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# DOCKOMINIUMS: AN EXPANSION OF RIPARIAN RIGHTS THAT VIOLATES THE PUBLIC TRUST DOCTRINE

*Mark Cheung\**

Two thousand miles I roam,  
Just to make this dock my home . . . .

Otis Redding & Steve Cropper  
(The Dock of the Bay)

## I. INTRODUCTION

The recreational boating system may well be headed toward a system of individual ownership of slip spaces. Just as rental apartments can be converted for sale as condominiums, rental slip spaces can be converted for sale as dockominiums. The dockominium concept, a lucrative response to the demands of the boating public, though, may find very little sanction in the law.

The recent development of selling boat slip spaces has propelled the dockominium concept toward a collision course with the riparian rights and public trusts doctrines. The current trend of increasing demand for dock space, coupled with a reduction in publicly available space and a less than parallel increase in marinas,<sup>1</sup> casts light on the dockominium's conflict with the common law. Such a conflict is brought to light by the apparent approval of the federal government through the issuance, by the United States Army Corps of Engineers

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<sup>1</sup> Behar, *Dockbroker Ed*, *Forbes*, September 21, 1987, at 166-68.

(Corps), of permits for marinas and piers designated for dockminium-type ownership.<sup>2</sup>

The dockminium concept is premised on the notion that individuals may own exclusive control of the water within a boat slip space.<sup>3</sup> A dockminium is an individual boat slip space,<sup>4</sup> or finger float slips,<sup>5</sup> that a marina sells or leases long-term to an individual boater. Each slip space services, or moors, one boat. The concept is analogous to the conversion of an apartment building to condominiums.<sup>6</sup> Some commercial marinas either sell part of their slip space inventory as dockminiums,<sup>7</sup> or sell all of their slip spaces, while retaining ownership of the upland facility for providing boating services.<sup>8</sup> In some instances, the marinas sell the entire facility to a condominium developer, who then privatizes the slip spaces and eliminates the boatyard.<sup>9</sup> Such dockminium transformations are essentially a creative

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<sup>2</sup> The United States Army Corps of Engineers (Corps) is authorized under 33 U.S.C. § 403 (1982), a permitting provision, to regulate docks and other obstructions of the waterways. Section 403 is the codification of § 10 of the Rivers and Harbors Appropriations Act of 1899 (Act of March 3, 1899, ch. 425, 30 Stat. 1121). Permits issued for docks and marinas are commonly referred to as section 10 permits.

<sup>3</sup> Reis, *Dockminiums*, in CONFERENCE ON GULF & SOUTH ATLANTIC FISHERIES: LAW & POLICY 179, 180 (1987) (published proceedings of a conference held in New Orleans on March 18–20, 1987) [hereinafter Reis, NEW ORLEANS CONFERENCE]. In operation, the dockminium concept involves an expansion of the riparian rights doctrine to a unique usage, and that usage implicates the public trust. This Comment assumes that riparian dockminium owners, possessing no upland interest, value their riparian rights solely for the accompanying right to exclude other boaters from using their dockminium space.

<sup>4</sup> "Slip spaces" or "slips" refer generally to spaces, at docks or piers, used by boats for mooring purposes. This is analogous to parking spaces for automobiles.

<sup>5</sup> Most marina docks take the form of floating piers. A floating pier is a "pier built to float on the surface of water." BALLENTINE'S LAW DICTIONARY 481 (3d ed. 1969). Most piers are designed with finger-like perpendicular extensions. Such structural projections are commonly called finger floats, piers, or slips. The design creates U-shaped slip spaces. The term "finger pier" was used, but not defined, by the court in *Yachting Arcade v. Riverwalk Condominium Ass'n*, 500 So. 2d 202, 203 (Fla. Ct. App. 1986).

<sup>6</sup> For a discussion of condominium conversions, see Note, *Condominium Conversion Legislation: Limitation on Use or Deprivation?—A Re-examination*, 15 NEW ENG. L. REV. 815 (1980).

<sup>7</sup> Some marina operators opt to convert some of the slips into dockminiums. Thus, the marina can still operate as a full service marina, capable of even accommodating transient boaters. Reis, NEW ORLEANS CONFERENCE, *supra* note 3, at 183–87.

<sup>8</sup> See *id.* Some marinas may convert all available slip spaces into dockminiums. Such marinas may retain the upland facilities for servicing the dockminium owners. Because the completed conversion fixes the clientele base, the upland facilities can be reduced to only maintenance capabilities and instead there would be upland space available for introducing social services such as a club and lounge.

<sup>9</sup> The boat slip in the condominium project would be allocated to the owners of the upland condominium units.

business effort to meet boaters' demands for water access and to maximize economic profit in the process.<sup>10</sup>

The initial analysis suggests that the Corps should not be approving the dockominium concept consistent with a proper consideration of the public interest.<sup>11</sup> The principles underlying the doctrines of public trust and riparian rights, however, appear to preclude the claim of exclusivity in the water that is basic to the dockominium concept. While the two doctrines are established in the *jus corpus*, the dockominium is merely a recent economic development and its legality has not been extensively challenged.<sup>12</sup> The dockominium is a concept, not a legal construct, that merely refers to a form of individual ownership interest in boat slip space.<sup>13</sup> Therefore, in light of the dockominium's novelty, the critical inquiry is whether the dockominium concept is a permissible expansion of the riparian rights doctrine that is consistent with the public trust doctrine and that survives a regulatory, public interest analysis.

The proliferation of dockominium conversions and developments is due primarily to an increased demand for access to the nation's waters.<sup>14</sup> Millions of people participate in boating and sport fishing in coastal waters, thus increasing the demand for small-boat harbors and marinas.<sup>15</sup> Dockominium proliferation is further encouraged by the financial attractiveness of the dockominium concept.<sup>16</sup> Thus,

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<sup>10</sup> Reis, NEW ORLEANS CONFERENCE, *supra* note 3, at 181-83.

<sup>11</sup> The Corps must conduct a public interest review when considering applications for section 10 permits. 33 C.F.R. § 320.4(a) (1987); *see infra* notes 144-53 and accompanying text.

<sup>12</sup> *See* Matthews v. United States, 526 F. Supp. 993 (M.D. Ga. 1981), *aff'd in part and rev'd in part*, 713 F.2d 677 (11th Cir. 1983) (only known reported case concerning a dockominium permitted by the Corps).

<sup>13</sup> Reis, NEW ORLEANS CONFERENCE, *supra* note 3, at 180.

<sup>14</sup> *See* L.A. TECLAFF, WATER LAW IN HISTORICAL PERSPECTIVE 271-73, 291 (1985).

<sup>15</sup> *Id.* at 291. Although waterfront properties are generally valued for their recreational purposes, coastal waterfronts tend to be more desirable than those in the interior. *Id.* A federal district court has recognized that recreation and fishing are beneficial uses of water. *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 883 (D. Nev. 1980), *aff'd in part and vacated in part*, 697 F.2d 851 (9th Cir.), *cert. denied*, 464 U.S. 863 (1983); *see also* McClellan v. Jantzen, 26 Ariz. App. 223, 547 P.2d 494, 496 (1976). Thus, some coastal marine economies are called upon to meet a regional and even national recreational demand, in addition to a local one.

<sup>16</sup> In some New York City area marinas, a 32-foot boat slip dockominium may cost \$44,500, up from \$17,500 two years ago. Geist, 'Dockominium': A Bronx Haven, For \$63,000 or So, N.Y. Times, June 24, 1987 at B1, col. 1. Likewise, a 42-foot dockominium is around \$63,000, up from \$31,000 two years ago. *Id.* Nationally, slipspace prices average at least \$1000 per foot and are currently rising. Behar, *supra* note 1, at 166-68; *see* Fisher, *Dockominiums*, N.Y. Times, September 20, 1987, § 3, at 1, col. 1. This spiralling of the dockominium values has been triggered by annual increases in boats versus decreases in marina facilities, and by

the emergence of the dockominium adds to the problem of increasing scarcity in the amount of dock spaces and full service boatyards.<sup>17</sup>

The dockominium concept of private ownership of individual docking units, or slips, takes on different legal forms, depending on the state jurisdiction.<sup>18</sup> In some jurisdictions, such as Connecticut, the dockominium transaction involves the transfer of riparian rights,<sup>19</sup> separating riparian rights from upland rights.<sup>20</sup> In other jurisdictions, such as Massachusetts, where the language of the condominium laws is expressly limited to land-based residential condominiums, developers have avoided the potential legal confrontation simply by opting for lease arrangements, thus avoiding condominium type conveyances.<sup>21</sup>

The dockominium thus involves the interaction of traditional condominium law, the riparian rights doctrine, and the public trust doctrine. Regardless of the technical format used to establish the dockominium, the arrangement intends to provide what amounts to an exclusive property interest in the water.<sup>22</sup> Water, however, is a resource held in trust by the government for the use and benefit of

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a growing acknowledgment that dockominiums present a considerable investment potential. See Geist, *supra*.

<sup>17</sup> Dock spaces have not been increasing at a sufficient rate to meet the demands of a rapidly growing number of boat owners. Interviews with Brian E. Valiton, Case Handling Specialist, U.S. Army Corps of Engineers, New England Division, Waltham, Massachusetts (1987-1988) [hereinafter Valiton Interviews]. Approximately 700,000 new pleasure boats were launched in the United States in 1986 with at least ten percent of them large enough to need a slipspace, while the number of marinas declined three percent in the same year. Behar, *supra* note 1, at 166.

<sup>18</sup> Brian E. Valiton, Internal memorandum of the Corps of Engineers, para. 2 (CENED-OD-R-31, subject: "Issues Relating to Dockominium Project, Either New or as Conversion of Existing Marinas," length: 2 pages) (October 6, 1987) (on file with author); Reis, NEW ORLEANS CONFERENCE, *supra* note 3, at 194-97.

<sup>19</sup> See Buck, *Drafting Dockominium Documents*, in NATIONAL DOCKOMINIUM CONFERENCE: THE OPPORTUNITIES & PROBLEMS (1987) (published proceedings of a conference held in New Haven, Connecticut on August 25-26, 1987) [hereinafter NEW HAVEN CONFERENCE]; Reis, *Dockominiums Are Legally Allowed*, in NEW HAVEN CONFERENCE, *supra*, at 132.

<sup>20</sup> A riparian proprietor is one who owns land (the upland) bordering on a natural watercourse and has certain rights (the riparian rights) to use the water that flows by such an upland property. See CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 299 (1962). Under some state jurisdictions, the riparian right to use or access the water flow may be severed or alienated from the upland by conveyance or lease contract.

<sup>21</sup> In Massachusetts, many marinas provide dockominiums under a long-term lease arrangement. Such lease terms may range up to ninety-nine years. (Marketing brochures offering such slip spaces are on file with author.)

<sup>22</sup> See generally text accompanying *infra* notes 28-33.

the general public.<sup>23</sup> In that light, the dockominium concept portrays a confrontation between the private claim in the boat slip space and the public interests in the water. Thus, the significant legal issue posed by the dockominium is whether the concept is a permissible hybrid of these settled legal doctrines.

This Comment discusses the legitimacy of dockominiums by examining existing water rights laws and describing how laws have been manipulated to allow for the emergence of the dockominium. The second section of this Comment discusses the settled doctrines of public trust and riparian rights, and the role of the Corps in respect to the dockominium. The third section considers whether the dockominium concept is consistent with the doctrines of riparian rights and public trust and whether the Corps should issue permits for dockominium structures.

This Comment concludes that the dockominium, although it does not violate the riparian rights doctrine, it does violate the public trust doctrine. The dockominium concept, despite its creative manipulation of riparian rights, does not adversely impact water quality, quantity, or flow, and thus does not violate the riparian rights doctrine. The dockominium violates the public trust by impeding the public's full access to the waterways and by creating a private claim of ownership upon water owned by the public. Because the dockominium concept offends the public trust doctrine, the Corps must weigh this adverse impact against any public benefits that a particular dockominium development may confer. In most instances, this inquiry should lead the Corps to conclude that the dockominium is an unacceptable burden on the public trust.

## II. THE NATURE OF THE DOCKOMINIUM AND ITS EFFECT UPON THE PUBLIC TRUST AND RIPARIAN RIGHTS DOCTRINES

The dockominium concept relies on the conveyance of riparian rights.<sup>24</sup> The riparian owner's most significant right is the right to use the water.<sup>25</sup> Here, the right is exercised by mooring a boat in

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<sup>23</sup> See *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *infra* notes 49-56 and accompanying text.

<sup>24</sup> Reis, NEW ORLEANS CONFERENCE, *supra* note 3, at 187 ("The interest acquired [for the dockominium] is the interest in the outshore area represented by the slip space."); Nixon, *Challenges to the Public Trust Doctrine*, in NEW HAVEN CONFERENCE, *supra* note 19, at 118-19.

