The Public Trust Doctrine: The Bottom Line on Bottom Lands Is Yet To Be Written

by Katherine White

This regular Insight *department examines policymaking in the judicial branch. In this column,* Insight *examines a little-noticed 1988 Supreme Court decision,* State ex rel Rohrer v. Credle, *which reaffirmed and expanded the doctrine that public waters are held for the benefit of the public.*

One man's losing court battle to keep his Swan Quarter Bay oyster beds private has opened hundreds of thousands of acres of North Carolina underwater land to the public for its use and protection.[1] And perhaps even more important, that case has broad policy implications for the way the state of North Carolina manages lands held in public trust.

For Sidney Credle, who with his father before him had tended 85 acres of Swan Quarter Bay bottom lands for nearly 70 years, the North Carolina Supreme Court decision means he can claim no ownership to the oyster beds he planted and nurtured. For the citizens of North Carolina, the decision puts in question whether anyone—even the government—can sell off or otherwise deprive the public of its rights in the submerged lands.[2]

The North Carolina Supreme Court's unanimous decision, issued in June 1988, reaffirms and expands the historic "public trust" doctrine, a concept that dates to an old, unwritten English law that the King owned the waters for the benefit of the public. The decision gives the doctrine constitutional protection, saying that a 1972 amendment to the North Carolina Constitution "mandates the conservation and protection of public lands and waters for the benefit of the public," wrote Justice Louis Meyer.[3]

But the implications of the June 1988 opinion go beyond the use of the lands beneath the sounds and bays of coastal North Carolina. The decision raises significant questions about the way North Carolina government deals with its land. It makes it more difficult for the state to sell off its marshland as it did from the early 1800s to the 1960s, including a 683-acre open water and marshland area that now hosts the private resort known as Figure 8 Island, north of Wilmington and cut off from the public by a private drawbridge.[4] Although the public is blocked from the island, the *Credle* case reinforces the argument that the public can use the wet sand area (the beaches and tidal areas) of the island if it can get to it.

"It is a fundamental decision," says John Runkle, an attorney for the Conservation Council of North Carolina, which filed a friend-of-the-court brief in the case. "It goes to the heart of environmental protection, of protecting public lands, and in that sense, it is one of the most important environmental decisions handed down by the court, because it determines what can be done with public lands."

The distinction between *public lands* and *public trust resources* may not be widely understood. "The common law public trust doctrine applies only to those unique resources in which the public has an interest that is incompatible with private property rights," explains Assistant Attorney General Robin Smith. "For example, the

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public interest in unobstructed navigation is incompatible with a fundamental attribute of private ownership—the owner's right to exclude others. The same is simply not true of other publicly owned lands. The state could sell many of its lands without significantly impacting any public interest," notes Smith.

The decision raises questions about more than just submerged lands. For example, it could be argued "that you have public trust land in the rivers and forests," Justice Harry Martin says in an interview. "Suppose the state wanted to sell Mount Mitchell? There's a question of public trust. They can regulate it but can they convey it? Strong arguments can be made against [conveyance]," he says.

Other potential questions center on access to the public trust lands and the extent of public trust lands in tidal areas.[5] The North Carolina Supreme Court has not yet considered whether the public trust doctrine extends to access to public trust lands, such as access to the beach through the dune lines. At present, the state seeks donations of land or buys property on which ramps are built to give the public access to the beaches under statutes adopted by the General Assembly.[6] If the public trust doctrine were extended to public access to beaches, the legislature could not restrict access by changing the laws.[7]

"We are hoping that this decision will be expanded to all public lands," says the Conservation Council's Runkle. "The state doesn't own land. It is the trustee for the land, to protect the interests of the rightful owners—all of us. In *Credle*, the court is saying that an individual cannot claim a public land and try to keep other individuals out."

Not everyone agrees that public trusteeship is the best way of protecting environmentally sensitive waters. In the view of at least one environmental law expert, the expansion of the public trust doctrine can help destroy bottom lands, as well as eliminate a potential clean water lobby. "If you have public beds, there is no incentive to postpone gratification. The oystermen will grab as much as they can," warns University of Maryland Law School Professor Garrett Power, who has studied and written extensively on the problems of the Chesapeake Bay.

The issue of who owns the bottom lands is an old one, debated for the last two centuries in this state and others as economic interests in fishing and other coastal industries have competed for the riches that the waters and the earth beneath provide. "Most other states apply the public trust doctrine only to the water column or water surface, but would permit transfers of the beds," Professor Power says.

North Carolina's approach to the interests has shifted from granting private rights in the submerged lands during the 1800s to severely restricting them in the *Credle* case. It was more than 100 years ago that the North Carolina legislature adopted a plan to give private grants in bottom lands to fishermen through a registration system for leasing for the cultivation of shellfish.[8] It was 102 years ago that the legislature expanded its involvement with oyster bed grants in an effort to take the oyster market over from Maryland and Virginia, where declining water quality was polluting the oysters with raw sewage and making them unsafe to eat.[9] The justification, as the state Supreme Court quoted from a 1896 Board of Agriculture report, ran like this:

> It happens that there remains one treasure-house not yet plundered, one great water granary whose doors are not yet thrown wide open. North Carolina, overlooked and despised in the Eldorado of the Chesapeake, now, when the glories of the latter are fading, is found to possess what, with prudence, patience, legislative wisdom and local self-control, may be converted into a field quite as prolific as the once teeming oyster waters of Maryland and Virginia.[10]

