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On the Wrong Side of the Railroad Tracks: Public Access to the Hudson River

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On the Wrong Side of the Railroad Tracks: Public Access to the Hudson River

MATTHEW R. ATKINSON*

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I. Introduction

The Hudson River estuary is one of the richest ecosystems on Earth. Millions of fish spawn there every year¹ in a tidal system that extends from New York Harbor to the Troy locks, a distance of some 150 miles. Although neglected until recently, the river's ecological health is now protected under an array of federal and state laws.²

The river has been a source for drinking water,³ fisheries, commercial navigation, and recreation. The river has also served as a convenient and inexpensive route for the railroads which were constructed along its shores in the mid to late 1800s.

This article considers the legal principles governing the state's and the railroads' obligation to provide river access, the factors threatening existing access, and militating against improved access.⁴ After considering the problem, this article recommends the codification of certain legal principles to protect and improve access to the tidal Hudson River.

1. See ROBERT H. BOYLE, *THE HUDSON RIVER: A NATURAL AND UNNATURAL HISTORY* 22, 131 (1979).

2. See The Hudson River Estuary Management Program, N.Y. ENVTL. CONSERV. LAW § 11-0306 (McKinney Supp. 1995). Most of the river and shoreline has been designated a critical environmental area under the State Environmental Quality Review Act (SEQRA) regulations of the New York Department of Environmental Conservation (DEC), providing additional scrutiny of state agency actions, and agency actions of political subdivisions of the state, in the designated areas. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7(c)(iii) (1996).

Federal law that protects the river includes 16 U.S.C. §§ 1221-1226 (1988) (conservation of estuarine areas). Perhaps the most significant federal law that has helped restore the ecological health of the river is the Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993). The first suits against polluters of the Hudson River were brought in the late 1960s and early 1970s under the long ignored Refuse Act of 1899, 33 U.S.C. § 407 (1988). For a description of these cases, see BOYLE, *supra* note 1, at 285-88.

3. There are seven water districts that presently take drinking water from the Hudson River. See Marine Sanitation Devices; Proposed Regulation to Establish Drinking Water Intake Zones in Two Sections of the Hudson River, New York State, 60 Fed. Reg. 34,940 (1995) (to be codified at 40 C.F.R. pt. 140).

4. The railroads impact access from Spuyten Duyvil to the Troy locks on the east shore, and from West Haverstraw to the Town of Lloyd on the west shore.

In 1846, the New York State Legislature authorized the incorporation of the Hudson River Railroad Company and the construction of its right-of-way along the eastern shore of the Hudson River as the railroad saw fit. By the end of 1851, service had begun between New York City and East Greenbush (the present terminal for Albany). The West Shore Railroad, affecting the western shore, was operational by the end of 1884. Under terms similar to the Hudson River Railroad Company, the West Shore Railroad was granted the shore of the Hudson River by statute and letters patent.⁵

As a result of the state's generosity, the tidal Hudson River is girded on the east and west by railroads. It is impossible to determine the number of railroad crossings that have been lost over the years,⁶ but the railroad title maps of 1917 give some indication. Along the Hudson River line (extending from Spuyten Duyvil to East Greenbush on the eastern shore), approximately 42% of the railroad crossings that impact access have been closed since 1917.⁷ Some of these crossings are or were private, however, private crossings often did and do afford public access. Also, undoubtedly myriad informal pedestrian crossings, which are not listed on the

5. This railroad was built to compete with the New York Central and Hudson River Railroad (successor to the Hudson River Railroad Company). One year later, after a brief but furious rate war, the West Shore Railroad was bankrupt. The West Shore line may have been developed by straw men for the Pennsylvania Railroad Company, the great rival of the New York Central. The direct competition was settled when the New York Central bought the West Shore line and the Pennsylvania Railroad bought a competing line that the New York Central had under construction in Pennsylvania. See ARTHUR G. ADAMS, *THE HUDSON THROUGH THE YEARS* 211-14 (1983). This was the heyday of railroad competition, unquestionably fed by New York's gift of approximately twenty-eight miles of the Hudson River shoreline.

6. The railroad might keep records that could be tabulated.

7. Excluded from this calculation are the urban areas of Greenbush, Hudson, Poughkeepsie, and Beacon, on the grounds that closure of some of the multiple crossings within an urban area are irrelevant to functional access. Also excluded are crossings north of Oscawana Island Park and south of Louisa Street (Charles Point) in the Town of Cortlandt, because the railroad is well inland through this segment. See MATTHEW R. ATKINSON, *PACE ENVIRONMENTAL LITIGATION CLINIC, INC., THE RAILROAD, THE HUDSON RIVER AND PUBLIC ACCESS: LEGAL OBLIGATIONS AND OPPORTUNITIES* app. B (1995) (listing the crossings on the Hudson Line identified from the railroad title maps of 1917) (on file with the *Pace Environmental Law Review*) [hereinafter PACE REPORT].

maps, have been lost.⁸ Another indication of lost access are the many wharves and docks shown on the railroad maps which had no formal access as of 1917.

Despite the adverse impact of the railroad upon access, the Hudson River line has been designated as a future home for high-speed passenger rail service.⁹ The Hudson line was selected on the basis of cost.¹⁰ Two lines which previously provided passenger service between New York City and Albany, the West Shore¹¹ and Harlem¹² lines, were not considered. The selection of the Hudson line for high-speed service underscores the priority the state has assigned to high-speed rail service. The goal is to implement high-speed service at

8. Informal pedestrian crossings are still used, primarily by fishermen. Prior to the widespread pollution of the river, and the institution of electrified commuter rail service, fishing and swimming were undoubtedly more common and access obtained where convenient.

9. See *infra* part II.A. for a discussion of plans for high-speed rail service in New York. Existing passenger service along the Hudson River is provided by Metro-North's commuter service (running as far north as Poughkeepsie) and Amtrak's service between New York City and Albany (with regular stops in Yonkers, Croton, Poughkeepsie, Rhinecliff, and Hudson).

10. See NEW YORK STATE DEPARTMENT OF TRANSPORTATION, MOVING TOWARD THE 21ST CENTURY: A PROPOSAL FOR HIGH-SPEED GROUND TRANSPORTATION IN THE STATE OF NEW YORK (1993) [hereinafter NYS PROPOSAL].

11. The West Shore line is used by Conrail exclusively for freight and adversely impacts access to the river for approximately forty miles. The Hudson line adversely affects river access along most of its approximately 130 miles. From the standpoint of minimizing the adverse impacts of high-speed rail service to access to the Hudson River, redevelopment of the West Shore line is preferable.

12. Metro-North provides commuter service as far north as Dover Plains on the Harlem line. The Harlem line used to extend to Chatham, where it connected with the Boston and Albany line, which is still used by Amtrak and Conrail.

the least cost.¹³ The adverse impact on coastal access is secondary.¹⁴

The public trust doctrine is a legal principle that colors all other doctrines touching upon the issue of access. This doctrine holds that the river belongs to the people in common forever. A necessary corollary to the doctrine is the public's right to access public trust lands and waters. Public trust doctrine and railroad operations along the Hudson River are in conflict. Public policy has thus far reconciled the conflict in favor of railroad operations. In order to understand the conflict, and as a first step to reordering the priorities for its resolution, an understanding of the factors and legal principles that govern the issue of access is essential. To this end, this article is organized as follows: Part II provides background concerning high-speed rail proposals for New York and present efforts to implement the service. Part III examines public trust doctrine and other legal principles which govern access to the river. Part IV proposes several means to improve public access to the Hudson River. Part V concludes this article and suggests that the problem of public access is indicative of a broader historic negligence and the abuse of an extraordinary natural resource. Public access is an issue that is intrinsically linked to the need to obtain a greater understanding and appreciation of the functions and values that the river serves, has served, and may serve again.

13. Inter-city high-speed ground transportation undoubtedly has benefits. For instance, it encourages core inner city redevelopment, NYS PROPOSAL, *supra* note 10, at 7, and reduces peripheral automobile dependent development around airports. See Philip Weinberg, *Public Transportation and Clean Air: Natural Allies*, 21 ENVTL. L. 1527, 1528-29 (1991). Finally, enhanced inter-city service is an effective way to reduce total automobile and air passenger miles, which are the most costly in terms of fuel and air pollution. See NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY, NEW YORK STATE HIGH-SPEED SURFACE TRANSPORTATION STUDY § 4 (1994) (tables comparing energy use per passenger mile and external costs of existing air, auto, and rail services and high speed ground transportation alternatives) [hereinafter NYS STUDY]. See also Laurence E. Tobey, *Costs, Benefits, and the Future of Amtrak*, 15 TRANSP. L.J. 245, 278-80 (1987) (describing the positive impact Amtrak Metroliner service has had on airport and highway congestion).

14. The state denies that high-speed rail service will adversely impact Hudson River access. See *infra* part II.D.

II. High-Speed Ground Transportation

A. The New York State Plan

High-speed ground transportation consists of three types of service. Maglev, an experimental technology, is designed to attain speeds of approximately 300 miles per hour.¹⁵ Very High Speed Rail (VHSR) refers to traditional steel wheel and track technology operating at speeds between 150 and 200 miles per hour.¹⁶ Europe and Japan have had VHSR in reve-

15. Maglev is an acronym for electro-magnetic levitation. Prototypes are currently being tested in Japan and Germany. NYS STUDY, *supra* note 13, at 1-26. Powered by magnets, the trains are also magnetically levitated to eliminate the friction of steel-wheel to rail technology. Designs have existed at least since the early decades of this century. See e.g., *Electric-Flyer Makes 500 Miles an Hour - Traveling at 500 Miles Per Hour in the Future Electric Railway*, THE ELECTRIC EXPERIMENTER (Mar. 1917), reprinted in *The High-Speed Rail Development Act of 1993, and Current Initiatives in High-Speed Ground Transportation: Hearing Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 1st Sess. 19-21 (1993) [hereinafter *Hearings*].

16. See NYS PROPOSAL, *supra* note 10, at 1-2. Potential maximum speeds are much higher. The French Train à Grande Vitesse (TGV) reached 320 miles per hour in one demonstration, and the German Intercity Express (ICE) train has been tested at 250 miles per hour. Taylor Moore, *High-Speed Rail Heading Down the Track*, 19 EPRI J. 25, 25 (Mar. 1994). The speeds are not practical for revenue service because, at such high speeds, the tracks are damaged. Optimal service is typically electrified and provided on a dedicated track. NYS STUDY, *supra* note 13, at 1-2. Germany's ICE trains, however, share the tracks with freight trains operating at 160 km/hr (100 mph). EUROPEAN CONFERENCE OF MINISTERS OF TRANSPORT, ROUND TABLE 87: HIGH-SPEED TRAINS 11, 13 (1992).

nue service for many years.¹⁷ High-speed rail operates at sustained speeds of 125 to 150 miles per hour.¹⁸

New York's inter-city ground transportation plan for the Empire Corridor¹⁹ is to gradually implement high-speed rail

17. France first implemented VHSR with the TGV train set in 1981, operating at speeds of 165 miles per hour. *Hearings, supra* note 15, at 68 (statement of Larry E. Salci, Pres., Bombardier Corp.). The TGV now runs at speeds of 186 mph. NYS STUDY, *supra* note 13, at 1-15. The Eurostar commenced passenger service between Paris, Brussels and London (via the English Channel Tunnel, or Chunnel) on November 14, 1994. *Chunnel Passenger Trains Makes Inaugural Run*, N.Y. TIMES, Nov. 15, 1994, at A10. The Paris link to the Chunnel is planned to operate at 200 mph. *Hearings, supra* note 15, at 54 (statement of Joseph Vranich, Pres., High Speed Rail/Maglev Ass'n). Germany's ICE trains, introduced in 1992, run at up to 180 mph. Moore, *supra* note 16, at 25; Peter H. Stone, *The Faster Track: Should We Build a High-Speed Rail System?*, 11 AMERICAN PROSPECT 99, 100 (Fall 1992). In 1992, Spain introduced the Alta Velocidad Espanol (AVE) train operating at comparable speeds. *Hearings, supra* note 15, at 53 (statement of Joseph Vranich, Pres., High Speed Rail/Maglev Ass'n). Italy also has train sets operating at speeds up to 186 mph. Moore, *supra* note 16, at 25.

Commercial VHSR service began with the Bullet Train in Japan during the late 1950s. The Bullet Train, operating between Tokyo and Osaka, now travels at speeds of up to 170 mph. Stone, *supra*, at 100. In April 1994, Korea signed a contract to implement the French TGV service between Seoul and Pusan. *Asia's Big New Train Set*, ECONOMIST, Sept. 7, 1994, at 67. Other Asian countries actively planning VHSR include China, Taiwan, Vietnam, and the Philippines. *Id.*

18. NYS PROPOSAL, *supra* note 10, at 3 (planning for high-speed rail in the Empire Corridor to operate at speeds of up to 125 mph through incremental improvements); NYS STUDY, *supra* note 13, at 1-2 (defining "incremental rail" as designed to obtain speeds of up to 150 mph). Federal railroad law defines "high-speed" as rail service operating at speeds in excess of 125 mph. 45 U.S.C. § 831(n) (West Supp. 1994).

Only the New York City to Washington, D.C., portion of the Northeast Corridor presently offers what could be called high-speed rail service in the United States. The Federal Railroad Administration (FRA) is presently implementing improvements in the New York City to Boston segment to permit maximum speeds of 150 mph. 2 FED. R.R. ADMIN., U.S. DEP'T OF TRANSP., THE NORTHEAST CORRIDOR TRANSPORTATION PLAN, B-2 app. B (1994) [hereinafter FRA PLAN] (issued in response to the Amtrak Authorization and Development Act of 1992, Pub. L. No. 102-533 § 4, 106 Stat. 3515, 3516 (1992) (codified as amended at 49 U.S.C. § 24903 (West Supp. 1995) (requiring the Secretary of Transportation to develop a program of improvements which would reduce the trip time between New York and Boston to three hours or less)).

19. The New York City to Albany to Buffalo route. *In re National Railroad Passenger Corp. v. Harnett*, 572 N.Y.S.2d 386, 388 (App. Div., 3d Dep't 1991).

and to encourage the development of maglev.²⁰ The existing infrastructure is suitable for high-speed rail, with several modifications. Tilt trains are capable of operating at speeds of up to 150 miles per hour on much of the existing track.²¹ The locomotives, however, will have to be self-propelled to save the cost of electrification.²² Grade crossings must also be eliminated where feasible.²³ The presence of freight and

20. See generally NYS PROPOSAL, *supra* note 10. The plan is based on a cost/benefit analysis that excludes VHSR. VHSR requires twin dedicated and electrified tracks with no grade crossings. NYS STUDY, *supra* note 13, at 1-2. To implement VHSR, the existing right-of-way in the Empire Corridor (from New York City to Buffalo) would require considerable straightening. *Id.* at 10. An aggressive realignment of the track would permit average speeds of 116 mph. *Id.* at 10-11. The projected capital cost, including new train sets and the electrification of the line, is \$7 billion. *Id.* at 23. On the other hand, improvement of the existing infrastructure, without electrification, and the acquisition of new tilt train sets would permit high-speed rail service to average speeds of 99 mph (assuming top speeds of 150 mph). *Id.* at 10-11. The estimated cost of this high-speed service is between \$1 and \$2 billion. *Id.* at 23.

Maglev would average speeds of 187 mph and cost \$17 billion. *Id.* Despite the higher costs, maglev is attractive because it would cost no more to operate than VHSR, while drawing a much larger share of the existing ground and air passenger market. NYS PROPOSAL, *supra* note 10, at 7. New York also hopes that maglev will become a major industry located in state. *Id.* at 10.

21. NYS STUDY, *supra* note 13, at 1-8. Tilt trains are a technology whereby the train leans into the curve to permit higher speeds without altering the superelevation of the track. *Id.* at 1-10. Superelevation, measured in inches, is the difference in elevation along a curve between the inside and outside track. *Id.*

22. Electrification of the New Haven to Boston segment of the Northeast Corridor is the single greatest expense, \$360 million, FRA PLAN, *supra* note 18, at I-5 tbl. I-1 (in 1993 constant dollars), in the \$2 billion budget to provide high-speed service and expanded capacity between New York and Boston. *Id.* at V-8 to V-9 tbl. V-1 (itemizing costs to reduce trip time and to provide for increased service demands).

The locomotives also must have sufficient acceleration (weight to power ratio) to benefit from the top speeds obtainable. See NYS STUDY, *supra* note 13, at 1-25. On October 14, 1994, Amtrak began testing a non-revenue gas-turbine locomotive between Schenectady and Hudson that is expected to meet the required specifications. See New York State Department of Transportation Grant Application for the National High Speed Ground Transportation Technology Demonstration Project (Oct. 15, 1993); Petition for Waiver for Test Program National Railroad Passenger Corp. (Amtrak), 59 Fed. Reg. 39,013 (1994). The track will also require upgrading throughout much of the corridor.

23. See *infra* notes 46-47 and accompanying text.

passenger services on the same tracks requires the testing and implementation of superior vehicle control systems.²⁴

The capital cost is the single greatest obstacle to implementation of maglev service.²⁵ Maglev requires a completely new right-of-way, track, and train sets.²⁶ The right-of-way issue and cost necessitate government investment, probably both federal and state.²⁷ In addition to the competition for government transportation dollars, implementation of maglev, and to a lesser extent high-speed rail, is potentially adverse to the automobile and airline industries which have lobbied against government investment in high-speed ground transportation.²⁸

New York anticipated substantial federal assistance with the implementation of high-speed rail service in the Empire

24. See *infra* note 41 and accompanying text.

25. Maglev service from New York City to Albany would cost approximately \$7 billion. NYS PROPOSAL, *supra* note 10, at 18. See also Moore, *supra* note 16, at 20; Stone, *supra* note 17, at 101.

26. Maglev probably would be constructed upon an elevated guideway within the NYS Thruway right-of-way. The cost of additional right-of-way has not been calculated. NYS STUDY, *supra* note 13, at 5-1.

27. Stone, *supra* note 17, at 101; Dean Patterson, *Funding High-Speed Rail: There Has Got to be a Government Role*, BOND BUYER, July 7, 1994, at 6.

28. Douglas Turner, *High-Speed Rail Funding Package Discourages Maglev Supporters*, BUFFALO NEWS, Apr. 29, 1993, at 7 (noting that two congressional foes of rail transit are strong supporters of the auto industry and highway spending); *Next Stop, America?*, BUS. WK., Apr. 19, 1993, at 106 (noting that some U.S. airlines, led by Southwest Airlines, oppose high-speed rail and maglev investment). Southwest Airlines played a significant role in defeating a VHSR system in Texas that required state subsidized financing. Patterson, *supra* note 27, at 6; Dan Charles, *High-Speed Rail Dreams Not Becoming a Reality* (National Public Radio, Transcript No. 1627-11, Oct. 6, 1994); Glen Biggs, *High-Speed Rail Didn't Succeed This Time; But It's Still Necessary*, HOUSTON POST, Sept. 18, 1994, at C3. See also NYS STUDY, *supra* note 13, at 3-21 to 3-27 (forecasting that maglev could take 84.7% of the market share for local airline service).

Airlines in Italy and Germany, however, view maglev and high-speed rail service as potentially supplemental to their core air service. Lufthansa operated a high-speed rail link between the Frankfurt and Dusseldorf airports. The train is now operated by German Railway. Moore, *supra* note 16, at 27; *Hearings*, *supra* note 15, at 59-60 (statement of Joseph Vranich, Pres., High Speed Rail/Maglev Ass'n) (Aitalia Airlines commencing rail service from Rome airport to Florence and Naples). The use of airports as ground transportation hubs, however, diminishes the benefits of direct inter-city service. See *supra* note 13 (discussing the benefits of inter-city high-speed ground transportation).

