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I. INTRODUCTION

Many landowners in New Jersey have had their worst nightmares come true -- they have been told that they do not own the land which they purchased. As a result, these landowners must pay the state additional money in order to obtain clear title to their land. For obvious reasons, people are upset and angry at this turn of events. The focus of this article is to examine the public trust doctrine, its history, and how the State of New Jersey is able to make people pay for land which they have already purchased. The article will also examine a few states to determine if any other state has carried the public trust doctrine to such extremes.

II. HISTORY OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine has been in existence almost as long as civilization. Roman law provided that "[t]he things which are naturally everybody's are: air, flowing water, the sea, and the sea-shore. So nobody can be stopped from going onto the sea-shore."[1]

> 2. Rivers and harbours are state property. So everybody shares the right to fish in them. 3. The sea-shore extends as far as the highest winter tide. 4. The law of all peoples allows public use of river banks, as of the rivers themselves: everybody is free to navigate rivers, and they can moor their boats to the banks, run ropes from trees growing there, and unload cargo. But ownership of the banks is vested in the adjacent landowners. That also makes them owners of the trees which grow there. 5. The law of all peoples gives the public a similar right to use the sea-shore, and the sea itself. Anyone is free to put up a hut there to shelter himself. He can dry his nets, or beach his boat. The right view is that ownership of these shores is vested in no one at all. Their legal position is the same as that of the sea and the land or sand under the sea.[2]

The public trust doctrine was slow to develop. The Magna Charta included some references to public rights but generally little was made of the doctrine in the document itself.[3] As time progressed, the law surrounding the public trust doctrine grew. One summary of the doctrine during the time after the Magna Charta stated:

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1. JUSTINIAN, INSTITUTES 2.1.1 (Peter Birks et al. trans., 1987).

2. *Id.* at 2.1.2-2.1.5.

3. Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762, 765-68 (1970).

> [I]t cannot be construed that the King has any other legal tenure in the rights of fishery and navigation than belong to him in the character of *protector* of public and common rights. And hence it is that the King has no authority either to grant the exclusive liberty of fishing in any arm of the sea, or to do anything which will obstruct its navigation. The King, it is true, may grant the soil of any arm of the sea, . . . but the right of the grantee so derived is always subservient to the public rights before mentioned.[4]

"In other words, public trust theory held that the public had certain important rights in the foreshore, which rights superseded any conflicting private rights including those claimed by the King. The King was trustee for those public rights, but he could not appropriate them to his own use."[5] This concept of the King holding the tidal areas in trust for the public was applied to the colonies as well.[6] After the American Revolution, the lands once held in trust by the King passed to the citizens of each state.[7] The American development of the public trust doctrine can be traced to the case of *Martin v. Waddell*[8] decided in 1842.

The Court in *Martin* had to determine who owned approximately one hundred acres of land located in the township of Perth Amboy in the State of New Jersey.[9] The land claimed lay beneath the navigable waters of the Raritan River and bay, where the tide ebbed and flowed.[10] The issue for the Court was whether the private landowner or the State of New Jersey held title to the land which lay beneath Raritan River.[11] Both landowners claimed an exclusive right to take oysters from the one-hundred acres in controversy.[12] The private landowner argued that because his land grant was from the King in fee, his claim was paramount to any State claim.[13]

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4. *Id.* at 768 (citations omitted).

5. *Id.* at 768-69.

6. *Id.* at 772.

7. *See* Arnold v. Mundy, 6 N.J.L. 1 (N.J. 1821) (after the Revolution the lands which had been the King's in trust passed to the citizens of the state).

8. 41 U.S. (6 Pet.) 367 (1842).

9. *Id.* at 407.

10. *Id.*

11. *Id.* at 411.

12. *Id.* at 408.

13. *Martin*, 41 U.S. (6 Pet.) at 407-08.

The opposing party claimed his title under a law of the State of New Jersey.[14] The lower court held that the landowner who had received his deeds from the King owned the land in fee simple.[15] Therefore, the King's prior grant of the land, made before the Revolution, precluded the validity of the subsequent grant of the State of New Jersey to Martin.[16]

The United States Supreme Court, on appeal, reversed the lower court.[17] The Court began by noting that lands under navigable waters were held by the King in public trust and that it would "not be presumed that he [the King] intended to part . . . [with] any portion of the public domain, unless clear and especial words are used to denote it."[18] The Court determined that the land was granted by the King in the same condition in which it had been held by the King, with the lands subject to the public trust preserved.[19] The grant received from the King gave the fast land in fee, but reserved the water and the soil under the water as public trust land, administered by the King. Thus, the Court held that New Jersey's grant to Martin was controlling because the state, at the end of the Revolution, controlled the land previously held by the King in public trust.[20] This decision established the public trust doctrine in the United States: "For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold absolute right to the navigable waters and the soils under them for their own common use . . . ."[21]

Because the doctrine in *Martin* was only applicable to the original thirteen colonies, the Court in its next major public trust case, *Pollard's Lessee v. Hagan*,[22] had to consider whether the public trust doctrine should extend to all states as they entered the Union.[23] The Court decided that the federal government held title to the land under any navigable water in any territory. However, the government was merely a guardian of the public trust lands until the territory was formed into a state,

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14. *Id.* at 408.

15. *Id.* at 374-80.

16. *Id.*

17. *Id.* at 418.

18. *Martin*, 41 U.S. (6 Pet.) at 411.

19. *Id.* at 413.

20. *Id.* at 410, 417-18.

21. *Id.* at 410.

22. 44 U.S. (3 How.) 210 (1845).

23. *Id.* at 218.

at which time the public trust lands were passed to the state.[24] This conclusion was required to enable each new state to be admitted on an equal footing with the original thirteen colonies.[25] "When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new States, and to invest them with it, to the same extent, in all respects, that it was held by the States ceding territories."[26] Therefore, each new state as it entered the Union received rights to the public trust lands as were held by the original thirteen colonies.

The seminal case in American public trust jurisprudence is *Illinois Central Railroad Co. v. Illinois*.[27] The Court was confronted with the issue of whether a state could convey public trust lands to a private owner and subsequently invalidate the grant, repossessing the lands originally granted. In 1869 the Illinois legislature passed the Lake Front Act over the veto of the governor.[28] The Act granted to the Illinois Central Railroad Company "all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile . . . in fee to the said Illinois Central Railroad Company, its successors and assigns."[29] The Act granting this property was repealed in 1873. Both sides then claimed the property, the Railroad by virtue of the 1869 grant and the State by virtue of the 1873 repeal of the Act.[30] The object of the suit was to obtain a judicial determination of the title of the submerged lands.[31]

The Court began the decision by stating what the public trust doctrine was:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control

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24. *Id.* at 220.

25. *Id.* at 221.

26. *Id.* at 220.

27. 146 U.S. 387 (1892).

28. *Id.* at 405.

29. *Id.* at 406 n.1.

30. *Id.* at 410.

31. *Id.* at 433. The land claimed by the Railroad comprised the entire Chicago harbor. *Id.*

Although the parties agreed as to what land was in the public trust, they disagreed as to what power the State had to dispose of the land. The Court framed the issue as follows:

> The question, therefore, to be considered, is whether the legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the state.[33]

The Court recognized that there was a difference between public lands and public lands under navigable water.[34] The Court then stated that "[t]he control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein,[35] or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."[36] The public trust lands which the Illinois legislature had granted to the Railroad could not be "relinquished by a transfer of the property."[37] The Court, in reaching this conclusion, compared the state's abdication of the public trust duty to an abdication of a state's police powers in the administration of government and the preservation of peace.[38]

> The Court concluded this portion of their discussion by stating: In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body,

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32. *Illinois Central*, 146 U.S. at 435.

33. *Id.* at 452.

34. Public lands are open to pre-emption and sale, whereas public lands under navigable waters are held in trust for the people of the state, so that they may enjoy the navigation of the water, carry on commerce over them, and have liberty of fishing therein, free from the obstruction or interference of private parties. *Id.*

35. Promoting interests of the public includes grants of land for foundations for wharves, piers, docks, and other structures in aid of commerce. *Id.*

36. *Id.* at 453. It is this second exception which the State of New Jersey presumably relies on in relinquishing its right to the public trust lands they are selling. *See infra* notes 72-127 and accompanying text.

37. *Illinois Central*, 146 U.S. at 453.

38. *Id.*

> but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters; *they cannot be placed entirely beyond the direction and control of the state.*[39]

The true effect of this case was that the public trust lands could no longer be easily divested. A state was given a duty to administer the lands which could not be abdicated or neglected. A state was limited to two narrow exceptions as to when public trust land could be disposed. However, even if a state were to grant public trust lands in fee simple to a private party, the *Illinois Central* case set a disturbing precedent by endorsing a state's move to repeal the grant and restore full "control, dominion and ownership" of the lands to the state. Although the *Illinois Central* court was only concerned with a four year period between the granting of the Act and the repeal, there is no reason to doubt that a state could reassert ownership to former public trust lands at any time, even hundreds of years after the grant, given the courts language that public trust lands "cannot be placed entirely beyond the direction and control of the state." This language should give any littoral owner or prospective littoral owner cause for concern.

While the *Martin*, *Pollard* and *Illinois Central*[40] cases defined what the public trust doctrine was in America, they never confronted the issue of exactly what were the boundaries of the public trust lands. The terms navigable waters and ebb and flow of the tide were used interchangeably to describe what lands the public trust contained.[41] There was not a case which described the limits of the public trust until 1988, when the United States Supreme Court decided *Phillips Petroleum Co. v. Mississippi*.[42]

Phillips Petroleum revolved around the ownership of forty-two acres of land underlying the north branch of Bayou LaCroix in Mississippi. Though the water covering the land was not navigable, it was influenced by the ebb and flow of the tide.[43] The record title to the land was held by Phillips Petroleum ("Phillips"), who

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39. *Id.* at 463-64 (emphasis added).

40. *See also* Shively v. Bowlby, 152 U.S. 1 (1894) (a summary of the development of the public trust doctrine in the individual states and the United States).

41. *See generally* Martin v. Waddell, 41 U.S. (6 Pet.) 367 (1842); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 210 (1845); Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892); Shively v. Bowlby, 152 U.S. 1 (1894).

42. 484 U.S. 469 (1988).

43. *Id.* at 472.

could trace its claim back to pre-statehood Spanish land grants.[44] Phillips argued that lands under non-navigable tidal waters were not part of the public trust.[45] Mississippi claimed that it acquired all lands lying under water and influenced by the tide, whether navigable or not, at the time of statehood.[46] The Court stated: "The issue here is whether the State of Mississippi, when it entered the Union in 1817, took title to lands lying under waters that were influenced by the tide running in the Gulf of Mexico, but were not navigable in fact."[47] The Court resolved the issue by holding "that the State, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide."[48] Therefore, the lands in controversy belonged to the State.

The Court went on to address Phillips' arguments that allowing Mississippi to retain title to these lands would be inequitable. Furthermore, Phillips argued, reasonable expectations based on record title for these lands have been developed and taxes have been paid on these lands for more than a century.[49]

The Court addressing these arguments recognized the "importance of honoring reasonable expectations in property interests."[50] However, many Mississippi cases consistently established "that the public trust in lands under water include[d] title to all of the land under tidewater.'[61] In the face of such case law, Phillips' expectations of ownership could not be considered reasonable.[52] The Court went on to endorse the Mississippi Supreme Court's holding that the "State's ownership of these lands could not be lost via adverse possession,[53] laches, or any other equitable doctrine."[54] The Court stated that "[w]e see no reason to disturb the general proposition that the law of real property is, under our Constitution, left to the

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44. *Id.*

45. *Id.* at 475.

46. *Id.* at 472.

47. *Phillips Petroleum*, 484 U.S. at 472.

48. *Id.* at 476.

49. *Id.* at 482.

50. *Id.*

51. *Id.*

52. *Phillips Petroleum*, 484 U.S. at 482.

53. *But see infra* notes 226-264 and accompanying text.

54. *Phillips Petroleum*, 484 U.S. at 484.

individual states to develop and administer.'"[55]

This decision could have far reaching effects. Landowners who have record title to their land and have paid taxes on the land for years could be forced to pay a state money for their land because the state at one time was negligent in their duty to administer the public trust lands. In the process, bona fide purchasers for value are injured.

What is curious about this decision is the Court's statement about real property law being left to the individual states. This statement contradicts previous Court rulings about the distinction between real property held by the state, and special property held by the state in trust.[56] The *Illinois Central* Court established that public trust land was held in trust for the enjoyment of the people with only two exceptions by which a state could legally divest itself of trust lands. If the trust lands were subject to real property principles, then a grant such as occurred in *Illinois Central* could not be repealed with the state taking back the land and giving no compensation. This type of taking would be abhorrent to the principles of real property law and the Constitution. Yet, the Court in *Phillips Petroleum* suggested that it was these principles of real property which should apply to public trust land. The Court, which has in the past given special treatment to public trust lands and allowed only two narrow exceptions for its divestiture, has now opened the road to arguments of adverse possession, laches, or other remedies by private owners with the state law to determine the outcome. This is an expansion of the two exceptions that the *Illinois Central* Court never contemplated.

What *Phillips Petroleum* ultimately did was to throw doubt on potentially thousands of titles in the nation. The decision endorsed a state's claim of ownership to land which the state had a duty to administer and yet ignored for many years. The state only became interested in the land when it was determined that money could be earned from land, which supposedly had always been in the public trust but had been neglected.[57] The *Phillips Petroleum* decision will only encourage other states, which have negligently managed the public trust, to follow similar policies, throwing a cloud on an unknown number of titles.[58]

Today, the public trust doctrine, in federal jurisprudence, incorporates all lands over which tidal water flows or did flow at any time since a state was admitted to the Union.[59] These lands may not be divested by the state unless: (1) it is for the purpose of promoting public interests in the trust; or (2) the lands can be disposed

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55. *Id.*

56. *See supra* notes 27-39 and accompanying text.

