

# Public Access to Private Beaches: A Tidal Necessity

*There is probably no custom more universal, more natural or more ancient, . . . not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. . . . We love the oceans which surround our State. We, and our visitors too, enjoy bathing in their refreshing waters. The constant enjoyment of this privilege of thus using the ocean and its foreshore for ages without dispute should prove sufficient to establish it as an American common law right, similar to that of fishing in the sea. . . .*<sup>1</sup>

## INTRODUCTION

In today's increasingly competitive world, society is more aware of the fundamentally restorative benefits of leisure time. Accordingly, many people are giving greater attention to the need for recreational outlets. Among the many categories of recreational facilities, swimming beaches traditionally command a special devotion from the American people.

Beaches are a unique and esteemed resource, irreplaceable and limited in amount.<sup>2</sup> Due to an ever higher standard of living, Americans devote more time, energy and funds toward their amusement, with a notable preference for water-based activities.<sup>3</sup> Stretches of oceanfront land are almost invaluable as recreational assets.

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1. *White v. Hughes*, 139 Fla. 54, 58-59, 190 So. 446, 448-49 (1939).

2. Note, *Public Access to Beaches: Common Law Doctrines and Constitutional Challenges*, 48 N.Y.U. L. REV. 369 (1973) [hereinafter *Constitutional Challenges*]. Coastal beaches are a unique resource, capable of satisfying a substantial quantity and range of recreational interests. Increasing urbanization near coastlines has intensified the need for public beaches. Even as demand rises, the beach space available is diminishing. While some of the lost beach area is put to industrial, commercial and military uses, much of its falls into the hands of persons seeking beaches for private recreation. See Note, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970).

3. Note, *Access to Public Municipal Beaches: The Formulation of a Comprehensive Legal Approach*, 7 SUFFOLK U. L. REV. 936, 936-40, n.1 (1973). Water is a prime factor in most outdoor recreation activities. Forty-four percent of the population prefer water-based recreation over other forms of recreation. By the year 2000, swimming is predicted to be the most popular type of outdoor recreational activity, exceeding even driving for pleasure, which now ranks first. OUTDOOR RECREATION REVIEW COMMISSION, OUTDOOR RECREATION FOR AMERICA 173 (1962).

Unfortunately, the fixed supply of beaches and a growing population create a situation in which most Americans, particularly those in urban settings, find the opportunities for beach recreation rapidly diminishing. This is due in large part to the fact that municipalities and private landowners, who desire beaches for their private use,<sup>4</sup> own a significant proportion of oceanfront property. Although state courts generally agree that municipalities must open their shorelands to the general public,<sup>5</sup> required public access to or over privately owned beachlands is complicated by the tension between the property ownership rights of *private* individuals and a "clear public policy in favor of encouraging and expanding public access to, and use of, shoreline areas."<sup>6</sup>

This Comment explores the rights of the landowners and the public in individually owned shore property<sup>7</sup> by first discussing the public's right to the sealands in general under the public trust doctrine. It then examines recent judicial attempts to coerce private landowners into either sharing or giving up their rights in tidal

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4. Note, *Public Trust Doctrine—Beach Access—The Public's Right to Cross and to Use Privately Owned Upper Beach Areas*, 15 SETON HALL L. REV. 344 (1985) [hereinafter *Beach Access*]. For example, the following table illustrates the ownership of New Jersey's oceanfront property in 1977:

<u>Owner</u>	<u>Miles of Oceanfront Owned</u>	<u>Percentage of Total Oceanfront</u>
Federal	16.6	13.4
State	11.5	9.3
County	0	0
Municipal	63.1	51.0
Private	<u>32.6</u>	<u>26.3</u>
TOTAL	123.8	100.0

NEW JERSEY BEACH ACCESS STUDY COMM'N, PUBLIC ACCESS TO THE OCEANFRONT BEACHES: A REPORT TO THE GOVERNOR AND LEGISLATURE OF NEW JERSEY 3, 19 (1977) [hereinafter STUDY COMM'N].

5. See *Van Ness v. Borough of Deal*, 78 N.J. 174, 393 A.2d 571 (1978); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47 (1972); *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969).

6. *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 42-43, 465 P.2d 50, 58-59, 84 Cal. Rptr. 162, 170-71 (1970). The court indicated a legislative preference in California toward public ownership of the shoreline, thus implying a state policy of public ownership of the dry sands as well. See Note, *California Beaches*, 44 S. CAL. L. REV. 1092, 1108 (1971).

7. Although the text and footnotes deal mainly with California, Texas, Oregon and New Jersey law, beach access problems exist in all coastal states, as well as in all states with significant lake frontage. This Comment is concerned with obtaining public access wherever it is needed, not just in these jurisdictions. The cases discussed are illustrative of remedies that should be applicable to all beaches.

zones under the following property theories: eminent domain, implied dedication, customary rights, and the public trust doctrine. Thereafter, the Comment determines which approach is the most equitable in protecting the expectations of the private landowner while satisfying the public's rights regarding these shore zones. The concluding section analyzes the selected theory under current California law to determine its feasibility and constitutionality.

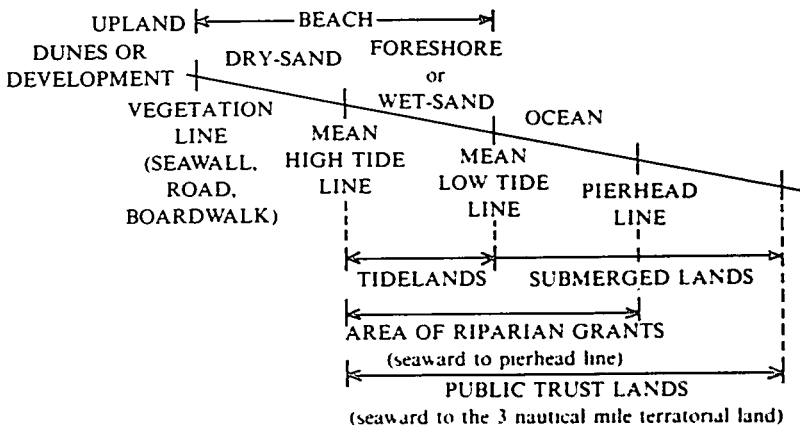
## I.

## PUBLIC RIGHT IN THE FORESHORE

Throughout history, civilized societies have recognized the shores of the sea as a special form of unusually valuable property, subject to different legal rules from those which apply to inland property.<sup>8</sup> Today, we regard the public trust doctrine, which proclaims the rights of all the states' citizens to use and enjoy the tidal land seaward of the mean high water mark, as the definitive rule governing shorelands.<sup>9</sup> This doctrine's origin can be traced to ancient Rome.<sup>10</sup> At Roman law, all citizens held and had access to the

8. *Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629, 631, 393 N.E.2d 356, 358 (1979).

9. *Lusardi v. Curtis Point Property Owners Ass'n*, 86 N.J. 217, 228, 430 A.2d 881, 886 (1981). The mean high water mark equals the average of all high waters over a specified period of time. *Borax Ltd. v. Los Angeles*, 296 U.S. 10 (1935). This article deals mainly with the right of the public to the area between the mean high tide mark and the vegetation line, otherwise known as the dry sand area. The diagram below illustrates the position of the dry sand and other significant divisions of the typical beach:



STUDY COMM'N, *supra* note 4, at 2.

10. Note, *Beach Access*, 15 SETON HALL L. REV. 344, 349 (1985). See *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 316-17, 471 A.2d 355, 360, *cert. denied*, 105 S. Ct. 93 (1984). The *Matthews* court recognized the analogy to Roman law "which

seashore as a resource in common. In the words of Justinian, "[the shores] cannot be said to belong to anyone as private property."<sup>11</sup>

Later, under the English common law, the "sovereign owned the sea, its underlying soils, and the tidelands and held them in trust for the public uses of navigation, commerce and fisheries."<sup>12</sup> Thus, private ownership in coastal land extended only as far as the mean high water line. Beyond that, ownership remained in the Crown but was subject to the rights of the public.<sup>13</sup> The sovereign had the power to grant portions of its domain to private individuals, but any grantee took subject to the traditional rights covered by the public trust doctrine.<sup>14</sup> In other words, public trust theory held that the public had certain important rights in the foreshore that superseded any conflicting private rights, including those claimed by the King. The King was trustee for these public rights, but he could not appropriate them for his own use.<sup>15</sup>

When the English settled in America, they brought along the English common law and the public trust doctrine. After the American Revolution,<sup>16</sup> the rights of the King of England in the public trust lands vested in the people of the individual states.<sup>17</sup>

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held that '[b]y the law of nature' 'the air, running water, the sea, and consequently the seashore' were 'common to all.'" *Id.* (quoting JUSTINIAN, INSTITUTES 2.1.1 (T. Sandars trans. 1st Am. ed. 1876)); see also Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763 (1970) [hereinafter *Public Trust in Tidal Areas*].

11. *Boston Waterfront Development Corp.*, 378 Mass. at 631, 393 N.E.2d at 358 (quoting JUSTINIAN INSTITUTES 2.1.1-2.1.6 (T. Sandars trans. 1st Am. ed. 1876)).

12. Note, *Lyon & Fogerty: Unprecedented Extensions of the Public Trust*, 70 CALIF. L. REV. 1138, 1140 (1982).

13. Opinion of the Justices, 365 Mass. 681, 684, 313 N.E.2d 561 (1974).

14. *Shively v. Bowlby*, 152 U.S. 1, 13 (1894).

15. Note, *Public Trust in Tidal Areas*, *supra* note 10, at 768. "[I]t cannot be construed that the king has any other legal tenure in the rights of fishery and navigation than belong to him in the character of protector of public and common rights. And hence it is that the king has no authority either to grant the exclusive liberty of fishing in any arm of the sea, or to do anything which will obstruct its navigation. The king, it is true, may grant the soil of any arm of the sea, . . . but the right of the grantee so derived is always subservient to the public rights before mentioned." J. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN THE WATERS AND IN THE SOIL AND SHORES THEREOF 33-34 (1st ed. 1826).

16. "The soils under the tidelands within the original states were reserved to them respectively, and the states since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original states possessed." *Martin v. Waddell*, 41 U.S. 367 (1842).

