E.2d at 828. At this point, the court began to construct Credle's argument for him.
212. Id. at 528, 369 S.E.2d at 828.
213. 1887 N.C. Sess. Laws ch. 119, sec. 6. These franchises remained in the grantee, his heirs, and legal representatives.
214. 322 N.C. at 528-29, 369 S.E.2d at 829.
218. 322 N.C. at 531, 369 S.E.2d at 830; N.C. GEN. STAT. §§ 113-205-06 (1965). The statute provides that in any proceeding where title is contested, the burden of showing title or right of fishery, by the preponderance of the evidence, is on the claiming title or right holder. N.C. GEN. STAT. § 113-206(d) (1987). See supra note 187 for a detailed explanation of N.C. GEN. STAT. § 113-205.
the conservation and protection of public lands and waters for the benefit of the public.”

Having marshalled its authorities, the court turned to Credle’s prescription argument, which was based on the contention that the S.S. Mann franchise application submitted under the 1887 shellfish cultivation act must have resulted in the issuance of a perpetual franchise. Although he could not produce a copy of the franchise, Credle had an affidavit from the Register of Deeds of Hyde County stating that two deed books were missing. Thus, Credle invited the court “to indulge in the legal fiction of the ‘lost grant’ to divest the State of its title.” The court declined this invitation, mainly because the opposing party in this case was the state, which enjoys a presumption of title under N.C. Gen. Stat. § 146-79. In addition, the public trust doctrine and the statutory mandate favoring public trust ownership of submerged lands under

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220. 322 N.C. at 532, 369 S.E.2d at 831. Article IX, section 5 of the North Carolina Constitution provides:

It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, open-lands, and places of beauty.


221. 322 N.C. at 533, 369 S.E.2d at 831.

222. Credle himself apparently located the original in the State Archives in Raleigh but neglected to copy it and could not later relocate it. Interview with Geo. Thomas Davis, Jr., attorney for Credle, (Mar. 25, 1989). This statement is in apparent conflict with the Court’s comment, See id.

223. Id. The affidavit from the Register of Deeds of Hyde County stated that one deed book had been stolen many years previously and the other had been burnt. Inquiry at the Hyde County Courthouse elicited the information that in years past the Register of Deeds was accustomed to taking both deeds and deed books home with him at night. He would then transcribe the information from the deeds into the deed books. One night, his stove overturned, and in the ensuing fire, deeds and books were destroyed. Interview at Hyde County Courthouse, (Mar. 25, 1989).

224. Id.; N.C. Gen. Stat. § 146-79 (1983) quoted in State ex rel Rohrer v. Credle. Such title can only be defeated by the opposing party’s showing of a “good and valid title to such lands in himself.” 322 N.C. at 533, 369 S.E.2d at 831. Credle’s failure either to link himself to the 1889 Hayes franchise or to produce a franchise issued to S.S. Mann scarcely enabled him to show “good and valid” title against the State.
N.C. GEN. STAT. § 113-206(f) weighed against Credle.  

Finally, the court turned to an eighty-five-year-old case to make its point: "Navigable waters are free. They cannot be sold or monopolized. They can belong to no one but the public and are reserved for free and unrestricted use by the public for all time. Whatever monopoly may obtain on land, the waters are unbridled yet." The court concluded that "[h]istory and the law bestow[ed] the title of these submerged lands and their oysters upon the State to hold in trust for the people so that all [might] enjoy their beauty and bounty."  

Although Credle was "not entitled to a jury trial on the issue of whether he had acquired the exclusive right to harvest oysters by prescription" in Swan Quarter Bay, he was nevertheless not precluded from harvesting activities. He would simply have to share the right to harvest oysters with the public.  

C. Resolvable Property Issues

The State v. Credle decision sheds light on several of the issues discussed in part one of this article. First, what is the geographical boundary between private and public trust lands in North Carolina? Under the State v. Credle decision, with its strong reaffirmation of the traditional public trust doctrine, title to

225. Id. at 534, 369 S.E.2d at 832.
226. Id. (quoting State v. Twiford, 136 N.C. 603, 609, 48 S.E. 586, 588 (1904)).
227. Id. The early controversies leading to the adoption of the public trust doctrine in this country were also based on the right to use oyster beds. Arnold v. Mundy, 6 N.J.L. (1 Hal.) 1 (1821). Oyster beds constitute breeding grounds and a source of food for innumerable species, both aquatic and amphibious. They also protect adjacent water by acting as filters. Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
228. Id. at 534-35, 369 S.E.2d at 832.
229. Id. Credle himself has not taken an oyster from Swan Quarter Bay since State v. Credle was decided. He is an elderly gentleman and has partially lost the use of his hands. In addition, he maintains that the water is too deep for harvesting by the tonging method, and dredging is not permitted in the area. Interview with Geo. Thomas Davis, Jr. (Mar. 25, 1988).