57. Mississippi is earning money by leasing the land for oil and gas exploration. New Jersey is earning money by forcing the landowners to pay the State for their land.

58. *See Phillips Petroleum*, 484 U.S. at 492-94 (O'Connor, J., dissenting).

59. The public trust doctrine has been extended to cover lands under navigable lakes and rivers upon their entry to the Union. *See* Barney v Keokuk, 94 U.S. 324 (1877).

of without substantial impairment of the public interest in the remaining public trust lands.

III. THE PUBLIC TRUST DOCTRINE IN NEW JERSEY

New Jersey was the first state to have a public trust doctrine announced by its courts.[60] The New Jersey Supreme Court in 1821 decided the case of *Arnold v. Mundy*.[61] The court held that the uplands owner had no exclusive right to the oyster beds because the state held the submerged lands in trust.[62]

> [T]he navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products . . . are common to all the citizens, . . . the property . . . is vested in the sovereign . . . .[63]

New Jersey's public trust doctrine remained stable after the *Arnold* decision for one-hundred years. Beginning in the late 1960's, New Jersey's public trust doctrine began to change in substance and form. Four cases, *Borough of Neptune City v. Borough of Avon-by-the-Sea*,[64] *Van Ness v. Borough of Deal*,[65] *Matthews v. Bay Head Improvement Association*,[66] and *O'Neill v. State Highway Department*,[67] have further developed the State's modern public trust doctrine. The cases establish that beach users cannot be discriminated against based on residency[68] and that the public trust doctrine includes public access to the dry sand area on beaches, whether

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60. Rose Young, Note, *The Public Trust Doctrine in California, Florida and New Jersey: A Critique of its Role in Modern Land Use Law*, 41 RUTGERS L. REV. 1349, 1351 (1989).

61. 6 N.J.L. 1 (N.J. 1821). The facts were similar to *Waddell*. Oyster beds in Raritan Bay were staked out and exclusively claimed by the uplands owner, which was challenged by another.

62. *Id.* at 78.

63. *Id.* at 76-77

64. 294 A.2d 47 (N.J. 1972).

65. 393 A.2d 571 (N.J. 1978).

66. 471 A.2d 355 (N.J. 1984), *cert. denied*, 469 U.S. 821 (1984).

67. 235 A.2d 1 (N.J. 1967).

68. *See Neptune City*, 294 A.2d at 55 ("[W]hile municipalities may validly charge reasonable fees for the use of their beaches, they may not discriminate in any respect between residents and non-residents.").

municipally[69] or privately[70] owned. *Neptune City*, *Van Ness*, and *Matthews* expanded the traditional scope of the public trust doctrine.[71] These decisions enforce the doctrine and use it to open additional areas to public access. It is also used for preservation of beach areas. The fourth case, *O'Neill*, diverges from the policy of preservation and pursues a policy of divesting the State of trust land. This decision and its progeny enforcing it have led the state to the income producing policy of selling its trust lands and causing the problems for private landowners.

IV. NEW JERSEY'S RIPARIAN POLICY TAKES SHAPE

O'Neill involved the ownership of lands along the Hackensack River in East Rutherford, New Jersey, claimed by the State to be "tidelands" and as such to be its property.[72] The trial court held that while the property in question was tidelands, the State was estopped from asserting its title.[73] The State appealed and the New Jersey Supreme Court reversed. In the process, the court set the ground rules by which the State could reclaim title to tidelands.

The court first stated that "neither estoppel nor laches applied against the State to the same extent as against private parties."[74] The court then framed the issue as follows:

> [W]hether the State's failure to exercise dominion over its properties or somehow to give public notice of its many holdings, should operate to divest it of title in favor of someone who in good faith dealt with the property in the belief that it was privately owned.[75]

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69. *See Van Ness*, 393 A.2d at 573 ("[I]n New Jersey a proper application of the Public Trust Doctrine requires that the municipality owned upland sand area adjacent to the tidal waters must be open to all on equal terms and without preference.").

70. *See Matthews*, 471 A.2d at 369 (by restricting access to the foreshore to only private members, "the Association is acting in conflict with the public good and contrary to the strong public policy 'in favor of encouraging and expanding public access to and use of shoreline areas'" and the Association should not be permitted to do this).

71. The State has extended the limits of the public trust doctrine beyond the ebb and flow of the tide set out in *Phillips Petroleum*. *See Van Ness*, 393 A.2d 571 and *Matthews*, 471 A.2d 355. The doctrine has also been expanded to include the traditional trust uses (navigation, commerce and fishing) and recreational uses. *See Neptune City*, 294 A.2d at 54 ("We have no difficulty in finding that . . . the public right in tidal areas . . . extend . . to recreational uses, including bathing, swimming and other shore activities.")

72. *O'Neill*, 235 A.2d at 4.

73. *Id.*

74. *Id.* at 7.

The court, in reaching an answer to this question, set forth some general principles of law. First, "[i]t is settled that the State's title in tidelands cannot be lost by adverse possession or prescription."[76] Second, "[t]he same considerations bar an estoppel against the State to assert its title because of delay or inaction."[77] Third, the State cannot be deprived of title to tidelands on a basis of presumption of a lost grant.[78] Finally, the State's title could not be lost by "mere inaction."[79] In stating these theories, the court basically deprived landowners of any theory of law which they could assert which would divest the State of title in tidelands, either submerged or formerly submerged.

The court answered its question by stating "[i]t would grossly disserve the public interest to hold that the State's continued ownership shall depend upon such measures."[80] The court also instructed the State that it "should do what is feasible to catalogue the State's far-flung holdings, . . . especially in ascertaining all the tidelands to which the State has clear or colorable title."[81]

The court did leave the landowners one glimmer of hope and one exception. The glimmer of hope was that the State was given the burden of proving "whether the alterations were due to State or to private activity, to satisfy the trier of the facts that the tideland status of the property was changed by such artificial measures."[82] The exception arises by virtue of "local custom"[83] codified in the Wharf Act passed in 1851, providing that a landowner could exclude the tide and acquire title to the land created.[84] Although this Act was repealed in two stages,[85] the court created an

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75. *Id.* at 8.

76. *Id.*

77. *O'Neill*, 235 A.2d at 8.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* It was this statement that prompted the State to pass legislation granting authority to map the State and determine what land the State could claim title to. *See infra* notes 87-92 and accompanying text.

82. *O'Neill*, 235 A.2d at 11 ("Practical necessity requires that the burden of persuasion be placed upon whoever asserts a tideland status different from that which now appears."). *Id.*

83. *See* Bell v. Gough, 23 N.J.L. 624 (N.J. 1852) (if the owner of land bounded by tide water makes improvements upon or reclaims the shore adjoining his lands, the part of the shore so improved or reclaimed belongs to him, and cannot be granted by the State).

84. *O'Neill*, 235 A.2d at 10.

exception for lands acquired by means of "local custom" or the Wharf Act. "Thus lands below mean high water acquired by a riparian owner pursuant to the local custom prior to the effective date of the repealing statute applicable to them are securely held, while tidelands he artificially appropriated after those dates remained the property of the state."[86]

As a result of the court's suggestion that the State determine what lands it owned, the State legislature passed legislation[87] directing the Resource Development Council[88] to survey meadowlands[89] to determine which property belonged to the State.[90] The legislation provided that the maps were to be published and filed so the public could inspect the maps.[91] The governor and legislature were to be informed annually on the progress the council was making.[92] The legislation also provided a process by which the landowners could assert that they held clear title to the land the

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85. In 1869 part of the Wharf Act was repealed with regard to certain tidal lands and in 1891 the Act was repealed with regard to all tidal lands. *Id.*

86. *Id.*

87. *See* N.J. STAT. ANN. §§ 13:1B-13.1 13:1B-13.14 (West 1991).

88. N.J. STAT. ANN. § 13:1B - 13.1(d) (West 1991). "Council' means the Resource Development Council [now the Tidelands Resource Council, see N.J. STAT. ANN. §§ 13:1B-10, 13:1D-18.2] of the Department of Conservation and Economic Development [now the Department of Environmental Protection and Energy]." The Resource Development Council became the Natural Resource Council which then became the Tidelands Resource Council.

89. N.J. STAT. ANN. § 13:1B-13.1 (a)-(c) (West 1991). This section Provides:

> As used in sections 86 through 102, inclusive, of this act:
> (a) "Meadowlands" means those lands, now or formerly consisting chiefly of salt water swamps, meadows, or marshes.
> (b) "Improved meadowlands" means such meadowlands as have been reclaimed by fill or other material thereon, and may include the erection of structure.
> (c) "Virgin meadowlands" means such meadowlands that are still in their natural state and upon which no diking, fill or structure have been placed.

90. N.J. STAT. ANN. § 13:1B-13.2 (West 1991). This section provides: "The council is hereby directed to undertake title studies and surveys of meadowlands throughout the State and to determine and certify those lands which it finds are State owned . . . ." Although this legislation directed the State to map only the defined meadowlands, the State, not one to pass up a good thing, decided to investigate all tidal property in which it might have an interest and a claim. *See* Dickinson v. Fund for the Support of Free Public Schools, 469 A.2d 1 (N.J. 1983).

91. N.J. STAT. ANN. § 13:1B-13.4 (West 1991). This section provides: "Upon completion of each separate study and survey, the council shall publish a map portraying the results of its study and clearly indicating those lands designated by the council as State-owned lands. . Such maps and studies shall be available for public inspection."

92. N.J. STAT. ANN. § 13:1B-13.6 (West 1991). This section provides: "The council shall make progress reports to the Governor and Legislature at least annually . . . ."

State was claiming.[93] The legislation also provides a process by which the State may convey or lease the parcels.[94] Finally, the legislation provided that any proceeds from the sale, lease or transfer of the State's interest would be paid to the Fund for the Support of Free Public Schools ("Fund").[95] While the mapping process was to be done quickly and efficiently, the landowners challenged the mapping process which delayed the project for years. The litigation over the maps was initially successful for the landowners.[96] However, in *City of Newark v. Natural Resource Council*,[97] the challenges to the mapping process came to an end.

In *City of Newark*, the landowners and title insurance companies sought to invalidate the maps on the ground that the mapping methodology failed to comply with the requirements set out in the statute.[98] In mapping the Hackensack

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93. N.J. STAT. ANN. § 13:1B-13.5(a) (West 1991). This section provides: "Any person aggrieved by a designation by the council that certain parcels are State-owned lands may file with the council pertinent information . documenting his claim of title. . . "

94. *See* N.J. STAT. ANN. §§ 13:1B-13.7 - 13.12 (West 1991).

95. N.J. STAT. ANN. § 13:1B-13.13 (West 1991). The New Jersey Constitution provides for a Fund to support free public schools:

> The fund for the support of free public schools, and all money, stock and other property, which may hereafter be appropriated for that purpose shall be securely invested . . and the income thereof . . . shall be annually appropriated to the support of free public schools, and for the equal benefit of all the people of the State.

N.J. CONST. art 8, § 4, ¶ 2. Pursuant to the provision which appropriates money to the fund, the legislature has passed a law which designates that all moneys received by the State for the sale of lands underwater shall be paid to the school fund. *See* N.J. STAT. ANN. § 18A:56-5 (West 1989). This section provides: "All lands belonging to this State now or formerly lying under water are dedicated to the support of public schools. All moneys hereafter received from the sales of such lands shall be paid to the board of trustees, and shall constitute a part of the permanent school fund of the State."

96. *See* Alfred Porro, Jr. and Lorraine Teleky, *Marshland Title Dilemma: A Tidal Phenomenon*, 3 SETON HALL L. REV. 323, 327 (1972) (in *State v. The Council in the Division of Resource Development*, No. L-12561-68 (N.J. Super. Ct., L. Div., Sept. 8, 1971) *modified* 287 A.2d 713 (N.J. 1972), the first of a contemplated series of maps was suppressed from introduction into evidence by the State due to its "not having been prepared in accordance with the legislative directions.").

97. 414 A.2d 1304 (N.J. 1980).

98. The statute is N.J. STAT. ANN. § 13:1B-13.3 (West 1991). It provides:

> In making a thorough study of all such lands to determine which are state-owned lands and in making its determination the council shall take into account the mean high water line as established by the United States Coast and Geodetic Survey, the nature of the vegetation thereon, artificial changes in land or water elevation, and such other historical or scientific data which, in the opinion of the council, are relevant in determining whether a parcel of land is now or was formerly flowed by

Meadowlands, the novel technique of biological delineation was used.[99] The second method challenged was a mapping process using historical sources which depicted the location of tidal creeks and streams in the meadowlands prior to development.[100] In both instances the State rejected the traditional mapping method.[101]

The court first noted that while section 13:1B-13.3 lists four specific types of source material to be taken "into account," broad discretion is vested in the Natural Resources Council ("NRC") to use other sources which, in its opinion, are relevant.[102] Therefore, the statute does not foreclose the NRC from using other sources in creating the maps.[103] This decision put to rest the landowners challenge to the mapping process.[104]

However, the landowners pursued another avenue of relief that, if successful, would at least provide a time frame within which the State would have to claim land, and after which, the State would be precluded from asserting a claim. In 1981, the people of New Jersey passed an amendment[105] to the New Jersey Constitution which required the State to specifically define and assert claims to land that had been tidally

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mean high tide.

99. *City of Newark*, 414 A.2d at 1306. The biological delineation method involved:

> analysis of color infrared aerial photographs of the meadows. This procedure was premised on the theory that there is a correlation between the various spectral reflectance patterns of Phragmites communis, a reedlike grass which grows extensively in the Hackensack meadows, and the extent of tidal inundation where the plants exist. Certain color patterns are said to indicate areas which are regularly flowed by the tide, while other patterns indicate areas not susceptible to tidal flow. The data from the biological delineation was then supplemented with information from earlier tide gauging and from a number of historical sources.

Id.

100. *Id.*

101. *Id.* at 1306 (the traditional tidal mapping program involves using tide gauging to locate mean high water points in the marsh and surveying to connect those points into a mean high water line).

102. *Id.* at 1309.