17. *Matthews*, 95 N.J. 306, 319, 471 A.2d 355, 361, *cert. denied*, 105 S. Ct. 93 (1984). Because America is an aggregation of separate states, each with jurisdiction over the land within its boundaries, the various states have the right to regulate their respective public trust lands and have developed different rules of riparian ownership. Note, *Lyon*

Yet, the states were uncertain as to what these rights entailed. In 1821, New Jersey's highest court analyzed its citizens' rights under the public trust doctrine in *Arnold v. Mundy*.<sup>18</sup> The court concluded that the coasts of the sea, including the water and land under the water, are "common to all the people."<sup>19</sup> The court held that the people of New Jersey owned the rights to this tidal area and even the Legislature "[cannot] make a direct and absolute grant, divesting all the citizens of their common right."<sup>20</sup>

Additionally, in the United States Supreme Court case of *Martin v. Waddell*,<sup>21</sup> the Court further clarified the issue of ownership of shorelands in colonial New Jersey. Although the state had granted the land in question to private owners, the Court ruled that the public interest in the tidal areas had never been actually severed from the land itself.<sup>22</sup> So, even as the land was sold, "each successive owner acted as a sovereign and took title to land which was entrusted to his care for the common benefit."<sup>23</sup> The Court emphasized that "when the [American] Revolution took place, the people of each state became themselves sovereign" and the "absolute right" to all the navigable waters became vested in the people of each state.<sup>24</sup>

With the additional decision of *Barney v. Keokuk*<sup>25</sup> in 1876, the United States Supreme Court firmly established the integration of

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& Fogarty: *Unprecedented Extensions of the Public Trust*, 70 CALIF. L. REV. 1138, 1141 (1982).

18. 6 N.J.L. 1 (1821).

19. *Id.* at 12. The court further explained that each person had a right to use the tidal waters "according to his pleasure, subject only to the laws which regulate that use; that the property indeed vests in the sovereign, but [only] for the sake of order and protection, and not for his own use, but for the use of the citizen . . ." *Id.*

20. Note, *Beach Access*, *supra* note 4, at 351. "The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people." *Arnold v. Mundy*, 6 N.J.L. at 78.

21. *Martin v. Waddell*, 41 U.S. 367 (1842). The plaintiff wanted to recover one hundred acres under the Raritan Bay, which he claimed title to by charters granted by Charles II to the Duke of York in 1664 and 1674.

22. *Id.* at 407, 411. Beginning with the grant from Charles II to his brother, the Duke of York, the Court in *Martin* traced the ownership of the territory that eventually became New Jersey. The Court ruled that the conveyance of the land under the Raritan Bay to private parties did not operate to extinguish public trust rights to this land.

23. Note, *Beach Access*, *supra* note 4, at 352 (quoting *Martin v. Waddell*, 41 U.S. 367, 411 (1842)).

24. *Id.* The Court emphasized that the State of New Jersey maintained an interest in the tidelands within its territory and that these lands must be maintained for public use. See *Martin v. Waddell*, 41 U.S. 367 (1842).

25. 94 U.S. 324 (1876).

the English common law public trust doctrine into American jurisprudence. The Court in *Keokuk* developed the rule that each state determines for itself all rights and title in the soil below the high water mark of all navigable waters.<sup>26</sup>

However, despite the decisions in *Mundy*, *Waddell* and *Keokuk*, state legislators were still confused as to the precise limitations on their ability to alienate tidal property. Thus, some state legislatures still operated under the assumption that they had the power to exclusively grant unrestricted ownership rights in the tidelands to private individuals in complete derogation of the public interest.<sup>27</sup>

The United States Supreme Court resolved this confusion in the law in the landmark decision of *Illinois Central Railroad v. Illinois*.<sup>28</sup> The Court ruled that a legislative grant to the Railroad of the bed of Lake Michigan did not pass the land free of the public trust.<sup>29</sup> The Court stressed that a state's title to land below the high tide mark is "held in trust for the people of the State"<sup>30</sup> and that "[t]he State can no more abdicate its trust over property in which the whole people are interested, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."<sup>31</sup> Grants of public trust lands from states to private owners were deemed to be legitimate only if they improved the public's ability to use the waters, or did not "substantially impair the public interest in the lands and waters remaining."<sup>32</sup>

In summary, the public trust doctrine grants the power to the individual states to regulate and to control the public trust lands found seaward of the mean high tide line. The states also may grant

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26. *Id.* at 338.

27. *See* Gough v. Bell, 22 N.J.L. 441 (Sup. Ct. 1850), *aff'd*, 23 N.J.L. 624 (1852).

28. 146 U.S. 387 (1892).

29. *Id.* at 452. In *Illinois Central*, the Illinois legislature attempted to convey lands constituting the bed of Lake Michigan along the entire Chicago waterfront. Later, when the legislature had a change of heart, it sought to revoke the grant. The United States Supreme Court upheld the revocation, concluding that the public trust was inalienable.

30. *Id.* at 452-53. The Court vehemently opposed the abdication of the general control of the State over its navigable lands. "Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such water for the use of the public." *Id.*

31. *Id.* The ability of a Legislature to grant trust property free of trust restrictions is extremely rare. Under California law, it is possible only "if the Legislature intended to grant a right free of the trust and either the grant serves the purpose of the trust or the grantee, in reasonable reliance on the grant, has rendered the property *unsuitable for trust purposes*." *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), *cert. denied*, 104 S. Ct. 413 (1983) (emphasis added).

32. 146 U.S. at 453. The Court stated that grants to allow construction of wharves and piers are a valid exercise of legislative power under the public trust. *Id.*

use of these lands to private parties, but such parties' use of the tidal lands may not be inconsistent with the public's rights.

## II.

### PUBLIC RIGHTS IN THE UPLAND AREA

Although the public trust doctrine secures the right of the public to use the shoreland area seaward of the mean high tide mark, the rights of the public to the beach area between the high tide mark and the vegetation line are still in controversy.<sup>33</sup> Beach access advocates argue that this dry sand area is crucial to the full enjoyment of the ocean itself. As such, private ownership and control of the dry sand and uplands threatens public enjoyment of the beach in two ways:

- (1) private landowners can restrict the use of the dry sand area that is essential to normal beach recreational activities such as sunbathing and picnicking; and
- (2) owners can isolate many beaches by denying public access across private uplands.<sup>34</sup>

Therefore, the increased demand for shoreline access is putting pressure on the courts to find a legal approach that justifies the general public's use of these privately-owned upland beach areas without unduly injuring their titleholders.

Various state courts have considered four different approaches to procure access to the dry sand area: eminent domain, implied dedication, customary rights and the public trust doctrine.

#### A. Eminent Domain

In confronting the problem of acquiring access for the public to the upland portion of the beach, eminent domain<sup>35</sup> is favored by property owners. Eminent domain allows the taking of private property for a valid public purpose by a public authority in return for just compensation.<sup>36</sup> Therefore, if property rights in the dry

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33. Note, *Public Access to Beaches*, 22 STAN. L. REV. 564, 565 n. 9 (1970). The vegetation line may be defined as the extreme seaward boundary of the natural vegetation that spreads continuously inland. It is a visible boundary, marking the border between the dry sand beach and the adjoining upland. See diagram *supra* note 9.

34. Note, *Public Access to Beaches*, *supra* note 33, at 565-66 n.13. For example, only 414 miles of coastline in California are in public ownership. Access for the public is only guaranteed for about 290 of these 414 miles. COMM. ON OCEAN RESOURCES, RESOURCES AGENCY OF CALIF., CALIFORNIA AND THE OCEAN 22-23 (1966).

35. Eminent domain is defined as "the power to take private property for public use by the state." BLACK'S LAW DICTIONARY 470 (5th ed. rev. 1979).

36. Opinion of the Justices, 365 Mass. 681, 690, 313 N.E.2d 561, 568 (1974). Provi-

sand area must be taken for the benefit of the populace, it might be equitable to compensate the littoral<sup>37</sup> owner for his or her loss.

Generally, there are two alternative ways of using the powers of eminent domain to secure public access to privately owned beachland. The first method involves using the strength of eminent domain to condemn and purchase the entire upland beach area and use the land to create a public beach park.<sup>38</sup> A park is both desirable and efficient because it would "integrate the entire beach environment (tidelands, dry sand and uplands) into a single recreational unit."<sup>39</sup> The technicalities of the public/private distinction would cease to plague legislators, courts and the public at large.<sup>40</sup>

However, this approach has significant problems. The first, and most important, is the cost: "Purchase of the necessary dry sand and uplands is [very] expensive."<sup>41</sup> Additionally, removing large quantities of beach property from the market serves only to aggravate further the conflict between public and private interests. "An 'all or nothing' park decision sacrifices the opportunity to use beaches flexibly."<sup>42</sup>

Moreover, from the property owners' viewpoint, the taking of all their beachfront property, even if fully compensated, directly contradicts the expectations they had when they first purchased the property. These private individuals expected to assert complete authority over their property. By condemning and taking the dry sand area from the property owner, a substantial amount of damage is done to expectations of ownership. Compensation may not be enough to repair the damage to both the owner's expectations and the value of the remaining property.

Instead of purchasing the entire area, a more realistic solution

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sions of the United States Constitution prohibit the taking of private property for public purposes without due compensation. *Id.*

37. Littoral has often been used to describe lands bordering the sea. See Note, *Public or Private Ownership of Beaches: An Alternative to Implied Dedication*, 18 UCLA L. REV. 795, 796 n.11 (1971) [hereinafter *Alternative to Implied Dedication*].

38. Note, *Public Access to Beaches*, *supra* note 33, at 566.

39. *Id.*

40. See generally Note, *Constitutional Challenges*, *supra* note 2; Note, *This Land Is My Land: The Doctrine of Implied Dedication and its Application to California Beaches*, 44 S. CAL. L. REV. 1092 (1971) [hereinafter *California Beaches*].

41. Note, *Public Access to Beaches*, *supra* note 33, at 566. Given the large demand for beach access and the current high property values of shorefront real estate, it would be cost prohibitive to try to buy quantities of shoreland as a large scale solution to the beach access problem.

42. *Id.* at 567. Taking away beachland from current owners by paying them the high fair market values of their properties ignores the possibility of working out a solution to the public access question which would allow both public and private access.

would be for the public to acquire an easement through eminent domain across the upland portion of the shore area. Buying an easement would be far less costly than buying a park because "a purchaser of an easement acquires only the right of use, not fee simple . . . to the property. . .thus fostering compatibility between private and public land usage."<sup>43</sup> Additionally, the fee owner is still entitled to use the property in any way, as long as this use does not interfere with the right of the public to access the area. Consequently, the use of eminent domain to obtain easements for public entry to the shorelands seems both fair and economical.