Two weeks after the decision was filed on 30 June 1988, a spate of newspaper articles appeared. See N.C. Court Severely Limits Claims to Submerged Lands, Raleigh News and Observer, July 15, 1988, at IA and 6A, col. 1; Shellfish Harvesters Preparing to Fight for River Bottoms, Raleigh News and Observer, July 18, 1988, at 1C, col. 1; Submerged Lands Ruling Significant, State Official Says, Raleigh News and Observer, Oct. 6, 1988, at 1C, col. 1.
all submerged lands subject to the ebb and flow of the lunar tides, as well as those covered by watercourses navigable by sea vessels and those which meet the "flotability" test, is vested in the state to hold in trust for the people. The seashore boundary is still the mean high water mark.\textsuperscript{230} Under N.C. GEN. STAT. § 113-205, the state lays claim only to lands that still lay under navigable waters in 1965. Lands that lay beneath navigable waters at the time of statehood but were subsequently filled and raised above the mean high water mark pursuant to a state grant or permit would not be open to an assertion of public trust rights. The resolution process under N.C. GEN. STAT. § 113-205 will probably result in the invalidation of many state grants and the impression on privately owned lands of the traditional public trust easement for navigation, commerce, and fishing.\textsuperscript{31} The state will recognize the Board of Education deeds to coastal marshlands as valid, but it may attempt to impress them with a public trust easement.\textsuperscript{232}

Second, to what extent can the state alienate public trust lands in fee? In \textit{State v. Credle}, the supreme court held that grants of fee simple title issued by the state to lands submerged by navigable waters are void, and private rights cannot be acquired in state-owned submerged lands either by prescription or by adverse possession.\textsuperscript{233} The decision is also important, however, for what it...

\textsuperscript{230} Note, however, that North Carolina statutorily provides that land raised above the high water mark as the result of the erection of a pier, jetty, or breakwater vests in the upland property owner. N.C. GEN. STAT. § 146-6(a) (1983). The statutory laws also provide that a private landowner may gain title to filled in shorelands in several ways: (1) when the filling is to reclaim land previously lost to erosion, (2) when the land was raised within the bounds of a conveyance by the state, (3) when the land was raised under lawful permit within the limits of the State Dredge and Fill Act and Coastal Area Management Act rules, or (4) when the land was raised as a result of the deposit of spoil from state or federal navigation projects on privately owned lands. Holders of lands raised by filling pursuant to an easement to fill issued by the state may obtain a quitclaim deed to the filled area. N.C. GEN. STAT. § 146-6(b), (c), (d) (1983).

\textsuperscript{231} See Jernigan, \textit{Workshop I} (presented to the 7th Annual Submerged Lands Management Conference) (1988).

\textsuperscript{232} \textit{Id.}

\textsuperscript{233} See Jernigan, \textit{Workshop I} (presented at the 7th Annual Submerged Lands Management Conference) (1988). Mr. Jernigan states that "[r]elying on the Credle decision, the state has intervened in separate lawsuits brought by a private individual and the RJR Technical Company, a subsidiary of the R.J. Reynolds Tobacco Company, contesting title to nearly 2,000 acres of the bed of the Chowan River, a navigable tributary of the Albermarle Sound. Those parties registered conflicting claims of fee simple title to the bed of the river, and to exclusive fish-
did not say. The supreme court confined its ruling strictly within watery bounds—there is no hint in the opinion that the public trust doctrine could be widely applied to forests, mountains, historical sites, and the like. Although the court quoted article XIV, section 5 of the North Carolina Constitution, which in part provides that the state shall “preserve as part of the common heritage . . . [the] forests, wetlands, estuaries, beaches, historical sites, open-lands, and places of beauty” and interpreted this to mean that the Constitution and the public trust doctrine are similar in concept, it did not state that title to any property other than submerged lands granted out by the state was void. One concludes that in North Carolina, unlike other states, the public trust doctrine is aquatic, not amphibious. Furthermore, by citing to *Ward v. Willis* and *Shephard’s Point Land Co. v. Hotel*, both of which recognize that the legislature may grant out public trust lands provided that a sufficient public purpose exists, the court implicitly acknowledged that the state has the power to sell its land

Title to real property held by the State and subject to public trust rights may not be acquired by adverse possession. As used in this Section, “public 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 and the right to freely use and enjoy the State’s oceans and estuarine beaches and public access to the beaches.