Corridor. It was estimated that implementation will cost nearly \$1 billion, of which almost three quarters would be supplied by the federal government.²⁹ This estimate of federal assistance was based upon Senator Moynihan's active support coupled with President Clinton's 1993 proposal for a \$1.3 billion high-speed rail development program.³⁰ President Clinton's proposal, however, was whittled to \$184 million for studies and demonstration projects over the next three years.³¹ No funds were allocated for the necessary capital improvements.³² Despite the lack of funding for high-speed rail service in general, the New York Department of

29. NYS PROPOSAL, *supra* note 10, at 14.

30. *Id.*

31. The Swift Rail Development Act of 1994, Pub. L. No. 103-440, 108 Stat. 4615 (1994).

32. Federal support for high-speed ground transportation has diminished over the years. The High-Speed Ground Transportation Act of 1965, Pub. L. No. 89-220, 79 Stat. 893 (1965), authorized the Secretary of Commerce to undertake research and development of high-speed ground transportation and fund demonstration projects. *Id.* §§ 1 & 2, 79 Stat. 893, 893. A demonstration was held in 1967 on a section of the Northeast Corridor in which speeds of up to 165 miles per hour were reached. *Hearings, supra* note 15, at 65 (statement of Larry E. Salci, Pres., Bombardier Corp.).

Revenue service on the Metroliner began in 1970 and reached speeds of 125 miles per hour. Tobey, *supra* note 13, at 251. By this time, however, rail passenger service in general was in serious decline. *Id.* at 249-50. To ensure the survival of inter-city passenger rail service, Congress created Amtrak in 1970. Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327 (1970) (codified as amended at 49 U.S.C. §§ 24301-24315 (West 1994)). The Act required the Secretary of Transportation to make recommendations concerning opportunities for the provision of "faster service." 84 Stat. 1327, 1329. Amtrak was authorized to improve the infrastructure and rolling stock along the Northeast Corridor to improve high-speed rail service. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210 §§ 701, 703, 90 Stat. 31, 119, 121 (1976) (codified as amended at 45 U.S.C. §§ 801, 851 (1988)). The Intermodal Surface Transportation Efficiency Act (ISTEA), Pub. L. No. 102-240, 105 Stat. 1914 (1991) (amended by Pub. L. No. 102-334, 106 Stat. 858, Pub. L. No. 102-338, 106 Stat. 1520, 1550, 1552, 1555, 1561-66, 1568, Pub. L. No. 102-580, 106 Stat. 4797, 4823 (1992) (codified as amended in scattered titles and sections)), was a comprehensive measure to improve all sectors of surface transportation. Section 1036 authorized the Secretary to promote and support the development of high-speed steel-wheel and maglev rail service. ISTEA § 1036(c)(1), 105 Stat. 1914, 1982 (codified at 49 U.S.C. § 309 (Supp. V. 1993)). Funding was intended to be generous, especially for maglev development, see ISTEA § 1036(d), 105 Stat. 1914, 1986 (allocating \$225,000,000 per annum through 1997), however, the following year funding was sharply curtailed. See

Transportation (DOT) continues to prepare for future service by fencing and seeking the closure of grade crossings.³³

B. The Regulatory Structure

The safe operation of railroads in the United States is under the general jurisdiction of the Department of Transportation (USDOT).³⁴ The USDOT is specifically responsible for coordinating all federal involvement with the development and implementation of high-speed ground transportation, including maglev.³⁵ The regulatory authority pertaining to safety is principally under the jurisdiction of the Federal Railroad Administration (FRA), an administration within the USDOT.³⁶

Grade crossing control devices are technically under the jurisdiction of the Federal Highway Administration

Pub. L. No. 102-388, 106 Stat. 1520, 1535 (1992) (eliminating all maglev funding).

The Swift Rail Development Act of 1994, Pub. L. No. 103-440, 108 Stat. 4615 (1994), sets the low-water mark for federal sponsorship of high-speed ground transportation. The Act states that implementation is primarily the responsibility of local and state governments. *Id.* § 102 (5), 108 Stat. 4615, 4615. After acknowledging the success of the subsidized Metroliner service in the Northeast Corridor, the Act states that no "new" service should receive federal operating and maintenance subsidies. *Id.* § 102(3), (4), 108 Stat. 4615, 4615. Applicability of the provision to improve the existing service in the Empire Corridor is unclear. There are, however, federal matching funds available to the states for environmental assessments of proposed high-speed rail service. *Id.*

33. See e.g., PACE REPORT, *supra* note 7, at B-5 (closure plan in Castleton-on-Hudson, replacing grade crossings with a pedestrian tunnel). Although the implementation of high-speed rail requires the elimination of most grade crossings, the policy for grade crossing elimination is longstanding and independent of high-speed rail. See *infra* part III.B.2.

34. See 45 U.S.C. §§ 1-43a, 421-445, 501-658, 801-855, 1101-1116 (1988 & Supp. V 1993); 49 U.S.C. §§ 101, 102 (1988 & Supp. V 1993).

35. 49 U.S.C. § 309 (Supp. V 1993).

36. *Id.* § 103; 49 C.F.R. § 1.4(e)(3) (1995). Many acts of Congress authorize the Secretary of Transportation to regulate the safety and operations of railroads, including the sponsoring of innovations in rail service. This authority is largely delegated to the FRA. See 49 C.F.R. § 1.49 (1995) (enumerating specific delegations). FRA regulations are published in 49 C.F.R. §§ 200-66 (1995). The FRA is specifically responsible for safety appliances, 49 U.S.C. §§ 20301-20306 (West Supp. 1995); signal systems, *Id.* §§ 20501-20505; locomotives, *Id.* §§ 20701-20703; accident investigations, *Id.* §§ 20901-20903; hours of service, *Id.* §§ 21101-07; and enforcement *Id.* §§ 21301-11.

(FHWA).³⁷ The FRA, however, regulates the safe operation of trains and establishes maximum operating speeds which are dependent, in part, on the grade crossing technology employed.³⁸ The FRA also sponsors demonstrations of train control systems, some of which are directly tied to grade crossings.³⁹ As a practical matter, therefore, the FRA and the FHWA must agree on grade crossing technology in order to implement high-speed rail service.⁴⁰

FRA regulations govern operating speeds of up to 110 miles per hour.⁴¹ Operating speeds in excess of 110 miles per hour are prohibited without the prior approval of the FRA.⁴² High-speed rail service, therefore, is regulated on a case by case basis.⁴³ FRA approval of speeds in excess of 110 miles per hour is dependent, in part, upon the presence of grade crossings and the types of controls employed.

Where speeds are anticipated to reach between 110 and 125 miles per hour, the FRA requires deployment of impenetrable barriers.⁴⁴ The FRA is officially requiring the elimina-

37. 49 U.S.C. §§ 104, 20134 (West Supp. 1995).

38. *Id.* § 24308(d); 49 C.F.R. § 213.9(a) (1994).

39. *See, e.g.*, 59 Fed. Reg. 46,470 (1994).

40. *See generally* FED. R.R. ADMIN., RAIL-HIGHWAY CROSSING SAFETY, ACTION PLAN SUPPORT PROPOSALS (1994).

41. 49 C.F.R. § 213.9(a) (classifying track for maximum operating speeds).

42. 49 C.F.R. § 213.9(c) (1994).

43. A carrier wishing to operate a train set at speeds in excess of 110 miles per hour must petition the FRA for an exemption or waiver. 49 C.F.R. §§ 213.9(c), 213.17(b) (1994). Waivers are granted at the discretion of the Railroad Safety Board. *Id.* §§ 211.7, 211.9, 211.41, 213.9(c), 213.17. The FRA, however, is drafting regulations applicable to high-speed rail service. *See* 59 Fed. Reg. 57,147, 57,149, 57,162 (1994) (stating that the FRA will promulgate safety rules in 1995 for rail service operating at speeds of up to 160 miles per hour); 60 Fed. Reg. 60,428-29 (1995) (determining that generic high-speed standards will not be promulgated, but that the FRA will address specific issues through appropriate rulemaking).

44. Letter from James T. McQueen, Associate Administrator for Railroad Development, Federal Railroad Administration, to Matthew R. Atkinson, Research Fellow, Pace Environmental Litigation Clinic, Inc. (Oct. 25, 1994) (on file with author). An impenetrable barrier is defined as one that can withstand the force of a 45,000 pound truck travelling at 45 miles per hour. The cost and technology required to deploy such a barrier essentially requires the closure of grade crossings, or a reduction of speed at grade crossings (compromising high-speed service). Telephone Interview with Donald A. Baker, Policy & Program Director, DOT (Sept. 15, 1994).

tion of all grade crossings where speeds in excess of 125 miles per hour are obtained.⁴⁵ The FRA, however, has shown some flexibility in the Northeast Corridor concerning the necessity of closing grade crossings that affect coastal access.⁴⁶ The efficacy of the control technology employed will determine the maximum permitted speeds at grade crossings.⁴⁷

Although high-speed rail service must be approved by the FRA, the DOT coordinates and furthers the implementation of high-speed rail service with Amtrak and the FRA.⁴⁸ The DOT also has the crucial authority to close grade crossings.⁴⁹

45. Letter from James T. McQueen, Associate Administrator for Railroad Development, Federal Railroad Administration, to Matthew R. Atkinson, Research Fellow, Pace Environmental Litigation Clinic, Inc. (Oct. 25, 1994) (on file with author).

46. Grade crossings that implicate coastal access in the Northeast Corridor are in Connecticut. Connecticut law requires that "new or improved shoreline rail corridors" improve coastal access, or, at the most, have a negligible adverse impact upon access. Connecticut Coastal Management Act, CONN. GEN. STAT. ANN. § 22a-92(c)(1)(F) (West 1995). The Connecticut statute has influenced the FRA's application of its general obligation to close grade crossings in the Northeast Corridor under the Amtrak Authorization and Development Act of 1992, Pub. L. No. 102-533, 106 Stat. 3515 (1992) (codified at 45 U.S.C. § 650(a) (Supp. V 1993)) (closure mandate); 45 U.S.C. § 650(b) (allowing the FRA to develop alternatives to grade crossing elimination where safety and necessity permits), at least partly because state law governs actual closures. FRA PLAN, *supra* note 18, app. A, at 1. For example, the FRA considered closure of a crossing, the legality of which was in dispute, that provides access to a beach. Amtrak claims that the crossing is illegal and leads solely to land owned by the railroad. The FRA, nonetheless, recommends construction of a pedestrian tunnel to provide coastal access. *Id.* at IV-8 to IV-15. Another case involved a private marina open to the public, where Amtrak urged condemnation of either the crossing or the entire property. *Id.* at IV-135. The FRA decided that acquisition of the property might violate the Connecticut Coastal Management Act, *id.* at IV-137, and recommended the consideration of improved grade crossing control technology because grade-separation was not feasible. *Id.* at IV-117, IV-124, IV-131.

47. Control technologies advise and control the train when there are hazards and limit vehicular and pedestrian access to the tracks. The FRA is authorized to fund demonstrations of these technologies sponsored by interested states. *See, e.g.*, Notice of Pre-Application Forum for Next Generation High-Speed Rail Program: Demonstration of High Speed Positive Train Control System, 59 Fed. Reg. 46,470 (1994) (encouraging applications for grants to test control systems). New York is expected to apply for these funds.

48. N.Y. TRANSP. LAW § 14-c (McKinney 1994).

49. *See infra* part III.B.2. (Grade Crossing Elimination). The DOT also regulates signage, crossing control technology, N.Y. COMP. CODES R. & REGS. tit.

C. Specific Impacts on Hudson River Access

Public access to the eastern shore of the Hudson River is limited by the presence of the railroad right-of-way which is largely constructed on filled tidal and submerged lands.⁵⁰ To access the river, the public must cross the tracks. Where a crossing is grade-separated, access may be impacted by the financial cost of maintenance.⁵¹ Public safety and railroad liability have long favored the minimization of grade crossings.⁵²

The DOT intends to eliminate, improve, or replace each grade crossing on a case by case basis in consultation with whichever local government, or individual, controls the crossing.⁵³ In addition, the DOT intends to fence portions of the

17(B), pts. 220, 277, 278, 279 (1995), and railroad safety generally. N.Y. COMP. CODES R. & REGS. tit. 17(C), pts. 910-24 (1995).

50. High-speed rail service will only affect the eastern shore. Nonetheless, grade crossings also pose a hazard to commuter rail operated by the Metropolitan Transportation Authority (MTA) on the eastern shore and to Conrail, operating on the eastern and western shores. Two MTA plans may adversely affect access to the river.

The MTA is considering extension of commuter service from Poughkeepsie to Rhinecliff. METRO-NORTH, 1995-1999 STRATEGIC BUSINESS PLAN 25 (Aug. 29, 1994). The extension of commuter service, if implemented, would increase train traffic on the segment and thereby increase pressure to limit access through fencing and the closure of grade crossings. The MTA also is considering three Hudson River crossings under six options for expanded commuter rail service. METRO-NORTH COMMUTER RAILROAD, FEASIBILITY AND BENEFIT-COST STUDY OF TRANS-HUDSON, CROSS-WESTCHESTER AND STEWART AIRPORT RAIL LINKS (1994). The alternatives are the subject of an EIS now being prepared. Five of the six alternatives under consideration provide for commuter service on the West Shore line between West Nyack and Newburgh. *Id.* at S-2. Within the proposed service area, the railroad is adjacent to the river north of the Village of West Haverstraw to Newburgh, a distance of twenty-four railroad miles. Commuter service in this segment would adversely affect the already scarce public access unless the existing grade crossings were preserved. Although pedestrian bridges could be constructed at the grade crossings, vehicle bridges, which are essential to replace grade crossings which serve boat ramps, are impractical at many locations. For a list of the involved crossings, see PACE REPORT, *supra* note 7, at app. A.

51. N.Y. R.R. LAW § 93 (McKinney 1991) governs the allocation of costs for bridge maintenance. The inability of a local government to pay its share may result in the closure of the crossing. See *infra* part III.B.3.

52. See *infra* parts III.B.2. and III.B.6.

53. Telephone Interview with Donald A. Baker, Policy & Program Bureau Director, DOT (Sept. 14, 1994). The only state-wide body with whom the DOT

Empire Corridor where unauthorized crossings are a problem.⁵⁴ The fencing is intended to eliminate crossings not recognized by the DOT and to otherwise prevent casual access to the tracks.⁵⁵ Although the DOT represents the fencing and grade crossing closures as a deliberative and access neutral process, the number of crossings at stake is a matter of dispute, and there is a lack of evidence that closures generally are preceded by formal notice and hearings.⁵⁶

The Hudson River Access Forum (Access Forum) has identified forty-one grade crossings between Rensselaer and Croton-On-Hudson.⁵⁷ The Access Forum also identified twenty-three crossings, grade and grade-separated, that have

coordinates crossing closures is the Greenway Council. The Greenway Council is within the executive department, created pursuant to N.Y. ENVTL. CONSERV. LAW §§ 44-0101 to 44-0121 (McKinney Supp. 1995). The purpose of the council is to promote the "preservation, enhancement and development of the . . . scenic, natural, historic, cultural and recreational resources of the Hudson river valley while continuing to emphasize economic development activities . . ." *Id.* § 44-0101.

Private crossings are not considered a substantial problem. The DOT believes that train dispatcher controlled locking gates are adequate to control these crossings. Telephone Interview with Donald A. Baker, Policy & Program Bureau Director, DOT (Sept. 14, 1994). Nonetheless, peak hour rail service, especially on the commuter lines, will limit private at-grade access substantially. In addition, when high-speed rail service is implemented, the burden of improving access may hinder transfers of private lands for public use, or transfers of public land to recreational use. *See, e.g.,* PACE REPORT, *supra* note 7, at B-3 to B-4 (plan to create public park at Cow Island, Village of Castleton, in question because of agreement with railroad governing grade crossing).

54. "To help control access to the right-of-way, 75 miles of fencing will be installed in urban areas and other key locations." NYS PROPOSAL, *supra* note 10, at 23. The preliminary budget for fencing is \$10 million.

55. *See supra* note 55. The elimination of even improved grade crossings is a high priority. *See infra* part III.B.2.

56. In response to a Freedom of Information Law (FOIL) request sent to the DOT asking for any information concerning grade crossing closures, formal proceedings were disclosed concerning only three crossings. *See* PACE REPORT, *supra* note 7, at app. B. Although archived files were not requested, the disclosed records dated from the early 1970s. The DOT probably ignores the closure of "unrecognized" or "private" crossings, regardless of historic public use.

57. THE HUDSON RIVER ACCESS FORUM, BETWEEN THE RAILROAD AND THE RIVER: PUBLIC ACCESS ISSUES AND OPPORTUNITIES ALONG THE TIDAL HUDSON 137-44 (1989) [hereinafter ACCESS FORUM].

been closed.⁵⁸ A subsequent study by the Pace Environmental Litigation Clinic (*Pace Report*) agreed with the number of total closures, although the status of several crossings had changed.⁵⁹ The DOT has variously reported the number of grade crossings as fifteen between New York City and Stuyvesant,⁶⁰ nineteen between Croton-On-Hudson and Stuyvesant (a lesser distance), and twenty-seven between Croton-On-Hudson and Rensselaer (where the Access Forum identified forty-one).⁶¹ Neither the Access Forum nor the DOT indicates any grade crossings south of Croton.

The *Pace Report* identified informal pedestrian crossings, that were not considered by the Access Forum, which might have legal protection.⁶² Below Croton, the *Pace Report* identified five pedestrian crossings that are in regular use, or have been recently obstructed, where there is evidence of a public right to use the crossing.⁶³ Above Croton, six pedestrian crossings were identified that are used by the public.⁶⁴

The discrepancy in the grade crossing totals reflects the different ways in which grade crossings are being counted. Specifically, the DOT does not recognize the existence of informal crossings that exist in fact. In such situations, closures occur by railroad and/or DOT fiat where there is no public or private authority to defend the crossing.⁶⁵ As a consequence, the DOT discounts the impact of fencing and grade crossing closures on public access to the Hudson River.⁶⁶

58. *Id.* at 137-45. The study area of the Access Forum did not include Bronx County.

59. PACE REPORT, *supra* note 7, at 30 and n.144.

60. NYS PROPOSAL, *supra* note 10, at 22.

61. New York State Department of Transportation, USDOT National Grade Crossing Inventory (July 6, 1994) (on file with author).

62. The basis for legal protection is discussed *infra* parts III.C.2.-4.

63. See PACE REPORT, *supra* note 7, at app. A.

64. *Id.*

65. See *supra* note 56.

66. An informal crossing long used for recreational purposes by the public lacks organizational representation. Fencing may appear as a *fait accompli* to individuals without the financial ability or motivation to lobby or litigate on behalf of their larger constituency. Private landowners may also permit informal coastal access. While public use alone does not create a public easement, nonetheless, if the DOT secures the railroad right-of-way, a *de facto* adverse

D. Procedural Review of Adverse Impacts to Access

New York has no law specifically addressing the impact of rail corridor improvements on coastal access.⁶⁷ The DOT, however, must comply with New York coastal policy and procedures as embodied in the Waterfront Revitalization of Coastal Areas and Inland Waterways Law (Coastal Law),⁶⁸ in addition to environmental review procedures under the State Environmental Quality Review Act (SEQRA).⁶⁹

The Coastal Law authorizes and encourages local governments to develop waterfront revitalization plans.⁷⁰ First, it requires state agencies to complete a Coastal Assessment Form (CAF) when planning an action in a coastal zone prior to making a determination of significance under SEQRA.⁷¹ Second, it requires agencies to act consistently with the policies of the law and with approved local revitalization plans to the "maximum extent practicable."⁷² Finally, it provides for

impact on public access will result. For further discussion of the public use of the public and private paths and roads, *see infra* parts III.C.3.-4.