Nevertheless, despite the fact that easements are less expensive to purchase than the whole upland area, state governments lack the money necessary to ensure beach recreation through purchase or condemnation.<sup>44</sup> So, while part of the problem of public entry to the dry sand area may be solved through eminent domain, lack of available funds precludes its effectiveness as a general policy. It is also important to remember that such policies will not come from the judiciary. The right to exercise the power of eminent domain is legislative, not judicial. In *Van Ness v. Borough of Deal*,<sup>45</sup> the New Jersey Supreme Court ruled that "there can be no taking of private property for public use without the consent of the owner in the absence of direct authority from the legislature. The power of eminent domain lies dormant until legislative action is had . . ." <sup>46</sup> Accordingly, eminent domain is presently ineffective as a tool until legislatively mandated.

## B. Implied Dedication

Another possible judicial method of obtaining public access to the upland beach area is dedication, a common law doctrine involving a voluntary donation of land or of an interest in land by a private owner to the public.<sup>47</sup> A manifestation of intent to dedicate is essential because the dedication is, by definition, a *voluntary* transfer. Conduct showing intent by the owner to dedicate land and an

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43. *Id.* Furthermore, the easement alternative means that the property owner need not be compensated as highly as someone who relinquishes all property rights.

44. *Id.* See COMM. ON OCEAN RESOURCES, RESOURCES AGENCY OF CALIF., CALIFORNIA AND THE OCEAN 24, 177 (1966).

45. 78 N.J. 174, 393 A.2d 571 (1978).

46. *Id.*

47. "The appropriation of land, or an easement therein, by the owner, for the use of the public, and accepted for such use by or on behalf of the public." BLACK'S LAW DICTIONARY 371 (5th ed. rev. 1979).

acceptance by the public completes the dedication.<sup>48</sup>

Since the littoral owner may lead the public to rely upon the public nature of the land and may indicate an intent to dedicate by his or her actions, the courts have held that an intent to dedicate to public use, and the intent of the public to accept, may be implied from the public's actions or the owners' inaction.<sup>49</sup> Thus, an implied dedication may be based simply upon public use of the land and the owner's failure to object to that use. "This use must be adverse to and exclusive of the use of the property by the owner."<sup>50</sup> Following acceptance, the dedication is irrevocable.<sup>51</sup> The public cannot lose its rights through nonuse or adverse possession.

The use of implied dedication to secure public access to beachlands is a relatively new extension of the doctrine. Early beach access opinions were hostile to public claims, holding that long unobstructed use of beaches was presumed to be granted under a revocable license from the owner.<sup>52</sup> This presumption was traditionally applied to open unimproved lands, such as forests or deserts.<sup>53</sup>

On the other hand, early courts used implied dedication to establish public rights in private roads.<sup>54</sup> The reasons for distinguishing between roadways and beaches seem to center around "the ease with which one can define a road, the frequent need for roadways

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48. *Seaway Co. v. Attorney General*, 375 S.W.2d 923, 936 (1964).

49. Note, *California Beaches*, *supra* note 40, at 1098. In *McKinney v. Ruderman*, 203 Cal. App. 2d 109, 21 Cal. Rptr. 263 (1962), the filing of a subdivision map with a street delineated thereon was held to be an offer to dedicate that street. Similarly, in *Tischauer v. City of Newport Beach*, 225 Cal. App. 2d 138, 37 Cal. Rptr. 141 (1964), dedication was also implied from subdivision map designations.

50. Note, *Constitutional Challenges*, *supra* note 2, at 371. Since rules for adverse possession vary from jurisdiction to jurisdiction, the requisite period of adverse public use in order to establish implied dedication also varies.

51. *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 44, 465 P.2d 50, 60, 84 Cal. Rptr. 162, 172 (1970). See also *City of Sacramento v. Jensen*, 146 Cal. App. 2d 114, 303 P.2d 549 (1956); *Humboldt County v. Van Duzer*, 48 Cal. App. 640, 192 P. 192 (1920); *Wheeler v. City of Oakland*, 35 Cal. App. 671, 170 P. 864 (1917).

52. See, e.g., *City of Manhattan Beach v. Cortelyou*, 10 Cal. 2d 653, 76 P.2d 483 (1938); *F.A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 150 P. 62 (1915).

53. Note, *Public Access to Beaches*, *supra* note 33, at 574. A good example is a 1915 case, *F.A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 150 P. 62, in which the public had used an entire beach area for recreation, and in doing so had created a visible roadway along the shore. Despite the owner's denial of any donative intent, the court found dedication of rights in the road. However, the court did not find such a dedication in the rest of the beach. The court made no real effort to justify this distinction. *Id.* at 446-47, 150 P. at 67-68.

54. Note, *Constitutional Challenges*, *supra* note 2, at 371. See, e.g., *Union Transp. Co. v. Sacramento County*, 42 Cal. 2d 235, 267 P.2d 10 (1954); *Bolger v. Fass*, 65 Cal. 250 (1884).

through private property, and perhaps also the relative frequency with which express dedications of roadways are made."<sup>55</sup> Additionally, there was no widely recognized public interest in the availability of beaches as there was with roads.<sup>56</sup> Hence, the need for public access to privately owned beaches was far less compelling than the need for public thoroughfares.

All of this changed in 1964 when a Texas court, in *Seaway Co. v. Attorney General*, eradicated the distinction between roads and beachland and applied the dedication doctrine to beaches.<sup>57</sup> Acting under a state statute that prohibited obstructing access to state-owned tidelands,<sup>58</sup> the Texas court required the removal of barriers erected by a private titleholder above the high water mark on the Gulf of Mexico.<sup>59</sup> For more than a century prior to the construction of the barriers, the public had used the beach for normal recreational purposes without seeking permission and without interference from the owner. The court found this evidence sufficient to infer dedication of an easement in the beach.<sup>60</sup>

Six years later, in *Gion v. City of Santa Cruz* and *Dietz v. King*, decided in a single opinion,<sup>61</sup> the California Supreme Court held that the public had acquired a recreational easement in private beach property by implied dedication. The court stated that public use might give rise to an implied dedication claim either through a showing of the owner's acquiescence in such use, and hence intent

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55. *Gion*, 2 Cal. 3d at 41, 465 P.2d at 58, 84 Cal. Rptr. at 170. In *F.A. Hahn*, the court speculated that local governments might be more likely to take an active financial part in the maintenance of roads, regardless of ownership, than of beaches. 170 Cal. at 446-47, 150 P. at 67-68. See also Note, *Constitutional Challenges*, *supra* note 2, at 371.

56. Note, *Constitutional Challenges*, *supra* note 2, at 371. In the past, more beachland was available and there was less demand because landlocked people lacked transportation to the shore. *Id.*

57. 375 S.W.2d 923 (Tex. Civ. App. 1964).

58. TEX. REV. CIV. STAT. ANN. art. 541d (1962) (current version at TEX. NAT. RES. CODE ANN. § 61.011 (1978)).

59. The State successfully asserted "that whatever rights [the landowner] had were subordinate and subject to the right of use of the people as a means of access to and the full use and enjoyment of the sovereign-owned shore and waters of the Gulf of Mexico for swimming, fishing, boating, camping and as a public way . . ." *Seaway Co. v. Attorney General*, 375 S.W.2d at 926.

60. 375 S.W.2d at 930. "If the open and known acts [of the landowner] are of such a nature as to induce the belief that the owner intended to dedicate the way to the public and individuals act on such conduct, i.e., proceed as if there had been in fact a dedication and acquire rights that would be lost if the owner were allowed to reclaim the land, then the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intent. The act of throwing open property to the public use, without any other formality, is sufficient to establish the fact of dedication to the public." *Id.* at 936.

61. 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

to dedicate, or through a showing of adverse use by the public for the five year statutory period required for a private prescriptive easement *regardless of the intent of the owner*.<sup>62</sup> This ruling was a major extension of the implied dedication doctrine.

*Gion* specifically established a standard by which to measure adverse use: use is adverse if the public believes it has a right to use the land without asking anyone's permission.<sup>63</sup> Evidence that people have used the beach "as if it were a public recreation area"<sup>64</sup> is sufficient to support a finding of adverse use. This formulation dilutes the requirement of exclusive use, making it far easier to prove implied dedication.

*Gion* also flatly rejected the traditional presumption that the public use of such beaches is under the revocable license of the owner.<sup>65</sup> Instead, the burden is on the owner to prove a license has been granted or that he or she has made a sufficient effort to prevent public use. Whether the owner's efforts to halt public use of the property are adequate to prevent implied dedication depends on the means the owner uses in relation to the character of the property and the extent of the public use.<sup>66</sup> Subsequently, the importance of the use to the public will play a significant role in deciding if implied dedication has occurred.

There is a weakness in the *Gion* decision that should be resolved before we can endorse implied dedication as a practical method of securing beach access. The *Gion* court gave landowners no clear

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62. *Id.* at 38, 465 P.2d at 55-56, 84 Cal. Rptr. at 167-68. In order to establish an easement by prescription, a claimant must prove actual, continuous, and uninterrupted use for the statutory period, which can range from as short as five years to as long as twenty years, depending on state law.

63. *Id.* at 39, 465 P.2d at 56, 84 Cal. Rptr. at 168. "An adverse possessor or a person gaining a personal easement by prescription is acting to gain a property right in himself and the test in those situations is whether the person acted as if he claimed a personal legal right in the property." *See also* O'Banion v. Borba, 32 Cal. 2d 145, 148, 195 P.2d 10, 12 (1948). However, such a personal claim of right need not be shown to establish a dedication because it is a public right that is being claimed. What must be shown is that persons used the property believing the public had a right to such use. *Gion*, 2 Cal. 3d at 39, 465 P.2d at 56, 84 Cal. Rptr. at 168.

64. 2 Cal. 3d at 39, 465 P.2d at 56, 84 Cal. Rptr. at 168. Litigants seeking to show that land has been dedicated to the public need only produce evidence that persons have used the land as they would have used public land.

65. *Id.* at 40-41, 465 P.2d at 57, 84 Cal. Rptr. at 169. "We will not presume that owners of property today knowingly permit the general public to use their lands and grant a license to the public to do so."

