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THE PUBLIC TRUST DOCTRINE IS ALIVE AND KICKING IN NEW JERSEY TIDALWATERS: NEPTUNE CITY v. AVON-BY-THE-SEA— A CASE OF HAPPY ATAVISM?

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INTRODUCTION

In the 1821 case of *Arnold v. Mundy*, the Supreme Court of New Jersey held that the American Revolution had vested inalienably and indefeasibly in the state's people the legal title and the usufruct in New Jersey's tidalwater resources. As legal representative of New Jersey's citizenry, the state's legislature might "lawfully erect ports, harbours, basins, docks, and wharves on the coasts of the sea and in the arms thereof . . . bank off those waters and reclaim the land upon the shores . . . build dams, locks, and bridges for the improvement of the navigation and the ease of passage . . . clear and improve fishing places, to increase the product of the fishery . . . create, enlarge and improve oyster beds. . . ."[1] But these legislative powers could be exercised only as by a sovereign, "for the common benefit of every individual citizen."[2]

A trespass action founded on a claim of private oyster fishery, answered with a claim of public right, was responsible for this holding.[3] But the decision had the potential to determine every conceivable state-law tidalwater resource allocation question.[4] New Jersey citizens, *qua* citizens, would have been assured standing to seek judicial protection against even legislatively authorized tidalwater pollution.[5] A century of post-*Arnold* decisional law acquiescing in legislative and private derogation of common tidalwater resource rights, however, abated the impact of that case. By early summer of 1972,

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1. 6 N.J.L. 1, 78 (Sup. Ct. 1821).

2. *Id.*

3. *Id.* at 2, 12. *See* Note, *State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey*, 25 Rutgers L. Rev. 571, 651-52 (1971) (Jaffee) [hereinafter cited as Note, 25 Rutgers L. Rev.].

4. *See* Note, 25 Rutgers L. Rev. 655-56, 669-72, 687-88.

5. *See* Note, 25 Rutgers L. Rev. at 688, 89. In a riparian system like New Jersey's, all water resource allocation powers stem from waterbed property. *Id.* at 687 nn. 764 & 765. If full equitable title to a state's tidalwater beds vests inalienably in all her citizens as individual cotenants, those citizens logically should be the ultimate arbiters of tidalwater resource allocation in that state. *See also* Paterson v. E. Jersey Water Co., 74 N.J.Eq. 49, at 62-66, 70 A. 472 at 479-80 (Ch. 1908), *aff'd*, 77 N.J. Eq. 588, 78 A. 1134 (E.&A. 1910). *See generally*, Note, Jaffee, 25 Rutgers L. Rev. 576-89.

legal and equitable tidalwater resource title had, practically, been squeezed from the citizenry.[6]

On July 24, 1973, however, the Supreme Court of New Jersey reinstated the rule of *Arnold*, in a seashore recreation right action brought by the Borough of Neptune City and two of its private residents, challenging the Borough of Avon-By-The Sea's seashore-access fee discrimination against non-Avonites. This case, *Neptune City v. Avon-By-The-Sea*,[6A] holds that the public trust doctrine prohibits the state and its subdivisions from discriminating among New Jersey citizens in foreshore access regulations.

Neptune City recognizes and assures a citizen recreation right respecting foreshore.[7] The decision apparently also secures citizen access to foreshore at points of intersection with dedicated public ways.[8] Moreover, *Neptune City* suggests: (a) that the public may have rights of wetbeach access over private drybeach, as well as usufructuary rights respecting wetbeach allocated to private possession;[9] (b) that no person or branch of state government can abridge citizen navigation, fishery, recreation, access and water purity interests;[10] and (c) that New Jersey citizens have standing to challenge private and state-government threats to such tidalwater interests.[11]

This comment will develop these points with respect to three questions: (1) citizen rights and standing to assert public tidalwater rights as against government regulation or private claims, (2) the impact of *Neptune City* on present tidalwater resource allocation, and (3) the need for legislative organization of (a) tidalwater resource use and of (b) citizen access to judicial and administrative forums for tidalwater resource allocation regulation.

CITIZEN RIGHTS AND STANDING TO SUE

The *Neptune City* plaintiffs' claims were (a) denial of equal pro-

6. *See* Note, 25 Rutgers L. Rev. 656-94.

6A. 61 N.J. 296, 294 A.2d 47 (1972), *rev'g*, 114 N.J. Super. 115, 274 A.2d 860 (Law Div. 1971).

7. *Accord*, Note, 26 Rutgers L. Rev. 179, 185, 186-87 (1972).

8. *See* 61 N.J. at 303, 294 A.2d at 54-55. *Compare* Hoboken Land Imp. Co. v. City of Hoboken, 36 N.J.L. 540 (E. & A. 1873). *See generally*, Note, 25 Rutgers L. Rev. 663-65, *citing, inter alia*, Louisville & N.R.R. v. Cincinnati, 76 Ohio St. 481, 81 N.E. 983 (1970), Chicago R.I. & P. Ry. v. People *ex rel.* Dailey, 222 Ill. 427, 78 N.E. 790 (1906), and People *ex rel* Burton v. Corn Products Refining Co., 286 Ill. 226, 121 N.E. 574 (1918). *See also* Jersey City v. Hall, 79 N.J.L. 559, 76 A. 1058 (E.&A. 1910); Note, 26 Rutgers L. Rev. 179, 180, 185-88 (1972).

9. *See* 61 N.J. at 303, 294 A.2d at 54-55; *id.* at 305, 294 A.2d at 56 (dissenting opinion); 26 Rutgers L. Rev. 184-88.

10. *See* 61 N.J. at 304, 294 A.2d at 55; 26 Rutgers L. Rev. 181-83.

11. Two private citizens remained joined as plaintiffs at the determination of *Neptune City*. This remarkable fact and other aspects of the case suggesting citizen standing are developed below.

tection and (b) infringement of common law public sea access rights.[12] The equal protection claim could have explained the continued joinder of private citizen plaintiffs, but would have said nothing about whether the citizenry has cognizable interests in tidalwater resource allocation generally. A successful suit by private citizens claiming municipal infringement of their common law sea-access interests, however, could have implied citizen standing to challenge either state-government misallocation or private appropriation of tidalwater resources. An enforceable common law claim respecting realty implies property in the claimant. Of course, the implication could also be either legislative (or constitutional) limitation on local government action, or state-government consent to be sued.

The trial court decision, while rejecting the equal protection claim, contraindicated citizen standing on a common law sea-access right. Under *Schultz v. Wilson,*[13] the legislature, as presumptive fee simple owner of all lands under the state's tidalwaters, might deny the entire citizenry all tidalwater resource uses and, under proper circumstances, discriminate in their allocation.[14] Since the legislature authorized municipalities to impose beach use tolls, the question in *Neptune City* was not whether Avon-By-The-Sea could levy such tolls on Neptune City residents, but solely whether the fourteenth amendment of the federal Constitution permitted the burden to fall more heavily on non-Avon residents than on Avonites.[15] Being rationally related to the borough's beach and boardwalk maintenance and safety burdens, Avon's toll discrimination did not offend the equal protection clause.[16]

The supreme court reversed, but eschewed decision on fourteenth amendment grounds. Under the public trust doctrine's guarantee of a "deeply inherent"[17] right in state citizens to the benefits of tidalwater resources, "municipalities may not discriminate in any respect between their residents and nonresidents."[18] Moreover, "the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms . . . and . . . any contrary state or municipal action is impermissible."[19]

The supreme court relied heavily on *Arnold's* language indicating

12. 61 N.J. at 300, 294 A.2d at 51.
13. 44 N.J. Super. 591, 131 A.2d 415 (App. Div. 1957), *cert. denied,* 24 N.J. 546, 133 A.2d 395 (1957).
14. 114 N.J. Super. 115, 118, 274 A.2d 860, 863 (Law Div. 1971).
15. *Id.*
16. *Id.* at 120, 274 A.2d at 864-65.
17. 61 N.J. at 303, 294 A.2d at 53.
18. *Id.* at 304, 294 A.2d at 55.
19. *Id.* at 304, 294 A.2d at 54.

each individual New Jersey citizen has an undivided claim in rem, good even against legislative impairment. It also approved *Arnold's* statement that not even "sovereign power" can make "a direct and absolute grant" of the waters of the state, "divesting all the citizens of their common right."[20] Therefore, since the individual plaintiffs remained joined in the supreme court process, *Neptune City* implies (a) that neither state government nor private entity may divest state citizens of their public trust rights in tidalwater resources, and (b) that no person may claim, nor arm of government grant him, a greater share of the benefit of this trust than every New Jersey citizen can claim.

Since the supreme court chose to enforce the latter of these rules in the face of legislation which did not expressly authorize discriminatory beach use fees, it appears the court will enforce directly individual citizens' substantive public trust claims, albeit relevant legislative statements are absent or contrary.[21] *Arnold and Neptune City* permit legislation licensing, leasing or conditionally granting possession of parcels of foreshore, ocean beach or tidalwater bedlands, if consistent with the public interest.[22] Such an allocation would not favor the grantee over other citizens, but choose him as the mechanism of an enhancement of the common benefit.[23] But, any tidal-

20. *Id.* at 302, 294 A.2d at 52-53.

