

OF TIME, TIDELANDS, AND PUBLIC TRUST

*M. Casey Jarman**

INTRODUCTION

Over the past several years, increased demands for coastal resources have created disputes over the respective rights of private landowners and the public in the bayous, tidal streams, and beaches of the Mississippi Gulf Coast. These legal rights are determined by the public trust doctrine, a concept that has evolved in American jurisprudence from Roman and English law.¹ Its philosophic underpinning is that seas and shores, and the resources found within, represent a vast, inexhaustible commons whose wealth can and should be shared by all.

Mississippi's public trust doctrine has its roots in the English common law.² Prior to the signing of the Magna Charta in 1215, the English monarchy claimed sovereign ownership in ocean and coastal lands and waters, and the resources contained therein. Over a period of time, as the King granted many coastal waterways to lords loyal to him, sovereign lands came to be divested in a manner indistinguishable from other private prop-

* B.A. 1971, Barry University; J.D. 1981, University of Mississippi; LL.M. 1985, University of Washington. Assistant Professor, William S. Richardson School of Law, University of Hawaii. This article was prepared with support from the United States Department of Commerce, National Oceanic and Atmospheric Administration, Office of Sea Grant, under Grant No. NA85AA-D-56005. The views herein expressed represent the author's alone and do not represent the views of the National Oceanic and Atmospheric Administration.

¹ See generally Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, *passim* (1969)(historic origins of public trust law); Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 *passim* (1980)(public trust law history); Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762, *passim* (1970)(origins of public trust law).

² *State v. Stewart*, 184 Miss. 202, 224, 184 So.2d 44, 47 (1938). Concerning public trust doctrine ". . . Mississippi adopted the common law as it prevails in England." *Id.*

erty. The Magna Charta, which has been interpreted to have brought to a close such privatization of public lands, established the roots of the modern law of public trust.³ It permitted the monarchy to retain sovereign rights in tidal lands and resources up to the high-water mark, but prohibited exclusive alienation to private parties for private use. Thus, a trust in favor of the public was impressed upon such lands.

Mississippi obtained ownership of its tidelands below mean high tide from the United States government under the equal footing doctrine, a legal principle which provides that states entering the Union after its initial creation came in on an "equal footing" with other states.⁴ Because the original states had reserved their tidelands and navigable waters and held them in trust for the public, Mississippi became owner of its tidelands upon statehood. Prior to statehood, the federal government owned these lands in a similar trust capacity.⁵

³ *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 366 (1842).

The question is not free from doubt, and the authorities referred to in the English books cannot, perhaps, be altogether reconciled. But . . . the question must be regarded as settled in England against the right of the king since the Magna Charta to make such a grant [of submerged lands] But the existence of a doubt as to the right of the king to make such a grant after Magna Charta, would of itself show how fixed has been the policy of that government on this subject for the last six hundred years; and how carefully it has preserved this common right for the benefit of the public.

Id. at 410, 412.

⁴ *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

The manner in which the new states were to be admitted into the union, according to the ordinance of 1787 [Northwest Ordinance], as expressed therein, is as follows: '. . . such state shall be admitted by its delegates into the congress of the United States, on an equal footing with the original states in all respects whatever.'

Id. at 222. This doctrine was extended to ensure that "new" states have the same rights as the original states in the tide waters, and in the lands below the high-water mark, within their respective jurisdictions. *Shively v. Bowlby*, 152 U.S. 1, 26 (1893).

⁵ *Knight v. United States Land Ass'n*, 142 U.S. 161 (1891).

It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders. Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory.

The extent of public rights in tidelands varies from state to state.⁶ And within state public trust case law, courts have had difficulty in establishing the bounds of the trust. Mississippi is no exception. Several property issues have arisen in Mississippi's public trust law. First, what is the geographical boundary between private and public trust land? Second, to what extent can the state alienate trust lands in fee? Third, what private and public uses are protected by the public trust doctrine? And fourth, what public rights are impressed upon owners whose property lies upland from public trust tidelands? This article explores these issues and how they are treated under Mississippi statutory and common law.

GEOGRAPHIC BOUNDARY OF TIDAL PUBLIC TRUST LANDS

1. *Ebb and Flow Test*

In its earliest public trust decision, *Martin v. O'Brien*,⁷ the Mississippi Supreme Court established the high water mark as the inland geographic boundary of public trust lands.⁸ One of the court's most coherent discussions on the subject is found in *State ex rel. Rice v. Stewart*.⁹ This case involved the ownership of submerged lands in Bayou Bernard, a navigable inlet of the Mississippi Sound.¹⁰ Contending that they owned the bed of the bayou and the minerals contained therein, the adjacent upland

Id. at 183.

⁶ *Shively v. Bowlby*, 152 U.S. 1 (1893).

. . . there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining uplands or not, as it considered for the best interests of the public.

Id. at 26. See, e.g. *City of Newport Beach v. Fager*, 102 P.2d 438, 441 (Ca. App. 1940)(legislature may alienate tidelands from public trust if public interest not substantially impaired); *Orbrecht v. National Gypsum Co.*, 105 N.W. 2d 143, 149 (Mich. 1960)(beds of Great Lakes alienable in exceptional circumstances); *State Laws Bd. v. Heuicer*, 548 P.2d 1323, 1325 (Or. App. 1976)(state can not grant away public right to use tidelands for commerce and navigation).

⁷ 34 Miss. 21 (1857).

⁸ *Martin v. O'Brien*, 34 Miss. 21, 36 (1857).

⁹ 184 Miss. 202, 184 So. 44 (1938), *sugg. error overruled*, 185 So. 247 (1939).

¹⁰ *State ex rel. Rice v. Stewart*, 184 Miss. at 219, 184 So. at 45.

owners established a commercial sand and gravel mining operation in the bayou.¹¹ Citing its ownership under the public trust doctrine, the state filed suit to enjoin the mining operations.¹²

In its opinion, the court restated its holding in *Martin* that the state holds lands under navigable tidal waters below mean high tide in trust for the people.¹³ It then further defined the term "navigable" to include all waters subject to the ebb and the flow of the tide, regardless of navigability in fact.

The phrase 'navigable river,' has a technical meaning in the Common Law. A river is navigable in the technical sense, as high up from its mouth as the tide flows . . . Above that it may be a common highway, subject to the use of the public for navigation according to the common law acceptance of the term, but it is not technically a navigable river. The soil under a river which is navigable in the technical sense, does not belong to the riparian owners, but to the public.¹⁴

Noting that no sound policy reason exists for distinguishing ownership of beds beneath freshwater (which extends to the middle of the stream with a navigation easement in favor of the public) and tidal rivers, the court nonetheless restated its acceptance of the English common law public trust doctrine.¹⁵

As recently as 1986, in *Cinque Bambini v. State*,¹⁶ the court affirmed this general rule, but with a curious line of reasoning. The case arose from a dispute over rights to oil and gas on approximately 600 acres of marshland in Hancock County.¹⁷ For almost a century and a half, a succession of owners of the land in question had paid property taxes to the state. Private ownership was not questioned until 1977 when the state granted mineral leases throughout the area.¹⁸ The leases contained assertions of state ownership, under the public trust doctrine, of sub-

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 224, 184 So. at 47.

¹⁴ *Id.* at 225, 184 So. at 47.

¹⁵ *Id.* at 230, 184 So. at 50.

¹⁶ 491 So. 2d 508 (Miss. 1986), *aff'd*, *Phillips Petroleum Co. v. Mississippi*, ____ U.S. ____, 108 S. Ct. 791 (1988).