<sup>25</sup> See 1A G.W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 273 (1980).

the slip space. For the purposes of creating a dockominium facility, riparian rights are subdivided and conveyed separately, consistent with the sizes of the slip spaces, which then constitute the separate dockominium units. Such a transaction is, in most instances, based on the severability of riparian and upland rights.<sup>26</sup> The transaction is thus intended to convey a fixed parcel of riparian rights in the form of a dockominium unit.<sup>27</sup> The riparian rights are thus subdivided and conveyed separately, consistent with the sizes of the slip spaces, which then constitute the separate dockominium units.

Riparian rights conveyancing is the preferred, and logical, vehicle for the dockominium concept, because the concept seeks to make ownership of each unit exclusive.<sup>28</sup> Ownership of the riparian rights within the dockominium unit is designed to provide the owner with a power to exclude others, or at the very least, to provide the owner a preferred right to use the slip. This exclusivity provides unit owners with what is hoped to be an exclusive property interest. The desire for exclusivity is understandable in light of the usually significant financial investment required for the right to place a boat in the unit.<sup>29</sup>

Alienability is the riparian rights attribute that provides the flexibility and convenience needed to facilitate the creation of most dockominium complexes.<sup>30</sup> When the riparian rights are alienable from the upland, dockominium purchasers need not buy the adjoining land. Such riparian rights are alienated from the upland and subdivided to conform to the configuration of the actual slip space.<sup>31</sup> Dockominium developers, in

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<sup>26</sup> Most jurisdictions permit the riparian owners to sever and convey away separately these riparian rights from the other traditional land ownership rights. *See infra* text accompanying notes 125-27. Therefore, X may own the riparian upland while Y may own the riparian rights to the water fronting X's upland property.

<sup>27</sup> *See* Appendix.

<sup>28</sup> Owners of riparian rights possess preferred rights to the use of the waterflow and of the water itself. *Tyler v. Wilkinson*, 24 F. Cas. 472 (D. R.I. 1827) (No. 14,312) (Story, Circuit Justice). In light of the water rights that the riparian rights doctrine confers upon the riparian owners, the dockominium concept finds its genesis in the doctrine. *Compare infra* notes 32-33.

<sup>29</sup> *See supra* note 16 for a sampling of dockominium prices.

<sup>30</sup> *Simons v. French*, 25 Conn. 346, 352 (1856); *Williams v. Skyline Dev. Corp.*, 265 Md. 130, 155-56, 288 A.2d 333, 348 (1972). The subdivision of riparian rights is the better method of creating dockominiums. The two alternative means, in subdividing either the riparian upland or the dock structure, do not provide the adequate water rights conveyances for the dockominium concept. *See infra* text accompanying notes 121-26.

<sup>31</sup> *See* Appendix.

the most basic form of a dockominium transaction, convey such subdivided riparian rights parcels to purchasers. The transaction involves no conveyance of the dock structure,<sup>32</sup> and rarely the upland.<sup>33</sup>

The creation of dockominium units is facilitated in most jurisdictions by state condominium law. In those states that adopted flexible condominium statutes, the statutory language can be construed to

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<sup>32</sup> The legitimacy of the dockominium conveyance would not be enhanced by conveying the physical dock structure. Conveyance of the dock structure as the dockominium unit, although initially tempting, does not carry an exclusive right to the water. See THOMPSON, *supra* note 25, § 274, at 454 (the public possesses the right to enjoy the use of the water and the surface water of navigable waters where title to the submerged bed is in the state under the public trust theory). In effect, owning a portion of the dock amounts to no more than ownership of personality, with no appurtenant rights to the water. If the unit owners possess no exclusive property interest in the unit space itself, then they cannot prevent others from entering and occupying the water within the unit. The dockominium concept, as arranged by riparian rights subdivisions, assumes that there can be private ownership in the water lying within the slipspace. See Appendix. *But see* Shively v. Bowlby, 152 U.S. 1, 57 (1894) (title in the water belongs with the sovereign). If so, ownership in the water would entitle the owner to exclude. By contrast, ownership in the dock structure provides no such exclusive privileges in the water. Owning just the structure without anything more would defeat the purpose of owning a dockominium unit.

<sup>33</sup> The dockominium conveyance is not fatally defective although it does not involve the transfer of fee interests in real estate. *Simons v. French*, 25 Conn. at 351-54 (riparian rights may be conveyed separately from the riparian upland). The dockominium conveyance need not, and should not, require subdivision of the upland. Subdivision of riparian upland, alone, does not provide the desired result of divided riparian rights. Essentially, the upland subdivision does not eliminate the need to further divide the riparian rights to fit the design of the dockominium configuration. Thus, the added transaction of subdividing the upland is both inefficient and ineffective by itself.

As an added problem, subdivision of the upland may produce subdivided tracts that lose physical contact with the water. Such tracts would be land-locked. In some states, an inland tract that loses contact with the water upon subdivision loses its riparian attributes solely because of its separation from the water. *Murphy Slough Ass'n v. Avila*, 27 Cal. App. 3d 649, 657-58, 104 Cal. Rptr. 136, 142-43 (1972); *Yearsly v. Cater*, 149 Wash. 285, 288, 270 P. 804, 805 (1928); *Rancho Santa Margarita v. Vail*, 11 Cal. 2d 501, 528-29, 81 P.2d 533, 547 (1938) (land is riparian only if it is contiguous to the water; is part of the smallest tract held under one title with the riparian rights intact, and is within the watershed of the waterway); *Hudson v. West*, 47 Cal. 2d 823, 829, 306 P.2d 807, 809-10 (1957); see THOMPSON, *supra* note 25, § 275, at 461. The inutility of using the upland as the primary basis for the dockominium conveyance demonstrates that the dockominium favors a conveyance of riparian rights, and not of upland property.

Ownership of the riparian uplands, moreover, is not generally a requisite for ownership of the riparian rights. See *Mianus Realty Co. v. Greenway*, 151 Conn. 128, 131-32, 193 A.2d 713, 715 (1963). Most jurisdictions permit separate ownership of the upland and of the riparian rights arising from that upland. See, e.g., *Simons v. French*, 25 Conn. at 352; *Skyline Dev. Corp.*, 265 Md. at 155-56, 288 A.2d at 348. In such situations, the riparian rights are alienated or separated from the land.



allow for the creation of the dockominium concept.<sup>34</sup> For instance, the language of the Connecticut statute expressly allows for the creation of condominiums from "spaces . . . filled with air or water."<sup>35</sup> Thus, developers use condominium or co-ownership statutes to subdivide riparian rights into parcels and sell them as dockominiums.

By contrast, a dockominium cannot be created under the Massachusetts condominium statute.<sup>36</sup> The Massachusetts legislation speaks of "condominium" and "unit" with reference to "rooms," "buildings," or "land."<sup>37</sup> The Massachusetts language makes it virtually impossible to interpret the statute to refer to the creation of dockominiums.<sup>38</sup>

In those states that have enacted condominium statutes strictly and narrowly applicable only to the traditional land-based condominium,<sup>39</sup> dockominium developers resort to the use of long-term leases to effect the practical equivalent of a dockominium.<sup>40</sup> Stressing function over form, the long-term leasing of a boat slip is tantamount to the actual conveyance of fee interests in subdivided riparian rights, as is permitted in states with permissive condominium statutes.<sup>41</sup>

The dockominium is conceptually similar to the condominium because both involve the division and co-ownership of an asset previously owned by a single entity. As condominiums are tenant-owned apartments, dockominiums are user-owned boat slip spaces. The condominium developers divide and convey fee simple interests in real estate<sup>42</sup> that they own subject to nothing but the state's police

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<sup>34</sup> "Real property" means any leasehold or other estate or interest in, over, or under land . . . [and] includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water." CONN. GEN. STAT. ANN. § 47-202(26) (West 1986). Moreover, dwelling and recreation are considered to be residential purposes. *Id.* § 47-202(27). Connecticut's condominium statute is consistent with the Uniform Common Interest Ownership Act, 7 U.L.A. 237-400 (1985 & Supp. 1988) (adopted by Alaska, Connecticut, and West Virginia).

<sup>35</sup> CONN. GEN. STAT. ANN. § 47-202(26).

<sup>36</sup> See MASS. GEN. L. ch. 183A, § 1(8) (1987) (a condominium unit includes "one or more rooms, with appurtenant areas"). The Massachusetts statute makes no mention of space ownership.

<sup>37</sup> *Id.* §§ 1-2.

<sup>38</sup> It is highly unlikely that courts will construe the Massachusetts condominium statute to authorize dockominiums, because the language refers to land-based properties and is silent as to water-related condominiums.

<sup>39</sup> See, e.g., MASS. GEN. L. ch. 183A.

<sup>40</sup> See *supra* note 21 and accompanying text.

<sup>41</sup> Marketing brochures of Massachusetts marinas offering 99-year leases for slip spaces are on file with the author.

<sup>42</sup> Each condominium owner has exclusive ownership of the individual condominium unit, as well as a percentage interest in all common elements of the condominium development, including the real estate. Reskin, *Overview and Comparison with Cooperatives*, in 4 COOP-

and zoning powers. The dockominium developers, however, convey riparian rights that are subject to peculiar doctrinal and governmental control that acts to severely limit the exercise of those rights.<sup>43</sup>

The dockominium concept is, therefore, founded on a principle of exclusive occupation of water using the subdivision and conveyance of riparian rights as a legal vehicle. Such occupation of the water—involving an ownership claim to water—necessarily implicates the public trust doctrine.<sup>44</sup> The public trust requires the government to oversee and protect public water resources.<sup>45</sup> The federal government's trusteeship over the nation's navigable waters is exercised in part by the Corps through its section 10 regulatory program.<sup>46</sup> The Corps' jurisdiction over structures placed in navigable waters operates in addition to state and local controls. Because no structure can lawfully be placed in a navigable waterway without federal approval, this Comment focuses only on the regulatory activity of the Corps.

### B. *The Public Trust Doctrine*

The dockominium concept rests on the notion that the dockominium owners gain exclusive dominion and control of the water within their unit spaces.<sup>47</sup> Although most dockominium transactions are

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ERATIVES AND CONDOMINIUMS 219, 219–20 (J. McCord ed. 1969). "Land is the material of the earth . . . and includes free or occupied space for an indefinite distance upwards as well as downwards, subject to limitations . . . by law." CAL. CIVIL CODE § 659 (West 1982).

<sup>43</sup> See *infra* text accompanying notes 128–43. See also *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 94–95 (1851) (the intertidal zone between the low and high water marks is "subject to somewhat more restrictive regulations in its use, than interior and upland estate remote from places in which the public have a common right"). In Massachusetts, taking or deprivation by the legislature for the enhancement of navigation between the low and high water marks do not require compensation. *Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. 629, 644–46, 393 N.E.2d 356, 364–65 (1979). A regulation may deprive the riparian owner of a beneficial use without rendering the government act an unconstitutional taking. *Lovequist v. Conservation Comm'n of Dennis*, 379 Mass. 7, 19–20, 393 N.E.2d 858, 866 (1979). Thus, the Massachusetts legislature has the authority to make reasonable regulations affecting riparian rights for the purpose of protecting or enhancing the public's navigation and other rights at the shore. *Alger*, 61 Mass. at 95.

<sup>44</sup> The dockominium's concept of exclusive rights in the water conflicts with the public trust principle that the water is owned in trust by the government for the people. See *infra* notes 128–43 and accompanying text.

<sup>45</sup> *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 435, 452 (1892).

<sup>46</sup> Rivers and Harbors Appropriations Act of 1899 § 10, 33 U.S.C. § 403 (1982). Section 10 provides the Corps jurisdiction over all waterway obstructions, which include the dockominium.

<sup>47</sup> *Reis*, NEW ORLEANS CONFERENCE, *supra* note 3, at 193 ("Ownership of a condominium marina slip unit provides security of tenure.").

based upon no more than a conveyance of riparian rights, the scope of the concept constructively, if not actually, creates ownership in a fixed location of water.<sup>48</sup> Such an ownership claim is inconsistent with the basic principles of the public trust doctrine.

The common law public trust doctrine<sup>49</sup> is premised on the concept that certain natural resources, such as waterways, shorelands, and the sea, are *held in trust by the government* for the common benefit of the public.<sup>50</sup> The doctrine is perceived to prevent the government from giving away rights to public lands and waters without adequately "protecting the public interest."<sup>51</sup> In essence, certain public lands and waters are "inalienable."<sup>52</sup> Although a quantity of water from a running stream can be removed and possessed, the running stream itself cannot be privately owned.<sup>53</sup> The adoption of the public trust doctrine was predicated on the belief that private ownership of certain resources of a peculiarly public nature, valued for their importance to society, would be inappropriate.<sup>54</sup> This doctrine pro-

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<sup>48</sup> It may be argued that non-dockminium riparian owners may similarly claim ownership of the entire riparian waters as enclosed by the adjoining property boundaries. It is unlikely and unrealistic, however, that the riparian landowners will exercise their ownership by occupying the entire lot of their riparian waters. Moreover, the riparian rights doctrine protects riparian owners' access to and use of water, and does not even implicitly provide a right to the occupation of water.