103. *Id.*

104. The landowners also argued in this case that "the State's title is limited to waterways which are both tidally flowed and navigable." *City of Newark*, 414 A.2d at 1310. The court held that "[s]overeign ownership based on tidal flow, irrespective of navigability, has been and continues to be the rule in this State." *Id.* at 1311. The State of New Jersey breathed a sigh of relief when the United States Supreme Court in *Phillips Petroleum* decided the same issue in the same manner.

105. The amendment was approved on November 3, 1981 by a vote of 864,445 yes and 756,220 no. Dickinson v. Fund for Support of Free Public Schools, 454 A.2d 491, 496 (N.J. Sup. Ct. 1982) ,*rev'd in part and aff'd in part*, 469 A.2d 1 (N.J. 1983).

flowed for more than forty years.[106] The amendment also gave the State a one year period after passage of the amendment to assert a claim over the land that had not been tidally flowed for forty or more years prior to November 3, 1981.[107]

The amendment was ultimately challenged and a conclusion of the issues was reached in *Dickinson v. Fund for the Support of Free Public Schools*.[108] The amendment was challenged primarily on two grounds: (1) the plaintiffs contended that the mapping would not be sufficiently completed within the time allowed for the State to specifically define their claims; and (2) constitutional issues, both federal and state, precluded the adoption of the amendment.[109]

The base map before the court contained a series of 1,632 squares, some of

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106. The amendment states:

> No lands that were formerly tidal flowed, but which have not been tidal flowed at any time for a period of 40 years, shall be deemed riparian lands, or lands subject to a riparian claim, and the passage of that period shall be a good and sufficient bar to any such claim, unless during that period the State has specifically defined and asserted such a claim pursuant to law. This section shall apply to lands which have not been tidal flowed at any time during the 40 years immediately preceding adoption of this amendment with respect to any claim not specifically defined and asserted by the State within 1 year of the adoption of this amendment.

N.J. CONST. art. 8, § 5, ¶ 1.

107. *Id.* In keeping with the history of extensive litigation over the tidelands issue, the explanatory statement of the amendment to be included on the ballot went through numerous revisions and a court case before one was finally adopted less than one month before election day. *See* Gormley v. Lan, 438 A.2d 519 (N.J. 1981). The statement finally adopted was suggested by the court:

> The primary purpose of this amendment is to relieve owners of land from certain competing claims of ownership by the State. These claims arise from the fact that the State may own any land that ever had the ordinary high tide ("mean" high tide) flow over it, regardless of who the record owner may be or how long he has occupied the land. Sometimes it is difficult to determine that fact and owners may be uncertain for years if the State has a claim to the land.
>
> When the State establishes ownership of tidal flowed land, any proceeds from the sale of the land are deposited in a fund devoted to public education.
>
> This amendment provides that if the State does not, within one year, present all claims on lands that have been "dry" for at least 40 years, those claims are barred. The State may have claims for such land that would succeed under present law but that may be extinguished by virtue of this amendment, if for any reason the State does not assert such claims within that one year.

Id. at 524 n.2.

108. 469 A.2d 1 (N.J. 1981).

109. *Id.* at 4.

which were colored.[110] The colored squares indicated areas where the State had made a sufficient investigation to define lands it claimed within those areas by preparing a claim overlay map.[111] The uncolored squares represented areas in which the State may or may not have a claim, but claim overlay maps had not been prepared.[112] The court held that the base map prepared by the State and supplemented by claim overlay maps constituted sufficient delineation of the State claims to satisfy the amendment.[113] However, where the base map was not supplemented by claim overlay maps, the State indicated that claims did not satisfy the amendment's requirement of specificity.[114]

The plaintiffs also argued four constitutional issues: (1) the State's interest in the riparian lands could not be cut off because of article VIII, section IV, paragraph 2 of the New Jersey Constitution and N.J. Stat. Ann. § 18A:56-5;[115] (2) the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution was violated since some owners had acquired land that was once tidally flowed by purchase from the State and others will have acquired similar property without consideration because of the State's inability to define and assert its claim within the time period;[116] (3) the amendment deprives the Fund of its interest in some tidelands without adequate compensation in violation of the due process clauses of the 5th and 14th Amendments to the United States Constitution;[117] and (4) the amendment violates the Contract Clause of the Federal Constitution.[118]

The court dealt with these arguments as follows. First, "the people have a right to amend their Constitution."[119] Because the prior constitutional dedication did not preclude a subsequent change in the dedication, the amendment could cut off the

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110. *Id.* at 9. The map was current to the November 2, 1982 deadline. *Id.*

111. *Id.*

112. *Id.* at 9.

113. *Dickinson*, 469 A.2d at 10-11.

114. *Id.*

115. *Id.* at 11-12. *See also supra* note 95 (setting out the applicable constitutional and statutory sections).

116. *Dickinson*, 469 A.2d at 12.

117. *Id.*

118. *Id.* at 13. The Contract Clause provides that "No state shall . . . pass . . . any law impairing the obligation of contracts . . . ." U.S. CONST. art I, § 10, cl. 1.

119. *Dickinson*, 469 A.2d at 12.

State's interest in riparian lands.[120] Second, the court indicated that the State had applied its resources in a sensible manner and had rationally selected the areas to be mapped. As a result, the court found no merit in the plaintiff's Equal Protection arguments.[121] Third, the court again noted that the people of the State have a right to change their Constitution. Because the Fund is a "creation of the New Jersey Constitution," the people may modify the Fund's terms or even eliminate it.[122] Finally, the court was satisfied that the Contract Clause had not been violated.[123]

The *Dickinson* case requires the State to make a complete and thorough investigation of tidally flowed land before asserting a claim. It rejects the dissent contention that landowners merely had to be notified that the State may have a claim to their property.[124] The decision also terminated within a reasonable time the uncertainty that landowners had with respect to whether the State had a claim to their property. The landowners finally won a battle against the State's attempts to make them pay for their land again. The landowners now have an effective weapon to preclude the State from asserting a claim to their property.[125] This decision effectively brought an end to the litigation over the validity of the State's actions. This string of cases endorsed the State's right to map and claim lands which were formerly tidally flowed. Two exceptions to State claims exist: (1) if the State made a valid grant of the land;[126] or (2) the land was filled in accordance with "local custom" or the Wharf Act.[127]

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 14.

124. *Dickinson*, 469 A.2d at 17 (Handler, J. dissenting).

125. The State, however, may not have been totally estopped from asserting claims to land which are supposedly precluded by the amendment. The maps published by the State contain a Reservation Clause which the court has determined is valid. This Clause may enable the State to claim additional lands not claimed on the map. *See* City of Jersey City v. Tidelands Resource Council, 469 A.2d 19 (N.J. 1983).

126. *Id.* at 21.

127. *See* O'Neill v. State Highway Department, 235 A.2d 1, 10 (N.J. 1967).

V. THE LANDOWNERS

Mr. and Mrs. Ralph Grieco live in Spring Lake, New Jersey.[128] In 1957 Mr. Grieco purchased three lots for $2,500, part of which happened to be filled tideland.[129] The property is four and one-half blocks from the ocean and backs onto a pond.[130] Mr. Grieco built a house on two of the lots and left the third lot open. Mr. Grieco, who is retired, dreamed of building a ranch on the vacant lot so that he and his wife would not have to climb stairs. Their intention was to sell their house and use the proceeds to build a new house.[131] With this idea in mind, Mr. Grieco went to examine copies of the State claim maps at the borough hall. The maps stated that portions of his property had once been underwater and therefore, the State owned the land.[132]

Before the Grieco's could build their new home, they would have to clear title to the land. A State appraiser estimated the market value of their filled land, which amounted to 0.29 acres, at $95,525.[133] In addition to this amount, additional fees, such as legal costs, paying an engineer to survey the land, paying the State to prepare the document formally granting the landowner ownership and paying the State for a permit to legalize the filling of the property which had occurred years before, added nearly $8,000 to the Grieco's bill.[134]

The Grieco's borrowed the money needed to pay the State to clear title to the land. After borrowing the money, they sold the vacant lot to repay the loan.[135] The Grieco's paid the State approximately $75,000 to clear title to their property.[136] In the process, they gave up their dream of building a ranch home.

Farther south in New Jersey, in the community of Avalon, when residents bought their lots in the 1970's few realized that they would someday owe the State

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128. Telephone Interview with Ralph Grieco, Landowner, in Spring Lake, N.J. (October 24, 1992).

129. Marc Duvoisin, *On tidal lands, homeowners' nightmares come true*, PHIL. INQUIRER, October 5, 1986, at A10.

130. Grieco, *supra* note 128.

131. Grieco, *supra* note 128.

132. Duvoisin, *supra* note 129.

133. Duvoisin, *supra* note 129.

134. Duvoisin, *supra* note 129.

135. Duvoisin, *supra* note 129.

136. Grieco, *supra* note 128.

more than what they originally paid for their properties.[137] The story begins in 1967 when a developer, Tito Macchia,[138] approached Avalon borough officials with a plan to dig lagoons out of marshlands and use the excavated material to create waterfront lots.[139] The borough, the owner of the land which Macchia wanted, consented to the plan and sold 38 acres of land at public auction in September, 1967 for $46,000 to Macchia.[140] Under State tidelands procedure, in order to clear title to the land, Macchia had to acquire the land that was tidally flowed from the State.[141] The State determined that 17.5 acres of the land was tide flowed, for which a price of $7,237 was set by the State in order for Macchia to hold title free and clear.[142] Pending approval by the State, Macchia posted a $3,400 bond and went to work.[143] In January 1969 Macchia bought an additional 95 acres -- of which 27.4 acres was tide flowed land -- for $95,400.[144] The State determined that they would sell all of the tideland Macchia was working on for $23,850.[145] A bond of $10,000 was posted and again Macchia began his work.[146]

Mr. Macchia's pending sales from the State ran into trouble when a new governor took office in 1970. Newly elected Governor William Cahill placed a moratorium on the sale of tidelands because he believed that the State was selling off its tidelands for less than their fair market value.[147] When the moratorium was lifted in 1972, the price for the State's claims on Macchia's Avalon property had risen from $23,850 to $88,000.[148] Macchia and the State fought over the price of the settlement

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137. Gordon Bishop, *'Dream' of owning homes turns into a high-cost nightmare*, NEWARK STAR LEDGER, September 9, 1991, at 1.

138. Mr. Macchia was contacted for this article. However, he was in the hospital and we were referred to his lawyer with whom messages were left, but no calls were ever returned.

139. Duvoisin, *supra* note 129.

140. Duvoisin, *supra* note 129.

141. Bishop, *supra* note 137, at 8.

142. Bishop, *supra* note 137, at 8.

143. Bishop, *supra* note 137, at 8.

144. Bishop, *supra* note 137, at 8.

145. Bishop, *supra* note 137, at 8.

146. Bishop, *supra* note 137, at 8.

147. Bishop, *supra* note 137, at 8.

148. Bishop, *supra* note 137, at 8.

for the next decade.[149] The State records reveal that they never received any payment from Macchia.[150] In 1985, the State closed the cases involving Macchia because it realized the balance of the amount due would never be paid by Macchia and deposited the downpayments, totaling $13,730, in the Fund.[151] With Macchia no longer in business, and the property values of the lots in question skyrocketing, the State decided to cash in on its lazy behavior and began negotiating individual settlements in Macchia's Avalon Lagoon development with each property owner.

In 1972 Mary Grace Keen and her husband bought a pie shaped lot in Avalon.[152] The price in 1972 for the lot was $25,000.[153] Nobody told them that the State might have a claim on their property at the closing.[154] In the mid 1980's, the Keen's received their first notification that the State claimed ownership of part of the Keens' property. Specifically, the State claimed that a creek had flowed over 42% of their property and this therefore belonged to the State.[155] The State told the Keen's that they could obtain clear title to their property by paying the State "something like $27,000."[156]

At the time the State made the offer, the house the Keen's lived in was almost twenty years old. It needed substantial remodeling, for which the Keen's took out a large equity loan.[157] When the State sent their bill "there was no way" the Keen's could afford another loan. To this day, the Keen's have not settled with the State. They are one of the few landowners in the Avalon development who have refused to settle.[158] When Mrs. Keen was asked who she thought was responsible for the problem, she answered simply, "the State."[159] She believes that the State has treated the landowners unfairly. She believes that this treatment began with Mr. Macchia.

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149. Bishop, *supra* note 137, at 8.

150. Bishop, *supra* note 137, at 8.

151. Marc Duvoisin, *Its tidal-land origin haunts exclusive Avalon neighborhood*, PHIL. INQUIRER, October 6, 1986, at A4. *See generally supra* note 95.

152. Interview with Mary Grace Keen, Landowner, in Avalon, N.J. (October 31, 1992).

153. Bishop, *supra* note 137.

154. Bishop, *supra* note 137, at 8.

155. Keen, *supra* note 152.

156. Keen, *supra* note 152.

157. Keen, *supra* note 152.

158. Keen, *supra* note 152.

159. Keen, *supra* note 152.

> [T]hey weren't fair with Mr. Macchia, who developed it, they wanted to up the ante just like they did with us. One year it's $5,000, the next year it's, you know, this new figure. And when they wanted to up the ante with him [Mr. Macchia], he balked, and they still let him go ahead and do it. See, they should have stopped him.[160]

Mrs. Keen is frustrated and does not think that the problem will ever end.[161]

In 1977 the Dell'Orifice family bought a 60 by 155 foot lot on a lagoon in Avalon for $35,000.[162] They had always thought that Avalon would be a wonderful place to raise a family because it was quiet and safe.[163] They were not told that the State did or could claim title to any portion of their lot when they bought it. However, at the closing Mrs. Dell'Orifice noticed a clause in the title insurance which excepted coverage for "riparian claims of the State of New Jersey and the United States of America."[164] When she asked the lawyer about the clause he told her that it did not mean anything, it was just part of the form and no claims had ever been made. Mrs. Dell'Orifice, with twenty-twenty hindsight, said of this incident "had I had my wits about me and said, 'If it doesn't mean anything then strike it,' I wouldn't be in the position that we're in today. But you don't know these things."[165]

The Dell'Orifice's believe that the State first notified them of the claim against their property in May 1990.[166] The State was claiming ownership to all of their property except for twenty five square feet. Mrs. Dell'Orifice read part of the letter which was sent to them:

> Dear Property Owner:
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> The State of New Jersey has asserted a claim of title to a portion of your property. Before the lagoons were constructed and the marsh was filled in, major parts of your neighborhood were flown by tidal waters, owned by the state of New Jersey. The state never

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160. Keen, *supra* note 152.