¹⁷ *Cinque Bambini v. State*, 491 So. 2d at 510.

¹⁸ *Id.* at 511.

merged lands subject to the ebb and flow of the tide up to mean high-water mark, by virtue of the "ebb and flow" test.¹⁹ The Cinque Bambini Partnership, contended however, that the public trust extends only to submerged tidelands that are "navigable-in-fact."²⁰

In its reaffirmation of state ownership of tidelands up to the mean high tide line, regardless of actual navigability, the court virtually ignored the *Stewart* line of reasoning. Instead, it re-analyzed the issue in light of federal law.²¹ This approach required the court to determine whether extension of the public trust doctrine to inland navigable waters by the United States Supreme Court in *The Genessee Chief*²² in 1851 had resulted in a restriction of the "ebb and flow" test for public trust jurisdiction in tidal lands.²³ Drawing an analogy to navigable freshwaters, the Mississippi court stated that the trust applies to both the navigable and non-navigable portions of a freshwater waterway up to the high-water mark.²⁴ It then equated the "mean high tide" line with the "high-water" mark of a river.²⁵ Because the tidelands granted to Mississippi under the "equal footing" doctrine are those fronting the Gulf of Mexico — un-

¹⁹ *Id.* at 514. Utilizing the "ebb and flow" test, the public trust would be construed to include tidally influenced non-navigable waters. *Id.*

²⁰ *Id.* at 513.

²¹ The court merely mentioned the *Stewart* holding in support of its own conclusion under the federal law analysis. *Id.* at 516. The court deemed the issue to be a federal question, as the federal government had title to the lands prior to statehood, and as the allocation of land to tide state, to private citizens, and to the public trust was governed by the "equal footing" doctrine. *Id.* at 513.

²² 53 U.S. (12 How.) 443 (1851). *The Genessee Chief* case was precipitated by a collision between two vessels on Lake Ontario. The appellant contended that the federal court system did not have jurisdiction over the case, as admiralty and maritime jurisdiction "is limited to cases occurring upon waters within the ebb and flow of the tide." *Id.* at 447. The court examined the reasons for the initial grant of admiralty jurisdiction to the federal government, and determined that the same reasons extend to navigable streams and lakes. *Id.* at 453-54. Accordingly, the court held that admiralty jurisdiction encompassed navigable inland waters as well as those influenced by the tide. *Id.* Subsequent to this expansion of admiralty jurisdiction, the Supreme Court expanded the boundaries of the public trust to include navigable inland waters. *Cinque Bambini*, 491 So. 2d at 514.

²³ *Cinque Bambini*, 491 So. 2d at 513.

²⁴ *Id.* at 514.

²⁵ *Id.* at 514-15.

questionably a navigable body of water — the court reasoned that the trust therefore extends from the state's border on the Gulf to the mean high tide line.²⁶ Despite the strained reasoning of the opinion, the resultant holding is consistent with past decisions of the court.

2. *Ambulatory Boundaries*

Because coastal tidelands are a dynamic, constantly changing ecosystem, their geographic boundaries are "ambulatory," or mobile. Wetlands are created and destroyed regularly by both natural and man-made forces, described in legal terminology as accretion²⁷, reliction²⁸, and avulsion²⁹. To what extent do the legal boundaries of trust land follow these changes? The Mississippi Supreme Court has taken the position that accretions that develop adjacent to the shore become the property of the upland owner.³⁰ The court justifies this holding on the theory that it protects an owner's littoral right of access to the water.³¹ Title to noncontiguous fast lands that emerge from tidal waters, however, is held by the state in trust for the public in the same manner as submerged tidelands.³² Accreted lands adjacent to an island belong to the owner of the island, even when such

²⁶ *Id.* at 515-16. The court found further support for its conclusion in the fact that "tide" terminology has continued in use since *The Genessee Chief*, thus indicating that the "navigable waters" test is an extension rather than replacement of the "ebb and flow" rule. *Id.* at 515.

²⁷ "Accretion" refers to the "addition of portions of soil, by gradual deposition through the operation of natural causes, to that already in possession of owner." BLACK'S LAW DICTIONARY 36 (4th ed. 1957).

²⁸ "Reliction" is an "increase of the land by the permanent withdrawal or retrocession of the sea or a river." BLACK'S LAW DICTIONARY 1455 (4th ed. 1957).

²⁹ "Avulsion" is the "removal of a considerable quantity of soil from the land of one man, and its deposit upon or annexation to the land of another, suddenly and by the perceptible action of water." BLACK'S LAW DICTIONARY 173 (4th ed. 1957).

³⁰ *H.K. Porter Co. v. Jackson County*, 324 So. 2d 746, 750 (Miss. 1975); *International Paper Co. v. Mississippi State Highway Dep't*, 271 So. 2d 395, 398 (Miss. 1972); *Harrison County v. Guice*, 244 Miss. 95, 106, 140 So. 2d 838, 841-42 (1962).

³¹ *Harrison County v. Guice*, 244 Miss. 95, 101, 140 So. 2d 838, 841-42 (1962).

³² *International Paper Co. v. Mississippi State Highway Dep't*, 271 So. 2d 395, 398-99 (Miss. 1972). The court noted that the land mass belonged to the state when submerged as part of a state-owned bay floor, and apparently reasoned that elevation of the noncontiguous mass above the water surface did not merit review of title to the land. *Id.*

accretions meet the mainland.³³

In 1962, the court was first presented the opportunity to determine whether lands that were once subject to the public trust could inure to the upland owner when artificially filled. In *Harrison County v. Guice*³⁴, the county filled shallow bottoms below mean high tide, as well as upland on Guice's property, in order to protect Highway 90 and the seawall that separated it from the Mississippi Sound.³⁵ The court found this to be an artificial accretion erected by "strangers to the upland title."³⁶ Such accretions, decided the court, become the property of the upland owner, even though the accretions were created at public expense and the submerged land that was filled to make the beach previously belonged to the state.³⁷ The court reached this conclusion by analogy to the principle that owners whose property adjoins tidelands cannot extend their lands by artificially reclaiming state-owned bottoms.³⁸ The court stated that protection of the littoral owner's right of access to the water is the reason for such a rule.³⁹

A federal court opinion arising from the same controversy as *Guice* came to the opposite conclusion. In *United States v. Harrison County*,⁴⁰ The Fifth Circuit rejected the *Guice* holding, reasoning instead that Section 95 of the Mississippi Constitution of 1890 supersedes the common law doctrine of accretion.⁴¹ Section 95 provides that "lands belonging to, or under the control of the state, shall never be donated directly or indirectly to private corporations or individuals."⁴² Because of this provision, the court ruled, private upland owners cannot take ownership of for-

³³ *H.K. Porter Co. v. Jackson County*, 324 So. 2d 746, 751 (Miss. 1975).

³⁴ 244 Miss. 95, 140 So. 2d 838 (1962).

³⁵ *Id.* at 839. Work was financed with a combination of federal and county funds to remedy an erosion problem associated with the original construction of the seawall. *Id.* The county secured an easement from Ms. Guice, but only 50' wide. *Id.* Ms. Guice owned approximately 175-250 feet south of Highway 90 at the time of granting of easement and emplacement of the sloping beach. *Id.*

³⁶ *Id.* at 842.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 399 F.2d 485 (5th Cir. 1968).

⁴¹ *Id.* at 491.