<sup>49</sup> For a discussion of the American adoption of the English public trust doctrine, see *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842); see also *Board of Public Works of Maryland v. Larmar Corp.*, 262 Md. 24, 46, 277 A.2d 427, 437 (1971).

<sup>50</sup> See *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 435 (1892); Carlson, *The Public Trust and Urban Waterfront Development in Massachusetts: What is a Public Purpose?*, 7 HARV. ENVTL. L. REV. 71, 71 (1983); see also Comment, *The Public Trust Doctrine Expansion and Integration: A Proposed Balancing Test*, 23 SANTA CLARA L. REV. 211, 211 (1983) [hereinafter Comment, *Public Trust Test*]. The public trust doctrine is also applicable to public air and land rights. See generally Comment, *Condominiums in Downtown Public Parking Lot Air Rights: A Creative City Planning Tool*, 23 SANTA CLARA L. REV. 607 (1983).

<sup>51</sup> 1 A. REITZE, ENVIRONMENTAL LAW 5-32 (2d ed. 1972); see also 1 W. RODGERS, ENVIRONMENTAL LAW: AIR AND WATER § 2.20(A) (1986).

<sup>52</sup> A. REITZE, *supra* note 51, at 5-32.

<sup>53</sup> 1 HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 137, 141 (Miscellaneous Publication No. 1206, U.S. Department of Agriculture 1974) (completed by H.H. Ellis and J.P. DeBraul); 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*14 ("[T]here are some few things, which, . . . must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had . . . Such . . . are the elements of light, air, and water . . .").

<sup>54</sup> *Shively*, 152 U.S. at 57. The Court held that:

[l]ands under tide waters are incapable of cultivation or improvement in the manner of [uplands] . . . They are of great value to the public for . . . commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the *benefit of the whole people*.

vides the public with a right to the beneficial use of certain public resources, and this right necessarily supercedes any private interests<sup>55</sup> and imposes strict responsibilities upon the government as trustee.<sup>56</sup>

The government, as the public trustee, cannot relinquish completely its trust duties associated with any public property.<sup>57</sup> Even when the government conveys away a trust property,<sup>58</sup> it has not alienated its rights and duty to protect the public's interest in that property.<sup>59</sup> The private grantees in such instances are restricted to using the property only in a manner consistent with the proper usage of the protected resource.<sup>60</sup> Thus, grantees of submerged lands cannot invade upland owners' riparian rights, including the right to an unobstructed view of the water body,<sup>61</sup> the right to cross a beach to access the water,<sup>62</sup> and the public trust rights of navigation and fishing.<sup>63</sup> Such limitations<sup>64</sup> act as a safeguard against improper gov-

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*Id.* (emphasis added); see Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 485 (1970).

<sup>55</sup> See, e.g., *Kootenai Env'tl Alliance, Inc. v. Panhandle Yacht Club*, 105 Idaho 622, 631, 671 P.2d 1085, 1094 (1983) ("The public trust doctrine takes precedent even over vested water rights.").

<sup>56</sup> Comment, *Public Trust Test*, *supra* note 50, at 211.

<sup>57</sup> See *State v. Cleveland & Pittsburgh R.R.*, 94 Ohio St. 61, 80, 113 N.E. 677, 682 (1916); *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 452-53 (1892); see also THOMPSON, *supra* note 25, § 258, at 309 (the government cannot fully discard its sovereign power and public obligation in the regulation of the waterways).

<sup>58</sup> See *Commonwealth v. Boston Terminal Co.*, 185 Mass. 281, 282-83, 70 N.E. 125, 125-26 (1904) (the state legislature is endowed with the control of all public rights, and thus the ability to convey away public properties).

<sup>59</sup> *Brickell v. Trammel*, 77 Fla. 544, 559, 82 So. 221, 226 (1919); see *Kootenai Env'tl*, 105 Idaho at 632, 671 P.2d at 1095 ("The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources."); Sax, *supra* note 54, at 486-87.

<sup>60</sup> *Brickell*, 77 Fla. at 559, 82 So. at 226; *Hayes v. Bowman*, 91 So. 2d 795, 799 (Fla. 1957) ("the state may dispose of submerged lands under tidal waters to the extent that such disposition will not interfere with the public's right of navigation, swimming and like uses").

<sup>61</sup> *Hayes*, 91 So. 2d at 799-800, 801.

<sup>62</sup> *Id.* at 799.

<sup>63</sup> *Treuting v. Bridge & Park Comm'n of Biloxi*, 199 So. 2d 627, 633 (Miss. 1967).

<sup>64</sup> A Florida statute authorizes a board to sell submerged lands to private individuals, but only after considering whether such a conveyance would interfere with marine, wildlife, fishing, and other environmental concerns. FLA. STA. ANN. § 253.12(2)(a) (West 1975). The Florida Supreme Court, in validating the statute, announced "as settled that title to all submerged lands . . . is held by the states in trust for all the people . . . , that such trust is governmental and may not be completely alienated but that in the interest of all the people, the states may grant to individuals limited privileges or rights in such lands." *Caples v. Taliaferro*, 144 Fla. 1, 6, 197 So. 861, 863 (1940), *motion to vacate and modify denied per curiam*, 146 Fla. 122, 200 So. 378 (1941).

ernmental conveyances, and as an assurance that the conveyance will preserve the rights and interests of the public.<sup>65</sup>

This recognition of public rights in water can be traced back to the ancient Romans.<sup>66</sup> The Romans recognized that the banks of waterways, though owned by the owner of the attached upland, were public and available equally to all those who desired to moor their vessels.<sup>67</sup> The ancient Roman rivers and ports and the sea and seashore were also available for public use.<sup>68</sup> This recognition of public rights in the water was later introduced to this continent in the Massachusetts colony.<sup>69</sup> It is now known as the public trust doctrine.

Application of the public trust doctrine is a matter of state common law.<sup>70</sup> The United States Supreme Court has held consistently that all states received ownership of all lands under tidal waters and the water itself, unless relinquished by the state.<sup>71</sup> In the 1842 case of *Martin v. Waddell*, the Supreme Court held that, upon the declaration of the American revolution, "the people of each state became themselves sovereign; and in that character [held] the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."<sup>72</sup> The American states thus

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<sup>65</sup> *Brickell*, 77 Fla. at 559, 82 So. at 226; see Sax, *supra* note 54, at 486-87. See, e.g., *People v. Chicago Park Dist.*, 66 Ill. 2d 65, 79-81, 360 N.E.2d 773, 780-81 (1976) (the granting of submerged lands for the private construction of a steel plant that will result in jobs and other economic advantages does not satisfy the public purpose essential for the state conveyance of trust land and resources).

<sup>66</sup> J. INST. 2.1.1 to 2.1.6; see Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763-65 (1970).

<sup>67</sup> J. INST. 2.1.4.

<sup>68</sup> *Id.* 2.1.2, 2.1.5.

<sup>69</sup> The General Laws and Liberties of the Massachusetts Colony, Liberties Common, § 2 (rev. 1672), reprinted in CITY COUNCIL OF BOSTON, THE COLONIAL LAWS OF MASSACHUSETTS, 90-91 (1887) (compiled by W.H. Whitmore, Record Commissioner of Boston); see *Shively v. Bowlby*, 52 U.S. 1, 18 (1894) (the ordinance is regarded as the Colonial Ordinance of 1641, although it was not passed until 1647).

The Massachusetts Supreme Judicial Court recognizes that the commonwealth holds title in the shoreland in trust for public uses; this recognition enjoys the support of legislative awareness. *Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. 629, 633, 393 N.E.2d 356, 359 (1979) "Tide waters . . . [are] for the common use like air and light . . ." *Id.* (citing the Massachusetts Senate Joint Committee on Mercantile Affairs and Insurance, 1850 Sen. Doc. No. 119, at 2); see also *Barker v. Bates*, 30 Mass. (13 Pick.) 255 (1832); *Commonwealth v. Boston Terminal Co.*, 185 Mass. 281, 283, 70 N.E. 125, 126 (1904).

<sup>70</sup> See, e.g., *Shively*, 152 U.S. at 26; *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791, 794, *reh'g denied*, 108 S. Ct. 1760 (1988).

<sup>71</sup> *Shively*, 152 U.S. at 26; *Phillips Petroleum*, 108 S. Ct. at 794; *Knight v. United States Land Ass'n*, 142 U.S. 161, 183 (1891).

<sup>72</sup> *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410, 413-14 (1842); *Barney v. Keokuk*, 94 U.S.

gained ownership of the land, once "held by the king in his public and regal character as the representative of the nation, and in trust for them."<sup>73</sup> The American states also took from the English monarch the responsibility to hold and to protect the navigable waters and the submerged lands "for the benefit and advantage of the whole community."<sup>74</sup>

In 1892, the United States Supreme Court announced its seminal decision concerning the public trust doctrine in *Illinois Central Railroad v. Illinois*.<sup>75</sup> In *Illinois Central*, the Illinois general assembly had passed the "Lake Front" Act in 1869,<sup>76</sup> which granted one thousand acres of the bed of Lake Michigan, constituting the entire harbor of the City of Chicago, to a railroad company.<sup>77</sup> The state legislature, however, passed legislation in 1873 repealing the 1869 act, extinguishing the railroad's interest.<sup>78</sup> In finding the 1873 act valid,<sup>79</sup> the Court declared the State of Illinois to be the owner in

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(4 Otto) 324, 336 (1876) ("In this country, as a general thing, all waters are deemed navigable which are really so . . .").

Currently, federal regulations recognize that "[n]avigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (1987). However, the regulations concede that "navigable waters" are ultimately dependent on judicial interpretation. *Id.* § 329.3.

<sup>73</sup> *Martin*, 41 U.S. at 409.

<sup>74</sup> *Id.* at 411. One law review article expressed the opinion that the "adoption of the public trust doctrine fit the needs of a growing democratic nation which sought to develop its economic resources by broadening individual opportunities." Comment, *Ownership Rights to Submerged and Formerly Submerged Land in New Jersey*, 91 DICK. L. REV. 833, 837 (Spring 1987). That view espouses the theory that public ownership of the water would create equal access and opportunity. To facilitate the commercial and population expansion in this country's developing period, some jurisdictions opted to expand the riparian rights of private individuals. See, e.g., *Board of Public Works v. Larmar Corp.*, 262 Md. 24, 37, 277 A.2d 427, 432-33 (1971).

<sup>75</sup> *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892); see generally Sax, *supra* note 54, at 489-91.

<sup>76</sup> *Illinois Central*, 146 U.S. at 432.

<sup>77</sup> *Id.* at 438.

<sup>78</sup> *Id.* at 463-64.

<sup>79</sup> The Court recognized that the 1869 act gave the railroad dominion over the bed and waters of the harbor, subject in part to the mere limitation that obstructions cannot be placed in the harbor to impair the public right to navigation. *Id.* at 451. The 1869 act granted only additional powers and privileges to the railroad for which the company paid nothing. *Id.* at 461. The only consideration consisted of possible future payments of a certain per centum of the gross proceeds, receipts, and incomes which the company might derive from the property granted under the 1869 act. *Id.* The Court noted that the 1869 act did not bind the company to use the granted property to produce income; therefore, the company conceivably did not have to pay any proceeds to the state. *Id.* The Court likened the 1869 act to a license that rendered the company as an agent of the state to improve the waterfront property, and under

fee simple of the submerged lands and water that the 1869 act had attempted to convey.<sup>80</sup> The Court stated that it is settled law that the states have sovereignty and control, under a trust arrangement, of lands covered by navigable waters, as well as of the water itself.<sup>81</sup> The Illinois legislature in 1869 had breached its trust duties by conveying the whole Chicago harbor.<sup>82</sup>

The public trust doctrine dictates generally the extent of public and private rights in navigable resources.<sup>83</sup> To that end, the states hold title to water and submerged lands.<sup>84</sup> Most states<sup>85</sup> limit private ownership of riparian property to the high water mark.<sup>86</sup> In these

that arrangement, the state had the unquestionable right to enact the 1873 act to cancel the agency and revoke the company's powers. *Id.* at 461-62.

<sup>80</sup> *Id.* at 463.

<sup>81</sup> *Id.* at 435, 452; see also *United States v. Kane*, 602 F.2d 490, 494 (2d Cir. 1979).

<sup>82</sup> *Illinois Central*, 146 U.S. at 452-54.

<sup>83</sup> Each state determines for itself who holds title to the beds of a waterway, and to what extent that title will be. *Barney v. Keokuk*, 94 U.S. (4 Otto) 324, 338 (1876); *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894); see *State v. Korrer*, 127 Minn. 60, 66, 148 N.W. 617, 619, *reh'g denied per curiam*, 127 Minn. 77, 148 N.W. 1095 (1914).

See *supra* text accompanying notes 49-65. In addition to the public trust doctrine, the navigational servitude also impacts upon private riparian interests. The federal government holds a navigational servitude easement for the benefit of the public, which is a paramount interest affecting all holders of riparian and riverbed interests. *Montana v. United States*, 450 U.S. 544, 554-55 (1981); *United States v. Cherokee Nation of Oklahoma*, 107 S. Ct. 1487, 1491-92 (1987). This dominant servitude stems from a power to regulate navigation, which extends to the body of the watercourse and the bed below the ordinary high water mark. *United States v. Rands*, 389 U.S. 121, 123 (1967).

