

Private Title, Public Use:
Property Rights in North Carolina's Dry-Sand Beach

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TABLE OF CONTENTS

	Introduction.....	1
Part I	Establishing a Public Right of Access to the Dry-sand Beach.....	4
	a. Prescriptive Easements and Implied Dedication	
	b. Implied Reservation	
	c. Purpresture	
	d. Custom	
	e. Public Trust	
	f. Environmental Bill of Rights	
Part II	Evidence of Custom.....	28
	a. Historical Evidence of Public Use of the North Carolina Beaches	
	b. Public Understanding	
	c. Public Policy	
Part III	Monopolizing Public Trust Lands: <i>Cooper</i> and the White Lake Case Study.	46
Part IV	Title and Ownership.....	50
	a. Rights of Title	
	b. Equitable and Distributional Concerns Affecting Ownership	

Introduction

The earliest records of European encounters with North Carolina's Outer Banks recount the use of the beach by Native Americans and colonists for fires, hunting, fishing, and shell-collecting.¹ The recreational uses that dominate the use of those beaches today were pioneered by nineteenth-century vacationers, who traveled to the Outer Banks for their health.² In 1998, a handful of beachfront property owners from the Whalehead subdivision in Currituck County raised a court challenge to the longstanding assumption that the public has a right to use the entire beach for the activities documented in the historical record.³ The plaintiffs claim that their title extends to the water's edge at high tide, and they seek to exclude the general public from this area.⁴ A victory by these plaintiffs could severely limit the public right of access to one of the state's predominant public resources.

The areas of the beach that are seaward of the mean high-tide line belong to the citizens of North Carolina under the Public Trust doctrine.⁵ These "wet-sand" portions of the beach have long been used by beachgoers for recreation, travel, hunting, and fishing.⁶ Traditionally, the public has also used the adjacent dry-sand areas above the mean high-tide line for these purposes.⁷ Most North Carolinians believe that the public has a right to use the beach as far as the vegetation or dune line.⁸

Use of the dry-sand portions of the beach is more than incidental to use of the wet-sand areas, however. A right to cross the dry-sand beach is critical if North Carolina is to continue to

¹ See *infra*, notes 206-212 and accompanying text.

² See *infra*, notes 211-212 and accompanying text.

³ No. 98 CvS 153 (N.C. Super. Ct. filed June 19, 1998).

⁴ See *id.*

⁵ See *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 302, 177 S.E.2d 513, 516 (1970).

⁶ See *infra*, notes 206-217 and accompanying text.

⁷ See *id.*

provide truly public access to its public trust lands. If the Whalehead plaintiffs succeed in convincing the court of their position, they could terminate public access to the dry-sand beach. This would result in a barrier of privately-held property between the publicly-owned trust lands and the vast majority of the public who own this common resource. Such a ruling would have severe consequences not only for beachgoers, but for the beachfront economy all along North Carolina's coast. Moreover, it would unjustly limit access to a treasured public resource to those who can afford private ownership of beachfront property.

The plaintiffs in *Giampa v. Currituck County*⁹ (commonly known as the "Whalehead" litigation) are seeking to establish that they hold title to the dry-sand beach adjoining their property.¹⁰ One of the traditional rights of property is the right to exclude others from it.¹¹ It is unclear, however, whether a title holder in the dry-sand beach can exercise this right of ownership. In contrast to popular belief, ownership of a title does not relieve the owner of the burden of responsibilities to others.¹² Titles may be subject to written or implied easements, traditional rights of use, or common law prohibitions on certain activities.¹³ The scope of the private right to property is always balanced against public rights in the use of that property, such as a neighbor's right to bring an action for nuisance.

Tradition and common understanding in North Carolina suggest that the public has a right to use the dry-sand beach, even if the title to that land is held in private ownership.¹⁴ In essence, the private property owner maintains a title to the dry-sand beach, but certain

⁸ See *infra*, notes 218-232 and accompanying text.

⁹ No. 98 CvS 153 (N.C. Super. Ct. filed June 19, 1998).

¹⁰ See Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry-sand Beaches of North Carolina*, 78 N.C. L. Rev. 1869, 1872 (2000).

¹¹ See *Hildebrand v Southern Bell Tel. & Tel. Co.*, 219 N.C. 402, 14 S.E.2d 252 (1941).

¹² See *infra*, notes 325-334 and accompanying text.

¹³ See *id.*

¹⁴ See DAVID C. SLADE ET AL., COASTAL STATES ORGANIZATION, INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 212 (1997). See also *infra*, notes 206-303 and accompanying text.

components of ownership, such as the ability to share in reasonable use of the beach, are held by the general public. This paper will examine evidence of this joint ownership regime as it is manifest in the state's tradition and common understanding.¹⁵ It will also argue that a joint ownership regime has been recognized through public policy, private investment decisions, and lore and common understanding.¹⁶

The Whalehead litigation provides an opportunity for courts to recognize this joint ownership as well. This paper will explore the ways in which a court could give the force of law to the traditional view that the public and private property owners share rights in the dry-sand beach.¹⁷ These methods include prescriptive easements, implied dedications, purpresture, state constitutional law, and the public trust and custom doctrines.¹⁸ Any of these approaches would suffice to give legal recognition to the joint ownership regime. They are unlikely to implicate the takings doctrine because public use of the dry-sand beach has been part of the "investment-backed expectations" of waterfront property owners from the time of the founding, even if the exact scope of that right has not been delineated by the courts.¹⁹ This paper will argue that judicial recognition of this joint ownership regime is not only a necessary result of the Currituck litigation, but that such an outcome promises a more democratic and efficient ownership of this natural resource.²⁰

¹⁵ See *infra*, notes 206-303 and accompanying text.

¹⁶ See *id.*

¹⁷ See *infra*, notes 21-191 and accompanying text.

¹⁸ See *id.*

¹⁹ See *infra*, note 194 and accompanying text.

²⁰ See *infra*, notes 325-346 and accompanying text.

PART I. Establishing a Public Right of Access to the Dry-Sand Beach

The beach is a public resource unlike any other. Under the public trust doctrine, the general public has a right to use every beach in North Carolina from the water's edge to the mean high-tide line.²¹ The public trust area is also known as the wet-sand beach or foreshore.²² For much of the length of the North Carolina coast, this public resource is bordered on its landward side by privately-owned property. The Whalehead plaintiffs are likely to succeed in demonstrating that their private title extends to the landward side of the mean high tide line, across what is known as the dry-sand beach.²³ Unless the court finds a public right of access across this wall of private property, much of the public resource on the other side will be cut off from public use.

Access in the context of the beach has two meanings. First, the general public has a need to cross upland reaches of private property to reach the beach. This is known as perpendicular access.²⁴ Second, the public needs to be able to move along the dry-sand portions of the beach.²⁵ This type of access is necessary because at certain times of day and in certain seasons, the public areas of the beach are entirely submerged.²⁶ Both forms of access are necessary if the general

²¹ See *infra*, notes 134-143 and accompanying text.

²² “Under the Common Law, the publicly owned area of the natural beaches [sic] is the foreshore or ‘wet-sand beach,’ the area exposed at low tide and covered by water at high tide.” Op. Att’y Gen., Basnight, October 15, 1996.

²³ See KALO, *supra* note 10, at 1879 (citing to N.C. General Statutes § 77-20(a) and noting that the statutory description of the private property line as extending to the mean high tide line leaves little doubt about the seaward edge of private property). The dry-sand beach “refers to the flat area of sand seaward of the dunes or bulkhead which is flooded on an irregular basis by storm tides or unusually high tides.” Op. Att’y Gen., Basnight, October 15, 1996.

²⁴ See William A. Dossett, Concerned Citizens of Brunswick County Taxpayers Ass’n v. Holden Beach Enterprises: *Preserving Beach Access Through Public Prescription*, 70 N.C. L. REV. 1289, 1290 (1992).

²⁵ See *id.* See also SLADE, ET AL., *supra* note 14, at 211.

²⁶ See Op. Att’y Gen., Basnight, October 15, 1996 (“Because public ownership stops at the high water line, the public must either be in the water or on the dry-sand beach when the tide is high.”); *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1984) (“Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry-sand area is also allowed. The complete pleasure of swimming must be

public is to be able to make full use of its rights in the trust lands.²⁷ Since 1981, the state has had a policy of acquiring and improving pathways for perpendicular access.²⁸ Neither the state nor the courts have determined whether the public has lateral access rights in the dry-sand beach.

Nationally, at least one court has found that the public trust doctrine creates an implied, if limited, public right of perpendicular and lateral access across private property and that this right of access is necessary to the enjoyment of the public resource.²⁹ Most North Carolina commentators favor this “expanded” public trust doctrine as the best approach for establishing a public right of access to the beach.³⁰ Some courts have relied instead on the law of implied dedication or prescriptive easement to establish a public right of access.³¹ Other potential sources of a public right of access in North Carolina include implied reservations, the common law of purpresture, and the Environmental Bill of Rights of the North Carolina Constitution. This paper will now examine each of these approaches as a means of establishing a public right of access across to the public trust beach.

Prescriptive Easements and Implied Dedications

The public can acquire an easement across private property through a prescriptive easement or an implied dedication.³² Each of these approaches is discussed in turn.

accompanied by intermittent periods of rest and relaxation beyond the water’s edge. [Citations omitted.] The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to the recreational use of the ocean.”).

²⁷ See *id.* (“Reasonable enjoyment of the foreshore [wet-sand beach] cannot be realized unless some enjoyment of the dry-sand area is also allowed.”).

²⁸ See N.C. GEN. STAT. § 113A-134.2 (2000).

²⁹ See *Matthews*, 471 A.2d at 365.

³⁰ See *KALO*, *supra* note 10, at 1893; *Dossett*, *supra* note 24, at 1332; Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627, 645 (1989); Alice Gibbon Carmichael, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C. L. REV. 159, 201 (1985).

³¹ See *infra*, notes 32-86 and accompanying text.

³² See *Dossett*, *supra* note 24 at 1309 & n.142 (*citing to* *Nicholas v. Salisbury Hardware & Furniture Co.*, 248 N.C. 462, 469-72, 103 S.E.2d 837, 842-45 (1958); *Town of Sparta v. Hamm*, 97 N.C. App. 82, 85, 387 S.E.2d 173, 175-76 (1990)).

Prescriptive Easement

A prescriptive easement is a right-of-way over another person's land that is established through adverse possession.³³ The easement can be in favor of an individual or the public generally.³⁴ In order to establish the existence of a prescriptive easement, the claimant must demonstrate his or her adverse use of the property for an uninterrupted period of 20 years. During that period the use must have been open and notorious and relatively unchanged over time.³⁵ The claimant bears the burden of proving each of these elements.³⁶

What constitutes evidence of a prescriptive easement? In *Moody v. White*,³⁷ a Texas case, the open and notorious use of a private portion of the beach was established by testimony of, among others, fishermen, ferryboat operators, law enforcement officials, and residents.³⁸ These witnesses established that the public had used the beach for fishing, boating, and swimming throughout the statutory period.³⁹ The court concluded that “[t]he public’s use of the beach for many years was so open, visible and notorious that the appellants must have recognized the people’s right to the beach.”⁴⁰

The most difficult element of replicating *Moody* in North Carolina is likely to be the requirement of adverse possession. In order to claim an easement, the claimant must establish that his or her use was contrary to the owner’s will. North Carolina law on adverse possession includes a presumption of permissive use, which means that the court begins each case with the

³³ See *Potts v. Burnette*, 301 N.C. 663, 667, 273 S.E.2d 285, 288 (1981).

³⁴ See *Dossett*, *supra* note 24, at 1307.

³⁵ See *Potts*, 301 N.C. at 663, 273 S.E.2d at 285; *Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900-01 (1974); *Curd v. Winecoff*, 88 N.C.App. 720, 364 S.E.2d 730 (1988).

³⁶ See *Potts*, 301 N.C. at 666, 273 S.E.2d at 288. This is because this easement by prescription are “disfavored” by the law. See *id.*

³⁷ 593 S.W.2d 372 (Tex. Civ. App. 1979)

³⁸ *Finnell*, *supra* note 30, at 632.

³⁹ See *id.*

⁴⁰ See *Moody v. White*, 593 S.W.2d 372, 377-78 (Tex. Civ. App. 1979), *quoted in* *Finnell*, *supra* note 30, at 632.

assumption that the claimant's use was not adverse to the owner.⁴¹ This presumption is essentially a policy choice by the court that a property owner who "quietly acquiesces in use of path, or road, across his uncultivated land, resulting in no injury to him, but in great convenience to his neighbor, ought not to be held to have thereby lost his rights."⁴² Under North Carolina law, the use of a path across another's land cannot "ripen" into an easement by prescription so long as it remains permissive.⁴³ Therefore, in order to succeed, the claimant must establish that her use was clearly "not an enjoyment of neighborly courtesy."⁴⁴

While a claimant must demonstrate that his use was adverse to the owner, he must also show that the owner did not succeed in causing a "substantial interruption" in his use of the path. In most jurisdictions, a substantial interruption is one that lasts more than a few days "during a time in which the [easement] would have been used if it were not for the landowner's efforts to obstruct [its] use."⁴⁵ In *Concerned Citizens v. Holden Beach Enterprises*, the North Carolina Supreme Court held that a substantial interruption requires "intent to interrupt use, overt acts towards that end, and actual success in preventing use for some substantial period of time in order to constitute an interruption of prescriptive use."⁴⁶ The court's language implies that, at least in beach cases, it will tolerate longer interruptions without finding the interruption to be substantial. Similarly, it suggests that the landowner, not the claimant, carries the burden of demonstrating that use was interrupted. Finally, the court held that a substantial interruption of a public easement occurs only when the general public, not just a subset of the public, is prevented

⁴¹ See *Dickinson v. Pake*, 284 N.C. 576, 580, 201 S.E.2d 897, 900 (1974).

⁴² See *Potts v. Burnette*, 301 N.C. 663, 273 S.E.2d 285 (1981).

⁴³ See *Higdon v. Davis*, 71 N.C.App. 640, 324 S.E.2d 5 (1984), *aff'd in part, rev'd in part*, 315 N.C. 208, 337 S.E.2d 543; *Nicholas v. Salisbury Hardware & Furniture Co.*, 248 N.C. 462, 103 S.E.2d 837 (1958).

⁴⁴ See *Dickinson*, 284 N.C. at 580-81, 201 S.E.2d at 900 (1974).

⁴⁵ See *Dossett*, *supra* note 24 at 1319.

