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## The Use of the Public Trust Doctrine as a Management Tool Over Public and Private Lands

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## ARTICLES

### THE USE OF THE PUBLIC TRUST DOCTRINE AS A MANAGEMENT TOOL OVER PUBLIC AND PRIVATE LANDS

*Patricia E. Salkin\**

#### INTRODUCTION

The articles contained in this special symposium edition of the *Albany Law Journal of Science and Technology* were presented in December 1992 at the second annual Public Trust Doctrine Conference sponsored by the Government Law Center of Albany Law School. The Government Law Center is grateful to the staff of the *Journal* who saw the value of this program, and generously agreed to dedicate an entire issue to the public trust doctrine, and to the members of the planning committee who had the vision and saw the need for this Conference.

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## BACKGROUND

The public trust doctrine is part of the common law and dates back to the Roman Empire.<sup>1</sup> It provides that the state, as sovereign, holds title to certain lands and waters in trust for the people.<sup>2</sup> The doctrine has been rooted in American common law since 1892.<sup>3</sup> The public has the right to utilize these lands and waters for a variety of purposes including: commerce, navigation, fishing, and recreation.<sup>4</sup> Traditionally, the public trust doctrine has been applied in three main areas: "(1) to guarantee the public's right to use the shoreline (including public access); (2) to determine the public's right to use the water; and (3) as a limitation on the state's ability to convey underwater lands."<sup>5</sup>

Under English common law, the public trust doctrine applied only to those lands over which the tide ebbed and flowed.<sup>6</sup> States have expanded this application, and in New York, for example, the trust extends to both the foreshore<sup>7</sup> and to submerged lands.<sup>8</sup> The doctrine has long been employed in New York as a technique of ensuring public access to the water.<sup>9</sup> Recognizing that without a mechanism in place to protect the very resources for which the public has a right to access, use, and enjoyment, the focus of the public trust doctrine has shifted to environmental protection. At least one state court has upheld the use of the doctrine for envi-

<sup>1</sup> Johanna Searle, Note, *Private Property Rights Yield to the Environmental Crisis: Perspectives on the Public Trust Doctrine*, 41 S.C. L. REV. 897, 898 (1990).

<sup>2</sup> David C. Slade et al., *Origins, History and Importance of the Public Trust Doctrine*, in PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS AND LIVING RESOURCES OF THE COASTAL STATES 1, 1 (David C. Slade ed., 1990). The Justinian Institute declared that there are three things common to all mankind: "the air, running water, and the sea, and consequently the shores of the sea which were incapable of private ownership." *Id.*

<sup>3</sup> *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

<sup>4</sup> Slade et al., *supra* note 2, at 1.

<sup>5</sup> Patricia E. Salkin, *Overview of the Public Trust Doctrine in New York*, in THE PUBLIC TRUST DOCTRINE: THE OWNERSHIP AND MANAGEMENT OF LANDS, WATER AND LIVING RESOURCES 71, 73 (Albany Law School Government Law Center ed., 1991).

<sup>6</sup> *Illinois R.R.*, 146 U.S. at 435.

<sup>7</sup> DIVISION OF COASTAL RESOURCES & WATERFRONT REVITALIZATION, N.Y. DEP'T OF STATE, PUBLIC ACCESS TO THE NEW YORK SHORELINE 139 (1988). The foreshore is defined as the area between the high and low water marks. *Id.*

<sup>8</sup> *Id.* Submerged lands are defined as lands lying below tidal waters, seaward of the ordinary low water mark, including bays, inlets, and other arms of the sea, out to the seaward boundary of the state. See Slade et al., *supra* note 2, at 1.

<sup>9</sup> Salkin, *supra* note 5, at 73.

ronmental protection as a valid public purpose, reasoning that without protection of the environment, trust rights, such as recreation and fishing, would become impossible.<sup>10</sup> This conference explores how the application of the public trust doctrine has been expanded over the years to address a number of new and changing public interests and values, and explores potential new applications of the doctrine.

#### EXPANDING THE TRADITIONAL DEFINITION

An exact definition of a public trust resource is difficult to articulate. A more appropriate approach might be to accept the notion that as public values change, so do the resources that the public trust doctrine might protect. In support of this notion, Professor M. Casey Jarman points out that the doctrine has evolved over the years to address conservation, scenic resources, open space, generation of energy, and preservation of ecosystems and historical sites. In asserting that the doctrine serves as the final vehicle for resource protection, Professor Jarman draws parallels from the doctrine as it has developed in the use of ocean and coastal space and resources.

While some might argue that the doctrine has been dormant and under-utilized by regulators in the past, the stage may now be set to once again test the applicability and limits of this important doctrine. Many students of the public trust doctrine have pointed out that the doctrine may, at times, be confusing. These materials, the second in a series,<sup>11</sup> are designed to provide public education and information on the development and use of the public trust doctrine in New York State and in courts across the country.<sup>12</sup>

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<sup>10</sup> *Just v. Marinette County*, 201 N.W.2d 761, 769 (Wis. 1972).

<sup>11</sup> In 1991, the Government Law Center's Public Trust Doctrine Conference provided an introduction to the public trust doctrine as it relates to the ownership and management of lands, water, and living resources. Conference, *The Public Trust Doctrine: The Ownership and Management of Lands, Water and Living Resources* (Government Law Center of Albany Law School Dec. 6, 1991). This program was held in 1992, Conference, *The Use of the Public Trust Doctrine as a Management Tool for Public and Private Lands* (Government Law Center of Albany Law School Dec. 4, 1992), and in 1993, the conference focused on the public trust doctrine and public nuisance law. Conference, *After Lucas: The Public Trust Doctrine and Public Nuisance Law in New York* (Government Law Center of Albany Law School Dec. 10, 1993)

<sup>12</sup> Materials from other programs are available from the Government Law Center of Albany Law School.