<sup>84</sup> See *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229 (1845) ("The shores of navigable waters, and soils under them . . . were reserved to the states respectively."). The Congress later codified the states' title to navigable waters by the enactment of the Submerged Lands Act of 1953, 43 U.S.C. § 1311(a) (1986). The Supreme Court has opined that the Act merely confirmed the states' pre-existing rights, and that the Congress merely quitclaimed all federal claims to the navigable waters. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 318 (1973).

<sup>85</sup> *E.g.*, *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 303, 177 S.E.2d 513, 516 (1970); *Barney v. Keokuk*, 94 U.S. at 336 (concerning Iowa); *State v. Superior Court of Lake County*, 29 Cal. 3d 210, 222, 625 P.2d 239, 246, 172 Cal. Rptr. 696, 703 (1981); *Simons v. French*, 25 Conn. 345, 351 (1856); *Parker v. West Coast Packing Co.*, 17 Or. 510, 515, 21 P. 822, 823 (1889); *In Re Sanborn*, 57 Haw. 585, 588-91, 562 P.2d 771, 773-75 (1977); *McManus v. Carmichael*, 3 Iowa (Cole's Ed.) 1 (1856) (analysis of the limits of public ownership along the Mississippi River); *Ross v. Mayor of Edgewater*, 115 N.J.L. 477, 483, 180 A. 866, 870 (1935), *aff'd per curiam*, 116 N.J.L. 447, 184 A. 810, *cert. denied*, 299 U.S. 543 (1936); *Newark v. Natural Resource Council*, 82 N.J. 530, 543, 414 A.2d 1304, 1310 (1980); *Brower v. Wakeman*, 88 Conn. 8, 11 (1914); *Short Beach Cottage Owners Improvement Ass'n v. Stratford*, 154 Conn. 194, 200, 224 A.2d 532, 535 (1966).

<sup>86</sup> "High water mark" is defined as "the line on the shore to which high tide rises under normal weather conditions." BLACK'S LAW DICTIONARY 656 (5th ed. 1979). See *In Re Minnetonka Lake Improvement*, 56 Minn. 513, 521-22, 58 N.W. 295, 297 (1894). This boundary mark is computed generally as a mean high tide, and not as the extreme height of the water. *Carolina Beach*, 277 N.C. at 303, 177 S.E.2d at 516. However, for purposes of fresh water rivers and lakes, which are typically nontidal, the high water mark is to be determined by

states, land seaward of the high water mark is subject to the public trust doctrine. Other states limit private ownership to the low water mark.<sup>87</sup> In the low water mark jurisdictions, the owners hold to the low water mark, but the title to the beach area between the high and low water marks is also subject to the public trust doctrine. Also, in the low water mark jurisdictions, the upland property and the tidal flats may be conveyed away separately.<sup>88</sup> Nevertheless, the riparian owner does not own the water. The public trust imposes a superior public right to free access of the intertidal zone for the purposes of recreation, fishing, navigation, hunting, and other activities, depending on the state's common law. Some states recognize more public rights than do other states.<sup>89</sup>

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examining the bed and banks for the presence of an ordinary and continued mark upon the soil which displays a distinct character in respect to the vegetation and the nature of the soil. *Minnetonka Lake*, 56 Minn. at 522, 58 N.W. at 297.

<sup>87</sup> In the states that follow a low water mark rule, private riparian land owners hold title to the low water mark, but such title is qualified by a public trust doctrine that recognizes certain public uses, such as fishing and navigation, in the zone between the high and low water marks. *Storer v. Freeman*, 6 Mass. 435, 437 (1810); *Montgomery v. Reed*, 69 Me. 510, 514 (1879); *Lapish v. Bangor Bank*, 8 Me. 85, 92 (1831); *Schumeier v. The St. Paul & Pacific R.R.*, 10 Gilfillan 59 (10 Minn. 82), 77 (1865); *State v. Korner*, 127 Minn. 60, 69, 148 N.W. 617, 620-21, *reh'g denied per curiam*, 127 Minn. 77, 148 N.W. 1095 (1914); *Union Depot, St. Ry. & Transfer Co. of Stillwater v. Brunswick*, 31 Minn. 297, 301, 17 N.W. 626, 628-29 (1883); *Johnson v. Rost*, 164 Minn. 154, 158, 204 N.W. 642, 643 (1925); *Johnson v. Seifert*, 257 Minn. 159, 165 n.5, 100 N.W.2d 689, 694 n.5 (1960); *Hazen v. Perkins*, 92 Vt. 414, 419, 105 A. 249, 251 (1918) (Vermont riparian properties bounding on public waters extend to the "water's edge, or to [the] low water mark if there be a definite low water mark line"); *Fletcher v. Phelps*, 28 Vt. 257, 262 (1856); *Lahey, Waterfront Development and the Public Trust Doctrine*, 70 MASS. L. REV 55, 56, 56 n. 12.

The low water mark boundary developed from the presumption that the early settlers required access to the sea by wharfage for purposes of commerce, and could not effectively do so without building out onto the shore bed waterward of the high water mark. *Commonwealth v. Alger* 61 Mass. (7 Cush.) 53, 77 (1851) ("to induce persons to erect wharves below high water mark, which were necessary to the purposes of commerce, the common law of England was altered by an ordinance providing that the [riparian] proprietor . . . shall hold to low water mark, where the tide does not ebb and flow more than one hundred rods") (opinion was not delivered until 1853). The legal principle of using a water mark as a property boundary does not change whether the waterway is fresh or salt water. *See Lapish*, 8 Me. at 93.

"Low water mark" is defined as the "[l]ine on the shore marking the lowest ebb of the tide." BLACK'S LAW DICTIONARY 854 (5th ed. 1979).

<sup>88</sup> *Storer v. Freeman*, 6 Mass. at 437; *Deering v. Long Wharf*, 25 Me. 51, 64-65 (1845). *Compare Thompson v.ENZ*, 379 Mich. 667, 686, 154 N.W.2d 473, 483 (1967) ("We hold that riparian rights are not alienable, severable, divisible, or assignable apart from the [riparian] land . . .").

<sup>89</sup> *See, e.g., CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1117-18 (Alaska 1988) (tidelands are subject to "continuing public easements for public purposes of navigation, commerce, and fishery"); *State v. Knowles-Lombard Co.*, 122 Conn. 263, 267, 188 A. 275, 276 (1936) (public rights of fishing, boating, hunting, bathing, and passing and repassing); *Butler v. Attorney*



In all jurisdictions, the public trust doctrine requires that state actions concerning the state's portion of the shore must be consistent with the public interest.<sup>90</sup> The public interest requires that the state not sell the tidelands or the flats, or control their usage except to increase the facilities for navigation and commerce.<sup>91</sup> Thus, the public trust doctrine is recognized as imposing a duty upon the government to hold the waters in trust for the people to use.<sup>92</sup> This trust is in keeping with the notion that water, being a vital and uncultivable resource, should be free of the monopolizing effect of private ownership.<sup>93</sup> Waterfront or riparian owners have a superior right to access and to use the water, but they cannot own the water adjacent to their property.<sup>94</sup> Waterfront or riparian owners, therefore, cannot own the water adjacent to their property, but do have a superior right to access and to use the water. This right accompanies ownership of the riparian parcel.

### C. The Riparian Rights Doctrine

The riparian rights doctrine<sup>95</sup> was developed to formalize the terms for water use between land owners along a body of

General, 195 Mass. 79, 82-84, 80 N.E. 688, 688-89 (1907) (public rights of fishing, fowling, and navigation, but not bathing); *Bell v. Town of Wells*, 510 A.2d 509, 510 (Me. 1986) (public rights of fishing, fowling, and navigation); *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 321-22, 471 A.2d 355, 363 (public rights of navigation, fishing, and recreation, including bathing, swimming, and other shore activities), *cert. denied*, 469 U.S. 821 (1984).

<sup>90</sup> See *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 352-53 (1892) (states possess police power to regulate waterways for benefit of the public, and state abdication of ownership of trust resources must be consistent with the public trust). The Vermont bed or soil of "boatable" lakes is held by the state in trust for the public to use. *Hazen*, 92 Vt. at 419, 105 A. at 251. In Massachusetts, the fee in the land under tide waters has remained in the government, held in trust for public use, except as affected by the Colonial Ordinance and by private grants. *Home for Aged Women v. Commonwealth*, 202 Mass. 422, 426, 89 N.E. 124, 125 (1909); *see also* note 69.

<sup>91</sup> See *Parker v. West Coast Packing Co.*, 17 Or. 510, 515-16, 21 P. 822, 824 (1889). Oregon, however, cannot sell the flats, nor control the usage except to increase the facilities for navigation and commerce. *Id.*; *see Sax*, *supra* note 54, at 477.

<sup>92</sup> Under the public trust doctrine, the state may exercise police power over the property, for the good of the people. *Home for Aged Women*, 202 Mass. at 434-35, 89 N.E. at 129.

<sup>93</sup> See *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

<sup>94</sup> *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 435, 445-46 (1892).

<sup>95</sup> Riparian rights are associated with property adjacent to a river or stream, while littoral rights are associated with property on the shore of seas or great lakes. The legal distinction between the two rights is almost immaterial because the common law applicable to each is virtually identical, having developed largely through riparian cases. *See CRIBBET*, *supra* note 20, at 310; *THOMPSON*, *supra* note 25, § 259, at 311. The United States, under the leadership of Justices Kent and Story, was the first nation to develop the doctrine of riparian rights. *CRIBBET*, *supra* note 20, at 298; *see THOMPSON*, *supra* note 25, § 255, at 290. Justice Story

water.<sup>96</sup> In the eastern states,<sup>97</sup> riparian rights developed amidst a society strong in European legal traditions and located in a climate generous with rainfall.<sup>98</sup> This doctrine is based on the right to use and enjoy land that contains, overlies, or abuts a natural watercourse.<sup>99</sup> The common law of the states<sup>100</sup> guided the development of riparian rights and required the riparian owner to make reasonable use of the water resource,<sup>101</sup> to share the use of the water with

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first set out the rights of riparian proprietors, both individually and collectively, in *Tyler v. Wilkinson*, 24 F. Cas. 472 (D. R.I. 1827) (No. 14,312) (Story, Circuit Justice). Justice Story's opinion in *Tyler* provided the principles, rights, and responsibilities of the doctrine as it related to the flow of water. For a discussion of the differing views on the historical roots of the riparian rights doctrine, see 7 WATERS AND WATER RIGHTS § 610 (Clark ed. 1976 and Supp. 1978) [hereinafter WATER RIGHTS].

<sup>96</sup> *United States v. Willow River Co.*, 324 U.S. 499, 504-05 (1945) (the riparian rights doctrine "was evolved to settle conflicts" between riparian owners); see CRIBBET, *supra* note 20, at 299.

<sup>97</sup> The development of water use doctrines is divided geographically between the eastern and western, or Atlantic and Pacific, water states. See CRIBBET, *supra* note 20, at 298; 1 HUTCHINS, *supra* note 53, at 180. The fundamental distinction between the states' treatment of water use is that the East has adopted a riparian rights doctrine, while the West has adopted a prior appropriation doctrine. CRIBBET, *supra* note 20, at 298. In the western states, the doctrine of prior appropriation developed from a notion of "first come, first served," where prior use gave a superior right. Lauer, *The Riparian Right as Property*, in WATER RESOURCES AND THE LAW 161 (Legislative Research Center, University of Michigan Law School 1958). Appropriative rights, unlike riparian rights, do not depend upon rights in the land. 5 R.R. POWELL, POWELL ON REAL PROPERTY ¶ 708(2)(c) (1986). This doctrine was built basically on a foundation of necessity and common practice. Lauer, *supra*, at 162; see also *Clark v. Nash*, 198 U.S. 361, 369-70 (1905). The doctrine of prior appropriation advances three principles: priority of claim gives priority of right; use must be for a beneficial purpose; and a failure to exercise the right forfeits the right. 5 POWELL, *supra*, ¶ 708(2)(b). Western states resorted to an appropriation doctrine to maintain the highest beneficial use while meeting the exigencies resulting from the short supply of and increasing demands for water. See, e.g., *Weber Basin Water Conservancy Dist. v. Gailey*, 8 Utah 2d 55, 58-59, 328 P.2d 175, 177, *judgment modified and aff'd*, 8 Utah 2d 79, 328 P.2d 730 (1958); see also Lauer, *supra*, at 161 ("New water rights become impossible to acquire; existing rights are seldom prone to change hands, and the purpose for which they are employed is almost never changed"). This view of the disbursement of water centers on the doctrine's design to prevent waste in those western states. See TECLAFF, *supra* note 14, at 278. This Comment will not address the doctrine of prior appropriations as affected by dockominiums, but will only consider the dockominiums' impact on the doctrine of riparian rights.