Credle argued to the court that the public trust doctrine could peacefully coexist with his private husbandry efforts. Oysters "do not need pens to keep them contained. It is feasible to raise oysters and at the same time to keep the waters above the bottom open to the public for fin fishing, navigation and other customary uses," said his lawyer, George Thomas Davis Jr. of Swan Quarter.[11]

Conversely, the Conservation Council of North Carolina, an environmental advocacy group, contended, "An exclusive fishery in many ways restricts all of the other uses of the waters. Our coastal waters are one of the great resources of North Carolina, and are held by all of us for the use of all of us. No one person should be permitted to impose on the common right of free enjoyment of our public trust."[12]

For Professor Power, a mix of private and public controls is the environmentally and economically sound way to protect the sounds and bays. Of the Chesapeake Bay oyster industry, he wrote: "The laws which in effect mandate public

oyster grounds created the basic economic problem—exploitation."[13] He suggested then and continues to advocate limits on entry to some oyster lands and setting aside "some portions of the oyster bottom as a public ground to serve as a functioning oyster museum."[14]

The North Carolina decision does not address potential exploitation of the submerged lands by watermen. The issue was not raised in the *Credle* case. But Assistant Attorney General J. Allen Jernigan says that the State Marine Fisheries Commission regulates the harvest of oysters and other shellfish in a way that protects future harvests and, therefore, reduces the risk of exploitation by the watermen.

Using Professor Power's economic analysis, the North Carolina approach is a policy decision to regulate rather than let private interests conserve their own vested interests in shellfish beds. "The thing that rankles you about private use is that you're devoting a public asset to a private person for his personal gain," Justice Martin says.

And, according to the state's highest court, the state has no choice as to what its policy shall be. "History and the law bestow the title of these submerged lands and their oysters upon the State to hold in trust for the people so that all may enjoy their beauty and bounty," the court wrote.[15]

That admonition seems to satisfy Section 5, Article XIV of the North Carolina Constitution, at least in terms of policy. That section provides, in part:

> 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, historical sites, openlands, and places of beauty.

The *Credle* decision, as Runkle notes, may be the key to making that policy work. "The next time there's a case coming along involving public lands, this decision will be there for the court to rely upon," notes Runkle.

Such a case could come along as early as 1991. The state is working against a Dec. 31, 1990 deadline, imposed earlier by the legislature, to sort through thousands of claims of bottom land ownership to determine which ones are valid.[16] Only those claims for lands granted during a 22-year period from 1887-1909 (when granting such rights was legal in North Carolina) will be recognized. The Credle claim was turned down because the plaintiff could not prove the state granted such a right during the period. If Credle had produced documentation of his claim, it likely would have been recognized as valid.

The state's Marine Fisheries Division has as many as 10,000 claims it must process to determine which claims might meet certain criteria, including claims of grants during the 22-year window of opportunity, and be recognized as valid. But since the *Credle* decision, the prospects for the state affirming a *private* right to a *public* water appear to be headed for stormy weather.

FOOTNOTES

[1] *State ex rel Rohrer v. Credle*, 322 NC 522, 369 SE 2d 825 (1988).

[2] North Carolina has about 2.2 million acres of submerged lands in its estuaries, bays, and sounds.

[3] *Credle, supra*, 322 N.C. at page 532, 369 S.E. 2d at page 831.

[4] See *This Land Is Your Land*, Chapter III, a report by the N.C. Center for Public Policy Research, 1977, pp. 20-26.

[5] In *Matthews v. Bay Head Improvement Assoc.*, 95 NJ 306, 471 A2d 335, cert. denied, 469 US 821, 105 SCt 93, 83 LEd 2d 9 (1984), the New Jersey Supreme Court held that the public trust doctrine gives the public the right to cross private property to reach the beach.

[6] G.S. 113A-134.

[7] The North Carolina Attorney General's office takes the position that the North Carolina law includes the right to cross private property and to include the dry sand beaches above high tide so that people on the beach at high tide would not have to leave but, instead, could remain on the beach between the dunes and the high tide mark. See Joint Brief for the Plaintiff-Appellants and Intervenor Plaintiff-Appellant in *Concerned Citizens of Brunswick County Taxpayers Association, et al v. State of North Carolina ex rel S. Thomas Rhodes v. Holden Beach Enterprises, Inc.*, No. 8813SC1075, now pending in the North Carolina Court of Appeals.

[8] Chapter 33 of the 1858-59 N.C. Session Laws.

[9] Chapter 119 of the 1887 N.C. Session Laws.

[10] *Credle, supra*, 322 NC at pages 527-28, 369 SE 2d at page 828. For a history of the way Maryland dealt and continues to deal with its oyster and environmental problems, see *Chesapeake Waters Pollution, Public Health, and Public Opinion, 1607-1972*, Capper, Power and Shivers, Tidewater Publishers, 1983.

[11] Defendant Appellant Brief at page 6.

[12] Friend of the Court brief by the Conservation Council of North Carolina, at page 3.

[13] "More About Oysters Than You Wanted To Know," *Maryland Law Review*, Vol. XXX (1970), pp. 198 and 224.

[14] *Ibid.*, page 225.

[15] *Credle, supra*, 322 NC at page 534, 369 SE 2d at 832.

[16] G.S. 113-206(f).