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will require ascertainment of those lands not owned by the state and studies to determine priorities of acquisition. New legislation must be developed and all environmental-protection legislation must be efficiently enforced by the appropriate state agencies. Every effort must be made to increase the efficiency of municipal and industrial facilities. Heavy penalties similar to those imposed by the Vermont legislature<sup>38</sup> may be necessary to prevent private citizens from polluting. Above all, there is a need for total environmental planning in the uses to be permitted of our estuarine zone. We must endeavor to determine realistic long-term uses that are not destructive to the estuarine environment and to limit development to those non-degradatory uses.<sup>39</sup>

KENNETH W. PARSONS

### Environmental Law—The Public Trust Doctrine: A Useful Tool in the Preservation of Sand Dunes

The problem of preventing the destruction of sand dunes by private interests should be of grave concern to North Carolina citizens. Indeed, the problem has been recognized by a specific statutory finding that the North Carolina coast "is wholly or in part protected from actions of the Atlantic Ocean and storms thereon by a system of natural or constructed dunes."<sup>1</sup> Our present statutes provide that

it shall be unlawful for any person, firm, or corporation in any manner to damage, destroy, or remove any sand dune, or part thereof, lying along the outer banks of this State . . . or to kill, destroy, or remove any trees, shrubbery, grass, or other vegetation growing on sand dunes, without first having obtained a permit as specified herein authorizing such proposed damage, destruction, or removal.<sup>2</sup>

Violation of this statute is a misdemeanor resulting upon conviction in the imposition of a fine of not less than fifty dollars and not more than 500 dollars.<sup>3</sup>

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<sup>38</sup>See note 22 *supra*.

<sup>39</sup>North Carolina has laid the basis for such planning. See COASTAL ZONE RESOURCES CORPORATION, A PRELIMINARY PLAN FOR THE NORTH CAROLINA ESTUARY STUDY (rev. 1970).

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<sup>1</sup>N.C. GEN. STAT. § 104B-3 (Supp. 1969).

<sup>2</sup>N.C. GEN. STAT. § 104B-4 (Supp. 1969).

<sup>3</sup>N.C. GEN. STAT. § 104B-12 (Supp. 1969).

<sup>4</sup>See Morgan, *On the Legal Aspects of North Carolina Coastal Problems*, 49 N.C.L. REV. 857, 864 (1971).

Unfortunately, an administrative approach has not resolved the problem that many coastal property owners now face.<sup>4</sup> Consider the following example: X Corporation buys fifty acres of land fronting on the Atlantic Ocean and proceeds to build a large beach-front motel. To enhance the view for the motel guests and make access to the ocean easier, the corporation begins removing the sand dunes along its property. If X Corporation is able to obtain the requisite permit from the county board of commissioners, can the neighboring property owners bring an action in a North Carolina state court to prevent the removal of the dunes, and, if so, on what theory? The purpose of this note is to suggest that in appropriate cases the attorney general should intervene on behalf of neighboring property owners even after authority for removal has been granted by the county board, and that the "public trust" doctrine can be used to justify that intervention. In fact, resort to the doctrine is required to protect the public interest from the short-sighted administrative decisions that high-pressure tactics yield. One commentator has noted that

public officials are frequently subjected to intensive representations on behalf of interests seeking official concessions to support proposed enterprises. The concessions desired by those interests are often of limited visibility to the general public so that public sentiment is not aroused; but the importance of the grants to those who seek them may lead to extraordinarily vigorous and persistent efforts. It is in these situations that public trust lands are likely to be put in jeopardy and that legislative watchfulness is likely to be at the lowest levels.<sup>5</sup>

One of the early landmark cases in the development of the public trust doctrine was *Illinois Central Railroad Co. v. Illinois*,<sup>6</sup> which involved a statute enacted by the Illinois state legislature to revoke a prior grant of nearly the entire Chicago water front to the Illinois Central Railroad. In upholding the revocation, the Court noted that

[t]he harbor of Chicago is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the State of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose, one limited to

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<sup>4</sup>Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 495 (1970) [hereinafter cited as Sax].