<sup>98</sup> 5 POWELL, *supra* note 97, ¶ 708(2)(a).

<sup>99</sup> *Id.*; see CRIBBET, *supra* note 20, at 308-10. It is generally assumed that to enjoy riparian land is to also enjoy the use of the water. The former cannot occur if the latter is restricted.

<sup>100</sup> The United States Supreme Court defers the regulation of private usage of the shores to the sovereign control of each state. *Shively v. Bowlby*, 152 U.S. 1, 40, 58 (1894) (providing an expansive survey of most jurisdictions concerning the division of the public trust and the private proprietary interest at the shoreline boundary).

<sup>101</sup> Most states have adopted the common law rule of reasonable use, which protects generally the water's rate of flow, quantity, and quality. 5 POWELL, *supra* note 97, ¶ 709(2)(b)(iii). See, e.g., *Weare v. Chase*, 93 Me. 264, 269, 44 A. 900, 902 (1899) ("[L]ow riparian proprietors

all other riparian owners, and to exercise such use without harming other riparian owners.<sup>102</sup> All riparian proprietors on a watercourse have equal rights to water use, and the doctrine insists that each owner use the water without impairing the quality of water available to other riparian owners along the same stretch of water.<sup>103</sup> Riparian rights, thus, are simply use privileges and responsibilities arising from coastal and shore landownership.

Central to the riparian rights concept is the premise that no water right exists without landownership.<sup>104</sup> The source of the riparian right is found in and defined in terms of the riparian upland.<sup>105</sup> Landowners obtain riparian rights as part of the transaction by which they acquire title to the land.<sup>106</sup> The right runs with the land and cannot be lost through nonuse.<sup>107</sup> Through ownership of an interest in the upland, riparian owners can inhibit the public's use of

. . . [are] entitled to the reasonable use and enjoyment of the water . . . and to the natural flow of the stream, without obstruction and without diminution, subject only to the reasonable and proper use or detention by the proprietors above."); *Mason v. Whitney*, 193 Mass. 152, 158, 78 N.E. 881, 884 (1906) ("The primary right of every riparian proprietor is to have the natural and customary flow of the stream, without obstruction or change."); *Meridian, Ltd. v. San Francisco*, 13 Cal. 2d 424, 445, 90 P.2d 537, 547, *reh'g denied per curiam*, 91 P.2d 105 (1939); *Snyder v. Callaghan*, 284 S.E.2d 241, 246 (W. Va. 1981); *Little Rock & Fort Smith Ry. v. Chapman*, 39 Ark. 463, 473-74 (1882) (no one can obstruct or change a water course in a manner injurious to the riparian owner); *Boyd v. Greene County*, 7 Ark. App. 110, 112, 644 S.W.2d 615, 616-17 (1983); *see Lauer, supra* note 97, at 163.

<sup>102</sup> 5 POWELL, *supra* note 97, ¶ 708(2)(a); 3 J. KENT, COMMENTARIES ON AMERICAN LAW \*439 (every riparian owner "has naturally an equal right to the use of the water which flows in the stream adjacent to his lands"); THOMPSON, *supra* note 25, § 264, at 365. Riparian rights concerning usage of the water are classified into two purposes: natural and artificial. *Thompson v. Enz*, 379 Mich. 667, 686, 154 N.W.2d 473, 483-84 (1967). Drinking and household uses are regarded as natural uses that enjoy a preferential status. *Id.* at 686-87, 154 N.W.2d at 483. Commercial and recreational uses, however, are considered as artificial uses that must satisfy a test for reasonableness. *Id.*, 154 N.W.2d at 484.

<sup>103</sup> CRIBBET, *supra* note 20, at 299. Justice Story noted that "no [riparian] proprietor has a right to use the water to the prejudice of another." *Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (D. R.I. 1827) (No. 14,312) (Story, Circuit Justice); *see TECLAFF, supra* note 14, at 277.

<sup>104</sup> 1 WATER RIGHTS, *supra* note 95, § 4.3; *see Illinois Central R.R. v. Illinois*, 146 U.S. 387, 445 (1892).

<sup>105</sup> *Belvedere Dev. v. Department of Transp.*, 476 So. 2d 649, 652 (Fla. 1985); *see THOMPSON, supra* note 25, § 264, at 361 (riparian rights arise as an incident to the upland, not as an incident to the submerged land). A tract of land not previously serviced with water, severed from a larger tract of riparian property, would be cut off from the riparian right of the original lot. *See Murphy Slough Ass'n v. Avila*, 27 Cal. App. 3d 649, 657-58, 104 Cal. Rptr. 136, 142-43 (1972).

<sup>106</sup> 2 HUTCHINS, *supra* note 53, at 22; *see Mianus Realty Co. v. Greenway*, 151 Conn. 128, 131, 193 A.2d 713, 715 (1963) (owners of upland property bounded by the high water mark are presumed to possess riparian rights, including the right to wharf out).

<sup>107</sup> 5 POWELL, *supra* note 97, ¶ 708(2)(a).

navigable waters by restricting access to the shores.<sup>108</sup> They cannot, however, exclude the public from the navigable waters.<sup>109</sup>

Riparian rights are of vague physical proportions.<sup>110</sup> The riparian rights provide access to the water fronting the upland property. In virtually all situations, a property deed describes the finite boundaries of the upland parcel. The accompanying riparian rights, however, lack such physical delineations.<sup>111</sup> The natural crookedness of riverbanks and shorelines creates difficulties in determining how the riparian boundary should extend seaward. Riparian rights originated with the belief that all riparian owners should have equal and communal roles in the use of a common waterway.<sup>112</sup> The rights and responsibilities operated in the hopes of ensuring continued free access to the water. The dockominium, however, operates to derogate that belief by imposing finite boundaries on riparian ownership.

Riparian owners acquire at most the usufructuary<sup>113</sup> right to water based on possession or dominion, but not outright ownership of the water.<sup>114</sup> The riparian owner has the right to erect piers and docks to facilitate use of the water, although the right is subject to governmental regulation.<sup>115</sup> Public policy discourages the privatization of watercourses because water, being vital to the existence of life, should remain available for all persons to use.<sup>116</sup> Thus, no riparian proprietor owns water in a stream; the riparian proprietor has only the right to the reasonable use of the water.<sup>117</sup> A free-flowing wa-

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<sup>108</sup> TECLAFF, *supra* note 14, at 277; *see* THOMPSON, *supra* note 25, § 274, at 454.

<sup>109</sup> TECLAFF, *supra* note 14, at 277; *see* THOMPSON, *supra* note 25, § 274, at 454.

<sup>110</sup> *See* Reis, NEW ORLEANS CONFERENCE, *supra* note 3, at 198.

<sup>111</sup> *See id.* Riparian rights are met with two sure boundaries. The riparian ownership extends seaward but to the point declared as navigable either by public authority or by judicial decision. *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 446-47 (1892). The second boundary is where the upland meets the water.

<sup>112</sup> *See* *Tyler v. Wilkinson*, 24 F. Cas. 472 (D. R.I. 1827) (No. 14,312) (Story, Circuit Justice).

<sup>113</sup> A "usufruct" is "the right of using and enjoying the fruits or profits of an estate . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2524 (unabridged 1981).

<sup>114</sup> Lauer, *supra* note 97, at 160.

<sup>115</sup> *United States v. 222.0 Acres of Land*, 306 F. Supp. 138, 151 (D. Md. 1969) (to facilitate the right of access to the water, the riparian owner may erect piers on the submerged land, subject to governmental regulations with regard to the public and the adjoining riparian owners); *see* *Mutual Chem. Co. of America v. Mayor & City Council of Baltimore*, 33 F. Supp. 881, 883 (D. Md. 1940) (the riparian owners are vested with the right to erect piers in the water fronting their riparian properties), *aff'd in part and rev'd in part sub nom.*, *Mayor & City Council of Baltimore v. Crown Cork & Seal Co.*, 122 F.2d 385 (4th Cir. 1941); *see also infra* notes 144-54 and accompanying text.

<sup>116</sup> Lauer, *supra* note 97, at 161; 3 KENT, *supra* note 102, at \*440 ("Streams of water are intended for the use and comfort of man . . .").

<sup>117</sup> *Williams v. Rankin*, 245 Cal. App. 2d 803, 818-19, 54 Cal. Rptr. 184, 194 (1966); *see* Sax,

tercourse, resembling more an animal *ferae naturae*<sup>118</sup> than an object of property, cannot be owned outright by a private individual.<sup>119</sup> Denial of private ownership in the water, however, does not prohibit the exercise of "valid private rights to capture, possess, and beneficially use the public waters."<sup>120</sup>

Although water may not be owned, the riparian right to *use* water is still regarded as a valuable property interest.<sup>121</sup> Such recognition is unsurprising because riparian owners can gain lawful access to the watercourse,<sup>122</sup> and because riparian owners can effectively deny the public such access.<sup>123</sup> This right to access can be exploited for commercial, fishing, recreational, or aesthetic purposes. In that light, riparian rights are significant property interests, because of the potential economic benefits that they may involve.<sup>124</sup>

Courts have noted that riparian rights are alienable from the adjoining upland property.<sup>125</sup> Thus, such rights are property that

*supra* note 54, at 485 (people own at most a usufruct in the water, but not the water itself); 3 KENT, *supra* note 102, at \*439 (The riparian owner "has no property in the water itself, but a simple usufruct while it passes along.").

<sup>118</sup> "*Ferae naturae*" is defined as "Of a wild nature or disposition. Animals which are by nature wild are so designated, by way of distinction from such as are naturally tame, the latter being called '*domitae naturae*.'" BLACK'S LAW DICTIONARY 558 (5th ed. 1979).

<sup>119</sup> Lauer, *supra* note 97, at 131, 159-60. The riparian right "to the flow of a natural watercourse is not an ownership of the *corpus* of the flowing water." 1 HUTCHINS, *supra* note 53, at 151 (italics original); see THOMPSON, *supra* note 25, § 261, at 318-20. Its ever-changing flow of water prevents it from being declared a private property interest. Lauer, *supra* note 97, at 160.

<sup>120</sup> 1 HUTCHINS, *supra* note 53, at 141.

<sup>121</sup> See, e.g., Illinois Central R.R. v. Illinois, 146 U.S. 387, 445-46 (1892); Yates v. Milwaukee, 77 U.S. (10 Wall.) 497, 504 (1870); Union Depot, St. Ry. & Transfer Co. of Stillwater v. Brunswick, 31 Minn. 297, 301, 17 N.W. 626, 628-29 (1883); Snyder v. Callaghan, 284 S.E.2d 241, 246 (W. Va. 1981) (the riparian owner has a property interest in the natural flow of the riparian watercourse); Braswell v. Highway Comm'n, 250 N.C. 508, 511, 108 S.E.2d 912, 915 (1959) ("the right to have water flow in the direction provided by nature is a property right"); Hanford v. St. Paul & Duluth R.R., 43 Minn. 104, 42 N.W. 596 (1889), *aff'd after reargument*, 43 Minn. 110, 119, 44 N.W. 1144, 1148 (1890) (the "quality of alienability should be deemed to belong" to the riparian right, as it does also to all other forms of property in general). See also Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, 512 So. 2d 934, 936 (Fla. 1987); see 1 HUTCHINS, *supra* note 53, at 154-55. The riparian right is regarded as part and parcel of the land itself. 1 HUTCHINS, *supra* note 53, at 156; THOMPSON, *supra* note 25, § 261, at 326.

<sup>122</sup> Lauer, *supra* note 97, at 163.

<sup>123</sup> Persons not the riparian owner must gain permission from the owner, or else commit trespass, in efforts to access the watercourse. See PROSSER, HANDBOOK OF THE LAW OF TORTS 357 (4th ed. 1971).

<sup>124</sup> The means of deriving economic benefits from riparian rights are numerous: the rights to a direct view of the water may increase a home's value; the rights may be used for the establishment of fishing and maritime businesses; the rights may be used for recreational or agricultural purposes; and the rights may be sold or leased to others.

<sup>125</sup> This riparian right is, like other property, alienable by the owner. Simons v. French, 25

may be a subject of a contractual or conveyance instrument. Land owners in possession of such riparian rights are generally at liberty to sell the land and retain the rights, or vice versa. Moreover, the land owner may opt to share the riparian rights with other individuals. The ownership arrangement of the riparian land and the riparian rights is generally without any restrictions as long as the land tract is physically in contact with the waterway.<sup>126</sup> Regardless of who may own the riparian rights, however, all riparian rights are subordinate to the paramount rights of the public.<sup>127</sup>

Riparian owners, regardless of the ownership arrangement, hold their interest in navigable waters subject to the federal government's paramount power to control and regulate the navigable waters for commerce purposes.<sup>128</sup> When the flats<sup>129</sup> are covered by water, or are not enclosed sufficiently to exercise exclusion, the public has the right to enter the submerged area for ordinary purposes of navigation.<sup>130</sup> The riparian owner merely possesses the riparian right of wharfage,<sup>131</sup> and the right to access and take water, to be exercised consistent with the rights of the public and the

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Conn. 346, 352 (1856). The underlying principle is that it is immaterial who owns the riparian wharfage rights, because the public in all cases is secured in its right of navigation and commerce. *Id.* The Connecticut Supreme Court noted that the flats may be alienated from the upland because neither public policy nor geographical peculiarities demand the prohibition of such an alienation. *Id.* at 354. Therefore, "the riparian rights to wharf out, erect bulkheads and fill in front of the land may lawfully and effectively be severed from the land . . . ." *Williams v. Skyline Dev. Corp.*, 265 Md. 130, 155-56, 288 A.2d 333, 348 (1972).

