

Presented by:



*The  
Public Trust Doctrine  
In Motion*

David C. Slade

State & Federal Cases:

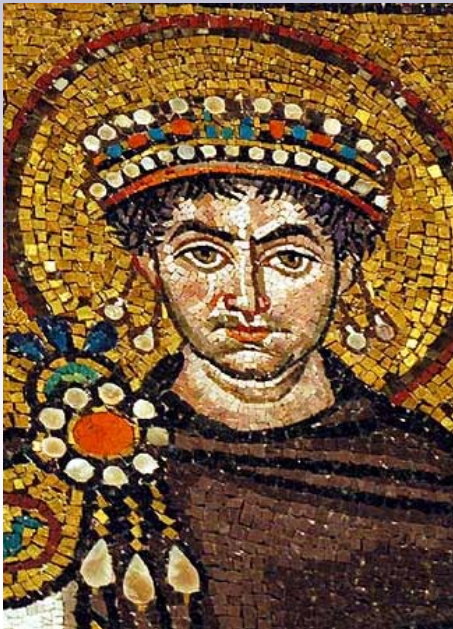
**1997-2008**





2009  
International Submerged Lands  
Management Conference

## The Evolving Public Trust Doctrine



September 24, 2009



# *The Public Trust Doctrine In Motion*

A Study of the Evolution of the Doctrine  
1997 - 2008

## DEVELOPMENT OF THE BOOK

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

## MAJOR FINDINGS FROM THE STUDY

- The doctrine is firmly embedded in state property, resource and environmental protection law in most states, but not all.
  - Hawaii is the vanguard State: ***Waiahole I*** (Supreme Court of Hawaii, 2000)
  - Wisconsin, California, New York, New Jersey, Rhode Island, Washington, Massachusetts aggressively invoking their Trust Power
  - Maryland silent: Chesapeake Bay with vast dead zones
- Trust Power broad power: used to ban jet skis, set speed limits for watercraft, limit the size of docks, ban the use of propelled water craft in shallow waters, assure public access to trust resources, require leasing of bottomlands for marinas, oystering and geoduck harvesting, set minimum flow standards, reserve groundwater for future use, and more.
- Some states unlinking the doctrine from traditional “navigable” waters to those that are “recreational”
- State budgets are dependent to a good degree on trust land leases, fees, etc.
- The Public Trust Doctrine is by no means a panacea, but is a very valuable tool in the sovereign powers “tool box”.

## MAJOR FINDINGS FROM THE STUDY

- Numerous states attempting to bring **ground waters** within the scope of the Public Trust Doctrine (NH, MI, WA, CA) unsuccessfully
  - Hawaii and New Mexico have extended doctrine to ground waters
- **Citizen “standing”** often challenged in Public Trust Doctrine cases
  - Standing legislation needed, but even then not certain (MI)
- **Fifth Amendment ‘takings’** cases are numerous, with the Public Trust Doctrine constituting the “background principles of State law” as a shield, per the *Lucas* decision.
- **Waterfront property** cases involving the Public Trust Doctrine are occurring all around the nation
- **Western state ‘water rights’** cases: Public Trust Doctrine is central argument in ‘prior appropriation’ states (NV, AZ, MT, HI, CA)
- Claims of **private interests** in public trust resources; conveyances of trust lands
- Growing number of States recognizing the “Sovereign Trust Power”, while State **legislatures often confused** / unclear as to whether exercising the Trust Power or the Police Power.

“That generations of trustees have slept on public rights does not foreclose their successors from awakening.”