66. *Id.* at 41, 465 P.2d at 57, 84 Cal. Rptr. at 169. For example, while "No Trespassing" signs may be sufficient to stop an occasional drifter, they will not generally provide enough deterrent power to halt the flow of the public to an attractive shoreland property.

test for determining what actions are sufficient to defeat an inference of dedication. As a result, the court made it almost impossible for the landowner to know what to do to protect property from a successful dedication claim.<sup>67</sup> This uncertainty may cause a reactionary backlash among beachfront property owners that could prove counterproductive to the goal of open access. Property owners might deem it necessary to protect their interests by excluding members of the public from their lands. Therefore, the aim of the *Gion* court—"expanding public access to and use of shoreline areas"<sup>68</sup>—may be frustrated.

However, this flaw in the *Gion* opinion should not really be advanced as an objection to implied dedication. The doctrine is geared towards obtaining permanent legal access to shoreland that is *already* used by the public, even if privately owned. No right is being taken away from the landowner, who is still able to exclude the public from this land. The point of implied dedication is to nullify this property right if the landowner chooses not to exercise it for a period of time longer than the statutory period required for prescription. By letting the public use this property without interference, the owner leads the public to believe that he or she intended to dedicate it. After providing the public with this valuable resource, the landowner can no longer withdraw consent and exercise full ownership control over the land—public recreation then takes precedence over the private rights of the beach owner.<sup>69</sup>

### C. Customary Rights

In *State ex rel. Thornton v. Hay*,<sup>70</sup> the Oregon Supreme Court resurrected a doctrine that had received scant attention<sup>71</sup> in the United States—the doctrine of customary rights.<sup>72</sup> The Oregon court ruled that the dry sand area of the beach had been enjoyed by the general public as a recreational adjunct of the wet-sand or fore-

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67. Note, *Alternative to Implied Dedication*, *supra* note 37, at 802.

68. 2 Cal. 3d at 43, 465 P.2d at 59, 84 Cal. Rptr. at 171.

69. Note, *Constitutional Challenges*, *supra* note 2, at 374.

70. 254 Or. 584, 462 P.2d 671 (1969) (Appeal from a trial court ruling forbidding a beach resort owner from fencing off the dry sand area of his property.)

71. The theory of customary rights has never received any wide adherence in the United States. However, it has been discussed in dicta in recent cases that were decided under other theories. See *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (1974); *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (1964).

72. Custom is defined as a "use or practice of the people, which, by the common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject matter to which it relates." BLACK'S LAW DICTIONARY 347 (5th ed. rev. 1979).

shore area since the beginning of the state's political history.<sup>73</sup> It found this usage sufficient to establish a custom of public recreational rights in the dry sand area of the seashore regardless of the record title held by private landowners.<sup>74</sup>

The law of customary rights first arose in medieval England.<sup>75</sup> The doctrine evolved from the belief that a usage which had lasted for centuries must have been founded on a legal right conferred in the distant past, and, therefore, should be recognized and enforced even though never formally recorded.<sup>76</sup> The customary right arose in favor of a community population and was strictly limited to a small geographic location.<sup>77</sup> As applied here, this right of customary use of the dry sand area of the beaches by the public does not create any interest in the land itself.<sup>78</sup> Rather the community receives only easements of use and passage by custom; the fee of the land remains in the owner of record.<sup>79</sup> To be valid, the custom must be continued,<sup>80</sup> peaceably enjoyed,<sup>81</sup> reasonable,<sup>82</sup> certain,<sup>83</sup>

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73. *State ex rel. Thornton v. Hay*, 254 Or. 584, 588, 462 P.2d 671, 673 (1969). "[F]rom the time of the earliest settlement to the present day, the general public has assumed that the dry sand area was a part of the public beach, and the public has used the dry sand area for picnics . . . and other beachfront activities." *Id.*

74. Note, *Alternative to Implied Dedication*, *supra* note 37, at 812. See Degnan, *Public Rights in Ocean Beaches: A Theory of Prescription*, 24 SYRACUSE L. REV. 935, 939 (1973).

75. Note, *Public Access to Beaches*, *supra* note 33, at 582. Through this doctrine, feudal villagers were able to obtain rights in land long before a system was devised for recording ownership.

76. Note, *Constitutional Challenges*, *supra* note 2, at 375. See *Post v. Pearsall*, 22 Wend. 425, 440-41 (N.Y. Ct. Err. 1839).

77. Note, *Constitutional Challenges*, *supra* note 2, at 375. It is not clear whether customary rights attach to the land, such that anyone coming on it has the same easement rights or whether they may be exercised only by the local inhabitants. The *Hay* court felt that the easement is open to all, since the general public, rather than any identifiable local community, had followed the custom.

78. *City of Daytona Beach v. Tona-Rama*, 294 So. 2d 73, 78 (1974). "The general public may continue to use the dry sand area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use this particular area of the beach as they have without dispute and without interruption for many years." *Id.*

79. Note, *Public Access to Beaches*, *supra* note 33, at 582.

80. A customary right need not be exercised continuously in the strict sense of the word, but rather must be exercised without interruption caused by anyone possessing a paramount right. *Thornton*, 254 Or. at 596, 462 P.2d at 677.

81. The customary use must be free from dispute. *Id.* at 596, 462 P.2d at 677.

82. The public must have always made use of the land in a manner appropriate to the land and the usages of the community. *Id.* at 596, 462 P.2d at 677.

83. In *State ex rel. Thornton v. Hay*, certainty was satisfied by the visible boundaries of the dry sand area and the character of the land, which limits the use thereof to recreational uses connected with the foreshore. *Id.* at 596, 462 P.2d at 677.

obligatory,<sup>84</sup> consistent with other customs and laws,<sup>85</sup> and, most importantly, immemorial.<sup>86</sup>

Opponents of this theory assert that rights to use private land cannot be created by custom, because "they would tend so to burden land as to interfere with its improvement and alienation, and also because there can be no usage in the country of an immemorial character."<sup>87</sup> In addressing the first objection, the court in *Thornton* concluded that the custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is "so notorious that notice of the custom on the part of persons buying land along the shore must be presumed."<sup>88</sup> If the custom is a matter of public knowledge, it cannot be said to unduly burden the land.

Addressing the second objection, the Oregon court held that a public use was sufficiently immemorial if it could be traced to the dawn of the area's political history, even though that did not amount to much longer than a century.<sup>89</sup> The court reasoned that if the custom had existed for as long as people had claimed property rights in the area, that was sufficient to establish it as immemorial.<sup>90</sup>

A more significant problem with the ruling in *State ex rel. Thornton v. Hay* is in determining the scope of the decision itself. Some of the language used by the court seems to indicate that it recognized a public right to recreational use of *all* Oregon beaches.<sup>91</sup> In choosing custom over prescription as the basis for the decision, the court said:

Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom,

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84. The landowner must not be left the option to recognize the public's right to go upon the dry sand area for recreational purposes. *Id.* at 597, 462 P.2d at 677.

85. The custom must not be repugnant, or inconsistent with other customs or with other law. *Id.* at 597, 462 P.2d at 677.

86. The custom must be ancient, of long and general usage. *Id.* at 595-96, 462 P.2d at 677.

87. *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d at 78. See J. LAWSON, THE LAW OF USAGES AND CUSTOMS 27 (1881), stating "[a]s the 'time where of the memory of man runneth not the contrary' is defined . . . to mean the beginning of the reign of Richard I, this is sufficient to stop all inquiry into American common law customs, for the reasons that this country was not discovered until several hundred years later."

88. *Thornton*, 254 Or. at 598, 462 P.2d at 678.

89. *Id.* at 597-98, 462 P.2d at 677-78.

90. See Note, *Constitutional Challenges*, *supra* note 2, at 376.

91. *Id.* Oceanfront lands from the northern to the southern border of the state ought to be treated uniformly. *Thornton*, 254 Or. at 596, 462 P.2d at 676.

on the other hand, can be proven with reference to a larger region. Ocean front lands from the northern to the southern border of the state ought to be treated uniformly.<sup>92</sup>

A broad interpretation finding a statewide custom would definitely expand the English doctrine since the English practice restricted customary rights to narrowly confined geographic localities.<sup>93</sup> Also, if read broadly, the decision may be an unconstitutional deprivation of the property rights of littoral owners.<sup>94</sup> "To declare ex parte a new public right absent any evidence to support it and without giving the owners with whose property interests that public right conflicts a chance to be heard is to violate fundamental due process principles."<sup>95</sup>

A narrow reading of the decision can resolve these problems. Thus, the doctrine of customary rights would apply to individual beaches only if the state can prove long public usage of the beach accompanied by the other elements of a valid custom.<sup>96</sup> This reading makes the decision binding only upon the owner actually before the court, thereby allowing other littoral owners the opportunity to show that an established usage did not attach to their land.<sup>97</sup> Also, the application of custom to a single stretch of beach is consistent with the English practice.

Even with the narrow interpretation of *Thornton*, a customary rights approach probably would not be an efficient and effective way to secure public access to the upland shore area. While the narrower reading is more in keeping with established doctrine, a substantial amount of complex litigation might be required before a significant amount of beach area could be opened to the public. Additionally, some states statutorily preclude judicial redefinition of littoral boundaries.<sup>98</sup> Finally, although it may be possible to show use since time immemorial in states such as Oregon where private beachfront development is just beginning, it may be impossible to make such a showing in states such as California with long histories of intensive private ownership and development of beachfront properties.<sup>99</sup>

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92. *Id.*

93. *See supra* text accompanying note 77.

94. Note, *Public Access to Beaches*, *supra* note 33, at 585.

95. *Id.* *See, e.g.*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

96. Note, *Constitutional Challenges*, *supra* note 2, at 376.

97. Note, *Public Access to Beaches*, *supra* note 33, at 585.

98. *See Note, Alternative to Implied Dedication*, *supra* note 37, at 812.