⁴⁶ See *id.* at 1318, *citing* *Concerned Citizens of Brunswick County Taxpayers Ass'n v. Holden Beach Enterprises*, 329 N.C. 37, 51-54, 404 S.E.2d 677, 686-88. *Dossett* extrapolates the "intent to interrupt" requirement from the facts of the case and analogous case law in other jurisdictions.

from using the property.⁴⁷ One commentator suggests that *Concerned Citizens* has significantly lowered the bar for plaintiffs on this element.⁴⁸

A second change in the law of prescriptive easements heralded by *Concerned Citizens* was the “relaxation” of the identity of the easement requirement.⁴⁹ Under the former law in North Carolina, a landowner was required to surrender an easement only if the claimant could demonstrate “a definite and specific line of travel” during the prescriptive period.⁵⁰ Given the malleability of the oceanfront environment, proving a “definite and specific” path across the beach for a 20-year period would be difficult.⁵¹ The *Concerned Citizens* court noted that the purpose of this element is to give the landowner reasonable notice of the adverse claim and to give the court guidance in locating the easement.⁵² The court held that these goals could be achieved by demonstrating a “substantial identity of a definite and specific line.”⁵³ Thus, if the claimant is seeking an easement across “windswept, shifting sands which are subject to ocean storms,”⁵⁴ she may not have to demonstrate as consistent a path as she would for an easement across an inland parcel.⁵⁵

In some jurisdictions, a public claimant has a greater burden than a private one.⁵⁶ Courts require a greater evidentiary showing in the former instance because the potential impact of a public easement is much greater than a private easement.⁵⁷ Moreover, public easements tend to

⁴⁷ See Dossett, *supra* note 24 at 1319-1321.

⁴⁸ See *id.* (“[T]he Concerned Citizens opinion makes it much more difficult for a landowner to interrupt prescriptive use in North Carolina than in other states.”).

⁴⁹ See *id.* at 1321.

⁵⁰ See Speight v. Anderson, 226 N.C. 492, 39 S.E.2d 371 (1946). See also Dossett, *supra* note 24, at 1304-07, n.99-122 and accompanying text.

⁵¹ See Dossett, *supra* note 24, at 1322.

⁵² See Concerned Citizens of Brunswick County Taxpayers Ass’n v. Holden Beach Enterprises, 329 N.C. 37, 47, 404 S.E.2d 677, 683.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See Dossett, *supra* note 24 at 1325.

⁵⁶ See *id.* at 1307-08.

⁵⁷ See *id.*

expand through use. As one commentator observed: “In theory, the scope of the public prescriptive easement would be limited to the extent of the use during the prescriptive period; in practice, however, the extent of use of a public prescriptive easement may greatly exceed the extent of use by which the easement was acquired.”⁵⁸ One method for increasing the burden is to require the public plaintiff to demonstrate that the use of the easement be akin to a road, and some even require a record of public maintenance.⁵⁹ Nonetheless, three states have used the law of prescriptive easements to establish a public right to the beach.⁶⁰ North Carolina law on prescriptive easements is unclear; however, our courts have tended to require a record of actual maintenance in the similar instance of an implied easement (see below).

One rationale for requiring maintenance in the case of implied easements is to give cities control over whether they accept dedicated properties. In the case of a prescriptive easement, there is less need to protect the city against responsibility for unwanted properties since it will usually be party bringing the claim. Further, there should be a presumption that a willing public entity should assume ownership of and responsibility for property that has been widely used by the public for a long time. The other common reasons for requiring a showing of public maintenance are to ensure that the landowner is aware of the adverse claim and to demonstrate to her that the claim is being asserted by the public at large.⁶¹ Because beach easements are used by the general public, rather than a few individuals, and because beach paths require little maintenance, one commentator has argued that maintenance is not relevant to the evaluation of

⁵⁸ See Dossett, *supra* note 24 at 1307.

⁵⁹ See *id.* at 1308.

⁶⁰ See *id.* at 1311, *citing to* City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73, 75 (Fla. 1974); State ex rel. Thornton v. Hay, 254 Or. 584, 594, 462 P.2d 671, 676 (1969); Moody v. White, 593 S.W.2d 372, 377-78 (Tex. Civ. App. 1979).

⁶¹ See Dossett, *supra* note 24 at 1325.

beachfront prescriptive easements.⁶² In fact, in *Concerned Citizens*, the North Carolina Supreme Court found a public prescription without requiring maintenance of the roadway.⁶³

Implied Dedication

A dedication is an offer of the use of property, such as an easement, by the present owner. Unlike a prescriptive easement, which is established predominantly from the acts of the claimant, an implied dedication requires evidence that the property owner intended to dedicate the land for public use.⁶⁴ One method of demonstrating intent is an express dedication; however, other actions by the owner may also be considered to be an offer of dedication. The North Carolina Supreme Court has said that an owner's intent to dedicate "may be manifested by his affirmative acts whereby the public use is invited and his subsequent acquiescence in such use, by his express assent to, or deliberate allowance of, the use, or merely by his acquiescence therein"⁶⁵ The public, the court has said, has "a right to rely on the conduct of the owner as indicative of his intent."⁶⁶

Because a dedication is essentially a contract, the public must manifest an intent to accept the offer of dedication.⁶⁷ The public may accept a dedication either by an express acceptance by the relevant public authority or by an implied acceptance.⁶⁸ An implied acceptance occurs if the general public uses a parcel of property and the property has been controlled by a public authority for at least 20 years.⁶⁹ Some jurisdictions recognize the concept of public user as an

⁶² See *id.* at 1326.

⁶³ See *id.* at 1325.

⁶⁴ See *Shear v. Stevens Building Co.*, 107 N.C.App. 154, 163, 418 S.E.2d 841, 847 (1992). See also *Dossett*, *supra* note 24 at 1310.

⁶⁵ See *Shear* 107 N.C.App. at 163, 418 S.E.2d at 847, *citing* *Nicholas v. Furniture Co.*, 248 N.C. 462, 103 S.E.2d 837 (1958).

⁶⁶ See *id.*, *citing* *Spaugh v. Charlotte*, 239 N.C. 149, 79 S.E.2d 748 (1954).

⁶⁷ See *Bumgarner v. Reneau*, 105 N.C.App. 362, 366-67, 413 S.E.2d 565, 568 (1992).

⁶⁸ See *id.* at 366-67, 413 S.E.2d at 569.

⁶⁹ See *id.* at 367, 413 S.E.2d at 569. If there is an express acceptance, there is no need for a 20-year prescriptive period to pass. See *Tise v. Whitaker-Harvey Co.*, 146 N.C. 374, 59 S.E. 1012 (1907).

alternative method of establishing an implied dedication.⁷⁰ Under the doctrine of public user, an implied offer of dedication, coupled with use of the property by the public for the purpose for which it was dedicated, constitutes an effective dedication.⁷¹ In jurisdictions that follow this rule, claimants do not have to demonstrate government control or the running of the prescriptive period. The North Carolina Court of Appeals has concluded that the rule of public user does not apply in this state.⁷²

California and Texas courts have used the implied dedication doctrine to provide public access to the dry-sand beach.⁷³ Texas's implied dedication case law is similar to North Carolina's in that it requires "evidence of the landowner's intent to dedicate to public use and acceptance by public authorities manifested by public maintenance and control of the acquired land."⁷⁴ In *Seaway Co. v. Attn'y Gen'l*, the Texas Court of Appeals held that the evidence that the owners made the beach available to the public constituted an offer, while police patrol and maintenance of the beach by the local government constituted acceptance.⁷⁵ California's theory of implied dedication is akin to the doctrine of public prescription.⁷⁶

In large part because of the requirement for a demonstration of government control over the property in question, North Carolina courts have applied the implied dedication doctrine to

⁷⁰ See Carmichael, *supra* note 30, at 170-71 & n.90 (citing to cases).

⁷¹ See *Bumgarner*, 105 N.C.App. at 367, 413 S.E.2d at 569 (holding that "[i]n North Carolina, the use by the public of dedicated property must be coupled with control of the property by the proper public authority for at least 20 years.").

⁷² See *id.* In her Comment, Alice Gibbon Carmichael suggests that the requirement for government control as a component of acceptance makes sense for roadways, since public ownership brings a duty to maintain safe roadways. She notes that where there is no equivalent duty to maintain the dedicated property, the public user requirement could be sufficient to constitute acceptance. Such a rule could be applied to beach accessways. See Carmichael, *supra* note 30, at 171-72.

⁷³ See Carmichael, *supra* note 30, at 171-72, *citing to* *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 43, 465 P.2d 50, 59, 84 Cal. Rptr. 162, 171 (1970); *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex. Civ. App. 1964).

⁷⁴ See *Dossett*, *supra* note 24, at 1312.

⁷⁵ 375 S.W.2d 923, 936-37 (Tex. Civ. App. 1964).

⁷⁶ See *Dossett*, *supra* note 24, at 1313.

find public property rights primarily in roadways.⁷⁷ This relatively strict interpretation of the doctrine would seem to preclude its application to beach access routes.⁷⁸

Prescriptive easements and implied dedications share the same theoretical shortcoming: they must be established on a parcel-by-parcel basis.⁷⁹ In order to establish coast-wide access, the Division of Coastal Management would have to litigate thousands of beach access cases. Moreover, property owners who wished to avoid a prescriptive easement or implied dedication might take aggressive action to prohibit beach access.⁸⁰ The result would be a significant reduction in public beach access rights in the short term. Prescriptive easements and implied dedication also have been criticized as being inequitable approaches to providing public access because those property owners whose properties were actually used for beach access are burdened in perpetuity, while neighboring parcels are spared.⁸¹

A mandatory dedication policy could run afoul of a takings challenge.⁸² Such a challenge was upheld in *Nollan v. California Coastal Commission*.⁸³ In *Nollan*, the U.S. Supreme Court found that the Commission had taken the plaintiff's property when it required him to dedicate a portion of his non-public trust lands for an accessway to the beach.⁸⁴ *Nollan* primarily concerned mandatory public dedication of uplands, however, rather than the dry-sand portions of the beach.⁸⁵ In the words of one observer, "Clearly the majority in *Nollan* did not reach the question

⁷⁷ See *Owens v. Elliott*, 258 N.C. 314, 128 S.E.2d 583 (1962). See also *Dossett*, *supra* note 24, at 1312.

⁷⁸ See *Carmichael*, *supra* note 30, at 172.

⁷⁹ See *Carmichael*, *supra* note 30, at 168; *Dossett*, *supra* note 24, at 1313, *citing to* *State ex rel. Thornton v. Hay*, 243 Or. 584, 595, 462 P.2d 671, 676 (1969).

⁸⁰ See *Carmichael*, *supra* note 30, at 170 (noting that following a California decision establishing an implied dedication of a beach access route that some beachfront landowners "constructed chain link fences, dynamited beach access paths, and planted cacti to preserve their property rights"); *Finnell*, *supra* note 30, at 644 ("To avoid both prescription and implied dedication, the landowner will... have to construct a fence or other unsightly barrier.").

⁸¹ See *Carmichael*, *supra* note 30, at 169-170.

⁸² See *Finnell*, *supra* note 30, at 656-665.

⁸³ 483 U.S. 825 (1987).

⁸⁴ See *id.*

⁸⁵ See *Finnell*, *supra* note 30, at 663 ("*Nollan* concerned regulation of private land lying landward of the historic mean high tide line and therefore beyond the area normally subject to the public trust doctrine.").

whether the public had earlier acquired an easement in the Nollan lot between the seawall and the mean high tide line.’⁸⁶

Implied Reservation

Another approach to finding a public easement across the dry-sand beach is through the law of implied reservation. When a parcel of land is completely surrounded by other parcels, the owner of the landlocked property can claim an easement by necessity across another’s land.⁸⁷

This easement gives the trapped owner a right to travel across the other’s land, but only to the extent reasonably necessary to enter and leave her own parcel.⁸⁸ The easement is called an implied reservation because if a right of access is not expressly provided in the deed, a court will find that one is implied. The courts’ reasoning in these cases is that because no one intends to buy or sell a landlocked parcel, the deed necessarily reserves a right of access.

Courts typically find an easement where an owner transfers landlocked property to a grantee.⁸⁹ In such cases the court presumes that the grantor did not intend to convey a property that could not be accessed.⁹⁰ In *Cieszko v. Clark*, the North Carolina Court of Appeals held that the same rationale could also be applied to establish an easement by necessity in favor of a grantor who conveys property that leaves its own title landlocked.⁹¹ The court cited favorably an earlier opinion which observed that “the law presumes that a vendor did not intend to convey a

⁸⁶ *See id.*

⁸⁷ *See Smith v. Moore*, 254 N.C. 186, 190, 118 S.E. 2d 436, 438 (1961).

⁸⁸ *See Blankenship v. Dowtin*, 191 N.C. 790, 133 S.E. 199 (1926), *quoting* J. Gould, *Gould on Waters* § 354 (3d ed. 1900) (holding that the grantee receives all easements that are “necessary to the reasonable enjoyment of the granted property”).

⁸⁹ *See Cieszko v. Clark*, 92 N.C. App. 290, 295, 374 S.E.2d 456, 459 (1988), *citing Moore*, 254 N.C. at 190, 118 S.E.2d at 438; *Oliver v. Ernul*, 277 N.C. 591, 599, 178 S.E.2d 393, 397 (1971).

⁹⁰ *See id.*

⁹¹ *See Cieszko*, 92 N.C. App. at 296, 374 S.E.2d at 460.

portion of his land in such a way as to deprive himself of full use of the remainder.⁹² Thus, even where there is no express reservation of a right of access and egress, courts will find an implied reservation in favor of the landlocked grantor.

In order to establish a right of access, a grantor must prove three elements: 1) both properties were originally in common ownership; 2) the common ownership was terminated by a conveyance; and 3) the need for the easement resulted from that conveyance.⁹³ The common ownership (“privity”) requirement means that one cannot use the law of implied easements to establish an easement across the property of third party.⁹⁴ The landlocked owner must also demonstrate that the easement is necessary. An easement is necessary if the owner is unable to access his or her property without the easement. It is important to note that the fact that an owner has a permissive right to reach the parcel over someone else’s land does not defeat the claim of necessity.⁹⁵

Could the state have an easement by necessity across private beachfront property to reach state-owned trust lands that are essentially landlocked by private parcels? Possibly. Privity of title between the present owner and the state exists in those beachfront properties in which the state once held title.⁹⁶ The element of necessity can be established from the fact that state-owned public trust lands (those properties over which the grantor retained title) are essentially landlocked between the ocean and privately-held property.⁹⁷ Because a permissive right of use does not defeat a claim of necessity, the use of this doctrine should not be barred by the fact that

⁹² See *id.*, citing to *Herndon v. R.R.*, 161 N.C. 650, 658, 77 S.E. 683, 686 (1913).

⁹³ See *Cieszko* at 296, 374 S.E.2d at 460.

⁹⁴ See *Lumber Co. v. Cedar Works*, 158 N.C. 161, 73 S.E. 902 (1912); *Wilson v. Smith*, 18 N.C. App. 414, 197 S.E.2d 23 (1973).