⁴² Miss. CONST. art. IV, § 95.

merly submerged lands.⁴³ This reasoning allowed specific performance of a contract entered into in 1951 by the federal government and Harrison County, in which the government awarded 1.3 million dollars to the state of Mississippi for the construction of 17 miles of beach in Harrison County. In exchange for such public funds, the county agreed that the beaches would be made available to the public. The court granted public access to such beaches for sunbathing, recreation, and other uses appropriate to a sand beach, so long as such use did not unreasonably interfere with the littoral rights of the upland owners.⁴⁴

These conflicting decisions leave the status of ownership of the man-made beaches on Mississippi's coast and the viability of the common law doctrine of accretions in doubt. Section 95 of the Mississippi Constitution of 1890 is not mentioned in the *Guice* opinion, so it is unclear whether that issue was raised and considered. Dicta in the Mississippi Supreme Court's latest public trust case suggest acceptance of the *Guice* holding.⁴⁵ As development pressures on Mississippi's coast increase, conflicts between public and private rights on the beach are bound to arise. Therefore, it is likely that the court will be called upon to resolve the two opinions.

If the court were to accept the *Guice* holding in a subsequent case, it would create a no-win situation for the governing body charged with overseeing man-made beaches, upland owners, and the public. The court could reconcile *Guice* with the *Harrison County* decision, however, by applying the common law doctrine of implied dedication. The dedication doctrine makes it possible for a landowner either to transfer full ownership of his land to the public or to grant an easement to the public for certain uses.⁴⁶ To be legally enforceable, two elements

⁴³ *Harrison County*, 399 F.2d at 491.

⁴⁴ *Id.*

⁴⁵ *Cinque Bambini*, 491 So. 2d at 519. The court referred to the *Guice* opinion as support for the proposition that the deposit of alluvial soil upon the "margin of water" inures to the benefit of the owner of the shoreland. *Id.* This reference was made as part of a summary of the contours of Mississippi Law governing the title of coastal lands, and did not address the inconsistency presented by the *Harrison County* decision.

⁴⁶ "Dedication is the term applied to a transfer of the ownership of land or of a privilege to use it to the public for a public purpose." 6A POWELL, LAW OF REAL PROPERTY § 926 (1986).

must be present: an intent on the part of a property owner to dedicate and a valid acceptance by the public.⁴⁷

An owner's intent to dedicate may be expressly given or implied from his failure to object to continued use of his property by the public.⁴⁸ It is crucial, though, that a non-expressed intention be clearly and unequivocally manifested. Also, acceptance may be either express or implied through formal action or use by the public.⁴⁹

To date, application of the doctrine of implied dedication in Mississippi has been limited to roads and parks.⁵⁰ The test established by the court requires "long use for a specific public purpose, the discontinuance of which constitutes a violation of good faith to the public and to those who have acquired property with a view to the use contemplated by the dedication."⁵¹ It seems clear that such a test can be met in relation to Mississippi's beaches. Members of the public have been using the beaches openly and without interference.⁵² Because use need not be constant, it would be irrelevant that public use diminishes during the winter months. In many instances, counties are expending funds to maintain them. In addition, local governments routinely grant privilege licenses to beach vendors without ob-

⁴⁷ *Id.* at § 926 (2).

⁴⁸ "An implied dedication may arise by operation of law from the acts and conduct of a landowner." *Id.*

⁴⁹ *Id.*

⁵⁰ *See, e.g.,* *City of Louisville v. Hull*, 292 So. 2d 177, 179 (Miss. 1974)(recognized implied dedication doctrine applicable to property owned by a municipality); *Armstrong v. Itawamba County*, 16 So. 2d 752, 757 (Miss. 1944)(recognized implied dedication of road which had been used by public and maintained with public funds for about twenty years); *Harrison County v. Seal*, 66 Miss. 129, 129, 5 So. 622, 622 (1889)(acceptance of dedication of road does not have to be express but can be inferred from public use); *Kinnare v. Gregory*, 55 Miss. 612, 620-21 (1878)(early recognition of implied dedication where court enjoined obstruction of highway by private party).

⁵¹ *City of Louisville v. Hull*, 292 So. 2d 177, 179 (Miss. 1974).

⁵² This writer knows of only two exceptions. First, formerly blacks were excluded from beaches which instigated the *Guice* and *Harrison County* decisions. More recently, a controversy has developed over public use of the beaches of Deer Island. Deer Island is a 500-600 acre island located in the Mississippi Sound, offshore from the coastal city of Biloxi. A private developer has attempted to restrict public access to all but a small portion of the island that is owned by the city of Biloxi. Prior to the developer's acquisition of the property, the public freely used the island for recreational purposes. As a result, an uneasy tension now prevails over public use of the island.

taining prior permission of adjacent landowners. Thus, it would be a violation of good faith to the public to discontinue such long use for public recreational purposes. The court has held continued use over a period of time, combined with maintenance at public expense, to be sufficient to find implied dedication of a road.⁵³ There is no reason that the result should differ when the issue is public use of a beach.⁵⁴

The Court in *Cinque Bambini* answered affirmatively the question of whether public trust lands can be enlarged by the natural inland expansion of tidewaters.⁵⁵ The court reasoned that such a ruling is logically consistent with the principle of allowing private freshwater riparian landowners to benefit from accretions.⁵⁶ It specifically declined to rule on the issue of the status of trust lands that become fast lands through reliction.⁵⁷ It seems likely that such a situation would be treated in the same way as natural accretions to upland property. In both instances, tidewaters are replaced by land; the only difference is the manner in which the land is formed. If the policy reason for granting accretions to the upland owner is to protect such owner's right to access to the water, then the legal result should be the same.⁵⁸ However, as discussed above, section 95 of the Mississippi Constitution of 1890 could be interpreted to prevent

⁵³ *Armstrong v. Itawamba County*, 16 So. 2d 752, 756-57 (Miss. 1944).

⁵⁴ Texas and California courts have recognized implied dedications of beaches. See *County of Los Angeles v. Berk*, 605 P.2d 381, 391 (Cal. 1980)(found implied dedication of beaches, slope, and bluff even though public thought property was private); *Gion v. City of Santa Cruz*, 465 P.2d 50, 57-58 (Cal. 1974)(once implied dedication complete, subsequent owner cannot prevent public use); *Seaway Co. v. Attorney General*, 375 S.W. 2d 923, 935-37 (Texas 1964)(found implied dedication of beach from mean low tide mark to seaward side of vegetation line).

⁵⁵ *Cinque Bambini*, 491 So. 2d at 519-20.

⁵⁶ *Id.* at 520.

⁵⁷ *Id.* at 519.

⁵⁸ The court in *Guice* hints at this result. It defines "accretion" broadly to include lands created by the gradual recession of water, which is technically known as "reliction". If the court understood reliction to be a subset of accretions, then relicited lands are logically treated the same as accreted lands. "Ordinarily, accretion means the gradual deposit of alluvial soil upon the margin of the water or the gradual recession of the water." *Guice*, 244 Miss. at 99, 140 So. 2d at 842. The court appears to be confused on this matter, though. The court in *Cinque Bambini* cites *Guice* for this proposition, but on the next page says reliction has never been decided by the court. *Cinque Bambini*, 491 So. 2d at 519.

this result.

Avulsions, on the other hand, have been held not to affect title or boundaries.⁵⁹ According to the court, this principle holds true whether the avulsion is natural or artificially induced, such as through dredging operations.⁶⁰ Therefore, when an upland owner dredges his land to create a boat slip, he retains ownership of that part of his property that becomes "wet" as a result.