21. The *Neptune City* court's choice is inconsistent with traditional indirection methods of securing public interests, methods like statutory construction contraindicating concentrated administrative or municipal allocations, as discussed in Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970). *See also infra* notes 50-53 and surrounding text. This implies the court is willing to protect citizen tidalwater resource interests as substantive, not procedural, rights. New Jersey courts had refused to recognize any rights against legislative preferences in tidalwater resource allocation, not in municipalities (as government subdivisions or corporate entities) or in individual state citizens or riparian proprietors. For example, the Attorney General ex rel. Simmons v. Paterson, 60 N.J. Eq. 385, 45 A. 995 (E. & A. 1900), the court held that the relator-complainant New Jersey citizen riparians had no rights in the tidalwaters of the Passaic River entitling them to personal or proprietary protection against legislatively-sanctioned water pollution by upstream municipalities. *Accord, e.g.*, Belleville v. City of Orange, 70 N.J. Eq. 244, 62 A. 331 (Ch. 1905). This holding assumes that tidalwaters and their beds and foreshore bear only generalized public interests titled in the legislature, rather like ordinary public domain or unallocated tax money. *Neptune City* obliterates these premises. Similarly, Bouquet v. Hackensack Water Co., 90 N.J.L. 203, 101 A. 379 (E. & A. 1917), which held owners of land abutting tidalwater remediless against legislatively authorized water pollution injurious to their aesthetic and recreational interests, would be susceptible of severe limitation or overruling under *Neptune City*. *Neptune City* would protect such landowners against unwarranted or discriminatory impairment of such interests. *Cf.* Arnold v. Mundy, 6 N.J.L. 1 (Sup. Ct. 1821).

22. *Id.* at 301-03, 294 A.2d at 52-54.

23. *See id.* at 302, 294 A.2d at 53, *citing*, Arnold v. Mundy, 6 N.J.L. at 78. *See also* Illinois Central R.R. v. Illinois, 146 U.S. 387, 452 (1892), *cited in Avon in* 61 N.J. at 300-01, 294 A.2d at 51-52; Note, 25 *Rutgers L. Rev.* at 694-710, *cited in part in Avon in* 61 N.J. at 303, 294 A.2d at 55. *Quaere*, however, whether such a grant may be unconditonal, whether its

water resource allocation or claim that impairs or does not supply the common interest of the state's citizens would be a discrimination violating the public trust and would be actionable by any injured state citizen.[24] Cases in other jurisdictions have assumed similar common property and citizen standing.[25] Legislation in other states has given citizens power to seek judicial remedies for water resource allocation problems.[26] But a statutory grant of power to sue on behalf of the public does not ensure future state citizens standing; this depends on a cognizable claim of the plaintiff that a judicially protectable interest has been injured or is threatened by the defendant. Repeal would remove any protection not premised on property or common law personal rights.[27]

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extinguishment (effect on improvement takings or devaluations aside) may be compensable? *See id.* at 303, 294 A.2d at 54; Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892); Note, 25 Rutgers L. Rev. at 710 N. 904 and references there cited.

24. Since the citizen's common law right under the public trust doctrine is unsusceptible of legislative impairment, his standing to challenge private or government tidalwater resource abuses should be secure against aught but constitutional alteration or federal navigation servitude assertion. Even state constitutional changes seem doubtful, because *Arnold* treated the public trust as beyond even sovereign infringement. 6 N.J.L. at 78, quoted in *Neptune City*, 61 N.J. at 303, 294 A.2d at 53. Indeed, no single generation of citizens ought to be able to diminish the public trust, any more than might a life tenant waste land improvements in which the remainderman is interested. *Cf.* Note, 25 Rutgers L. Rev. 596-99 and notes thereto. *See also* Illinois Central R.R. v. Illinois, 146 U.S. at 453-57; Priewe v. Wisconsin State Land & Imp. Co., 93 Wis. 534, 67 N.W. 918 (1896). "Injury" doubtless ought to be a jurisdictional question. But it should be provable by a demonstration of impairment of interest in fact. *Compare* Barlow v. Collins, 397 U.S. 159, 167-78 (opinion of Brennan and White, JJ.) *with* Neptune City v. Avon-by-the-Sea *and* Crescent Park Tenants' Assoc. v. Realty Equities Corp., 58 N.J. 98, 275 A.2d 433 (1971). Since under *Neptune* New Jersey citizens hold individuated equitable property in tidalwater resources, *quaere* whether even injury in fact would be prerequisite to standing in an injunction action against, *e.g.*, tideland alienation legislation, tidalwater pollution authorization, or overregulation of common tidalwater resource use. *Cf., e.g.*, Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913); and *compare* Attorney General *ex rel.* Simmons v. Paterson, 60 N.J. Eq. 385, 45 A. 995 (E. & A. 1900) (if injunction much greater hardship to defendant and public than benefit to proprietor plaintiff, plaintiff to be remitted to remedy in damages, which, absent injury, should be awarded nominally to stay prescription).

25. *See* Wilbour v. Gallagher, 77 Wash.2d 306, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970); Baker v. Voss, 217 Wis. 415, 259 N.W. 413 (1935); *cf.* Priewe v. Wisconsin State Land & Imp. Co., 93 Wis. 534, 67 N.W. 918 (1896).

26. *See generally* McLennan, *State Legislation to Grant Standing: Questions, Answers and Alternatives*, 2 Environmental Law 313 (1972) [hereinafter cited as McLennan].

27. Mich. Comp. Laws Ann. § 691.1201 et seq. (1972) grants power (not standing in the strict sense) *inter alia* to "any person, partnership, corporation, association, organization or other legal entity [to] maintain an action . . . for the protection of the air, water and other natural resources and the public trust therein. . . ." The problem is the content of the "public trust:" Does it contain inalienable, indefeasible individuated citizen property as suggested by *Arnold v. Mundy* and *Neptune City*? Florida Stat. Ann. § 403.412 (1973) is substantially identical. Wisconsin, the only riparian state besides post-*Neptune City* New Jersey recognizing individuated citizen public trust property, may have legislation permitting public nuisance suits not predicated on special damages. Assembly Bill 879, Wis. 1971. *See* 2 McLennan at 322. The Wisconsin bill was premised in part on a public trust in

NEPTUNE CITY AND CURRENT TIDALWATER RESOURCE ALLOCATIONS

A. Foreshore Use and Access

Arnold v. Mundy holds that the American Revolution gave to the people of New Jersey all lands under tidalwater within the state's boundaries. It follows that no prerevolution private allocation of tidelands or foreshore can have defeated the tidelands and foreshore interests of New Jersey's citizenry. Therefore, under *Arnold*, the postrevolution legislature held in public trust all unappropriated tidelands and foreshore title within the state, as well as title to the public interests if not the legal title in privately appropriated tidelands and foreshore. Since the power of the legislature to delegate its tidelands and foreshore improvement functions[28] to municipalities and private proprietors is circumscribed by the public trust doctrine's protection of common tidalwater-resource rights of the citizenry,[29] the legislature cannot authorize land development inconsistent with public trust interests like tidalwater access.[30]

The New Jersey Court of Errors and Appeals once nearly so held,

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navigable water. Since the Wisconsin citizenry have long had individually assertable equities in navigable waters, the Wisconsin bill contemplates establishing merely a mechanism of remedy, not creating a rescindable power. Moreover, since the bill precludes money damages only against the state, it allows damages actions against private claims and injuries, as should the rule of *Neptune City*. For nearly three years, New Jersey's legislature has been considering legislation respecting citizen suits to protect the state's environment. *E.g.*, S. 973 (1971); Assembly 1268 (1971); Assembly 569 (1972). A 1970 bill contemplated a three-judge environmental protection court with original, appellate, and general jurisdiction, presided over by lawyer-judges with ten or more years membership in the New Jersey Bar, S. 868 (1970), not carried into 1972-73 sessions. The appropriateness of such a court was noted in Note, 25 Rutgers L. Rev. 571, 703-05, 708-09 (1971), and will be discussed further, below, vis-a-vis *Neptune City* and the need for economist and scientist judges.

Though its biophysical, economic, and technological aspects are beyond the scope of this commentary's analysis, the plan of New Jersey's Environmental Protection agency, to reclaim private-appropriated tidemarsh and resell it to increase the state's school fund, see N.Y. Times, Mar. 15, 1973, at 1, col. 2, ought to be noted as a problem requiring the consideration of an environmental court. Much of the tidemarsh in question may have been essential, in its natural state, to full-scale ocean fishery reproduction, perhaps soon to be a critical element of world food supply. But some may not be renaturalizable. Thus the public trust doctrine may require that some such reclamation be for reallocation to natural use, not for capitalization of the school fund, a purpose outside the public trust except in situations like those cited in *Arnold v. Mundy*. *See* text accompanying note 1, *supra; infra* notes 119-22 and accompanying text. The present mechanism for testing projects like this tidemarsh reallocation plan, judicial review of partly discretionary agency action, appears to continue to be awkward if not incompetent as an instrument of the public trust doctrine. *See* opinion of Justice Hall, dissenting in N.J. Sports and Exposition Authority v. McCrane, 61 N.J. 1, 292 A.2d 545 (1972).

28. *See supra* note 1 and accompanying text.

29. *See supra* note 2 and accompanying text.

30. *See* 61 N.J. at 303, 294 A.2d at 54. *See also id.* at 305, 294 A.2d at 56-57 (dissenting opinion).

in *Hoboken Land Improvement Co. v. Hoboken.*[31] That case involved the question of whether the statute incorporating defendant land company, which granted defendant some foreshore, extinguished a pre-existing dedicated public water access easement.[32] The incorporating act's foreshore grant, when read most favorably to the public interest, was legally consistent with a public water access easement. Hence, the easement would extend over the defendant's foreshore when filled.[33] Public tidalwater access could not have been cut off by the granting act unless the statute had expressed such intent in "clear and unequivocal language."[34] The public tidalwater access route was an implied extension of a dedicated street abutting defendant's foreshore.