⁹⁵ See *Wilson*, 18 N.C. App. at 414, 197 S.E.2d at 23.

⁹⁶ See DAVID BROWER, *UNC SEA GRANT, ACCESS TO THE NATION’S BEACHES: LEGAL AND PLANNING PERSPECTIVES* 101 (1978). Title to all lands in North Carolina originated in the state unless they were granted by the English Crown prior to independence. See *State v. Taylor*, 60 N.C.App. 673, 675, 300 S.E.2d 42, 44 (1983).

⁹⁷ See *id.* at 102.

access is available elsewhere via publicly-owned beaches and beach accessways. Therefore, a court could find an implied reservation was created by the original state conveyance if it determines that the state “did not intend to relinquish well-established public rights of use or access, and accordingly impliedly reserved such rights for the public.”⁹⁸

Courts could have difficulty in reaching this determination, however. Unlike a landlocked property owner, it is not clear that the state would have intended to reserve a right of use in upland beaches at the time of their conveyance. Observers suggest that North Carolina courts would be unlikely to find such intent in fee simple grants to private property owners absent a significant evidentiary showing.⁹⁹ The state would probably have to produce some historical evidence of its intent to retain a right of use.¹⁰⁰

The state could also be barred by the doctrine of laches. As applied to an implied easement, this doctrine holds that the easement does not evaporate through disuse, but it can be voided if the claimant’s disuse is unreasonable and prejudicial to the other landowner.¹⁰¹ In this case, the state has not acted to enforce a public right of access, so beachfront homeowners are presumptively unaware of any implied easement. If parcels were unused for access and development progressed based on that lack of use, a court might consider enforcement at this point to be unfairly prejudicial. On the other hand, the court must also consider whether the claimant was aware that it had a claim and if it unfairly delayed bringing it forward.¹⁰² In this case, the state can assert that it was unaware of the need to bring its claim because of the

⁹⁸ See *id.* at 101.

⁹⁹ See *id.* at 103.

¹⁰⁰ See *id.*, citing to *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex. Civ. App. 1964).

¹⁰¹ See *Cieszko v. Clark*, 92 N.C. App. 290, 297, 374 S.E.2d 456, 461 (1988).

¹⁰² See *id.* at 298, 374 S.E. 2d at 461.

longstanding tradition of public use of the dry-sand beach.¹⁰³ As with the other implied rights in property, this is a cause of action that would likely have to be brought on a case-by-case basis.

Purpresture

A purpresture occurs when a private property owner encroaches on private rights.¹⁰⁴ Unlike a nuisance, the encroachment does not have to be noxious.¹⁰⁵ Rather, a purpresture may result when a private party merely blocks access to a public resource, or appropriates the resource for his or her sole use.¹⁰⁶ Like nuisance law, purpresture is a matter of state common law. Unfortunately, appellate courts in North Carolina have never addressed the law of purpresture, so the availability and scope of the cause of action in this state remains unclear.

Although a purpresture is not necessarily a nuisance, Texas courts treat purpresture as akin to a public nuisance. In *State v. Goodnight*,¹⁰⁷ the Texas Supreme Court said that “[t]he inclosure of public lands for private use, whether viewed as a wrong merely to the body politic or as an infringement of the privileges of its citizens, is a nuisance subject to be abated at the suit of the State.”¹⁰⁸ The *Goodnight* court addressed the use of fences on private property to block access to public grazing lands. The court held that it had the power under the law of purpresture

¹⁰³ See *id.* (“In determining whether a delay constitutes laches, the court must consider whether the claimant knew of the existence of the grounds for the claim and whether the defendant had knowledge of the claim.”).

¹⁰⁴ See BLACK’S LAW DICTIONARY (6th ed. 1990) (defining a purpresture as “an encroachment upon public rights and easements by appropriation to private use of that which belongs to the public. An inclosure by a private party of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large.”).

¹⁰⁵ See *Shively v. Bowlby*, 152 U.S. 1, 13 (1893); BLACK’S LAW DICTIONARY (6th ed. 1990). A public nuisance is a “substantial non-trespassory invasion of another’s interest in the private use and enjoyment of property” that substantially affects the “health, comfort, or property of those who live near[by].” *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 617, 124 S.E.2d 809, 813-13 (1962) (quoting *Pake v. Morris*, 230 N.C. 424, 436, 53 S.E.2d 300, 301 (1949)). Obstructing beach access is unlikely to constitute a public nuisance because it does not pose the kind of risk to the public health or safety that courts traditionally recognize as public nuisances. See Christopher City, Note, *Duty and Disaster: Holding Local Governments Liable for Permitting Uses in High-Hazard Areas*, 78 N.C. L. REV. 1535, 1546 & n.72.

¹⁰⁶ See BLACK’S LAW DICTIONARY (6th ed. 1990).

¹⁰⁷ 70 Tex. 682, 11 S.W. 119 (1888).

¹⁰⁸ *Id.* at 686, 11 S.W. at 120.

to abate activity that was occurring solely on adjacent private property.¹⁰⁹ In contrast, the majority of courts who have addressed the issue appear to follow the California rule that a cause of action in purpresture exists only when the private party has physically invaded public lands.¹¹⁰ The Texas rule also differs from most purpresture cases by recognizing an interference with “intangible” public rights, such as the value of the public land for sale or lease without the encroachment.¹¹¹

Professor Finnell argues that *Goodnight* supports the application of purpresture law to the public right of use established by the public trust doctrine.¹¹² He suggests that a cause of action should arise where beachfront property owners enclose the dry-sand beach and limit the public’s right of use in its trust lands. Enclosure of the beach could be demonstrated where private actors erect fences or otherwise inhibit access to the beach across their property.¹¹³ The problem with extending the purpresture argument from *Goodnight* is one of causation. As Professor Finnell points out, one landowner was responsible for the purpresture in *Goodnight*.¹¹⁴ In contrast, the loss of access to the beach is the combined result of a number of individual actors, no one of whom is solely responsible.¹¹⁵

¹⁰⁹ *See id.* For a discussion of the facts of *Goodnight*, see Finnell, *supra* note 30, at 647-650 (noting that the defendant had effectively enclosed 600,000 acres of Texas’ public school property by erecting fences and hiring line riders on his own property. This enclosure prevented use of those public lands, including grazing rights, and the passage of herds and people.).

¹¹⁰ *See* Finnell, *supra* note 30, at 647, *citing to* *Yokohama Specie Bank, Ltd. v. Unosuke Higashi*, 56 Cal. App. 2d 709, 133 P.2d 487 (1943) (holding that a building built on public trust tidelands without the state’s permission became property of the state).

¹¹¹ *See* Finnell, *supra* note 30, at 647.

¹¹² *See id.*

¹¹³ Under the California rule, by contrast, fences would be actionable only if they extended onto public trust lands.

¹¹⁴ *See* Finnell, *supra* note 30, at 649.

¹¹⁵ *See id.*

Custom

The public can establish a right through customary use of land.¹¹⁶ The standard for a customary use is: (1) “a long and general usage”; (2) “without interruption by oceanfront property owners”; (3) “peaceful and free of dispute”; (4) “reasonable”; (5) “certain as to its scope and character”; (6) “without objection by landowners”; and (7) “not contrary to other customs or laws of the state.”¹¹⁷ Some states require that the long and general usage be as far back as “time immemorial.”¹¹⁸

The primary advantage of the custom doctrine is that the right of use arises from “the nature of the land, not the nature of the use.”¹¹⁹ Unlike an easement, where the claimant must demonstrate actual use of a particular parcel, the claimant in a customary use case must only demonstrate the use of that kind of land for public purposes. Thus, the Florida Supreme Court held that “[t]he constant enjoyment of this privilege [bathing in salt waters] of thus using the ocean and its foreshore for ages without dispute should prove sufficient to establish it as an American common law right”¹²⁰

The leading case for customary use in the United States is *State ex rel. Thornton v. Hay*,¹²¹ from the Oregon Supreme Court.¹²² In that case, the Oregon Supreme Court ordered the removal of a fence that a private property owner had erected on his dry-sand beach. The court held that public had used the beach “running back in time as long as the land has been inhabited”

¹¹⁶ See Carmichael, *supra* note 30, at 173 & n.100, *citing to* 3 H. TIFFANY, LAW OF REAL PROPERTY, § 935, at 623 (3d ed. 1939).

¹¹⁷ See Kalo, *supra* note 10, at 1894 & n.106 (*citing to* *State ex rel. Thornton v. Hay*, 462 P.2d 671, 673 (Or. 1969)).

¹¹⁸ See Carmichael, *supra* note 30, at 173 & n.104.

¹¹⁹ See *id.* at 175 & n. 124 (*citing to* *Graham v. Walker*, 78 Conn. 130, 132, 61 A. 98, 99 (1905) (“A right of way by custom appertains to a certain district or territory . . . It belongs to the inhabitants of that territory, whether landowners or not.”)).

¹²⁰ See *White v. Hughes*, 139 Fla. 54, 59, 190 So. 446, 449 (1939), *cited by* *Matthews v. Bay Head Improvement Association*, 95 N.J. 306, 321, 471 A.2d 355, 363 (1984).

¹²¹ 462 P.2d 671 (Or. 1969).

in satisfaction of the time immemorial standard.¹²³ The court also expanded the doctrine's traditional scope to include the non-local users. Under the English doctrine of custom, the rights of customary use extended only to those who lived near the disputed property.¹²⁴ The Oregon Supreme Court held that a customary right of use in beaches applies to the public generally, and to beachfront property throughout the state.¹²⁵

While a few courts have followed Oregon's lead in extending custom rights to the beach,¹²⁶ most have not.¹²⁷ North Carolina courts have not decided the issue of custom with regard to any property.¹²⁸ Professor Kalo suggests that if a court were to apply doctrine custom in the Whalehead litigation, the result would have statewide implications for both the level of proof and the outcome: "The doctrine of custom would allow proof of a state-wide custom, and an affirmative decision would establish the existence of a state-wide right of the public to use dry-sand beaches."¹²⁹ In Kalo's view, the customary right of use of the Currituck beaches could be established by evidence of customary use elsewhere on the Outer Banks. Once established for Currituck, the same right of custom would apply to private property all along the coast.

¹²² For a general discussion of *State ex rel. Thornton v. Hay*, see Kalo, *supra* note 10, at 1894 & n.6, and Carmichael, *supra* note 30, at 174-75.

¹²³ See Thornton, 462 P.2d at 671.

¹²⁴ See Carmichael, *supra* note 30, at 174.

¹²⁵ See *id.* (citing to Thornton, 462 P.2d at 678, n.8. ("[A] custom, established in fact, can have regional application and be enjoyed by a larger public than the inhabitants of a single village.")).

¹²⁶ See Kalo, *supra* note 10, at 1894 n.106 (citing to *United States v. St. Thomas Beach Resorts, Inc.*, 386 F. Supp. 769, 772-73 (D.V.I. 1974); *Public Access Shoreline v. Hawaii County Planning Comm'n*, 903 P.2d 1246, 1255-56 (Haw. 1995); *County of Hawaii v. Sotomura*, 517 P.2d 57, 61 (Haw. 1973); *Arrington v. Mattox*, 767 S.W.2d 957, 958 (Tex. Ct. App. 1989)).

¹²⁷ See Carmichael, *supra* note 30, at 174 & n.120.

¹²⁸ See *id.* at 175; Kalo, *supra* note 10, at 1894 & n.110. Professor Kalo notes that the North Carolina Supreme Court acknowledged a custom of free-ranging livestock in *Bost v. Mingues*, 64 N.C. 44, 46-47 (1870). The court apparently rejected the doctrine in an earlier case, *Winder v. Blake*, 49 N.C. 332, 336 (1857). See *id.*

¹²⁹ See Kalo, *supra* note 10, at 1894, n.109 (citing to *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969)).

Public Trust

The public trust doctrine provides that navigable waters of the United States and the land beneath them are held by the states in trust for their citizens.¹³⁰ The doctrine also creates a public right to the use and enjoyment of lands held in the public trust.¹³¹ The public trust doctrine has a history that dates back to Roman law, and it became a part of U.S. law through the English common law tradition.¹³² Despite its long history, there is tremendous variation in its application today. This variation stems from the fact that although the doctrine is applicable in every state, each state is individually responsible for defining the scope and form of the doctrine within its borders.¹³³

North Carolina has followed the public trust doctrine since the Revolutionary War.¹³⁴ Like the majority of states, North Carolina applies the public trust doctrine to all waters that are subject to “navigability in fact.”¹³⁵ Lands under navigable waters are also subject to the public trust.¹³⁶ If the navigable water is a tidal body, the state’s jurisdiction includes all lands covered by water at mean high tide.¹³⁷ No precise method for determining the location of the mean high tide line has been adopted in North Carolina.¹³⁸ In 1978, the General Assembly rejected the use

¹³⁰ See SLADE, ET AL., *supra* note 14, at 3.

¹³¹ See *id.*

¹³² See *id.* at 3-5.

¹³³ See *id.* at 3.

¹³⁴ See *Gwathmey v. State*, 342 N.C. 287, 464 S.E.2d 674 (1995).

¹³⁵ See *Gwathmey*, 342 N.C. at 287, 464 S.E.2d at 674 (holding that “if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose. Lands lying beneath such waters are the subject of the public trust doctrine.”). See also N.C. GEN. STAT. § 146-64(4) (2000) (““Navigable waters” means all waters which are navigable in fact.”).

¹³⁶ See *id.* Interestingly, the right of use of navigable rivers under the public trust doctrine apparently does not include the right to land on the riverbank, no matter what the height of the water. See *Op. Att’y Gen., Whisnant*, Jan. 20, 1998 (*citing to Gaither v. Albemarle Hospital*, 235 N.C. 431, 444, 70 S.E.2d 680 (1952)).

¹³⁷ *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 302, 177 S.E.2d 513, 516 (1970); *State ex rel. Roher v. Credle*, 322 N.C. 522, 532, 369 S.E.2d 825, 831 (1988); *State v. Forehand*, 67 N.C. App. 148, 150-51, 312 S.E.2d 247, 249 (1984); N.C. GEN. STAT. § 77-20(a) (2000). See also *Dossett*, *supra* note 24, at 1315 (discussing generally the public trust rights in submerged lands).