ALIENATION OF PUBLIC TRUST LANDS

Historically, the Mississippi Supreme Court has been erratic in its position regarding the extent to which the state can divest itself of tidelands. Early in the history of Mississippi public trust case law, the court held in *Martin v. O'Brien* that state-owned tidelands could "by grant, become private property, or the subject of an exclusive private right."⁶¹ Following this reasoning, the court upheld the right of a municipality to grant to an individual who was not a riparian landowner the exclusive right to erect, operate, and maintain a public wharf in the Mississippi Sound.⁶² Furthermore, the decision allowed a riparian landowner to erect a private wharf in public trust waters adjacent to his property.⁶³ The wharf was to be used for landing and shipping his own property, but not that of others.⁶⁴ However, in keeping with its assertion that the state could freely alienate lands below the high water mark, the court stated that the right to construct a private wharf could be taken away by the legisla-

⁵⁹ *Cinque Bambini*, 491 So. 2d at 520. This proposition has been well-settled law in the United States as regards fresh water since 1904 when, in the case of *Missouri v. Nebraska*, 196 U.S. 23 (1904), the United States Supreme Court stated: "It is equally well settled that where a stream which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; . . . This sudden and rapid change of channel is termed, in law, avulsion." *Missouri v. Nebraska*, 196 U.S. at 35.

⁶⁰ *Cinque Bambini*, 491 So. 2d at 520. "Put more broadly, under the laws of this state, neither artificially created water courses, inlets, slips, marinas and the like, nor physical improvement or alteration made thereto, become a part of the public trust, even though they become tidally affected." *Id.*

⁶¹ *Martin v. O'Brien*, 34 Miss. 21, 36 (1857).

⁶² *Id.* at 38.

⁶³ *Id.* at 37.

⁶⁴ *Id.*

ture.⁶⁵ This decision indicated that such a right was not incident to the ownership of property bordered by tidelands.⁶⁶

The ability of the state to grant fee simple title in public trust tidelands to private parties for private purposes was restricted seventy-five years later in *Money v. Wood*.⁶⁷ Here, the plaintiffs challenged the state's right to sell submerged lands between Deer Island and the mainland in Biloxi "for the purpose of constructing and erecting an artificial island, with hotels, boulevards, and residences for the private purposes of the appellants."⁶⁸ The sale was made pursuant to a statute that permitted the state land commissioner to sell certain public lands.⁶⁹ In finding the sale void, the Mississippi Supreme Court held that the state, as trustee, could not dispose of these lands, if to do so would be inconsistent with the purpose for which the trust exists.⁷⁰ Unfortunately, the court shed no light on the exact nature of this purpose. It stated further that section 81 of the Mississippi Constitution of 1890⁷¹ supports the court's decision to align itself with those states holding that trust lands cannot be conveyed in fee to private owners for private purposes.⁷² The court specifically recognized, however, that some states allow conveyance of fee title to public trust lands, even if doing so deprives the people of future control of these lands.⁷³

This decision directly contradicts the court's holding in *Martin*, which was not alluded to in the opinion. While it is unclear why the court chose to ignore *Martin*, two important events arguably influenced its decision. First, between the *Mar-*

⁶⁵ *Id.* at 36.

⁶⁶ *Id.* ". . . and it also follows that the position . . . that the owners of lands lying on the seashore have the right to build wharves for their own use into the sea adjoining the front of their lands, and cannot be deprived of that right by grant under legislative authority, cannot be maintained." *Id.*

⁶⁷ 152 Miss. 17, 118 So. 357 (1928).

⁶⁸ *Id.* at 24, 118 So. at 358.

⁶⁹ *Id.* The statute provided for the sale of "all accretions of land not the subject of private ownership, and particularly those accretions near the mouth of the Pascagoula River . . . at the same price as swamp and overflow lands . . ." 1906 Miss. Laws 2919.

⁷⁰ *Money*, 152 Miss. at 27, 118 So. at 359.

⁷¹ Miss. CONST. art IV. § 81. "The Legislature shall never authorize the permanent obstruction of any of the navigable waters of the State. . ." *Id.*

⁷² *Money*, 152 Miss. at 27, 118 So. at 359.

⁷³ *Id.*

tin and *Money* decisions, the United States Supreme Court, in *Illinois Central Railroad v. Illinois*⁷⁴, had occasion to interpret the right of states to alienate public trust lands. The issue in *Illinois Central* concerned a grant by the Illinois legislature of over 1,000 acres of shoreline on Lake Michigan. The United States Supreme Court held the grant invalid under the public trust doctrine, ruling that such a grant would be permissible only if it did not result in public uses being subjected to private interest.⁷⁵

Second, section 81 of the Mississippi Constitution of 1890, which prohibits the permanent obstruction of the navigable waters of the state, was adopted after the *Martin* decision. The court stated that the purpose of this section was to align Mississippi with those states that follow the holding of *Illinois Central*.⁷⁶ The court then cited an earlier decision that interpreted the statute involved in *Money* to be applicable only to rural lands valuable for timber, pasturage, or agriculture.⁷⁷ Relying on this definition, the court construed the statute narrowly to exclude tidelands, which the court classified as water rather than land.⁷⁸

These contrasting opinions could also indicate a change in philosophy regarding the scope of the state's trust duties. The court's language in *Martin* demonstrates a strong conviction that the legislature has an unrestricted right to alienate trust lands to private persons for private purposes. By contrast, the *Money* court indicated that such a divesture by the legislature would be a breach of its duty to the public, even absent section

⁷⁴ 146 U.S. 387 (1892).

⁷⁵ *Id.* at 452-53.

⁷⁶ *Money*, 152 Miss. at 29, 118 So. at 359. "It seems to us that section 81 of the Constitution was adopted by the Constitutional Convention for the purpose of aligning this state with the line of authorities which hold that the state cannot convey in fee such rights to private owners for private purposes. We are satisfied that this section of the Constitution applies to the waters here involved, and to the lands under such waters, and that such waters are regarded as navigable." *Id.*

⁷⁷ *Id.* In *Huber v. Freret*, 135 Miss. 235, 103 So. 3 (1925) the court rejected application of the statute to the grant of land located in the heart of downtown Jackson. *Huber*, 135 Miss. at 239, 103 So. at 4. In doing so the court limited application of tide statute to "those public lands which are usually bought and sold by acreage - in other words, property commonly known as rural lands . . ." *Id.*

⁷⁸ *Id.* at 30, 118 So. at 359-60.

81 of the Mississippi Constitution of 1890. "It is unnecessary to decide whether it would be possible for the state to sell such lands in fee independent of a constitutional restriction. It certainly would be a breach of duty for the legislature to do so

... "79

Thirty years later the court, in *Giles v. City of Biloxi*⁸⁰ displayed another shift in attitude regarding private development of tidelands. Although *Giles* dealt not with the public trust doctrine, but with a provision of the Mississippi constitution prohibiting the granting of state lands to private persons except by general law,⁸¹ the language of the court presages its next public lands alienation case. *Giles* concerned an effort to develop Deer Island, a nearshore barrier island, into a resort. To facilitate such development, the Mississippi legislature, by a local and private law, established the Biloxi Bridge and Park Commission and empowered it to lease and sell certain reclaimed submerged lands around Deer Island. After holding this legislation unconstitutional under Section 90(u), the court stated that it was "keenly aware of the public interest involved and the desirability of developing the island. This decision does not mean that this court will not look upon any future plan for developing Deer Island with as much favor as the constitution and laws of the state permit."⁸²

The court kept its word eight years later in *Treuting v. Bridge and Park Commission*⁸³ when it was called upon to rule upon the ability of the legislature to authorize, pursuant to general legislation, fee simple transfer of title to tidelands. In 1960 the Mississippi legislature passed a statute authorizing coastal municipalities to establish bridge and park commissions who were authorized to purchase islands and submerged lands in the Mississippi Sound.⁸⁴ After purchase, a commission could reclaim and sell them if they were "unnecessary for park or recreational

⁷⁹ *Id.*, 118 So. at 359.