Faced with a similar problem in the 1910 case of *Jersey City v. Hall,*[35] the Court of Errors and Appeals seemed to say that no legislative or municipal act could cut off public access to tidalwaters.[36] The specific holding there, however, was that the tideland grants in question did not divest Jersey City of municipal jurisdiction to regulate access and use of the affected tidalwater basin. *Hall* does not, apparently, preclude limited allocations of foreshore to exclusive private use. Rather, *Hall* insinuates that the public trust doctrine prohibits substantial interference with public access to tidalwaters or obstruction of established entrances (like those naturally connecting with dedicated roads or streets).[37] *Neptune City* seems to agree.[38]

Absolute power to cut off citizen foreshore access by realty grant, or to plan roads not to connect with foreshore, then, cannot, consistently with this public trust doctrine, vest in any branch or arm of the government of New Jersey. One may, accordingly, expect that tres-

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31. 36 N.J.L. 540 (E. & A. 1873). *Cf.* Jersey City v. Hall, 79 N.J.L. 559, 76 A. 1058 (E. & A. 1910).

32. *See* Note, 25 Rutgers L. Rev. at 663-65.

33. *Id.*, nn. 579-80 and accompanying text.

34. 36 N.J.L. at 552. This was because the foreshore fee grant was an act of legislature as proprietor conveying "proprietary title," while legal title to the public easement inhered in the legislature as sovereign; a grant of proprietary title "will never operate as a release or extinguishment of a sovereign right not necessarily included within the scope of the grant." *Id.* at 551.

35. 79 N.J.L. 559, 76 A. 1058 (E. & A. 1910).

36. *Id.* at 564, 76 A. at 1062. *See* Note, 25 Rutgers L. Rev. 669-72.

37. *Compare* Note, 25 Rutgers L. Rev. 630-43, and 665 n. 593, *citing, e.g.,* Louisville & N.R.R. v. Cincinnati, 76 Ohio St. 481, 81 N.E. 983 (1970). *See* Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892); Note, 26 Rutgers L. Rev. at 187 nn. 49-50 and accompanying text.

38. *See* 61 N.J. at 304, 294 A.2d at 55, *citing* State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969), quoting Arnold v. Mundy, and indicating that the incidence and contours of the public trust depend on current citizenry demand. *See also id.* at 305-06, 294 A.2d at 56-57 (dissenting opinion); Note, 26 Rutgers L. Rev. at 186-88.

pass actions will not lie against New Jersey citizens who, without injuring improvements, traverse upland beach abutting a public road or street to reach foreshore. Condemnation of upland improvements obstructing foreshore access from public roads should be available to municipalities and county governments.[39] Citizen suits to enjoin construction or compel removal of such obstructions to tidalwater access extensions of public roads and streets are far from inconceivable.[40]

B. Water Recreation and the Fishery: Water Impurity and Other Impediments

1. Vis-A-Vis Citizen Interests Generally

Classically, the public trust doctrine gave the citizenry a navigation easement, a fishery and attendant foreshore rights like mooring.[41] *Neptune City* recognizes that "[t]he public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."[42] Under *Neptune City*, the public trust comprehends recreational rights like "[sea] bathing, swimming and other shore activities."[43]

The doctrine also protects New Jersey citizens against economic and probably other nonphysical, as well as physical, impairments of their tidalwater resource interests.[44] It is likely that pollution degradation of aesthetic or recreational tidalwater boating and bathing

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39. *See* Note, 26 Rutgers L. Rev. 187-88 n. 54. *Cf.* 72 C.J.S. *Private Roads* § § *1-6;* Note, 19 Ore. L. Rev. 171 n. 1 (1940). *See also* Allen v. Stevens, 29 N.J.L. 509 (E. & A. 1861).

40. *Compare* State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969) (private fence obstructing ocean beach access), *cited in, Neptune City,* 61 N.J. at 304, 294 A.2d at 55. *Cf., e.g.,* suits to establish ways by necessity as discussed in Oregon Mesabi Corp. v. D. Johnson Lumber Corp., 166 F.2d 997 (9th Cir. 1947), Marinclin v. Uling, 262 F. Supp. 733 (W.D. Pa. 1967), and Flora Logging Co. v. Boeing, 43 F.2d 145 (D. Ore. 1930). In areas where no public roads run perpendicular to wetbeach, public necessity should support fixing a public way across private drybeach at points most compatable with both public and private interests. The necessity of the public access route implies the drybeach owner has been permitted invalidly to impair the public trust. Thus, again, condemnation of the easement should be required; the public necessity would have been the result of a severance of an estate, and the accommodation of public and private interests would minimize losses to the drybeach proprietor, who should be compensated for improvements losses he could not have foreseen. *Cf., e.g.,* Finn v. Williams, 376 Ill. 95, 33 N.E.2d 226 (1941). Note that prescription will not lie against the public trust. *See infra* note 56.

41. *See* Note, 25 Rutgers L. Rev. 576-649.

42. 61 N.J. at 303-04, 294 A.2d at 54-55, *citing, e.g.,* Note, 25 Rutgers L. Rev. at 608 n. 226, 690, 701.

43. *Id. But compare* Blundell v. Caterall, 5 B.&Ald. 368, 106 Eng. Rep. 1190 (K.B. 1821), discussed in Note, 25 Rutgers L. Rev. 599-613.

44. *Accord,* Note, 26 Rutgers L. Rev. at 183.

interests, pollution injury to the common piscary, and pollution endangerment to tidalwater bathers are actionable under *Neptune City*.[45] Accordingly, municipal and industrial tidalwater polluters may not retain this doctrinal shelter from injunction which they have enjoyed for over seventy years.[46] Wharf-out, tideland and foreshore fill and dock improvement developments that have been taken for granted since 1850 (when *Gough v. Bell*[47] held owners of upland adjacent to tidalwaters had a license to fill and wharf-out onto foreshore and tidelands which became irrevocable when exercised)[48] may now be susceptible to citizen public trust doctrine actions against interference with common boating and fishing rights.[49]

In any case, administrative or legislative determinations respecting the propriety of a concentrated tidalwater resource use, like a wharf or a sewage usufruct, will probably be accorded some respect: *Neptune City* sanctioned reasonable, nondiscriminatory beach use fees. But legislative and administrative tidalwater resource allocations will no longer be effectively conclusive: *Neptune City* questioned whether many such allocations were valid or absolute and overturned an access toll ordinance on public trust doctrine grounds, albeit the enabling act could have been construed[50] as prohibiting the ordinance.[51] Judicial intervention in great-water resource allocation fields occupied by legislative or administrative action is likely to remain cautious, however.[52] Courts lack technical expertise, and a particular challenged legislative or administrative scheme may not appear sufficiently unreasonable to justify intervention by a court with a crowded docket.[53] But in the areas of noncitizen and extraterritorial use, immediate judicial consideration may be appropriate.

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45. *See* 61 N.J. at 304, 294 A.2d at 55, *citing, inter alia,* Note, 25 Rutgers L. Rev. at 690, 701, which argues for a citizen's antipollution right incident to the common piscary.

46. *Compare* Attorney General *ex rel.* Simmons v. Paterson, 58 N.J. Eq. 1, 42 A. 995 (Ch. 1899), *rev'd,* 60 N.J. Eq. 385, 45 A. 995 (E. & A. 1900); Note, 25 Rutgers L. Rev. 683-89. *See also* Bouquet v. Hackensack Water Co., 90 N.J.L. 203, 101 A. 379 (E. & A. 1917).

47. 21 N.J.L. 156 (Sup. Ct. 1847), *after new trial,* 22 N.J.L. 441 (Sup. Ct. 1850), *aff'd,* 23 N.J.L. 624 (E. & A. 1852).

48. *See* Note, 25 Rutgers L. Rev. 657-63.

49. *See id.* at 573, 690, 701.

50. *See also* Note, 26 Rutgers L. Rev. 184-85.

51. *Compare* Bailey v. Driscoll, 19 N.J. 363, 117 A.2d 265 (1955), *rev'g in part, aff'g in part,* 34 N.J. Super. 228, 112 A.2d 3 (App. Div.) (administrative tidelands grant to be redrafted in light of narrow reading of authorizing act). *See generally,* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 Mich. L. Rev. 471 (1970).

52. *See* N.J. Sports and Exposition Authority v. McCrane, 61 N.J. 1, 292 A.2d 545 (1972).

53. *See supra* note 27 and *infra* notes 113-35 and surrounding text.

2. Extraterritorial or Noncitizen Appropriation

Arnold v. Mundy[54] held that tidalwater resource interests (there an oystery) were the property of the people of New Jersey. *Neptune City* seems to accord, and even pre-*Neptune City* cases that gave the legislature absolute regulatory power respecting such resources view those interests as property of the state as sovereign.[55] Accordingly, tidalwater resource interests are the property, not mere privileges, of New Jersey's citizenry. It follows, respecting any such property vested exclusively in New Jersey citizens, that even government-authorized noncitizen or extraterritorial use or enjoyment may be disallowed by the public trust doctrine, which, under *Arnold v. Mundy,* prohibits private claims and government alienations impairing the tidalwater interests of any New Jersey citizen.[56]

These observations, however, raise two questions: (1) What precisely is the subject of the public trust? (2) Which elements may inhere exclusively in New Jersey citizens?