¹³⁸ See *Kalo*, *supra* note 10, at 1879.

of the vegetation or dune lines as a marker of the mean high tide line.¹³⁹ The federal rule, as adopted by the U.S. Supreme Court in *Borax Consolidated, Ltd. v. Los Angeles*,¹⁴⁰ sets the line at “the average height of all waters over a period of 18.6 years.”¹⁴¹ One observer has suggested that North Carolina’s Supreme Court has implicitly adopted the Borax rule.¹⁴² The inter-tidal area between the mean high tide line and the mean low tide line is known as the foreshore or wet-sand beach.¹⁴³

In addition to establishing state ownership in certain waters and submerged lands, the public trust doctrine also vests the general public with certain rights to use these lands. North Carolina courts have said that the public has the right to use trust lands for navigation and commerce,¹⁴⁴ travel,¹⁴⁵ fishing,¹⁴⁶ and hunting.¹⁴⁷ In addition, the General Assembly has given statutory recognition to swimming and other recreational activities as rights within the public trust.¹⁴⁸ At least one observer interprets North Carolina’s statutory provision as permitting courts to adapt the doctrine to include modern uses as well as traditional ones.¹⁴⁹

Although the public trust doctrine nominally applies only to land that is regularly covered by water, at least one court has taken an “expansive” view of the doctrine.¹⁵⁰ Under this expanded view, the privately held lands adjacent to the public trust lands may subject to some

¹³⁹ See N.C. GEN. STAT. § 77-20 (2000); Kalo, *supra* note 10, at 1881.

¹⁴⁰ 296 U.S. 10 (1935).

¹⁴¹ See *id.*

¹⁴² See Kalo, *supra* note 10, at 1883.

¹⁴³ See SLADE, ET AL., *supra* note 14, at xiv.

¹⁴⁴ See *Tatum v. Sawyer*, 9 N.C. (2 Hawks) 226, 229 (1822); *State v. Baum*, 128 N.C. 442, 40 S.E. 113 (1901). See also *Burke County v. Catawba Lumber Co.*, 116 N.C. 420, 21 S.E. 941 (1895) (finding a public trust right to use streams for floating logs). See generally SLADE, ET AL., *supra* note 14, at 169-207.

¹⁴⁵ See *West v. Slick*, 313 N.C. 33, 60, 326 S.E.2d 601 (1985).

¹⁴⁶ See *State ex rel. Rohrre v. Credle*, 322 N.C. 522, 527, 369 S.E.2d 825 (1988); *Collins v. Benbury*, 25 N.C. (3 Ired.) 277 (1842).

¹⁴⁷ *Swan Island Club v. White*, 114 F.Supp. 95 (E.D.N.C. 1953) (*aff’d sub nom* *Swan Island Club v. Yarbrough*, 209 F.2d 698 (4th Cir. 1954)).

¹⁴⁸ N.C. GEN. STAT. § 1-45.1 (2000).

¹⁴⁹ See SLADE, ET AL., *supra* note 14, at 172 & n.32 (referring to N.C. GEN. STAT. § 1-45.1, which states that public trust rights “are established by common law as interpreted by the courts of this State.”).

public use rights incident to the use of the public trust lands.¹⁵¹ The expanded public trust doctrine was pioneered by the New Jersey Supreme Court in *Matthews v. Bay Head Improvement Association*.¹⁵² The *Matthews* court concluded that public trust rights in the dry-sand were necessary if there were to be any value in public ownership of the wet-sand beach.¹⁵³ The court limited the rights of public use to those that were “reasonably necessary” and “subject to the accommodation of the interests of the [private property] owner.”¹⁵⁴

North Carolina courts have not yet considered whether the public trust doctrine applies to the dry-sand beach as well as the wet-sand beach.¹⁵⁵ Several pieces of evidence suggest that the North Carolina Supreme Court has, at times, favored such a right.¹⁵⁶ In dicta in a 1987 decision, Justice Frye wrote that an act prohibiting the use of motor vehicles on certain beachfront owners’ property gave a special privilege to those owners “in that they do not have the use and enjoyment of their oceanfront property infringed upon or restricted by the public’s right to use motor vehicles on the public trust portions of their property.”¹⁵⁷ Justice Frye’s statement suggests the existence of public trust rights in land held by private property owners.¹⁵⁸

In contrast, a statement in a 1995 decision by the North Carolina Supreme Court suggests that the public trust rights are limited to areas subject to being covered by navigable waters. In

¹⁵⁰ See *Matthews v. Bay Head Improvement Association*, 95 N.J. 306, 471 A.2d 355 (N.J. 1984).

¹⁵¹ See *id.* at 323, 471 A.2d at 364; SLADE, ET AL., *supra* note 14, at 210-212.

¹⁵² 95 N.J. 306, 471 A.2d 355 (N.J. 1984).

¹⁵³ See *id.* at 323-24, 471 A.2d at 364 (“To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine.”).

¹⁵⁴ *Id.* at 324-25, 471 A.2d at 364-65 (explaining that the public does not have “an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea.”).

¹⁵⁵ See *Kalo*, *supra* note 10, at 1894 (“Whether the public trust doctrine would be interpreted as broadly by the North Carolina Supreme Court is an open question.”).

¹⁵⁶ See *Dossett*, *supra* note 24, at 1315-16.

¹⁵⁷ See *Town of Emerald Isle v. State*, 320 N.C. 640, 360 S.E.2d 756 (1987).

¹⁵⁸ See *Dossett*, *supra* note 24, at 1315-16 & n.195.

Gwathmey v. State,¹⁵⁹ the court was faced with the question of whether tidal marshlands were subject to the public trust doctrine if they were not navigable even when covered with water.

Chief Justice Mitchell noted that “the public trust doctrine is not an issue in cases where the land involved is above water or where the body of water regularly covering the land involved is not navigable in law.”¹⁶⁰ The issue in the case was the scope of the public trust waters as defined by navigability. The Chief Justice’s comment could be regarded as dicta insofar as they address public trust rights in the land underlying navigable waters.

The most favorable indication that the court may accept an expanded version of the public trust doctrine occurred in a 1991 decision, *Concerned Citizens v. Holden Beach Enterprises*.¹⁶¹ In *Concerned Citizens*, the Supreme Court expressly rejected a Court of Appeals comment that had denied the possibility of public trust rights in the dry-sand beach. The Court of Appeals opinion had stated that the public trust doctrine should not be extended because it would “deprive individual property owners of some portion of their property rights without compensation.”¹⁶² The Supreme Court replied:

We note dicta in the Court of Appeals opinion to the effect that the public trust doctrine will not secure public access to a public beach across the land of a private property owner . . . [but] it [is not] clear that in its unqualified form the statement reflects the law of this state, [and] we expressly disavow this comment.¹⁶³

A pre-*Concerned Citizens* law review article on the scope of the public trust doctrine in North Carolina took the position that an expansion of the doctrine was unlikely.¹⁶⁴ In contrast, a review

¹⁵⁹ 342 N.C. 287, 464 S.E.2d 674 (1995).

¹⁶⁰ *Id.* at 293-94, 464 S.E.2d at 678.

¹⁶¹ 329 N.C. 37, 404 S.E.2d 677 (1991).

¹⁶² 95 N.C. App. 38, 46, 381 S.E.2d 810, 815 (1989), rev’d, 329 N.C. 37, 404 S.E.2d 677 (1991).

¹⁶³ 329 N.C. 37, 55, 404 S.E.2d 677, 688 (1991); *see also* Kalo, *supra* note 10, at 1895.

¹⁶⁴ *See* Valerie B. Spalding, *The Pearl in the Oyster: The Public Trust Doctrine in North Carolina*, 12 CAMPBELL L. REV. 23, 64 (1989).

of *Concerned Citizens* interprets the case as suggesting that an expanded version of the public trust doctrine may in fact be the law in North Carolina.¹⁶⁵

Whatever the scope of the public trust rights exist in North Carolina, those rights are generally not terminated by a grant of the property from the state to a private owner. The North Carolina Supreme Court has held that the state may transfer public trust lands free of the public trust burden, but it can do so only where there is an express statement of legislative intent.¹⁶⁶ The necessary corollary of this holding is that where the state has not made an express statement in its grant to private landowners, the public trust reaches of their property remain burdened by the public right of use.¹⁶⁷ Most grants from the state, including grants made under the general entry laws, lack an express legislative statement of release and therefore do not transfer free of the public trust burden.¹⁶⁸ Under this rule, the state could convey wet-sand stretches of the beach into private ownership without surrendering the public right to use those areas. Likewise, if the state has a public trust right in the dry-sand beach, the conveyance of those properties to private owners should not terminate the right of use in the dry-sand beach.

At least one legislature has taken an expanded statutory view of the public trust doctrine. Texas adopted a state statute that permits lateral access to the dry-sand beach by extending the rights of the public trust to the vegetation line.¹⁶⁹ Private property owners may own land between the vegetation line and the mean high tide line subject to the rights of public use.¹⁷⁰ Legislative action runs the risk of taking property in violation of the Fifth Amendment takings

¹⁶⁵ See Kalo, *supra* note 10, at 1895. Kalo adds that “[i]f the court chooses to protect the public right, there is ample legal basis for such a ruling.” See *id.* at 1896.

¹⁶⁶ See *Gwathmey v. State*, 342 N.C. 287, 464 S.E.2d 674 (1995).

¹⁶⁷ See *id.* at 293, 464 S.E.2d at 677.

¹⁶⁸ See *id.* at 363, 464 S.E.2d at 683.

¹⁶⁹ See Tex. Nat. Res. Code Ann. § 61.011 (Vernon Supp. 1999).

¹⁷⁰ See SLADE, ET AL., *supra* note 14, at 211-12.

clause or similar state constitutional provisions.¹⁷¹ Generally, however, a public right of use that a court finds to be grounded in custom or the public trust doctrine should not implicate the takings clause.¹⁷² Where the public has had a long-standing right of access, the landowner cannot claim that the right to exclude was part of his or her reasonable, investment-backed expectations.¹⁷³

Environmental Bill of Rights

North Carolina's constitution contains an environmental quality amendment that many commentators believe incorporates the public trust doctrine and the law of custom. The voters of North Carolina adopted the "Environmental Bill of Rights" in November, 1972, in the midst of a major evolution in this state's environmental law.¹⁷⁴ The first paragraph of the amendment reads as follows:

It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches,

¹⁷¹ A unilateral declaration of a public right of use or easement across private property will certainly raise takings concerns. See Finnell, *supra* note 30, at 654. For example, the New Hampshire Supreme Court has concluded that such a declaration creates a taking. See Opinion of the Justices, 649 A.2d. 604 (N.H. 1994), cited in SLADE, ET AL., *supra* note 14, at 210 & n.10 ("Legislative recognition of public easement in 'dry-sand areas' located between high water mark and the intersection of the beach with high ground would constitute a taking of private property of owners of land adjacent to public trust areas, in violation of state takings clause, as 'dry-sand areas' had not been acquired b[y] state through prescriptive easement.").

¹⁷² See SLADE, ET AL., *supra* note 14, at 9 ("[P]ublic trust land that has been conveyed to private ownership has always been burdened by the public's trust rights. . . . Because the owner received the trust land already burdened by the public's trust rights, a private owner's argument that she had unfettered investment-backed expectations is far more tenuous.").

¹⁷³ See *id.* At least one justice of the U.S. Supreme Court believes that takings can be implicated by the public trust doctrine. See *Stevens v. Cannon Beach*, 510 U.S. 1207, 1207-14 (1994) (Scalia, J., dissenting). See also Kalo, *supra* note 10, at 1894, n.110.

¹⁷⁴ See Milton S. Heath, Jr., North Carolina Environmental Bill of Rights: Origins and Implications 1 (January, 1999) (unpublished manuscript, on file with Institute of Government, The University of North Carolina at Chapel Hill).

historical sites, openlands, and places of beauty.¹⁷⁵

The scope of the constitutional power emanating from the Environmental Bill of Rights remains unclear nearly thirty years into its existence.¹⁷⁶ In *Smith Chapel Baptist Church, et al. v. City of Durham*,¹⁷⁷ the North Carolina Supreme Court held that the amendment gave local governments constitutional authority to undertake environmental protection measures without specific statutory authority.¹⁷⁸ The court apparently shifted its position after the decision was rendered and decided to re-hear the case.¹⁷⁹ In its second decision [hereinafter *Smith II*], the Supreme Court set aside its previous holding.¹⁸⁰

Commentators and the state's courts do agree that the Environmental Bill of Rights acknowledges some form of public trust rights in property. Early drafts of the amendment appeared to make this acknowledgement explicit. One version mandated the protection of "resources which are held in trust for the People of the State."¹⁸¹ This reference was deleted from later versions.¹⁸² In his history of the Environmental Bill of Rights, Professor Heath observes that the resulting change could be interpreted either as a rejection of the doctrine or as

¹⁷⁵ N.C. CONST. art. XIV, § 5. The other paragraph of the amendment permits the state and local governments to acquire land for a system of natural preserves: "To accomplish the aforementioned public purposes, the State and its counties, cities and towns, and other units of local government may acquire by purchase or gift properties or interests in properties which shall, upon their special dedication to and acceptance by resolution adopted by a vote of three-fifths of the members of each house of the General Assembly for those public purposes, constitute part of the 'State Nature and Historic Preserve,' and which shall not be used for other purposes except as authorized by law enacted by a vote of three-fifths of the members of each house of the General Assembly. The General Assembly shall prescribe by general law the conditions and procedures under which such properties or interests therein shall be dedicated for the aforementioned public purposes." N.C. CONST. art. XIV, § 5.

¹⁷⁶ There is some debate as to whether the power established in the first paragraph is limited to the actions prescribed in the second paragraph. Professor Milton Heath, in his article on the drafting of the Environmental Bill of Rights in the General Assembly, argues that the separation of the two paragraphs is intended to illustrate that they "each paragraph serves a separate purpose—the first paragraph, to delineate certain 'proper function[s]' for the state and local governments; and the second paragraph, to define procedures for dedicating properties to the State Nature and Historic Preserve." See Heath, *supra* note 174, at 6.

¹⁷⁷ 348 N.C. 632, 502 S.E.2d 364, 367 (1998) [hereinafter *Smith I*].

¹⁷⁸ See Heath, *supra* note 174, at 3 ("For local governments the Environmental Bill of Rights as interpreted in *Smith Chapel [I]* could amount to something resembling a constitutional charter of environmental home rule.").

¹⁷⁹ See *Smith Chapel Baptist Church v. City of Durham*, 514 S.E.2d 272 (1998).

¹⁸⁰ 350 N.C. 805, 819, 517 S.E.2d 874, 883 (1999).

¹⁸¹ See Heath, *supra* note 174, at 8.

an affirmation of the doctrine in other terms.¹⁸³ He identifies two passages in the surviving version of the amendment that support the latter conclusion. The first is the opening phrase of the amendment, which states that “[i]t shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry . . .” The preservation of public rights in certain lands and waters parallels the workings of the public trust doctrine.¹⁸⁴

The second phrase Heath identifies is at the end of the first paragraph, which says that “it shall be a proper function of the State . . . to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.”¹⁸⁵ The phrase “common heritage” has been interpreted by the courts as encompassing both public trust and customary rights in property.¹⁸⁶ In *State ex rel. Rohrer v. Credle*,¹⁸⁷ the North Carolina Supreme Court specifically suggested that the amendment makes the public trust doctrine the law in this state.¹⁸⁸ Contrary evidence may be found in *Gwathmey*,¹⁸⁹ where the court observed that “[t]he public trust doctrine is a common law doctrine. In the absence of a constitutional basis for the public trust doctrine, it cannot be used to invalidate acts of the legislature which are not proscribed by our Constitution.”¹⁹⁰ This language suggests the court does not believe the Environmental Bill of Rights provides constitutional support for the public trust doctrine.