67. Such a law in Connecticut appears to have helped coastal access despite infrastructure improvements in the Northeast Corridor rail system. *See supra* note 46.

68. N.Y. EXEC. LAW §§ 910-22 (McKinney 1982 & Supp. 1996). The state Act was prompted by the federal Coastal Zone Management Act. 16 U.S.C. §§ 1451-1464 (1994). The federal Act encourages states to develop consistent coastal management programs to further the declared federal policy "to preserve protect, develop, and where it is possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations" *Id.* § 1452(1). The encouragement takes the form of federal funding for approved programs. *Id.* §§ 1454-1455a. Once a program is approved, federal agency actions within an approved coastal zone must conform "to the maximum extent practicable" to the program. *Id.* § 1456(c)(1). Approved programs should provide for "public access to the coasts for recreation purposes." *Id.* § 1452(2)(D). For full discussions of the federal statute *see* NICHOLAS A. ROBINSON, ENVIRONMENTAL REGULATION OF REAL PROPERTY ch. 17 (1994); LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE ch. 2 (1994).

69. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1984 & Supp. 1996). Department of Environmental Conservation regulations, issued under the authority of § 8-0113, describe the types of agency actions that require the preparation of an Environmental Impact Statement (EIS). N.Y. COMP. CODES R. & REG., tit. 6, pt. 617 (1996).

70. *See* N.Y. EXEC. LAW § 915 (McKinney 1982 & Supp. 1996).

71. N.Y. COMP. CODES R. & REGS. tit. 19, § 600.4 (1994).

72. N.Y. EXEC. LAW §§ 916(b), 919(1) (McKinney 1982); N.Y. COMP. CODES R. & REGS. tit. 19, §§ 600.4(c), 600.5 (1994). If a locality objects to a state

New York Secretary of State oversight of agency actions within coastal zones.⁷³ The governing policy is the requirement that an agency balance economic development with the beneficial use, conservation, and access to coastal resources.⁷⁴ Where the coastal lands are publicly owned, the policy is to provide access to such lands.⁷⁵

The DOT does not believe that the preparation of an Environmental Impact Statement (EIS) is required for the incremental implementation of high-speed service.⁷⁶ The DOT further states that its plans have been reviewed by the Department of State and the Department of Environmental Conservation and that these agencies do not believe a programmatic EIS is required.⁷⁷

agency action on the grounds that it is inconsistent with the local waterfront development plan, the agency's determination will be upheld provided that it can marshal "substantial evidence" to justify its decision. *City of New Rochelle v. Public Service Comm'n*, 541 N.Y.S.2d 49 (App. Div., 2d Dep't 1989) (upholding Commission's determination of where to locate transition station despite New Rochelle's contention that the action was inconsistent with its waterfront plan).

73. N.Y. EXEC. LAW §§ 913(4), 916(1) (McKinney 1982). The New York Secretary of State promulgates regulations under the Waterfront Revitalization of Coastal Areas and Inland Waterways Law (Coastal Law). N.Y. COMP. CODES R. & REGS. tit. 19, pts. 600-603 (1994).

74. N.Y. EXEC. LAW § 912. The regulations enlarge upon the statutory public access policy as follows: "Protect, maintain and increase the levels and types of access to public water-related recreation resources and facilities so that these resources and facilities may be fully utilized by all the public in accordance with reasonably anticipated public recreation needs" N.Y. COMP. CODES R. & REGS. tit. 19, § 600.5(e)(1).

75. *Id.* § 600.5(e)(2).

76. The DOT reasons that no acquisition of additional right-of-way is anticipated along the Hudson River and the alteration of signaling systems and an increase in the speed of service, standing alone, do not have environmental impacts. The DOT concedes that the removal of crossings, or the construction of grade-separated crossings, might require the preparation of site specific EISs. Telephone Interview with Donald A. Baker, Policy & Program Bureau Director, DOT (Dec. 5, 1994).

77. *Id.* The FRA also is not planning to prepare an EIS under the National Environmental Policy Act (NEPA). Telephone Interview with Mark Yachmetz, FRA Chief of Passenger Program Division (Sept. 27, 1994). While the FRA is the agency authorizing funds for the Northeast Corridor, no federal funds are presently available for capital projects in the Empire Corridor. At present, the only action FRA will take concerning the Empire Corridor will be the approval,

The DOT rests heavily on the assertion that it does not have a high-speed rail plan *per se*, but only a plan to "improve" the infrastructure, which will improve existing service, as well as facilitate high-speed service. This "no plan" plan appears designed to avoid environmental review.⁷⁸

The DOT's position also depends on its debatable assertion, without formal findings, that it will not diminish coastal access. Under the provisions of the Coastal Law and SEQRA, such an adverse impact would require an EIS, and any plan that affects access would require preparation of a CAF.⁷⁹ The DOT has not prepared one EIS or CAF in view of its closure plans.⁸⁰

The requirement of an EIS turns upon whether there may be the potential for an adverse environmental impact by

or disapproval, of high-speed service. The FRA does not consider its approval to have an environmental impact. *Id.*

78. New York's "little NEPA," SEQRA, presumes that an environmental impact statement (EIS) must be prepared if the agency action "may" have the potential for a significant environmental impact. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7. The refusal to consider the high-speed rail implementation as a "plan" violates SEQRA's proscription of the segmentation of agency actions to avoid environmental review. *Id.* §§ 617.2(ag), 617.3(g)(1).

NEPA, 42 U.S.C. §§ 4321-70d (1988 & Supp. V 1993) (applicable to federal agency actions), sets a higher threshold for EIS review. Under NEPA, the agency action only requires EIS review if the action "will" have an impact. *See* 40 C.F.R. § 1508.13 (1995) (no environmental impact statement required when the action will not have a "significant effect on the human environment"). The FRA treatment of the Northeast Corridor improvements as requiring substantial environmental review stands in stark contrast to the DOT's "no plan" plan to make similar improvements without general environmental review, despite the lower threshold for New York State agencies to prepare an EIS than that of the FRA under NEPA. FRA environmental impact review to date for the Northeast Corridor has been general, NORTHEAST CORRIDOR IMPROVEMENT PROJECT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT (1978), and site specific, FRA PLAN, *supra* note 18, at I-11 ("more than 160 site specific environmental reviews . . . have been prepared by the FRA to address individual subcomponents of the project").

79. An agency considering an action that might affect coastal access is required to submit a Coastal Assessment Form (CAF) to the Secretary of State before making a determination of significance under SEQRA. *See supra* note 71.

80. The DOT stated that no EISs or CAFs have been prepared concerning public access in response to a FOIL request sent by the author.

limitations on access.⁸¹ Without comprehensive study, the threshold question cannot be answered definitively (the purpose of an EIS review), but there are several indications that the implementation of high-speed service, or preparation for the same, will result in diminished access. The closures noted by the Access Forum and the *Pace Report*,⁸² the discrepancy in the number of actual crossings, and the plan to fence the corridor which will cut off DOT unrecognized access, including informal access, all point to a substantial likelihood that implementation of the DOT's plans will adversely affect access to the river.

III. Substantive Law Affecting Access to the Hudson River

A. The Public Trust Doctrine

1. Introduction

The inalienable right of the general public to use coastal and navigable waters is the essence of the public trust doctrine. To insure the public right, the trust limits the private appropriation of lands under water clothed with the trust. The public trust doctrine applies to the public's right to access the Hudson River in two ways. The first issue is one of access. The corollary to the public trust doctrine is that the alienation of trust lands is unlawful if the right to use remaining trust lands and waters is unreasonably denied.⁸³ The second issue is the extent of the state's power to grant trust lands to railroads and the title such grants convey. These issues overlap because the grant of trust lands to railroads adversely affects public access to the remaining trust lands and waters of the Hudson River.

81. Noise and vibration are issues that also should be considered. The issues are important because of the proximity of the right-of-way to recreational locations and residential communities along the Hudson.

82. See *supra* part II.C.

83. The New Jersey Supreme Court indicated that it would go further and consider imposing a public easement over non-trust private lands where necessary to give meaningful effect to the right of the public to access and use trust lands and waters. See *infra* note 104 and accompanying text.

Granting over half the shoreline to railroads, to the complete exclusion of access, violates the right of the public to access the river and the sovereign responsibility of the state under the public trust doctrine.⁸⁴ Public trust doctrine, therefore, grafts limitations on the railroads' title to trust lands, as well as on the state's power to alienate the public's trust lands.

2. Background

a. Historical Antecedents

A recurring judicial question is whether the state has the power to extinguish the public trust in lands under water. The decisions of the New York courts considering this issue are inconsistent. A cause for this inconsistency is the historical and political context in which the public trust doctrine developed.

Although the doctrine reaches far into antiquity, the first codification is ascribed to the Roman Emperor Justinian in the sixth century A.D.⁸⁵ The Justinian Code declared that the use of the shore, sea, and rivers were common public rights.⁸⁶ Under Roman law, therefore, some lands were not susceptible to private ownership as we understand private ownership today.⁸⁷ The roots of the doctrine were in Greek natural philosophy⁸⁸ which subsequently served, perhaps unintentionally, as a check on the power of government, akin to a natural bill of rights.

The history of the doctrine under English common law began with the Magna Carta's limitation on obstructing navigation in rivers.⁸⁹ Thereafter, the doctrine developed piecemeal under the common law.⁹⁰ The principal modification of

84. See *infra* part III.A.3.c.iii.

85. DAVID C. SLADE, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 4 (1990); Note, *The Public Trust in Tidal Areas: A Sometime Submerged Doctrine*, 79 YALE L.J. 762, 763 (1970) [hereinafter *Submerged Doctrine*].

86. SLADE, *supra* note 85, at 5.

87. A fundamental element of private property is the owner's right to exclude others. See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

88. SLADE, *supra* note 85, at 4; *Submerged Doctrine*, *supra* note 85, at 763.

89. *Submerged Doctrine*, *supra* note 85, at 765-67.

90. *Id.*

Roman law was a division of trust lands into two interests. Trust lands could be held privately, an interest termed the *jus privatum*, subject to public rights, termed the *jus publicum*.⁹¹ This division continues to confound the doctrine today.

The Crown held the *jus privatum* in a proprietary capacity, and the *jus publicum* in trust for the people.⁹² The difficulty with this division lies in the fact that Parliament came to represent the people. In recognition of the dual sovereignty, courts in New York often reasoned, at least in theory, that the Crown and Parliament could jointly extinguish the public trust.⁹³ Thus, the state, holding all sovereign powers, could do the same.⁹⁴ Of course, this analysis converted a public right into an alienable property interest, a conclusion at odds with the basic tenet of the public trust doctrine that some lands are not susceptible to private property ownership. The judiciary has served as an uncertain defender of the non-property interest in lands under water.

b. State Law Variations

There are three principal issues that affect the application of the public trust doctrine. The first issue involves determining what waters and lands are subject to the public trust. The second issue is the scope of the protected trust interests. The third issue is the extent to which a state may alienate trust lands.

The majority rule, and the general rule in New York,⁹⁵ applies the trust doctrine to all waters which are navigable in

91. SLADE, *supra* note 85, at 15; JACK H. ARCHER ET AL., *THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS* 6-7 (1994).

92. *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 91 N.E. 846, 847 (N.Y. 1910).

93. *People v. Steeplechase Park Co.*, 113 N.E. 521, 526-27 (N.Y. 1916); *People v. New York and Staten Island Ferry Co.*, 68 N.Y. 71, 77 (1877); *Lansing v. Smith*, 4 Wend. 9, 21 (N.Y. 1829). *But see* *Coxe v. State*, 39 N.E. 400, 402 (N.Y. 1895) (stating that Parliament and the King jointly could not extinguish the public trust).

94. Although New York courts have sometimes broadly asserted the proposition, an analysis of the holdings indicates that some limitations apply. See *infra* parts III.A.3.ii.-iii.

95. See *infra* part III.A.3.a.

fact, to all tidal waters,⁹⁶ and to the lands under tidal waters.⁹⁷ The minority rule, which is followed in New Jersey,⁹⁸ Massachusetts,⁹⁹ and Mississippi,¹⁰⁰ only applies the trust doctrine to tidal waters. The majority of states, including New York, apply the public trust rights to state waters extending from the former seaward limit of the territorial sea (three nautical miles) to the mean high-tide line.¹⁰¹ Seven states apply the public trust only to lands seaward of the low-tide line.¹⁰²

In recent years, there has been an expansion beyond the traditional boundaries of lands and waters subject to the public trust. The New Jersey Supreme Court held that the general public must have reasonable access to the dry sand (non-tidal) areas of municipal and quasi-municipal beaches.¹⁰³ The California Supreme Court has held that the state, as trustee of its public trust lands, may regulate the use of non-

96. Tidal character, usually, is defined by the influence of the oceanic tide, regardless of the salt content of the water. See SLADE, *supra* note 85, at 28. See also *People v. Tibbitts*, 19 N.Y. 523, 526 (1859); *Attorney General v. Woods*, 108 Mass. 436, 439 (1871). In North Carolina, however, the state's highest court held that the tide only refers to the ebb and flow of the sea, therefore, the tide only extends as far as the salt water line. *Collins v. Benbury*, 27 N.C. 118, 124 (1844).

97. ARCHER, *supra* note 91, at 15-16. The Supreme Court held that the Great Lakes, although not tidal, were "navigable-in-fact" and, consequently, were subject to the public trust. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 435-36 (1892). See also *infra* notes 176-78 and accompanying text (describing New York rule concerning title to lands under navigable fresh water); SLADE, *supra* note 85, at 25 (ownership of lands under trust waters).

98. *Cobb v. Davenport*, 32 N.J.L. 369, 378 (1867).

99. *Ingraham v. Wilkinson*, 21 Mass. (4 Pick.) 268, 270-272 (1826). See also *Trustees of Hopkins Academy v. Dickinson*, 63 Mass. (9 Cush.) 544, 546-548 (1852).

100. See *Morgan and Harrison v. Redding*, 11 Miss. 334 (1844); *State ex rel. Rice v. Stewart*, 184 So. 44 (Miss. 1938).

101. ARCHER, *supra* note 91, at 15-16.

102. *Id.* These states are Delaware, Maine, Massachusetts, New Hampshire, Pennsylvania, Virginia and Wisconsin.

103. *Matthews v. Bay Head Improvement Ass'n, Inc.*, 471 A.2d 355, 363-66 (N.J. 1984) (indicating that the court also might recognize a public right to use private dry sand beaches where necessary to protect public use of the shore generally).

navigable waters when such use affects public trust waters.¹⁰⁴

The second issue is the scope of the protected public trust doctrine interests. The core public trust uses are fishing, commerce and navigation.¹⁰⁵ However, many other uses are also recognized as protected public trust uses.¹⁰⁶ These include bathing, hunting, swimming, skating, cutting ice,¹⁰⁷ watering cattle, boating, and recreation.¹⁰⁸

In recent years, several states have recognized the preservation of trust land in its natural state as a protected public trust use.¹⁰⁹ Finally, at least three state courts have recognized the right of the public to preserve trust lands and waters simply to preserve the scenic beauty of the area.¹¹⁰

The power of the state to alienate the trust is the most divisive issue. Absolute conveyances of limited public trust

104. *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983).

105. ARCHER, *supra* note 91, at 23.

106. See, e.g., *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158, 167 (1863) ("It would be scarcely be necessary to mention bathing, or the use of the waters for washing, or watering cattle, preparation of flax, or other agricultural uses, to all which uses a large body of water, devoted to the public enjoyment, would usually be applied"); *Arnold v. Mundy*, 6 N.J.L. 1, 12 (1821); *Matthews*, 471 A.2d at 358 ("The public's right to use the tidal lands and water encompasses navigation, fishing and other recreational uses, including bathing, swimming, and other shore activities."); *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (public trust easements include the right to fish, hunt, bathe, swim, and to use for boating and general recreation).

107. See *Cummings v. Barret*, 64 Mass. (10 Cush.) 186, 188 (1852) (holding that all ponds are public and are subject to reasonable uses including supplying ice houses); *Hartford v. Town of Gilmanton*, 146 A.2d 851 (N.H. 1958) (public trust interests include right to skate and cut ice).

108. But see *Bell v. Town of Wells*, 557 A.2d 168, 169 (Me. 1989) (excluding recreation as a recognized public trust right).

109. See, e.g., *Marks v. Whitney*, 491 P.2d at 380; *Saxon v. Division of State Lands*, 570 P.2d 1197 (Or. Ct. App. 1977) (holding that the public interest is better served by retaining a salt marsh in an unimproved, natural condition); *Save Ourselves, Inc. v. Louisiana Env'tl. Control Comm'n*, 452 So. 2d 1152, 1158 (La. 1984) (stating that the Louisiana environmental regulatory framework is based, to an extent, on the public trust doctrine).

110. These three states are California, Pennsylvania, and Wisconsin. See *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 719 (Cal. 1983); *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976); *State v. Trudeau*, 408 N.W.2d 337 (Wis. 1987).

lands to private parties are generally permissible, provided the legislature expressly states its intent to extinguish the public's interest, the conveyance was made for a valid public purpose, and the affected lands are no longer suitable for public trust uses.¹¹¹ Some states recognize the conveyance of small tracts of trust lands to private persons for purely private purposes,¹¹² although such conveyances are contrary to the basic trust doctrine.¹¹³ One state suggests that the legislature is powerless to divest public trust lands absolutely.¹¹⁴

The public purpose used to validate conveyances of public trust lands relates to the lands and waters remaining, and not to any interest that would further the general common good of the public.¹¹⁵ In practice, however, the definition of public purpose has also encompassed uses unrelated to the water-related interests protected by the public trust doctrine.¹¹⁶

c. Federal Law

The public trust doctrine is principally defined by state law. A body of federal law, however, has developed in areas where there is otherwise federal competence. Federal law defines or limits the public trust doctrine under the Commerce Clause, treaty law, United States territorial law, when exer-

111. See, e.g., *Opinion of the Justices*, 437 A.2d 597, 606 (Me. 1981); *City of Berkeley v. Superior Court of Alameda County*, 606 P.2d 362, 369 (Cal. 1980); *Opinion of the Justices*, 424 N.E.2d 1092, 1100 (Mass. 1981).

112. See, e.g., *People v. Steeplechase Park Co.*, 113 N.E. 521 (N.Y. 1916).

113. See *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892). Cf. *Steeplechase Park Co.*, 113 N.E. 521 (holding that a grant for beneficial enjoyment of the upland owner for consideration conveyed absolute title without deciding power of the legislature).

114. See *Vermont v. Central Vt. Ry.*, 571 A.2d 1128, 1133 (Vt. 1989) (suggesting that the legislature can grant no more than a fee simple conditional in trust lands to protect the public interest, but holding that because the grant in the instant case was conditional, the court need not decide if the legislature's power is so limited).

115. *People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773, 779-81 (Ill. 1976).

116. These uses include offshore oil production, *Boone v. Kingsbury*, 273 P. 797, 815-17 (Cal. 1928), and the assurance of marketability of title to structures built on filled-in trust lands, *Opinion of the Justices*, 423 N.E.2d 751 (Mass. 1981).

cising the power of eminent domain, upon the admission of states into the Union, and where a state's construction of the public trust gives rise to a claim by a property owner under the federal constitution.

i. Commerce Clause

Under the Commerce Clause, the federal government has regulatory jurisdiction over foreign trade and trade between the states.¹¹⁷ In *Gibbons v. Ogden*, the United States Supreme Court held that the authority over trade also conveyed to the United States jurisdiction over navigation.¹¹⁸ Therefore, state sovereignty over navigable waters is subject to federal regulation of navigation.¹¹⁹

All private property interests are subject to the federal regulation of navigable waters. This limitation on property interests is called the "navigational servitude."¹²⁰ Private claims inconsistent with the exercise of the servitude are not recognized.¹²¹ The Commerce Clause, therefore, limits state and private interests in trust lands and waters rather than defining the trust doctrine itself.

117. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

118. 22 U.S. (9 Wheat.) 1 (1824).

119. *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 435 (1892).

120. The navigational servitude generally relieves the government of the obligation to pay compensation when interfering with the private ownership of riparian, littoral, or submerged lands which, if not for the fact that navigable waters are involved, would require compensation under the Fifth Amendment. *Boone v. United States*, 944 F.2d 1489 (9th Cir. 1991).

121. *Id.* See also, *United States v. Willow River Power Co.*, 324 U.S. 499 (1945) (no taking where alteration of river's level to improve navigation adversely affected hydro-electric plant); *Donnell v. United States*, 834 F. Supp. 19 (D. Me. 1993) (no taking where Army Corps of Engineers suspended plaintiffs' nationwide permit and suspension resulted in loss of a property interest recognized under Maine law). Cf. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (holding that the United States could not require a public easement over waters of a private marina under doctrine of navigational servitude without paying compensation where marina created from a Hawaiian fishpond deemed fast lands under Hawaiian law); accord *Boone v. United States*, 944 F.2d 1489 (9th Cir. 1991).

ii. Treaty Law

In *Summa Corp. v. California State Lands Commission*,¹²² the Supreme Court construed the effect of federal patents conveying lands under the 1851 Act which settled land claims between the United States and Mexico pursuant to the Treaty of Guadalupe Hidalgo.¹²³ The Court held that California could not, in 1984, assert a public trust easement over tidal lands because it had failed to assert the interest when the land patents were settled.¹²⁴ The Court refused to inquire into the Mexican law then in effect, holding, as a matter of federal law, that the settlement of land claims under the Treaty did not permit any reservations by implication.¹²⁵

In sum, the Court held that the public trust interest of California, a sovereign interest, was subject to the procedure set forth in a federal statute to settle an obligation under international law. The procedure to settle land claims, however, was silent as to the applicable substantive law. The Court devised a rule of federal common law to displace the state trust doctrine without inquiring whether either Mexican law or principles of international law required such a result.¹²⁶

122. 466 U.S. 198 (1984).

123. *Id.* at 205. The Court acknowledged the principle that an ordinary federal patent purporting to convey tidelands located within a state to a private individual is invalid, since the United States only holds such tidelands in trust for the state. The federal patents issued in this case, however, were merely confirmatory of Mexican patents. *Id.* According to the terms of the 1851 Act, any claim adverse to a Mexican patent had to be presented within two years. *Id.* at 203. The failure of California to timely assert an interest in the lands, therefore, waived its claim of a public trust interest in the tidal lands. *Id.* at 209.

124. *Summa Corp.*, 466 U.S. at 209.

125. *Id.* at 198.

126. The Court stated that the federal question before it was the interpretation of the 1851 Act. *Id.* at 201 n.1. If under applicable Mexican law, the Mexican patents were subject to the public trust, the argument is weak that the transfer of the sovereign interest to California somehow violated the obligation of the United States to recognize the Mexican patents. The Court hints that a reluctance to disrupt settled property expectations, while undertaking an uncertain determination of 19th Century tidal boundaries and Mexican law, may have influenced its decision. See *Summa Corp. v. California State Lands*

iii. Eminent Domain

When the United States exercises the power of eminent domain and takes public trust lands under the Fifth Amendment,¹²⁷ the issue raised is whether the taking extinguishes the public trust. The applicable case law is inconclusive.

In *United States v. 1.58 Acres*,¹²⁸ the district court held that the United States may obtain fee simple title through condemnation of public trust lands¹²⁹ held by the Commonwealth of Massachusetts, subject, however, to the public trust.¹³⁰ The court found that in addition to acquiring title to the submerged lands, the federal government also became the substituted trustee of the public interest, an interest which remained undiminished, although the state's interest was wholly extinguished.¹³¹ Key to the holding was the finding that the United States, in its sovereign capacity, also holds submerged lands subject to the public trust.

In *United States v. 11.037 Acres*,¹³² the United States exercised its power of eminent domain over filled tidal lands that, under California law, had not lost their character as trust lands.¹³³ The District Court for the Northern District of California held that, under the Supremacy Clause, federal eminent domain completely extinguished the state's public trust easement.¹³⁴ The court expressly declined to follow *United States v. 1.58 Acres*, which it misconstrued as holding

Comm'n, 466 U.S. 198, 201 n.1, 202 n.2 (1984) (noting that a recognition of California's public trust interest could affect title to thousands of acres).

127. "[No] private property [shall] be taken for public use, without just compensation." U.S. CONST. amend. V.

128. 523 F. Supp. 120 (D. Mass. 1981).

129. *Id.* at 120-21.

130. 523 F. Supp. at 120. Massachusetts follows the minority rule that public trust lands do not include the intertidal shore, but extend seaward of the mean low water mark. See *supra* note 103 and accompanying text.

131. *Id.* at 124. "It must be recognized, however, that the federal government is as restricted as the Commonwealth in its ability to abdicate to private individuals its sovereign *jus publicum* in the land." *Id.* at 125.

132. 685 F. Supp. 214 (N.D. Cal. 1988).

133. *Id.* Under California law, only the legislature can authorize the extinguishment of the trust by filling submerged lands. *Id.* at 216 (citing *City of Long Beach v. Mansell*, 476 P.2d 423 (Cal. 1970)).

134. 685 F. Supp. at 217.

that the state's public trust easement survived condemnation.¹³⁵ The court did not consider whether the federal government took the lands subject to the trust doctrine as an element of federal sovereignty, nor did the court say whether the United States could extinguish the public trust in lands which had not been filled. Also, the court's reasoning did not suggest that the extinguishment of the public trust depended upon a distinction between filled and unfilled public trust lands.¹³⁶ The court did not address *City of Alameda v. Todd Shipyards*,¹³⁷ an earlier case in which the Northern District of California had followed *United States v. 1.58 Acres*.

In *City of Alameda*, one issue was whether the United States could convey condemned trust lands to a private party.¹³⁸ The district court explicitly adopted the reasoning of *United States v. 1.58 Acres* and held that the federal exercise of eminent domain over tidal lands did not extinguish the trust, but rather transferred the trust to the United States.¹³⁹ The court modified the rule, however, by holding that when the lands had been filled prior to the federal exercise of eminent domain, then the United States took the lands free from the public trust and could, therefore, convey them to a private party.¹⁴⁰

The rule in *1.58 Acres* is that the public trust doctrine applies to lands acquired by the United States through eminent domain as a characteristic of federal sovereignty. Although *11.037 Acres* appears to reject this rule, it misstates

135. *Id.*

136. The court rightly acknowledged that the trust doctrine, under California law, could apply to filled lands. *Id.* at 216.

137. 635 F. Supp. 1447 (N.D. Cal. 1986) [hereinafter *Alameda II*].

138. *Id.* at 1450.

139. *Id.*

140. *Id.* For an earlier decision in the same case, see *City of Alameda v. Todd Shipyards Corp.*, 632 F. Supp. 333 (1986) where the court applied California law to the alienation of trust lands generally. *Id.* at 336-37. On rehearing, however, the court carved out the federal common law exception to California law. 635 F. Supp. at 1450. Under the exception, the federal exercise of eminent domain, after trust lands had been filled, extinguished the public trust in those lands despite the fact that under California law, filling trust lands has no effect on their character as trust lands. The court provides no rationale for its choice of law.

the holding and only denies, on the facts, that the federal government takes filled trust lands subject to the trust. *City of Alameda* is consistent with both *1.58 Acres* and *11.037 Acres*. *City of Alameda* approves of the rule in *1.58 Acres* while inventing a federal common law rule that filled trust lands are taken free of the trust. The cases may be harmonized by stating the rule as follows: the federal government takes trust lands subject to the public trust, but it is not constrained by the contours of a specific state doctrine, rather federal courts may develop federal doctrine where uniformity or federal interests are desirable.¹⁴¹

iv. Admission of States into the Union

Federal courts have jurisdiction to determine the interest granted to a newly admitted state, in addition to determining what lands are granted to that state.¹⁴² The principle which governs the determination is the equal footing doctrine. The doctrine, in pertinent part, states: "The new states have the same rights, sovereignty, and jurisdiction over [submerged

141. The prevailing federal jurisprudence treats public trust doctrine as a matter of state common law, *see, e.g.*, *Shively v. Bowlby*, 152 U.S. 1, 26 (1894), however, where the federal government holds public trust lands in its sovereign capacity, the application of only federal law to such lands is reasonable. Of course, federal common law can adopt state law for most purposes. For example, the boundary of trust lands varies under state law. In *1.58 Acres*, under Massachusetts law, the trust lands in question were below the low water mark. If federal common law adopted the majority rule, that trust lands begin at the mean high water mark, then the federal acquisition of lands in Massachusetts might engraft a public easement over what were previously wholly private lands. As a matter of public policy, therefore, federal common law might adopt the law of the state to determine the bounds of the public trust lands, while developing federal rules where uniformity is desirable, or perceived federal interests are served. In *Alameda*, the court's rule concerning the effect of eminent domain on previously filled lands presumably serves a perceived federal interest. None, however, is articulated and the only apparent interest is marketable title. The rule merely enabled the federal government to convert public trust lands, under California law, into fee simple uplands through the exercise of eminent domain.

142. *See Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 369-70 (1976) (citing *Borax, Consol. v. Los Angeles*, 296 U.S. 10 (1935)).

lands] as the original states."¹⁴³ In other words, "the federal government holds title to the beds of navigable waterways in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an equal footing with the established States."¹⁴⁴ Barring a superior federal interest, a newly admitted state is provided the broadest jurisdiction over submerged lands as was found in the original thirteen states; thereafter, the state is left to shape its own public trust doctrine.¹⁴⁵

The federal policy of allowing states latitude in determining the limits of state jurisdiction over public trust lands is illustrated by *Phillips Petroleum Co. v. Mississippi*.¹⁴⁶ In *Phillips Petroleum*, the United States Supreme Court considered whether states obtained title to tidal lands which were neither navigable nor adjacent to a navigable waterway. The issue was of first impression in Mississippi,¹⁴⁷ however, title to the land in question had been held privately, and property taxes paid upon it, since Mississippi was admitted into the Union in 1817.¹⁴⁸ The Court held that when Mississippi became a state, it took title to all tidal lands regardless of whether the surface waters, or adjacent surface waters, were navigable in fact.¹⁴⁹

v. Claims Under the Federal Constitution

Federal interpretation of public trust doctrine has also been shaped by landowners' constitutional claims. In *Illinois*

143. *Pollard's Lessee v. Hagan*, 44 U.S. 212, 230 (1845). Congress codified this common law principle in 1953 with the passage of The Submerged Lands Act. 43 U.S.C. § 1311 (1994).

144. *Alaska v. United States*, 754 F.2d 851, 853 (9th Cir. 1985) (quoting *Montana v. United States*, 450 U.S. 544, 551 (1981)). Whether a particular body of water is navigable for purposes of title is a federal question. *Id.*; *Utah v. United States*, 403 U.S. 9 (1971); *Mobil Oil Corp. v. Coastal Petroleum Co.*, 671 F.2d 419 (11th Cir. 1982).

145. See *Shively*, 152 U.S. at 1. Local custom and territorial law may shape the doctrine applicable to a state prior to its admission. *Id.* at 2.

146. 484 U.S. 469 (1988).

147. *Id.* at 482.

148. *Id.* at 492 (O'Connor, J., dissenting).

149. *Id.* at 476.

Central R.R. v. Illinois,¹⁵⁰ the Court addressed the validity of a legislative grant to a railroad company of over 1,000 acres of submerged lands under Lake Michigan, comprising the major part of the harbor of Chicago.¹⁵¹ The Illinois Legislature rescinded the grant under subsequent legislation. The railroad contended that the rescinding legislation violated the Contracts Clause¹⁵² and the Due Process Clause¹⁵³ of the Constitution.

The Court upheld the rescinding legislation on the grounds that the legislature was powerless to make an irrevocable grant in the first place.¹⁵⁴ The Court noted that the legislature could grant limited quantities of trust lands "for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains"¹⁵⁵ Aside from such limited grants, "[t]he control of the State for the purposes of the trust can never be lost The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."¹⁵⁶ The original grant, therefore, was a mere license, revocable by the state.¹⁵⁷

Illinois Central R.R. does not squarely address whether it is federal or state law that limits the power of the legislature to alienate trust lands.¹⁵⁸ Presumably, the Court is de-

150. 146 U.S. 387 (1892).

151. *Id.* at 454.

152. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10.

153. "[N]o State [shall] deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1.

154. 146 U.S. at 453-54.

155. *Id.* at 454.

156. *Id.*

157. *Id.* at 461-62. Divestment of the railroad's title and control of improvements made in reliance upon the license, however, may be compensable. *Id.* at 455.

158. The Supreme Court has subsequently indicated, however, that the law applied in *Illinois Cent. R.R.* was the state law of Illinois. *Appleby v. City of New York*, 271 U.S. 364, 395 (1926). Certainly the state courts in Illinois have

claring binding state law under the Supremacy Clause. Under Contract Clause analysis, a federal court makes an independent determination of the state law that would otherwise govern the threshold issue of whether a contract is valid.¹⁵⁹ The United States Supreme Court may even reverse a state's highest court on a question of state law.¹⁶⁰ This extraordinary review is deemed necessary to ensure federal protection of the constitutional prohibition.¹⁶¹ A rare example of such a reversal is found in the public trust doctrine case of *Appleby v. City of New York*.¹⁶²

The facts of *Appleby* are complex, involving a series of valid regulations and enactments by New York City, New York State, and the United States Secretary of War, concerning title to submerged lands and placement of bulkhead lines.¹⁶³ In brief, the plaintiffs received a grant of submerged lands for beneficial enjoyment with the authority to wharf out to a bulkhead line approved by the Secretary of War, but later moved inland by New York City. As a result, the westerly portion of the submerged lands became unavailable for the construction of wharves. New York City, controlling the adjacent piers, had commenced dredging the lands, while permitting the mooring and docking of vessels on the surface waters. The plaintiffs brought an action to enjoin the dredging and the use of the surface waters. The New York Court of Appeals held that until the owner appropriated the submerged lands by the erection of docks, title was held subject

followed the rule of *Illinois Cent. R.R.*, see *People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773 (1977), nonetheless, the *Illinois Cent.* Court does not cite one *Illinois* case when deciding the public trust doctrine rule. 146 U.S. at 452-62.

159. *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992).

160. The constitutional prohibition, however, only applies to state legislative enactments and not to judicial decisions. *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924). State courts can only be reversed in conclusions concerning the effect of state legislation (whether it impairs a contract).

161. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938).

162. 271 U.S. 364 (1926) (*rev'g* 139 N.E. 474 (N.Y. 1923)).

163. For the following facts see *Appleby*, 192 N.Y.S. 211, 213-19 (App. Div., 1st Dep't 1922).

to public control of navigation; thus, the injunction was denied.¹⁶⁴

The Supreme Court conceded that state law controls the City's right to use and regulate granted lands and surface waters,¹⁶⁵ characterizing the issue as "the extent of the power of the State and city to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself."¹⁶⁶ The Court undertook an exhaustive survey of New York cases to deduce that under New York law, within limits,¹⁶⁷ the state may fully divest itself of the public interest in unappropriated submerged lands, at least where the fee is granted for valuable consideration.¹⁶⁸

164. *Appleby*, 139 N.E. 474, 476 (N.Y. 1923).

165. 271 U.S. at 380. The City's title to the submerged lands stems from colonial grants and by state legislation. The City thus stands in the shoes of the state and holds both the proprietary and sovereign title to the submerged lands. *Langdon v. Mayor of New York*, 93 N.Y. 129, 143-45 (1883).

166. 271 U.S. at 380. The federal questions involved the effect of the Secretary of War's bulkhead line, and the Contract Clause. *Id.* Thus, the power of the legislature was directly before the Court. *Cf.* *People v. Steeplechase Park Co.*, 113 N.E. 521 (N.Y. 1916) (finding that the power of the legislature was not before the court when determining if a beneficial grant contained a reservation for public access).

167. The Court acknowledged limits under *Coxe* and *Illinois Cent. R.R.*, but noted that both cases admitted the right of the state to "surrender[], alienate[], or delegate[] [submerged lands] . . . for some public purpose, or some reasonable use which can fairly be said to be for the public benefit." *Id.* at 395 (quoting *Coxe*, 39 N.E. at 402 (citing *Illinois Cent. R.R.*, 146 U.S. 387)).

168. 271 U.S. 364, 382-83, 400-03 (1926) (distinguishing *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71 (1877)). *New York & Staten Island Ferry Co.* held that legislation moving the pier line closer to shore prior to grantee's construction of a pier over patented submerged lands was not a taking since title was held subject to the sovereign's power to regulate navigation. *Id.* at 79. The Supreme Court in *Appleby* held that the patent in *New York & Staten Island Ferry Co.* was apparently a gift, and not for valuable consideration as in *Appleby*. *Appleby*, 271 U.S. at 383.

With exasperating imprecision, the *Appleby* court opined that the city had divested its public interest and "must be content with sailing over with boats as it finds it [in its natural condition]." *Id.* at 400. Of course, sailing over the lands is a public interest, an apparently retained interest which limits the holding, although not in a practical sense. If unable to dock vessels on the adjacent piers, the core public trust interest, commercial navigation, is extinguished in fact.

The principal difficulty with *Appleby* is that the Supreme Court reversed the New York Court of Appeals on a question of state law that was of first impression. No prior Court of Appeals case had decided whether the legislature could or did alienate its control over public navigation, under a beneficial grant for valuable consideration, where the grantee had not appropriated the submerged lands by the construction of a wharf.¹⁶⁹ Consequently, the decision may be attacked on the ground that the Supreme Court did not decide what the New York law was, but what it believed was a better law.¹⁷⁰

169. The Supreme Court principally relied upon *Langdon v. Mayor of New York*, 93 N.Y. 129; *Williams v. Mayor of New York*, 11 N.E. 829; and *Steeplechase*. All three cases involved grants for valuable consideration where the lands had been appropriated. *Steeplechase* only interpreted the grant and explicitly does not reach the issue of the legislature's power. See *infra* notes 235-47 and accompanying text.

170. The Court stated that it made an independent determination, regardless of whether the question was governed by "issues of general or purely local [New York] law." *Appleby*, 271 U.S. at 380. Although the Court only cited New York cases, the decision may have been influenced by the Court's suggestion that its independent determination might consider "general" legal principles. For example, in a circuitous manner, the Court seems to find that the federal government's establishment of the bulkhead line somehow concludes the City's sovereign control of patented lands within the federal boundary. *Id.* at 401-402 (arguing that City had conveyed the right to build bulkheads or piers along with submerged lands somehow shown by analyzing the effect of the federal action). "General" federal common law was repudiated by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Indeed, the competence of the Court under the Commerce Clause is questionable. The Court stated that it was construing the effect of state legislation affecting the bulkhead line and pier locations. *Appleby*, 271 U.S. at 380-81. In fact, the entire decision concerned what property interest New York conveyed to the plaintiffs, a question of common law normally not reviewable under the Contract Clause. See *supra* note 160.