Arnold v. Mundy and *Neptune City* admit that the public trust doctrine allows alienation of possessory interests and some usufructs in tidalwater resources. For example, sale of a fee in some foreshore to a shipping company could further a purpose of the trust, development of water commerce.[57] Moreover, a sale of some foreshore or a leasing of an exclusive fishery might not violate the public trust, even if it affords the citizenry no immediate benefit, provided the grant is either defeasible upon assertion of superior citizen claim or not inconsistent with current common use.[58] Public trust rights are not static possessory claims. They are protean usufructuary interests

54. 6 N.J.L. 1 (Sup. Ct. 1821).

55. *E.g.,* Stevens v. Paterson & Newark R.R., 34 N.J.L. 532 (E. & A. 1870); Ross v. Mayor of Edgewater, 115 N.J.L. 477, 180 A. 866 (Sup. Ct. 1935), *aff'd,* 116 N.J.L. 447, 184 A. 810 (E. & A. 1936), *cert. denied,* 299 U.S. 543 (1936); *see* Note, 25 Rutgers L. Rev. 657-76. McCarter v. Hudson County Water Co., 70 N.J. Eq. 525, 61 A. 710 (Ch. 1905), *aff'd,* 70 N.J. Eq. 695, 65 A. 489 (E. & A. 1906), *aff'd,* 209 U.S. 349 (1908), held, *inter alia,* that the state, being lowest riparian and water bed owner along New Jersey streams, could claim a paramount right to natural flow against diversions by upper riparians, bed owners, and strangers.

56. Estoppel, laches, prescription, and adverse possession appear irrelevant because *Arnold v. Mundy* held such property inalienable and immutable. *Cf., e.g.,* Arnold v. Mundy, 6 N.J.L. 1, 81 (Sup. Ct. 1821); Gough v. Bell, 22 N.J.L. 441 at 461 (Sup. Ct. 1850); Cross v. Morristown, 18 N.J. Eq. 305 (Ch. 1867), *approved in* Jersey City v. Hall, 79 N.J.L. 559 at 573-74, 76 A. 1058 at 1063 (E. & A. 1910). *Accord,* O'Neill v. State Hwy. Dept., 50 N.J. 307, 235 A.2d 1 (1967). *See also* Note, 25 Rutgers L. Rev. at 661 n. 567.

57. *See* Arnold v. Mundy, 6 N.J.L. 1, 78; Illinois Central R.R. v. Illinois, 146 U.S. at 452. Similarly, some private trustees may sell portions of the corpus to supply increased benefits intended by or consistent with the instrument of trust. *See also* Cunningham & Tischler, *Dedication of Land in New Jersey,* 15 Rutgers L. Rev. 377 (1961) respecting the somewhat different law on reallocation of land dedicated and devoted to public uses.

58. *See* 61 N.J. at 303, 294 A.2d at 54-55.

respecting tidalwater flow, purity and access, tidelands and foreshore use and tidalwater fishery maintenance and consumption.[59]

Some of these interests are peculiar to the citizens of New Jersey, others shared by federal citizens. Fast fisheries, oysteries, clam fisheries and the like, may be entirely the property of New Jersians, because the *res* is not naturally in interstate commerce.[60] Foreshore and tidelands are similar, but the fee and the usufructs in these res are limited by the federal navigation servitude.[61] Interests like the right of natural flow[62] are also tributaries to the navigation servitude. The commerce clause may not prevent New Jersey from hoarding its streamwater against private noncitizen or sister state extraterritorial diversion.[63] But flow changes incident to navigation servitude exercises may not be (compensible) takings of public trust property.[64] Finally, the floating or free fishery, at least in coastal and interstate tidalwaters, is either the property of federal citizens or a privilege of New Jersey citizens equally shared by sister state residents (under article IV, section 2[65] or the commerce clause[66] of the Federal Constitution).

Fast inland tidalwater fisheries, inland tidalwater floating fisheries and intrastate tidal stream flow are protected by statute in New Jersey.[67] But at least two statutes permit diversion of fast and floating tidalwater fishery resources and tidal streamwaters by noncitizens or to other states.[68] These statutes pose two problems: (A) Does the federal Constitution require New Jersey to share this wealth with other states and their citizens? (B) If not, do these statutes benefit New Jersey's citizenry sufficiently to justify their otherwise misallocative abuse of the public trust?

Professor Charles Corker has suggested[69] the commerce clause may have contraindicated the decision in *McCarter v. Hudson County Water Company,*[70] that New Jersey had power to "insist

59. *See id.*

60. *Compare* Toomer v. Witsell, 334 U.S. 385 (1948) (shrimp fishery in coastal waters) *with* McCready v. Virginia, 94 U.S. 391 (1876) (fast fishery in inland waters).

61. *See, e.g.,* 2 Waters and Water Rights § § 100-105 (Clark ed. 1967).

62. *See generally* Hanks, *The Law of Water in New Jersey,* 22 Rutgers L. Rev. 621 (1968).

63. McCarter v. Hudson County Water Co., 70 N.J. Eq. 525, 61 A. 710 (Ch. 1905), *aff'd,* 70 N.J. Eq. 695, 65 A. 489 (E. & A. 1906), *aff'd,* 209 U.S. 349 (1908).

64. *See* 2 Waters and Water Rights § § 101.3-101.4, *especially* § 101.4.

65. *See* Toomer v. Witsell, 334 U.S. 385 (1948).

66. *Id.; cf.* 2 Waters and Water Rights § § 131.6-132 (Clark ed. 1967).

67. *See generally* title 23 N.J. Stat. Ann. (1940 and Supp. 1972-73); N.J. Stat. Ann. § 58:2-1 through § 58:3-1 (1966).

68. N.J. Stat. Ann. § 23:3-4 (Supp. 1972-73) and N.J. Stat. Ann. § 58:3-1 (1966).

69. Waters and Water Rights § 132 (Clark ed. 1967).

70. 209 U.S. 349 (1908), *aff'g on other grounds,* 70 N.J. Eq. 695, 65 A. 489 (E. & A. 1906), *aff'g on yet different grounds,* 70 N.J. Eq. 525, 61 A. 710 (Ch. 1905).

that its natural advantages," including its streamwaters, remain within its borders for use by its citizens.[71] In *McCarter*, the problem was, *inter alia*, the constitutionality of a statute limiting extraterritorial pipe or ditch diversion of streamwaters.[72] Professor Corker questions whether *Arizona v. California*,[73] which held that Congress could apportion Colorado River waters among the states interested in the river by a legislative plan conflicting with the laws of those states, disallows state rules that repel noncitizen users or preclude extraterritorial diversion.[74]

But the Colorado River naturally supplied each party state. Moreover, Congress' plan merely provided a more efficient mechanism for allocating Colorado River water use than the disparate system the states had employed.

Many New Jersey streams and surface water systems, the Mullica, Great Egg Harbor, Rathway, and Manasquan, for example, however, flow solely through New Jersey. The states adjacent to New Jersey are not naturally benefited by such waters. Therefore, they cannot claim use rights like those inhering in the Colorado River system states, rights necessary to Congress' Colorado River plan. The Mullica River is "interstate" in that it connects with the Atlantic Ocean. But, since that river does not flow through any other state, no other state can claim consumptive interests in it under any riparian or prior-appropriation theory.[75]

Professor Corker also suggests that if *McCarter* or New Jersey legislation precludes exporting bottled water from New Jersey, it has been overruled by *City of Altus v. Carr*.[76] *Altus* held, *inter alia*, that Texas' legislature could not prohibit production of private groundwater for interstate commerce, when Texas law otherwise allowed private groundwater to be bottled and sold.

But, under New Jersey law[77] legal title to land under tidalwaters, including tidelands and foreshore, vests in the state as trustee for its citizens.[78] Ownership of land under water carries title to all state-law

71. 209 U.S. at 357 (per Justice Holmes for the Court).

72. *See* N.J. Stat. Ann. § 58:3-1 (1966).

73. 373 U.S. 546 (1963).

74. 2 Waters and Water Rights 323-24 (Clark ed. 1967).

75. To the extent, however, sister states or the nation may be interested in flowage into the ocean (or more realistically the quality of Mullica waters emptying into the Atlantic), other states or the federal government may have standing to contest New Jersey regulations bearing on Mullica River use.

76. 385 U.S. 35 (1966), *aff'g per curiam*, 255 F. Supp. 828 (W.D. Tex. 1966) (three-judge court).

77. As Professor Corker knows, *see* 2 Waters and Water Rights § 131.6 at 319 (Clark ed. 1967).

78. Arnold v. Mundy, 6 N.J.L. 1 (Sup. Ct. 1821); *see, e.g.*, Stevens v. Paterson & Newark R.R., 34 N.J.L. 532 (E. & A. 1870); Schultz v. Wilson, 44 N.J. Super. 591, 131 A.2d 415 (App. Div.), *cert. denied*, 24 N.J. 546, 133 A.2d 395 (1957).

interests in the waters above.[79] In the riparian system, as developed in New Jersey, lower riparians or bed owners are protected against unreasonable consumptive diversions by upstream bed or *ripa* owners. Nonriparian diversion or commercial exportation is per se unreasonable,[80] and the lower owner (the state is the lowest in New Jersey) may absolutely prohibit diversions from above his stream bed or from beside his ripa (depending upon whether ripa ownership in fact carries streambed title).[81]

Since the groundwater in *Altus* was the property of a private person not limited by a Texas common law diversion limitation like New Jersey's, the Texas statute precluding exportation could unduly burden interstate commerce.[82] *McCarter* is, therefore, distinguishable from *Altus.*[83] The commerce clause does not require goods or land profits to be shipped in interstate commerce. That is what the Supreme Court meant when it held in *McCarter* that New Jersey "may prefer its own inhabitants in the enjoyment of *its products,* even when the effect of its law is to keep *property* within its boundaries. . . ."[84] The product New Jersey would keep within its boundaries is the *property* of the state and all its individual citizens. The groundwater owner in *Altus* could likewise have refused to sell his water to the exporter there.