⁸⁰ 237 Miss. 35, 112 So. 2d 815 (1959).

⁸¹ Miss. CONST. art IV, § 90 (u).

⁸² *Giles*, 239 Miss. at 44, 112 So. 2d at 824.

⁸³ 199 So. 2d 627 (Miss. 1967).

⁸⁴ *Id.* at 629.

purposes for the benefit of the public, or for other public use."⁸⁵ Subsequently the state conveyed to the Biloxi Bridge and Park Commission fee simple interest in approximately 150 acres of submerged lands in the Mississippi Sound adjacent to the island.⁸⁶ The Park Commission had already purchased 12 ½ acres of land, with accretions, on the west end of Deer Island.

At issue was the ability of the state to convey fee simple interest in public trust tidelands to private parties for private purposes. In reaching an affirmative answer, the court considered two sub-issues: (1) did the proposed project violate section 81 of the Mississippi Constitution of 1890 prohibiting the obstruction of navigable waters, and (2) did the sale of submerged lands violate the common law public trust doctrine?⁸⁷

As to the "obstruction" issue, the court found that filling of the submerged lands in question would have no tangible effect upon the right of the public to use navigable waters of the state.⁸⁸ In fact, navigation would be aided because existing channels in Biloxi Bay would be widened and deepened to provide the necessary fill material.⁸⁹ Therefore, section 81 was not violated.⁹⁰ This position represented a retreat from an earlier holding of the court that section 81 is applicable to all tidal waters regardless of actual navigability.⁹¹ It is unclear what legal principle this distinction is based upon. The court offhandedly relegated to dicta the holding that the purpose of section 81 was to prohibit the alienation of tidelands for private purposes.⁹² The court's language implies that incremental obstructions will be permitted when overall navigation in the state is furthered.⁹³

⁸⁵ *Id.*

⁸⁶ *Id.* The Biloxi Park Commission intended to undertake a project for development of the island as a means of expansion for the city. The island was to be connected to the mainland by a bridge. Approximately 27% of the island was to be devoted to public uses, and 50 to 53% to residential, commercial and resort development. *Id.* at 630-31.

⁸⁷ *Id.* at 631-33.

⁸⁸ *Id.* at 631.

⁸⁹ *Id.* at 632.

⁹⁰ *Id.* at 632. "The context of section 81 is directed toward free navigation. It has nothing to do with the alienation of mud flats and waters not suitable for navigation in fact, or the sale of submerged lands." *Id.*

⁹¹ *Culley v. Pearl River Indus. Comm'n*, 234 Miss. 788, 108 So. 2d 390 (1959).

⁹² *Treuting*, 199 So. 2d at 632.

⁹³ "The filling of the submerged lands in question will have no tangible effect on the

Next, the court discussed the issue of whether such a sale was in contravention of the public trust doctrine. In upholding the sale, the court found that the legislature was justified in authorizing the sale of these lands to private individuals as "incident" to the overall public interest and purpose.⁹⁴ Because no substantial interference with the original purposes of the trust would occur, the trust was not violated.⁹⁵ "If the totality of the development promotes the public interest in general, the incidental private ownership of individual lots does not negative [sic] the comprehensive public purpose."⁹⁶ The public purposes served by the development, as recognized by the court, were "commerce, tourism, recreation, and accommodation of an expanding population."⁹⁷ The court concluded that the proposed development was not inconsistent with formerly established trust purposes, i.e., navigation, fisheries, and commerce.⁹⁸

Six years later, the court modified the stance it had taken in *Treuting. International Paper v. Mississippi State Highway Department*⁹⁹ arose from the Highway Department's proposed construction of Interstate 10 across property on Lowry Island that International Paper claimed to have acquired by mesne conveyances in 1967.¹⁰⁰ International Paper and its predecessors had paid taxes on the property since 1884, when it was first sold pursuant to an act of the legislature.¹⁰¹ The land in question was subject to the ebb and flow of the tide in 1817 when Mississippi entered the Union. In addition, some of the land had formed by accretion from the floor of the bay. The issue before the court was whether the legislature had authority to convey in fee simple the marshlands and accreted lands on Lowry Island for private benefit.

The court first addressed the issue of accretion. It found the

right of the public in waters of the state for fishing, boating and related endeavors." *Id.*

⁹⁴ *Id.* at 633.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ 271 So. 2d 395 (Miss. 1972).

¹⁰⁰ *Id.* at 397.

¹⁰¹ *Id.* at 396-97.

Guice holding inapplicable because in *Guice* the accreted land was adjacent to the upland owner's property where as in the case at bar the accreted land was noncontiguous.¹⁰² Unable to find authority applicable to the title of noncontiguous fast lands which had emerged from tidal waters, the court decided, with no discussion of its rationale, that such lands were owned and held by the state in trust for the public in the same manner as submerged tidelands.¹⁰³

The court then turned to the ability of the legislature to convey title to private parties. As could be expected, International Paper relied upon *Treuting* to support its claim. But the court, in another philosophical about-face, characterized *Treuting* as an exception to the general rule prohibiting sale of trust lands.¹⁰⁴ Having thus limited the *Treuting* decision to its facts, the court was free to hold the 1884 sale invalid under the line of decisions following *Money*.¹⁰⁵

How can the above cases be reconciled into a coherent state policy regarding the alienation of public trust tidelands? The following principles can be derived from the case law. First, the state is clearly prohibited from selling trust lands to private persons for private purposes. Arguably this principle is the reason that the *Treuting* court had to strain to find a "totality of public purpose" rationale for approving the sale of public lands for what was clearly private development. Second, the state may convey fee simple title to private persons if the conveyance is consistent with the public purposes of the trust and the sale is made pursuant to general legislation.¹⁰⁶ Purposes of the trust have evolved over time to include commerce and navigation,¹⁰⁷ fishing,¹⁰⁸ bathing, swimming, and other recreational activities,¹⁰⁹ and development of mineral resources.¹¹⁰ The legislature

¹⁰² *Id.* at 398.

¹⁰³ *Id.* at 398-99.

¹⁰⁴ *Id.* The court distinguished *Treuting* as being exceptional since it involved special legislation directed to a particular area, and more importantly, the resulting public purpose substantially outweighed the public interest. *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See *supra* notes 87-98 and accompanying text.

¹⁰⁷ *Martin*, 34 Miss. at 37.

¹⁰⁸ *Stewart*, 184 Miss. at 231, 184 So. at 50.

¹⁰⁹ *Trueting*, 199 So. 2d at 632-33.

¹¹⁰ *Id.* at 633.

has expanded these to include the preservation of wetlands in their natural state.¹¹¹ However, because the court has for the most part rejected efforts to privatize public tidelands, case law provides little guidance on how the state can assure such consistency.

One writer has argued that private ownership of public trust lands for private purposes need not be antithetical to public rights in such lands. He therefore questions the court's reluctance to allow divestiture.¹¹² He suggests that the public interest can be protected when public land is sold by imposing a public trust easement on the property.¹¹³ He further advocates that in limited circumstances, such as when land is incapable of public use, it should be subject to sale free of the trust.¹¹⁴ Although his proposal has some logical appeal and has precedent, this outlook ignores one of the most important purposes of the trust — protection of resources contained in public lands. As a matter of policy, private ownership is a poor way to guarantee this protection. Without extensive land-use regulation and enforcement, it is unlikely that a private owner will consistently make decisions concerning property that sufficiently weigh the public's interest. In addition, such regulation is rarely welcomed by private landowners.