<sup>126</sup> Although the use of the water may be conveyed away separate from the upland, the riparian rights are never severed from the riparian land. *See* 1 WATER RIGHTS, *supra* note 95, § 53.4, at 356 ("The riparian hereditament is incident to the land and passes with it by conveyance. For the same reason, it is not severable from the land, although the right to the use of the water may be conveyed . . ."). *But see* THOMPSON, *supra* note 25, § 262, at 327 ("Riparian rights may be alienated separately from the ownership of the uplands."). *See also* Butler, *Allocating Consumptive Water Rights in a Riparian Jurisdiction: Defining the Relationship Between Public and Private Interests*, 47 U. PITT. L. REV. 95, 137 (1985) (riparian rights should be transferable); *supra* text accompanying note 105.

<sup>127</sup> *See* *Petraborg v. Zontelli*, 217 Minn. 536, 548, 15 N.W.2d 174, 180-81 (1944); *Skyline Development Corp.*, 265 Md. at 155, 288 A.2d at 348; *supra* notes 54-60.

<sup>128</sup> *Carolina Beach Fishing Pier v. Town of Carolina Beach*, 277 N.C. 297, 301, 177 S.E.2d 513, 515 (1970) (the federal government may regulate navigable waters under authority of the commerce clause); *Johnson v. Seifert*, 257 Minn. 159, 165 n.5, 100 N.W.2d 689, 694 n.5 (1960) (riparian rights are subject to state regulation for public purposes such as navigation).

<sup>129</sup> The flats (i.e., shore, tidelands, foreshore) are the stretch of land bounded by the low and high water marks, alternately covered by water and bare. *Storer v. Freeman*, 6 Mass. 435, 439-40 (1810).

<sup>130</sup> *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 74-75 (1851); *see also* *Austin v. Carter*, 1 Mass. 231, 231 (1804).

<sup>131</sup> *See supra* note 115. The United States Supreme Court regards the wharfage right as a franchise. *Shively v. Bowlby*, 152 U.S. 1, 20 (1894); *see also* THOMPSON, *supra* note 25, § 264, at 362.

adjoining riparian owners.<sup>132</sup> Thus, ownership of riparian rights, unlike that of land, is met with strict doctrinal regulations and restrictions.<sup>133</sup> Indeed, the dockminium, as a waterway structure, is regulated by the Corps under section 10 of the Rivers and Harbors Act.

Riparian property is, and has always been, subject to a dominant servitude.<sup>134</sup> The federal exercise of claiming a watercourse for the purposes of the navigational servitude,<sup>135</sup> by proper

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<sup>132</sup> *Parker v. West Coast Packing Co.*, 17 Or. 510, 515, 21 P. 822, 824 (1889). Thus, water rights, including the rights associated with water usage and water flow, as held by riparian land owners, are not absolute against the world. *United States v. Willow River Co.*, 324 U.S. 499, 510 (1945). Government actions in navigable waterways, where boating activities are most likely to take place, will not necessarily require compensation, although they may have an adverse impact on the rights of individual riparian owners. *Id.* at 507-10. For example, navigation improvement measures that increase the water level, and reduce an individual's dry land area, will not cause courts to find for compensation. *Id.* at 510 (government dam in navigable river raised water level by three feet); *Crocker v. Champlin*, 202 Mass. 437, 440-42, 89 N.E. 129, 130-31 (1909) (state dam in navigable river submerged gravel pit in eight feet of water). Also, legislation that fixes a harborline through private tidelands to prevent full use of the submerged land does not require compensation. *Alger*, 61 Mass. at 104. Because Massachusetts recognizes private ownership to the low water mark, the *Alger* land owner was prevented from building a pier along the full expanse of the private tidelands. Recently, the Supreme Court held that even tide lands under non-navigable water, but influenced by the ebb and flow of the tide, are subject to the public trust doctrine. *See generally Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791, *reh'g denied*, 108 S. Ct. 1760 (1988). It is, therefore, clear that the authority of the government to conduct activities in navigable waters, for the sake of navigational preservation or improvement, is superior to any contrary private interest.

<sup>133</sup> A property owner's right to reasonable private use is "subject to the rights and interests of the public in the navigable and other waters of the United States, including the federal navigation servitude and federal regulation for environmental protection." 33 C.F.R. § 320.4(g)(1) (1987). The rights and use of the property at the shore are subject to the state's police power. *Home for Aged Women v. Commonwealth*, 202 Mass. 422, 435, 89 N.E. 124, 129 (1909).

<sup>134</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 177-78 (1979); *United States v. Commodore Park*, 324 U.S. 386, 390-91 (1945); *Willow River Co.*, 324 U.S. at 507-11; *United States v. 412.715 Acres of Land*, 53 F. Supp. 143, 148-49 (N.D. Cal. 1943), *judgment amended*, 60 F. Supp. 576 (N.D. Cal. 1945).

<sup>135</sup> *Lauer*, *supra* note 97, at 138-39. Where there is an issue of taking involving navigable waters and lands submerged below such waters, a statute asserts that the "United States retains all its navigable servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce [and other activities] . . ." 43 U.S.C. § 1314(a) (1982). Accordingly, the Fifth Circuit in *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), held that the "waters and underlying land are subject to the paramount servitude in the Federal government which the Submerged Lands Act [43 U.S.C. §§ 1301-15 (1982)] expressly reserved as an incident of power incident to the Commerce Clause." *Zabel*, 430 F.2d at 215. The *Zabel* court found no governmental taking associated with the government's denial of a permit to the plaintiff to dredge and fill plaintiff's eleven acres of tidelands for use as a commercial mobile trailer park. *Id.* at 215. The United States Supreme Court in 1978 subsequently rejected the similar argument that

legislation,<sup>136</sup> is not a taking of property from riparian owners within the meaning of the fifth amendment.<sup>137</sup> The interests of riparian owners have always been subject to this dominant federal power, regardless of whether that power has been exercised affirmatively or has been permitted to lie dormant.<sup>138</sup> Under the authority of the navigation servitude, the government can control, improve, and regulate the navigability of waterways for the benefit of the navigating public,<sup>139</sup> and may do so without compensating the owners of property subject to the servitude.<sup>140</sup> Because water rights do not enjoy the legal status of other properties, such as real estate,<sup>141</sup> the dock-

property owners "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development . . ." *Penn Central Transp. v. New York*, 438 U.S. 104, 130 (1978). Recently, however, the Supreme Court invoked the fifth amendment's due process clause to secure compensation for a temporary taking that denied a church use of its property in a manner no different from a permanent taking. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378, 2386-87 (1987); *see also* *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 657 (Brennan, J., dissenting) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable."). The *First English* Court held that a local ordinance operated to deprive the landowner church of the free use of its property. 107 S. Ct. at 2389; *see* *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

<sup>136</sup> *See* *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249-52 (1954) (a statute must make an "express assertion" of the government's paramount right to use water to the exclusion of existing users).

<sup>137</sup> THOMPSON, *supra* note 25, § 258, at 310 (the exercise of navigational servitude is not a taking); *see supra* note 135 for a brief discussion of some takings cases. The United States Supreme Court recently found a California regulation that conditioned permission to rebuild a beach house upon the owner's transfer of a public easement across the beach property would operate as a taking requiring just compensation. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3143-46 (1987).

The federal Constitution requires that governments not deprive a person of property without due process of law or just compensation. U.S. CONST., amend. V. Amendment XIV, § 1 to the U.S. Constitution applies the due process taking rules to the states. *See* *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897) (due process of law under the Fourteenth Amendment requires just compensation when private property is taken). *See also* *Lauer, supra* note 97, at 137 & nn.11-14.

<sup>138</sup> *See* *United States v. Rands*, 389 U.S. 121, 123 (1967).

<sup>139</sup> *United States v. 412.715 Acres of Land*, 53 F. Supp. 143, 148 (N.D. Cal. 1943), *judgment amended*, 60 F. Supp. 576 (N.D. Cal. 1945); *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 104 (1851); *Crocker v. Champlin*, 202 Mass. 437, 440-42, 89 N.E. 129, 130-31 (1909).

<sup>140</sup> *Zabel*, 430 F.2d at 215; *412.715 Acres of Land*, 53 F. Supp. at 148 (The government "may deepen channels, widen streams, erect lighthouses, build bridges, construct dams, and make similar improvements, without compensating the owners of land subject to the navigation servitude.").

<sup>141</sup> *United States v. Willow River Co.*, 324 U.S. 499, 510 (1945); *see* *Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629, 649, 392 N.E.2d 356, 367 (1979) (private submerged land is not held in fee simple absolute).

Not only is the exercise of water rights vulnerable to government intervention, but private



ominium's claims of property and water rights are highly susceptible to government intervention as permitted by the commerce clause.

Whether governmental action in the form of denials of section 10 permits may or may not require just compensation appears to be a premature question, because the dockominium concept's reliance on vested property interests in the boat slip space runs counter to the accepted notion that ultimate ownership in water is public.<sup>142</sup> The dockominium concept is best portrayed as one derived from riparian rights as facilitated by condominium laws. Riparian rights are carved out neatly for separate ownership, made possible by condominium laws in most states. The purchasers become the riparian owners of the individual parcels of riparian rights, and they hope to moor their boats in that space. Understandably, such owners expect that no other boater, or even a swimmer, could occupy the unit slip space. This expectation suggests that the dockominium owner owns the water within the slip space. The public trust doctrine, however, asserts that public waters are held by the public to facilitate equal access for all people. Thus, although dockominium owners possess preferred water privileges by virtue of riparian ownership, they must exercise such rights in conformity with the public trust.<sup>143</sup> In light of the public trust implications involved in the dockominium concept, the Corps must factor in the dockominium's adverse impacts upon the public's interest when it reviews section 10 applications to permit dockominium facilities.

#### *D. Federal Regulatory Controls of Dockominiums*

The Corps derives its authority to regulate the dockominium, and all other structures placed in navigable waters, from section 10 of

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expectations in property interests at the shore may also be in jeopardy. *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791, 798, *reh'g denied*, 108 S. Ct. 1760 (1988). The dockominium owner asserts a property claim to the exercise of water rights. Both the claim of property and the water rights are highly susceptible to government intervention. The Supreme Court has opined that, for the purposes of a fifth amendment taking, not all economic interests are property rights. *Willow River*, 324 U.S. at 502. "Economic advantages" at the shore cannot be recognized as compensable rights unless they are supported by law. *Id.* The dockominium is a novel economic use of riparian ownership that cannot claim the full force of legal support. Water rights do not enjoy the legal status of other properties, such as real estate. *Id.* at 510; see *Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629, 649, 392 N.E.2d 356, 367 (1979) (private submerged land is not held in fee simple absolute). Therefore, dockominiums have yet to gain the legal recognition and support of any law, whether legislative or common, to defend against any legitimate government intervention.

<sup>142</sup> Private vested rights in government properties generally concern licenses in mining properties. See Laitos & Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1, 12-13 (1987).

<sup>143</sup> See *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900).

the Rivers and Harbors Appropriations Act of 1899.<sup>144</sup> Until 1968, the primary thrust of the Corps' regulatory program was the protection of navigation.<sup>145</sup> Since then, an ancillary objective of the Corps' program has been to protect the water resources of the United States.<sup>146</sup> As a result of regulations promulgated in 1968, the program serves this purpose through a "public interest review"<sup>147</sup> that "balanc[es] the favorable impacts [of work in navigable water] against the detrimental impacts."<sup>148</sup>

An application submitted to the Corps for a permit to approve dockominium facilities will trigger the public interest review.<sup>149</sup> In considering such applications, the Corps must take into consideration an evaluation of the proposed activity and of the activity's potential impact upon the public interest.<sup>150</sup> The review should be conducted

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<sup>144</sup> 33 U.S.C. § 403 (1982). The Act was designed to benefit the public by empowering the federal government, through the Corps, to exercise its authority over interstate commerce with respect to obstructions on navigable rivers. *California v. Sierra Club*, 451 U.S. 287, 294-95 (1981). Corps regulations grant to the District Engineers the authority to enforce and regulate the applicable provisions of the Rivers and Harbors Act and the Clean Water Act. 33 C.F.R. §§ 320.1(a)(6), 320.2, 320.3 (1987). The District Engineers are empowered with the discretion to issue, modify, suspend, condition, or revoke a permit. *See generally* 33 C.F.R. §§ 325.4, 325.7, 325.8. The Corps' decision, however, is normally upheld unless proven to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." 5 U.S.C. § 706(2)(A) (1982); *see Missouri Coalition for Env't v. Corps of Engineers*, 678 F. Supp. 790, 801 (E.D. Mo. 1988).