Of course, *McCarter* does *not* permit New Jersey to prevent noncitizen or for-exportation diversions from interstate waters running through or adjacent to its territory *where the point of diversion is in another state* or where (as with the Delaware) the river is a boundary. Also, Congress may sanction changes in the level of New Jersey streams partaking of interstate water systems *for the purpose of improving navigability.*[85] New Jersey and her citizenry have the property otherwise to prevent nonriparian diversion and commercial exportation of tidalwaters contained naturally within the state. Before the promulgation of the Constitution, the government of

79. *E.g.,* Paterson v. E. Jersey Water Co., 74 N.J. Eq. 49 at 55-57, 70 A. 472 at 478-80 (Ch. 1908), *aff'd,* 77 N.J. Eq. 588, 78 A. 1134 (E. & A. 1910); *see* McCarter v. Hudson County Water Co., 70 N.J. Eq. 695, 65 A. 489, *aff'g,* 70 N.J. Eq. 525, 61 A. 710; Sayre v. Newark, 60 N.J. Eq. 361, 45 A. 985 (E. & A. 1900).

80. *See* Hanks, *The Law of Water in New Jersey,* 25 Rutgers L. Rev. 621, 649-67 (1968).

81. *See* Paterson v. E. Jersey Water Co., 74 N.J. Eq. 49 at 56-57, 70 A. 472 at 479-80 (Ch. 1908), *aff'd,* 77 N.J. Eq. 588, 78 A. 1134 (E. & A. 1910).

82. *Compare* Arnold v. Mundy, 6 N.J.L. 1 (Sup. Ct. 1821) (legal and equitable title vested in citizenry of New Jersey by the Revolution) *with* Martin v. Waddell 41 U.S. (16 Pet.) 367 (1842), Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845); Barney v. Keokuk, 94 U.S. 324 (1876) (states determine greatwater resource allocation).

83. *Compare* Toomer v. Witsell, 334 U.S. 385 (1948) *with* McCready v. Virginia, 94 U.S. 391 (1876).

84. 209 U.S. at 357 (emphasis added).

85. *E.g.,* United States v. Willow River Power Co. 324 U.S. 499 (1945). *See* 2 Waters and Water Rights § § 100.1-101.5 (Clark ed. 1967).

sovereign New Jersey held title to the state's tidalwater interests for the benefit of its citizenry, present and future. The state could not have transferred this trust to the federal government for the national benefit, as it had surrendered many of its sovereign powers in assenting to the Constitution. The tidalwater resource interests recognized in *Arnold v. Mundy* were and remain inalienable. These premises are not limited to the field of water diversion.

As was suggested above, the fast fishery in intrastate New Jersey tidalwaters is wholly the property of the state's citizenry.[86] But the floating fishery in inland tidwalwaters may be the interest of all federal citizens and susceptible of Congressional regulation.

As between the state, or its citizens *qua* citizens, and freshwater riparians, the fishery in tidal streambeds should be treated like that in fresh streamwaters. Freshwater riparians should not be entitled to take fish from waters flowing past their banks in such quantities as would deprive the lower owners, New Jersey and the rest of her citizens, of their natural, reasonable fishery enjoyment.[87]

Some tidal stream floating fisheries, however, may supply interstate or coastal piscaries. To the extent of such connection, the rule of *Toomer v. Witsell*[88] probably applies. In *Toomer,* the coastal shrimp fishery was held to be a federal interest protected against state taxation favoring the citizens of the taxing jurisdiction.

As profits a prendre, however, tidalwater floating fishery resources unconnected with interstate or coastal waters should be property of the state citizenry, free of federal claims. Moreover, the commerce clause ought never apply where a floating fishery cannot legitimately be treated as a usufruct like the flowing water, rather than as a profit of the streambed soil.

Since her intrastate tidal stream flowage and tidalwater fast fisheries are exclusively New Jersey's interests, the public trust doctrine of *Arnold v. Mundy* and *Neptune City* precludes their allocation to noncitizen use, unless her citizenry will thereby benefit more than by retention of their enjoyment. Because once consumed free fish are unredeemable, prudence indicates treating the free fishery as state citizenry property, and leaving to a federal court challenge by foreign citizenry the question of the validity of legislation prohibiting noncitizen appropriation.[89]

86. *Compare* McCready v. Virginia, 94 U.S. 391 (1876) *with* Arnold v. Mundy, 6 N.J.L. 1 (Sup. Ct. 1821).

87. *See* Note, 25 Rutgers L. Rev. 582-87. *Compare* Hanks, The Law of Water in New Jersey, 22 Rutgers L. Rev. 621, 649-99 (1968). *Cf.* Cobb v. Davenport, 32 N.J.L. 369 (Sup. Ct. 1867).

88. 334 U.S. 385 (1948).

89. *Cf.* Missouri v. Holland, 252 U.S. 416 (1920) (migratory birds).

New Jersey legislation prohibits extraterritorial streamwater diversion except by consent of the Water Policy and Supply Council.[90] If consent is granted, diversion is permitted up to 100 gallons daily per person for each municipality supplied with fees charged for diversions exceeding that rate,[91] unless the Council finds such schedule impracticable.[92]

This scheme is problematic. It sets a flat rate and equates money compensation with flowage conservation. This does not directly serve the public trust, but threatens it. The excess diversion fees could mediately benefit citizenry tidalwater resource interests, as by helping to pay water purification costs. But current legislation does not contemplate such a use of the fees. The 100 gallon limit could be damaging in dry periods. Moreover, the fees may not inhibit water-necessitous foreign communities whose dry-period demands would likely be paralleled by affected New Jersey communities. Problems, as the effects of such diversions on the tidalwater fishery, are not considered by the legislative scheme, and all of these problems are left to the virtually uncheckable quasi-legislative discretion of the Council.[93] Consequently, New Jersey's water use permit system raises some substantial public trust doctrine questions.

Legislation[94] allowing noncitizen appropriation of tidalwater fishery resources, however, may afford New Jersey's citizenry benefits that tend to offset resource losses. Sport fishing, like other seashore recreation, is a considerable revenue source in New Jersey.[95] Seasonal noncitizen angling as presently regulated[96] threatens neither to extinguish the tidalwater fishery nor to dampen citizen-angler shore use. Foreign fish-harvesting firms may employ New Jersians, and their operations may supply some of the state's food demand. Since the fishery, unlike other tidalwater resources, is valuable principally as a consumer or commercial resource, money-licensed nonresident appropriations and citizen uses may accomplish the same allocations.

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90. N.J. Stat. Ann. § 58:3-1 (1966).
91. N.J. Stat. Ann. § § 58:3-1(b), 58:2-1 (1966).
92. N.J. Stat. Ann. § 58:3-1(b)(1966).
93. Whether foreign communities will succeed in making damaging dry-period diversions may depend solely on the foresight, diligence, or procedures of the Council. *Compare infra* notes 114-32 and accompanying text. Moreover, the council, not having been charged to consider the tidalwater fishery in consenting to or allowing continuance of a foreign diversion, may not do so. The effects on the fishery may seldom be significant. But they are legitimate property concerns of New Jersey's citizenry.
94. N.J. Stat. Ann. § 23:3-4 (Supp. 1973).
95. The following analysis applies in many respects to nonresident wetbeach use.
96. See N.J. Stat. Ann. § § 23:3-1, 23:3-4, 23:3-11, 23:3-57, 23:5-1 through 23:5-17 (Supp. 1973).

Thus, noncitizen appropriation of tidalwater fishery resources requires policing not prohibition, and this has been provided for. It appears that *Neptune City* and *Arnold v. Mundy* would support a citizen suit to enjoin *exclusive* commercial appropriations of tidalwater fishery resources by noncitizens or foreign firms; but the point is presently academic, since the legislature has outlawed nonresident net fishing.[97]

USE REGULATION, MAINTENANCE COSTS, AND CITIZEN SUITS

The primary impact of *Neptune City,* opening New Jersey's entire wetbeach resource to equal use by all New Jersians, threatens as well as benefits common foreshore interests. Previous to *Neptune City* some New Jersians might have been deprived of seashore recreation in desirable areas because access was burdened by high tolls or exclusive private use of the wetbeach. Now many New Jersey citizens may be denied recreational use of some of the state's seashore because overuse may destroy or substantially degrade the res or its enjoyment potential.