A better approach would be to prohibit totally the disposition of public tidelands in fee simple to private parties. The state already has extensive regulatory powers that are well-adapted to accommodating the needs of private parties and the public in coastal resources. The Coastal Wetlands Protection Law¹¹⁵ and accompanying regulations incorporated in the Mississippi Coastal Program¹¹⁶ establish a permit system for certain activities that are detrimental to the wetland ecosystem. The

¹¹¹ MISS. CODE ANN. § 49-27-3 (Supp. 1987).

¹¹² Comment, *The Mississippi Public Trust Doctrine: Private and Public Rights in the Coastal Zone*, 46 MISS. L.J. 84, *passim* (1975).

¹¹³ *Id.* at 111.

¹¹⁴ *Id.* at 112.

¹¹⁵ Coastal Wetlands Protection Law, MISS. CODE ANN. § 49-27-1 (Supp. 1987).

¹¹⁶ Wetlands Management, Mississippi Coastal Program Ch. 8, § 2 (Rev. 1983)(administrative rules, regulations, and procedures adopted to further aims of Coastal Wetlands Protections Law) [hereinafter Wetlands Management Regulations].

law is designed to further a legislatively declared public trust policy of preserving the "natural state of the coastal wetlands and their ecosystems and to prevent the despoliation and destruction of them, except where a specific alteration of specific coastal wetlands would serve a higher public interest in compliance with the public purposes of the public trust in which coastal wetlands are held."¹¹⁷

The Coastal Program was envisioned by its creators as a vehicle for protecting valuable coastal resources without hampering the state's potential for economic growth. This is accomplished by regulating growth away from more fragile coastal resources while encouraging economic development in areas more capable of accommodating it with the least amount of alteration of the wetlands ecosystem. Under the permit review system in the Coastal Program, activities of private parties will be allowed to encroach into public tidelands only so long as the public interest is accommodated.¹¹⁸ It provides private owners a

¹¹⁷ MISS. CODE ANN. § 49-27-3 (Supp. 1987).

¹¹⁸ Wetland Management Regulations, *supra* note 116. The rules and regulations regarding wetlands management were adopted to carry out state policies as announced in Mississippi Code sections 49-27-3 and 57-15-6. Wetlands Management Regulation, *supra* note 116, at Ch. 8 § 2 (I)(A).

It is declared to be public policy of this state to favor the preservation of the natural state of the coastal wetlands and their ecosystems and to prevent the despoliation and destruction of them, except where a specific alteration of specific coastal wetlands would serve a higher public interest in compliance with the public purposes of the public trust in which coastal wetlands are held.

MISS. CODE ANN. § 49-27-3 (Supp. 1987)

In recognition of the Coastal Zone Management Act of 1972, as amended, the [Marine Resources] Council is directed to prepare and implement a coastal program that establishes guidelines and procedures pursuant to the following goals:

(a) To provide for reasonable industrial expansion in the coastal area and to insure the efficient utilization of waterfront industrial sites so that suitable sites are conserved for water dependent industry;

(b) To conserve the resources of the coastal area for this and succeeding generations in accordance with the public policies expressed in sections . . . 49-27-3 . . ., Mississippi Code of 1972; . . .

MISS. CODE ANN. § 57-15-6(1)(Supp. 1987)

In deciding whether or not a permit should be granted authorizing a regulated activity, it is the state's position that "[p]reference is to be given to preserving the coastal wetlands in their natural state, and that the burden of demonstrating the higher public interest in altering wetlands rests with the party proposing the alteration." Wetlands Management Regulations, *supra* note 116, at Ch. 8, § 2(I)(E).

means of using public trust lands without having to obtain fee simple title, while simultaneously protecting the public interest. This obviates the need to transfer ownership to private parties.

PROTECTED PUBLIC AND PRIVATE USES

1. *Common Law*

An uneasy tension exists between public and private uses in protected nearshore waters. In 1904, the court in *Barataria Canning Co. v. Ott*¹¹⁹ had the opportunity to distinguish between the rights of littoral/riparian¹²⁰ owners and the public in natural resources in the waters adjacent to their property.¹²¹ The case involved leasing oyster beds off waterfront property on the Mississippi Sound. Ott, a riparian owner, leased waterfront property to Barataria. Subsequently, the Harrison County Board of Supervisors granted Barataria the right to plant and harvest oysters from the water bottoms adjacent to the leased property. Ott later conveyed the lot to Barataria, with the proviso that Barataria would cancel and surrender the lease and pay Ott \$6,000. The deed reserved in Ott the littoral and aquatic rights appurtenant to the property. The issue before the court was whether this reservation resulted in Ott having a property right in the oysters.

In its opinion, the court stated unequivocally that landowners abutting the Sound possess the same right as the public to fish and gather oysters from waters in front of their property.¹²² Therefore, the right to harvest oysters was not a littoral right. The court then enumerated some rights incident to littoral ownership which include "the privilege of landing his boats, hauling his nets, the gathering of seaweed and shells, and taking sand from the beach between the high and low water marks."¹²³ Next,

¹¹⁹ 84 Miss. 737, 37 So. 121 (1904).

¹²⁰ Riparian owners are those whose land borders on a water course. BLACK'S LAW DICTIONARY 1192 (5th ed. 1979). Littoral owners are those whose property borders on an ocean, sea, or lake. *Id.* at 842. The two terms are often used interchangeably.

¹²¹ *Barataria Canning Co. v. Ott*, 84 Miss. at 752-54, 37 So. at 123-24.

¹²² *Id.* at 752, 37 So. at 123.

¹²³ *Id.* at 752-53, 37 So. at 123. The court noted that some jurisdictions protect, in addition, a right to erect wharves, piers, and bathhouses in the water fronting property. *Id.* The *Martin* court expressly denied such rights as incident to littoral ownership in

the court acknowledged the right of the county to lease to private parties submerged lands for a term of 25 years for the purpose of oyster farming.¹²⁴ The lessee, a non-riparian owner, acquired a vested private property right in the oysters that he "banked, planted, and cultivated" within the lease area.¹²⁵ Because this right arose from a legislative rather than common law littoral power, Ott could not acquire the right to the oysters through reservation in the deed.

The public, including the littoral owner, presumably retained common rights such as fishing and navigation in the leased area, so long as doing so did not unreasonably interfere with the lessee's lawfully conducted oyster business.¹²⁶

Fifty years elapsed before the court again dealt with littoral rights. *Crary v. State Highway Commission*¹²⁷ involved property that Crary owned adjacent to the Bay of St. Louis in the Mississippi Sound. By statute, he had been granted the privilege of planting and gathering oysters and erecting bathhouses and other structures in front of his land for a distance of 500 yards from the low water mark.¹²⁸ Later the state constructed a bridge across the Bay of St. Louis. As a result, Crary was unable to exercise these privileges. He claimed that such action amounted to a taking of his property for public use without just compensation.¹²⁹ The state claimed that since it had merely imposed an additional public use on property already set aside for a public purpose no unconstitutional taking had occurred.¹³⁰

The court concurred with the state's position, holding that

Mississippi. *Martin*, 34 Miss. at 36. The court also intimated that littoral rights are so inextricably bound to the property that they are legally incapable of separation. *Barataria Canning Co.*, 84 Miss. at 753, 37 So. at 123.

¹²⁴ *Barataria Canning Co.*, 84 Miss. at 753-54, 37 So. at 124.

¹²⁵ *Id.* at 754, 37 So. at 124.