161. Keen, *supra* note 152.

162. Interview with Mary Joe Dell'Orifice and Vincent Dell'Orifice, Landowners, in Avalon, N.J. (October 31, 1992).

163. Dell'Orifice, *supra* note 162.

164. Dell'Orifice, *supra* note 162.

165. Dell'Orifice, *supra* note 162.

166. Dell'Orifice, *supra* note 162.

> sold its ownership interest in this land. During the past few years, some of your neighbors have cleared title of this claim based upon a calculation of fair market value set in 1985, Legally, these values of the properties in your neighborhood have increased substantially since 1985. As a result, the Tidelands Resource Council has decided to have all the remaining properties reappraised. The cost to you of removing this cloud on title, should you decide to do so, is likely to go up significantly as a result of this reappraisal.[167]

The letter was a threat as far as the Dell'Orifice's were concerned. They interpreted the letter as suggesting that they either settle now for the 1985 price or pay the new reappraised price which tripled the property values.[168] The end of the letter indicated that the State wanted $48,169 for the property.[169] The Dell'Orifice's considered a loan and thought that maybe the State would at least back them up. Mrs. Dell'Orifice inquired of the Tidelands Resource Council about a loan which the State would back; she was told to go to a bank.

In the same meeting, Mrs. Dell'Orifice told State officials that her husband had built the house with his own two hands. They told her that they could just evict her and take the house because it was their property. Mrs. Dell'Orifice responded, "I'll burn the god-damned thing down first."[170] To this day, the Dell'Orifice's have not settled with the State.

When asked who they thought was responsible for the problem, the Dell'Orifice's said it was the State's fault. Mrs. Dell'Orifice said:

> [T]he State had the right to claim, to make its claim when it did make its claim [in the late 1960's when Tito Macchia bought the property]. It lost that right . . . . Here, I believe the State lost, dropped the ball, . . . and now, in the eleventh hour wants to pick it back up and go for the touchdown.[171]

Her husband added that the State wants to "[m]ak[e] an exorbitant profit in between."[172] They think the system is very unfair because when the State began drawing these maps they "immediately came to the areas where they thought it was

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167. Dell'Orifice, *supra* note 162.

168. Dell'Orifice, *supra* note 162.

169. Dell'Orifice, *supra* note 162.

170. Dell'Orifice, *supra* note 162.

171. Dell'Orifice, *supra* note 162.

172. Dell'Orifice, *supra* note 162.

the most high priced."[173] By the end of the interview, the stress of the frustration and anger caused by this problem and the State's unsympathetic behavior was clearly exhibited in Mrs. Dell'Orifice's tears.[174]

VI. THE STATE

When the mapping process and the litigation over the methods used was finally completed in May 1982, the State of New Jersey could finally begin to assert claims to property. In order to facilitate the process, legislation was passed.[175] The Tidelands Resource Council ("TRC") is the first State agency a person who wants to buy, sell, or lease State tidelands contacts.[176] They make the initial decision about whether any tidelands grant, license or lease is issued. There are twelve members of the council who serve three or four year terms.[177] The members of the council are appointed by the governor and meet twice a month. Seven votes are required for any action of the TRC to be effective.[178] Once an action is approved by the TRC, the Commission of the Department of Environmental Protection and Energy ("Commission") reviews the decision.

The Commission can either accept the TRC's decision or reject it. If it is rejected the action is sent back to the TRC and the process starts again. If the decision is approved, the process continues.[179] The Attorney General, on behalf of the Governor, next reviews the action. The Governor is left with the ultimate decision as to whether to approve or reject the action.[180] Even if the TRC approves the action, there is no recourse left to the landowner if the Governor rejects the action except to start over.[181] This is what occurred in Avalon. The TRC originally approved the conveyance to Tito Macchia. It was the Governor who rejected the

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173. Dell'Orifice, *supra* note 162.

174. Dell'Orifice, *supra* note 162.

175. *See supra* notes 87-95 and accompanying text.

176. Interview with William Andersen, Deputy Attorney General, State of New Jersey and Special Counsel to the Tidelands Resource Council, in Trenton, N.J. (November 2, 1992).

177. Andersen, *supra* note 176.

178. Andersen, *supra* note 176.

179. Andersen, *supra* note 176.

180. Andersen, *supra* note 176.

181. *See* B.P. Oil v. State of New Jersey, 379 A.2d 1051 (N.J. Sup. Ct. Div.) (Governor could not be compelled to convey tidelands interest to private person at consideration originally approved by the Natural Resources Council).

conveyance at the price approved by the TRC.[182] This process is established by statute. The State believes that the process is effectively designed "to prevent the wholesale give away of state tidelands, something which has happened in the past."[183]

All moneys received from the sale of tidelands property are dedicated to the Support of Free Public Schools Fund. The sale of tidelands in the past few years has consistently brought in three to four million dollars and before that the money brought in was routinely over two million dollars per year.[184] The costs of running the TRC are deducted from the money brought in. However, the TRC is a "profit center for the State."[185] The money received from tidelands sales has been dedicated to the Support of Free Public Schools Fund since at least 1894.[186]

In setting a price for the release of tidelands claims, the State relies upon the fair market value at the time the claim is released by the State.[187] This policy was modified by the Attorney General in 1983 through a Formal Opinion ("Opinion").[188] The Tidelands Resource Council asked the Attorney General "whether it may fix a price in an amount less than fair market value for a grant of state owned tidelands which have been improved by private parties in good faith."[189] The Attorney General concluded "that the [TRC] has the discretion to grant the state's interest in tidelands upon which improvements have been made in good faith by record owners under color of title for a price based upon current fair market value of the state's interest in those lands without the improvements."[190]

In reaching this decision, the Attorney General relied on several factors. First, the legislation failed to provide any specific guidance for determination of an appropriate price, but rather provided only general direction.[191] Second, the State recognized the existence of equities in favor of one who has in good faith made

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182. Andersen, *supra* note 176.

183. Andersen, *supra* note 176.

184. Andersen, *supra* note 176.

185. Andersen, *supra* note 176.

186. Attorney General of New Jersey Formal Op. 3, at 3 (March 14, 1983).

187. Andersen, *supra* note 176; Interview with Joseph Clayton, Esquire, Landowners' attorney, in Princeton, N.J. (November 2, 1992).

188. Formal Op. 3, *supra* note 186, at 3.

189. Formal Op. 3, *supra* note 186, at 1.

190. Formal Op. 3, *supra* note 186, at 6-7.

191. Formal Op. 3, *supra* note 186, at 2.

improvements on the land. These equities include the fact that the owner who made improvements to his land did so in good faith and at his own expense and for his own benefit.[192] Finally, the legislation giving the TRC power to set the consideration for its grants specifically provides "in determining such consideration the [TRC] shall take into account the actions of a claimant under color of title who in good faith made improvements or paid taxes, or both, on the lands in question."[193]

The Attorney General also determined that "the [TRC] has the authority to make a grant of the state's interest in tidelands where the state's claim to title is disputed" at a price less than fair market value.[194] The Opinion recognized that the State's claim is "no greater than its ability to prove [its claim] pursuant to law."[195] Therefore, the State may, after determining that their case is not that strong, reduce the consideration in order to settle the case instead of going to the extra expense of litigation.

The Opinion provided guidance on how the TRC could determine a good faith discount.

> In the case of improvements, an allowance may be made only after the [TRC] has made a thorough inquiry into the facts of each case. In particular, those facts which bear on the knowledge or opportunity for knowledge of the applicant to the existence of the state's title and the extent to which either the applicant for a grant was responsible for making improvements in question or paid its predecessor in record title for those improvements should be explored.[196]

Thus, the State currently permits good faith discounts and litigation risk discounts.[197]

However, if one is "lucky" enough to have insurance that does not except riparian claims by the State, no discount is allowed. The Attorney General was presented with the question, "whether the [TRC] may provide a good faith discount

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192. Formal Op. 3, *supra* note 186, at 5.

193. Formal Op. 3, *supra* note 186, at 6 (quoting N.J. STAT. ANN. § 13:1B-13.9).

194. Formal Op. 3, *supra* note 186, at 7.

195. Formal Op. 3, *supra* note 186, at 7.

196. Formal Op. 3, *supra* note 186, at 7.

197. Andersen, *supra* note 176. The following is an example of how a price is arrived at. Assume that the State claims 100% of a parcel of property. The property is appraised at $100,000. If there are no discounts, the price is the full $100,000. However, assume a good faith discount of 65% is granted. Then the price is $35,000. If the State only claims 50% of the property appraised at $100,000, then the price, with no discounts, is $50,000. Any discounts are applied against this amount, so a litigation discount of 75% would result in a price of $12,500 for this parcel of property.

on valuation based on the underlying value of the property without any improvements in an instance where the owner has obtained insurance to indemnify against any defects in title."[198] The Attorney General concluded "that the [TRC] should fix the price for state owned tidelands improved in good faith at its current fair market value in its improved state when it is determined the property owner's title insurance will provide indemnification to cover any defect in title occasioned by the State's riparian claim."[199]

In reaching this conclusion, the Attorney General reasoned that the title insurance company entered into a contract with the full knowledge of the risks against which it was providing indemnification. The company's expertise and resources could evaluate the risks and make an informed judgement. In addition, the company was receiving "adequate consideration for providing indemnification against those risks."[200] The insurance company stood in a different position from that of an innocent owner who is entitled to special consideration in light of the owner's blamelessness and the State's obligation to treat its citizens fairly.[201] Therefore, the insurance company must pay the full amount that the State sets as its consideration for the release of the it's tidelands claim.

VII. LITIGATION RISK DISCOUNTS

In *State of New Jersey, by the Commissioner of Transportation, v. Jack Blades*[202] an action was initiated by the Commissioner of Transportation to condemn Blades' property which was needed to improve a road in Atlantic City. The TRC entered the litigation as a party-condemnee and asserted its paramount claim to ownership of the property in question.[203] The TRC was claiming title to 96.6984% of the property in question. The land, the TRC asserted, had been flowed by the Clam Creek before being filled by artificial means.[204] The property was bought by Blades' father in 1963 for $3,500. At the time it was purchased, the property was filled, and "there was no visible evidence of any claim of ownership by the State of

198. Letter from Irwin Kimmelman, Attorney General, New Jersey, to David Moore, Chairman of Tidelands Resource Council 1 (November 26, 1984)(on file with authors).

199. Letter, *supra* note 198, at 3-4.

200. Letter, *supra* note 198, at 2.

201. Letter, *supra* note 198, at 2.

202. State of New Jersey, Comm'r of Transp. v. Jack Blades, Docket No. L-68448-48 (N.J. Super. Ct., Atlantic and Cape May Counties, May 28, 1986).

203. *Id.* at 1.

204. *Id.*

New Jersey, based on the assertion that the property was formerly tide-flowed."[205]

The court recognized that the origin of the claim lay in the public trust doctrine and that under the *O'Neill* holding, the State owns in fee simple all lands that are flowed by the tides, up to the mean high water mark.[206] The court also stated that where the high water mark moves either seaward or landward through the processes of erosion or accretion, ownership will change. With erosion, the land owned by the State will increase, and accretion will result in the upland owner, whose property abuts the tidelands, owning the accreted land.[207] The burden of proof in tidelands disputes rests upon the person attacking the existing scene, or in this case upon the State.[208]

Clam Creek existed in the vicinity of the property in question in 1863. In 1924 the State issued a riparian grant for a portion of Clam Creek's bed so it could be filled for road construction.[209] In connection with this construction, Clam Creek was filled "sometime between 1924 and 1932."[210] The State at the time of the filling took no steps to delineate the high water mark.[211] This evidence clearly established that the creek had been filled by artificial means. Therefore, it was up to the State to prove that the property was flowed by Clam Creek "at some point in the past and, allowing for erosion and gradual and imperceptible accretion, define the bondaries [sic] of Clam Creek with respect to the high-water mark prior to its artificial filling sometime between 1924 and 1932."[212] The State, in establishing its claim, relied on an 1863 Coast and Geodetic Survey to establish the high-water mark of Clam Creek as it existed in 1863 with respect to Blades' property.[213] The State asserted that having established the high-water mark and the artificial filling, it had established its claim to the property.[214] However, the court stated that "not only must the state show that the property had at one time been tide-flowed, but also that it had not been

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205. *Id.* at 3-4.

206. *Id.* at 2.

207. *Blades*, No. L-68448-84, at 2.

208. *Id.*

209. *Id.* at 4.

210. *Id.*

211. *Id.* at 2.

212. *Blades*, No. L-68448-84, at 4-5

213. *Id.* at 5.

214. *Id.* at 6.

accreted."[215] The State had not shown where the high-water mark was located immediately preceding the filling, thus requiring the court "to assume that there had been no change in the location of the high-water in the 60 year period between 1863 and 1924."[216] This the court could not do.[217]

The court pointed out that in using the 1863 Coast and Geodetic Survey as its prime source in establishing the high-water mark, the State had rejected five more contemporaneous potential sources.[218] The court noted that proof of ownership may be difficult to establish, but it does not relieve the State from its burden of persuasion. The court, in entering judgement for the defendant, held that the State had not met its burden of persuasion "as to where the high-water mark was located 60 years after 1863 and prior to the artificial filling."[219]

This case is the only one where the State was seeking to establish a claim in the property which the State has brought to trial and lost on the merits.[220] A direct result of the State losing this case was the adoption of a litigation discount. A litigation discount, when granted, is generally 75%.[221] The litigation discount is granted in cases where the claim is based on non-aerial photography or maps that pre-date 1932.[222] Good faith discounts are arrived at on an individual basis after investigation into the facts surrounding the acquisition of property by the individual landowner.[223]

At the conclusion of Mr. Andersen's interview he was asked if he had any advice for a prospective lawyer looking to practice real estate law in New Jersey. He gave this advice:

> If you're involved in real estate law in New Jersey and you're in a coastal area, . . even if your client has land all around him and the property has been high and dry forever, or what appears to be forever, you should absolutely check to see whether or not there are

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215. *Id.*

216. *Id.*

217. *Blades*, No. L-68448-84, at 6.