¹⁸² See *id.* at 8. At about the same time, the term “shorelines” was replaced with the word “beaches.” See *id.* at 7.

¹⁸³ See *id.* at 9.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* at 8.

¹⁸⁶ See Dossett, *supra* note 24, at n. 198-99 (“Some have argued that the NC Constitution, which establishes that it is the proper function of the state to preserve ocean beaches ‘as a part of the common heritage of the state’ implicates public trust rights.”).

¹⁸⁷ 322 N.C. 522, 525-532, 369 S.E.2d 825, 827-831 (1988).

¹⁸⁸ See *id.*

¹⁸⁹ 342 N.C. 287, 304, 464 S.E.2d 674, 684 (1995)

¹⁹⁰ See *id.*

In 1998, the General Assembly passed General Statutes 77-20(d), which explicitly closes the link between public trust rights, the dry-sand beach, and the Environmental Bill of Rights.¹⁹¹ The relevance of such a post-hoc connection to the plaintiffs in the present litigation and other similarly-situated beachfront owners is discussed below.

PART II. Evidence of Custom

Most commentators in N.C. favor an expansion of the public trust doctrine or the use of custom to expand the public right of access to dry-sand areas of North Carolina's beaches.¹⁹² These doctrines attach to the land and therefore do not need to be litigated on a parcel-by-parcel basis.¹⁹³ Moreover, they depend upon a right of use that either always belonged to the state or was vested in the state a long time ago. From a takings perspective, either result is preferable to actions that seek to extract an easement from an existing title. A pre-existing condition, such as a right of use under the public trust doctrine, is considered to be a part of the investment-backed expectations of the landowners. There is no taking when the interest the landowner claims is being taken was not part of his or her title to begin with.¹⁹⁴ A finding of a public right in the dry-sand area would give the state an equitable right to defend those rights against incursion and obstruction.¹⁹⁵

If the public trust/custom route is the way to go, what evidence would demonstrate a customary public use of North Carolina beaches? In *Thornton*, the leading case for using custom to establish beach access rights, the Oregon Supreme Court found a custom where there was

¹⁹¹ N.C. GEN. STAT. § 77-20(d) (2000).

¹⁹² See *Kalo*, *supra* note 10, at 1893; *Dossett*, *supra* note 24, at 1332; *Finnell*, *supra* note 30, at 645; *Carmichael*, *supra* note 30, at 201.

¹⁹³ See *Dossett*, *supra* note 24, at 1333.

¹⁹⁴ See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1002 (1992). See also *CALLIES, FREILICH, AND ROBERTS, CASES AND MATERIALS ON LAND USE* 299 (3d. ed. 1999).

evidence of historical use, a common public understanding over time, and present public policy. The court traced the human use of Oregon’s beaches to the beginning of the state’s “political history.”¹⁹⁶ The first European visitors had observed Native American use of the dry-sand portion of the beaches for cooking fires.¹⁹⁷ Oregonians continued to use the beach for cooking purposes after statehood, as well as for new uses, such as “picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede.”¹⁹⁸ In tandem with the use by the public was a general assumption that the dry-sand area was “a part of the public beach.”¹⁹⁹ The court noted that this assumption was reflected in public policy: state and local police patrolled the dry-sand area of the beach, and municipal employees collected trash from that area.²⁰⁰

The courts do not clearly distinguish between the historical record necessary to establish a right of custom and historical evidence that supports a public trust right of use. In *Matthews*, the New Jersey Supreme Court concluded that the public trust doctrine was properly a flexible doctrine, one which should expand to reflect changing demands on trust resources.²⁰¹ Nonetheless, the court anchored the central holding of the case—that use of the wet-sand beach cannot be accomplished without some attendant use of the dry-sand beach—by citing historical precedent.²⁰² The court noted that New Jersey fishermen were historically permitted to “draw

¹⁹⁵ See *State ex rel. Thornton v. Hay*, 254 Or. 584, 587-88, 462 P.2d 671, 673 (1969).

¹⁹⁶ *Thornton*, 254 Or. at 588, 462 P.2d at 673. Other courts require evidence of use “back to time immemorial” See Carmichael, *supra* note 30, at 173 & n.104. The *Thornton* court said that the requirement of ancient use was satisfied in Oregon by evidence of use “so long as there has been an institutionalized system of land tenure” in the state. See *Thornton*, 254 Or. at 596, 462 P.2d at 677.

¹⁹⁷ See *id.* at 588, 462 P.2d at 673.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Matthews v. Bay Head Improvement Association*, 95 N.J. 306, 326, 471 A.2d 355, 365 (N.J. 1984), *citing to* *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309, 294 A.2d 47, 54 (1972) (“[W]e perceive the public trust doctrine not to be ‘fixed or static,’ but one to ‘be molded and extended to meet changing conditions and needs of the public it was created to benefit.’”)

²⁰² See *Matthews*, 95 N.J. at 325, 471 A.2d at 365 & n.7.

nets on the beach above the ordinary high water mark” as an extension of their entitlement to fish in the public trust waters.²⁰³ One advantage of providing historical evidence for the scope of the public trust right is that newly-defined rights in land often risk a taking, while those that are considered to have been a part of the “background principles” of the state’s property law do not.²⁰⁴

At least one public trust scholar believes that there is a tradition or custom of public use of the dry-sand beach in North Carolina.²⁰⁵ What evidence is there to support this contention?

Historical Evidence of Public Use of the North Carolina Beaches

The earliest written accounts of North Carolina record Native Americans and then European settlers using the beaches. Giovanni da Verrazzano wrote in the spring of 1524 of the first encounter between Europeans and Native Americans on the Outer Banks of North Carolina. He said the Native Americans had set up “great fires” on the shore.²⁰⁶ When English explorer Arthur Barlowe encountered Native Americans on the Outer Banks some sixty years later, the leader of the tribe came to the beach, where these English and the native tribe had their first meeting.²⁰⁷ The Native Americans’ villages were inland from the beach.²⁰⁸ William Byrd, a Virginian who was a member of the survey expedition that set out the border between North Carolina and Virginia, noted in 1728 that conch shells from the Outer Banks beaches were used

²⁰³ *See id.*

²⁰⁴ CALLIES, FREILICH, AND ROBERTS, *CASES AND MATERIALS ON LAND USE* 299 (3d. ed. 1999).

²⁰⁵ *See* SLADE, ET AL., *supra* note 14, at 212.

²⁰⁶ *See* Giovanni da Verrazzano, *Contact*, from Susan Tarrow, *Translation of the Celere Codex*, in LAWRENCE C. WROTH, *THE VOYAGES OF GIOVANNI DA VERRAZZANO, 1524-1528, 135-36* (1970) *excerpted in* AN OUTER BANKS READER 3-4 (David Stick ed., 1998).

²⁰⁷ *See* Arthur Barlowe, *Traffic with the Savages*, from *THE PRINCIPAL NAVIGATIONS VOYAGES TRAFFIQUES & DISCOVERIES OF THE ENGLISH NATION*, vol. 8, 299-301, 304-6 (Richard Hakluyt, ed., 3rd ed. 1903) *excerpted in* AN OUTER BANKS READER 5 (David Stick ed., 1998).

²⁰⁸ *See id.*

for decorative purposes and currency by Native American tribes.²⁰⁹ At the beginning of their trip, members of the expedition harvested and ate oysters from the Currituck shore.²¹⁰

By the middle of the nineteenth century, the Outer Banks were becoming a summer resort for affluent farmers from the coastal counties. George Higby Throop, who visited Nags Head in 1849 in his role as tutor to a planter's son, recorded the use of the beach at that time. The primary use of the beach, and the purpose of Throop's first encounter with it, was as a route of travel. He wrote of his arrival at Nags Head: "I straightway set forth along the shore of the sound for my new home. Did you ever walk in the sand, worthy reader, for a considerable distance? . . . Do you know anything more discouraging? . . . Along the interminable sand-beach did I resolutely plod my way for some two or three furlongs."²¹¹ Throop was later introduced to the other available "amusements" on the beach, which included fox-hunting, fishing, swimming, and walks or horse-drawn drives along the ocean.²¹²

North Carolina courts have acknowledged historical public uses of upland portions of the beach on several occasions. In *West v. Slick*,²¹³ the court described the use of two roads across the Currituck Banks that were used for much of the century for travelling between Dare County and Corolla.²¹⁴ In *Concerned Citizens v. Holden Beach Enterprises*,²¹⁵ the court noted the use of

²⁰⁹ See William Byrd, *The Dividing Line*, from WILLIAM BYRD'S HISTORIES OF THE DIVIDING LINE BETWEEN VIRGINIA AND NORTH CAROLINA 38-50 (William K. Boyd ed., 1929) excerpted in AN OUTER BANKS READER 7-8 (David Stick ed., 1998).

²¹⁰ See *id.* at 9.

²¹¹ Gregory Seaworthy (George Higby Throop), *Antebellum Nags Head*, from NAGS HEAD; OR, TWO MONTHS AMONG "THE BANKERS" 22-26, 37-39, 79-80, 159-61 (1850), excerpted in AN OUTER BANKS READER 13 (David Stick ed., 1998).

²¹² See *id.* at 16.

²¹³ 313 N.C. 33, 326 S.E.2d 601 (1985).

²¹⁴ See *id.* at 41-45, 326 S.E.2d at 606-08. See also *Wise v. Hollowell*, 205 N.C. 286, 286-87, 171 S.E. 82, 82-83 (1933) (noting the use of the beach as a roadway).

²¹⁵ 329 N.C. 37, 404 S.E.2d 677 (1991).

the “seashore” for fishing and recreation.²¹⁶ Use of the beach to dry fishing gear was recognized by a federal District Court in *Peele v. Morton*.²¹⁷

Public Understanding

Whether public use spawned a general understanding about the nature of the beach, or whether a general understanding encouraged use by the public is a chicken-or-the-egg type of question. It is clear, however, from present-day public accounts of the beach that there is both a general understanding that the beach itself belongs to the public and a history of public use in accordance with that belief.²¹⁸ Shortly after the Whalehead suit was filed, a major North Carolina newspaper observed that “[f]or generations, the public has treated that [dry] sand as its own, though in many cases, private landowners hold legal title to that part of the beach.”²¹⁹ This sentiment was echoed by many of the state’s leading political figures. The article quoted the president pro tem of the Senate, Senator Marc Basnight, as saying “Our state has always allowed everyone access to the beaches, not just people who can own beach-front property.”²²⁰ Then-Attorney General Mike Easley asserted the state’s belief that the public has a right to use the dry-sand area that stems from its use of the beach “since time immemorial.”²²¹

Editorials in response to the Whalehead lawsuit strongly condemned the plaintiffs for seeking to appropriate what the editorial writers believed to be a public resource.²²² The

²¹⁶ *See id.* at 38-40, 404 S.E.2d at 679-80.

²¹⁷ 396 F. Supp. 584, 585-86 (E.D.N.C. 1975). *See generally* Kalo, *supra* note 10, at 1877-78 (discussing traditional and public trust uses of the Outer Banks).

²¹⁸ *See* LEGISLATIVE RESEARCH COMMISSION, COASTAL SUBMERGED LANDS: REPORT TO THE 1985 GENERAL ASSEMBLY OF NORTH CAROLINA, at 9 (December 13, 1984).

²¹⁹ Martha Quillin, *Senate Tries to Clarify Beach-Access Policy*, NEWS & OBSERVER (Raleigh, N.C.), October 1, 1998, at A3.

²²⁰ *Id.*

²²¹ *See* Martha Quillin, *Easley Blisters Plaintiffs in Beach-Ownership Suit*, NEWS & OBSERVER (Raleigh, N.C.), June 9, 1999, at A3. Easley advised the plaintiffs to “Get over it.” *See id.*

²²² *See* Editorial, *Public Beach Access Must be Defended*, MORNING STAR (Wilmington, N.C.), July 28, 1998, at 6A.

Wilmington *Morning Star* called the suit an “arrogant and greedy attempt to end a long-standing legal doctrine in North Carolina.”²²³ It noted that four of the five plaintiff couples live outside the state, with the implication being that they were unaware of North Carolina coastal traditions.²²⁴ The paper concluded: “The state must fight this battle as hard as it can for as long as it takes.”²²⁵ The *Asheville Citizen-Times* took a similar stand in its editorial of June 25, 1999.²²⁶ The paper contended that the public has a right to the dry-sand beach in North Carolina.²²⁷ It contrasted the traditional experience of walking on a North Carolina beach with encountering “no trespassing” signs in states where the public does not have a right to use the dry-sand beach.²²⁸ The editorial asserted that the beach has been used by the public “for generations” and that it would be a “crime beyond naming” to reverse “one of North Carolinians’ most cherished rights and traditions” by allowing exclusive use of the beach by its private owners.²²⁹

In contrast, news stories about Bird Island, in Sunset Beach, North Carolina, advised readers that the dry-sand beach is off-limits to the public. In a 1995 travel article on the state’s beaches for the *News & Observer*, reporter Julie Ann Powers repeatedly warned visitors to Bird Island, a privately-owned island, to stay on the wet-sand beach to avoid trespassing.²³⁰ Powers’s concern was likely triggered by an on-going dispute between the owner of Bird Island and a local environmental group. The group offered tours to the island’s beach for bird-watching until the

²²³ *Id.*

²²⁴ *See id.* Professor Kalo notes that many of the buyers of property in the Whalehead development were from states with different traditions regarding the coast. *See Kalo, supra* note 10, at 1876-77. A news story reported that the developer had told the plaintiffs that the beach was “private.” *See Martha Quillin, Senate Tries to Clarify Beach-Access Policy*, NEWS & OBSERVER (Raleigh, N.C.), October 1, 1998, at A3.

²²⁵ *See* Editorial, *Public Beach Access Must be Defended*, MORNING STAR (Wilmington, N.C.), July 28, 1998, at 6A.

²²⁶ *See* Editorial, *Public Property Under Siege in Lawsuit*, ASHEVILLE CITIZEN-TIMES (Asheville, N.C.), June 25, 1999, at A8.