The application of the Contract Clause to land grants is suspect in any case. See Douglas W. Kmiec and John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 539-40 (1987). Strict application of the Contract Clause to land grants would prohibit all legislative and common law development of private property rights, including zoning, nuisance, and pollution laws. If states utilize public trust doctrine to exert control over water related resources, limitations on private interests may be subject to federal oversight under takings and Contract Clause analyses. Such oversight could freeze the common law development of public trust doctrine in favor of private property rights. See, e.g., *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (holding that coastal zone regulations that render private property valueless a taking unless justifiable under tradi-

3. Public Trust Doctrine in New York

a. Scope of the Public Trust Interest

In New York, the public trust doctrine applies to submerged lands and surface waters.¹⁷¹ The application to submerged lands results in a restriction on private use, whereas the application to surface waters permits public use. In either case, the doctrine protects the right of the public to use surface waters for navigation.

Public trust lands in New York include all lands washed by the tides and certain lands under navigable non-tidal waters. Unless previously granted, title to all lands subject to the tide is vested in the state.¹⁷² Title to lands under fresh water depends upon the status of the water body.¹⁷³ Where rivers and lakes form the boundaries of the state, title to the submerged lands beneath them is vested in the state.¹⁷⁴ In addition, title to the lands beneath the Mohawk River and the non-tidal upper Hudson River is also vested in the state.¹⁷⁵ Title to all other purely intrastate rivers, streams, ponds, and smaller lakes is presumptively vested in the adjacent upland owners.¹⁷⁶ Title to large intrastate lakes with a history of public navigation may be vested in the state.¹⁷⁷

tional state nuisance law, suggesting that innovations in state nuisance law would result in a taking).

171. John A. Humbach, *Public Rights in the Navigable Streams of New York*, 6 PACE ENVTL. L. REV. 461, 465-66 (1989). For a comprehensive summary of case and statutory law concerning the public interest in navigable waters in New York, see *id.*

172. See *Coxe v. State*, 39 N.E. 400 (N.Y. 1895). As with all coastal states, New York's jurisdictional limit is three miles. See *supra* note 101 and accompanying text.

173. The terminology is not exclusive because some tidal water, such as the upper Hudson River, is fresh although subject to tides.

174. *Fulton Light, Heat & Power Co. v. State*, 94 N.E. 199, 202-03 (N.Y. 1911).

175. *Id.* at 202.

176. See *id.* at 203 (streams); and *Waters of White Lake, Inc. v. Fricke*, 123 N.Y.S.2d 400, 403 (App. Div., 3d Dep't 1953) (ponds and lakes).

177. The division between state owned and riparian owned lakes is uncertain and case specific. *Granger v. City of Canandaigua*, 177 N.E. 394, 396 (N.Y. 1931). The Court of Appeals has held that the state holds title to Lake Canandaigua, *id.*; and Lake George, *People v. System Properties, Inc.*, 141 N.E.2d 429 (N.Y. 1957). The courts have also avoided deciding the issue. See *City of Ge-*

Beyond navigation, the scope of protected public interests turns on the ownership of the submerged lands and the historic patterns of use.¹⁷⁸ Public rights are most restricted where navigable-in-fact waters lie over non-trust lands.¹⁷⁹ Although these waters are subject to an easement for public navigation, any other public interest is questionable.¹⁸⁰ Where trust lands are granted to the upland owner, the public retains the right to fish and navigate over the granted lands.¹⁸¹ The broadest public rights are in waters above trust lands held by the sovereign. These rights include navigation, swimming, bathing, fishing, hunting and recreation.¹⁸²

neva v. Henson, 95 N.E. 1125 (N.Y. 1911) (regarding Seneca Lake); Stewart v. Turney, 197 N.Y.S. 81 (App. Div., 4th Dep't 1922) (regarding Lake Cayuga). Former Associate Judge William S. Andrews of the New York Court of Appeals suggested a system based upon size and use to determine the title to lake beds, see William S. Andrews, *Lands Under Water in New York*, 16 CORNELL L.Q. 277 (1931), that the Court of Appeals seemed to approve in *Granger*, 117 N.E. at 396.

178. In England, the common law source of the doctrine in the United States, tidal and navigable in fact waters were essentially synonymous. The navigability-in-fact test in the United States was an innovation arising from the presence of major non-tidal lakes and rivers typically used in commerce. See *Barney v. Keokuk*, 94 U.S. 324, 336-38 (1876).

The traditional test of navigability is whether the surface water has a history of navigation for commercial purposes. Navigation includes the use of the stream for transporting logs, provided the stream was capable of floating logs in its natural state. The test has recently been broadened. Use of a stream on a single occasion for recreational purposes, such as canoeing, may result in a finding that the stream is navigable in fact, even where the occasional portage is required. See *Adirondack League Club, Inc. v. Sierra Club*, 615 N.Y.S.2d 788 (App. Div., 3d Dep't 1994).

179. Where the riparian owner presumptively holds title to the stream or lake bed.

180. See Andrews, *supra* note 177, at 277.

181. *Slingerland v. International Contracting Co.*, 61 N.E. 995, 998 (N.Y. 1901) (holding that the state is powerless to grant exclusive fishing rights to tidal portion of the Hudson River). Shellfishing rights, however, may be granted or implied in a grant of submerged lands because the shellfish are attached to the granted land. See *Martin v. Waddell*, 41 U.S. 367 (1842); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 91 N.E. 846 (N.Y. 1910).

182. See *Long Sault Development Co. v. Kennedy*, 105 N.E. 849 (N.Y. 1914) (navigation); *Stewart v. Turney*, 197 N.Y.S. 81 (App. Div., 4th Dep't 1922) (hunting); *Adirondack League Club, Inc.*, 615 N.Y.S.2d 788 (App. Div., 3d Dep't 1994) (recreation); *Barnes v. Midland R. Terminal Co.*, 85 N.E. 1093 (N.Y. 1908) (bathing, fishing, boating). These interests have been given some statutory protection. See *infra* note 200.

b. Grants of Lands Under Water

i. Statutory History

In 1786, the legislature created the Board of Land Commissioners (Board) to facilitate the distribution and sale of state lands.¹⁸³ In relevant part, the act authorized the Board to grant submerged lands beneath "navigable rivers, as the [Board] shall deem necessary to promote the commerce of this State."¹⁸⁴ The act restricted grants to the owners of the adjacent uplands.¹⁸⁵ The lands that the Board was authorized to convey increased to include lands underlying navigable lakes,¹⁸⁶ the Hudson River across from New Jersey,¹⁸⁷ and submerged lands both around Long Island and along the coast of Westchester County.¹⁸⁸ The Board was also given

183. Act of May 5, 1786, ch. 67, 1786 N.Y. Laws 334. The Board consisted of the governor, the lieutenant governor, the speaker of the assembly, the secretary of state, the attorney general, the treasurer, and the state auditor (comptroller). *Id.* Over the years, the composition of the Board was altered. The state surveyor became a Board member. *See* Act of Apr. 6, 1813, ch. 74, § 1, 1813 N.Y. Laws 292, 292 (providing that the state surveyor and at least two other commissioners would constitute a quorum). In 1962, submerged lands were placed under the jurisdiction of the commissioner of general services. The statute was altered to provide the commissioner with the powers previously held by the Board. Act of Apr. 19, 1962, 643, 1962 N.Y. Laws 2917. For purposes of consistency, the term Board will be used in this comment, notwithstanding that, after 1962, the powers of the Board were vested in the commissioner.

184. 1786 N.Y. Laws at 338.

185. *Id.* The statute still restricts grants or leases of submerged lands to the upland owner, with certain exceptions. The Board may convey jurisdiction of state owned lands to other state agencies for the "purpose of protecting environmentally sensitive lands," regardless of who owns the appurtenant uplands. N.Y. PUB. LANDS LAW § 75(7)(a) (McKinney 1993). *See also infra* note 189 (regarding leases to non-upland owners). The restriction does not apply to railroads, who receive lands under separate statutory provisions. *See infra* part III.A.3.b.ii.

186. N.Y. PUB. LANDS LAW § 67 (Packard and Van Benthuyssen 1829).

187. *Id.* § 68 (subject to the prior rights of New York City).

188. Act of May 6, 1835, ch. 232, 1835 N.Y. Laws 276 (codified at N.Y. Pub. L. Law § 75(6) (McKinney 1993) (excluding lands within New York City). The submerged lands surrounding New York City had originally been devised to the city under colonial grants, subsequently affirmed by the legislature. *Langdon v. Mayor of New York*, 93 N.Y. 129, 134-38 (1883).

the discretion to make grants for a period of years (leases) and lesser interests.¹⁸⁹

Amendments affecting the Board's power reflect a conflicted policy of promoting economic development while preserving a public interest in trust lands. For example, one amendment authorized the Board to convey to the holder of patented submerged lands all remaining interest the state may have in the lands.¹⁹⁰ Such a conveyance settled title and encouraged development. Somewhat inconsistently, the Board was admonished to impose conditions on such a conveyance as will protect the interests of the state.¹⁹¹ Where other grants require prior public notice,¹⁹² a grant under this provision, purportedly extinguishing any remaining interest held by the state, is exempt from public notice requirements.¹⁹³

In 1835, the use of tidal lands was limited to the erection of docks to promote water borne commerce.¹⁹⁴ No case law successfully enforced the restriction, however, and it was repealed by 1909.¹⁹⁵ In 1850, the Board was empowered to

189. N.Y. PUB. LANDS LAW § 75(6) (McKinney 1953) ("The [Board] may grant in perpetuity or otherwise . . ."). The statute now permits the Board to make "grants, leases, easements, and lesser interests, including permits . . ." N.Y. PUB. LANDS LAW § 75 (McKinney 1993). The most recent innovation allows the Board to make leases, with the consent of the upland owner, with any party. Act of Aug. 2, 1994, ch. 703, § 2, 1994 N.Y. Laws 1722, 1722-23 (codified at N.Y. PUB. LANDS LAW § 75(7)(a) (McKinney 1993 & Supp. 1995)).

190. Act of Apr. 6, 1949, ch. 595, 1949 N.Y. Laws 1360 (codified at N.Y. PUB. LANDS LAW § 75(11) (McKinney 1993)).

191. *Id.*

192. N.Y. PUB. LANDS LAW § 77 (McKinney 1993). The notice requirement dates from 1786. Act of May 5, 1786, ch. 67, 1786 N.Y. Laws 334, 338.

193. N.Y. PUB. LANDS LAW § 75(11) (McKinney 1993). Grants of lands below non-navigable waters are also exempt from notice requirements. *Id.* § 75(12).

194. Act of May 6, 1835, ch. 232, 1835 N.Y. Laws 276 (for a subsequent history, see *infra* note 195) ("This act . . . shall confer upon the [Board] no other power than to authorize the erection of such dock or docks, as [it] shall deem necessary to promote the commerce of this state, and the collection of [fees] from persons using such dock or docks . . .").

195. N.Y. PUB. LANDS LAW § 111 (J. B. Lyon Co. 1909) (referring to annexed Schedule of Laws Repealed, at page 3177 (repealing Laws of 1835 ch. 232)). The restriction is also omitted from N.Y. PUB. LANDS LAW § 70 (Banks and Brothers 1896), but appears in N.Y. PUB. LANDS LAW §§ 67-71 (Banks and Brothers 1889) as an addendum to those sections; See also N.Y. PUB. LANDS

make grants "for the purpose of beneficial enjoyment."¹⁹⁶ A restriction incorporated in 1894 prohibited grants that interfered with the rights of the Hudson River Railroad Company.¹⁹⁷

Although the Board frequently conditioned grants of land to protect public interests,¹⁹⁸ the statute was silent on the issue for over one hundred years. In 1917, however, the Board was required to periodically investigate whether conditions to grants, that had a fixed time for compliance, had been met by the grantee.¹⁹⁹ It was not until the amendments of 1992 that the Board was directed to protect the public interest in submerged lands.²⁰⁰

LAW § 84 (Banks and Brothers 1875) and N.Y. PUB. LANDS LAW § 84 (Banks and Brothers 1859). The Court of Appeals stated that the restriction was repealed by the amendment to the Public Lands Law, Act of Apr. 10, 1850, ch. 283, 1850 N.Y. Laws 621, that permitted conveyances for beneficial enjoyment. *In re Water Front on Upper New York Bay*, 157 N.E. 911 (N.Y. 1927). Neither the language of the amendment, nor the statutory history, offers any support for the court's assertion. The subsequent authorization for beneficial enjoyment grants is not inconsistent with application of the restriction to non-beneficial enjoyment grants. Lacking other evidence, it can be concluded that the restriction was repealed between 1889 and 1894. *See also infra* notes 221-23 and accompanying text for an analysis of the judicial interpretation of the restriction.

196. Act of Apr. 10, 1850, ch. 283, 1850 N.Y. Laws 621. Agriculture was included as a permitted use under the Public Lands Law, 1909 N.Y. PUB. LANDS LAW § 75(4) (J.B. Lyon Co. 1909).

197. N.Y. PUB. LANDS LAW § 70 (Banks and Brothers 1896).

198. *See, e.g., Barnes v. Midland R.R. Terminal*, 85 N.E. 1093 (N.Y. 1908) (grant prohibiting obstruction of public access along the shore).

199. Act of May 2, 1917, ch. 308, 1917 N.Y. Laws 1053 (current version at N.Y. PUB. LANDS LAW § 78 (McKinney 1993)) (requiring the attorney general to commence actions to annul grants where the conditions had not been fulfilled). *See also* N.Y. PUB. LANDS LAW § 75(7)(g)(ii) (Board to take enforcement action against lessees, easement holders, or permittees in violation of conditions, or refer to the attorney general, at the request of the Commissioner of the Department of Environmental Conservation).

200. Act of Aug. 7, 1992, ch. 791 § 3, 1992 N.Y. Laws 2168, 2169 (codified at N.Y. PUB. LANDS LAW § 75(7)(a) (McKinney 1993)) ("the commissioner shall, upon administrative findings, and to the extent practicable, reserve such interests or attach such conditions to preserve the public interest in the use of state-owned lands underwater and waterways for navigation, commerce, fishing, bathing, recreation, environmental protection and access to the navigable waters of the state . . ."). *See also* N.Y. PUB. LANDS LAW §§ 75(7)(b), (c), (f) (containing provisions to protect the public interest in submerged lands).

ii. Railroad Grants

The Hudson River Railroad Company²⁰¹ was formed under legislative authorization in 1846.²⁰² The act authorized the railroad to lay out its line, take possession of necessary lands and waters, and to construct its road along the eastern shore of the Hudson River.²⁰³ Although the act provided the means and authority for the railroad to take possession of public property,²⁰⁴ the act did not authorize the railroad to take title to lands under water,²⁰⁵ nor did the act purport to convey any such lands.²⁰⁶ After the railroad was constructed, its interest in the submerged lands, therefore, was in the nature of an implied license until it obtained grants from the Board.²⁰⁷

Under the General Railroad Act of 1850,²⁰⁸ all railroads formed under, or prior to the act, were authorized to obtain grants of public lands.²⁰⁹ The act failed to mention any right of the railroads to obtain submerged lands in particular. Nonetheless, the New York Court of Appeals construed the act as authorizing the Board to convey submerged lands to railroads, notwithstanding that they are not owners of the adjacent uplands, because any other interpretation would frustrate the purpose of the act.²¹⁰ The grants, however, do not cut off the rights of upland owners. Submerged lands

201. The Hudson River Railroad was consolidated with the New York Central in 1869 to form the New York Central & Hudson River Railway Company. *New York Cent. & Hudson River R.R. v. Aldridge*, 32 N.E. 50 (N.Y. 1892).

202. Act of May 12, 1846, ch. 216, § 1, 1846 N.Y. Laws 272, 276, *amended by* Act of Feb. 10, 1848, ch. 30, 1848 N.Y. Laws 39.

203. Act of May 12, 1846, ch. 216, §§ 1, 4, 9-13, 1846 N.Y. Laws 272, 272-79; Act of Feb. 10, 1848, ch. 30 §§ 1-4, 1848 N.Y. Laws 39, 39-43.

204. Act of May 12, 1846, ch. 216, §§ 9-13, 1846 N.Y. Laws 272, 275-79; Act of Feb. 10, 1848, ch. 30 §§ 1-5, 1848 N.Y. Laws 39, 39-43.

205. The Board was generally prohibited from conveying submerged lands except to the adjacent upland owner. *See infra* note 358 and accompanying text.

206. *Aldridge*, 32 N.E. at 51.

207. *Id.*

208. Act of Apr. 2, 1850, ch. 140, 1850 N.Y. Laws 211.

209. *Id.* §§ 25, 49, 1850 N.Y. Laws 211, 223, 235.

210. *Saunders v. New York Cent. & Hudson River R.R. Co.*, 38 N.E. 992, 995 (N.Y. 1894).

that the railroad lawfully fills do not become uplands with attached riparian rights.²¹¹

The successor in interest to the Hudson River Railroad Company, The New York Central and Hudson River Railroad Company, acquired the lands under water belonging to the State of New York under letters patent in 1873.²¹² This omnibus patent referenced the survey maps filed with the several counties through which the railroad passed.²¹³ The language of the patent conveys unrestricted title, however, the courts have construed the railroad's title in harmony with applicable statutes and common law to limit title to something in the nature of an easement.²¹⁴ The consideration was also nominal, \$500.00 for approximately 60% of the eastern shore of the river.

The state subsequently granted other parcels to the railroad for right-of-way realignments, additional tracks, appurtenant uses (yards and stations), and to correct discrepancies between the filed maps and the actual locations. The language in later grants varies. The most restrictive language provides for revocation at will by the state.²¹⁵

Title to lands on the west shore of the Hudson River were conveyed by statute and by letters patent to the West Shore

211. *In re Buffalo*, 99 N.E. 850 (N.Y. 1912).

212. New York State Letters Patent, Book 42, pages 690-92 (Dec. 26, 1873).

213. Westchester (Bronx County, along the Hudson River, was part of Westchester County at the time of the patent) Putnam, Dutchess, Columbia, and Rensselaer Counties. The original maps should still be on file with the respective counties. A complete duplicate set of maps was filed with the state and are in the possession of the Office of Government Services, Division of Land Utilization, in Albany. These maps are made of linen and are as long as 100 feet, representing the first systematic survey of the east shore of the Hudson River. As such, they are the basis for determining the shoreline for subsequent grants of lands underwater and are the starting point for the several efforts (none completed) to establish the change in the modern shoreline (with consequent title implications).

214. Grants of submerged lands to the railroads convey a limited fee for use as a railroad. *Aldridge*, 32 N.E. at 54.

215. New York State Letters Patent, Book 47, page 570 (May 16, 1913) (conveying additional lands in the Town of Stockport, Columbia County, as shown on Land Under Water Map 7). There is nothing special about these lands to explain the reservation. Specific language may have been politically motivated (by, for example, an unhappy riparian with connections in Albany).

Railroad Company.²¹⁶ Title to underwater lands in Rockland County was conveyed by statute.²¹⁷ The statute of 1865 specifically reserved riparian rights.²¹⁸ The letters patent issued for Orange and Ulster Counties were in the nature of quit-claim deeds, reserving any rights previously granted and gold and silver mines to the state.²¹⁹ No consideration was paid for any of the grants examined by the author.²²⁰ The reservations of existing rights and riparian interests, the complete lack of monetary consideration, as well as the general body of railroad law, point to the conclusion that the railroad essentially received an easement.

c. Limitations on Fee

Public trust doctrine raises issues of title that confound principles of property law. The state holds title, but that title is neither absolute nor defeasible. Determination of title to public trust lands involves principles of property law and principles of state sovereignty. To the extent that absolute title to trust lands is vested in the public as a whole, the state holds title as a trustee, and conveyances may not violate the terms of the trust. Put another way, the state's authority over trust lands is sovereign and proprietary. Although the state may convey its proprietary interest, the state cannot contract away or abdicate its sovereignty. This principle of sovereignty is not constitutional, but an intrinsic attribute of government. Nonetheless, trust lands have been conveyed. The courts dislike incomplete title and, consequently, judicial limitations on fee are rare.