218. *Id.* at 7. The State had rejected using sources dating from 1924, 1919, 1902, 1888 and 1869. *Id.*

219. *Id.* at 7.

220. Andersen, *supra* note 176; Clayton, *supra* note 187.

221. Andersen, *supra* note 176.

222. Andersen, *supra* note 176.

223. Andersen, *supra* note 176.

> any State tidelands claims on the property, or you darn well better make sure your malpractice insurance is paid.[224]

He suggested that the attorney obtain a copy of *Index of Lands Subject to Investigation for State Tidelands Claims*, which is available from the State.[225] This book lists all lands which might be subject to a State claim and allows a landowner to clear title and avoid the hardship suffered by other landowners.

VIII. LANDOWNER ARGUMENT - ADVERSE POSSESSION

The power of the New Jersey Tidelands Resource Council has so far avoided any viable legal challenge. Because a substantial number of parties are unwilling to litigate against the State, a resolution of the extent of the TRC's power remains inevitably postponed. The power of the TRC grows with every settlement.

There are several legal challenges waiting for private landowners' attorneys, but will the challenges ever be tested? Many parties find it of less economic risk to settle; but not all landowners are willing to settle. One legal challenge that could be promising in testing the power of the TRC is adverse possession. However, if the past is a guide to the future, a challenge on this ground may only be a dream for hold-out landowners.

Historically, it was impossible to adversely possess against a state, including New Jersey. A recent decision of the New Jersey Supreme Court, *Devins v. Bogota*, held adverse possession is possible against the State.[226] If *Devins* is applicable to tidelands, the fight then becomes which statute of limitations to apply; New Jersey has several. The State advocates, even accepting that *Devins* allows adverse possession against the State, that no limitation applies to lands such as tidelands which are dedicated to public use. While landowners, if they had the resources or initiative to fight the State, would argue a general twenty year statute of limitations for adverse possession applies to State tidelands claims.

This section examines these issues and the law of a possible adverse possession claim against the State.

A. Recent Case Law on the State and Adverse Possession

Adverse possession has historically been a way of acquiring title to real property without any conveyance, inheritance or other means. Adverse possession is a method of acquisition of title to real property by possession for a statutory period

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224. Andersen, *supra* note 176. Mr. Clayton was asked the same question and after saying that they should of course hire him for any tidelands claims, he essentially gave the same advice. Clayton, *supra* note 187.

225. Andersen, *supra* note 176.

226. 592 A.2d 200 (N.J. 1991).

under certain conditions.[227] The conditions of adverse possession in New Jersey are that the possession of land be notorious, actual, adverse, exclusive, continuous and uninterrupted.[228] In order for one to adversely possess from another, the real owner must fail to sue to recover title to the property and fail to remove the squatter from the property in question within the statutory period.[229]

In New Jersey, the statutory period for adverse possession varies depending on the nature of the land possessed.[230] The period ranges from twenty to sixty years.[231] Historically, courts have been reluctant to allow a claim of adverse possession of governmental property.[232] This reluctance to adverse possession against the State is rooted in an ancient doctrine called *nullum tempus regi*, literally meaning time does not run against the King.[233] In the past many New Jersey courts have cited this doctrine and held that adverse possession could not apply to land dedicated to public use.[234]

However, in 1991, several cases decided by the Supreme Court of New Jersey dealt a blow to this once formidable doctrine. In *Devins v. Bogota*, the New Jersey Supreme Court, when faced with an adverse possession issue, held that "When municipal property is not dedicated to or used for a public purpose, [the property] is subject to claims made under adverse possession."[235] The court remanded the *Devins* claim for determination in light of this opinion.[236]

The Devins' claim involved a vacant lot in the Borough of Bogota ("Borough"). The Borough had acquired the lot by foreclosure in 1962. The Devins' received a quitclaim deed for the property from the Borough at the time of their purchase of the adjacent lot in 1965. The Devins' fenced in the lot, and made it into

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227. BLACK'S LAW DICTIONARY 49 (5th ed. 1979).

228. Patton v. New Jersey District Water Supply Commission, 459 A.2d 1177 (N.J. 1983).

229. *Id.* at 1180.

230. *Devins*, 592 A.2d at 201.

231. *Id.*

232. *Id.*

233. Trustees for the Support of Pub. Sch. v. Ott & Brewer Co., 37 A.2d 832 (N.J. 1944).

234. *Devins*, 592 A.2d at 201.

235. *Id.* at 203. In this case the court stated that a municipally owned property not dedicated to or used for a public purpose should be treated like property owned by private owners. *Id.*

236. *Id.* at 204.

their side yard, but they never paid taxes on the lot.[237] The lot was never dedicated to public use. In 1985 the Devins' wrote the Borough requesting title to the lot. The Borough refused, and the fight began.[238]

The court in *Devins*, seemingly frustrated with the varying statutory periods in the State, requested the legislature to act. The court concluded this possible landmark decision with the following instructions to the legislature: "We therefore commend the matter to the legislature. Given the length of the various periods of limitation, the legislature should have ample time to take whatever action it deems appropriate."[239]

Twelve days after *Devins*, the court looked further into the doctrine of *nullum tempus regi*. The court examined a claim of the State that it had general immunity from the statute of limitations on a contract action;[240] however, the New Jersey Supreme Court held that the State must sue in a timely manner.[241] The court held further that the fact that the State is a party will not create immunity for the State from the usual statute of limitations.[242] The court noted that it had generally abandoned the view that the statutes of limitations did not apply to the State.[243]

As applied to the Tidelands Resource Council, a landowner could assert that these cases limit the time in which the State can legally claim formerly tideflowed lands. Many of the lands that were once tideflowed are now in the hands of private title holders, and have been for well over twenty years. The claimed area is seemingly indistinguishable from the balance of the property. Many landowners have paid property taxes on what they believed was their land for decades. The claimed land was in private hands, not public use. For these reasons the landowners could easily claim their occupation had been notorious, actual, adverse, exclusive, continuous and uninterrupted. It can be argued that a statute of limitations for claims relating to real property should apply to State tidelands claims in light of these recent state supreme court holdings. However, in New Jersey, a question arises as to which statute of limitations would apply if adverse possession were allowed in tidelands cases.

The State feels that the validity of its tidelands claims remain undiminished

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237. *Id.* at 200. The Devins even built a shed on the side lot. *Id.*

238. *Id.*

239. *Devins*, 592 A.2d at 200.

240. New Jersey Educ. Facilities Auth. and Jersey City State College v. Gruzen Partnership, 592 A.2d 559 (N.J. 1991).

241. *Id.* at 563.

242. *Id.*

243. *Id.* at 564. In this case the court called the doctrine of *nullum tempus regi* a legal relic that should have been abrogated or curtailed by the court. *Id.*

by the recent supreme court decisions. The State further feels that any reliance on *Devins* is misplaced and there can be no adverse possession of these claims. Nonetheless, there are those who would assert the opposite.

B. If Adverse Possession, Which Statute of Limitations?

The first argument that could be made is that the proper statute of limitations regarding tidelands is a constitutionally mandated statute of limitations. The State of New Jersey advocates that tidelands claims have their own statute of limitations by virtue of the statewide passage of the following 1981 Amendment to the New Jersey Constitution:

> No lands that were formerly tideflowed, but which have not been tideflowed at any time for a period of 40 years, shall be deemed riparian lands, or lands subject to a riparian claim, and the passage of that period shall be a good and sufficient bar to any such claim, unless during that period the state has specifically defined and asserted a claim pursuant to law. This section shall not apply to lands which have not been tidal flowed at any time during the 40 years immediately preceding adoption of this amendment with respect to any claim not specifically defined and asserted by the state within 1 year of the adoption of this amendment.[244]

The State would argue that the Riparian Amendment is specific and is in no way affected by any other statute of limitations. The State would further argue that no statute of limitations is now running on State tidelands claims. The State believes this is so because it has filed its tidelands maps asserting its claims on the properties around the State in accordance with the Riparian Amendment.

However, the landowners may be able to assert that the applicable statute of limitations is not the Riparian Amendment, but a general statute of limitation which provides "[n]o person or body politic or corporate shall be sued or impleaded by the state of New Jersey for any real estate, or for any rents, revenues, issues or profits thereof, except within 20 years after the right or title thereto or cause of action shall have accrued."[245] The ultimate resolution of which limitation to apply may turn on statutory construction. In a statutory construction argument, the State would argue that the Riparian Amendment is controlling; in effect the Riparian Amendment is a specific repealer of any general statute of limitations advocated by the landowners. The State would also argue that the 1981 Riparian Amendment is the statute which controls in tidelands claims of adverse possession.

An argument against this Riparian Amendment as the controlling statute would be one against implied repealer. The landowners may argue that the State is

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244. N.J. CONST. art. 8, § 5, ¶ 1 ("Riparian Amendment').

245. N.J. STAT. ANN. § 2A:14-8 (West 1991).

attempting to set up the Riparian Amendment as an implied repealer of the general statute of limitations in the State. The private landowners would argue that under proper statutory construction, an implied repealer should not be construed in this case. They would also argue several rules of statutory construction. There is a presumption against implied repealers in statutory construction and this presumption can only be overcome by a showing of irreconcilable inconsistency.[246] There is no indication that there was any legislative intent to impliedly repeal the general 20 year statute of limitations. Additionally, there is a rule of statutory construction which states that when two statutes are in conflict, it is the duty of the judiciary to construe them together so each one may fully be effective as a harmonious whole.[247]

Joseph Clayton, an attorney who is awaiting a client[248] to test this adverse possession claim, believes the Riparian Amendment was passed for different reasons other than to repeal the general 20 year statute of limitations.[249] He believes that the Riparian Amendment was adopted as a "carrot and stick".[250] He says that the Riparian Amendment was designed to force the State to promptly complete and file its tidelands claims maps.[251] The State had been working on the maps for many years, and as early as 1967, the New Jersey Supreme Court strongly suggested to the State to complete their maps.[252] The Riparian Amendment does not require adverse possession so as to bar the State's claims; it simply says that the State has relinquished claims to lands which have not been tideflowed for forty years regardless of whether the claimed land had been occupied by anyone meeting the elements of adverse possession.

An argument can be made that State tidelands are subject to a twenty year statute of limitations under N.J. Stat. Ann. § 2A:14-8 for adverse possession. In situations where the elements of adverse possession are not present, the State is subject to the limitations placed on the State by the Riparian Amendment. This should be examined in light of its two components. First, under N.J. Stat. Ann. § 2A: 14-8, a twenty year statute of limitations begins to run when a cause of action for adverse possession accrues.[253] Second, the Riparian Amendment, by its terms,

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246. State v. Des Marets, 455 A.2d 1074 (N.J. 1983).

247. Clifton v. Passaic County Bd. of Taxation, 147 A.2d 1, 11 (N.J. 1958).

248. Clayton, *supra* note 187.

249. Clayton, *supra* note 187.

250. Clayton, *supra* note 187.

251. Clayton, *supra* note 187.

252. *O'Neill*, 235 A.2d at 6.

253. Clayton, *supra* note 187. Mr. Clayton believes that the statute of limitations begins to run when a person illegally fills or occupies State owned tidelands. *Id.*

simply bars the state from asserting a tidelands claim to lands that have not been tideflowed for forty years unless that claim is defined and asserted on the maps pursuant to the law (Riparian Amendment) within one year after its adoption. The landowners could argue that the Riparian Amendment and N.J. Stat. Ann. § 2A: 14-8 are not inconsistent, but that each has its own purpose and each should be given its full effect.

However, N.J. Stat. Ann. § 2A: 14-8 was in place in 1967 when the landmark decision of *State v. O'Neill* was decided. The State could strengthen the dismissal of an adverse possession claim by referring to the discussion in *State v. O'Neill*. The court in that case said "it is settled that the state's title in tidelands *cannot be lost by adverse possession* or prescription."[254] The State would say that the court determined N.J. Stat. Ann. § 2A: 14-8 was inapplicable by virtue of this very strong language used by the court.

However, private landowners could then draw attention to the facts in *O'Neill*. *O'Neill* did not involve any claim of adverse possession[255] nor did the court cite, let alone mention N.J. Stat. Ann. § 2A: 14-8. Notably, the *O'Neill* court did cite to several cases that stated that adverse possession does not run against the State.[256] The landowners would maintain that the natural inference from the recent court opinions indicates that the conclusions in *O'Neill* have effectively been overruled.

C. Public Use in New Jersey Prevents Adverse Possession

The State would argue that even if you accept *Devins* as applicable, the decision merely reaffirmed prior cases that held there can be no adverse possession against the government if the property has been dedicated to public use.[257] This was first held several years ago in the *Patton* case.[258] The State would argue that the tidelands were dedicated to the public use when the State took title to them from King George III of Great Britain following the American Revolution.[259] It can be

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254. *O'Neill*, 235 A.2d at 8 (emphasis added).

255. *Id.* Mrs. O'Neill did not claim adverse possession but she claimed laches. The court said laches against the State is not applied to the same extent as against a private person. *Id.*

256. *Id.*

257. *See* Patton v. New Jersey District Water Supply Comm'n, 459 A.2d 1177 (N.J. 1983).