²²⁷ *See id.*

²²⁸ *See id.*

²²⁹ *Id.*

²³⁰ *See* Julie Ann Powers, *Natural Attractions*, NEWS & OBSERVER (Raleigh, N.C.), April 2, 1995, at H1.

owner sued the group for trespassing.²³¹ The owner claimed that the tours wandered off the wet-sand beach and onto her private property. The issue in that case does not appear to be trespassing on the dry-sand beach per se, but rather the possible damage to uplands beyond the vegetation line.²³²

Public Policy

North Carolina's state government has long had a policy of defending the public right to use the dry-sand area of the beach. This policy is reflected to varying degrees in state law, administrative rules, and governmental study commission reports. The most immediate defense of the beach is usually brought by the Division of Coastal Management [DCM]. As one news story noted, private property owners who post 'No Trespassing' signs or fence off areas of the dry-sand beach are quickly required to remove them: "[T]he state has promptly sent a letter stating its position: that the dry-sand beach . . . is public domain, no matter whose name is on the title."²³³ DCM clearly understands there to be a public right of use in the dry-sand beach.

DCM's position has a foundation in actions by the General Assembly, which has repeatedly asserted that there is a tradition of public rights in the dry-sand beach.²³⁴ In the words of one legal observer, "the North Carolina General Assembly believes that such a customary right exists."²³⁵ Unfortunately, the record is vague, at best, for determining what the General Assembly believes to be the scope of those rights, including determining who may use the dry-sand beach and for what purposes.

²³¹ See *Lawsuit Makes Preservationists Avoid Island*, GREENSBORO NEWS & RECORD (Greensboro, N.C.), February 10, 1999, at B5.

²³² See *id.* The owner's lawyer told the reporter that "these folks have encouraged people to walk on the sea oats." See *id.*

²³³ See Martha Quillin, *Public Beach or Private Property*, News & Observer (Raleigh, N.C.), Sept. 5, 1998, at A1.

The most recent declaration by the General Assembly with regard to public trust rights in the beach is the most explicit in this regard. The General Assembly adopted what became General Statutes Sections 77-20(d) and (e) in November, 1998, in response to the Whalehead litigation.²³⁶ Sub-section (e) is the bookend to the earlier-adopted sub-section (a), which defined the seaward extent of private ownership as the mean high tide line.²³⁷ Sub-section (e) responds by defining the landward reach of the public's beaches to encompass the dry-sand beach as far up as "is established by the common law."²³⁸ The statute suggests that the courts could recognize such "natural indicators" of the landward edge of the dry-sand beach as the first line of vegetation, the dune line, or the storm debris line.²³⁹ The sum effect of this sub-section is to explicitly extend the recognized reach of public trust rights inland from the wet-sand area to encompass some or all of the dry-sand beach as well.

In sub-section (d), the statute asserts a tradition of public use of the dry-sand beach that supports the General Assembly's broad definition of the public trust lands. The text of the statute reads as follows:

The public having made frequent, uninterrupted, and unobstructed use of the full width and breadth of the ocean beaches of this State from time immemorial, this section shall not be construed to impair the right of the people to the customary free use and enjoyment of the ocean beaches, which rights remain reserved to the people of this State under the Common law and are a part of the common heritage of the State recognized by Article XIV, Section 5 of the Constitution of North Carolina. These public trust rights in the ocean beaches are established in the common law as interpreted and applied by the courts of this State.²⁴⁰

²³⁴ See Dossett, *supra* note 24, at nn.197 & 263 ("Several NC statutes suggest that the public possesses rights of access to the entirety to the entirety of the oceanfront beach.").

²³⁵ See Kalo, *supra* note 10, at n.111.

²³⁶ See Martha Quillin, *Senate Tries to Clarify Beach-Access Policy*, NEWS & OBSERVER (Raleigh, N.C.), October 1, 1998, at A3.

²³⁷ N.C. GEN. STAT. § 77-20(a) (2000).

²³⁸ N.C. GEN. STAT. § 77-20(e) (2000).

²³⁹ See *id.*

²⁴⁰ N.C. GEN. STAT. § 77-20(d) (2000).

This section demonstrates the General Assembly's belief that the traditional use of the coast included use of the dry-sand portions of the beach. The section also clarifies the relationship between subsection (a), which vests title to the dry-sand in private owners, and subsection (e), which grants a right of use of the dry-sand in the public. Finally, this section purports to give constitutional authority to the public trust rights under the Environmental Bill of Rights.²⁴¹

The legal failing of Sections 77-20(d) and (e) for the purposes of the Whalehead litigation is that they were enacted after those landowners had bought property and filed their suit. The plaintiffs are likely to succeed in arguing that this kind of post-hoc legislation is not dispositive of their case.²⁴² This same failing could be said to apply to other recently circulated evidence of tradition, such as the editorials that claim that the plaintiffs are seeking to destroy a long-standing tradition. Ironically, because there was little doubt of the right of public use before the Whalehead suit was filed, there was little effort given then to establishing a record of public use. The problem now is that post-hoc assertions carry little evidentiary weight without some pre-suit evidence to support them.

Statutes that pre-date the Whalehead litigation are less explicit in defining the scope of the public's rights in coastal property. General Statutes Section 1-45.1 says that public trust rights include (but are not limited to): "the right to navigate, swim, hunt, fish, and enjoy all recreational activities . . . and the right to freely enjoy the State's ocean and estuarine beaches and public access to the beaches."²⁴³ Although this section is widely quoted as recognizing the existence of public trust rights, it does not define where on the beach those public trust rights may be exercised.

²⁴¹ See *supra*, note 191 and accompanying text.

²⁴² In the words of one of the Whalehead plaintiffs, "A magic legislative wand will not cut it." Martha Quillin, *Senate Tries to Clarify Beach-Access Policy*, NEWS & OBSERVER (Raleigh, N.C.), October 1, 1998, at A3.

²⁴³ N.C. GEN. STAT. § 1-45.1 (2000).

The public may exercise public trust rights throughout a beach that has been raised through state-funded beach nourishment projects.²⁴⁴ General Statutes Section 146-6(f) provides that “the title in land . . . raised above the mean high water mark by publicly financed projects . . . vests in the State.”²⁴⁵ This is true even if the “raised lands” were previously held in private ownership.²⁴⁶ When these restored beaches vest in state ownership, they are “impressed” with the full panoply of public trust rights and obligations that clearly apply to wet-sand beaches.²⁴⁷

One interpretation of these beach nourishment provisions is that they establish a right of use only where the state has spent money to “acquire” the land involved.²⁴⁸ In contrast, the state Attorney General believes these statutory provisions evince a tradition of use of the dry-sand beach by the general public. In an opinion letter addressed to Senator Marc Basnight, Deputy Attorneys General Daniel Oakley and Daniel McLawhorn write that Section 146-6 was enacted to ensure the continued existence of public beaches in high erosion areas. The authors observe that the dry-sand beach “is an area of private property which the State maintains is impressed with public rights of use under the public trust doctrine and the doctrine of custom or prescription.”²⁴⁹ These public rights of use are endangered by erosion, which has the effect of narrowing the beach: “[a]s the beach area erodes on developed beaches so that the mean high water line moves closer to the foundations of ocean front structures, the area of dry-sand beach regularly used by the public is lost.”²⁵⁰ The letter gives the opinion of the Attorney General that Section 146-6 does not create new rights, but rather ensures that when the beaches are repaired at

²⁴⁴ See N.C. GEN. STAT. § 146-6(f) (2000).

²⁴⁵ See *id.*

²⁴⁶ See *id.* Privately-funded filling or nourishment projects that restore formerly private property vest in the adjacent private property owner. See N.C. GEN. STAT. § 146-6(a) (2000).

²⁴⁷ Op. Att’y Gen., Basnight, October 15, 1996.

²⁴⁸ See, e.g., *Cooper v. United States*, 779 F.Supp. 833, 836 (E.D.N.C. 1991).

²⁴⁹ Op. Att’y Gen., Basnight, October 15, 1996.

²⁵⁰ *Id.*

public expense that the rights of the public to use those beaches are not diminished.²⁵¹ The authors do not explain why there is no provision affirming a public right of use when the beach is restored by private investment.

State administrative regulations also affirm a public right to use the beach, but are generally vague as to the extent of public rights in the dry-sand beach in particular. Regulations for the state Department of Environment and Natural Resources [DENR] declare that “It is the policy of the State of North Carolina to . . . ensure optimum access to recreational opportunities at ocean and estuarine beach areas consistent with public rights [and] rights of private property owners”²⁵² The DENR code does not define either public or private rights, although it does note that the public has “traditionally and customarily freely used and had access to these [public trust] resources.”²⁵³ The code further states that it is the policy of the agency that “[d]evelopment shall not interfere with the public’s right of access to the shorefront where established through public acquisition, dedication, or customary use.”²⁵⁴ Again, the code does not define customary use. DENR regulations do require guaranteed public access as a condition of state funding for erosion-control and nourishment projects.²⁵⁵ These regulations echo the statutory provisions discussed above.

The General Assembly often indicates its policy intent through a statement of purpose clause at the beginning of a bill.²⁵⁶ These are preserved in the General Statutes to assist judges,

²⁵¹ *See id.*

²⁵² N.C. ADMIN. CODE tit. 15A, 7M.0301 (2001). *See also* N.C. ADMIN. CODE tit. 15A, r.7H.0306(a)(5) (2001) (“Established common-law and statutory public rights of access to the public trust lands and waters shall not be eliminated or restricted. Development shall not encroach upon public accessways nor shall it limit the intended use of the accessways.”).

²⁵³ *See id.*

²⁵⁴ *See* N.C. ADMIN. CODE tit. 15A, r. 7M.0303 (2001).

²⁵⁵ *See id.*; N.C. ADMIN. CODE tit. 15A, 2G.0107 (2001).

²⁵⁶ *See* Milton S. Heath, Jr. & David W. Owens, *Coastal Management Law in North Carolina*, 72 N.C. L. REV. 1413, 1416 (1994).

administrators and others in interpreting the law.²⁵⁷ For example, the legislative findings section of the Coastal Area Management Act [CAMA], states that the General Assembly believes that “the public has traditionally fully enjoyed the State’s beaches and coastal waters and public access to and use of the beaches and coastal waters.”²⁵⁸ The General Assembly further noted that “the beaches and coastal waters are resources of statewide significance and have been customarily freely used and enjoyed by people throughout the State.”²⁵⁹

The CAMA statement of purpose clauses also observed that public access to the state’s beaches was “becoming severely limited,” presumably by development.²⁶⁰ They note that use of some access routes was limited by a lack of public parking.²⁶¹ The General Assembly relied on these findings to establish “a comprehensive program for the identification, acquisition, improvement, and maintenance of public accessways to the beaches and coastal waters.”²⁶² That program is the Public Beach and Coastal Waterfront Access Program.²⁶³ The Beach Access statute echoes the statements of purpose by authorizing “acquiring, improving, and maintaining property along the Atlantic Ocean and coastal waterways to which the public has rights-of-access or public trust rights as provided in this Part.”²⁶⁴

Purchase of perpendicular access to the beach is not a rational goal for a legislature to set unless there is a beach to get to, even at high tide. However, at least one court has interpreted the language of the beach access statute as implying that the state does not possess a right of use in the dry-sand beach. A federal district court in *Cooper v. U.S.* reasoned that if the state had such

²⁵⁷ *See id.*

²⁵⁸ N.C. GEN. STAT. § 113A-134.1 (2000).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ N.C. GEN. STAT. § 113A-134.2 (2000).

²⁶⁴ *See id.* The cross reference is to N.C. GEN. STAT. § 113-131(3), which does not define or create public trust rights.

a right, it would not need to *acquire* access.²⁶⁵ This interpretation has not been echoed by any state court. Instead, the language could as easily refer to the need to improve the feasibility of existing access as it does to the need to acquire new rights of access. The language of the statute supports this latter reading. The statute seems to refer to the degradation of existing rights of access when it speaks of those rights “*becoming* severely limited.” [emphasis added]. Thus the “increased” access the statute calls for could be provided by enforcing and improving the feasibility of existing access rights by, among other means, providing increased parking facilities.

The *Cooper* perspective finds support in the fact that North Carolina provides tax incentives for the dedication of property for beach access.²⁶⁶ The State also provides fiscal support for beach protection when public beach access is guaranteed as a result.²⁶⁷ A narrower way of reading these statutes is to assume the credits are for improving an existing right of beach access or use.

In addition to its law-making authority, the General Assembly has also addressed the question of public rights in the dry-sand beach through its Legislative Research Commission.²⁶⁸ For example, a 1984 General Assembly commission study on submerged coastal lands found a common understanding among members of the public that they had a wide-ranging right of use of the beach. The report noted that the public “apparently takes for granted that there is a right to

²⁶⁵ See *Cooper v. United States*, 779 F.Supp. 833, 836 (E.D.N.C. 1991).

²⁶⁶ N.C. GEN. STAT. § 105-130.34 (2000) (corporate donations) and N.C. GEN. STAT. § 105-151.12 (2000) (individual donations). State officials note that the marginal benefit of a donation is negligible in cases in which the public is already obligated not to develop the land. See Op. Atty. Gen., Flournoy, March 20, 1996. A donation of property to the public where there is already an implied public right of use would seem to be equally valueless. Nonetheless, there is a difference between having a right to use and owning outright; when a donor gives the title to the state, she closes the gap. See *id.*

²⁶⁷ N.C. GEN. STAT. § 143-215.71 (2000) (providing authority for state matching funds of up to 75% of the cost of “protection of privately owned beaches where public access is allowed and provided for.”).

²⁶⁸ See LEGISLATIVE RESEARCH COMMISSION, COASTAL SUBMERGED LANDS: REPORT TO THE 1985 GENERAL ASSEMBLY OF NORTH CAROLINA, at 2 (December 13, 1984).

fish, to swim, and to engage in other forms of activities [at the coast] at will. This has generally been the accepted rule.”²⁶⁹

The study commission drafted a bill entitled “An Act to Provide for Management and Protection of the Public Trust Resources Held by the State in Trust for the Benefit of All its People.”²⁷⁰ The bill included rights of use in the beach among the public trust rights to be protected.²⁷¹ It did not, however, define the extent of the beach. The Act explicitly recognized the public trust rights as being a part of the common heritage of the state and acknowledged the flexibility of the public trust doctrine.²⁷² The Act would have created a Public Trust guardian role for the Attorney General, who would have been empowered to bring an action to abate a “public trust nuisance.”²⁷³ A public trust nuisance would be akin to a pre-emption: it would bar encroachment on public trust resources.²⁷⁴ The final section of the proposed legislation would have provided that: “No lands owned by the State which front upon or are near any . . . body of navigable water, convenient access to which is not provided by public road . . . or otherwise, shall ever be sold . . . without reserving to the people of the State an easement across the lands for convenient access to such waters.”²⁷⁵ The existence of this passage suggests that the commission did not believe such an easement existed in property already in private ownership. The bill was never enacted.

A 1994 study commissioned by Governor Jim Hunt reviewed the first decade under CAMA. Its report, called *Charting a Course for Our Coast*, found that further progress toward

²⁶⁹ See *id.* at 9-10.