¹²⁶ "They [littoral owners] had the right to use the beach and water front of their property in any manner which would not interfere with the business of their lessee carried on upon the leased premises." *Id.*

¹²⁷ 219 Miss. 284, 68 So. 2d 468 (1954).

¹²⁸ *Id.* at 287-88, 68 So. 2d at 468.

¹²⁹ *Id.* at 288, 68 So. 2d at 469. "Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law . . ." MISS. CONST. art. III, § 17.

¹³⁰ *Crary*, 219 Miss. at 289, 68 So. 2d at 469.

the state simply granted a revocable license.¹³¹ To hold otherwise, the court said, would be a violation of the state's constitutional and common law public trust responsibilities.¹³² Because Crary held only a revocable license, no private property was taken. Therefore, the right to farm oysters and erect structures in waters adjacent to one's property is not a littoral right. Even though the rights at issue in this case were granted by statute, the court's language is sufficiently broad to include other littoral rights that attached at common law.

The damage sustained results not from a taking of the riparian owners' privileges in the Bay, but from the lawful exercise of the state's power to which this property has always been subject, and which has always been owned by the state as trustee for the people. It is this primary and superior title of the state as trustee for the people which frees the state from any liability to appellants in constructing this bridge. When the state implemented its title and responsibilities as trustee, for the public, by constructing this bridge, it was exercising its paramount power and superior title in the waters of and soil under the Bay of St. Louis, rather than taking the private property of anyone.¹³³

Later that same year, in *Xidis v. City of Gulfport*,¹³⁴ the court dealt with the extent of state power to authorize a project that obstructed a littoral owner's access to water.¹³⁵ Xidis owned and operated a restaurant on U.S. Highway 90 bordering the Mississippi Sound. He had spent large sums of money advertising the restaurant as being on the beach. However, the city of Gulfport's development of a small craft commercial harbor in front of his restaurant as part of an expansion plan for the Port of Gulfport allegedly obstructed the restaurant's waterfront view, as well as deprived him of other littoral rights such as ac-

¹³¹ *Id.* at 293, 68 So. 2d at 471. "Code Sec. 6066, when construed consistently with these decisions (*Money* and *Stewart*) and Const. sec. 81, simply granted to appellants a revocable license of the privilege to plant and gather oysters and to build bathhouses and other structures." *Id.* (parenthetical added).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 221 Miss. 79, 72 So. 2d 153 (1954).

¹³⁵ *Id.* at 91, 72 So. 2d at 158.

cess to the water, boating, bathing, and fishing. He brought suit, claiming an illegal taking of his littoral property rights.¹³⁶

First, the court ruled that the city of Gulfport was acting under properly delegated legislative authority when it approved and began construction of the harbor.¹³⁷ The city therefore possessed the same rights as the state as trustee of the submerged lands in question.¹³⁸ Citing *Crary*, the court held that rights of riparian owners in public trust tidelands are subordinate to rights of the state.¹³⁹ Because the commercial harbor was a legitimate additional use of public trust lands, designed to benefit the public, no taking occurred.¹⁴⁰ The court indicated, however, that future erection of commercial structures in the harbor could result in actionable injury to Xidis.¹⁴¹ Arguably, then, the state is limited in uses of public trust lands that cause detriment to an adjacent upland owner. Unfortunately, the court gave no guidance on what must be considered in balancing public and private rights.

Eighteen years later, the court in its *Guice* decision took a strong stand in favor of littoral rights of a property owner. As mentioned earlier, *Guice* arose over public use of beach property in Harrison County.¹⁴² The beach had been constructed with the use of public funds and was intended for public use. The Guices claimed, however, that, as a result of the doctrine of artificial accretion, the beach belonged to them. In its opinion, the court recognized littoral property rights of navigation, boating, swimming, fishing, exclusive access to the water, and the right to accretions to upland property.¹⁴³ It intimated that state actions which would result in loss of one of these rights would be a tak-

¹³⁶ *Id.* at 93, 72 So. 2d at 159. The court rejected that argument on the basis that commercial harbor use was important to the port and therefore was an aid to navigation rather than an obstruction of navigable waters, and that "[t]he right of access of a riparian owner may not prevail as against the state or its grantee in the exercise of the lawful use or purpose . . ." *Id.* at 90-91, 72 So. 2d at 158.

¹³⁷ *Id.* at 91, 72 So. 2d at 158.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 93, 72 So. 2d at 159.

¹⁴¹ *Id.* at 95, 72 So. 2d at 160.

¹⁴² *Guice*, 244 Miss. at 100-03, 140 So. 2d at 839-40.

¹⁴³ *Id.* at 106-07, 140 So. 2d at 842.

ing of private property, requiring the payment of just compensation.¹⁴⁴

The court distinguished *Crary* and *Xidis* primarily on the grounds that the plaintiffs in those cases did not seek damages for interference with access to the water.¹⁴⁵ This distinction, although not persuasive, is not surprising. It should be recognized that the issue in the *Guice* case was as much civil rights as public trust. Because it arose over the use of Harrison County beaches by blacks at a time when the civil rights movement was in its infancy, it is arguable that the result is also a reflection of the segregationist mores of the time.

Five years later in *Treuting* the court reiterated its stand in *Guice*. "Moreover, there is a private trust associated with the submerged bottoms running in favor of the upland owner whose lands border the line marked by the mean high tide line."¹⁴⁶ According to the court, this private trust, presumably consonant with common law littoral rights, includes an unobstructed view and access to the water.¹⁴⁷ The precedential value of this case is questionable, however. First, the court's statements on the public trust are dicta. Second, as stated earlier, the case was restricted to its facts by the court in *International Paper*.

As can be seen from the above discussion, the Mississippi Supreme Court has not developed a consistent position on the relative common law rights of public and private citizens in their use of nearshore public trust waters. The Mississippi legislature, however, has attempted to reconcile public and private interests in this area. These will now be examined.

2. Statutory

A national movement emerged in the early 1970s to reduce the growing loss of coastal wetlands to development pressures. Congress responded with passage of the Coastal Zone Management Act of 1972,¹⁴⁸ which provides coastal states with incen-

¹⁴⁴ *Id.* at 107-08, 140 So. 2d at 842.

¹⁴⁵ *Id.* at 109, 140 So. 2d at 843.

¹⁴⁶ *Treuting*, 199 So. 2d at 633.

¹⁴⁷ *Id.* at 632-33 (quoting *Hayes v. Bowman*, 91 So. 2d 795, 799 (Fla. 1957)).

¹⁴⁸ Coastal Zone Management Act, 16 U.S.C. § 1451 (1987).

tives to manage their coastal areas through implementation of federally approved coastal zone management programs. During this period, the Mississippi legislature passed the Coastal Wetlands Protection Law of 1973.¹⁴⁹ The Act seeks to protect coastal wetlands by requiring permits for certain activities. Coastal wetlands are defined in the law to include all public trust tidelands located within Harrison, Hancock and Jackson counties.¹⁵⁰

The public policy of the Act is to preserve wetlands, except when a specific alteration would serve a higher public interest.¹⁵¹ The regulatory system established to carry out this policy is contained in the Mississippi Coastal Program.¹⁵² It delineates a procedure for issuing permits for the following activities: (1) dredging any type of material from wetlands; (2) filling any kind of material either directly or indirectly, on or in the wetlands; (3) killing or materially damaging any flora or fauna on or in any coastal wetlands; (4) erecting on coastal wetlands any structure that materially affects the ebb and flow of the tide; and (5) erecting any structure on sites suitable for water-dependent industry.¹⁵³ In addition to identifying regulated activities, the Coastal Program includes a wetlands use plan, which divides coastal wetlands into five types of use districts: commercial, industrial, general, preservation, and special use. Within each district, only certain types of activities are eligible for a wetlands permit.¹⁵⁴

Permits are issued by the Bureau of Marine Resources, following approval by the Commission on Wildlife Conservation.¹⁵⁵ In considering an application, the Bureau examines several aspects of a project. First, the proposed project's effect on the public interest is evaluated by reviewing applicable legislative or

¹⁴⁹ MISS. CODE ANN. § 49-27-3 (Supp. 1987).