<sup>5</sup>146 U.S. 387 (1892).

transportation of passengers and freight between distant points and the city, is a proposition that cannot be defended.<sup>7</sup>

This early public trust case falls far short of justifying the North Carolina Attorney General in seeking an injunction to prevent removal of sand dunes by a private corporation on private property. However, North Carolina does have some case history which could be used as a basis for development of the public trust doctrine. In 1903, the North Carolina Supreme Court decided *Shepard's Point Land Co. v. Atlantic Hotel*.<sup>8</sup> Therein the court recited with favor the following declaration from *Illinois Central Railroad Co.*:

The State can no more abdicate its trusts over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police power in the administration of government and the preservation of peace. So with trusts connected with public property or *property of a special character*, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.<sup>9</sup>

*Shepard's Point Land Co.* clearly provides a foundation for the use of the public trust doctrine in North Carolina. Other states, including Massachusetts, Wisconsin, and California, have developed and refined the use of this doctrine. For example, the Massachusetts courts have avoided direct confrontation with the legislature, but have in many instances been successful in protecting public lands. Professor Sax says of the Massachusetts approach: "The court has served notice to all concerned that it will view with skepticism any dispositions of trust lands and will not allow them unless it is perfectly clear that the dispositions have been fully considered by the legislature."<sup>10</sup> In *Gould v. Greylock Reservation Commission*,<sup>11</sup> the Massachusetts Supreme Court prevented a state agency from permitting a publicly preserved natural forest to be turned into a ski resort, remarking that it found "no express grant to the Authority of power to permit use of public lands . . . for what seems, in part at least, a commercial venture for private profit."<sup>12</sup>

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<sup>7</sup>*Id.* at 454.

<sup>8</sup>132 N.C. 517, 44 S.E. 39 (1903).

<sup>9</sup>*Id.* at 527-28, 44 S.E. at 42 (emphasis added).

<sup>10</sup>Sax 502.

<sup>11</sup>350 Mass. 410, 215 N.E.2d 114 (1966).

<sup>12</sup>*Id.* at 426, 215 N.E.2d at 126.

According to Professor Sax, "[t]he Supreme Court of Wisconsin has probably made a more conscientious effort to rise above rhetoric and to work out a reasonable meaning for the public trust doctrine than have the courts of any other state."<sup>13</sup> In *Priewe v. Wisconsin State Land & Improvement Co.*<sup>14</sup> the Wisconsin Supreme Court said:

[I]f the state had power . . . to convey and relinquish . . . all its right, title, and interest in and to all lands lying within the limits of Muskego Lake, then it may, in a similar manner, convey and relinquish to private persons or corporations all such right, title, and interest in and to every one of the 1,240 lakes in Wisconsin.<sup>15</sup>

*City of Milwaukee v. State*<sup>16</sup> affords a clear description of the trust aspect of the public trust doctrine:

The trust reposed in the State is not a passive trust; it is governmental, active, and administrative. . . . The equitable title to these submerged lands vests in the public at large, while the legal title vests in the State . . . .<sup>17</sup>

Professor Sax cites several California cases which show the reluctance of California courts to overrule express legislative enactments.<sup>18</sup> However, he does cite one interesting section from the California Government Code:<sup>19</sup> "The Legislature hereby finds and declares that the public interest in the San Francisco Bay is in its beneficial use for a variety of purposes; that the public has an interest in the bay as the most valuable single natural resource of an entire region. . . ." <sup>20</sup>

Thus, other states do not hesitate to use the public trust doctrine to protect certain types of land after administrative safeguards have failed. In most of the public trust cases, the land involved has been state-owned land which had been either sold to or put under control of private interests. With respect to the protection of sand dunes, the public trust doctrine is clearly relevant when the dunes are located on publicly owned beaches. However, in many instances the dunes are located on property

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<sup>13</sup>Sax 509.

<sup>14</sup>93 Wis. 534, 67 N.W. 918 (1896).

<sup>15</sup>*Id.* at 551, 67 N.W. at 922.

<sup>16</sup>193 Wis. 423, 214 N.W. 820 (1927).

<sup>17</sup>*Id.* at 449, 214 N.W. at 830.

<sup>18</sup>See Sax 524-38.

<sup>19</sup>*Id.* at 532 & n. 185.