²⁷⁰ See *id.* at Appendix H-1.

²⁷¹ See *id.* at Appendix H-2.

²⁷² See *id.* at Appendix H-3.

²⁷³ See *id.* at Appendix H-8.

²⁷⁴ See *id.* at Appendix H-3.

²⁷⁵ See *id.* at Appendix H-12.

assuring public access to public trust property was needed.²⁷⁶ The commission reported that rapid development of the coast continued to constrain public use of the beach.²⁷⁷ It found that state efforts under the Beach Access Program adopted in 1981 had not yet matched the demand for public passageways to the beach.²⁷⁸ The authors observed that the right to use the beaches guaranteed by the public trust is “an empty right without adequate and effective public access to these resources.”²⁷⁹ On the other hand, they acknowledged that there is “no state requirement that access be provided . . .”²⁸⁰

The commission did not clearly address the scope of public trust rights in the beach. The report defined public trust property as including both “land and water owned by the public but held in trust by the state.”²⁸¹ The authors suggested that perpendicular access had been “traditional,” if “informal,” but that many such accessways were no longer available.²⁸² It also called for public-private partnerships to foster access, including private management of publicly-owned access sites.²⁸³

Charting a Course for Our Coast is an example of the ambiguity with which the state has addressed access to the beaches. The ambiguity arises because the state sometimes treats lateral and perpendicular access issues as the same and sometimes as different things. For example, both the report and the legislative statements of purpose suggest that perpendicular and lateral access are both traditional appurtenances to the public trust rights. Nonetheless, the General Assembly has never clearly stated that perpendicular access rights should be enforced under the public trust doctrine. It has made this assertion with regard to lateral access rights.

²⁷⁶ NORTH CAROLINA COASTAL FUTURES COMMITTEE, CHARTING A COURSE FOR OUR COAST 47 (September, 1994).

²⁷⁷ See *id.* at 45.

²⁷⁸ See *id.* at 47.

²⁷⁹ *Id.*

²⁸⁰ See *id.*

²⁸¹ *Id.* at 85.

²⁸² *Id.* at 47.

This ambiguity in state intent has resulted in a difference in state action with regard to perpendicular and lateral access. The state has tried to acquire publicly-owned perpendicular routes of access to the beach, and the 1994 report calls for further efforts in that area. On the other hand, the state has never made any equivalent effort toward acquiring lateral rights. This discrepancy between the approaches to perpendicular and lateral access suggests that the state agencies understand the scope of the public right in North Carolina as providing lateral access, but requiring the public to pay for perpendicular access to public trust lands.

North Carolina continues to spend money on beach access routes.²⁸⁴ It also fosters access in a more general sense by stimulating development along the coast. The state provides funding for the infrastructure that has made the beaches and barrier islands of the state more accessible to visitors and property owners.²⁸⁵ This infrastructure includes roads, bridges, and ferries.²⁸⁶ State investments in beach nourishment, sand pumping, and erosion controls are intended to ensure that there is a beach to go to.²⁸⁷ Not surprisingly, an editorial in Wilmington *Morning Star* called for an end to these public subsidies if the Whalehead plaintiffs succeed in reserving the dry-sand beach for their private use or receive compensation for its public use.²⁸⁸

In *Thornton*, the Oregon Supreme Court noted that one reason the public came to assume that the dry-sand beach was a part of the public beach was because of the tremendous difference in value of the beach for public and private purposes.²⁸⁹ The court noted that the dry-sand beach

²⁸³ See *id.*

²⁸⁴ There are presently more than 250 accessways for the state's 320 miles of beaches. See North Carolina Division of Coastal Management homepage (visited April 5, 2001) <<http://dcm2.enr.state.nc.us/Other%20Stuff/access/Access.htm>>.

²⁸⁵ See N.C. ADMIN. CODE tit. 15A, r. 7M.0303 (2001) ("The State should continue in its efforts to supplement and improve highway, bridge and ferry access to and within the 20 county coastal area consistent with the approved local land use plans."). The construction of a state road into the northern Currituck Banks area was a significant factor in the development of the area as a tourist destination. See Kalo, *supra* note 10 at 1874, 1878.

²⁸⁶ See N.C. ADMIN. CODE tit. 15A, r. 7M.0303 (2001).

²⁸⁷ See Op. Att'y Gen., Basnight, October 15, 1996.

²⁸⁸ See Editorial, *Public Beach Access Must be Defended*, MORNING STAR (Wilmington, N.C.), July 28, 1998, at 6A.

²⁸⁹ See *State ex rel. Thornton v. Hay*, 254 Or. 584, 588-89, 462 P.2d 671, 673-74 (1969).

“could not be used conveniently by its owners” due to the site’s unsuitability for construction.

On the other hand, the court observed that the dry-sand beach had tremendous public value for recreation.²⁹⁰ A similar discrepancy in values occurs in North Carolina, where the Coastal Area Management Act severely restricts permanent private uses of the dry-sand beach through a setback requirement.²⁹¹

On the other hand, the value of the sand for recreational purposes extends throughout the coastal counties’ economies. Coastal businesses, particularly in the tourist industry, depend on public access to the water.²⁹² Currituck County beaches average 20,000 beachgoers on summer Sundays.²⁹³ Most of these are visitors who are renting rooms or houses nearby.²⁹⁴ Certainly many are like the Pennsylvania man who told a reporter that he visits Currituck because he can take his family to the beach. When the reporter asked whether the family would come to Currituck if the beach were private, the man replied, “Who’d rent anything down here then?”²⁹⁵

For the moment, the Currituck County Chamber of Commerce does not mention *any* limit to beach access on its promotional website. Instead, it entices potential visitors by echoing sung praises of its beaches: “USA Today described the Currituck beaches as ‘one of the best undiscovered beaches on the East Coast.’ The wide, clean, and beautiful beaches attract millions of vacationers each year.”²⁹⁶ The Chamber’s website does not suggest that a visitor might be trespassing if she assumes that the entire width of the beach is hers to enjoy.

²⁹⁰ *Id.*

²⁹¹ N.C. GEN. STAT. § 113A-134 and following (2000).

²⁹² See Editorial, *Public Beach Access Must be Defended*, MORNING STAR (Wilmington, N.C.), July 28, 1998, at 6A.

²⁹³ See Martha Quillin, *Public Beach or Private Property*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 5, 1998, at A1.

²⁹⁴ See *id.*

²⁹⁵ See *id.*

²⁹⁶ See Currituck County Chamber of Commerce homepage (visited April 5, 2001)

<http://www.currituckchamber.org/vacation_paradise.htm>.

In *Thornton*, the Oregon Supreme Court observed that the title owner of the beach was trying to reserve the recreational values of that property for the customers of its resort.²⁹⁷ North Carolina state government has traditionally refused to allow private owners to monopolize these values for private gain.²⁹⁸ As a result, coastal development has matured in a way that presumes public access to the coast. The value of off-ocean land is dependent on beach access.²⁹⁹ In the Whalehead development, for example, interior lots were listed for half the price of waterfront parcels.³⁰⁰ Interior buyers clearly believed they would have access to the beach.³⁰¹ The difference in price therefore reflected the difference between an obstructed and unobstructed view of the waterfront, not a difference in rights of access.

Private title to the dry-sand beach is not valueless even if it is burdened with a public right of access. For example, title in the dry-sand beach ensures that a house remains in private ownership if a storm results in its location on the dry-sand beach.³⁰² The fact that some property value lies in the title holder is further reflected in the fact that local government taxes the dry-sand portion of property owners' parcels.³⁰³

²⁹⁷ See *id.* at 590, 462 P.2d at 674.

²⁹⁸ As noted above, the state tells private owners to remove fences and 'no trespassing' signs.

²⁹⁹ See Editorial, *Public Beach Access Must be Defended*, MORNING STAR (Wilmington, N.C.), July 28, 1998, at 6A.

³⁰⁰ See Martha Quillin, *Public Beach or Private Property*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 5, 1998, at A1.

³⁰¹ See *id.*

³⁰² According to Deputy Attorney General Dan McLawhorn of the North Carolina Attorney General's Office, a house that ends up on the wet-sand beach is not necessarily in state ownership, but it is on land owned by the state. See The Associated Press, *Rebuilt Beaches Pose Problems of Ownership*, GREENSBORO NEWS & RECORD (Greensboro, N.C.), November 14, 1996, at B2.

³⁰³ See *Cooper v. United States*, 779 F.Supp. 833, 836 (E.D.N.C. 1991).

PART III. Monopolizing Public Trust Lands: *Cooper* and the White Lake Case Study

An example of the pitfalls resulting from lack of access to public trust resources can be seen in the case of White Lake, a state-maintained lake in Bladen County.³⁰⁴ Like most large lakes, White Lake was preserved in perpetual state ownership by an act of the General Assembly that both recognized the state's public trust ownership of navigable lakes and prohibited their sale or transfer.³⁰⁵ The state has patrolled the lake and enforced pier regulations on White Lake for more than eighty years.³⁰⁶

There is no free public access to White Lake, however. The lake is ringed by private homes, hotels, and recreational facilities. Aside from a state pier that is restricted to use by the state employees who patrol the lake, there is no public property that touches the water. There is also no right to cross private property to reach it.³⁰⁷ The only people who have access to the lake are those who own property there or who pay to access this publicly-owned amenity. State officials now believe that the lake's shore is "so thoroughly developed that no vacant land suitable for a state park now exists."³⁰⁸

White Lake reached its present condition through a combination of accident and private activity. Although the General Assembly had the foresight to statutorily reaffirm citizens' public trust rights in the lake, it did not authorize the public acquisition of any of the lakeshore at the

³⁰⁴ This case study is drawn from: Frank Tursi, *No Room, No View: State Keeps an Eye on its Lakes, but Development is Keeping Them Out of Reach of Ordinary People*, WINSTON-SALEM JOURNAL (Winston-Salem, N.C.), November 19, 2000, at 1.

³⁰⁵ See N.C. GEN. STAT. § 146-3(2)(2000) (enacted 1959) ("No natural lake belonging to the State or to any State agency on January 1, 1959, and having an area of 50 acres or more, may be in any manner disposed of, but all such lakes shall be retained by the State for the use and benefit of all the people of the State and administered as provided for other recreational areas owned by the State.").

³⁰⁶ See Tursi, *supra* note 304, at 1.

³⁰⁷ The freshwater public trust doctrine applies only to lands permanently covered by water and does not extend to the shoreline. See Op. Att'y Gen., Whisnant, Jan. 20, 1998 (*citing to* Gaither v. Albemarle Hospital, 235 N.C. 431, 444, 70 S.E.2d 680 (1952)).

³⁰⁸ See Tursi, *supra* note 304, at 1.

same time.³⁰⁹ The area surrounding lake developed rapidly after the state act was passed.³¹⁰ By the 1920s, the lake was served by paved roads and ringed with amusement parks. Local citizens, who were profiting from their monopoly over access to the lake, and their legislators successfully rebuffed subsequent efforts to provide public access to the lake.³¹¹

This monopoly of the resource continues today. In the words of the lake's former administrator, "Somebody living in Wilmington or Asheville owns just as much of White Lake as the people who have houses there, but the people who own the lake have to trespass on somebody's property to get to their own water."³¹² Developers along the lake market it as a "private, secured" development. Homesites cost as much as \$70,000. Motels and recreational site owners profit by offering exclusive access to the lake.³¹³ These and other property owners not only effectively own the lake, they also benefit from state management in maintaining and patrolling the lake. State management generates an estimated \$30,000 annual deficit. In the words of the state division of parks and recreation director Phillip McKnelly, "The way the ownership patterns around that lake exist, I am not aware of a reason for it to be a part of the state park system."³¹⁴

The lack of public management of the water's edge has resulted in poor lakeside planning and environmental degradation of the lake. A 1977 state report concluded that as a result of the lack of planning and funding, "existing use is unbalanced to the detriment of the natural resources."³¹⁵ As one reporter described it in the fall of 2000, "Almost the entire shoreline of the lake is crowded with houses, mobile homes, motels and campgrounds. Small wooden walls, or

³⁰⁹ White Lake was originally reserved by a special act of the General Assembly in 1911. *See id.*

³¹⁰ *See id.*

³¹¹ *See id.*

³¹² *Id.*

³¹³ *See id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

bulkheads, armor much of the shore to prevent erosion, and more than 300 private piers extend into the water.”³¹⁶ At White Lake, government policy and private action has resulted in sole ownership of the resource by the private landowners who border it.

A federal district court case from the coast suggests that state law might be interpreted to create the same effect on the coast. *Cooper v. U.S.*,³¹⁷ a beachfront property case, was decided in 1991 in the federal District Court in New Bern. The plaintiffs in *Cooper* claimed that they were improperly denied a tax refund when they donated a strip of dry-sand beach to the town of Atlantic Beach.³¹⁸ The IRS’s position was that the property was public to begin with. The court noted that “the extent to which the public trust doctrine applies to dry-sand property in North Carolina is an unsettled question.”³¹⁹ In the absence applicable prior case law, the court looked for relevant statutory language. The court concluded that the statutes explicitly vested title to the dry-sand beach in private ownership.³²⁰ The court then found no other statutory or judicial language that explicitly created a public right of use in the privately-titled land.³²¹ Without looking for further direction regarding the existence of public trust rights, the court concluded that private ownership of the dry-sand beach was exclusive.³²² The title owners retained all of the bundle of rights in the dry-sand beach.³²³

³¹⁶ *Id.*

³¹⁷ 779 F. Supp. 833 (E.D.N.C. 1991).

³¹⁸ *See id.* at 833.

³¹⁹ *Id.* at 835.

³²⁰ *See id.*

³²¹ This case was decided prior to the 1998 amendments that expanded the statutory definition of the public trust interest. *See supra*, notes 237-242 and accompanying text.

³²² *See Cooper* at 835 (noting that the private right of title was limited only “by the state’s power, under the doctrine of the public trust, to acquire an interest in the property.” The court defined “acquire” in terms of the state’s spending power, not its power to assert previously sentient rights. Because the state had never bought rights in the dry-sand beach, the court held that this area was private property.).

³²³ *See id.* As one observer notes, § 77-20(a) only defines the seaward edge of private property ownership. It does not address the landward extent of public use rights. *See Dossett, supra* note 24, at 1316, n.196. General Statutes sections 77-20(d) and (e), added after *Cooper* was decided, say that the public use rights extend landward of the mean high tide line as far as the courts decide under the common law of North Carolina. N.C. GEN. STAT. §§ 77-20(d) and (e) (2000). For this reason, lawyers for the State in the Whalehead litigation have asserted that the *Cooper*

The *Cooper* court read the state's coastal law as establishing an absolute property regime, one in which title ensures the owner the right to exclude the public. The court in *Cooper* could have reached a different result if it had acknowledged a right of use in the dry-sand beach arising from customary use by the public. The danger of the theory followed by *Cooper* is that without such a right of use, the public trust beach could be cut off from public use because so much of the dry-sand beach is in private ownership.