But, in Concerned Citizens of Brunswick County Taxpayers Assoc. v. North Carolina, No. 8813SC1075, pending in the court of appeals, the State is arguing for the right to cross private property and for the inclusion of the dry sand beaches above the high tide mark, so that people on the beach at high tide could remain there between the dunes and the high tide mark. See supra note 73 and accompanying text.

236. 51 N.C. (6 Jones) 183 (1858).

237. 132 N.C. 517. 44 S.E. 39 (1903).
where necessary. 238

Third, what private and public uses are protected by the public trust doctrine? In North Carolina, littoral owners may erect piers and jetties, 239 but these must be confined to straight lines out from the waterfront. 240 Where the state is successful in intervening to claim submerged lands bordering on a littoral owner’s property as subject to the public trust, the citizenry would be free to exercise its common law rights to fish and navigate in the waters. Although as a general rule, for example, 241 the state has bought or been donated property for beach access ramps, 242 it is now attempting to obtain the right for the public to cross privately owned property for beach access, as well as the right to remain on the beach between the dunes and the high tide mark once the tide has come in. 243

Fourth, what public rights are impressed upon owners whose property lies upland from public trust tidelands? North Carolina’s coastal wetlands protection laws 244 impact on littoral owners by requiring permits for certain activities. 245 However, some private rights, such as private shellfish bottoms are protected. 246 Individu-

238. The court did not state the factors which would be examined in any judicial determination of whether such land had been sold for a public purpose, but one can fairly assume that they would be similar to those considered in other states. See supra note 112.


241. See also N.C. GEN. STAT. § 113-29 (1987), entitled “Acquisition and Control of State Forests and Parks,” which provides for acquisition of forestland through legislative appropriation, gifts of money or land, and cooperation with landowners and public agencies.


243. See supra note 235.


246. N.C. GEN. STAT. § 113-208 (1987). At the time State v. Credle was decided, the State had recognized five private oyster bottoms pursuant to N.C. GEN. STAT. § 113-205.
als who violate the provisions of the conservation and development statutes are subject to fines and prison terms. The *State v. Credle* decision has an indirect bearing on these laws insofar as the state may soon find itself in the position of having acquired a great deal of extra property in trust for the people, which it must oversee and protect and in which it must regulate the public's common law activities.

Finally, if one accepts the notion that the public trust doctrine simply reflects the assertion of public rights that preexist any private property rights in submerged lands and their resources, when, if ever, does a taking occur? Under *State v. Credle* and *Phillips Petroleum*, it might appear absolute that fee titles to submerged lands issued before or after statehood are invalid in North Carolina in the face of the public trust doctrine. However,

247. Comment, *The Fifth Amendment as a Limitation on the Public Trust Doctrine in Water Law*, 15 PAC. L.J. 1291, 1319 (1984) ("The preexisting title theory of the public trust doctrine asserts retroactively that the water rights holder never possessed the property, therefore, compensation is not required when the state acts to protect public trust uses that conflict with the water rights. This contravenes the mandate of the fifth amendment.").

248. Indeed, one writer concludes that when *State v. Credle* is read in conjunction with *Phillips Petroleum*, the following principles of law are absolute:

1. All lands covered by waters of sounds, rivers and creeks in the coastal counties are held in public trust for the "free use of all its citizens."

2. Grants of fee title to submerged lands issued before July 4, 1776 are void.

3. Grants of fee title to submerged lands issued by the State since July 4, 1776 are void.

4. Fee title to the bed of public trust lands cannot be obtained by adverse possession.

5. Rights to use described areas of public trust lands/waters for limited purposes could be conferred only as authorized by legislative acts.

6. Such rights of use, e.g. piers for access or mooring, shellfish cultivation, and duck blinds, are valid only:
   a. for the limited right described in the enabling statute,
   b. when supported by a state-issued instrument,
   c. when the instrument describes the area claimed, and
   d. when the limited right is still being exercised.

7. The conferring of exclusive rights to fish in defined areas of navigable waters has never been authorized under North Carolina law and no one has such rights.


249. This is not the case in other states. If a title-holder can satisfy a two-pronged test: (1) chain of title goes back prior to statehood, and (2) the convey-
under N.C. Gen. Stat. § 113-205, persons who believe that they have been deprived of their private property without just compensation may file a complaint in the superior court of the county in which the property is located. If the plaintiff prevails in court, the North Carolina Department of Natural Resources and Community Development may, if necessary to conserve the marine and estuarine resources of the state, condemn the property. The plaintiff will be paid the monetary worth of the claim as determined by the trier of fact.