99. Note, *Constitutional Challenges*, *supra* note 2, at 377.

#### D. Public Trust Doctrine

As previously discussed in Part I, the public trust doctrine acknowledges that the ownership, dominion and sovereignty over the land, flooded by tidal waters, which extends to the mean high tide line, is vested in the state in trust for the people.<sup>100</sup> Under the historical definition of the doctrine, the foreshore of the entire coast is said to be held in trust for the public for the explicit purposes of navigation and fishing.<sup>101</sup>

In *Borough of Neptune City v. Borough of Avon-by-the-Sea*,<sup>102</sup> the New Jersey Supreme Court presented a modern and dynamic view of the doctrine by stating that it was not "fixed or static", but rather a flexible concept which clearly extended "to recreational uses, including bathing, swimming and other shore activities."<sup>103</sup> The court encouraged an expansive definition of the public trust doctrine, urging that the doctrine be molded or extended to meet changing conditions and the needs of the public it was created to benefit.<sup>104</sup> *Avon* concluded that "the beach . . . must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible."<sup>105</sup>

Several years later, the New Jersey Supreme Court relied on *Avon* to decide whether a municipality could exclude all nonresidents from a municipally-owned beach in *Van Ness v. Borough of Deal*.<sup>106</sup> The Borough of Deal argued that, unlike the Borough of Avon-by-the-Sea, it had not "dedicated" the municipality's beach to public use.<sup>107</sup> The court disagreed, holding that Deal's failure to dedicate the beach to public use was "immaterial".<sup>108</sup> Deal's beach was sub-

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100. *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309, 294 A.2d 47, 54 (1972).

101. Jaffee, *The Public Trust Doctrine Is Alive and Kicking in New Jersey Tidal Waters: Neptune City v. Avon-by-the-Sea—A Case of Happy Atavism?*, 14 NAT. RESOURCES J. 309 (1974).

102. 61 N.J. 296, 294 A.2d 47 (1972).

103. *Id.* at 309, 294 A.2d at 54.

104. *Van Ness v. Borough of Deal*, 78 N.J. 174, 179, 393 A.2d 571, 573 (1978) (quoting *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. at 309, 294 A.2d at 47).

105. *Id.* at 179-80, 393 A.2d at 573 (quoting *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. at 309, 294 A.2d at 54).

106. 78 N.J. 174, 393 A.2d 571 (1978).

107. *Id.* at 179, 393 A.2d at 573.

108. *Id.* The court stated that although the beach was not dedicated to the general public, it was dedicated to recreational activities. "If the area, which is under municipal ownership and dedication, is subject to the public trust doctrine, and we hold that it is, all have the right to use and enjoy it. Deal cannot frustrate the public right by limiting its dedication of use to residents of Deal. Nor may it allocate to the public on a limited

ject to the public trust doctrine and therefore the public had "the right to use and enjoy it."<sup>109</sup>

*Avon* and *Deal* dealt specifically with the rights of the public under the public trust doctrine to municipally owned upland shore areas. In *Matthews v. Bay Head Improvement Association*,<sup>110</sup> the New Jersey Supreme Court further expanded the public trust doctrine by applying it to privately owned beachland.

The *Matthews* court unanimously ruled that a private association, because of its quasi-public nature, cannot exclude the general public from its shore area.<sup>111</sup> The decision explicitly stated that "private land is not immune from a possible right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming."<sup>112</sup> Thus, the public's interest in privately owned dry sand may give rise to two kinds of rights: the right to cross privately owned dry sand beaches in order to gain access to the foreshore and the right to sunbathe and generally to enjoy the upland area itself for recreational activities.<sup>113</sup>

In coming to its conclusions, the court in *Matthews* stressed the "unique" nature of the New Jersey shoreline and emphasized the statewide policy of encouraging and protecting public access to and recreational use of dry sand beach areas.<sup>114</sup> In resolving the foreshore access issue, the court noted that the opportunity to swim may be entirely dependent upon the public's ability to reach the foreshore.<sup>115</sup> While the public's right to cross over the dry sand area is not absolute or unrestricted, *Matthews* requires the populace to have "reasonable access to the sea."<sup>116</sup>

After disposing of the public's right of reasonable access to the sea, the *Matthews* court turned to the issue of whether the public

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basis, rights which, under the doctrine, the public inherently has in full." *Id.* at 180, 393 A.2d at 574.

109. *Id.*

110. 95 N.J. 306, 471 A.2d 355, cert. denied, 469 U.S. 82 (1984).

111. *Id.* at 332, 471 A.2d at 368.

112. *Id.* at 322-23, 471 A.2d at 363-64.

113. Note, *Beach Access*, *supra* note 4, at 357.

114. 95 N.J. at 323, 471 A.2d at 364. See *Lusardi v. Curtis Point Property Owners Ass'n*, 86 N.J. 217, 430 A.2d 881 (1981). New Jersey beaches have "a unique character and a statewide policy designates what uses are appropriate for such land. . . . Ocean-front property is uniquely suitable for bathing and other recreational activities. Because it is unique and highly in demand, there is a growing concern about the reduced availability to the public of its priceless beach areas." *Id.* at 227, 430 A.2d at 886.

115. Note, *Beach Access*, *supra* note 4, at 358.

116. 95 N.J. at 324, 471 A.2d at 364.

has the right to use and enjoy the privately owned dry sand.<sup>117</sup> The court determined that the ocean cannot be reasonably enjoyed unless accompanied by intermittent periods of rest and relaxation beyond the water's edge on the dry sand.<sup>118</sup> In fact, the court stated that this was a principal reason behind the decisions in *Avon* and *Van Ness*.<sup>119</sup> The rights covered by the public trust doctrine are not limited to municipally owned property. Rather, *Matthews* held that the public does have a right to use private dry sand areas when such use is "essential or reasonably necessary for enjoyment of the ocean."<sup>120</sup>

*Matthews* may be a significant judicial mandate regarding access to private beach property unless the decision rests on the fact that the court classified the Bay Head Improvement Association as a "quasi-public" institution. It is doubtful, however, that this classification is significant because the vast majority of the Bay Head beach was privately owned by individuals who leased parcels to the Association.<sup>121</sup>

In addition, "the principal reason for the court's quasi-public determination was to justify its review of the Association's membership requirements."<sup>122</sup> Thus, subsequent analysis has shown this classification to be unnecessary.<sup>123</sup> Therefore, the court could have addressed only the private beach property issue, and in future public access cases, *Matthews* should not be distinguished on the basis of the quasi-public label.

Nevertheless, there are three problems with applying in other jurisdictions the New Jersey Supreme Court's expansion of the public trust doctrine in its decisions up to and including *Matthews*. First, there is disagreement among the states as to whether the public trust doctrine even covers recreational rights. Second, the use of the public trust doctrine to obtain entry onto private property may constitute a taking without compensation. Third, expanded use of the nation's beaches may lead to overuse and eventual destruction of the beach areas.

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117. *Id.* at 325, 471 A.2d at 365.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 327, 471 A.2d at 366.

122. *Id.*

123. Note, *Beach Access*, *supra* note 4, at 365. It was not necessary for the court to order the admission of nonresidents to the Association. The parameters of the public trust doctrine could have been met by compelling the Association to admit non-members directly to the beach. *Id.*

In deciding whether recreation is covered by the public trust theory, Massachusetts' judicial opinions proclaim that the only justification for taking the use of private land without compensation is the improvement of fishing or navigation—the two areas originally covered by the public trust.<sup>124</sup> In *Michaelson v. Silver Beach*,<sup>125</sup> the court clearly reports: "An examination of our decisions shows that the only specific powers which have been expressly recognized as exercisable without compensation to private parties are those to regulate and improve navigation and the fisheries. . ."<sup>126</sup> In fact, the court, in *Opinion of the Justices*,<sup>127</sup> specifically stated that public rights in the seashore *do not* include a right to use otherwise private beaches for public bathing.<sup>128</sup> Accordingly, more moderate judges urge restraint in the application of the public trust theory until its contours and limits are fully defined.<sup>129</sup>

The second difficulty with applying the *Avon-Matthews* line of cases is that a taking without compensation may be effected by allowing the public access to privately owned upland areas. If, however, the land was improperly alienated or passed to subsequent owners subject to an easement in favor of the public, then there is no compensable taking. It is impossible to take away a right which the party never possessed. If the legislature never had the power to grant land free of the public trust, then the public always possessed the paramount interest in the dry sand area. Addressing this, the court in *Avon* discussed the legislative power to alienate public trust land to private parties.<sup>130</sup> It concluded that absolute legislative power to abrogate the public's rights in trustlands "may well be too broad."<sup>131</sup> "It may be that some such prior conveyances constituted an improper alienation of trust property or at least that they are impliedly impressed with certain obligations on the grantee to use the conveyed lands only consistently with the public rights

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124. *Opinion of the Justices*, 365 Mass. 681, 686, 313 N.E.2d 561, 566 (1974). "It is proper to interfere with the private property rights of coastal owners in the tidal area for purposes reasonably related to the protection or promotion of fishing or navigation without payment of compensation." *Id.* See *Michaelson v. Silver Beach*, 342 Mass. 251, 173 N.E.2d 273 (1961).

125. 342 Mass. 251, 173 N.E.2d 273 (1961).

126. *Id.* at 277.

127. 365 Mass. 681, 313 N.E.2d 561 (1974).

128. *Id.* at 688, 313 N.E.2d at 567 (emphasis added). "We are unable to find any authority that the rights of the public include a right to walk on the beach." *Id.*

129. *Van Ness*, 78 N.J. at 182, 393 A.2d at 576 (dissenting opinion).

130. Note, *Water Law—Public Trust Doctrine Bars Discriminatory Fees to Non-residents for Use of Municipal Beaches*, 26 RUTGERS L. REV. 179, 180 (1973).

131. 61 N.J. at 308, 294 A.2d at 54.

therein."<sup>132</sup>

The third criticism of judicial expansion of public access rights is a general one—the fear that opening up beaches to the public will lead to overuse which will destroy or substantially damage the shoreland.<sup>133</sup> This complaint is easily nullified. The New Jersey Supreme Court cases involving the public trust doctrine only prohibit discriminatory access restrictions; they do not preclude the right to regulate the access.<sup>134</sup> Therefore, shore municipalities may still control the number of people allowed on the beach as long as it is done in a non-discriminatory manner.

### III.

#### RECOMMENDATION

Public demand for beachland recreational facilities has never been stronger or more vocal than it is at present. Unfortunately, the policy of providing greater access to the shore area is thwarted by the fact that a substantial proportion of the United States' beach-front property is in the hands of private titleholders. Some mode of legal doctrine must be found which will preclude private landowners from denying the public access to these shoreline regions while still preserving the expectations of the property owner.

If public policy demands that we interfere with the system of property rights in this country, the integrity of the landowners' expectations may be best preserved through the process of eminent domain. By condemning and purchasing the land, private property is still being "taken", but it is for a public purpose and the owner is compensated. Eminent domain illustrates to the titleholder the value of all rights in the property, even the right to exclude others from it. Thus, the owner's expectations are reinforced, not contradicted.