Cooper and the White Lake case suggest that a single-ownership regime adjacent to public resources is a legal and practical reality in this state.³²⁴ *Cooper* demonstrates that the courts are likely to favor the title rights of private property owners as a legal matter. And the White Lake experience suggests that, as a practical matter, single-owner regimes will tend to monopolize public resources where the state has not acted to ensure public access.

White Lake, in particular, illustrates the consequences of not extending access. The private monopoly of the lake enriches the few who can afford access to this public resource. The state further subsidizes the monopoly through public spending. Finally, the lack of public oversight of the resource leads to its over-use of the resource and its degradation as an environmental and recreational asset. The Whalehead case gives the courts the opportunity to recognize the faults of this system and to acknowledge the legal basis for ensuring public rights of access to the public trust resources.

decision does not reflect the law in North Carolina. See *Kalo*, *supra* note 10, at 1872, n.12, citing to Memorandum in Support of Motion for Judgement on the Pleadings at 24, *Giampa v. Currituck County* (N.C. Super. Ct. filed June 19, 1998) (No. 98 CvS 153).

³²⁴ For a contrary perspective, see *Dossett*, *supra* note 24, at 1326-27. *Dossett* argues that in *Concerned Citizens* the North Carolina Supreme Court favored public over private interests in the dry-sand beach. ("In *Concerned Citizens*, the traditional distrust of prescriptive acquisition ran headlong into another overarching public policy, the state's duty to preserve public access to oceanfront beaches. The court responded by making it much more difficult for landowners to interrupt prescriptive use, modifying the substantial identity test to allow prescription in a coastal

PART IV. Title and Ownership

Rights of Title

The plaintiffs in the Whalehead litigation are seeking to establish that they hold the title to the dry-sand beach. Their purpose is to be able to exert one of the primary rights of the title holder in real property, which is the right to exclude others from that property.³²⁵ If title to the dry-sand beach—that land above the mean high tide line—belongs to the owners of the landward property, those homeowners might have the right to exclude the public. They could, in the words of the *Thornton* court, reserve for themselves and their guests “the recreational advantages that accrue to the dry-sand portions of their deeded property.”³²⁶

Legal observers believe that the Whalehead plaintiffs, like most other North Carolina beachfront property owners, do hold title to the beach.³²⁷ Nonetheless, exclusive use of the dry-sand beach may not be a part of the title that they hold.³²⁸ As we have seen above, title alone does not establish sole ownership over property. Private property can be subject to a number of competing property interests that limit the traditional private rights of use. The existence of

environment . . . and by choosing not to adopt the underinclusive bright-line rule that maintenance by public authorities is an essential element of public prescription.”).

³²⁵ See N.C. GEN. STAT. § 40A-2(7) (1999) (“‘Property’ means any right, title or interest in land, including leases and options to buy or sell. ‘Property’ also includes rights of access, rights-of-way, easements, water rights, air rights, and any other privilege or appurtenance in or to the possession, use, and enjoyment of land.”). See also *Hildebrand v Southern Bell Tel. & Tel. Co.*, 219 N.C. 402, 14 S.E.2d 252 (1941) (holding that the term property “comprehends not only the thing possessed but also . . . the right of the owner to possess, use, enjoy, and dispose of it, and the corresponding right to exclude others from its use.”).

³²⁶ *State ex rel. Thornton v. Hay*, 254 Or. 584, 590, 462 P.2d 671, 674 (1969).

³²⁷ See *Kalo*, *supra* note 10, at 1879. The plaintiffs claim they can demonstrate a chain of title that extends to pre-colonial grants from the Crown and which includes the dry-sand beach within their parcels. See Martha Quillin, Public Beach or Private Property, News & Observer (Raleigh, N.C.), Sept. 5, 1998, at A1. As much as half of the state’s beachfront shoreline is similarly held in private title. Editorial, *Public Property Under Siege in Lawsuit*, ASHEVILLE CITIZEN-TIMES (Asheville, N.C.), June 25, 1999, at A8.

³²⁸ This was the conclusion reached by the *Thornton* court, which held that the doctrine of custom established public rights in the dry-sand beach regardless of who holds title to it. See *Thornton*, 254 Or. at 591-92, 462 P.2d at 675 (“While the foreshore is ‘owned’ by the state and the upland is ‘owned’ by the patentee or record-title holder, neither can be said to ‘own’ the full bundle of rights normally connoted by the term ‘estate in fee simple.’”).

these competing interests is recognized by splitting the estate among the stakeholders through easements, implied dedications, and other rights of use.

The idea that title conveys property without obligation is the myth of the sole owner. This myth is well-entrenched in the public consciousness, but it is historically and practically incorrect.³²⁹ Robert Gordon identifies the origins of the myth in the eighteenth-century English conception of property. He says the English ideal was one in which:

All the potential sticks in the bundle of property rights are gathered in a single owner, the rights to enjoy and to exploit the owned resources without restriction, to exclude others from access to them for any and no reason, and to alienate them without restraint—all secured by fixed, stable, predictable rules of law against diminution or encroachment.³³⁰

In fact, Gordon observes, there were few actual examples of such absolute rights in property either in England or her colonies in the eighteenth century. He writes that:

The real building-blocks of basic eighteenth-century social and economic institutions were not absolute dominion rights but, instead, property rights fragmented and split among many holders; property rights held and managed collectively by many owners; property relations of dependence and subordination . . . property surrounded by restriction on use and alienation; property qualified and regulated for communal or state purposes . . .³³¹

In contrast with the ideal of the single owner, ownership in the eighteenth century was in fact usually a complicated bundle of rights and responsibilities divided among a number of stakeholders. Nonetheless, modern concepts of title often reflect the eighteenth-century predilection for a single owner.

In many instances, the complications of ownership are more accurately depicted by the concept of the split estate. In the split estate, one owner holds the title, but others have

³²⁹ Perhaps the most famous image of this myth is the citizen farmer. As an example of the difference between the myth of property and the reality, Robert Gordon points out that in eighteenth-century America more farmers were tenants or laborers than landowners. See Robert W. Gordon, *Paradoxical Property*, in EARLY MODERN CONCEPTIONS OF PROPERTY 95, 98 (John Brewer & Susan Staves, eds. 1995).

³³⁰ *Id.* at 95.

enforceable and perhaps even alienable rights in the property. Often, an estate is split voluntarily, such as when a property owner grants an easement to a neighbor. In other cases, the split may be involuntary, such as when a trespasser establishes an easement through adverse possession. Property rights in the latter cases are often not recorded until they are disputed and the dispute is resolved. In other words, the title to a property may not reflect who actually possesses the rights of ownership.

In cases in which nontraditional stakeholders can exercise rights of ownership, we should think of the affected property as being held in a split estate,³³² rather than single ownership, regardless of the state of the title. A split estate is the proper framework for understanding why beachgoers should enjoy a right of use in the dry-sand beach even if the title is in private hands. As we saw above, the public right of use could encumber a private title by way of dedication, easements, or common law doctrines prohibiting certain uses, such as *purprestures*.³³³ Alternatively, custom and the Public Trust Doctrine have been used to establish a public right of use across private property.³³⁴ A split in ownership by one of these means is supported by the historical precedent that shows that the reality of single ownership is not as pervasive as its myth. Moreover, if beachfront property owners' title is encumbered by a public right of use, it is reasonable to believe that such a right exists even if it is not reflected in private title.

³³¹ *Id.* at 96. Gordon says commonly shared rights in early modern America included: shared rights of use in hunting, fishing, grazing, and wood-gathering commons; farm tenancies; and shares of contractual property (such as certificates of stock in land). *See id.* at 96-100.

³³² For a discussion of split estates, see Charles Geisler, *Property Pluralism*, in *PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP* 65, 67 (Charles Geisler & Gail Daneker eds. 2000) *citing* W. HAGE, *STORM OVER RANGELANDS* 4 (1990).

³³³ *See supra*, notes 32-115 and accompanying text.

³³⁴ *See supra*, notes 116-173 and accompanying text.

Equitable and Distributional Concerns Affecting Ownership

Easements, dedications, custom, and the public trust are the legal tools by which we can understand how the rights of ownership in a single property can be shared by many people. There are also equitable and distributional reasons why we should recognize a split estate in the dry-sand beach. This section will examine some of those reasons.

Professor Singer observes that certain “values” could be said to arise from the myth of the single owner.³³⁵ One of these is that the single owner enjoys a strong “moral” claim to unfettered ownership of her property. The claim arises because the idea of the single owner is so popular that it weighs heavily against any alternative vision of ownership, such as reasonable regulation of the property for the benefit of neighboring owners.³³⁶ In this case, the beachfront owners believe that their title should be the same as any other insofar as it should permit them to exclude others. They are likely to make a moral claim that recognizing a public right of use in the dry-sand beach is the equivalent of giving a windfall to the public at their expense.

Singer observes that the moral claims of single owners are particularly questionable when the use of the property causes harm to the owner’s neighbors, or non-property owners. He notes that our society has often responded to such claims by curtailing private property rights. For example, the Civil Rights Act of 1964 requires the private owners of certain public facilities to provide equal access based on race.³³⁷ The public right to access to private property (and the correlated demands on the rights of private owners) is grounded in our collective judgement that race or disability should not preclude access to public facilities, even when they are in private

³³⁵ See Joseph William Singer, *Property and Social Relations*, in *PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP* 4-5 (Charles Geisler & Gail Daneker eds. 2000).

³³⁶ See *id.* at 7.

³³⁷ See *id.* at 14.

ownership.³³⁸ Where unfettered private ownership would impair our collective notions of equity, the public interest may demand “a more inclusive menu of ownership.”³³⁹

The dry-sand beach is privately-held property to which the public should continue to enjoy access for reasons of equity. A private right to exclude the public from the dry-sand beach would significantly impair public use and enjoyment of the wet-sand beach, which is a public resource. If the public does not have a right to use the dry-sand beach, the effect would be to redistribute much of the state’s coastal public trust lands into private ownership. This would unfairly enrich the private property owners while depriving the public of its opportunity to benefit from a natural resource that is supposed to be held in common for the benefit of all.

Exclusive private use of the dry-sand beach would significantly harm the general public’s ability to reach its public trust beachfront. Because as many as half of the miles of beaches in North Carolina are bordered by private property, a prohibition on public use of the dry-sand would make many of the beaches in the state completely inaccessible. The access points that remained public would be jammed.³⁴⁰ Beach businesses and inland homeowners would similarly suffer as the limited access reduced the attractiveness of the coast as a recreational destination. Moreover, the intangible benefits of the resource as a place for recreation, hunting, fishing, and travel would be eliminated. Commentators have recognized the value of such unique natural resources for the development of society.³⁴¹ In the words of one commentator, “public recreational use is arguably the most valuable use of the dry-sands...”³⁴²

³³⁸ *See id.*

³³⁹ Geisler, *supra* note 332, at 66.

³⁴⁰ *See* Editorial, *Public Beach Access Must be Defended*, MORNING STAR (Wilmington, N.C.), July 28, 1998, at 6A.

³⁴¹ *See* Finnell, *supra* note 30, at 644, *citing* Carol Rose, *Comedy of the Commons*, 53 U. CHI. L. REV. 711 (1986) (“Professor Rose argues that ‘we might believe that unique recreational sites ought not be private property; their greatest value lies in civilizing and socializing all members of the public and this value should not be ‘held by private owners.’”).

³⁴² *See* Finnell, *supra* note 30, at 644.

On the other hand, exclusive private use of the beachfront adds relatively little value to the private estate. The beach areas seaward of the dunes are unsuitable for permanent uses and in most cases cannot be developed due to CAMA regulations.³⁴³ Whatever benefits a homeowner gains by private use of the dry-sand beach in front of her property would be offset by her inability to use her neighbors' dry-sand beach. Under an exclusive use rule, the homeowner who can now walk along the dry-sand beach will be trespassing if he chooses to walk along his neighbors' dry-sand beaches.

Nonetheless, without a public right of use of the dry-sand beach, most public trust lands would simply become an addition to the private property of the beachfront owners. This windfall would be particularly unfair because beachfront property owners already disproportionately benefit from public investment in coastal roads, bridges, and ferries. It is these investments, as well as public funding for post-disaster reconstruction, that make coastal development feasible. In many areas of the beach, public use pre-dated public improvements, further suggesting that the primary beneficiaries of the public investment have been private property owners.³⁴⁴ Already, state statutes demand assurances of public access as a condition of public funding for nourishment. Why should recognition of public rights of access be limited to public investment in nourishment, when so many other public investments have also directly benefited private beachfront owners?

The Anglo-American property rights system is founded on the idea that differences in private property ownership are legitimately based on one's ability to afford. But this rule has

³⁴³ See Dossett, *supra* note 24, at 1330. ("Because the dry-sand beach is unsuitable for development due to overwash in severe storms, a public easement over the dry-sand neither deprives the landowner of the right to develop his land nor deprives the public of any gains in efficiency attributable to private ownership of land.")

³⁴⁴ See *id.* at 1289 ("In most cases, public recreational and commercial use of barrier islands begins long before intensive residential development because permanent households are dependent on improved roads, bridges, or ferries, while recreational and commercial use occurs when an island can be reached only by boats, wooden bridges, and sand roads.").

generally not been applied in the case of access to public property. If public use of the dry-sand beach were prohibited, access to the public trust lands would be based on one's ability to pay for access. Just as we do not discriminate against access to public buildings on the basis of race or disability, we should not discriminate in access to public resources on the basis of class. In fact, the state has already taken that position in its Beach Access Program regulations, which provide that "All land use plans and state actions to provide additional shorefront access shall recognize the need for providing access to everyone regardless of their social or economic status."³⁴⁵

As a society, we have been willing to curtail private property rights when countervailing equitable interests are sufficiently compelling. Professor Geisler calls the resulting encumbrances a "social mortgage." The mortgage is a social acknowledgement that property rights exist not only in those who own, but in those who are affected by the use of the property.³⁴⁶ Judicial or statutory recognition of the social mortgage allows the public to enforce its rights in that property. A social mortgage that includes a public right to use the dry-sand beach is a traditional and reasonable burden of ownership of beachfront property in North Carolina. The Whalehead case provides an opportunity for courts of this state to join the General Assembly and the state's environmental regulators in acknowledging this public right in the private edge of our beaches.

³⁴⁵ See N.C. ADMIN. CODE tit. 15A, r. 7M.0303 (2001).

³⁴⁶ See Geisler, *supra* note 332, at 68. (" . . . public planning, impact assessment, loans, improvements, and a gallery of legislation . . . separates ownership from control. In a word, most private land has a perpetual social mortgage over and above any private mortgage.").