Some of *Neptune City's* mediate ramifications seem similarly problematic. Uncertainty respecting the existence of public equitable interests in dry-beach estates[98] and treacherous difficulties in the administration of citizen suits,[99] for example, are not unlikely side-effects of *Neptune City.*

A. Citizen Use Regulation and Resource Maintenance Costs

The *Neptune City* court "fully appreciate[d] the burdens, financial and otherwise, resting upon . . . oceanfront municipalities by reason of the attraction of the sea and their beaches . . . to large numbers of people not permanently resident in the community."[100] The entire court agreed that municipalities, under existing enabling legislation, may impose reasonable, nondiscriminatory beach-use fees, and "in arriving at such fees, consider all additional costs legitimately attributable to the operation and maintenance of the beachfront, including direct beach operational expenses, additional personnel and services required in the *entire* community, *debt service of outstanding obligations* incurred for *beach improvement and preservation,* and a *reasonable annual reserve* designed *to meet expected future capital expenses* therefor."[101] The majority also suggested

97. N.J. Stat. Ann. § 23:5-24.7 (Supp. 1973).
98. *See* 61 N.J. at 305-06, 294 A.2d at 56-57 (dissenting opinion).
99. *See* Note, 25 Rutgers L. Rev. 703-05.
100. 61 N.J. at 304, 294 A.2d at 55.
101. 61 N.J. at 305, 294 A.2d at 56 (emphasis added).

that oceanfront municipalities "may . . . *regulate and limit, on a first come, first served basis,* the *number of persons allowed on the beach* at any one time *in the interest of safety.*"[102]

"Additional" costs presumably means expenses related to nonresident summer influx and beach use. But under the court's antidiscrimination public trust doctrine ruling, an oceanfront municipality's expenses attributable to nonresident use and user servicing may not be shifted to nonresident users in the form of disproportionate user fees. Hence, in order not to expose its residents to tax costs unrelated to their enjoyment or explainable only by nonresident use and service enjoyment, oceanfront municipalities may create nondiscriminatory beach access fee schedules reflecting the entire cost of beach use and maintenance and other burdens cited in *Neptune City.* Such fee scheduling would charge beach-use-related costs to beach users only, seemingly a most equitable solution. But the per capita incidence would probably often be exorbitant, and even prohibitive to many of the same nonresidents the *Neptune City* court sought to protect. Low income nonresidents may not be able to afford the fees as well as transportation expenses, itinerant lodging, and other away-from-home maintenance costs. This effect could be heightened by such ordinarily innocent, trivial restrictions, as municipal regulations respecting offbeach dress. Should such fee schedules be disallowed as effectively discriminatory contra the public trust doctrine, oceanfront community residents could suffer the unequal money burdens suggested above. The lopsided tax effect of such a rule might be offset somewhat by the commercial benefits oceanfront communities specially derive from nonresident tourism. Local regulation poses organizational problems also.

In an article discussing some organizational problems Wisconsin suffered under localized boating regulations,[103] Richard Cutler, a member of Wisconsin's Southern Regional Planning Commission, illustrated how the various self-serving boating regulations of many Wisconsin communities had, *inter alia,* prevented intercommunity boating.[104] Cutler's well-argued suggestion was exclusive state-level control.

Municipal regulation of ocean beach use creates similar organizational problems. For example, local first-come-first-served entry regulation allows local residents an access advantage incident to their

102. *Id.* (emphasis added).

103. Cutler, *Chaos or Uniformity in Boating Regulations? The State as Trustee of Navigable Waters,* 1965 Wis. L. Rev. 311 (1965) [hereinafter cited as Cutler].

104. *See* Cutler, 314-20. Many Wisconsin lakes as well as navigable streams border on several municipalities.

choice of home situs. Local beach use regulation and maintenance, however, involves resource allocation problems touching conservation interests too.

Sea bathers, fishers, boaters, anglers, and oceanbeach sunbathers tend to congregate in municipal jurisdictions organized to service them. Such communities have neither the desire nor the power to rationalize *res* use distribution by spreading the incidence evenly over the New Jersey coast. Indeed, *Neptune City's* ruling, that local communities may regulate the number of persons allowed on beaches "in the interest of safety," sanctions such misallocation. If the use limit in a given municipality is determined solely by safety requirements, many more individuals than indicated by state-wide conservation and recreation use diffusion interests may continue to congregate in a few "resort" areas. The result of continued local control qualified by *Neptune City* could well be continued allocation inefficiency vis-a-vis both individual use maximization and resource conservation, as well as further disutility in public recreation oriented tidelands resource development.

Neptune City indicates residential communities up-and-down-beach of, say, Atlantic City will see many newcomers to adjacent tidelands. But the *res* may not be prepared, even if nearby communities adjust to the nonexclusivity imposed by *Neptune City*. Any comparatively isolated New Jersey wetbeach may not see any or additional recreational use, either because most nonlocal citizens are more attracted to built-up and "resort" areas or because the *res* has been rendered unfit for diffuse recreational use.

Some beach use problems (conflicts between sea-bathing and surf-angling, for example) may be susceptible of rational local solution. But, local communities will rarely have legitimate paramount seashore interests, and local controls will always threaten extramunicipal organizational problems. As Cutler suggested,[105] the type of administrative scheme Michigan devised to regulate boating is the best for all similar water resource related public recreation fields. The Michigan Boating Act of 1962[106] provides for state-wide rules, but allows municipal participation[107] in rulemaking.[108] State control may, however, involve some pitfalls.

If only state funds pay the costs involved, local residents and communities could reap small windfalls in employment (local resi-

105. Cutler, 320-21.

106. Mich. Stat. Ann. § 18.1286(1) through § 18.1286(32) (1963).

107. Via petition to the State Boating Committee, *see* Mich. Stat. Ann. § 18.1286(1a) (1963).

108. *See* Cutler, at 320.

dents likely would dominate beach service employment), commerce, and superior local citizen use privileges, financed partly by nonresident or nonuser taxes. But some safeguards may be available.

A state agency with branches could issue limited-period licenses, while charging, or authorizing municipalities to charge, on-location access and use tolls scheduled by the state agency. Under this system, local residents and nonresident citizens would be on an equal footing vis-a-vis access. Licenses available to all citizens on a first come first served basis could authorize use of a certain seashore area without regard to the applicant's place of residence or could guarantee nonresident citizens access-for-a-fee in a given locality during a specified time-period. The allocation could be by beach sector, not municipal jurisdiction, to assure that no particular beach area would be relatively overused. Access and use rates could be scheduled to fit low-income citizen pocketbooks, and development and maintenance costs slack would be taken up by state tax revenues. Accordingly, the skewing of seashore recreation cost tax burdens among citizens should be minimized, while access and use rates would not be prohibitive for low-income inland citizens.

Local community employment and commerce advantages inhering in a state-level system are largely incidental to the location choices of citizens generally. Thus, perhaps they are not properly treated as system problems.

Commerce and employment advantages are also local expense factors. The *Neptune City* court recognized the legitimacy of an ocean-front community's consideration of such costs in its entrance fee rate-setting.[109] Cost "misallocation" in this area, though probably fluctuating from year to year, would be slight. Further it would be diffused more by state government administration than by a local system under which a few local communities or taxpayers would bear the costs of benefits potentially accruing to many nonresidents or non-taxpayers.

One systems conversion matter also deserves mention. The state should assume those current debts seashore communities have incurred in financing beach preservation and bathing facilities improvement[110] that promise future benefits. The state should appropriate to a central agency directed to supply seashore resource conservation and recreation user service any reserves local governments have established for expenses[111] related to similar utilities.[112]

109. *See supra* note 101 and accompanying text. Public seashore areas should be treated like state parks.

110. *See supra* note 101 and accompanying text.

111. *See supra* note 101 and accompanying text.

112. Compensation for state government confiscation of local property is not a question

B. Citizen Suits

If the public trust doctrine of *Neptune City* and *Arnold v. Mundy*[113] gives New Jersey citizens the benefit of a judicial remedy for misallocation of tidalwater resources, it also portends headaches for New Jersey's court system and for the state as an economic entity. Under the present court system, the economic, technological and biophysical questions inhering in most important tidalwater resource allocation problems often would be beyond the fact-finding competence of trial judges.[114] Moreover, state economic and resource development programs as well as private entrepreneurial operations affecting tidalwater resources would share a new risk, the possibility of abortion by citizen suit.[115]

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here. *See* Note, 67 Colum. L. Rev. 1083 at 1088-91, 1106-20 (1967). Space limitations contraindicate further development of this theme or schemes respecting other problems in this field, like surf-angling regulation. *See,* however, *e.g.,* Comment, 1959 Wis. L. Rev. 117 (1959). *See also, e.g.,* White v. Hughes, 190 So. 446 (Fla. 1939). It should be noted here, however, that New Jersey's present water diversion permit system, *see supra* notes 69-85, 90-93 and surrounding text, invites reconsideration vis-a-vis preferences among citizens as well as respecting extraterritorial and noncitizen diversions. Certain of present fishery use regulations affecting inland intrastate tidalwaters, like N.J. Stat. Ann. § § 23:5-24.2 and 23:9-76.1 (Supp. 1973) should also be noted here. These statutes appear to allow commercial net-fishing in tidalwaters subject to the public trust interests of New Jersey's citizenry. Some permit net-fishing only during a few months of each year and impose substantial fines for some violations. If the proceeds of conviction are put toward restocking, *compare* N.J. Stat. Ann. § 23:10-19 with § 23:3-11 (Supp. 1973), a public trust violation would be hard to argue. N.J. Stat. Ann. § 23:9-76.1 (Supp. 1973) seems to authorize stationary commercial fishing operations, though this inference is not necessary. Apparently the "fishery" operation contemplated is taxed, perhaps meaning licensed, and possibly the proceeds are applied toward restocking. N.J. Stat. Ann. § 23:5-24.2 (Supp. 1973) provides for paid net-fishing licenses, the proceeds to go partly toward restocking. Its fee schedule is, arguably, low, and the limitations it contemplates, net-type and (time and place) use restrictions rather than catch size limits, allow administrative error. But in principle the statute comports with the public trust doctrine.

113. 6 N.J.L. 1 (Sup. Ct. 1821).