258. *Id.* at 1177. In *Patton* the court was dealing with a debtor in reorganization that attempted to sell land whose title came into question. This occurred after the title search. The court said that the evidence was insufficient to establish that they had acquired title to the property through adverse possession. The court stated that it is well established that adverse possession does not run against the State. Similarly, there can be no adverse possession of the State at least with respect to property dedicated to a public use. *Id.*

259. *See* Arnold v. Mundy, 6 N.J.L. 1 (N.J. 1821).

asserted that they are still subject to the public trust doctrine[260] and any artificial filling does not change the title, once the State proves the land is still State owned. The State would argue further that despite the filling, there has been no change in the tidelands earlier dedication to public use. The State would maintain that its claims are preserved under the *Patton* decision, not abolished by *Devins*. In other words, tidelands by their very nature are dedicated to the public's use and hence beyond the reach of *Devins* or N.J. Stat. Ann. § 2A: 14-8.[261]

There are several cases that the State would assert to support the notion that its tidelands are dedicated to public use and are not subject to adverse possession claims.[262] The main support can come from the *O'Neill* and *Patton* decisions. The State would assert that if the supreme court had intended for the tidelands to be subject to the *Devins* analysis, it would have mentioned the tidelands. The State would maintain that the court did not do so because it was aware of the Riparian Amendment which specifically deals with tidelands and that it had squarely dealt with the issue in *Patton* and *O'Neill*.

The private landowners would assert that *Devins* clearly indicated an exception to the application of adverse possession against the sovereign for lands not dedicated to or for public use. The argument would be made that tidelands are not dedicated for the public use by their very nature or under any historical perspective. The landowners would argue that the lands in question are former tidelands which have not been tideflowed in decades. The lands could not even have been determined to be tidelands until the maps were filed by the State. The landowners have built homes, paid taxes and made improvements. From a landowners perspective, it seems logical that in no sense had the lands been dedicated to any public use. Therefore, another question for judicial determination arises. Were the tidelands dedicated to or used for a public purpose?[263]

The private landowners will argue that their lands are markedly different than the other lands clearly dedicated for public use. If rejected, query whether this would mean that the public had a right to passage through a family's living room?

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260. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984), *cert. denied*, 469 U.S. 821 (1984).

261. It should be noted that even this is arguable because *Devins* did not deal with a claim under N.J. STAT. ANN. § 2A:14-8; it is said that the question has yet to be resolved. Clayton, *supra* note 187.

262. *See* Quinlan v. Borough of Fair Haven, 136 A. 870 (N.J. 1926) (there can be no title by prescription against the public).

263. There have been cases where the land was clearly dedicated for a public use. *See* Jersey City v. Hall, 76 A. 1088 (N.J. 1910) (railroad attempted to adversely possess a basin it had created by building a structure); Hoboken Land and Improvement Co. v. Mayor and Common Council of Hoboken, 36 N.J.L. 540 (N.J. 1873) (land in question was a dedicated public street).

D. The Prospective Application Of Devins

A final point regarding *Devins* is its prospective application. The court held that its decision should be given prospective effect.[264] The court went on to turn the matter over to the legislature. The State should assert that even if N.J. Stat. Ann. § 2A:14-8 is accepted as the applicable statute of limitations, under *Devins*, the State is immune from any adverse possession claims for at least twenty years.

The landowners would argue this proposition is not what the court intended. They would argue that the court would not have intended the consequences of its decision to be postponed for twenty years. More importantly, the landowners would argue that N.J. Stat. Ann. § 2A: 14-8 expressly and specifically applies to the State, and it provides that any action commenced by the State must be commenced within twenty years after the cause of action has accrued. Landowners would argue that the statute was in place at the time of the *Devins* decision, thereby eliminating any need for any prospective application of an adverse possession claim against the State.

IX. THE PUBLIC TRUST DOCTRINE OUTSIDE OF NEW JERSEY

Phillips Petroleum v. Mississippi provided the United States Supreme Court with its most recent opportunity to examine the public trust doctrine in relation to the conflict between public and private ownership interests.[265] The general reaction was divided as to the Court's ruling. Government officials in many of the coastal states applauded the *Phillips Petroleum* Court's reaffirmation of state ownership rights over all lands affected by the ebb and flow of the tides, regardless of navigability.[266] New Jersey in particular welcomed the decision, as it effectively endorsed the State's aggressive policy of asserting public trust claims over filled lands that were tidal upon the State's entry into the Union.[267] Others in government believed the *Phillips Petroleum* decision would clarify issues pertaining to the parameters of a state's tideland ownership, thus reducing the amount of tideland ownership disputes in the court system.[268] Additionally, by clarifying the extent of the public's ownership interest in tidal areas, it was felt that the *Phillips Petroleum* decision would lend itself to more precise policy-making by the states in regard to areas affected by tidal forces.

However, private landowners viewed the ruling as opening the door for

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264. *Devins*, 592 A.2d at 206.

265. 484 U.S. 469 (1988). *See also supra* notes 42-58 and accompanying text.

266. *See, e.g.*, Joseph B. Sullivan, *Jersey Asserts Tidal Land Rights After U.S. Ruling*, N.Y. TIMES, February 28, 1988, § 1, at 32.

267. Sullivan, *supra* note 266, at 32.

268. Sullivan, *supra* note 266, at 32.

states to claim tidelands that had long been held by private owners.[269] Justice O'Connor echoed these concerns in her dissent from the majority in *Phillips Petroleum*:

> The Court's decision today could dispossess thousands of blameless record owners and leaseholders of land that they and their predecessors in interest reasonably believed was lawfully theirs. . . . [T]he majority's rule is one that will upset settled expectations. . . . [M]ore than 9 million acres have been classified as fresh or coastal saline wetlands. The Federal Government conveyed these lands to the States, which have conveyed many of them to individuals. To the extent that the conveyances purport to include public trust lands, the States may strike them down, if State law permits. The Court's broad definition of public trust lands will increase the amount of land that is vulnerable to such challenges. . . . Although Mississippi collected taxes on the land and made no mention of its claim for over 150 years, the Mississippi Supreme Court held that Mississippi was not estopped from dispossessing petitioners. The stakes are high when the land lies over valuable oil, gas or mineral deposits.[270]

In the aftermath of *Phillips Petroleum*, a number of states have re-evaluated the public trust doctrine as it has been used and developed within their respective states. This stems both from the states' desire to quell the concerns of large private landowners and the recognition of the public trust doctrine as a potential tool in bringing a number of coastal programs to fruition.

The public trust doctrine is viewed by many coastal states as serving to further three primary state interests: public access, environmental preservation, and the protection of public benefit from certain land areas.[271] First, a state can invoke the public trust to assert a public right to cross private beachfront property in order

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269. *See, e.g.*, Stuart Taylor, Jr., *Supreme Court Roundup; High Court Expands States' Rights to Tidelands Miles From the Ocean*, N.Y. TIMES, February 24, 1988, at A16.

270. *Phillips Petroleum*, 484 U.S. at 493-94 (O'Connor, J., dissenting).

271. These uses were characterized as the current primary state interests by representatives of the coastal and public lands governmental agencies for the states of Mississippi, Delaware and Louisiana in telephone interviews. Telephone Interview with William Mack Cameron, Esq., formerly Special Assistant Attorney General for the State of Mississippi (November 13, 1992); Telephone Interview with James Rives, Assistant Director of Louisiana Coastal Management Department (November 13, 1992); Telephone Interview with Carl Morgan, Louisiana Public Lands Utilization Manager (November 13, 1992); and Telephone Interview with David Carter, Coastal Resource Specialist for the State of Delaware (November 13, 1992).

to allow public access to state-owned waterfront or coastal property.[272] States can invoke the trust to ensure state access to coastal areas for undertaking measures designed to preserve the coastline and protect ecologically sensitive areas.[273] Finally, states like New Jersey have invoked the public trust to protect the public's financial interest in certain land areas. Lease or sale of such areas would generate revenue for the public's use; thus, the land would continue to benefit the public.[274] In view of the tenacious balance between the potential beneficial invocation of the public trust doctrine, and the concerns of large, property tax paying landowners, a number of states have reexamined the function of the public trust within their states. What follows is an analysis of the public trust doctrine as it exists in several coastal states outside of New Jersey. Specifically, this analysis will consider these states' views towards the use of the public trust doctrine, developments since the *Phillips Petroleum* decision, and in consideration of New Jersey's filled tidelands policy.

A. Mississippi

After the Supreme Court's *Phillips Petroleum* ruling was handed down, a coastal commission was established to develop a number of recommendations for the Legislature. One of the recommendations was to establish boundary lines of developed lands in accordance with the *Phillips Petroleum* decision.[275] While the legislature adopted many of the recommendations, it rejected the commission's proposed boundary line. Instead, the legislature passed a statute establishing the boundary between public and private coastal lands as the mean high water mark as of July 1, 1973.[276] In effect, the State Legislature attempted to grant ownership to areas filled by private landowners before 1973. A lawsuit challenging the constitutionality of the statute was filed subsequent to its adoption by the legislature

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272. Most notably, this has been a policy of the State of California. However, Mr. David Carter of Delaware's Coastal Zone Management Committee, indicated that the State of Delaware considered the invocation of the public trust doctrine in this regard, as well. Carter, *supra* note 271.

273. This may be particularly attractive to states in view of renewed public interest in environmental protection and preservation. However, Delaware's David Carter indicated that states may run into conflict with developers and private landowners even where the state is merely replacing sand which had been lost by avulsion from beach areas. Carter, *supra* note 271. *See also infra* note 325 and accompanying text.

274. The State could use the doctrine to generate revenue from leasing certain public trust lands for oil or mineral mining, as in the *Phillips* case, or through the imposition of a fee, necessary for private owners to clear title to filled tideland areas, as in New Jersey.

275. Thus, the boundary of the land owned by the state in trust would encompass all lands subject to tidal influence, inland to the mean high water mark, as of the time of the state's incorporation into the Union, 1817 in Mississippi's case. *Phillips Petroleum*, 484 U.S. at 473-74.

276. Public Trust Tidelands Regulation, MISS. CODE ANN. § 29-15-1 (1989). The legislature chose the year 1973, because that year marked the creation of the Mississippi Marine Resource Council. This Council prepared the first maps identifying State-owned wetlands in Mississippi. Cameron, *supra* note 271.

and is currently pending before the Mississippi Supreme Court.[277]

William Mack Cameron, State's counsel in *Cinque Bambini Partnership v. State of Mississippi*,[278] provided insight into Mississippi's impetus for invoking the public trust argument in the *Phillips Petroleum* case.[279] Although *Phillips Petroleum* eventually involved an issue over oil and gas rights, a control of access problem actually underlies the case. Private landowners had claimed ownership of all waters north of the Mississippi River; only water south of the Mississippi was acknowledged by them to be public areas. Certain individuals owning property adjacent to the bayou area at issue sought to enforce their perceived ownership interest and attempted to cut off access to what were held by the Court to be public lands. These property owners often brandished shotguns, not only to prevent members of the public from gaining access, but also to persuade people attempting to enjoy these areas to remove themselves quickly.[280] Consequently, the Attorney General invoked the public trust doctrine to settle such claims of private ownership and eliminate the bad situation that had evolved.

Mississippi does claim title to filled tideland areas,[281] and Mr. Cameron was personally critical of any assertions of ownership of such lands by private landowners. Although only vaguely familiar with New Jersey's policy regarding filled tidelands and the public trust, his personal experience leads him to believe that most landowners are fully aware of whether the land they have purchased has been filled.[282] Perhaps rather pessimistically, Mr. Cameron believes these people either knew the lands were filled when they purchased the property or filled the areas

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277. Byrd v. State of Mississippi, No. 17-879 (Chancery Ct., Harrison County Civ. April 18, 1990), *appeal docketed*, Nos. 90TS-692 and 90TS-714 (Miss. Sup. Ct.). This case is actually an appeal of two lower court decisions; opposite conclusions as to the constitutionality of the Act were reached in each case. In order to avoid further complications for private property owners in light of the legal challenge to this Act, the Secretary of State has prepared maps delineating lines in accordance with both the *Phillips Petroleum* decision and the Mississippi Public Trust Tidelands Regulation. UPI, May 23, 1989, *available in* LEXIS, Nexis Library, UPI File.

278. 491 So.2d 508 (Miss. 1986), *aff'd sub nom.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988). Mr. Cameron served as Special Assistant Attorney General during the *Cinque Bambini* case, but went into private practice prior to the controversy's hearing before the United States Supreme Court in *Phillips Petroleum*. Cameron, *supra* note 271.

279. Cameron, *supra* note 271.

280. Cameron, *supra* note 271. Mr. Cameron noted one incident in particular where a couple was threatened by a landowner with a shotgun while they were canoeing with their nine year-old son. Cameron, *supra* note 271.

281. Cameron, *supra* note 271.

282. "Most of these people know this stuff -- what was filled land and what was not -- at the time they purchase the property." Cameron, *supra* note 271.

themselves subsequent to purchase.[283] The State believes illegal takings of public lands should not go unpunished, particularly where the taking leads to the generation of profit for the wrongdoer.[284] In addition, such assertions of private ownership can prove not only disruptive to the fishing and shrimping industries of the State, but also serve to undermine preservation of waterways for future generations of the public.

Mr. Cameron applauds the aggressive use of the public trust doctrine in New Jersey, particularly where the policy is intended to lead to the preservation of coastal areas.[285] While a case for equity may exist where an individual has made a bona fide purchase,[286] there is still a need to stop individuals from impeding upon the trust. Apparently, this is true irrespective of how far removed the party eventually punished is from the transgression against the public trust. The purchasers in New Jersey should have known or could have reasonably learned that their property had been filled and that the interest was subject to the State's declared interest: "In preserving the public trust, the interest is so great on the part of the state that occasionally innocent people do suffer -- but you cannot make exceptions to it."[287]

B. Louisiana

The public trust doctrine is not clearly set out in any single law in Louisiana; instead, the doctrine is based in the Louisiana Constitution,[288] the State Code, and a

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283. Cameron, *supra* note 271. Mr. Cameron related one such case with which his office was confronted: "Mrs. Brown's Restaurant." Mrs. Brown's restaurant was built on a virtually square area of land, jetting out from the coastline into the Mississippi Sound. The "owner" of the land tried to convince the state that the land naturally formed this way. In reality, she and her husband had filled in the Sound and built a marina and restaurant on the newly created land area. The pair charged rent on the property for a number of years, generating a significant sum of money during that time. State officials eventually caught up with them and they must now make yearly payments to the state. Cameron, *supra* note 271.