216. The railroad was also known as the New York West Shore Railroad Company; and, the New York, West Shore and Buffalo Railroad Company. The line was purchased by the New York Central Railroad. For a short history of the West Shore line see ADAMS, *supra* note 5, at 211-15.

217. The state conveyed the lands shown on a map filed with the Secretary of State. Act of Apr. 24, 1865, ch. 556, 1865 N.Y. Laws 1121; Act of June 18, 1886, ch. 601, 1886 N.Y. Laws 858.

218. Act of Apr. 24, 1865, ch. 556, § 1, 1865 N.Y. Laws 1121, 1121-22.

219. The railroad was obliged to purchase any submerged lands previously granted by the state to the adjacent upland owners.

220. The principle grant is located in the New York State Letters Patent, Book 40, pp. 314-29 (Feb. 16, 1882).

i. Purpose of Grant / Actions to Annul

The owner of public trust lands may use them for any purpose not otherwise restricted by law or the language of the grant. Violation of the terms of the grant, fraud, or failure to vest title pursuant to a condition subsequent, may give rise to an action by the state attorney general to challenge the validity of the grant.²²¹ Such an action is limited, however, by the statute of limitations applicable to adverse possession.²²² If the attorney general "has good reason to believe" that the patent can be annulled, then he "must" bring the action.²²³ Since the duty is mandatory, a private party may petition the court to compel the attorney general to

221. N.Y. PUB. LANDS LAW § 138 (McKinney 1993). An action to quiet title or ejectment based upon the theory that another grant is invalid is improper unless the grant in question is invalid on its face. *E.G. Blackslee Manufacturing Co. v. E.G. Blackslee's Sons Ironworks*, 29 N.E. 2 (N.Y. 1891) (holding that a grant valid on its face may not be attacked collaterally). The grant at question in *Marba Sea Bay Corp. v. Clinton Street Realty Corp.*, 5 N.E.2d 824 (N.Y. 1936), may provide an example of a grant void on its face. The court found, in a collateral attack, that a colonial grant was void as against public policy. *Id.* at 826. See *infra* notes 262-63 & accompanying text for a discussion of the case. The dissent argued that the validity of the colonial grant should not be reached on the grounds, *inter alia*, of the collateral attack rule in *Blackslee*. 5 N.E. at 829 (O'Brien, J. dissenting). The majority did not address the issue, perhaps finding that the grant was void on its face.

222. *People v. Clarke*, 9 N.Y. 349 (1850). See also *M.R.M. Realty Co. v. Title Guarantee & Trust Co.*, 280 N.Y.S. 22 (App. Div., 1st Dep't 1935) (New York City grantor would be barred by statute of limitations from enforcing grantee's covenant to construct a wharf at any time City so directed); *People v. New York Transit & Terminal Co.*, 195 N.Y.S. 305 (Sup. Ct. 1922) (holding that an action to void grant on grounds grantee not upland proprietor barred by statute of limitations); *People v. Havemeyer & Elder, Inc.*, 265 N.Y.S. 249 (Sup. Ct. 1933) (action to void grant for failure to comply with condition subsequent within a fixed time barred by statute of limitations). The applicable statute of limitations is twenty years. N.Y. CIV. PRAC. L. & R. § 211(c). In *Marba Sea Bay*, 5 N.E.2d 824, the issue of the statute of limitations did not arise. If the statute did apply, it would bar a direct action to void the grant. Nonetheless, the court voided the grant in a collateral action brought to determine title. *Marba Sea Bay* suggests, therefore, that if a plaintiff can overcome the collateral attack rule, the statute of limitations will not apply. See *supra* note 221.

223. N.Y. PUB. LANDS LAW § 138 (emphasis added).

bring the action.²²⁴ Alternately, the state may bring an action on behalf of an interested party.²²⁵

ii. Language of Grant

The principal distinction among grants of lands under water is whether they are for "commercial purposes" or for "beneficial enjoyment."²²⁶ As the terms are not defined in the statute, the applicable law construing these terms has been developed judicially.

The courts have been inconsistent in construing the "commercial purposes" language. A first group of cases hold that the language, at least when coupled with a condition that docks are erected on the submerged lands, prohibits the owner from excluding public use of the premises.²²⁷ Other cases hold that the "commercial purposes" language imposes no public use restriction on the grant, regardless of whether the grant requires the erection of docks.²²⁸ These second

224. N.Y. CIV. PRAC. L. & R. § 7801 (article 78 proceedings).

225. N.Y. CIV. PRAC. L. & R. § 1302. One court assumes in dicta that only the state has power to revoke a grant under letters patent. *Smith v. State*, 545 N.Y.S.2d 203 (App. Div., 2d Dep't 1989).

226. Other specific conditions may apply. *See generally supra* part III.A.3.b.

227. *Thousand Island Steamboat Co. v. Visger*, 71 N.E. 764 (N.Y. 1904); *Harper v. Williams*, 18 N.E. 77 (N.Y. 1888).

228. *In re Water Front on Upper New York Bay*, 157 N.E. 911 (N.Y. 1927) (holding that the "commercial purposes" and erection of docks language in grant permits grantee to build private docks and warehouses, *cert. denied*, 276 U.S. 626 (1928); *Abbot v. Curran*, 98 N.Y. 665 (1885) (holding that commercial purposes language imposes no restriction on absolute title).

Efforts by the attorney general to enforce grants, apparently limited to the use of docks, met with a baffled response from the lower courts. In *People v. American Sugar Refining Co.*, 148 N.Y.S. 160 (Sup. Ct. 1914), the attorney general brought an action to vacate letters patent on the grounds that the grantee had violated the terms by erecting factory buildings of up to ten stories on the lands. The patents were conditioned upon the grantee erecting docks and applying the premises to commerce. The court dismissed the complaint for failure to state a claim. The court noted that docks had been constructed and that the premises were applied to commerce, therefore, no violation of the terms of the patents were alleged. Neither the court, nor possibly the complaint, addressed the statutory restriction. All the letters patent were issued between 1868 and 1884, while the restriction appears to have been in force. At first glance, the case may have been decided merely upon an error in the pleading, however, the attorney general was insistent and presumably amended his complaint when he sued again. He fared no better, however, the second round. *People v. Ameri-*

cases, however, contain errors which weaken their authority.²²⁹ Nonetheless, the most recent case by the Court of Appeals to address the issue, *In re Water Front on Upper New York Bay*, provides the rule that a grant for commercial purposes conveys unrestricted title, subject to state control of navigation.²³⁰ If a grant, however, contains language purporting to restrict the use of the submerged lands to the erection of docks for the purpose of commerce, then a condition subsequent is imposed, but the condition does not carry any public right of use.²³¹ As the rule stands, the public does not necessarily lose use of filled lands where there is historic public use.²³²

The general rule applied to grants for beneficial enjoyment is that such grants convey the entire interest that the state has in the submerged lands.²³³ However, there remains

can Sugar Refining Co., 163 N.Y.S. 456 (Sup. Ct. 1917), *aff'd* 169 N.Y.S. 386 (App. Div., 2d Dep't 1918). The second opinion was lengthier, discussing the relation of docks to commerce, but again no reference was made to the statutory restriction, nor was it mentioned on the unsuccessful appeal. 169 N.Y.S. 386.

229. *In re Water Front* relies, in part, on the apparently mistaken finding that the statutory restriction limiting the use of the premises to erecting docks for public use was repealed in 1850. 157 N.E. at 915. See *supra* notes 195-96. *Abbot*, is a memorandum decision holding, without analysis, that grants of submerged lands carry neither a condition subsequent nor a restriction. 98 N.Y. 665, 668 (1885). *Abbot*, however, cites for authority a line of cases that begin with, and rely upon, *Craig v. Wells*, 11 N.Y. 315 (1854). *Craig v. Wells*, however, is inapplicable. The case holds that a covenant in a deed, in favor of a third party, is void. *Id.* at 323. Obviously a grant from the state, as trustee, does not fall afoul of the rule when it imposes a restriction in favor of the people of the state.

230. 157 N.E. 911, 917 (N.Y. 1927).

231. *In re Water Front on Upper New York Bay*, 157 N.E. 911, 917 (N.Y. 1927). The court states that if a grant is subject to the condition subsequent that the premises be applied to commercial purposes, the erection of private wharves and warehouses satisfy the condition.

232. See *infra* part III.C.2 (concerning points of public access). Where grants are for commercial purposes, a history of public use may engraft a public right to use private wharves. See *Thousand Island Steamboat Co. v. Visger*, 71 N.E. 764 (N.Y. 1904) (discussing the history of prior public use of a wharf); *Harper v. Williams*, 18 N.E. 77 (N.Y. 1888) (discussing the history of public use after the construction of a wharf). Cf. *Wetmore v. Brooklyn Gas Light Co.*, 42 N.Y. 384 (1870) (holding that no right of public use was implied where there never was any public use in fact).

233. *In re Water Front*, 157 N.E. at 914-15 (citing *People v. Steeplechase Park Co.*, 113 N.E. 521 (N.Y. 1916)). The state legislature implicitly concurred

a possibility that the state may void a grant for beneficial enjoyment that reserves the public use of the lands until the beneficial enjoyment is "appropriated" by the grantee.²³⁴

A beneficial grant can fully extinguish the public trust interest, or non-proprietary interest, of the state, provided that the grant is not of such magnitude as to run afoul of the proscription in *Coxe v. State*.²³⁵ "The question . . . is largely one of degree."²³⁶

The principal case construing an unrestricted grant for beneficial enjoyment is *People v. Steeplechase Park Co.*²³⁷ At issue was whether a private amusement park in Coney Island could appropriate the tidal shore of the Atlantic Ocean, completely blocking public access along the beach. The park was built upon several grants. All but one grant reserved public access to the tidal lands. The court affirmed, without discussion, the order of the court below that required the removal of the obstructions from those grants which reserved the public right of access.²³⁸ The court held that the one grant which contained no restrictions was for beneficial enjoyment and extinguished the public trust interest in the appropriated lands.²³⁹ Despite the strong language, there are several aspects to the decision that qualify it.

The weight of the authority of *Steeplechase*, and the breadth of its holding, are not conclusive as to the power of the legislature to extinguish the public trust. The decision

with the court's interpretation. See Act of Apr. 16, 1949, ch. 595, § 3, 1949 N.Y. Laws 1360, 1362 (amending Public Lands Law by adding subsection 11 which authorized the Board to convey to grantees, who had received a lesser interest than beneficial enjoyment, all remaining interest held by the state). The 1949 act expresses a legislative opinion that where grants are not for beneficial enjoyment, the state retains an interest in the lands.

234. *Smith v. State*, 545 N.Y.S.2d 203, 204 (App. Div., 2d Dep't 1989). How the grantee would appropriate beneficial enjoyment is unclear.

235. 39 N.E. 400 (N.Y. 1895); See *infra* part III.A.3.c.iii.

236. *Steeplechase*, 113 N.E. at 527 (Bartlett, C.J., concurring in the result).

237. 113 N.E. 521 (N.Y. 1916) (4-3 decision).

238. *Id.* at 521 (*aff'd* 143 N.Y.S. 503 (Sup. Ct. (1913)), *aff'd* 151 N.Y.S. 157 (App. Div., 2d Dep't 1914)).

239. *Steeplechase*, 113 N.E. at 526-27.

commanded a bare majority,²⁴⁰ and the opinion only a plurality.²⁴¹ The opinion quotes, with approval, the principle that such grants are permissible if they are in the public interest, or at least, not injurious to the public.²⁴² Factually, however, the grant allowed an amusement park to block public beach access in Coney Island. No possible public interest, under traditional land use planning or public trust doctrine, is furthered by allowing this use, and it is clearly injurious to the public use of the remaining shore.²⁴³

The opinion was restricted, however, to a construction of the intent of the legislature when granting a fee for beneficial enjoyment.²⁴⁴ The opinion stated that the issue of whether the legislature acted beyond its power was not before it.²⁴⁵ The decision, therefore, can be limited to the posture of the case. No reservation will be implied in a grant for beneficial enjoyment, for consideration, that will provide the grounds for an injunction to permit public access to the foreshore.²⁴⁶ A court could still find such an unequivocal grant beyond the power of the legislature without overruling *Steeplechase*.²⁴⁷

240. Four judges voted to reverse the order below enjoining the obstructions, while three judges voted to affirm the order. The judges that dissented included Associate Judge Benjamin Cardozo, later a justice of the United States Supreme Court. *Id.* at 528.

241. *Steeplechase*, 113 N.E. at 527. The Chief Judge of the New York Court of Appeals concurred in the result, but wrote separately to limit the holding to the fact that only a "few hundred feet" of the shore was involved. *Id.* (Bartlett, C.J., concurring).

242. 113 N.E. at 526 (quoting *In re Long Sault Development Co. v. Kennedy*, 105 N.E. 849, 851 (N.Y. 1915)).

243. After stating the non-injury rule, the court makes no attempt to apply it to the instant facts. The court simply states that "the propriety or validity of the grant is not attacked in this action." 113 N.E. at 526.

244. *Id.* at 526-27.

245. *Id.* at 527 (noting that a patent for submerged lands could not be voided in a collateral attack).

246. Any such grant, however, is still subordinate to the federal power to regulate navigation. *Id.*

247. One lower court was so incensed by *Steeplechase* that in dicta, the court said that despite the controlling precedent, it would not follow it. *Aquino v. Riegelman*, 171 N.Y.S. 716, 718 (Sup. Ct. 1918), *aff'd on other grounds*, 173 N.Y.S. 917 (App. Div., 2d Dep't 1919) (stating "I must respectfully refuse to follow [*Steeplechase*] . . . I deny that the Legislature has the power . . . to give or grant to any person rights which are the property of all the citizens of this commonwealth . . .").

In *Appleby v. City of New York*,²⁴⁸ the United States Supreme Court extended *Steeplechase*. In *Steeplechase*, the grantee had improved the property inconsistently with public access.²⁴⁹ In *Appleby*, the submerged lands had not been filled, nonetheless, the Court found that absolute title had passed to the grantee.²⁵⁰ Under *Appleby* and *Steeplechase*, the settled rule is that, under certain circumstances, the state cannot interfere with a grant for beneficial enjoyment, for consideration, without effecting a taking. If the grant specifically reserves a public interest, however, the grant is held subject to that interest.²⁵¹

iii. Magnitude of Grant

On very rare occasions, the courts have found grants of submerged lands invalid on the grounds that the state has given away too much and, therefore, impermissibly abdicated its sovereign power to manage trust lands for the benefit of the public.²⁵² The limitation is vague and fact sensitive. An examination of the specific cases where the courts have invalidated grants of submerged lands, however, sheds some light on how much is too much.

The principal case in New York to examine the outer limits of the state's power to convey absolute fee to trust lands is *Coxe v. State*.²⁵³ The question in *Coxe* was the validity of legislation authorizing a private development corporation to fill and take title to all tidal marsh lands, with some exceptions,

248. 271 U.S. 364 (1926) (*rev'g* 139 N.E. 474 (N.Y. 1923)). See *supra* notes 159-70 and accompanying text for a full discussion of *Appleby*.

249. *People v. Steeplechase Park Co.*, 113 N.E. 521, 522 (N.Y. 1916).

250. See *supra* notes 159-70 and accompanying text for an analysis of *Appleby*. New York cases following *Appleby* include: *In re Water Front on North River*, 219 N.Y.S. 353 (App. Div., 1st Dep't 1926); *In re Water Front in Thompkinsville*, 220 N.Y.S. 18 (App. Div., 2d Dep't 1927).

251. *Steeplechase*, 113 N.E. 521. See also *Barnes v. Midland R.R. Terminal Co.*, 85 N.E. 1093 (N.Y. 1908) (holding that the grant of lands to a riparian owner with a restriction prohibiting obstruction of public access along the shore will be construed in view of the grantee's reasonable necessity and right to access navigable waters as a riparian owner).

252. See, e.g., *Coxe v. State*, 39 N.E. 400 (N.Y. 1895); *Long Sault Dev. Co. v. Kennedy*, 105 N.E. 849 (N.Y. 1914).

253. 39 N.E. 400 (N.Y. 1895).

on Long Island and Staten Island.²⁵⁴ The court employed general language indicating that the legislature's wholesale disposition of public trust lands for speculative and private purposes exceeded its authority.²⁵⁵ The opinion went on to hold that the legislation also violated the delegation to Congress of the exclusive power to regulate foreign and interstate commerce under the Commerce Clause of the United States Constitution.²⁵⁶ Finally, the court held that the legislation violated the state constitution by embracing more than one subject and failing to indicate the nature of the legislation in its title.²⁵⁷

To the extent the court in *Coxe* relied upon public trust doctrine to strike the legislation,²⁵⁸ the holding is diluted by its alternate grounds. The New York Court of Appeals, however, has relied subsequently upon the public trust language in *Coxe*.

In *Long Sault Dev. Co. v. Kennedy*,²⁵⁹ at issue was the constitutionality of an act of the legislature conveying to a private corporation the control of navigation to a segment of the St. Lawrence River.²⁶⁰ The corporation was formed for the principal purpose of generating hydroelectric power.²⁶¹ The proposed site on the St. Lawrence consisted mainly of rapids and was not navigable for most of the year.²⁶² The authorized grant of the submerged lands was conditioned upon the corporation's construction of locks to improve public navi-

254. *Id.* at 400. More exactly, the validity of the legislation was put at issue when the legislature repealed the law forming the corporation and authorizing it to take tidal lands. *Id.* The case arose when a creditor of the corporation claimed \$25,000 from the state, a sum actually paid into the state treasury by the corporation pursuant to the legislation. *Id.*

255. 39 N.E. at 402-03.

256. *Id.* at 403.

257. *Id.* (emphasis added). The New York Constitution prohibits local or private bills from containing more than one subject, and requires that the subject be expressed in the title to the bill. N.Y. CONST. art. III, § 15.

258. The court also cites *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892), for the proposition that "the state is powerless to divest itself" of its title to trust lands held for the benefit of the public. *Coxe*, 39 N.E. at 402.

259. 105 N.E. 849 (N.Y. 1914).

260. *Id.* at 851.

261. *Id.* at 852.

262. *Id.*

gation.²⁶³ Citing *Coxe* and *Illinois Cent. R.R.*, the court held that the state could not divest itself of, nor delegate, control of the public navigable waters of the St. Lawrence to a private corporation.²⁶⁴

In *Marba Sea Bay Corp. v. Clinton Street Realty Corp.*,²⁶⁵ the Court of Appeals considered the validity of a colonial grant conveying the entire eleven miles of ocean front tidal lands found in the borough of Queens, New York City.²⁶⁶ The colonial grant expressly conveyed the beach, to the low water mark, to a private individual. The court noted that similar grants to political entities were valid delegations of sovereign power, but that such a vast conveyance to a private party was "contrary to . . . public policy and the law and, therefore, void."²⁶⁷

Out of these cases two rules emerge. The first rule is clear: the state may not convey to a private entity an entire segment of a navigable waterway subject to public trust,²⁶⁸ even where the conveyance is conditioned upon public rights of navigation and the duty to improve the navigability of the waterway.²⁶⁹

The second rule is less certain: there is a limit to the size of trust lands that the state may permissibly alienate to a private entity. The pertinent cases, *Marba Sea Bay* and *Coxe*, do not draw a fine line. In *Marba Sea Bay*, the entire ocean front beach of Queens County was at issue.²⁷⁰ The grants were of such magnitude that the court could not credibly uphold them without declaring that the public trust doctrine was no longer the law of the State of New York.²⁷¹ The

263. 105 N.E. at 852.

264. *Id.*

265. 5 N.E.2d 824, 825 (N.Y. 1936).