## THE PUBLIC TRUST DOCTRINE AND TAKINGS LAW

This conference was held shortly after the United States Supreme Court released its long awaited decision in *Lucas v. South Carolina Coastal Council*.<sup>13</sup> Professor Martin H. Belsky discusses the evolution of the new "takings doctrine," and argues that the public trust doctrine is one of those "common law property doctrines" that can justify governmental regulations without requiring the payment of compensation. Professor Belsky further argues that the doctrine can be read broadly to protect all types of government action meant to provide a sound ecologically based law and policy. He concludes that the public trust doctrine may be one of the few tools left for regulators who seek to protect the environment for the benefit of the public, without the costly, and often prohibitive, burden of paying compensation.

## APPLICATION OF THE DOCTRINE IN NEW YORK STATE

In New York State, the public trust doctrine has been used as a mechanism to guarantee the public's right to use the shoreline,<sup>14</sup> as a tool in determining the public's right to use the water,<sup>15</sup> and as a limitation on the state's ability to convey underwater lands.<sup>16</sup> The use of the doctrine as a mechanism for area-wide management of lands based upon geographic features and natural and cultural resources, rather than on political boundaries, is not new to New York. Lieutenant Governor Stan Lundine articulates the obligation of the government to engage in active stewardship over public trust lands, and discusses how the Coastal Resources Task Force, which he chaired, recommended more aggressive application of the public trust doctrine.

The state legislature has applied the underlying public trust doctrine principle, that trust resources must be preserved for present

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<sup>13</sup> 112 S. Ct. 2886 (1992).

<sup>14</sup> *E.g.*, *Tucci v. Salzhauer*, 336 N.Y.S.2d 721 (App. Div. 1972), *aff'd*, 307 N.E.2d 256 (N.Y. 1973).

<sup>15</sup> *E.g.*, *Tiffany v. Town of Oyster Bay*, 136 N.E. 224 (N.Y. 1922).

<sup>16</sup> *E.g.*, *People v. Steeplechase Park Co.*, 113 N.E. 523, 526 (N.Y. 1916) (holding that a grant by the state could only be made when it "can be done without substantial impairment of the public interest[.] . . ." (quoting *Saunders v. New York Cent. & Hud. Riv. R.R.*, 38 N.E. 992, 994 (N.Y. 1894))). This has remained a controversial issue, and just two years after the *Steeplechase* decision, one lower court judge expressly refused to follow it. *Aquino v. Riegelman*, 171 N.Y.S. 716 (Sup. Ct. 1918), *aff'd sub nom. People ex rel. Aquino v. Riegelmann*, 173 N.Y.S. 917 (App. Div. 1919).

and future public use and benefit, to a number of regional planning and preservation efforts including the Adirondack Park, the Hudson River Estuary Management Program, the Long Island Maritime Pine Barrens Reserve, and the Horizon Project along Lake Erie. Most recently, this was evidenced by the 1991 Hudson River Valley Greenway Act<sup>17</sup> and the 1992 legislation creating the Canal Recreationway Commission.<sup>18</sup> Professor Philip Weinberg and Paul Bray assert that both of these acts clearly articulate public trust purposes within their public purpose sections, and they discuss the applicability of the public trust doctrine to the Hudson River Valley and the New York State Canal System, respectively. Lawrence Weintraub, former counsel to the Hudson River Greenway Communities Council, discusses the importance of the Hudson River as a public trust resource, and points out how the state has, through the Public Lands Law, the Waterfront Revitalization and Coastal Resources Act, the Hudson River Estuarine District, and the Hudson River Valley Greenway Act, created a comprehensive program of management for this trust resource.

Elizabeth Moore, counsel to Governor Mario Cuomo, provides insight into the development, negotiations, and passage of a significant amendment to the Public Lands Law in 1992, which clearly articulates the public interests and the state's proprietary interests in underwater lands. The new law also provides for the coordination of state agency efforts to guarantee these public interests. Professor David Markell highlights a number of key issues relating to the future application of the public trust doctrine in New York, including an analysis of the relationship between the public trust doctrine and the police power, and the empowerment of private citizens to act to protect public trust uses, values, and resources.

### CONCLUSION

The public trust doctrine is an evolving legal concept which has withstood the test of time. It is a unique and valuable principle that holds promise for the protection and preservation of important coastal and ecological resources to ensure their viability for generations to come. Regulators, environmentalists, and citizens in

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<sup>17</sup> Act of December 31, 1991, ch. 748, §§ 5-10, 1991 N.Y. Laws 4064, 4065-73 (codified as amended at N.Y. ENVTL. CONSERV. LAW §§ 44-0101 to -0121 (McKinney Supp. 1994)).

<sup>18</sup> Act of Aug. 3, 1992, ch. 766, § 17, 1992 N.Y. Laws 3948, 3957 (codified at N.Y. CANAL LAW §§ 138-a to -c (McKinney Supp. 1994)).

general should become more familiar with the doctrine so that its application can be appropriately made in furtherance of societal values with respect to the management over certain public and private lands.