284. Cameron, *supra* note 271.

285. Cameron, *supra* note 271. However, he was critical of state intervention in the use of clearly private areas inland from the mean high water mark (calling the result in Lucas v. South Carolina, 112 S. Ct. 2886 (1992), "absolutely ridiculous"). Governmental agencies, be they the Army Corps of Engineers or a state coastal commission, should not be allowed to tell private property owners what they can do with property that is legitimately their own, according to Cameron. Cameron, *supra* note 271.

286. A bona fide purchaser in this instance would be one who purchases land without knowledge that the land was tidal at some point in history.

287. Cameron, *supra* note 271.

288. LA. CONST. art IX, § 1 (1974) states:

> The natural resources of the state, including air and water, and the healthful, scenic, historic, and aesthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The Legislature shall enact laws to implement this policy.

number of court decisions. The doctrine is thus somewhat cryptic to many in the State, including some in government and the legal community. Unlike Mississippi, the territory of Louisiana was ruled by the French and Spanish prior to its admission to the Union in 1812. Consequently, the legal history of Louisiana is rooted in Spanish civil law and the Napoleonic Code, rather than English common law. Although the public trust doctrine was carried over to the common law states through English law, its roots in Louisiana can be traced to the State's civil law tradition.

Under the civil law, on which the Louisiana Code is based, certain principles of the public trust doctrine did exist: navigable rivers, streams, the sea and shores were recognized as "pertaining to the public domain" and "not susceptible of private ownership."[289] When Louisiana entered the Union in 1812, it was granted sovereign rights over public lands on an equal footing with the other states.[290] Thus, the public trust in Louisiana includes public lands from its pre-statehood tradition and legislation, as well as all waters subject to the ebb and flow of the tide, irrespective of navigability, and all navigable water not subject to tidal influence.[291] While Louisiana has never expressly alienated the areas long held "public" or "common" under the Civil Code,[292] the State's complex wetlands geography has complicated public trust treatment of non-navigable tideland areas.

The geographic complexities of the State of Louisiana pose special challenges for property law and the public trust doctrine. According to the Coalition to Restore Coastal Louisiana, Louisiana contains almost 40% of the coastal wetlands

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289. Napoleonic Code art. 538. The Louisiana Civil Code prior to statehood referred to navigable rivers as "public things" and the sea and its shores as "common things". LA. CIV. CODE ANN. arts. 450, 453 (1808). This classification distinction, which was apparently born of tradition rather than substance, continued until 1978, when all three were referred to by statute as "public things" LA. CIV. CODE ANN. art. 450 (West 1980). Article 450 reads in its entirety:

> Public things are owned by the state or its political subdivisions in their capacity as public persons.
> Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.
> Public things that may belong to political subdivisions of the state are such as streets and public squares.

Id.

290. Shively v. Bowlby, 152 U.S. 1, 57 (1894).

291. *See id.*; Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988).

292. These areas being all "navigable or floatable rivers, the territorial sea and seashore." In *Gulf Oil v. State Mineral Board*, the Louisiana Supreme Court reaffirmed this, making it clear that any attempt by the State to alienate navigable water bodies is null and void. Gulf Oil v. State Mineral Board, 317 So.2d 576 (La. 1975). In the case, the State had inadvertently sold land that included navigable water areas. The State Legislature, in an attempt to avoid further controversy surrounding the sale, later passed a statute to limit the amount of time to six years in which the State could revoke a land patent. Although initially upheld, the *Gulf Oil* court struck down the statute, thus allowing the State to revoke prior patents to public trust lands at any time. *Id.*

of the United States.[293] The State's wetlands are comprised of a number of different types of land and water areas: low-lying salt and fresh water marshes, many of which are subject to direct and daily tidal inundation, and several thousand lakes, rivers, streams, bayous,[294] and bays, a significant number of which are also affected by tidal ebb and flow.[295] Louisiana's coastal land areas are also subject to tidal overflow from wind-driven tides during heightened storm weather conditions, as well as overflow from the flooding of rivers and bayous.[296] In addition, the wetlands areas have continually expanded and contracted over centuries, due to both natural and artificial influences.[297] Consequently, it can prove difficult to manage public trust lands without being able to ascertain with any real certainty the geographic boundaries of non-navigable public trust areas within the State.

The *Phillips Petroleum* decision has brought the concerns of private owners of non-navigable tidelands to the forefront of attention once again. The problem largely stems from the sale of swamp and marshlands by the state after the federal Swamp Land Grant Acts of 1849 and 1850.[298] As a result of those Acts, the federal government transferred ownership of lands rendered unfit for cultivation either by swamp or by overflow to a number of states for reclamation.[299] The lands so acquired by Louisiana included areas encompassing navigable waterways and non-navigable tidelands. The State subsequently sold large tracts of the granted land to

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293. COALITION TO RESTORE COASTAL LOUISIANA, COASTAL LOUISIANA: HERE TODAY GONE TOMORROW? 5 (1989).

294. According to the Louisiana State Lands Office, bayous are essentially "slow moving streams." Rives, *supra* note 271.

295. Rives, *supra* note 271.

296. Rives, *supra* note 271.

297. Rives, *supra* note 271. Artificial influences upon coastal areas in Louisiana have resulted from such activities as the construction of levees and canals. By natural means, adjustments in the sea level and in the amount of sediment deposits also influence the geographic positioning of water areas. Rives, *supra* note 271. One concern, expressed by a number of commentators, centers on the effect of global warming on coastal areas and the public trust in relation thereto. *See generally* Robert L. Fischman, *Global Warming and Property Interests: Preserving Coastal Wetlands as Sea Levels Rise*, 19 HOFSTRA L. REV. 565 (1991). Briefly outlined, the theory states that as the earth's climate begins to warm, due to any number of factors (including -- most popularly -- depletion of ozone), the ice and glacier areas of the earth will begin to melt. This melting will generate a significant amount of water, which would cause the levels of the earth's seas and waterways to rise. Thus, the size of states' public trust land areas would gradually increase. Consequently, it would behoove states to define the scope of public trust lands now, in such a way as to accommodate fluctuations in land area in the future. *Id.*

298. 43 U.S.C. §§ 981-994 (1988).

299. *Id.*

private landowners, inadvertently including tidal[300] as well as navigable areas within those transfers. While *Gulf Oil* addressed the issue regarding the State's sale of navigable water bottoms in the granted lands,[301] it left open the question as to ownership of the non-navigable areas. Thus, when the *Phillips Petroleum* decision was handed down, private landowners were once again concerned over the quality of their title in non-navigable, but tidally affected lands.

The legislature responded to the private landowners' concerns by proposing two bills in the 1991 regular session.[302] The bills would have, *inter alia*, declared that areas that were neither part of the territorial sea, navigable-in-fact, nor in the "space of land in the open coast over which the waters of the sea spread directly in the highest tide" of winter were susceptible of private ownership.[303] However, neither bill was passed and the legislature instead adopted a concurrent resolution directing the Louisiana State Law Institute to "clarify Louisiana law with respect to the ownership of inland non-navigable waterbodies, including those waterbodies subject to tidal influence" and the effect of the *Phillips Petroleum* decision on State law.[304] According to Carl Morgan, Public Lands Utilization Manager for the State of Louisiana, the Institute made its recommendations and the legislature confirmed the titles of the current private landowners, thus quelling the fears of large corporate landowners in particular.[305] So, while the question raised by the *Phillips Petroleum* case is still present, the State Legislature has effectively declared that the State will not pursue any interest in these areas.[306]

Louisiana's Coastal Management Assistant Director James Rives stated that although the State is concerned with wetlands protection, issues surrounding the public trust and public access have historically received very little attention in the State. In fact, the public trust doctrine is "alien to most people here." Rives stressed the difference between southern and northern attitudes: "Custom weighs heavily in Louisiana, particularly with public access and use of wet and tidelands areas."[307] As long as people are not unreasonable in their behavior towards the land or inhabitants,

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300. That is, non-navigable, but subject to the ebb and flow of the tides.

301. Gulf Oil v. State Mineral Board, 317 So. 2d 576 (La. 1975).

302. H. B. 538, Reg. Sess. La. (1991); H.B. 539, Reg. Sess. La. (1991).

303. H. B. 539, Reg. Sess. La. (1991).

304. H.R. Con. Res. 145, Reg. Sess. La. (1991).

305. Morgan, *supra* note 271.

306. According to James Rives, the legislature "purported to fix the problems caused by *Phillips*, but it took the easy way out, giving private landowners greater ownership interest than they had before the . . . decision." Rives, *supra* note 271.

307. Rives, *supra* note 271.

private landowners are very "neighborly" and will allow others to cross their property to gain access to public areas.[308] Thus, the Coastal Zone Management office does not use the public trust doctrine in relation to beach or coastal access. Mr. Rives indicated that all direct conflicts between private and public ownership claims are dealt with through the State Lands Office.

While Louisiana does assert an ownership interest in river beds and bodies to the mean high water mark, Louisiana Public Lands Utilization Manager Carl Morgan agreed with Mr. Rives that the public trust doctrine is not strong in Louisiana at the present time.[309] As such, it generally has not been central to issues of property titles.[310] However, he indicated that his office had explored the doctrine in greater depth after the *Phillips* decision, although no formal action was taken.[311] The public's right at present extends to the use of riparian lands; certain water bottoms and beds are leased for commercial wharves and piers.[312]

Responding to the New Jersey claim of public trust interest over filled tidelands, Mr. Morgan reflected upon Louisiana's policy as regards State-owned bayous. While it is possible that bayous can shift their geographic position over time, Morgan stated that the State asserts no ownership interests in the bayous once they have dried up.[313] So, once a bayou ceases to exist, the State would consider itself to have no interest in the now-dried land area.[314] Similarly, he believes the State would assert no ownership interest over the lands New Jersey is claiming under the public trust doctrine.

In Louisiana, the sole question is one of navigability: if the body is navigable, then it belongs to the State.[315] If the State's policy was to assert ownership of non-navigable areas up to the high tide mark, nearly one-fifth of the

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308. Although Mr. Rives' assessment may work well with the Board of Tourism, a recent case involving fishermen and corporate landowners works against Rives and emphasizes the need for a properly articulated and more active public trust doctrine, at least with respect to public access. In *Dardar v. LaFourche Realty Co.*, a corporate landowner imposed a $200 per year fee on local crawfishermen to permit them to fish in a bayou area the company claims to own. Dardar v. LaFourche Realty Co., 1988 U.S. Dist. LEXIS 3673 (E.D. La. 1988). The private landowner employed armed guards to position themselves at different points in the bayou to prevent fishermen without the $ 200 permit from fishing in the area. *Id.*

309. Morgan, *supra* note 271.

310. Morgan, *supra* note 271.

311. Morgan, *supra* note 271.

312. Morgan, *supra* note 271.

313. Morgan, *supra* note 271.

314. Morgan, *supra* note 271.

315. Morgan, *supra* note 271.

State -- millions of acres -- would be affected.[316] Concern regarding the potential disruption involved with such an assertion of ownership, particularly among tax paying corporate landowners, was the motivating factor behind the Legislature's action in the 1992 Regular Session.[317]

C. Delaware

The Supreme Court has held that states are free to manage their public trust lands in accordance with state law, subject only to certain general conditions.[318] While there is national uniformity as to the main parameters of the doctrine, the flexibility allowed by the Court has led to divergent development of the public trust among individual states. In certain states, the public trust doctrine is not as firmly entrenched in the legal tradition and policy as it has become in other states. Despite its border with New Jersey, where the trust is quite strong, Delaware is one state where the doctrine's growth has been somewhat stunted.

According to David Carter, Coastal Resources Specialist for the State of Delaware, the State would like to utilize the public trust doctrine to enhance ongoing coastal preservation efforts and to ensure public access to shoreline areas.[319] In a telephone interview, Mr. Carter described the case law pertaining to the public trust doctrine in Delaware as "weak" in terms of its utility to the State in asserting public claims to coastal areas.[320] In the aftermath of both the *Phillips Petroleum* case and the more recent New Jersey tidelands policy, Delaware has been reexamining the public trust doctrine.[321] While the State has no present intention to invoke the doctrine for revenue generation, Delaware is contemplating its future impact on State claims to coastal areas, primarily for the purpose of beach preservation.[322]

Delaware has been "waiting for one good public trust case in the State, some significant judicial precedent on which to base future public trust claims."[323] Confidence in the support of a stronger public trust would enable the State to pursue

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316. Morgan, *supra* note 271.

317. Morgan, *supra* note 271.

318. Shively v. Bowlby, 152 U.S. 1, 26 (1894); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476-79 (1988).

319. Carter, *supra* note 271.

320. Carter, *supra* note 271.

321. Carter, *supra* note 271.

322. Carter, *supra* note 271.

323. Carter, *supra* note 271.

preservation policies more aggressively.[324] A recent conflict between private and public ownership provided Delaware with its first opportunity to strengthen the public trust within the State.

The land interest conflict arose during a beach preservation project undertaken by the State in South Bethany, Delaware. In South Bethany, the State attempted to lay down fresh sand on already existing beaches to strengthen the beach area where it had been eroded by natural forces. Approximately ten private landowners filed suit, seeking to prevent the State from continuing its activities without first procuring an easement from the landowners. Delaware looked to the public trust doctrine to repel the claims of the landowners. However, Mr. Carter indicated that the suit was subsequently dropped by the landowners, before the public trust argument could be posited.[325]

D. Rhode Island

Rhode Island poses an interesting situation for the public trust doctrine. The State's capital city, Providence, was developed largely on filled land over what once was the Great Salt Cove. In 1865, the Rhode Island Legislature sold a significant portion of the land area of Providence to a railroad company. In order to effectuate the sale, the State Legislature made a general grant of the area to the company for the price of $200,000. Perhaps during the height of the Industrial Revolution, the railroad's utilization of the property may well have been a use to enhance the public good. However, subsequent sale to a private developer rendered the use outside of the public trust.