114. The author has discussed this problem before. *See* Note, 25 Rutgers L. Rev. 694-95, 703-10, especially notes 875-81, which would have been drafted with great deference to Professor Coase had it been done at the time of this writing. The author has come to understand that Professor Coase's propositions do indicate proper, long-range solutions to all public trust impairment problems. The author has seen that where greatwater pollution substantially impairs the common interest the polluter's long-range cost contraindicates the pollution for reasons that are reflected in reasons why the social interest indicates cessation of the pollution. The author cannot devote space here to a detailed explanation. But he would appreciate the reader's noting an editing error in note 880 of the aforementioned article: line 26 reads "not injure the polluters . . ." but ought to read "not benefit the polluters. . . ."

115. State legislative programs, of course, would not often fall under citizen litigational attack, since the judiciary would justifiably shrink from invalidating under the public trust doctrine any but outrageous violations, like those in *Illinois Central R.R. v. Illinois,* 146 U.S. 387 (1892) and *Priewe v. Wisconsin State Land Imp. Co.,* 93 Wis. 534, 67 N.W. 918 (1886). *Compare* dissenting opinion of Justice Hall, New Jersey Sports Exposition Auth. v. McCrane, 61 N.J. 1, 292 A.2d 545 (1972) *and* Neptune City v. Avon-By-The-Sea, 61 N.J. 296, 294 A.2d 545 (1972) (per Hall, J.) *with In re* Environmental Hearings on Proposed Sports

New Jersey Assembly bill No. 569 (1972) contemplates citizen suits to protect the state's environment.[116] The bill provides that a

Complex in the Hackensack Meadowlands, 62 N.J. 248, 300 A.2d 337 (1973) (Hall, J. concurring in the result). Nevertheless, there is real potential for invalidation of administrative or legislative schemes like those tested in the *Sports Complex* cases above.

116. "... [A]ny person, partnership, corporation, association, organization or other legal entity may maintain an action in any court of competent jurisdiction where the alleged violation occurred or is likely to occur ... against the State, any political subdivision ... instrumentality or agency of the State or of a political subdivision ... any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the interest of the public therein from pollution, impairment or destruction of the environment or any part thereof...."

Revisionary note: Since the final draft of this article was written, two events have occurred relevant to this note and its accompanying text. First, Assembly #569 (1972) failed. Second, the New Jersey legislature has begun considering two new environmental rights bills, as well as a proposed resolution that would add to the state's constitution an environmental rights amendment.

The two new bills, Senate #873 (1974) and Assembly #1245 (1974), introduced as this article went to press, appear to narrow the field of litigational action that would have been available to New Jersey citizens, under #569. In defining the available remedies, both provide:

> In any action ... where the plaintiff has made a prima facie showing that ... the defendant has, or is likely to pollute ... the defendant may rebut ... by the submission of ... evidence of compliance ... in good faith with any pollution abatement schedule entered into by the defendant with the Department of Environmental Protection, the purpose of which is the alleviation of the damage ... complained of. The defendant may also show ... that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety, and welfare in light of the State's paramount concern for the protection of the environment....

This language allows aesthetic degradation. It may also allow some damage to wetlands and their fish spawning functions so long as existing, human health, safety, or welfare interests are not immediately injured or threatened with necessarily deleterious long-range consequences. Assembly #569 did not express such limitations, and did not imply the aesthetic one.

Otherwise the two new bills are substantially old hat respecting *substantive* concerns, except for one minor conflict between them. Senate #873 incorporates the rule de minimis, while Assembly #1245, which once contained it, was amended not to include it, suggesting that causes that might have been maintainable only at law for nominal damages may support injunctions. This is not irrational, where a pollution threat, though far away, is likely to grow. The two bills also contain some confusing language which could lead the unwary reader to believe citizen environmental protection suits would be available only to enforce statutes, ordinances, or administrative rules prohibiting environment-threatening action. But the bills really intend no such limitation and ought to be rewritten so as to make this clear.

The proposed constitutional amendment, Assembly Concurrent Resolution #107, reads:

> Each person has the right to live in a *healthful* environment, free from pollution and waste in all *forms*. Each person may enforce this right against any party through *appropriate* legal proceedings *subject to reasonable limitation and regulation as the Legislature may provide*.... [Emphasis added.]

This language seems riddled with holes. For example, the words "healthful" and "forms" in the first sentence allow that pollution is actionable only where it *substantially* threatens human health. This possible limitation compares with that of Senate #873. Similarly, "waste" may not be actionable unless *substantial*, because all *forms* and *not* all *degrees* make causes of action. This reading allows, for example, piecemeal destruction of New

court trying such a suit may defer to an appropriate state agency for findings of fact, retaining, however, jurisdiction over questions of fact and law.[117] But an appropriate agency may not always be available, and the restraint of the judiciary contraindicates meaningful review of agency fact-findings.

Consider, for example, the recent sports complex cases.[118] The question was the propriety of building a huge sports complex in tidalmarshlands which may be critical estuarine areas vis-a-vis ocean fish spawning. In his partial dissent in the first case, Justice Hall criticized the lower court for assuming that funnelling proceeds from the project into New Jersey's school fund[119] would satisfy the rele-

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Jersey's meadowlands, which have supplied much of the North Atlantic's ocean fisheries. Further, the word "appropriate" in the second sentence allows courts to continue: (a) to apply liberally the doctrine of sovereign immunity; (b) to refuse to question legislative action; and (c) to "balance the conveniences," in equitable actions, to the detriment of environment-protecting plaintiffs and either remit them to meaningless or absent legal remedies or dismiss with prejudice their actions. The language, "subject to reasonable limitation and regulation" by the legislature, seems to allow New Jersey's legislature to withdraw its actions or programs from liability by regulating-out or limiting-out remedies. It is logical that whoever or whatever has the power to limit or regulate liability is beyond the ambit of the substance or causes of action subject to such limits or regulation, as a set defines its members. The legislature *could* be limitable or regulable *only* for the reason that it acted unreasonably in regulating or limiting individual, government agency, or government subdivision liability. Further, that a nonreviewability provision in an environment-threatening legislative program may be "unreasonable," seems to imply merely that the specific program may have no rational foundation in social fact or public purpose. Both of these are due process matters, rarely arguable, and extrinsic to the field of substantive environmental rights. Indeed, the words "reasonable limitation" could even permit the legislature to preclude suits against selected forms of *private* conduct, given the elasticity of "reasonableness" and the principal meanings of "limit" or "limitation" (boundary, restriction, or circumscription). Such a limitation could relate to an otherwise proper legislative plan that incidentally requires immunity for certain private conduct or persons.

The new bills and constitutional amendment, then, would not make positive changes in the situation discussed in this article. If anything, they underscore the reform suggestions this article made before they were proposed.

117. "If administrative or other proceedings are required or available to determine the legality of the defendant's conduct, the court may remit the parties to such proceedings. . . ." ". . . In so remitting the court shall retain jurisdiction of the action pending completion thereof for the purpose of determining whether adequate protection from such pollution, impairment or destruction has been afforded.

. . . In such adjudication the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this act. . . ."

Two new bills, Senate #873 (1974) and Assembly #1245 (1974) displaced Assembly #569 (1970) as this article went into print. They are substantially identical to #569 respecting the provisions quoted in this footnote, however.

118. N.J. Sports & Exposition Authority v. McCrane, 61 N.J. 1, 292 A.2d 545 (1972); *In re* Environmental Hearings on Proposed Sports Complex in the Hackensack Meadowlands, 62 N.J. 348, 300 A.2d 337 (1973).

119. Consideration from grants of tideland interests is dedicated to the Fund for Support of Free Public Schools by N.J. Const. art. 8, § 4, ¶ 2 and N.J. Stat. Ann. § § 18A: 56-5, 6 (1968).

vant requirements of the public trust.[120] Justice Hall, who wrote the majority opinion in *Neptune City,* noted that, although each was a "public purpose," neither land sports recreation nor support of public schools supplies a goal contemplated by the public trust doctrine.[121] The public trust doctrine requires a common water interest-related public purpose which tends to diffuse and enhance, rather than concentrate and impair, the citizenry's beneficial enjoyment of tidalwater resources.[122] The majority of the *New Jersey Sports Exposition* court (the first sports complex case) remanded the cause to the New Jersey Sports and Exposition Authority for further consideration in formal consultation with the Department of Environmental Protection and the Meadowlands Commission respecting the ecological questions involved.[123]

In the second sports complex case,[124] decided after *Neptune City,* the supreme court determined that the Authority's findings on certain of the environmental questions were not arbitrary and should be sustained, Justice Hall concurring in the result. The Authority had considered and made substantial program adjustments respecting the impact of auto exhaust emissions on the area, the air, and the public health, and called for continuing state agency "participation, primarily in the areas of solid waste disposal and recycling, storm water disposal, sewage disposal, potable water supply, noise abatement and air quality monitoring and control. . . ."[125] The impact of the mere presence of the physical plant on estuarine fishery reproduction, however, was not mentioned, presumably because it was found to be negligible (not that the agency's continuing participation in this area, short of tearing down the structure and restoring

120. 61 N.J. at 36, 292 A.2d at 580, *criticizing* 119 N.J. Super. 457 at 492-95, 292 A.2d 580 at 615-18 (Sup. Ct. Law Div. 1971) (Pashman, A.J.S.C.).

121. *See id., and compare* the opinion of the court per Hall, J. in *Neptune City,* 61 N.J. at 301-04, 294 A.2d at 52-55. *See also* Note, 25 Rutgers L. Rev. 643-46, 696-710, *citing, inter alia,* Hixon v. Public Service Commission, 32 Wis.2d 608, 146 N.W.2d 577 (1966), *cited in Neptune City, id.* at 304, 294 A.2d at 55.