266. *See id.* at 825.

267. *Id.* at 825-26.

268. Title to the beds of most rivers is held privately. The St. Lawrence River, however, forms a state boundary, and title to the riverbed is vested in the state. *See supra* part III.A.3.a.

269. *Long Sault Dev. Co.*, 105 N.E. at 852.

270. 39 N.E. at 401.

271. The court also found that such large grants were *per se* contrary to the public interest. *See Coxe*, 39 N.E. at 402-403 (noting first that the state cannot transfer title to land if the transfer is not in the public interest, and second that

limitation concerning the size of a permissible grant is so undefined that *Coxe* and *Marba Sea Bay* serve mainly as warnings to the legislature rather than as guides.

In sum, the limitation on the magnitude of permissible grants is a reservation of judicial power to annul grants authorized by the legislature. Thus far, the judiciary has only exercised its power in the most egregious cases. By not defining a threshold for a permissible grant, however, the judiciary has reserved the power to annul any grant that it determines is too much.

iv. Abandonment of Use

In New York, the implication from the cases construing title is that grants of public trust lands have no possibility of reverter by virtue of their character as public trust lands.²⁷² If the rule applies, abandonment of use can have no impact on title. The language of the grant, however, may create a defeasible estate.²⁷³ The courts have not decided definitively whether conditional grants for commercial purposes, which are vested but then subsequently appropriated to purely private non-commercial uses or abandoned, convey absolute title excluding a possibility of re-entry by the state.²⁷⁴

the grant at issue affected four counties); *Marba Sea Bay*, 5 N.E.2d at 825 (stating that "[t]he grant of eleven miles of foreshore, being the entire ocean front of the borough of Queens, which grant is to a private person for neither commercial nor governmental purposes, is not one recognized by law."). Thus, the public interest may be nothing more than a corollary to the impermissible size of the grant.

272. See *supra* part III.A.3.c.iii. Grants to railroads are a probable exception. See *infra* notes 404-14 and accompanying text.

273. See *supra* notes 226-32 and accompanying text.

274. The courts might consider the abandonment of a commercial use, or appropriation to non-commercial use, a violation of the grant, giving the state a cause of action for re-entry subject to the statute of limitations. See *supra* part III.A.3.c.i. This possibility is suggested by *In re Water Front*, and supported by legislation that implies a reserved state interest in grants that are for less than beneficial enjoyment. See *supra* note 233 and accompanying text.

B. Railroad Law

1. Statutory Protection of Access

Statutory provisions restrict the railroads' use of lands to protect access to the Hudson River. Grants of submerged lands are only available if required for a right-of-way.²⁷⁵ The charter of the Hudson River Railroad Company explicitly protects the upland owners' "usual access to the river" and requires the railroad to restore the use of wharves and docks severed from the river by construction of a road.²⁷⁶ Where the railroad crosses a highway or street, the railroad is responsible for required alterations, or bridging, to restore the road to its former usefulness.²⁷⁷

2. Grade Crossing Elimination

Since the end of the 19th Century, through both legislative enactments²⁷⁸ and an addition to the state constitution,²⁷⁹ it has been the policy of the State of New York to

275. N.Y. R.R. LAW § 18 (McKinney 1991). Filled lands and railroad bridges may not cause flooding, nor block navigation. *Rumsey v. New York & New England R.R.*, 28 N.E. 763 (citing Act of Apr. 2, 1850, ch. 140, 1850 N.Y. Laws 211). The court noted that the obligation of a railroad company to "restore the stream or water-course . . . [crossed by a railroad] to its former state, or to such a state as not unnecessarily to have impaired its usefulness" had been deleted from the railroad law by Act of June 7, 1890, ch. 565, 1890 N.Y. Laws 1082. *Id.* at 765. In fact, the provision had been relocated and expanded so as to additionally prohibit any interference with the navigation of steamboats and sailboats. Act of June 2, 1890, ch. 565, § 11, 1890 N.Y. Laws 1082, 1087.

276. Act of Apr. 22, 1846, 1846 N.Y. Laws 272, 279-80, ch. 216, §§ 15-16. Use of the right-of-way can only reasonably affect the upland owner's riparian right of access to navigable waters. See *infra* part III.C.1.

277. See *infra* part III.B.3.

278. See Act of Mar. 26, 1906, ch. 109, 1906 N.Y. Laws 213; Act of July 25, 1911, ch. 777, 1911 N.Y. Laws 2065; Act of June 2, 1917, ch. 719, 1917 N.Y. Laws 2361; Act of Mar. 30, 1927, chs. 444-46, 1927 N.Y. Laws 1113-1125; Act of Mar. 27, 1928, ch. 677, 1928 N.Y. Laws 1455; Apr. 13, 1939, ch. 289, 1939 N.Y. Laws 669 (codified as amended at Grade Crossing Elimination Act of 1970, N.Y. TRANSP. LAW §§ 220-29 (McKinney 1991)). See also N.Y. R.R. LAW § 91 (McKinney 1991).

279. See N.Y. CONST. art. VII, § 14 (1941 amendment authorizing legislature to issue \$300 million in bonds to finance grade crossing eliminations).

eliminate grade crossings.²⁸⁰ The Commissioner of Transportation (Commissioner), was authorized to order the relocation or elimination of grade crossings.²⁸¹ In addition, the Commissioner was directed to avoid creation of new grade crossings.²⁸² As a consequence of these provisions, no public crossings can be built without the approval of the Commissioner.²⁸³

Until 1994, the Commissioner only had jurisdiction over public crossings.²⁸⁴ However, in 1994, the New York State Legislature amended the Railroad Law to allow the Commissioner to require alterations and/or closures of private cross-

280. "A grade crossing in the ordinary sense . . . refers to the crossing of a railroad location by a highway on the level of the railroad." *Armour & Co. v. New York, N.H. & H. R.R.*, 103 A. 1031, 1033 (R.I. 1918).

281. Under Article II of New York Highway Law, the Commissioner of Transportation shall "[p]rovide for the separation of highway-railroad crossings and construction of highway-railroad crossings at grade . . ." N.Y. HIGH. LAW § 10(26) (McKinney 1979) (applicable to state highways). Any municipality in which a grade crossing is located, or any railroad company whose tracks are crossed at grade by a highway, may initiate proceedings to eliminate grade crossings upon petition to the Commissioner. In addition, upon his own motion, the Commissioner may investigate any other grade crossings which he determines should be considered for elimination. N.Y. TRANSP. LAW § 222(3) (applicable to county or local roads). See also N.Y. TRANSP. LAW §§ 223-24 (governing reimbursement by the state for elimination costs); N.Y. R.R. LAW § 91 (McKinney 1991) (alteration or elimination of grade crossings procedure).

282. N.Y. R.R. LAW § 89 (McKinney 1991). This provision prohibits the creation of public grade crossings after 1897 without the authorization of the Commissioner. For the history of section 89, see 1910 N.Y. Laws 923-24; Act of May 26, 1913, ch. 744, 1913 N.Y. Laws 1866; Act of Apr. 16, 1914, ch. 378, 1914 N.Y. Laws 1523; Act of Apr. 25, 1924, ch. 481, § 1, 1924 N.Y. Laws 891, 891; Act of Mar. 28, 1928, ch. 546, 1928 N.Y. Laws 1185; Act of Apr. 18, 1945, ch. 855, § 58, 1945 N.Y. Laws 1890, 1917-34; Act of May 31, 1968, ch. 420, § 251, 1968 N.Y. Laws 1467, 1609-10; Act of Apr. 29, 1970, ch. 267, § 25, 1970 N.Y. Laws 1347, 1482-83 (codified as amended at N.Y. R.R. LAW § 89 (McKinney 1991)).

283. Whether the crossing is "public" under the railroad law determines the jurisdiction of the DOT and the availability of public funds for crossing improvements. See *Neuhaus v. Long Island R.R.*, 292 N.Y.S.2d 930 (App. Div., 2d Dep't 1968).

284. *In re New York Cent. & Hudson River R.R.*, 93 N.E. 515, 516 (N.Y. 1910) (holding that statutory proceedings under section 91 to alter or close a grade crossing only apply to public streets).

ings,²⁸⁵ including farm crossings, located in an inter-city rail passenger service corridor.²⁸⁶

3. Crossing Construction and Maintenance

Railroads are responsible for all crossing costs when constructing a new line.²⁸⁷ The first act to authorize and regulate railroad corporations provided that when the railroad track crossed a highway, such highway may be carried under or over the track, as may be most expedient.²⁸⁸ In addition, the corporation was given the power to construct its road across, along, or upon any water-course or street, provided that the railroad restored the intersected entity to its former state, or to such a state as not to unnecessarily impair its usefulness.²⁸⁹

285. Intercity rail passenger service, N.Y. R.R. LAW § 97 (McKinney 1991 & Supp. 1995). "Private rail crossing" is defined by the statute as a crossing which traverses a railroad track or tracks and may be used by the owner of the right-of-way, the owner's invitees and others, including the public, but has not been declared or recognized as a public rail crossing by the Commissioner. *Id.* Jurisdiction over private crossings was requested by the DOT to "advance the development of a [sic] intercity rail passenger service . . ." DOT Memorandum No. 4-1994, Dept. Bill No. 516.

286. "Inter-city rail passenger service" means any inter-city rail passenger transportation operation where rail passenger trains operate on a regular scheduled basis. "Inter-city rail service corridor" is defined as a continuous railroad route which contains one or more segments of railroad track or tracks where inter-city rail passenger service is in operation by the national rail passenger corporation (Amtrak). N.Y. R.R. LAW § 97. The section is not applicable, therefore, to the west shore where Amtrak does not operate. This section also requires application to the Commissioner for the establishment of new private rail crossings in an inter-city rail passenger service corridor. *Id.*

287. Whenever under section 89 a new railroad is constructed across an existing street, the expense of crossing above or below the grade of the street, including any expense incurred in altering or changing the street, is paid entirely by the railroad corporation. N.Y. R.R. LAW § 94 (McKinney 1991).

288. Act of Apr. 2, 1850, ch. 140, 1850 N.Y. Laws 211. *See also* Act of May 12, 1846, ch. 216, 1846 N.Y. Laws 272 (authorizing the formation of the Hudson River Railroad). In 1884, the legislature passed an act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in cities, towns and villages (intra-city trains). Act of May 5, 1884, ch. 252, 1884 N.Y. Laws 308.

289. Act of Apr. 2, 1850, ch. 140, 1850 N.Y. Laws 211.

In 1890, the authority of the railroad under the Act of 1850²⁹⁰ was limited. Under the 1890 law, the railroad could not construct a bridge across a stream or lake, or a road across a street, without the consent of the municipality or an order from a special term of the supreme court.²⁹¹

Whenever a new street is constructed across an existing railroad, the railroad corporation pays one-half of the cost and the municipal corporation having jurisdiction over such street pays the remaining one-half.²⁹² The Commissioner determines whether the street will cross the railroad above, below, or at grade, and the safest way to accomplish the crossing.²⁹³ The Commissioner is obliged to avoid grade crossings where feasible.²⁹⁴

Section 91 of the Railroad Law also permits the Commissioner to order the alteration of a crossing, upon petition of the affected municipality or railroad corporation, when the Commissioner determines that the alteration is in the public interest.²⁹⁵ The expenses of every change made in accordance with section 91 are borne 85% by the state and 15% by the municipal corporation in which the crossing sits.²⁹⁶ However, whenever a change is made to an existing crossing, other than a change made in accordance with the provisions of section 91,²⁹⁷ 50% of the expense is borne by the railroad

290. 1850 N.Y. Laws at 211.

291. Act of June 7, 1890, ch. 565, 1890 N.Y. Laws 1082, 1136.

292. N.Y. R.R. Law § 94.

293. N.Y. R.R. Law § 90. For the history of section 90, see 1910 N.Y. Laws 923-24; Act of May 26, 1913, ch. 744, 1913 N.Y. Laws 1866; Act of Apr. 16, 1914, ch. 378, 1914 N.Y. Laws 1523; Act of May 12, 1921, ch. 698, § 1, 1921 N.Y. Laws 2467; Act of Apr. 25, 1924, ch. 481, § 2, 1924 N.Y. Laws 891, 892-4; Act of Mar. 23, 1928, ch. 546, § 19, 1928 N.Y. Laws 1185, 1202-05; Act of Apr. 18, 1945, ch. 855, § 58, 1945 N.Y. Laws 1890, 1934-35; Act of May 31, 1968, ch. 420, § 252, 1968 N.Y. Laws 1467, 1610-11; Act of May 9, 1969, ch. 430, § 10, 1969 N.Y. Laws 1498, 1505-07; Act of Apr. 29, 1970, ch. 267, § 26, 1970 N.Y. Laws 1347, 1484-86 (codified as amended at N.Y. R.R. Law § 90).

294. See *supra* notes 281-82 and accompanying text.

295. N.Y. R.R. Law § 91.

296. N.Y. R.R. Law § 94(3).

297. For example, the Commissioner may institute proceedings on his own motion for the alteration of an existing grade crossing or structure when, in his opinion, public safety requires the alteration. N.Y. R.R. Law § 95. Such an alteration is one made other than in accordance with section 91, and thus the

corporation, 25% by the municipal corporation, and 25% by the state.²⁹⁸

When a street crosses a railroad by an overhead bridge, the framework of the bridge and its abutments are maintained by the railroad, and the roadbed and approaches to the bridge are maintained by the municipality having jurisdiction over the street.²⁹⁹ Since both the railroads and the municipalities would like to avoid such maintenance costs, the definitions of "roadway," "approaches," and "framework of the bridge and its abutments" are often at issue.³⁰⁰

Railroads are fully responsible for maintaining the structure and roadway of bridges constructed prior to July 1, 1897, if they had such an obligation prior to 1897.³⁰¹ When a pre-

railroad must split the expense with the municipality and the state pursuant to section 94(3). *In re Staten Island Rapid Transit Ry.*, 221 N.Y.S. 129, 144 (App. Div., 2d Dep't 1927), *aff'd*, 157 N.E. 892 (N.Y. 1927), *aff'd*, 276 U.S. 603 (1928).

298. N.Y. R.R. Law § 94(3). In addition, "there is no question that if the change is reasonably necessary in the interests of public safety, the [Commissioner] may insist upon it regardless of the prospective bankruptcy of the railroad company financially burdened thereby." *In re Lehigh Valley R.R. & Tioga St.*, 5 N.Y.S.2d 946, 948-49 (App. Div., 3d Dep't 1938).

299. N.Y. R.R. Law § 93. Under this section, the railroad is required only to maintain the bridge framework and abutments as originally designed. *In re Morris Ave. Bridge*, 174 N.Y.S. 682 (Sup. Ct. 1919). If an alteration, as opposed to maintenance, is required in the existing structure due to an increase in traffic over the bridge in excess of that which could have been contemplated when the bridge was originally built, the procedures of section 91 must be followed. *Id.* at 683.

300. If the purpose of a member of a bridge structure is to provide form and strength to the bridge crossing a railroad, it must be maintained and repaired by the railroad. 18 Op. Comptroller 236 (1962). The term roadway, however, may also include the immediate support for the pavement even if the support also serves a structural function. For example, the steel plating which supports the asphalt pavement of an overhead bridge is part of the roadway, and must be maintained by the municipality. 18 Op. Comp. 236 (1962). *See also* New York Cent. R.R. v. Erie County, 95 N.Y.S.2d 305, 307-09 (Sup. Ct. 1949) (railings along the sidewalks not a part of the framework of the bridge).

301. N.Y. R.R. Law § 93. The railroad's duty to maintain a bridge built by the railroad before 1897 is not limited to instances where the railroad crossed an existing highway. *Pennsylvania R.R. v. City of Rochester*, 37 N.Y.S.2d 471 (Sup. Ct. 1942), *aff'd*, 47 N.Y.S.2d 288 (App. Div., 4th Dep't 1943), *aff'd*, 59 N.E.2d 178 (N.Y. 1944). The evidence of an agreement concerning the maintenance of a bridge can be lost quickly, if it ever existed at all. In one case, decided in 1916, the evidence showed that a bridge had been constructed before 1897, but the plaintiff town apparently had no knowledge or evidence of an

1897 bridge is replaced, the law is uncertain as to whether the bridge retains its pre-1897 status. If a bridge is replaced by a railroad for its own purposes, the railroad may remain solely liable for its maintenance.³⁰² On the other hand, replacement can result in the loss of pre-1897 status.³⁰³

The maintenance responsibility of either the railroad or the municipality can be discharged in certain situations. When a railroad sells its road beneath a bridge, the obligation it had to maintain the structural portion of the bridge reverts to the municipality.³⁰⁴ In addition, where a county has taken over the roadway and approaches to a bridge above a railroad as part of a county road, the county becomes liable for all maintenance and repair.³⁰⁵

4. Eminent Domain

The power of eminent domain is the right of the government to take private property for a public purpose or use. Courts have held that this power is an inherent attribute of

agreement concerning the maintenance of the bridge. *Town of Cortlandt v. New York Cent. R.R.*, 161 N.Y.S. 377 (App. Div., 2d Dep't 1916) (deciding that the statute governed the respective obligations of the town and the railroad for the maintenance of the highway bridge leading to Croton Point).

302. *Town of Cortlandt v. New York Cent. R.R.*, 161 N.Y.S. 377 (App. Div., 2d Dep't 1916), *aff'd*, 115 N.E. 1052 (N.Y. 1917) (holding that bridge replaced by railroad solely for railroad improvements retains its status as a pre-1897 bridge). See also *City of New York v. Long Island R.R.*, 5 N.E.2d 380 (N.Y. 1936) (railroad to maintain the roadway and the framework of a bridge which passed over property used only for railroad yard purposes).

303. *City of Mt. Vernon v. Feinberg*, 113 N.Y.S.2d 534 (App. Div., 3d Dep't 1952) (declining to follow *Cortlandt* on grounds it was dicta and under facts suggesting bridge replaced or modified for highway traffic purposes on several occasions). Resurfacing alone does not result in a loss of pre-1897 status. *Pennsylvania R.R. v. City of Rochester*, 59 N.E.2d 178 (N.Y. 1944).

304. 81 Op. Att'y Gen. 144 (1981). But see *City of Middletown v. Wallkill Transit Co.*, 193 N.Y.S. 297 (Sup. Ct. 1922) (holding that where a trolley railway company's predecessor erected a highway bridge crossing a railroad, and agreed with the railroad company to maintain the bridge, the agreement did not relieve the railroad from its primary liability to the municipality under Railroad Law § 93 for cost of repairing the framework). However, sections 93-a and 93-b of the Railroad Law provide that the responsibility of a railroad to maintain and keep in repair the bridge does not terminate upon the abandonment of the railroad, unless otherwise agreed upon by the railroad and the governing body. N.Y. R.R. LAW §§ 93-a, 93-b.

305. 1971 Op. Att'y Gen. 117.

sovereignty vested in the legislature and, as such, exists without constitutional authorization.³⁰⁶ The New York State Constitution, however, does require the payment of just compensation.³⁰⁷ Provided just compensation is paid, the state may condemn private property when "necessary" to serve a "public purpose."³⁰⁸ Necessity is a legislative determination subject only to the deferential judicial review of whether the authority acted in "good faith and with sound discretion."³⁰⁹ Whether the condemnation serves a public purpose or use, however, is a judicial question.³¹⁰ The analysis is also quite different where a private corporation wields the power under a delegation from the legislature.

The state may delegate the power of eminent domain to railroad companies under the settled rule that they perform a public purpose.³¹¹ The power to determine necessity, however, is not delegated to the corporation; rather, it is a purely judicial question.³¹² An analysis of the authority delegated to the railroads must begin with the applicable statutes.