Many of the State's most important business and corporate office buildings were erected on these filled areas.[326] If Rhode Island were to aggressively pursue claims to these areas under the public trust, it would be very disruptive to the State's economy. However, this has not prevented the State from invoking the public trust in order to protect and benefit the public. The case centrally important to the modern day public trust doctrine in Rhode Island is *Hall v. Nascimento*.[327]

In *Nascimento*, the State Supreme Court was presented with conflicting claims of ownership to a filled area of Mount Hope Bay between two private claimants. The Court held that it is not inconsistent with the precepts of the public trust doctrine for the State to transfer, by legislative grant, filled or submerged land areas owned by the State.[328] However, the private property rights created by such a

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324. Carter, *supra* note 271.

325. Carter, *supra* note 271.

326. Including the main corporate offices of one of the Northeast's largest banks, Fleet Bank.

327. 594 A.2d 874 (R.I. 1991).

328. *Id* at 877.

transfer remain subservient to the State's rights as holder of title in fee, subject to the public trust.[329] This decision had a direct and immediate impact on the general perception of the public trust in the City of Providence, as illustrated by the following case.

Capital Properties, a large landowner and developer in Providence, owned property taken by Rhode Island via condemnation proceeding to further a river relocation program.[330] In 1987, as compensation for the relatively small area of land,[331] Capital received $2.6 million. The developer later filed suit requesting additional compensation in the amount of $6.1 million.[332] While Capital Properties' case was pending, the Rhode Island Supreme Court handed down the *Hall v. Nascimento* ruling. Consequently, after introducing maps dating back to the 1600's to show that the developer's property area was once tidal land, Rhode Island argued that Capital Properties was entitled to no additional compensation and should in fact be ordered to return the $2.6 million received.

Daniel A. Procaccini, a member of the law firm McGovern, Noel & Benik, argued the case for the State. Relying on *Nascimento* and three cases from other New England states, Mr. Procaccini argued that the sale of public trust land areas can be effectuated only by a grant *specifically* divesting the public trust interest.[333] During the course of the trial, according to Mr. Procaccini, Superior Court Judge Bourcier was not very convinced of the public trust argument advanced by the State. This is largely due to the Judge's expressed belief that the State's Attorney General should raise the public trust argument before the court, not private counsel. However, in his decision, Judge Bourcier did not strike down the public trust argument, ruling that Capital was not entitled to additional compensation from the State.[334] The case

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329. *Id.*

330. The relocation program involved the Mohassuck and Woonasquatucket Rivers, tributaries of the Providence River. Telephone Interview with Daniel A. Procaccini, Esq., Rhode Island's counsel in *Hall v. Nascimento* (November 16, 1992).

331. More than 93,000 square feet of commercial area. John Castellucci, *Capital Center Landowner Seeks $ 6.1 Million for Land State Took*, PROVIDENCE J. BULL., December 2, 1991, at B1.

332. The President of Capital Properties, Joseph R. DiStefano, believed the property to be worth this much more than what the State had paid for it in 1987. *Id.*

333. This is essentially the argument posited by New Jersey in *O'Neill v. State Highway Dep't*, 235 A.2d 1 (N.J. 1967). The public trust doctrine in each of these cases began with the individual state constitutions. All indicated that the state's legislature was the only body with the power to divest the public trust interest, by *specific* grant. In each case, the state legislature had not done so. This led Procaccini to argue that, at least in the Rhode Island area, the public trust doctrine could be completely divested of the State, only if it was accomplished by specific legislative grant. Procaccini, *supra* note 330.

334. Procaccini, *supra* note 330. The issue over the State's claim to compensation for the $2.6 million already paid was left unanswered by Judge Bourcier. Instead, the Judge's decision provided the Attorney General ninety days to pursue the public trust argument. The Attorney General did not in fact

was appealed by Capital Properties and is currently pending before the Rhode Island Supreme Court.[335]

Because of the geographic characteristics of the Providence area, Mr. Procaccini believes the Governor and Legislature alike are hesitant to invoke the public trust doctrine with respect to landowners in the Providence area.[336] In fact, they are quite willing to divest public trust claims to the extent possible, in order to appease corporate landowners in Providence.[337] One illustration of this cooperation involves Narragansett Electric Company's Manchester Street Station property near Providence's hurricane barrier.[338] Concerned with State invocation of the public trust in the aftermath of *Nascimento*, the company pressured the State Legislature to make a specific grant of the land area, so as to remove any doubts regarding the fullness of the company's title thereto. The government buckled to the pressure and made the grant, thus preserving the new jobs that would be created by the company's planned redevelopment of the land.

According to Mark Imperial, Marine Resource Specialist for the State of Rhode Island, after the *Nascimento* decision, the legislature formed a committee to look into the utilization of a leasing program for filled tidelands.[339] The idea was that landowners could clear title either by way of a formal lease or by making a one-time purchase or buy-back fee payment.[340] The State's primary interest, at least initially, is the preservation of public access to beach areas.[341] Thus, the State's focus would be on the first line of structures that abut the coastline.[342] Consequently, lease/buy-back fees would be determined in relation to proximity to the water: a higher fee

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pursue the argument, probably for political reasons, according to Mr. Procaccini. Procaccini believes the Governor discouraged further argument of the public trust, because of the potential impact such an argument, if successful, would have on land ownership in the Providence area. Procaccini, *supra* note 330.

335. Mr. Procaccini went before the Court on November 18, 1992. As of the date of the interview, two days before the proceeding, the Supreme Court had not yet indicated whether Mr. Procaccini should continue to make the public trust argument regarding payback of the original purchase price. Procaccini, *supra* note 330.

336. Procaccini, *supra* note 330.

337. Procaccini, *supra* note 330.

338. Procaccini, *supra* note 330. There was no dispute that the property lay clearly within the public trust land area. Procaccini, *supra* note 330.

339. Telephone Interview with Mark Imperial, Marine Resource Specialist for the State of Rhode Island (November 13, 1992).

340. *Id.*

341. *Id.*

342. *Id.*

would be charged for property closer to the present day coastline than for inland areas.[343]

In the aftermath of *Phillips Petroleum*, Mr. Imperial emphasized that one of the overriding concerns of the State is to avoid the "full-blown mapping process."[344] Rhode Island does not want to follow New Jersey's lead in implementing a costly and extensive program to generate a geographic chronology of the State.[345] New Jersey's purpose in such mapping seems geared towards facilitating state claims over a greater land area.[346] Rhode Island's present mapping system is poor, particularly in regard to ascertaining tidal areas in the 1780's and 1790's. Elaborate and fairly reliable aerial photographs and maps were taken of the State fifty years ago, as a result of the Second World War. Additional maps dating back to the First World War and some others made prior thereto, are also of some value to the State.[347]

As Rhode Island's rate scheduling is not intended to generate vast sums of money, the State is concerned that the revenues received on the filled tideland leases and payback fees would not be enough to warrant more elaborate mapping.[348] Instead, Rhode Island believes the maps it already possesses are sufficient to generally indicate which lands were filled and thus former tidelands.[349] Thus, the State is provided with an overall understanding of its historic tideland areas.[350] If an examination of the State's existing maps indicates a filled tideland area, the State believes the burden of proof then lies on the individual land owner to establish that the property is not in fact filled land.[351] If the landowner is unable to disprove the State's assertion, then that landowner would have the option of either executing a

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343. *Id.*

344. Imperial, *supra* note 339.

345. Imperial, *supra* note 339.

346. Imperial, *supra* note 339.

347. Mr. Imperial indicated that some of the maps provide closer interpretations of property characteristics in relation to former tideland areas than do others. Imperial, *supra* note 339.

348. Imperial, *supra* note 339.

349. Imperial, *supra* note 339.

350. Imperial, *supra* note 339.

351. Mr. Imperial does not believe that this shifting of the burden of proof is unfair nor that it unfairly weighs in favor of the state. He views it as part of a potential land purchaser's responsibility in verifying the extent of the interest to be conveyed, as part of an extensive and thorough title search. Imperial, *supra* note 339.

lease with the State or making a one-time payment to uncloud title to the property.[352]

A dispute between two main schools of thought on the use of the public trust doctrine prevented the adoption of a policy resolution in the State Legislature's last session, in relation to both direct coastal areas and filled tidelands. These two schools seem to mirror the opposing views seen in other coastal states: one perceives the leasing program as a revenue generating program to provide funds for the beach preservation and public access policies of the State; the other merely wants to ensure continued public access, without focusing on the revenue potential.

According to Mr. Imperial, Rhode Island has no intention of using the public trust doctrine to the extent New Jersey has in pursuing claims to areas that were tidelands at the time the State was admitted into the Union.[353] Even if Rhode Island's Legislature should seek to generate revenue in its invocation of the public trust, the State's policy can be distinguished on several grounds. First, Rhode Island is not seeking to invoke the public trust to significantly finance State activities that bear no relation to coastal or wetland interests. The State would funnel whatever funds are inevitably generated from the lease and payback program back into harbor management or to improve various public access areas. Second, the lease or buy-back fees charged by the State would not be based upon the fair market value of the property at issue. Instead, a fee schedule, based upon proximity to the coastline, would be implemented. As a result, private property owners in Rhode Island would be required to make payments significantly lower than those required of New Jersey landowners to uncloud their titles.

Mr. Imperial believes that New Jersey's policy of revenue generation with regard to filled public trust tidelands is a policy that carries the public trust too far.[354] His committee in particular exercises jurisdiction over public trust uses. They do not charge for the use of presently submerged lands or for the filling of tidelands and waterways that is permitted by the State.[355] However, a clause is included in all permits to develop, fill or use submerged lands that clearly reserves for the State the right to charge a lease fee in the future for use of the property. The State would like to implement a submerged land leasing program for docks and marinas, which would charge a yearly lease fee. However, at present there is no compensation system, only a regulatory system over the use of filled tidelands.

Daniel Procaccini believes the public trust is a "significant and precious right" that ought to be vigorously protected by the states.[356] While he agrees with the

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352. The price of either option would be determined on the rate schedule basis. Imperial, *supra* note 339.

353. Imperial, *supra* note 339.

354. Imperial, *supra* note 339.

355. Imperial, *supra* note 339. A minimal amount of filling is permitted by the State, but for what filling there is, the State imposes no fee. Imperial, *supra* note 339.

356. Procaccini, *supra* note 330.

State of New Jersey's invocation of the public trust against present owners of filled tideland areas, he is not unaware of the potential for inequitable treatment of bona fide purchasers who lack knowledge of the filled character of their property. Thus, he believes title companies and attorneys should be held liable, as well:

> It is incredible that, with such a precious doctrine that has been around forever, a coastal attorney would not have recognized a potential tideland issue in a proper title search and sought to fully define respective rights in that land. It should seem clear that there are certain public rights in that land, that should be clarified for the potential purchaser by a competent real estate attorney.[357]

X. CONCLUSION

The situation in New Jersey is not unique. The problem exists in other states, though no other state has carried it to the extremes that New Jersey has. However, there is no guarantee that these states will not implement programs similar to New Jersey's, especially when revenue can be generated at very little cost to the state. The State of New Jersey, following an aggressive policy, continues to collect money from landowners. There is a good deal of uncertainty regarding the adverse possession claims against the State in tidal matters. The *Devins* decision may have opened the door for many private landowners. However, if past actions by the landowners are any indication of the future, the issue will never be litigated much less resolved.

There are three observations that may be drawn from the New Jersey situation. First, while outside the scope of this article in terms of examining New Jersey's sovereign immunity statute, a question remains as to whether the landowners can sue the State for negligence. There seems to be evidence which establishes such liability. The State has a duty to administer the public trust lands. This was made clear in *Illinois Central* and *O'Neill*. In New Jersey, the State breached this duty by allowing public trust lands to be filled and owned by private people in clear violation of the law, or so the State alleges. This breach has caused damages to the landowners who have had to pay the State additional money to clear a title which most thought was already clear. The four elements of negligence appear to be present. However, it remains to be investigated whether New Jersey's sovereign immunity statutes would allow such a suit.

Second, one of the goals of remedies in both tort and contract actions is to make the person who has suffered damages whole again. In New Jersey, the landowners are required to pay the State a price which is fixed at the fair market value according to today's prices. Often times the property in question was filled decades ago when the land was worth about $500 per acre or less, compared with hundreds of thousands of dollars per acre in some instances today. Requiring the landowner to pay a price fixed by today's standards makes the State "wholer" than

357. Procaccini, *supra* note 330.

it would have been had the State not neglected its duty and required the filler to pay for the land at the time the land was filled. The situation in Avalon is a clear example of this inequity and the State's greed.

In 1972, New Jersey was still owed approximately $74,500 for the land which Macchia developed. The State sat on this claim for nearly twenty years, knowing full well that the land was being built on and sold. When it came time to collect, the State, instead of dividing the amount owed among the landowners, pursued the individual landowners and made them pay for their land based on today's fair market value instead of the original price as set by the State. As a result of this policy, in Avalon alone, the State recognized a profit of approximately *$6 million*, compared to the $88,000 the State would have received when the land was originally sold.[358] This is not a bad return considering, at least in the Avalon case, a fair portion of the blame for the problem can be attributed to the State's own negligence and ineptitude. The State should set the price for its claims based on the price the land was being sold for at the time the property was artificially filled. This way the State will treat landowners fairly and not profit from the indifference.

Finally, using the reasoning set forth by the United States Supreme Court in *Illinois Central*, there is no guarantee that New Jersey will not at sometime in the future come back and without compensation repossess these lands. "The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."[359] If it is determined that too much of the public trust land has been given away so as to substantially impair the public's interest, the *Illinois Central* decision gives a state authority to take these lands back. A proposition which a landowner should find frightening and one the state probably finds quite appealing.

358. Andersen, *supra* note 176.

359. Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, 453 (1892).