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The Public Trust Doctrine

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Introduction

Broadly stated, the Public Trust Doctrine (PTD) provides that government holds certain submerged and adjacent lands, waters, and (increasingly) other resources in trust for the benefit of its citizens, establishing the right of the public to fully enjoy them for a variety of public uses and purposes. Implied in this definition are limitations on the private use of such water, land or other resources as well as limitations on government to transfer interests in them to private parties, particularly if such transfer will prevent or hamper use by the public. These limitations raise four issues: (1) what is the distinction between the application of the PTD and the truism that government always holds land in trust for its citizens? (2) how and to what resources besides (traditionally) water and land immediately adjacent to water does the PTD apply? (3) what private uses can government permit on PTD water or land, short of sale or other transfer which is generally prohibited? (4) is public access to a PTD resource across private land automatically a part of the public trust, or must that access be separately acquired by government from the private landowner?

I. PTD Defined

The PTD may mean many things to many people, but there is usually at least a sharp divide between the common-law PTD universally associated with water - with roots in Roman Law as it is practiced in England and as it came to the United States - on the one hand, and the universal principle that waters and lands held by government are usually, if not always, held in trust for its citizens. Unfortunately, much literature and many courts confuse the two, with serious consequences for the public and private sector alike. Thus, for example, the PTD has historically been applied only to water and resources directly related to water (e.g., riparian land, submerged land) whereas the latter extends to all manner of natural resources "owned" by government. PTD resources are almost always held by, and are inalienable by, government and are limited to use by the public for purposes such as swimming, boating, and the like. Resources merely held in general trust for the people are usually freely alienable and useable for a variety of private and commercial purposes such as mineral exploration and extraction, with caveats that holding such resources for the public usually carries with it the need to preserve some semblance of public use and enjoyment.

II. The PTD Beyond Interests in Water: Not So Much.

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There is little uniform application of the PTD among the states. The doctrine was first recognized in American law in the early Nineteenth Century in *Arnold v. Mundy,* which held that, like England, submerged lands belong to the sovereign.[1] Within a few decades, the doctrine was expanded to include navigable waters.[2] Thus, the state owns and holds PTD waters that are navigable-in-fact, while lands submerged beneath non-navigable waters can be owned privately.[3] Most states have only extended the scope of the PTD beyond its traditional common law application to navigable waterways and tidelands to include more water, as for example, non-navigable waters, drinking water, groundwater, wetlands, all submerged or submersible lands, and even public ownership of all water found in the state.[4] The doctrine has been expanded by some states, as certain courts extended the doctrine to include non-navigable waters,[5] ground water,[6] and (rarely) parklands.[7]

New York arguably represents the high wash of expansion of such PTD trusts for the public, so far. Under its constitution and statutes, New York's forest preserve lands and specified state parks are forever inalienable and to be kept in a natural state, with timber removal for any reason prohibited.[8] The New York Supreme Court, since 1871, has held that municipalities hold parklands in trust for the public,[9] and more recently a host of opinions have reiterated that "[d]edicated park areas in New York State are impressed with a public trust."[10] A state appellate court has even held that a municipal parking lot could be within such public trusts if dedicated to public use by deed or legislative act, but was unwilling to consider use alone in that context.[11]

In Illinois, which also breaks from tradition, the PTD applies not only to submerged lands but also to parks and conservation areas as long as they have been dedicated as such.[12] However,

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[1] *Arnold v. Mundy*, 6 N.J.L. 1, 8, 32 (1821);, *Pollard v. Hagan*, 44 U.S. 212 , 3 How. 212 (1845)(ruling that the Federal government held tidal submerged lands in trust for future states prior to statehood).

[2] *See e.g., McManus v. Carmichael*, 3 Iowa 1, 18, 30 (1856); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484-85 (1988)(Confirming that lands beneath both tidal and navigable-in-fact waters were state-owned public trust lands).

[3] *See generally* Michael C. Blumm, 27 Pace Envtl. L. Rev. 649, 650 (2010).