D. Practical Effects

The practical effects of the State v. Credle decision on the environment and people of North Carolina are quite wide ranging. The supreme court’s reaffirmation of the public trust doctrine as well as its reiteration that the state owns the shoreland up to the ordinary high water mark will invalidate local statutes which previously extended a property owner’s land to the low water mark. Therefore, claims to submerged land grounded solely on such local statutes will be automatically denied under N.C. Gen. Stat. § 113-205. Thousands of claimants filing under this statute armed with claims grounded on recorded deeds will be informed that their deeds are void since the land belongs to the state under the public trust doctrine. One can understand why “shellfish harvesters . . .
dropped their oyster rakes and clenched their hands in anger when they understood the full import of the *State v. Credle* decision—submerged lands they had considered as their private property for years and from which they had taken oysters more or less at will would likely no longer belong to them unless they could produce a chain of title to a source instrument dating back perhaps as much as two hundred years.

**E. The Future**

The state has until December 31, 1990, to deal with claims to submerged lands submitted under N.C. Gen. Stat. § 113-205. One anticipates that the statute’s requirement of a survey for each parcel of claimed property will cause those who could not afford the high attorneys’ fees involved simply to fail to file claims, so that title to their claimed lands will devolve upon the state.

Not surprisingly, the claim that the public trust doctrine can destroy submerged lands will be made. The argument is that the private owner, because he has a vested interest in protecting his income, will take better care of oyster bottoms, for example, than will the state. Because of the paucity of personnel, the state is less likely to ensure that oystermen do not simply harvest as many oysters as they can, with no thought for future harvests or environmental protection. There may possibly be some truth to this argument, but with the recent heightened public awareness of the possible ecological destruction of several North Carolina sounds, one scarcely imagines that the state will stand silently by and watch the destruction of the oyster bottoms. Indeed, without ex-

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255. See *supra* note 1.

256. Cauffman, *supra* note 129, at 18-19. But see N.C. Gen. Stat. 113-206(ali) (amended 23 June 1989) (Marine Fisheries Commission may grant shellfish lease to a claimant for part or all of area where claim based on oyster or other shellfish grant or perpetual franchise for shellfish cultivation. If claim based on conveyance by Literary Fund, Literary Board or Board of Education, and claimant can show that area cultivated by him or his predecessor in title for the seven years prior to registration of claim, Marine Fisheries Commission may grant shellfish lease for area not to exceed ten acres.)


258. There is a substantial cost involved because attorneys must read many ancient handwritten deeds and wills, since the indices do not describe the parcels transferred. In addition, source instruments issued in the 1700s do not reflect the high and low water marks. Cauffman, *supra* note 129, at 19 (letter from Attorney Richard B. Gwathmey, Jr., to NRCD).
tensive land-use regulation and enforcement, it seems unlikely that a private owner would consistently make decisions that sufficiently take the public's interest into account. The public trust doctrine, backed by statutory law, by implication requires the state not only to hold the submerged lands in trust for the people, but also to see that they are properly preserved for future generations.

The public trust doctrine has been touted as a useful judicial tool to use, for example, in gaining access to beaches, protecting historic sites, and enlarging state-owned forest land. However, piecemeal judicial decisions in other states have resulted in an undesirable patchwork of rules. In North Carolina, on the other hand, the Supreme Court has simply reaffirmed the classic interpretation of the doctrine. Further decisions to expand its scope should be left to the North Carolina legislature.

IV. Conclusion

In North Carolina, the public trust doctrine serves to prevent the divestiture of public trust rights in estuarine and coastal areas. Without it, scarcely a foot of coastal water would remain unclaimed by private individuals, effectively preventing public enjoyment of the beauty and bounty offered there. Further, as scientific knowledge expands, the wisdom of enforcing a public trust duty to protect submerged lands for fishing and shellfish harvesting becomes increasingly apparent.

The public trust doctrine is an ancient and venerable concept. From its beginnings in Roman "natural" law; through its expansion in English common law as a device to wrest the subordination

261. The distinction between "jus privatum" and "jus publicum" has often been cited when defining a State's authority to convey public trust land, and when describing the rights of the public that remain in public trust land that has been so conveyed. As the "fee simple absolute" owner of public trust land, a State owns both interests—the private (jus privatum) and public (jus publicum) interests. Beyond those proprietary interests, the state has a separate jus publicum interest deriving from its sovereignty. From that interest derives the state's power to regulate and protect the public interest in lands under the public trust. Slade, The Conveyance of Public Trust Land and the Nature of the Remaining Servitude, supra note 68, at 40.
of vital fishing, navigational, and commercial rights from the greed and corruption of the feudal system; to its adaptation to American topography, it has shown itself to be a flexible and protective mantle for public rights. In North Carolina's submerged lands, the public trust doctrine is the pearl in the oyster.