Unfortunately, limited governmental funds make it almost impossible to use eminent domain as a broad range policy for acquiring access to upland beach areas. While it should be used whenever feasible, we must look to other doctrines for a more general solution.

In evaluating theories in terms of protection of the landowner's expectations, implied dedication and customary rights follow eminent domain as the favored policy choices. Both methods are only

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132. *Id.*

133. Jaffee, *supra* note 101, at 324.

134. *Id.*

applicable when the land in question has already been the subject of public use. Neither necessitates any donative intent on the part of the fee titleholder. However, implied dedication theory may be preferable to customary rights theory.

Customary rights theory does not require proof of adverse use by the public in order to gain an easement to the upland, but it is difficult to prove immemorial use. In terms of burdens of proof, it is much easier to show for implied dedication that use was adverse to or under the donative consent of the landowner for the statutory period (usually between five and twenty years).

In addition, implied dedication honors the expectations of the public and of the private owner since the theory is "essentially protective in nature, serving only to preserve beaches that are, or were, publicly used."<sup>135</sup> Nothing is taken from the private landowner that has not already been given through action or inaction. Also, implied dedication does provide titleholders with some indication, however vague, of ways to avoid dedication of their land to the public. Conversely, the beachfront property owner is powerless to avoid dedication under eminent domain and the public trust doctrine.

However, implied dedication is also a limited remedy, because it is only effective where the public has previously obtained access to the upland beach area. Consequently, the doctrine is ineffective in situations where the public has been denied access to private beachlands or has not maintained use for the statutory prescriptive period.<sup>136</sup>

Ultimately, doctrines such as eminent domain and implied dedication will fail to meet the expanded demand for shorelands due to a lack of financial resources and/or an inability to establish dedication. Consequently, this Comment recommends that state legislatures seriously consider mandating the application of the public trust doctrine to *all* areas of shoreland, from the vegetation line to the sea. In this way, the public may obtain access rights to privately owned beachland areas without the necessity of showing prior use and possibly without having to compensate the littoral landowner for such rights.

The legislatures and courts must still resolve two issues before the expansion of the public trust doctrine to privately-owned upland

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135. Note, *Alternative to Implied Dedication*, *supra* note 37, at 811.

136. See Note, *California Beach Access: The Mexican Law and the Public Trust*, 2 *ECOLOGY L.Q.* 571, 574-75 (1972) [hereinafter *Mexican Law*].

beach property can be fully endorsed: (1) the constitutionality and statutory legality of extending the public trust doctrine above the mean high tide line; and (2) the taking without just compensation issue.

Section IV will analyze the broadened public trust doctrine recommendation under existing California law in order to show an illustrative example of the feasibility of such an approach and the ability to successfully resolve the constitutional and taking objections to this recommendation.

#### IV.

##### ANALYSIS OF AN EXPANDED PUBLIC TRUST DOCTRINE UNDER CALIFORNIA LAW

When California was admitted to the Union in 1850, it acquired under the "equal footing doctrine" all of the powers and prerogatives previously vested in the older states.<sup>137</sup> Thus, the state took title to the tidelands within its borders, subject to the public trust, as an incident of its sovereignty and in recognition of the state's equal status.<sup>138</sup> The public trust doctrine places a limit on the state's ability to alienate public trust lands. As previously stated, the landmark case of *Illinois Central*<sup>139</sup> stands for the proposition that the states may not abdicate their roles as trustees by conveying vast areas of such lands to private parties.<sup>140</sup>

California courts modified the limitation which *Illinois Central* placed upon the proper granting of lands by a legislature in *People v. California Fish Company*.<sup>141</sup> Instead of invalidating the improper transfer of public trust land, the California Supreme Court held that an improper alienation of such lands transfers only the legal title to the land, subject to a retained public trust easement.<sup>142</sup> Therefore, the grantee retains title to the lands, subject to the public's superior rights of use.<sup>143</sup>

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137. Note, *The Public Trust Doctrine and California Water Law: National Audubon Society v. DWP*, 33 HASTINGS L.J. 653, 661 n.45 (1982).

138. *Borax Consol. v. Los Angeles*, 296 U.S. 10, 15-16 (1935); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Martin v. Waddell*, 41 U.S. 367 (1842).

139. See *supra* text accompanying notes 28-32.

140. Note, *Increased Public Trust Protection for California's Tidelands—City of Berkeley v. Superior Court*, 14 U.C.D. L. REV. 399, 401 (1980) [hereinafter *Berkeley*].

141. 166 Cal. 576, 598-99, 138 P. 79, 88 (1913).

142. *Id.* at 599, 138 P. at 88. The grantee continued to own "the soil, subject to the easement of the public for the public uses of navigation and commerce . . ."

143. There is one exception to the rule of *California Fish*: where the conveyance of public trust lands to private parties will facilitate the public interests—for example, when the land conveyed is used to construct wharves to provide access to navigable water-

Under the Treaty of Guadalupe-Hidalgo, Mexico granted title to all California land to the United States federal government. When California became a state, it gained title to all public trust lands as trustee.<sup>144</sup>

An important issue with regard to the conveyance of public trust lands arose concerning the effect of Mexican grants of public trust lands to private parties prior to California becoming a state. In 1982, the California Supreme Court ruled in *City of Los Angeles v. Venice Peninsula Properties*<sup>145</sup> that under Mexican law, a grant of tidal land by the government to private parties contained an implied reservation of a public easement. Therefore, upon the annexation of California, the United States federal government succeeded to Mexico's right in the tidelands.

However, the United States Supreme Court reversed this California decision in *Summa Corp. v. California ex rel. State Lands Commission*.<sup>146</sup> Since California had not raised its claim under the public trust doctrine during federal patent proceedings pursuant to an 1857 Act that had been enacted to implement the Treaty of Guadalupe-Hidalgo and confirm land titles, the Court ruled that the state could not raise such a claim now.

Regarding the effect of *Summa Corp.* on public beach access claims, the Supreme Court's holding may be distinguished on its facts. In *Summa Corp.*, the City of Los Angeles wanted to exercise the public trust doctrine over coastal lands in order to dredge a lagoon and make other improvements without having to exercise its power of eminent domain.<sup>147</sup> The Supreme Court appeared to place particular emphasis on the fact that the exercising of the public trust doctrine in *Summa Corp.* and in other cases it was relying on involved a "permanent occupancy."<sup>148</sup> It specifically stated that "the interest claimed by California is one of such substantial magnitude that regardless of the fact that the claim is asserted by the state in its sovereign capacity, this interest . . . must have been presented in the patent proceedings or be barred."<sup>149</sup>

Providing the public with access to the shoreline does not involve

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ways. Under these circumstances, the courts will hold that the conveyance was proper and that the grantee received title free from the public trust. *Id.* at 585, 138 P. at 82-83.

144. See Note, *Mexican Law*, *supra* note 136.

145. 31 Cal. 3d 288, 644 P.2d 792, 182 Cal. Rptr. 599 (1982).

146. 466 U.S. 198 (1984).

147. *Id.* at 200.

148. *Id.* at 208.

149. *Id.* at 209.

any physical alteration or right of permanent occupancy as discussed in *Summa Corp.*

In addition, the Supreme Court's reasoning in *Summa Corp.* may be misinterpreting Mexican law at the time California became a state and in effect grants greater rights to landowners who obtained their fee title from the Mexican government than they would have received under United States law. Article VIII of the Treaty of Guadalupe-Hidalgo requires that the property rights of Mexicans be "inviolably respected" and that property owners "shall enjoy . . . guarantees equally ample as if the same [property] belonged to citizens of the United States."<sup>150</sup> In *Summa Corp.*, the Court focuses on the inviolability aspect of the treaty, while in essence ignoring the equal treatment theme regarding property. A recent commentator suggests that the property interest protected by the Treaty of Guadalupe-Hidalgo should be defined as a right to equal treatment, an approach consistent with the terms of the treaty and all previous Supreme Court decisions regarding Spanish and Mexican land grants, with the single exception of *Summa Corp.*<sup>151</sup>

If *Summa Corp.* can be isolated on its facts, as proposed above, all tidal lands in California, regardless of when they were granted to a private party, carry with them a public trust easement with the very limited exception of land granted for a public trust purpose.

#### A. *Constitutionality of Extending the Public Trust Doctrine to the Upland Beach Area*

An analysis of subsequent California statutory and judicial decisions reveals the gradual expansion of the public trust doctrine. The question remains whether the broadening of the doctrine's reach to include upland beach areas has exceeded permissible constitutional boundaries.

##### 1. *California Constitutional Mandate*

During the 1878 California Constitutional Convention, the delegates enacted two provisions designed to protect public ownership and access to beach areas. Article X, § 3 prohibits alienation of any tidelands from the public trust when they are located within two miles of "any incorporated city, county or town."<sup>152</sup> Although this

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150. 9 Stat. 922, 919-30 (1851).

151. Comment, *A New Approach to Spanish and Mexican Land Grants and Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe-Hidalgo*, 33 U.C.L.A. L. REV. 1364 (1986).

152. CAL. CONST. art. X, § 3.

section is important to tideland access, it is expressly limited to prohibiting alienation of *designated* portions of tidelands. Article X, § 4 of the California Constitution has a much broader application. It guarantees a right of way to all navigable waters in the state for *any public purpose*, and empowers the legislature to “enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always obtainable for the people thereof.”<sup>153</sup> The delegates indicated that their basic objective in enacting this constitutional protection was to prevent the continuing abuse of the state’s tidelands by land speculators.<sup>154</sup> This constitutional mandate has served as the basis for significant expansion of the scope and applicability of public trust easements.

## 2. Judicial Expansion of Public Trust Doctrine Coverage

In its 1971 landmark decision of *Marks v. Whitney*,<sup>155</sup> the California Supreme Court recognized that “[t]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs.”<sup>156</sup> The court stressed that public trust burdens are a matter of “great public importance, particularly in view of population pressures, demands for recreational property, and the increasing development of seashore and waterfront property.”<sup>157</sup> This philosophy espoused by the *Marks* court subsequently resulted in the initial expansion of traditional public trust protection in three ways.

First, California courts continued to liberally interpret historical easements granted under the trust doctrine for navigation, commerce and fishing to include *recreational* uses of water. The California Supreme Court specifically declared in *Marks* that public trust easements include “the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchor-

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153. CAL. CONST. art. X, § 4 (formerly CAL. CONST. art. XV, § 2)(emphasis added). This article states: “No individual . . . claiming or in possession of . . . navigable waters in this state, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, . . . and the Legislature shall enact such laws as will give the most liberal construction to this provision so that access to the navigable waters of this state shall be always obtainable for the people thereof.”