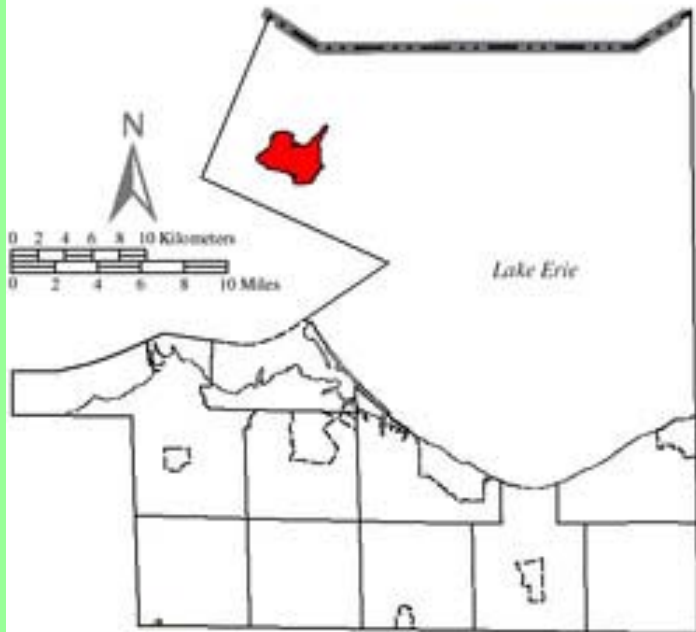
Supreme Court of Arizona

*Arizona Center for Law in the Public Interest v. Hassell*

1991

# ***Schnittker v. Ohio***

Court of Appeals of Ohio, 2001



# ***Schnittker v. Ohio***

Court of Appeals of Ohio, 2001

- 1984 - Robert Schnittker bought waterfront property on Kelleys Island, Lake Erie, which included a sizeable pier out into Lake.
- Pier was actually built in the early 1900s, long before Schnittker came along. No permit or lease was needed at the time the pier was built.
- 1917 – Ohio Legislature passed “Fleming Act” which required leases for docks or piers, but no previous owner ever applied.
- 1993 - Ohio Department of Natural Resources sought enforcement of the Fleming Act, requiring Schnittker to obtain a lease for the pier.
- Schnittker objected, and the case went to the top court of Ohio, which held that a lease was required:

“The state as trustee for the public cannot, by acquiescence, abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created. Whatever the littoral owner does is done with knowledge on his part that the title to the subsoil is held by the state, as trustee for the public, and nothing can be done which will destroy or weaken the rights of the beneficiary's trust estate. Mere non-use of the trust property by the public cannot authorize the appropriation of it by private persons to private uses and thus thwart the purpose of the trust.”

***Lake Union Drydock Co. v. Department of Natural Resources***

Court of Appeals of Washington, 2008



## ***Lake Union Drydock Co. v. Department of Natural Resources***

Court of Appeals of Washington, 2008

- Commercial marine repair and construction business on a 7.8 acre parcel on Lake Union, Washington.
- Leases 2.8 acres of bottomland from the Department of Natural Resources.
- Lease rate for submerged lands determined by a statutory formula based on assessed value of upland parcel.
- The twist? 7.8 acre upland parcel was highly contaminated, although the contamination had no adverse effect on the shipyard's business. But due to the contamination, the county assessor determined that because the cost to clean up the contamination exceeded the land's value, the upland parcel was assessed at a nominal value of \$1,000.
- Under the statutory formula, the lease for the 2.8 acres of bottomland came to a mere \$5.41.
- DNR maintained that in such a situation, it's trust authority obligated it to locate a 'comparable alternative parcel' with the same zoning. DNR recalculated the annual lease rate at \$ 29,512.92.
- Lake Union Drydock challenged DNR's authority to vary from the statute – and lost. The case went to the top court of the State, which held:

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

# ***Stewart v. Hoover***

Supreme Court of Mississippi, 2002

- Follow up case of 1988 *Phillips Petroleum v. Mississippi*.
- 1989 MS legislature enacted “Public Trust Tidelands Act”
  - required Secretary of State to prepare a ‘Preliminary’ and then “Final” map of “Public Trust Tidelands” which were publicly posted.
- Lawrence Stewart was next door neighbor of Jim and Sandy Hoover on Heron Bayou.
  - The marshland between his upland and the open water of the Bayou was never included in any map.
  - He never received statutory required notice from the Secretary of State that his marshland was included within the public trust lands.
  - More than three years had passed, making boundaries final, in accordance with the Tidelands Act.
- 1992, Hoovers applied for, and received, a permit to build a 110’ pier right across Stewart’s marshland. They built the pier.
  - Stewart sued, introducing the Certified Map, lack of notice, running of 3 years.
- Case went to State’s top court, which ruled against Stewart on PTD grounds.