<sup>145</sup> 33 C.F.R. § 320.1(a); *Deltona Corp. v. United States*, 657 F.2d 1184, 1187 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

<sup>146</sup> *See Deltona*, 657 F.2d at 1187; Remarks made by Col. Thomas A. Rhen, Division Engineer, U.S. Army Corps of Engineers, New England Division, during a meeting held at Col. Rhen's office in Waltham, Massachusetts (October 13, 1987) (author was an observer at a meeting to negotiate a consent decree). For a survey and discussion of the Corps' jurisdiction, *see Power, The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 VA. L. REV. 503 (1977). Col. Rhen noted that the country had not treated its water resources very well for the past 200 years; therefore, the Corps' current policy of scrutinous examination of proposed activities which may impact water resources is equivalent to making up for past "sins."

<sup>147</sup> 33 C.F.R. § 320.4(a). The Corps revised its regulations on December 18, 1968 to implement a public interest review, thus expanding from the prior, sole interest in preserving the navigability of United States waters. *Deltona Corp.*, 657 F.2d at 1187. This new set of Corps regulations was judicially upheld in *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 901 (1971).

<sup>148</sup> 33 C.F.R. § 320.1(a).

<sup>149</sup> *Van Abbema v. Fornell*, 807 F.2d 633, 636 (7th Cir. 1986); *Friends of the Earth v. Hintz*, 800 F.2d 822, 830 (9th Cir. 1986) (upholding Corps' decision to issue permit for discharging fill material into wetlands). The public interest review regulations at 33 C.F.R. § 320.4(a), apply to the review of all applications for Department of the Army permits. *See also* 33 C.F.R. § 320.2(b). Applications for dockominium marinas generally involve a section 10 permit. At times, however, marinas require some land-fill at the waterline, thus necessitating a separate federal permit under § 404 of the Clean Water Act. 33 U.S.C. § 1344 (1982 & Supp. IV 1986); 33 C.F.R. § 320.2(f).

<sup>150</sup> 33 C.F.R. § 320.4.

to achieve a rational decision that reflects "the national concern for both protection and utilization of important resources."<sup>151</sup> The Corps must consider all factors relevant to the proposed activity.<sup>152</sup> Each of the regionally situated District Engineers may grant a permit subject to the public interest review guidelines "unless [that] engineer determines that [to do so] would be contrary to the public interest."<sup>153</sup>

Decisions of the Corps are accorded much deference.<sup>154</sup> Normally, courts reviewing Corps actions should give appropriate deference to the Corps' determination,<sup>155</sup> by not substituting their own views for the decision reached by the Corps<sup>156</sup> or for the Corps' interpretation of its own regulations.<sup>157</sup> Moreover, the courts should adhere to such a standard of review when the agency action under review includes a balancing process such as the Corps' public interest review.<sup>158</sup> In light of such guidelines for judicial review, most Corps decisions will likely withstand appellate scrutiny. This deference amplifies the

<sup>151</sup> 33 C.F.R. § 320.4(a).

<sup>152</sup> Such factors include, but are not limited to, "conservation, economics, . . . land use, navigation, . . . recreation, . . . considerations of property ownership and, in general, the needs and welfare of the people." *Id.*; see also H.R. Rep. No. 917, 91st Cong., 2d Sess. at 5 (1970) (report of the House Committee on Government Operations listing factors to be considered in the Corps' review process). Consideration of socio-economic concerns must be limited to effects directly related to the proposed activity. *Mall Properties, Inc. v. Marsh*, 672 F. Supp. 561, 566-67 (D. Mass. 1987), *appeal dismissed*, 841 F.2d 440 (1st Cir.) (holding that the trial court's remand to the Corps did not provide finality needed to invoke appellate review jurisdiction), *cert. denied*, 109 S. Ct. 128 (1988); *Missouri Coalition for the Env't v. Corps of Eng'rs*, 678 F. Supp. 790, 802-03 (E.D. Mo. 1988). It may be implied that the Corps may consider only those factors that are adequately related to impacts on the physical environment. *Mall Properties*, 672 F. Supp. at 566-67.

<sup>153</sup> 33 C.F.R. § 320.4(a) (emphasis added). The language of § 320.4(a) suggests that there is a presumption that the Corps will issue a permit "unless" the Corps finds that the submitted proposal does not meet the requirements of the public interest review. See *Friends of the Earth v. Hintz*, 800 F.2d 822, 830 (9th Cir. 1986); *Oklahoma Wildlife Fed'n v. United States Army Corps of Eng'rs*, 681 F. Supp. 1470, 1487 (N.D. Okla. 1988) (upholding Corps' FONSI in a water transfer project). Indeed, there is very little judicial guidance as to whether or not such an inference exists.

<sup>154</sup> *Van Abbema v. Fornell*, 807 F.2d 633, 636 (7th Cir. 1986) ("In reviewing this public interest determination by the Corps, it is not our role to second-guess.").

<sup>155</sup> *Environmental Coalition of Broward County v. Myers*, 831 F.2d 984, 986 (11th Cir. 1987).

<sup>156</sup> *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 555 (1978) (judicial review of agency's consideration of environmental factors is a limited one); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) ("a court should [generally not] substitute its judgment for that of the agency as to the environmental consequences").

<sup>157</sup> *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (Secretary of the Interior's interpretation of an Executive Order); *Missouri Coalition for Env't v. Corps of Eng'rs*, 678 F. Supp. 790, 801 (E.D. Mo. 1988).

<sup>158</sup> *Environmental Coalition*, 831 F.2d at 986.

Corps' responsibility for properly evaluating the dockominium concept.

Only the Eleventh Circuit has even indirectly confronted and commented on Corps action concerning the dockominium concept.<sup>159</sup> It is not surprising that the issue has not been addressed by more courts, because the dockominium is a novel concept that has met with very little litigation.<sup>160</sup> In *Matthews v. United States*,<sup>161</sup> the Eleventh Circuit ruled on certain public recreational rights without directly discussing the dockominium's impact on the public trust. The plaintiff in *Matthews* alleged that the location of a dock adjacent to her property caused a diminution in the value of her property and obstructed her view of the cove.<sup>162</sup> She did not contest the legality of the dockominium as a discrete interest in property. The *Matthews* courts' reasoning concerning the public's rights as weighed against an individual's interest in a dockominium may, however, shed some light upon how courts might view the dockominium concept.

In *Matthews*, the Corps granted a 35-year commercial concession lease to a private marina to furnish and maintain docks for private boats and to provide related boating services at a Corps-managed lake.<sup>163</sup> The lessee, as agent for eleven of its customers, applied to the Corps for the construction of a condominium-type dock on the

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<sup>159</sup> *Matthews v. United States*, 526 F. Supp. 993, 1002-05 (M.D. Ga. 1981), *aff'd in part and rev'd in part*, 713 F.2d 677 (11th Cir. 1983). The trial and appellate courts found improper the challenged federal permit issued for a dockominium pier, based chiefly on the interpretation of federal regulations and not on riparian rights or public trust considerations. *Id.* Other courts have adjudicated matters involving condominium-ownership marina and boat slips. *See, e.g.,* McKnight v. Board of Directors, Anchor Pointe Boat-A-Minium Ass'n, Inc., 32 Ohio St. 3d 6, 6-7, 512 N.E.2d 316, 317 (1987) (condominium unit owners disputed the appointment of the association's board of directors); Deupree v. Ruffino, 505 So. 2d 1218-19 (Ala. 1987) (breach of contract action concerning the expectation that a boat slip space would be constructed); Dalzell v. Harlow, 129 N.H. 43, 43-45, 523 A.2d 54, 55 (1986) (condominium unit owner disputed the contractual language concerning access to the association's limited dock spaces); Lake Wylie Water Resources v. Rodgers Builders, 621 F. Supp. 305, 306-07, 307 n.4 (D. S.C. 1985) (property owners sought to enjoin dredging operations associated with proposed construction of dockominium facility).

<sup>160</sup> More often, dockominiums appear in legal actions as incident to other issues, such as property boundary disputes, riparian rights disputes, and condominium-based disputes. *See* cases cited *supra* note 159.

<sup>161</sup> *Matthews v. United States*, 526 F. Supp. 993 (M.D. Ga. 1981), *aff'd in part and rev'd in part*, 713 F.2d 677 (11th Cir. 1983).

<sup>162</sup> *Matthews*, 526 F. Supp. at 995 (trial court found that the Corps of Engineers issued improperly a permit for the dockominiums and ordered the unit owners to resell the slipspace to the marina); *Matthews*, 713 F.2d at 679. *But see* *Matthews*, 713 F.2d at 681-82 (appellate court found the proper remedy to be the removal of the dockominium pier).

<sup>163</sup> The body of water in question is Lake Hartwell in the Piedmont Plateau region of Georgia and South Carolina. *Matthews*, 713 F.2d at 679.

lessee's separate land adjacent to the lessee's existing marina.<sup>164</sup> Upon notice of the Corps' approval, the lessee marina built the designated "Dock F" and executed bills of sale for the slip spaces to pass title to the eleven individuals who had by then already formed an association.<sup>165</sup>

The district court found that Dock F was not a public commercial concession dock as contemplated by the lease.<sup>166</sup> The district and appellate courts ruled that the concept of private ownership, or private dominion over recreational resources, such as dock spaces, within a designated public recreational area, is against the public interest.<sup>167</sup> Dock F could not be considered public because: the lessee marina, as applicant to the Corps, was merely an agent for the eleven individuals, and was without supervisory control over the dock; the public was allowed no access to the dock; no public facilities or other services incidental to public marinas were provided; and the sale of the dock slip spaces was for an indefinite duration.<sup>168</sup> The district court also found that the ownership and utilization of a private dock in a public recreation area was a *per se* violation of management regulations of the lake.<sup>169</sup> On that basis, the district court ordered the lessee marina to purchase Dock F from the eleven individuals and operate the dock in conformity with normal public commercial docks, such as the lessee's existing marina.<sup>170</sup>

The Eleventh Circuit, however, ordered the removal of Dock F, because it found that the district court's order, which allowed the

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<sup>164</sup> Under the terms of the lease, only the lessee marina could apply to the Corps with the dock construction proposal. *Matthews*, 526 F. Supp. at 996.

<sup>165</sup> *Matthews*, 713 F.2d at 679-80.

<sup>166</sup> *Matthews*, 526 F. Supp. at 1002.

<sup>167</sup> *Id.* at 1004; *Matthews*, 713 F.2d at 681.

<sup>168</sup> *Matthews*, 526 F. Supp. at 1003.

<sup>169</sup> *Id.* at 1004. The court found that the lessee could have built additions to the existing dock to accommodate any increase in demand (an increase that the court did not find to be substantial); and that the individuals could have applied to the Corps for permission to construct a private community dock in a limited development area at the lake. *Id.* at 1004-05. Furthermore, it was not clearly in the "public interest" under regulations at 36 C.F.R. § 327.30 (1981), to allow the individuals to own rather than rent dock space at the lake. *Id.* at 1004. The regulations at 36 C.F.R. § 327.30 dealt with the lakeshore management of civil works projects like the lake in *Matthews*.

<sup>170</sup> One noteworthy fact is that the Corps had previously ordered the lessee and the plaintiff *Matthews* to remove a private dock (that was being used by the plaintiff as a private dock) in the vicinity of Dock F's location, because the dock was located in an area reserved for the public's use and had not been approved by the Corps. *Matthews*, 526 F. Supp. at 998. The previous dock was probably built without the necessary Corps permit, and was subsequently also denied a Corps after-the-fact permit. See 33 C.F.R. § 326.3(e) (1987) (Corps regulations for after-the-fact permits).

eleven individuals to retain use of Dock F, would not be a sufficient remedy for the violation of a public marina lease.<sup>171</sup> The trial court merely ordered the sale of Dock F to the lessee, and did not enjoin the eleven individuals from using Dock F. Therefore, although title was transferred from the individuals, the individuals were still in possession of Dock F in accordance with their original design. According to the appellate court, the lower court's order would not operate to convert the dock from a private dock to one for public use.<sup>172</sup>

The *Matthews* ruling prevented a private encroachment upon a public recreational area. This ruling is consistent with the rooted doctrinal pronouncements that public rights in water, as protected by the public trust doctrine, override any private assertions of riparian rights.<sup>173</sup> The *Matthews* courts recognized that a public resource, held and managed by the government, must not be allowed to enter into private hands. Allowing the private Dock F to exist in a public lake, with no access provided to the public, would violate the government's duty under the public trust doctrine. The *Matthews* case emphasizes the need for the Corps to give better consideration to the potential harm resulting from reduced public access to the water.