[4] For a meticulous summary of all fifty state public trust - including PTDs and the several issues they present, *see* Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1 (2007) and *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010).

[5] *See e.g., Mont. Coal. For Stream Access, Inc., v. Curran*, 682 P.2d 163, 171 (Mont. 1984); *State v. McIlroy*, 595 S.W.2d 659 (Ark. 1980); *Parks v. Cooper*, 676 N.W.2d 823 (S.D. 2004)

[6] Hawai'i and the Waiahole Ditch cases, *infra* n. 23; Vermont has statutes declaring that groundwater resources are held in trust for the public; the Great Lake States hold the lake water in trust for the public.

[7] *See, e.g., Paepcke v. Pub. Bldg. Comm'n*, 263 N.E.2d 11, 15 (Ill. 1970); *Friends of Van Cortland Park v. New York*, 750 N.E.2d 1050, 1053 (N.Y. 2001).

[8] N.Y. CONST., Art. XIV, § 1 (West, Westlaw through 2013); N.Y. ENVTL. CONSERV. LAW § 9-0301 (West, Westlaw through L.2014, chapters 1 to 17).

[9] *Brooklyn Park Comm'rs v. Armstrong*, 45 N.Y. 234 (1871).

[10] *Grayson v. Town of Huntington*, 160 A.D.2d 835 (1990); *see also, Johnson v. Town of Brookhaven*, 230 A.D.2d 774 (N.Y. 2009).

[11] *10 E. Realty, LLC v. Inc. Vill. of Valley Stream*, 49 A.D.3d 764 (N.Y. App. Div. 2008), *rev'd on other grounds*, 907 N.E.2d 274 (N.Y. 2009)

[12] *Timothy Christian Schools v. Vill. of Western Springs*, 675 N.E.2d 168 (Ill. App. Ct. 1996).

classification of property as a "park" on a village land use plan is insufficient to trigger the PTD.[13]

While a few commentators have suggested that the PTD should be applied to some or all natural resources everywhere, few courts have accepted this extension. Thus, for example, only the Supreme Courts of California, New Jersey, and Vermont have gone so far as to declare the PTDs in their states to be elastic and evolving with needs of the people they benefit.[14] More typical is Sanders-Reed v. Martinez when the court held that the PTD did not empower the judicial branch to establish the best way to protect the atmosphere, citing decisions from other jurisdictions which also refused to extend the PTD to the atmosphere.[15] Indeed, some states have refused to extend the PTD from surface water to underground water.[16].

The most extreme example of potentially expanding the PTD to lands with no relationship to water comes from Hawai'i; where plaintiffs seeking to block the construction of the world's largest reflecting telescope just off the summit of the State's 13,900-foot mountain, Mauna Kea, have challenged its construction in part on PTD Grounds. The site is in an "astronomy precinct" on land leased by the University of Hawai'i from the state and thirteen astronomical telescopes are already built and operating in the precinct. In a 4-1 opinion upholding a state department's granting a permit for construction, the Court failed to address the application of the PTD, per se, as a concurring justice correctly observed, but instead held only that all public lands, like those on Mauna Kea, were held in some sort of trust for the public.[17] PTD in Hawai'i so far applies only to water.

III. The PTD and Private Property

While it is true that sometimes public property held in trust for the public is subject to the PTD, the situation is somewhat different with respect to private property. There are two major lines of cases: 1) those where a state was allowed to convey public trust lands to a private property owner because a public purpose was still being served and the public trust lands were not adversely affected by the conveyance and (2) those where the state conveyed outright lands held in the trust for the public. However, the private owners could only use such lands insofar as the use was consistent with the PTD. Regardless of which line of reasoning the courts adopted, the main point appears to be that use of public trust lands, whether or not clearly subject to the PTD, is allowed, *so long as it furthers the purpose of the public trust*.