<sup>20</sup>CAL. GOV'T. CODE § 66600 (West 1966).

that has been in private hands for many years. Can the public trust doctrine be used to prevent removal of dunes that are on private property? Both *Illinois Central Railroad Co.* and *Shepard's Point Land Co.* speak of property of a "special character" which cannot be placed entirely beyond the direction and control of the state. Recently, in *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*,<sup>21</sup> the North Carolina Supreme Court emphasized the peculiarly public nature of lands on which sand dunes are located. The court declared: "Manifestly, the purpose [of building the sand wall] was the preservation and protection of the Town of Carolina Beach from the fury of the sea rather than the reclamation of the lands of private owners along the beach."<sup>22</sup> Sand dunes are one of the few natural protections from high wind and water damage. Surely the "special character" of the small strips of land on which sand dunes are located justifies state control of them.

According to Professor Sax, there is a "rule of water law that one does not own a property right in water in the same way he owns his watch or his shoes, but that he owns only an usufruct—an interest that incorporates the needs of others."<sup>23</sup> This same concept should be extended to include those who own property that contains sand dunes. A further insight into the nature of lands that have a "special public character" is revealed in *Yates v. Milwaukee*,<sup>24</sup> which was quoted with approval by the North Carolina court in *Shepard's Point Land Co.*<sup>25</sup> In *Yates*, the United States Supreme Court said: "This riparian right is property, and is valuable, and, though *it must be enjoyed in due subjection to the rights of the public*, it cannot be arbitrarily or capriciously destroyed or impaired."<sup>26</sup> The same rule should apply to those who own littoral rights in coastal property.

It is and always has been difficult to get a "sympathetic ear" when private property rights are affected. However, notwithstanding the resistance of private owners, the attorney general should be armed with legal tools to protect the public interests. The concept of the public trust doctrine can be utilized as a vital back-up to established administrative

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<sup>21</sup>277 N.C. 297, 177 S.E.2d 513 (1970).

<sup>22</sup>*Id.* at 304, 177 S.E.2d at 517.

<sup>23</sup>Sax 485.

<sup>24</sup>77 U.S. (10 Wall.) 497 (1870).

<sup>25</sup>132 N.C. at 379, 44 S.E. at 45.

<sup>26</sup>77 U.S. (10 Wall.) at 504 (emphasis added).

safeguards. In order to counteract the pressure brought to bear upon administrative agencies by private groups to secure permits to remove dunes, in appropriate situations the North Carolina Attorney General's Department should use the public trust doctrine to protect coastline property. Although the guidelines should be spelled out in specific terms by our legislature, the attorney general should not hesitate to invoke the doctrine as enunciated in the case law.

FRANK B. JACKSON

### **Environmental Law—Water Resources—Zones of Shared Conservation Authority and United States Public Policy**

The exercise of conservation authority must be understood in the context of the conservation movement as a living and evolving ethic in the American conscience. Many writers trace the emergence of the conservation movement as a real force in the United States to the Governor's Conference of 1908 called by President Roosevelt and the subsequent work of the National Conservation Commission.<sup>1</sup>

In the beginning, this movement generated a great unity of purpose and direction. The Commission's scientists focused the laws of man on the laws of nature. The Commission itself contributed the concept of resource management to the movement by publishing an inventory of the nation's resources. Yet as the movement grew it began to fragment, for one of its essential characteristics was the propensity to attract exceptionally diverse groups. Those who placed nature's highest values in the aesthetics marched to the cause alongside the sportsmen, the lumbermen, the developers, and other groups who understood nature's utility value. While each group could agree on the general concept of conservation, their specific interests conflicted.

William Howard Taft, who followed Roosevelt into office, once remarked that conservation was such an abstruse subject that many people were for it no matter what it meant.<sup>2</sup> His remark captured the essential weakness of the movement. In the eyes of the political scientist, the form of the classic political struggle—which is the basic ingredient of the democratic process—surfaced in the conflict of the group interests:

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<sup>1</sup>See, e.g., N. WENGERT, *NATURAL RESOURCES AND THE POLITICAL STRUGGLE* 22 (1955).

<sup>2</sup>RESOURCES FOR THE FUTURE, *PERSPECTIVES ON CONSERVATION* 8 (1951).