### III. WILL THE DOCKOMINIUM STAY AFLOAT?

As has been seen, the dockominium is a concept whose validity must survive several common law and regulatory tests. First, the dockominium must be a use consistent with the riparian rights doctrine.<sup>174</sup> Second, it must meet the test of the public trust doctrine.<sup>175</sup> Third, it must receive a section 10 permit from the Corps.<sup>176</sup> This Comment now addresses each of these issues, and concludes that the dockominium—so heavily reliant on the notion of private, exclu-

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<sup>171</sup> *Matthews*, 713 F.2d 681-82.

<sup>172</sup> *Id.* at 681. The court further ruled that it was the location and operation of Dock F that violated the applicable regulations. *Id.* Thus, the plaintiff's view from her property weighed more heavily than the hardships caused by the removal of Dock F. *Id.* at 681-82.

<sup>173</sup> See *supra* text accompanying notes 53-54.

<sup>174</sup> The dockominium must not violate any of the rights and responsibilities espoused by the riparian rights doctrine. See *generally supra* text accompanying notes 95-109.

<sup>175</sup> The dockominium must not violate the public trust principle that the navigable waters are held in trust by the states for the use and enjoyment of the public. See *generally supra* text accompanying notes 49-56.

<sup>176</sup> In virtually all instances, the placement of structures, including dockominiums, in the water requires a section 10 permit from the Corps. 33 U.S.C. § 403 (1982); see *generally supra* text accompanying notes 144-53.

sive ownership of a slip space in what was conceivably or actually a public facility—offends the public trust doctrine. Because it offends the public trust doctrine, the dockominium should find no safe harbor in a section 10 permit, which should be issued only upon a finding by the Corps that the public interest is served or at least not adversely affected by a development.

### A. Riparian Rights

The doctrine of riparian rights is implicated, because such riparian rights are subdivided and manipulated under condominium laws and conveyed separately to create dockominium units.<sup>177</sup> Condominium statutes that allow for the creation of condominiums in water provide convenient vehicles for the creation of dockominiums from subdivided riparian rights.<sup>178</sup> The dockominium concept claims to be an ownership interest in the water with each unit's size and location defined by the dock slip space.<sup>179</sup> The purported creation of a property interest in water that underlies the dockominium concept relies on the ability of the riparian proprietor to subdivide and convey parcels of riparian rights.<sup>180</sup>

The balancing of the harms and benefits associated with the subdivision of riparian rights suggests that such subdivision should, despite a lack of common law authority, be permissible.<sup>181</sup> A generic marina with fully operating docks and piers impacts the watercourse in the same way regardless of whether it is dockominium-owned or not. That is, permitted docks in the watercourse, whether used by renters or dockominium owners, do not offend the riparian rights doctrine because they neither destroy the waterflow nor do they

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<sup>177</sup> See *supra* text accompanying notes 24–27.

<sup>178</sup> See, e.g., Common Interest Ownership Act, CONN. GEN. STAT. ANN. §§ 47-200 to -293 (West 1986 & Supp. 1988); see *supra* text accompanying notes 34–35.

<sup>179</sup> See *supra* text accompanying notes 24–27.

<sup>180</sup> The severance and separate conveyance of riparian rights with the aim of creating an exclusive interest in a defined locus of water conflicts directly with the prohibition of private water ownership as mandated by the public trust doctrine.

<sup>181</sup> Although this Comment concludes that the dockominium does not violate the riparian rights doctrine, this author maintains reservations concerning the legal propriety of wholesale subdivision of riparian rights. Such a manipulation of the riparian rights doctrine, through the use of subdivision, appears at first glance to be an awkward and impermissible expansion of law. The subdivision of riparian rights into parcels to facilitate dockominium conveyance hinges on the general recognition that riparian rights may be severed and subdivided many times over, all claiming to be appurtenant to *one* land tract. That conveyance arrangement can be interpreted to represent a distortion of the doctrine. Although courts have been relatively silent on the dockominium concept, judicial interpretation of the doctrine has not contemplated subdivision of riparian rights as required under the dockominium concept.

impact the exercise of riparian rights by other riparian owners. The transfer of a nonconsumptive right, as contemplated by the dockominium concept, does not involve a significant or higher risk of expanded, altered, or detrimental use.<sup>182</sup> In essence, the dockominium creates no more harm, than do other similarly situated marinas, to the riparian rights doctrine. Thus, the creation of dockominiums through subdivision of riparian rights, from the perspective of the riparian rights doctrine, is not distinguishable from the operation of a conventional marina.

### *B. Public Trust*

Although the dockominium does not offend the traditional exercise of riparian rights, its reliance on the notion of exclusive ownership or control in the water within a slip space runs counter to the public trust doctrine. Generally, the exercise of riparian rights implicates a relationship between neighboring riparian owners that involves rights, duties, and responsibilities concerning the waterflow of a commonly used watercourse. For example, the right to use the water is accompanied by a responsibility to not destroy the flow and quality of the water. With the public trust doctrine, however, the riparian owners' relationship is with the public. The creation of a dockominium suggests a claim of exclusivity in a slip space in the water that is in direct conflict with the public trust doctrine's premise that the water resource is owned by the public.

The difficulty with the dockominium owner's claim of exclusivity is in the degree of interest that the dockominium owner seeks in the water. A water right may be sold or otherwise transferred like other property interests,<sup>183</sup> but such an interest is only in the flow of the water and not in the water itself.<sup>184</sup> The usage contemplated by the dockominium is an exclusive occupation of water space with a claim of title. The dockominium concept seeks more than just a preferred right to access the water. Indeed, it contemplates an ownership interest. Such exclusive claims parallel the situation that the two

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<sup>182</sup> Butler, *supra* note 126, at 142; see 3 KENT, *supra* note 102, at \*440 ("All that the law requires . . . [of the riparian owner is] . . . that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect the application of the water by the proprietors above or below on the stream.").

<sup>183</sup> See *supra* notes 121-26 and accompanying text.

<sup>184</sup> THOMPSON, *supra* note 25, § 273, at 452 ("The property rights are in the flow of water at the point of passage or beneficial uses that may result from it.").



*Matthews* courts sought to undo by ordering the removal of a dockominium pier.<sup>185</sup>

The public trust doctrine should not be manipulated to allow a conveyance of fee interest in the water.<sup>186</sup> Permits issued by regulatory agencies for dock structures are essentially easements for the construction of the physical dock for a particular purpose, and such permits expressly deny any grant of title and meticulously delimit the nature and extent of the rights conferred by the permit.<sup>187</sup> The permits authorize the floating dock to encroach upon the water surface, and sometimes the submerged bed, as an exercise of the riparian right to wharf out from the upland.<sup>188</sup> Thus, the current regulatory actions of governmental agencies, such as the Corps, are consistent with the traditional public trust notion of allowing access to water via wharfage.<sup>189</sup> Agencies rightly allow individuals to place docks in the water for the purpose of access, but they do so by issuing permits, not title to the water.<sup>190</sup> Given that the submerged lands and the navigable waters belong unquestionably to the people by virtue of the public trust,<sup>191</sup> to allow private individuals to claim the dockominium slip space or the water within the slip space as a property interest is violative of the public trust doctrine.<sup>192</sup>

### C. Section 10 Regulation

Despite the dockominium's conflict with the public trust doctrine, the Corps and other regulatory agencies are not prohibiting dockominiums.<sup>193</sup> Dockominium proposals undergo public interest review as required by Corps regulations. The Corps, however, has no known

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<sup>185</sup> See *Matthews v. United States*, 713 F.2d 677, 681-82 (11th Cir. 1983), *aff'g in part and rev'g in part* 526 F. Supp. 993 (M.D. Ga. 1981).

<sup>186</sup> See, e.g., R.R. WRIGHT, *THE LAW OF AIRSPACE* 298, 300 (1968) (municipalities are generally without authority to permit encroachments over public ways in the absence of legislative approval).

<sup>187</sup> See, e.g., MASS. GEN. L. ch. 91, § 15 (1987); 33 C.F.R. § 320.4(g)(6) (1987) ("A [Department of the Army] permit does not convey any property rights, either in real estate or material, or any exclusive privileges."); see also 33 C.F.R. § 330.5(c)(3) (Department of the Army nationwide permits do not give property rights).

<sup>188</sup> Piling are sometimes used to secure the dock to the submerged bed.

<sup>189</sup> See, e.g., *Town of Orange v. Resnick*, 94 Conn. 573, 582, 109 A. 864, 867 (1920).

<sup>190</sup> 33 C.F.R. § 320.4(g)(6).

<sup>191</sup> See *supra* notes 49-54 and accompanying text.

<sup>192</sup> See Sax, *supra* note 54, at 484; see *supra* text accompanying notes 50-65.

<sup>193</sup> Regulatory agencies issue permits for dockominium arrangements. (Copies of Corps permits that authorize dockominiums are on file with the author.)

policy as to the validity of the dockominium's claim of property interest in the water.<sup>194</sup>

Regulatory agencies are not antagonistic to the dockominium *per se*, but rather are concerned with its ancillary effects on the boating community.<sup>195</sup> This concern stems from the view that the dockominiums' popularity has resulted in a decrease in boatyards.<sup>196</sup> Boatyards and marinas are being acquired for the development of waterfront condominiums with private access to a dockominium facility.<sup>197</sup> This removes boat dock spaces from the public market and also deprives the public of services provided by the former boatyard. Unless the boatyard is relocated or replaced, its elimination would damage local boating services. The removal of public access and services that the yard had provided would be a hard-felt loss should the rate of dockominium conversions increase.

Regardless of the apparent impact on the availability of commercial and public marinas, the dockominium must be measured against the limits of established law. The public trust doctrine specifies that the government, through its many agencies, must protect all public resources that are held in trust. Given that, by its terms, a section 10 permit does not convey any property interests,<sup>198</sup> and that public interest review must consider benefits and harm to the public,<sup>199</sup> the Corps should not permit dockominium facilities.<sup>200</sup> To authorize permits for dockominiums is tantamount to breaching the public trust by allowing individuals to claim title, and thus exclusivity, to water that has previously been owned, ultimately, by the public.

Permit applications for the construction and maintenance of large dockominium facilities should not pass the muster of the Corps' public interest review. Considering that regulations and judicial decisions prohibit the conveyance of title to the water,<sup>201</sup> any dockominium proposal should fail the public interest review. The Corps should not approve the dockominium, then, for the primary reason that approval of the section 10 application would amount to the Corps giving away public property, the consequence of which is that some

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<sup>194</sup> Although the Corps has made no official policy, individual officials have expressed concerns about the dockominium. See Valiton Interviews, *supra* note 18.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> 33 C.F.R. § 320.4(g)(6) (1987).

<sup>199</sup> 33 C.F.R. §§ 320.1(a), 320.4(a) (1987).

<sup>200</sup> See *supra* note 187 and accompanying text.

<sup>201</sup> See, e.g., *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892).

individuals will be able to use public waters to the exclusion of others. Such a conclusion is extreme, yet legally supportable. The Corps should adopt such a policy regardless of the fact that dockominium facilities may pose no more danger to navigation than do other marina facilities.<sup>202</sup>

The dockominium is not inherently harmful to society or to the water environment. After all, the concept was a pure creature of economic demand. Boaters residing inland desired secured boating privileges. The dockominium merely responds to that hunger by promising an exclusive perpetual interest in a defined locus of water. Such an arrangement, however, is prohibited by the public trust doctrine. No matter how harmless a pleasure boat in the water may appear, the dockominium concept exists in defiance of the public's ownership and right of access to the water. The Corps is no longer concerned only with matters of navigability.<sup>203</sup> Indeed, the Corps has adopted a public interest review method to analyze the *use* to which a structure will be put. In that light and in light of the public trust doctrine, the Corps appears bound by law and its own regulations to deny permits to dockominiums.

#### IV. CONCLUSION

The American demand for access to recreational water resources has created a proliferation of dockominium marinas. There is substantial economic profit to be had by the marina owner or developer, just as developers have taken advantage of the land condominium boom. The creation of a dockominium, however, is in conflict with the public trust doctrine.

Although the dockominium concept appears to be protected by current governmental inaction and encouraged by free-market economics, the dockominium is in conflict with a policy of maintaining free and equitable access to the public water resources. More importantly, the dockominium concept appears to be a business creature vulnerable to legal attack. The expansion of riparian rights to such a novel use oversteps the bounds of the public trust doctrine due to an expressed claim of ownership of the water. The public trust doctrine reserves, to the public, ownership of the water and a paramount right of navigation in the water. This conflict with the

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<sup>202</sup> See *supra* note 182 and accompanying text.

<sup>203</sup> *Deltona Corp. v. United States*, 657 F.2d 1184, 1187 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

basic principles of the public trust doctrine should doom the dockominium.

It is apparent from the lack of judicial treatment of the dockominium concept that the Corps bears the major responsibility for evaluating the appropriateness of the dockominium. The dockominium is an economic alteration of long-established boating activities. No visible harm is created, but individuals are reaping private gains to the detriment of the public. The Corps must review its own public interest review criteria when considering applications for dockominium facilities. In doing so, the Corps should conclude that the dockominium violates the public trust doctrine.

APPENDIX