In the landmark 1892 case, *Illinois Central Railroad v. Illinois*, the United States Supreme Court provided that a State:

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[13] *Id*.
[14] *Nat'l Audubon Soc'y v. Super. Ct.*, 658 P.2d 709 (Cal. 1983)(en banc); *Borough of Neptune City v. Borough of Avon-By-The Sea*, 294 A.2d 47 (N.J. 1972), *principle reaff'd in Raleigh Ave. Beach Ass'n v. Atlantis Beach Club*, 879 A.2d 112 (N.J. 2005); *State v. Cent. Vt. Ry. Inc.*, 571 A.2d 1128 (Vt. 1989).
[15] 350 P.3d 1221 (NM. Ct. App. 2015).
[16] *See* Environmental Law Foundation v. State Water Resources Board, 26 Cal.App.5th 844 (Cal Ct App 2018).
[17] *In re* Contested Case Hearing re Conservation Dist. Use, 143 Haw. 379; 431 P.3d 752

> can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties,. . .than it can abdicate its police powers in the administration of government and the preservation of the peace.[18]

However, Illinois Central did provide that privatization of PTD resources could occur if (1) the conveyance furthered a public purpose and (2) there was no substantial effect on remaining trust resources.[19] Several cases have adopted these *Illinois Central* exceptions.[20] [21]

Generally, in cases where a state has conveyed a public trust interest, private parties are still burdened by the PTD. After *Illinois Central*, the PTD did not require full public ownership of lands; privatization was (and is) allowed as long as the res publicum is maintained. Almost a century later, the Supreme Court recognized that individual states may define the lands held in public trust and recognize private rights in such lands.[22]

IV. Access to the PTD Resource

Trust resources are often surrounded by privately owned property, raising questions of the public's ability to reach the resource.[23] While some jurisdictions hold that access to the resource is part of the PTD, this access is limited.[24] Most require the exercise of eminent domain to provide such access.

Perhaps the clearest such judicial declaration comes from *Opinion of the Justices* [25] in which the Supreme Court of New Hampshire rejected a statutory attempt to legislate access to public beaches across private property. Liberally citing the Maine case of *Bell v. Town of Wells* [26], the New Hampshire Court held that "[a]lthough the State has the power to permit a comprehensive beach access and use program by using its power of eminent domain, it may not take property rights without compensation through legislative decree."[27] The court closed by noting that "if the work is one of great public benefit, the public can afford to pay for it."[28]

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[18] *Illinois Cent. Railroad Co. v. Illinois*, 146 U.S. 387, 453-54 (1892).
[19] *Id*.
[20] *Boone v. Kinsburry*, 273 P. 797 (Cal. 1928).
[21] *Id*. at 816.
[22] *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988).
[23] HILDRETH & JOHNSON, OCEAN AND COASTAL LAW 94 (1983)("Preserving public recreational access rights in navigable waters has become one of the principal uses of the public trust doctrine.").
[24] *See, e.g., Township of Neptune v. State, Dept. of Environmental Protection,* 425 N.J. Super. 422, 41, A.3d 792, 802 (App. Div. 2012)(holding that the state is under no obligation to dredge channels in a body of water to ensure access).
[25] 649 A.2d 604 (N.H. 1994).
[26] 557 A.2d 168 (Me. 1989).
[27] 649 A.2d at 94.
[28] *Id.* (quoting *Eaton v. B.C. & M.R.R.*, 51 N.H. 504, 518 (1872)).

Conclusion

In sum, there continues to be a lot of confusion between the PTD and the simple holding of property/resources by government in trust for its citizens. The former carries a lot more public responsibilities with it. The latter does or does not depending upon the language of the constitution or legislation establishing either a different kind of trust or no trust at all. It is also clear that despite suggestion and commentary to the contrary, there is virtually no movement to extend the PTD beyond its traditional association with and application to water and water resources, submerged lands, and shoreland. Moreover, it is abundantly clear that many private uses of public trust resources are routinely permitted so long as the jus publicum of the PTD is preserved and there is some public benefit to the private use. Finally, most state courts that have considered the matter do not extend the PTD to access to the PTD resource. Courts in New England are particularly clear that if the public wants access to a PTD resource across private land, the public must pay for it.