154. Note, *Mexican Law*, *supra* note 136 at 579; see 3 DEBATES AND PROCEEDINGS OF THE CALIFORNIA CONSTITUTIONAL CONVENTION OF 1878-1879, at 1480 (E. Willis & P. Stockton stenographers 1881).

155. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

156. *Id.* at 259, 491 P.2d at 330, 98 Cal. Rptr. at 796.

157. *Id.* at 257, 491 P.2d at 380, 98 Cal. Rptr. at 794.

ing, standing or other purposes."<sup>158</sup>

Next, the California Supreme Court recognized new areas of public trust rights, thereby enabling California courts to use the public trust doctrine for environmental regulation. Again, *Marks v. Whitney* was largely responsible for this development. At issue in the case was the right of a tidelands grantee to fill and to develop property.<sup>159</sup> The court, citing *California Fish*, denied the grantee absolute ownership of the property, holding that the title to the land was subject to a public trust easement.<sup>160</sup> Significantly, the court, in dictum, expressly broadened the range of public trust easements to include uses not mentioned in earlier cases, specifically stating that one of the uses protected by the public trust doctrine was conservation of resources.<sup>161</sup>

The third major expansion involved the definition of waters covered by the public trust doctrine. As previously stated, while early common law definitions applied only to tidal lands, subsequent public trust decisions adopted "navigability" as the test for public trust coverage.<sup>162</sup> California courts have significantly expanded the scope of navigability, beginning with *City of Los Angeles v. Aitken*,<sup>163</sup> which broadened the scope of the public trust doctrine to include non-tidal, navigable streams and lakes.<sup>164</sup> More recently, the appellate court in *People ex rel Baker v. Mack*<sup>165</sup> adopted a recreational boating test to be used to determine if a body of water is navigable for the purposes of applying public trust easements.<sup>166</sup>

The most important decision regarding public trust doctrine coverage was the 1983 California Supreme Court decision in *National Audubon Society v. Superior Court*.<sup>167</sup> In that case, the National Audubon Society sought to enjoin the Los Angeles Department of Water and Power from diverting the flow of freshwater, non-navigable streams from Mono Lake because the diversion was causing the level of the lake to drop.<sup>168</sup> Following the reasoning of *People v.*

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158. *Id.* at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796. See also *Hitchinger v. Del Rio Woods Recreation & Park Dist.*, 55 Cal. App. 3d 560, 127 Cal. Rptr. 880 (1976); *People ex rel Baker v. Mack*, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971).

159. 6 Cal. 3d at 251, 491 P.2d at 374, 98 Cal. Rptr. at 790.

160. *Id.* at 259-60, 491 P.2d at 580, 98 Cal. Rptr. at 796.

161. *Id.*

162. See *supra* text accompanying notes 8-20.

163. 10 Cal. App. 2d 460, 52 Cal. Rptr. 585 (1935).

164. *Id.*

165. 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971).

166. *Id.* at 1044-49, 97 Cal. Rptr. at 450-53.

167. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

168. *Id.* at 424, 658 P.2d at 711, 189 Cal. Rptr. at 348. For a discussion of the effect

*Gold Run Ditch & Mining Company*,<sup>169</sup> the California Supreme Court ruled that "the public trust doctrine . . . protects navigable waters from harm caused by diversion of non-navigable tributaries."<sup>170</sup> Thus, the history of judicial expansion of the public trust doctrine up to and through *National Audubon* has allowed the courts to reach non-tidal, non-navigable waters (areas not normally covered by the public trust doctrine) because private use of such waters has an adverse effect on tidal and/or navigable waters (areas normally covered by the public trust doctrine). Stated another way, the government can regulate and/or restrict private use of privately owned waters not normally covered by the public trust doctrine because of the effect the private use has on the enjoyment of a public trust right.

This same line of reasoning can be used to procure public access to privately owned upland beach areas. Private restrictions prohibiting public access to upland beach areas can have an adverse effect on the enjoyment of public trust recreational rights in tidal waters. If it can be shown that the lack of access to the foreshore and/or restricted use of the dry sand area has sufficient impact on the public's right to recreational usage of tidal waters, it then follows under *National Audubon* and the constitutional provision for public access protection that the courts can reach private action.

### 3. *Use of Access Dedications as a Condition for New Development*

Additional support for public access to the privately owned beachlands rests in an analysis of two recent California Supreme Court decisions: *Grupe v. California Coastal Commission*<sup>171</sup> and

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of diversions on the ecology of Mono Lake, see Young, *The Troubled Waters of Mono Lake*, (Oct. 1981) NATIONAL GEOGRAPHIC, at 504; Jehl, *Mono Lake: A Vital Way Station for the Wilson's Phalarope*, (Oct. 1981) NATIONAL GEOGRAPHIC, at 520; Huff, *The Legal Battle Over Mono Lake*, (Jan. 1982) CAL. LAW at 28 (CAL. DEPT. WATER RESOURCES, REP. OF THE INTER-AGENCY TASK FORCE ON MONO LAKE (Dec. 1969)).

169. 66 Cal. 138, 4 P. 1152 (1884). The court ruled that the company could be enjoined from depositing mining debris in non-navigable streams because of the downstream effect on a navigable river.

170. 33 Cal. 3d at 437, 658 P.2d at 721, 189 Cal. Rptr. at 357. "The core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. This authority applies to the waters tributary to Mono Lake and bars DWP or any other party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust." *Id.* at 425, 658 P.2d at 712, 189 Cal. Rptr. at 349.

171. 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985).

*Whaler's Village Club v. California Coastal Commission*.<sup>172</sup> Both cases challenged the constitutionality of a condition imposed in a new development permit, which required a property owner to dedicate a public access easement along the beach fronting his property.<sup>173</sup> The California Supreme Court ruled that the Coastal Commission may constitutionally require an uncompensated public access dedication of the upland beaches as a condition of approving coastal development.<sup>174</sup>

In *Grupe*, the court also declared that there need only be an indirect relationship between the proposed exaction and a need to which the development contributes.<sup>175</sup> Also, even though the owner's home alone had not created the need for access to tidelands fronting his property, other such houses together would severely limit public access to tidelands and beaches and therefore collectively create the need for public access.<sup>176</sup> Thus, the court stated that the decision to impose the access condition was supported by findings that public access was not available to this portion of the beach and that the condition would facilitate public access along the shoreline. In this way, the condition was reasonably related to a legitimate governmental purpose (i.e., providing access to the shoreline) and did not violate substantive due process.<sup>177</sup>

With the decisions in *Grupe* and *Whaler's Village*, the California Supreme Court contributed further substantial support to the clearly enunciated state policy in favor of allowing public access to

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172. 173 Cal. App. 3d 240, 220 Cal. Rptr. 2 (1985).

173. In *Grupe*, respondent was required to dedicate an easement to the public over his land in order to get a permit to build a single family house on undeveloped land in a private beachfront community. The respondents in *Whaler's Village* built a rock rivetment on the beach in order to repair damage to the shoreline from a major storm and to prevent any future damage to the foundation walls of homes in the area. Likewise, the California Coastal Commission required *Whaler's Village* to dedicate a public easement over their land as a condition for receiving the permit for the rivetment.

174. 166 Cal. App. 3d at 180, 212 Cal. Rptr. at 599; 173 Cal. App. 3d at 255, 220 Cal. Rptr. at 10. See *Georgia-Pacific Corp. v. California Coastal Commission*, 132 Cal. App. 3d 678, 183 Cal. Rptr. 395 (1982). "A regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permitting land development." *Id.* at 699, 183 Cal. Rptr. at 407.

175. See *Sea Ranch Ass'n v. California Coastal Commission*, 527 F. Supp. 390 (N.D. Cal. 1981); *Georgia-Pacific Corp. v. California Coastal Commission*, 132 Cal. App. 3d 678, 183 Cal. Rptr. 395 (1982). In both cases, the courts approved beach access dedication conditions without requiring that any benefit be conferred upon the condition developments. "The fact that the development has no direct nexus to the condition, that the benefit to the public is greater than to the developer, or that future needs are taken into consideration does not destroy the validity of the condition."

176. 166 Cal. App. 3d at 167, 212 Cal. Rptr. at 589.

177. *Id.* at 171, 212 Cal. Rptr. at 592.

shoreline areas. The court in *Whaler's Village* even went so far as to say that "one may not do with his property as he pleases; his use is subject to reasonable restraints to avoid societal detriment."<sup>178</sup> The mandate of Article X, § 4 of the California Constitution, coupled with the high degree of deference shown by the California courts to the public's need for access to the shorelands, indicates a high likelihood of successful expansion of the public trust doctrine to cover upland shore areas.

### B. *The Takings Issue*

Although the state may be able under the public trust doctrine and/or its police power to obtain access for the public to privately owned shore zones, the issue remains whether the private landowner is entitled to compensation. The fifth amendment to the United States Constitution, which is made applicable to the states through the fourteenth amendment, prohibits the taking of private property for public use without just compensation.<sup>179</sup> While property may be regulated to a certain extent, "if regulation goes too far it will be deemed a taking."<sup>180</sup> Therefore, the state government will have to pay compensation if their regulation exceeds the authority of their police power.<sup>181</sup>

Turning to California courts, it is important to note that they have historically accorded great deference to government action designed to promote public rights in the tidelands, even when the action has resulted in serious economic harm to individuals.<sup>182</sup> "Where the state or its subdivisions have acted to promote the public trust and such action has resulted in damage to the property rights of upland owners, the courts have generally been unwilling to find a taking, even though the action might be deemed a taking in a non-trust context."<sup>183</sup>

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178. 173 Cal. App. 3d at 253, 220 Cal. Rptr. at 8; see *People v. Byers*, 90 Cal. App. 3d 140, 147-48, 153 Cal. Rptr. 249, 253 (1979); *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 515, 125 Cal. Rptr. 365, 370, 542 P.2d 237, 242 (1975).

179. *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 122 (1978). See 42 U.S.C. § 1983, "Every person who, under the color of any statute, . . . of any state or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the constitution and laws shall be liable to the party injured in an action at law . . . for redress."

180. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

181. *Id.* at 413.

182. 166 Cal. App.3d at 160, 212 Cal. Rptr. at 592.