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

- Even when party is right statutorily, MS Court was reluctant to allow lands clearly subject to the ebb and flow of the tide to be lost from the trust due to mapping inaccuracies.

***Sandusky Marina Limited Partnership v. State of Ohio***  
(Court of Appeals of Ohio, 1998)



# ***Sandusky Marina Limited Partnership v. State of Ohio***

(Court of Appeals of Ohio, 1998)

- In 1989 Sandusky Marina contracted with ODNR for a 50-year lease for submerged land in Lake Erie for a marina;
  - annual rent of \$2,500 for the first five years;
  - After 5 years, rent could be adjusted for “any variations in property values.”
- In 1992 ODNR adopted new rental rates based on a fee per square foot.
- When first 5-year period expired, the ODNR informed Sandusky Marina that, based on the new regulations, the annual rent would increase from \$2,500 to \$33,654 for the next five year term of the lease.
- Sandusky Marina’s lawyers invoked the ancient legal principle:  
“Goeth Jumpeth in the Laketh”
- Trial court ruled in favor of the marina. ODNR appealed, arguing “the public trust doctrine permits the director [of ODNR] to override the contract.”
- Ohio’s top court invoked the ancient legal principle advanced by Sandusky Marina.

“While the doctrine charges the state with the responsibility and authority to maintain offshore submerged lands for the benefit of the public, the doctrine does not give the state the unbridled power to do anything it pleases. Contracts of the state are subject to the same obligations as those of a private individual. The state may not exercise its [trust] power to the extent that it acts to unilaterally abrogate contracts into which it entered.”

## OBLIGATIONS IMPOSED ON TRUSTEES BY THE PUBLIC TRUST DOCTRINE

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

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

## ***Baxley v. Alaska***

Supreme Court of Alaska, 1998

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

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

## ***Brooks v. Wright***

Supreme Court of Alaska, 1999

- “. . . application of private trust principles may be counterproductive to the goals of the trust relationship in the context of natural resources.”
- “. . . although trust law dictates that the acts of a trustee should be reviewed for abuse of discretion, we have held that grants of exclusive rights to harvest natural resources listed in the common use clause are subject to close scrutiny.”
- “. . . general principles of trust law do provide some guidance, they do not supercede the plain language of statutory and constitutional provisions when determining the scope of the state's fiduciary duty or authority.”

# ***Secure Heritage v. City of Cape May***

Superior Court of New Jersey, 2003

- Case involved charging 'beach fees' for the use of the beaches of Cape May, New Jersey
- Citizen group argued that the beach fees were for the use of public trust resources (the beach) and thus a separate trust fund strictly for beach fees must be established.
- Court held that a city has 'a duty to take special care to account for all costs and revenue related to the beach operation.' Separate trust account not required. Rather, the focus must be on the internal accounting measures of the general budget.

## ***Kelly vs. 1250 Oceanside Partners***

Supreme Court of Hawaii, 2006

- In the mid-1990s, Oceanside Partners received permit to construct 1,540 acre development on the island of Hawaii. The surrounding ocean waters were “pristine” – the “wilderness character of these areas shall be protected.”
- Strict development restrictions were placed on the permit by the County and State.
- September, 2000, heavy rainstorms hit Kona. Severe runoff resulted because Oceanside did not implement all of the runoff management measures specified in its permit. Surrounding waters severely degraded.
- Citizen group sued State and County, arguing that under the PTD, they had an ‘affirmative duty’ to enforce the runoff restrictions in Oceanside’s permit.
- County and state officials defended by arguing they had “absolute discretion.
- Supreme Court of Hawaii held that under the Public Trust Doctrine, the county and the State both had an ‘affirmative duty to protect the waters’ of Hawaii.

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



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*Thanks!*