¹⁵⁰ MISS. CODE ANN. § 49-27-5(a) (Supp. 1987).

¹⁵¹ MISS. CODE ANN. § 49-27-3 (Supp. 1987).

¹⁵² See *supra* note 118.

¹⁵³ MISS. CODE ANN. § 49-27-5 (Supp. 1987).

¹⁵⁴ Wetlands Management Regulations, *supra* note 116 at Ch. 8, § 2(IV).

¹⁵⁵ MISS. CODE ANN. § 57-15-6 (Supp. 1987). The Coastal Wetlands Protection Law and Coastal Program are administered by the Mississippi Commission on Wildlife Conservation through the Bureau of Marine Resources, a subdivision of the Department of Wildlife Conservation. Where the Bureau is referred to hereinafter, it should be understood to include the authority of the Commission, unless the context clearly indicates otherwise.

judicial definitions of public interest. Also reviewed are applicable coastal use and special management area plans, precedent-setting effects of the proposed activity, the national interest, and public comments. Second, the degree of ecosystem alteration is assessed by analyzing reasonably anticipated, direct and indirect effects of the project on the ecosystem. Also evaluated are the extent to which adverse impacts can be avoided through modifications, and the extent to which natural scenic qualities will be preserved. Third, economic benefits of the proposed project are evaluated by examining the extent to which adverse impacts can be avoided through modifications, safeguards or other conditions; the availability of alternative sites; and the extent to which a waterfront location is necessary for the proposed use.¹⁵⁶

When the Mississippi legislature passed the Wetlands Law, it exempted certain activities, areas, and entities from all but the public policy provision of the statute.¹⁵⁷ Included in these exemptions are, among others, activities that occur within five feet of private property; recreational activities that do not adversely affect wetlands; shellfishing when otherwise legally permitted; normal maintenance and repair of bulkheads, piers, and roads; and exercise of riparian rights by a landowner.¹⁵⁸ Each of these exemptions involves in some way littoral rights of upland owners.

This provision has been a source of confusion and some controversy as some have claimed that it constitutes a blanket exemption from the Act.¹⁵⁹ The Bureau has interpreted this section to remove the exempted entities and activities from the formal permit process only. According to the procedure set out in the Coastal Program, the Bureau must be notified of any exempted activities which would otherwise be regulated. Within

¹⁵⁶ In cases where unauthorized work affecting wetlands occurs, an after-the-fact permit may be applied for. MISS. CODE ANN. § 49-27-51 (Supp. 1987). The Bureau must issue such a permit if the work was conducted in accordance with the public policy of the Wetlands Law and the pertinent provisions of the Coastal Program. MISS. CODE ANN. § 49-27-51 (Supp. 1987). This determination is made by utilizing the same factors used in reviewing other permits. *Id.*

¹⁵⁷ MISS. CODE ANN. § 49-27-7 (Supp. 1987).

¹⁵⁸ *Id.*

¹⁵⁹ C. JARMAN & C. MILLS, A LEGAL ANALYSIS OF MISSISSIPPI'S COASTAL WETLANDS MANAGEMENT PROGRAM 16-23 (1984).

thirty days of such notification, the Bureau is required to make a finding that the proposed activity is in fact excluded and is in accordance with the public policy of preserving wetlands. The analysis used by the Bureau in making this decision is the same as for a permitted activity.¹⁶⁰ Absent such a finding, the project cannot go forward.¹⁶¹

How, then, do the Coastal Wetlands Protection Law and Coastal Program affect the legal status of common law littoral rights? As can be seen from the above discussion, the court has recognized littoral rights. These include landing boats, hauling nets, gathering seaweed and shells, and taking sand from the beach between the high and low water mark. In addition, a littoral owner has the right to an unobstructed view, access to the water, and use of the water for navigation, boating, swimming, and fishing. Finally, accretions to upland property are granted to the owner as littoral rights.¹⁶² Note, though, that the broad public policy statement of the Act creates a presumption that favors public rights over private rights in wetlands when the conflict would result in damage to or destruction of tidelands. Such a presumption does not clearly exist at common law.¹⁶³

Although private littoral rights are subordinate to public rights, the law and accompanying regulations recognize and accommodate these rights by exempting some activities associated with them from the formal permitting process. Arguably this language is broad enough to include common law as well as statutorily granted littoral rights. In addition, it expands an upland owner's property rights to include the construction and maintenance of piers, bathhouses, and similar structures that don't significantly interfere with the flow of the tides. The law appears to have no affect on the exercise of littoral rights that do not alter wetlands, such as boating, swimming, fishing, and viewing the water. In addition, it does not change the law with respect to granting accreted lands to the upland owner as the law applies only in publicly-owned wetlands. Other rights, to the extent that

¹⁶⁰ Wetlands Management Regulations, *supra* note 116 at Ch. 8, § 2(II)c.

¹⁶¹ *Id.*

¹⁶² See *supra* notes 34-45 and accompanying text.

¹⁶³ See *supra* notes 120-147 and accompanying text.

they adversely affect tidelands, are now subject to the review procedure established in the Coastal Program.

CONCLUSION

The public trust doctrine in Mississippi continues to be a fluid one. Because of the erratic nature of the court's rulings, it is difficult to discern a coherent and consistent policy behind the doctrine. One reason for this is that the court has never expressed a clear sense of purpose for the public trust concept.

As stated earlier, the public trust doctrine developed originally to preserve in the public rights to fishing and navigation in tidal waters.¹⁶⁴ Since then, the goals of the doctrine have broadened into a duty to manage all natural resources included in the trust in a manner that protects the public's right to use them.¹⁶⁵ In other words, the trust mandates an ecological ethic in coastal decision-making that maintains an environmentally sound tidelands ecosystem. The legislature has codified this duty in the Coastal Wetlands Protection Law which is based upon a principle of preserving coastal wetlands in their natural state.¹⁶⁶

Keeping this duty in mind, the following principles should evolve in Mississippi's public trust jurisprudence. First, the state should be prohibited from granting fee simple interest in public trust lands to private parties. Second, public trust lands should remain the property of the state, even if they lose their character as wetlands. Third, exclusive private use of public trust lands should be viewed with skepticism, and allowed only when the likelihood of conflict with public use of the land is minimal and the environment will not be significantly degraded by the private use. This includes decisions regarding upland activities that have a high degree of potential for degrading the tideland environment. Fourth, sufficient provisions should be made to guarantee public access to tidelands and their resources.

Such an interpretation of the public trust doctrine is consistent with the goals expressed by the Mississippi legislature in

¹⁶⁴ See *supra* notes 120-126 and accompanying text.

¹⁶⁵ Jarmon, *The Public Trust Doctrine in the Exclusive Economic Zone*, 65 OR. L. REV. 1, 26 (1986).

¹⁶⁶ MISS. CODE ANN. § 49-27-3 (Supp. 1987).

the Coastal Wetlands Protection Law and Coastal Program to balance private development with the need to protect the resources of the coastal environment.

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