183. *Id.*

For example, *Miramar Co. v. City of Santa Barbara*,<sup>184</sup> involved a dispute which arose when the city of Santa Barbara built an ocean breakwater for the purpose of creating a harbor for fishing and pleasure boats. The breakwater blocked the littoral drift of sand along the coast and the plaintiff's beach eroded away, depriving him of his beach above the mean high tide line. The court denied recovery against the city for an unconstitutional taking stating that "littoral rights must give way to any use of the tidelands and water flowing over them that serves the public (trust) right of navigation."<sup>185</sup> *Miramar* is important because the landowner suffered not merely the burden of a public easement but the virtual loss of his entire beach. In the face of this private loss, the government action that caused the beach depletion was held to be constitutional. *Miramar* does not say that a taking may never result when the state is acting to promote public trust purposes. However, it does show that California courts have been extraordinarily deferential to state action designed to further the purposes of the public trust, even if the action results in significant economic injury to individual landowners.

Another area that is illustrative of judicial deference is the requirement of public access conditions in order to obtain building permits. In general, "[a] regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this . . . ."<sup>186</sup> However, there must be a rational relationship between the requirement of dedication of the property and the burden imposed on the public by the new construction.<sup>187</sup> Otherwise, if as a condition on the receipt of a permit, the landowner must donate property for a public use that bears no relationship to the benefit conferred on the landowner or the burden imposed on the public, there is a taking of property without payment of just compensation in violation of the United States

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184. 23 Cal. 2d 170, 143 P.2d 1 (1943).

185. *Id.* at 173, 143 P.2d at 2. "A littoral owner may have a right as against an individual to the uninterrupted flow of sand to his land by the ocean currents in their natural state . . . but he has no such right as against the state."

186. *Georgia-Pacific Corp. v. California Coastal Commission*, 132 Cal. App. 3d 678, 699, 183 Cal. Rptr. 395, 417 (1982), *citing* *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971).

187. This is a relatively easy burden to meet. For example, in *Grupe*, it was not necessary to show that the new construction on one lot would impair public access to the beach; rather, it was enough to show that if every house performed the same construction it would have an adverse impact on public access. *See supra* text accompanying notes 175-76.

Constitution.<sup>188</sup>

Determining when government action amounts to a fifth amendment taking requiring payment of compensation is not a simple procedure performed in a well-defined fashion. The United States Supreme Court itself has admitted it has never been able to develop a "set formula" to determine when "justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."<sup>189</sup> The Court has generally failed to provide any clear and adequate standard for determining when a Fifth Amendment "taking" has occurred, relying instead on a case-by-case determination.<sup>190</sup>

The clearest statement of "taking" law by the U.S. Supreme Court was set forth in *Penn Central Transportation Co. v. New York City*.<sup>191</sup> While admitting that takings analysis proceeds on an essentially "ad hoc" basis, the Supreme Court did identify "several factors" that have particular significance in the analysis.<sup>192</sup> The most important is the economic impact of the action on the individual landowner. The California Supreme Court has determined that there is no taking of property through regulation unless its effect is to deprive the landowner of substantially *all reasonable use*—and therefore all reasonable economic value—of his or her property.<sup>193</sup>

The California Supreme Court has interpreted this holding broadly to deny compensation in a variety of cases. For example, in *HFH, Ltd. v. Superior Court*,<sup>194</sup> the court held that a diminution in the value of property from \$400,000 to \$75,000 did not amount to a taking of property. In *Colberg v. State of California ex rel Department of Public Works*,<sup>195</sup> shipyard owners brought an eminent domain claim for damages arising from the impairment of their access

188. *Remmenga v. California Coastal Commission*, 163 Cal. App. 3d 623, 627, 209 Cal. Rptr. 628, 632 (1985).

189. *Penn Central*, 438 U.S. at 124.

190. *See Sax, Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964).

191. 438 U.S. 104 (1978).

192. Factors are: (1) economic impact of the action and the extent to which regulation has interfered with investment-backed expectations; (2) character of government action, i.e. more likely to be a taking if interference with property is physical invasion by the government—*see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); (3) government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions often have been held to constitute takings. *Penn Central*, at 124-28.

193. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 277, 598 P.2d 25, 36, 157 Cal. Rptr. 372, 383 (1979). *See also Pennsylvania Coal v. Mahon*, 260 U.S. at 415.

194. 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975).

195. 432 P.2d 3, 62 Cal. Rptr. 401 (1967).

to the Stockton Deep Water Channel by the construction of two proposed low level bridges spanning a connecting navigable waterway to which their properties were riparian. The court found that 81% of Colberg's business would be effectively eliminated by the construction of the bridges. However, it still held that only a partial taking had occurred meaning that no compensation was required.<sup>196</sup> In *Grupe*, the court stated that the individual landowner had received a substantial benefit from the state's decision to allow development of his property. Therefore, "when compared with the value of the developed property, the economic detriment [of allowing public access] is not so significant as to require a finding that a taking has occurred in this case."<sup>197</sup>

The California Supreme Court's reasoning in *Agins* and its application to subsequent cases creates important ramifications concerning the ability of the legislature and courts to extend the public trust doctrine to privately-held upland beachfront property without payment of compensation. As stated in *Agins*, a taking requiring compensation occurs only if "substantially all reasonable use" of the property is taken away by the state. Allowing the public to have access over or use of the dry sand area would not eliminate all reasonable use by the landowner since he or she would also be allowed to use the area. The only "property" which might have been taken from the owner is the right to exclude others—i.e. the right to privacy. While the right to privacy on one's own land is a constitutionally protected right and may be abridged only where there is a compelling public need,<sup>198</sup> *Whaler's Village* declared that the right to privacy does not extend to exclusion of the public from access to public trust lands.<sup>199</sup> Therefore, it is highly likely that the extension of the public trust doctrine to allow public access to private beaches is not a taking requiring compensation.

## V.

### CONCLUSION

With increased leisure time and a corresponding need for recreational areas, it is extremely important that the public not be denied

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196. *Id.* at 6-8, 62 Cal. Rptr. at 404-06.

197. 166 Cal. App. 3d at 177, 212 Cal. Rptr. at 597.

198. *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 130, 610 P.2d 436, 443, 164 Cal. Rptr. 339, 346 (1980).

199. 173 Cal. App. 3d at 255, 220 Cal. Rptr. at 10.

use of recreational water.<sup>200</sup> The remaining tidal water resources still owned by the states have become very scarce because of the increased recreational demands of a growing population. The time has come to develop a definitive answer to the question of how to obtain public access to privately held beach land.

While the theories of eminent domain, custom and implied dedication are all of some assistance in acquiring public easements across and upon private shore property, none of them will be effective as a long-term solution. Only the public trust doctrine has the potential to provide a long-range solution to the public access problem.

By showing that use of the dry sand area is important to the enjoyment of public trust recreational rights, the state may compel a private landowner to allow the public to traverse or to use private beachfront property for public trust purposes. Yet the private landowner will also retain the right to use the property. In this way, both the expectations of the private landowner and of the public will be served while resolving the beach access problem. For it is important to remember that "solitary walks along the shore and tranquil evenings spent among friends on the beach comprise a dream that many of us share. But this dream may not be fulfilled by excluding others who ask for only the simpler pleasures of engaging in ocean bathing and beach activities . . . ."<sup>201</sup>

#### POSTSCRIPT

The United States Supreme Court recently ruled that the California Coastal Commission could not require owners of beachfront property to provide public lateral access across their beach as a condition of development project approval.<sup>202</sup>

James and Marilyn Nollan own a beachfront lot in Ventura County, California. In 1982, they applied for a coastal development permit to demolish a 521 square foot, substandard beach house located on their lot and replace it with a two-story, 1674 square foot permanent residence. The California Coastal Commission (the "Commission") approved their application with a condition requiring lateral public access. The Nollans objected and this action

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200. *People ex rel. Baker v. Mack*, 19 Cal. App. 1040, 1044, 97 Cal. Rptr. 448, 451 (1971).

201. *Lusardi v. Curtis Point Property Owners Ass'n*, 86 N.J. 217, 230-31, 430 A.2d at 888.

202. *Nollan v. California Coastal Commission*, 107 S. Ct 314 (1987).

ensued.<sup>203</sup>

The trial court issued a peremptory writ commanding the Commission to issue the permit without the condition requiring public access. In *Nollan v. California Coastal Commission*,<sup>204</sup> the California Court of Appeals upheld the right of the Commission to impose public access requirements on shore zone landowners as a condition of development.

The court in *Nollan* declared that the Nollans did not have a pre-existing right to unregulated new construction. Since the Commission allowed them to construct, the only issue is the reasonableness of the condition attached to the permit.<sup>205</sup>

While the trial court found that the Nollans' project would not "create a direct or cumulative burden on public access to the sea," the Court of Appeals followed the holding in *Grupe* judging the constitutionality of exactions.<sup>206</sup> Only an indirect burden on public access, not a direct burden, need be demonstrated.<sup>207</sup> Additionally, the court had previously stated in *Remmenga v. California Coastal Commission*<sup>208</sup> that the justification for required dedication is not limited to the burdens created by the individual project.<sup>209</sup> The Court of Appeals concluded, "the Nollans' project has not [itself] created the need for access to the tidelands fronting their property but it is a small project among many others which together limit public access to the tidelands and beaches of the state and, therefore, collectively create a need for public access."<sup>210</sup>

The U.S. Supreme Court reversed, stating that the Commission may condition a development permit on a concession by the landowner only if there is a close link between the concession and the legitimate public purpose it advances. The Court held that requiring lateral access across the beach would not further the Commission's goal of minimizing the visual and psychological barriers to

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203. *Nollan v. California Coastal Commission*, 177 Cal. App. 3d 719, 721, 223 Cal. Rptr. 28, 29 (1986), *review granted*, 55 U.S.L.W. 3247 (U.S. Oct. 20, 1986) (No. 86-133).

204. *Id.*

205. *Id.* at 722, 223 Cal. Rptr. at 29-30.

206. *Id.* at 723, 223 Cal. Rptr. at 30.

207. *See supra* notes 175-76 and accompanying text.

208. 163 Cal. App. 3d 623, 209 Cal. Rptr. 628 (1985), *reh. denied*, 106 S. Ct. 584 (1985).

209. *Id.* at 628, 209 Cal. Rptr. at 632.

210. 177 Cal. App. 3d at 323, 223 Cal. Rptr. at 30-31.

the beach created by the Nollan's larger residence.<sup>211</sup>

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211. *Nollan*, 107 S. Ct. at 3147.

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