122. *Compare* Arnold v. Mundy, 6 N.J.L. 1 (Sup. Ct. 1821) *with* Hixon v. Public Service Commission, 32 Wis. 2d 608, 146 N.W.2d 577 (1966), *approved in* Neptune City v. Avon-By-The-Sea, 61 N.J. at 303-04, 294 A.2d at 54-55. This would follow from the premise of the public trust doctrine, that the legislature is a mere trustee of tidalwater resources, holding title for the common use and benefit of the people it represents: The trustees would be disabled to impair, substantially, the corpus (in quality or quantity) and its power would be limited by the purpose of the trust, efficient satisfaction of the citizenry's current usufructuary demands. *See also, infra* note 126; 61 N.J. at 302-04, 294 A.2d at 53-55.

123. These questions, much broader than those involving the public trust in tidalwater resources, included air pollution and general public health.

124. *In re* Environmental Hearings on Proposed Sports Complex in the Hackensack Meadowlands, 62 N.J. 248, 300 A.2d 337 (1973).

125. *Id.* at 252, 300 A.2d at 341.

the marshland's natural state, would have any effect in any event).[126]

Two aspects of this case history should be noted: (a) the court would not have vacated or supplanted the agency findings unless they had been arbitrary;[127] (b) the responsible agency was the Sports and Exposition Authority, whose main (perhaps exclusive) purpose[128] is construction of a sports exposition complex, not protection of estuarine life.

Deference to superior fact-finding resources in the technical fields involved, rather than to naked quasi-legislative prerogative, may explain the *Sports Complex* court's choice of standards. If so, its decision does not conflict theoretically with this article's analysis of *Neptune City*, that *Neptune City* implies the supreme court is willing to invalidate any legislative or administrative tidalwater resource allocation which substantially impairs[129] the citizenry's tidalwater resource interests, notwithstanding contrary legislative or quasi-legislative findings. Under this analysis of the *Sports Complex* decision, legislative findings would be "arbitrary," not "merely erroneous," when they threaten substantial, not merely de minimus, impairment of public trust interests. This would explain Justice Hall's concurrence in the result. As in most other trust relationships, the trustee's (legislature's) judgment–respecting corpus conservation and benefit maximization vis-a-vis current beneficiary demands and future beneficiary rights–would be respected insofar as it did not impair the corpus, allocate its use or distribute its benefits, contrary to the purposes of the trust. The legislature is legally, politically and practically better situated than the present court system to perceive and satisfy legitimate trust benefit demand. But it is the business of the judiciary to protect the beneficiary (citizenry) from actions of the trustee (legislature) that impair the corpus or violate its natural purposes. Thus, if at least one cogent argument indicated the sports complex plan was threatening substantial impairment of common fishery interests in New Jersey's estuaries, then the *Sports Complex* court's decision either retracts *Neptune City's* dicta respecting the

126. But, since the public trust respecting tidalwaters arose because certain tidalwater resources were by nature inappropriate for unnatural or concentrated allocation or necessary to common interests (*see* Note, 25 Rutgers L. Rev. at 596-99), privatization of tidalmarsh which is appropriate for concentrated allocation and not necessary to common interests would not violate the public trust. *See id.* at 606 n. 217.

127. The finding in question being "quasi-legislative," could not be overturned if "merely erroneous" but only if arbitrary. 62 N.J. at 250, 300 A.2d at 339.

128. N.J. Stat. Ann. § 5:10-1 et seq. (1973).

129. *See* 61 N.J. at 303, 294 A.2d at 54, *quoting* Illinois Central R.R. v. Illinois, 146 U.S. 387, 453 (1892).

limitations of legislative power under the tidalwater resource trust or confines it to foreshore access allocation cases. Either way, it counters *Neptune City's* insinuation that the citizenry may obtain direct court enforcement of the "deeply inherent" substantive rights recognized in *Neptune City* and *Arnold v. Mundy,*[130] and not be relegated to the uncertain procedural "remedy" of "judicial indirection."[131] Indeed, it would seem a violation of judicial duty under *Neptune City* for the court to sanction a program affecting estuarine marshland essential to New Jersey's coastal tidalwater fishery designed upon the erroneous findings of an administrative agency whose function is potentially inconsistent with the public trust in the state's tidalwater resources.[132]

One answer is a special court, like those governing water resource allocation in Western states.[133] Such a court would have original and prerogative jurisdiction over tidalwater resource allocation questions, and would be composed of at least three judges, one skilled in a relevant technological or scientific field and one with expertise in economics. This court, empowered to entertain citizen suits, should be established by constitutional amendment, but creation by legislation renouncing the supremacy of legislative findings would suffice. Whatever its origin, the court should be independent of the legislature and executive, though subject to review by the supreme court. Its orientation should be wholly judicial, and should be membership appointed to minimize the influence of interests (like tidalwater-polluting municipalities and industries) hostile to the public trust. Its technological and economic expertise, as well as juristic skills, would justify the primacy of its findings (even over legislative determinations) and its power to retry fact questions passed upon by administrative agencies acting upon tidalwater resources.

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130. 6 N.J.L. 1 (Sup. Ct. 1821).

131. *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 Mich. L. Rev. 473, especially at 495 (1970). The article surveys judicial techniques for precluding manifestation of legislative or administrative error in public water resource allocation without "displacing" the legislative as ultimate decisionmaker in the field. The techniques include remanding for further administrative action a program arguably inconsistent with ambiguous authorizing legislation. *See also* J. Sax, Defending the Environment (1971).

132. In the second *Sports Complex* case, the Sports Exposition Authority's determination had comprehended results of investigations by the Department of Environmental Protection. 62 N.J. at 249, 300 A.2d at 338. Such input tends to indicate a trustworthy result. But the Authority's conclusions may have influenced the Department of Environmental Protection, or the Department may have violated its trust. *Compare supra* note 27. *See also* Note, 25 Rutgers L. Rev. at 572, n. 6. If consequently the trust is threatened and the court deems itself powerless to intercede, "public trust" is an empty term involving no citizen rights after all.

133. *See, e.g.,* Colo. Rev. Stat. Ann. § 148-21-1 et seq. (1969).

The now-defunct New Jersey Senate bill No. 868 of June 8, 1970, contemplated an "environmental protection court" with "original, appellate and general jurisdiction throughout the State in all environmental protection causes," the appellate jurisdiction being "from any municipal or county court or from any administrative body having *quasi-judicial* powers."[134] But the standard of review seems the same as that of the second *Sports Complex* case. Indeed, the absence of any provision for appointment of members competent to make "quasi-legislative" findings on technological scientific and economic questions indicates such a constraint.[135] Perhaps, however, only tidalwater resource allocation questions should receive the special judicial treatment this article proposes. No public trust having been recognized in the rest of the New Jersey environment, the state's citizens can claim no inalienable, indefeasible property-like equities in any but tidalwater interests. Their interests in the rest of their environment, therefore, remain susceptible of legislative impairment. It follows that imperfect legislative allocations of other public resources are unreviewable, if they are not arbitrary. This situation may be indicated by the scope and complexity of the New Jersey environment above and beyond the tides, where few resources have essentially public, naturally circumscribed utilities.

SUMMARY AND CONCLUSIONS

Neptune City apparently announces recognition by the Supreme Court of New Jersey that its 1821 decision in *Arnold v. Mundy* established an inalienable, indefeasible equitable property in the citizens of New Jersey respecting the state's tidalwater resources. This interest, whose legal title is held in trust for the public by the legislature, seems to be cognizable at the suit of individual citizens *qua* citizens. Expansive or protean, though principally related to navigation, fishing and attendant interests, the public trust is defined by actual citizenry demand. Thus, presently the trust comprehends the rights of sea-bathing and foreshore and tidelands recreation, and precludes discrimination in its regulation. This public trust also appears

134. *Compare supra* note 27 (Emphasis added).

135. *Compare* Assembly #569 (1972) which provides no special court but may contemplate broader review of administrative findings. *See supra* notes 116-17 and accompanying text.

Revisionary note: As this article went to press, State Senator Dodd introduced bill #169 (1974), which substantially resurrects Senate #868 of 1970, and, like 868, neither provides for a special state water resource court nor requires technological or economics expertise of the judges. Neither bill, however, would prevent appointment of such experts if they also had practiced law in New Jersey for ten years, assuming two or more such doubly qualified individuals exist.

to be beyond legislative prerogative. Citizens accordingly would seem entitled to judicial review of legislative allocations of tidalwater resources, review even of relevant legislative findings and policies.

Beneath these apparent contours, *Neptune City* bears many muscular problems. They include: (a) the geographical limits of the trust, (b) its relation to federal powers and the Constitutional rights of federal citizens not domiciled in New Jersey, (c) the validity of legislative allocations of tidalwater resources to nonresident or extraterritorial use, (d) the efficiency and propriety of local regulation of citizen tidalwater resource enjoyment, and (e) the appropriate definition and administration of citizens' remedies for violations of the trust.

Respecting citizens' remedies, stubbornest of the problems, the answer should be a special tidalwater resource allocation court with relevant technological, scientific, and economics expertise as well as juridical competence, and with power to review legislative and quasi-legislative findings. Otherwise, *Neptune City* may be too little too late to protect the "deeply inherent right"[136] of New Jersey citizens in their "very scarce" and important[137] tidalwater resources.

136. 61 N.J. at 303, 294 A.2d at 53.

137. *Id.*; *cf.* New Jersey Sports & Exposition Authority v. McCrane, 61 N.J. 1 at 55, 292 A.2d 545 at 579 (1972) (Hall, J., dissenting).