Under the General Railroad Act of 1850,³¹³ the railroads could exercise the power of eminent domain only to acquire lands necessary to their right-of-way.³¹⁴ The Hudson River Railroad was initially given the slightly broader power to condemn land for the right-of-way or land affected by the operation of the right-of-way.³¹⁵ An 1869 amendment to the General Railroad Law permitted the railroad to condemn lands required for the "purposes of its incorporation."³¹⁶

306. *Fifth Avenue Coach Lines, Inc. v. City of New York*, 183 N.E.2d 684, 687 (N.Y. 1962); *People v. Priest*, 99 N.E. 547, 552 (N.Y. 1912); *Heyward v. Mayor of New York*, 7 N.Y. 314, 324 (1852).

307. N.Y. CONST. art. I, § 7 (requiring payment of just compensation).

308. *People v. Fisher*, 83 N.E. 482, 485 (N.Y. 1908).

309. *Id.*

310. *In re City of Brooklyn*, 38 N.E. 983, 989 (N.Y. 1894), *aff'd sub nom. Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685 (1896).

311. *Rensselaer & Saratoga R.R. v. Davis*, 43 N.Y. 137, 142 (1870).

312. *Id.* at 144.

313. Act of Apr. 2, 1850, ch. 140, 1850 N.Y. Laws 211.

314. *Id.* § 14, 1850 N.Y. Laws at 216-18.

315. Act of May 12, 1846, ch. 216, § 10, 1846 N.Y. Laws 272, 275-78.

316. Act of Apr. 17, 1869, ch. 237, 1869 N.Y. Laws 441.

The language of the statute is broad, but the courts have limited its import to land required for the roads, yards, terminals, and facilities for the temporary storage of freight.³¹⁷ Condemnation to acquire manufacturing facilities, worker housing,³¹⁸ and gravel quarries are not within the statutory delegation.³¹⁹

When a railroad seeks waterfront facilities to receive shipping traffic and lands in excess of its immediate needs, the question of the railroad's power is less certain. In *Rensselaer & Saratoga R.R. v. Davis*,³²⁰ the court found that the need for docking facilities in anticipation of increased demand was speculative, mainly serving to enhance the railroad's competitive position against private interests, including other common carriers.³²¹ The court held that the railroad had to show "beyond a reasonable doubt, that such increase [in demand] will occur."³²² The court found such proof lacking and stated that it did not think that the "construction of slips for the accommodation of vessels" was a necessary corporate purpose.³²³

Seven years later, in *New York Cent. & Hudson River R.R.*, the Court of Appeals permitted that railroad to condemn a large portion of the water front in New York City, including piers and submerged lands.³²⁴ The court distinguished *Rensselaer & Saratoga R.R.* on the grounds that the earlier case relied on the speculative and competitive purposes for which the railroad sought title to the lands.³²⁵ The court refused to question whether all the lands were required for expansion, finding that the "weight of evidence" was "con-

317. *In re N.Y. & Harlem River R.R. v. Kip*, 46 N.Y. 546, 552-53 (1871).

318. *Id.* at 552 (citations omitted).

319. *In re N.Y. & Canada R.R. v. Gunnison*, 3 N.Y. Sup. Ct. 632 (1874).

320. 43 N.Y. at 137.

321. *Id.* at 146.

322. *Id.* at 145.

323. *Id.* at 146. The court stated, however, that the railroad could acquire such facilities by ordinary purchase. *Id.* The distinction is dicta. The applicable railroad law restricted all real estate ownership to lands necessary to the corporate purpose. See § 28(3), 1850 N.Y. Laws at 224.

324. *In re N.Y. Cent. & Hudson River R.R.*, 77 N.Y. 248 (1879).

325. *Id.* at 259.

vincing" that the railroad needed more lands for its present needs, and to accommodate a "large increase of freight [that] may and will occur" ³²⁶ In sum, *New York Cent. & Hudson River R.R.* held that railroads may acquire waterfront facilities and some excess lands provided, at least, that it has an immediate need to expand and convincing proof that its need for excess lands is not merely speculative. ³²⁷

5. Abandonment of Railroad Lands

The title a railroad obtains by condemnation of a right-of-way is in the nature of a permanent easement for the sole purpose of the railroad. ³²⁸ When a road is abandoned, as happens upon the dissolution of the corporation ³²⁹ or the sale of the right-of-way for non-railroad purposes, title reverts to the grantor. ³³⁰

Lands acquired for a depot, however, are taken in fee simple without possibility of reverter. ³³¹ Actual use of the lands for a depot is not required to vest absolute title, ³³² but

326. *Id.* at 265-66 (stating that findings concerning prospective needs met test of *Rensselaer and Saratoga R.R. Co.*).

327. The decision commanded a bare majority, 4-3, and the opinion only a plurality (Miller, Rapallo, and Earl, JJ., concurring in the opinion; Church, C.J., concurring in the result; Folger, Andrews, and Danforth, JJ. dissenting). The case may represent, therefore, the outer bounds of the railroad's power to exercise eminent domain.

328. *O & W Lines, Inc. v. St. John*, 228 N.E.2d 370, 371-72 (N.Y. 1967).

329. If the corporation is dissolved pursuant to its acquisition by another railroad, its corporate existence is continued through the merger. *Miner v. New York Cent. & Harlem River R.R.*, 25 N.E. 339 (N.Y. 1890).

330. *Id.*; *In re Harlem River Drive*, 121 N.E.2d 414, 416 (N.Y. 1954). See Act of Apr. 2, 1850, ch. 140, § 18, 1850 N.Y. Laws 211, 219-20 ("the company shall be entitled to enter upon, takes possession of, and use the [condemned] land for the purposes of its incorporation, during the continuance of its corporate existence . . ."). The durational provision was deleted by Act of Apr. 22, 1964, ch. 735, 1964 N.Y. Laws 1902, but remains applicable to lands acquired under the earlier provision.

331. *O & W Lines, Inc.*, 228 N.E.2d at 373 (holding that amendment of the General Railroad Law vests railroads with absolute fee in lands condemned for depots).

332. *Ellar Estates Corp. v. Cohen*, 383 N.Y.S.2d 532 (App. Div., 2d Dep't 1976) (holding that proceedings to acquire lands for a depot conclusively vested absolute title in railroad, despite fact that lands were only used for a hotel and "places of amusement").

an intention to so use, or actual use as a depot, must be proved.³³³ Title to lands acquired by purchase is only limited by the language of the deed.³³⁴

The courts have not considered whether title to trust lands granted to railroads is defeasible upon the abandonment of use. However, some railroad grants specifically reserve the power of the state to revoke the grant, although the power of revocation is not limited to abandoned railroad lands.³³⁵

6. Tort Liability and Public Safety

Railroads create a barrier to river access for two reasons. First, railroads are dangerous and subject to many regulatory controls designed to protect public safety. Second, railroads face the possibility of financial liability for personal injuries resulting from their operations. Consequently, railroads have a financial interest in excluding the public from their dangerous right-of-ways, and issues of tort liability and public safety come to have a direct impact on public access to the Hudson River.

Liability and safety concerns have prompted the federal and state governments to take steps to reduce rail accidents.³³⁶ The policy of promoting safety is furthered by regu-

333. *Schenectady Chem., Inc. v. DeLuke Sand & Gravel Co.*, 286 N.Y.S.2d 902 (App. Div., 3d Dep't 1968) (holding that where purpose is not indicated in condemnation proceedings, purpose is a question for the finder of fact).

334. *Nicoll v. New York & Erie R.R.*, 12 N.Y. 121 (1854).

335. "This grant is made subject to revocation by the State under its trust powers for the benefit of the People of the State." New York State Letters Patent, Book 47, p. 570 (May 16, 1913). The appearance of this language in some, but not all grants, permits the argument that when omitted, the state intended to grant fee simple absolute. Nonetheless, because the power of revocation is absolute, thereby reserving an extraordinary power in the state, its absence in a grant does not foreclose the more ordinary reversion or power of re-entry on abandoned railroad lands.

336. Accidents involving motorists and pedestrians along the railroads' right-of-way are a national problem. As of 1973, there were 395,000 grade crossings in the United States. 214,000 were public crossings. Benson C. Marshall, *Defending the Defensible: A Railroad Grade Crossing Accident*, ISSUES IN RAILWAY LAW, 1990 A.B.A. TORT AND INS. PRAC. SEC. 193-251, 204. In 1981, there were 8546 accidents at grade crossings, or approximately one accident for every four grade crossings during the calendar year (an accident frequency of

lating railroad operations and public access to the right-of-way.³³⁷ Liability relates to the railroads' financial ability to

approximately 0.25 per year/crossing), resulting in 697 deaths and 3121 injuries. Dale Haralson, *Trying a Grade Crossing Case*, 25 TRIAL 40 (1989) (citing U.S. DEP'T OF TRANSP., BULL. NO. 4, RAIL-HIGHWAY CROSSING ACCIDENT INCIDENT AND INVENTORY BULL. (1982)).

The Hudson River Railroad has a long history of injuries and deaths resulting from its operations. Between 1863 and 1864, for example, the railroad reported twenty-one serious injuries or deaths, half of which appear to have involved persons using a grade crossing or the railroad right-of-way. ANNUAL REPORT OF THE STATE ENGINEER AND SURVEYOR OF THE STATE OF NEW YORK (Albany, Weed, Parsons & Co. 1865). Today, along the Hudson River line (eastern shore), there are twelve active grade crossings (including five unimproved pedestrian crossings) south of the Poughkeepsie station (the northern terminus of Metro-North commuter service, a subsidiary of the Metropolitan Transportation Authority (MTA)). See PACE REPORT, *supra* note 7, at app. A. Between 1989 and 1995 the total accident frequency (mostly involving pedestrians) was 0.33 per year/crossing in the MTA service area, or approximately one accident at each crossing every three years. See Metropolitan Transportation Authority, Vehicle Incidents at Grade Crossings, Hudson Line (computer printout May 4, 1995) (on file with author) (three accidents involved MTA trains and the fourth an Amtrak train); Metropolitan Transportation Authority, Trespassers on Hudson Line (computer printout May 3, 1995) (on file with author). Although the figures suggest that New York has a higher injury rate than the national average, the risk of injury, factoring the frequency of trains and crossing use, may be less than the national average.

The most serious collisions are between trains and do not implicate public access. For example, in 1987, an Amtrak passenger train collided with a Conrail freight train, resulting in fifteen passenger deaths and 174 injuries. *Hearings*, *supra* note 15, at 86 (Background Paper on Eliminating or Limiting Punitive Damages for Railroad Passenger Deaths and Injuries). Punitive and compensatory damages amounted to \$134 million. *Id.* at 36 (statement of Edwin L. Harper, Pres., Association of American Railroads).

337. The federal government has encouraged the elimination of grade crossings. 23 U.S.C. § 130 (1994) (federal funds for grade crossing elimination); 45 U.S.C. § 650(a) (Supp. V 1993) (federal mandate to eliminate grade crossings in the Northeast Corridor). It also sponsors the development of sophisticated train control technologies. 59 Fed. Reg. 46,470 (1994). Finally, it has encouraged the improvement of traffic control devices at existing grade crossings. 23 U.S.C. § 130.

New York's initiatives to reduce liability focus on the reduction of hazards posed by grade crossings in addition to the regulation of railroad safety generally. N.Y. COMP. CODES R. & REGS. tit. 17(C), §§ 910.0-924.31 (1995). For example, the DOT regulates signage and crossing control technology. N.Y. COMP. CODES R. & REGS. tit. 17(B), §§ 220.1-220.4, 277.1-277.9, 278.1-278.6, 279.1-279.11 (1995). The DOT also has the authority to close grade crossings. See *supra* part III.B.2. State law requires motorists to come to a full stop before grade crossings. N.Y. VEH. & TRAF. LAW § 1170 (McKinney 1986) (where warning of oncoming train); *Id.* § 1171 (certain vehicles must always stop); *Id.* § 1176

provide service.³³⁸ A number of legal principles serve to lessen the liability exposure of the railroads.

Federal regulations governing speed limits preempt tort claims alleging that a train, although in compliance with federal speed limits, was traveling at an excessive speed.³³⁹

(vehicles may not block a crossing at any time). Railroads must install and maintain such signs and traffic control devices at public crossings as are required by the DOT. N.Y. R.R. LAW § 53 (McKinney 1991).

338. To protect high-speed passenger rail operators from liability, the United States Senate considered legislation, S. 839 (not enacted), that required applicant states to create funds in the amount of \$500 million to indemnify railroad companies of all liability from high-speed rail passenger services. 140 CONG. REC. S12,128-S12,129 (daily ed. Aug. 18, 1994). The legislation was prompted partly by the fact that indemnification agreements from passenger rail operators are required by the owners of the rights-of-way, typically freight carriers. *Hearings, supra* note 15, at 86. These agreements may indemnify the owners from all liability to rail passengers, regardless of fault. *Id.*; see also Liability Apportionment Agreement between Conrail and Amtrak § 8 (June 19, 1979) (on file with the author). Amtrak disputed the meaning of the apparently blanket indemnification, arguing that it has not indemnified Conrail for accidents arising from "deliberate or knowing disregard or disablement of safety signals, safety mechanisms, or safety systems [by Conrail employees] . . ." Letter from Stephen C. Rogers, General Counsel, Amtrak, to Bruce P. Wilson, Senior Vice President - Law, Conrail (Jan. 29, 1992) (on file with author).

339. The Secretary of Transportation has established speed limits for freight and passenger trains that depend upon track classification. 49 C.F.R. §§ 213.51-59, 213.101-.143 (1993) (six classifications of track based upon geometry and structure); *Id.* § 213.9 (speed limits). The regulations are promulgated under the authority of the Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971 (1970) (codified as amended in scattered sections of 49 U.S.C.A.). The act contains an explicit provision regarding the preemptive effect of the Secretary's standards. 49 U.S.C.A. § 20106 (West 1994). The federal speed limits preempt any state regulation of train speed, whether by statute or by common law. *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737-38 (1993). Nonetheless, the statute contains a savings provision whereby states may promulgate more stringent standards to address local hazards provided that such standards are not "incompatible" with federal law. 49 U.S.C.A. § 20106(2). *CSX*, however, left little to no room for state regulation of speed limits, despite the savings provision. *CSX*, 113 S. Ct. at 1743 (stating that federal speed limits apply regardless of the presence of grade crossings and rejecting the argument that federal speed limits are only designed to prevent derailments and not safe speeds in view of local conditions); see also *Mahony v. CSX Transp., Inc.*, 966 F.2d 644, 646-47 (11th Cir. 1992) (Birch, J., concurring) (criticizing *CSX* and arguing that a train can exceed a safe speed although obeying federal speed limits); *Landrum v. Norfolk S. Corp.*, 836 F. Supp. 373, 375 (S.D. Miss. 1993) (arguing that the state legislature, at least, should be able to reduce the speed limit at a specific crossing).

Under New York law, crossing control devices are only required if ordered by the DOT.³⁴⁰ DOT ordered controls are sufficient as a matter of law.³⁴¹ Consequently, a plaintiff cannot argue that the railroad was negligent for failing to install a superior control device.³⁴² Trains also have a statutory duty to sound a warning before entering a grade crossing.³⁴³ Breach of the duty, however, is inadmissible as evidence of negligence.³⁴⁴ Nonetheless, a train may have a duty in tort to warn of its approach.³⁴⁵

Trains also have the paramount right of way at grade crossings.³⁴⁶ Motorists and pedestrians, therefore, must exercise caution commensurate with the risk posed at a crossing.³⁴⁷ Where visibility is impaired, motorists and

340. *Bastek v. Lehigh & New England R.R.*, 192 N.Y.S.2d 134 (App. Div., 2d Dep't 1959); *Ames v. Pennsylvania R.R.*, 186 N.Y.S.2d 367 (1959); *Bailey v. Baltimore & Ohio R.R.*, 227 F.2d 344 (2d Cir. 1955).

341. *Callis v. Long Island R.R.*, 372 F.2d 442 (2d Cir. 1967).

342. *Bailey v. Baltimore & Ohio R.R.*, 227 F.2d 344 (2d Cir. 1955). If a traffic control device malfunctions, however, the malfunction may be used as evidence of negligence. *Davis v. Long Island R.R. Co.*, 95 N.E.2d 700 (N.Y. 1950). Federal participation in the selection of crossing controls can also preempt state tort law. *CSX*, 113 S. Ct. at 1737 n.4 (any uniform safety standard concerning railroads or grade crossings may have preemptive effect under 49 U.S.C.A. § 20106). Federal preemption over grade crossing controls turns on the extent of federal involvement. Federal funds must actually be used, *Landrum*, 836 F. Supp. at 377, and the crossing improvements installed before preemption occurs. *St. Louis Southwestern Ry. v. Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994); *Armijo v. Atchison, Topeka & Santa Fe Ry.*, 19 F.3d 547 (10th Cir. 1994). But see *Shots v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994) (holding no preemption of state tort law where federal funding of statewide program to install standard crossbucks at all grade crossings was not a federal decision that crossbucks were a sufficient control device at any particular crossing).

343. N.Y. R.R. LAW § 53-b (McKinney 1991).

344. *Vandewater v. New York & New England R.R.*, 32 N.E. 636 (N.Y. 1892).

345. *Ritter v. Merenda*, 606 N.Y.S.2d 956 (Sup. Ct. 1993). The duty is a question of fact determined solely upon the characteristics of the crossing and attendant circumstances. *Vandewater*, 32 N.E. 636. The railroad may have no duty to warn of an approach at a private crossing, but if the private crossing is used regularly by the public, a duty to warn may arise. *McDermott v. New York Cent. R.R.*, 218 N.Y.S.2d 266 (App. Div., 3d Dep't 1961).

346. *Siivonen v. City of Oneida*, 306 N.Y.S.2d 278, 281 (App. Div., 3d Dep't 1970).

347. *Delaney v. Town of Orangetown*, 354 N.Y.S.2d 957, 960 (App. Div., 2d Dep't 1974).

pedestrians must "stop, look and listen" before proceeding over the grade crossing.³⁴⁸

The duty of care owed to pedestrians is complicated by the fact that, unlike vehicles, pedestrians may be found anywhere along a railroad's right-of-way. Section 83 of the New York Railroad Law prohibits persons from walking along the tracks, or traversing the same, except at a crossing, whether formal or informal.³⁴⁹ Walking along the railroad tracks always violates the statute.³⁵⁰ However, the railroad is never relieved from the duty to exercise a reasonable standard of care to a foreseeable plaintiff.³⁵¹ Breach of the duty can result in substantial awards.³⁵²

The availability of punitive damages depends upon the operator. The New York Court of Appeals has held that the state, and its political subdivisions, are not subject to punitive damages.³⁵³ This immunity was extended to the Long Island Railroad Company on the grounds that the parent corporation, the MTA, is a public benefit corporation performing an essentially governmental function.³⁵⁴ Thus, all MTA commuter railroads are immune from punitive damages. The im-

348. *Id.*

349. N.Y. R.R. LAW § 83 (McKinney 1991); *Zambardi v. South Brooklyn Ry.*, 24 N.E.2d 312 (N.Y. 1939) (holding that the statute does not bar public use of customary pedestrian crossings).

350. *Merriman v. Baker*, 348 N.Y.S.2d 622 (App. Div., 4th Dep't 1973); *Waters v. Long Island R.R.*, 276 N.Y.S.2d 262 (Sup. Ct. 1966). Violation of the statute constitutes negligence *per se*. *Carpino v. Baker*, 412 N.Y.S.2d 617, 620 (App. Div., 1st Dep't 1979).

351. See, e.g., *Fuentes v. Consolidated Rail Corp.*, 789 F. Supp. 638 (S.D.N.Y. 1992) (holding that a sleeping homeless man, whose presence was unknown to the railroad, and who was a trespasser, was a foreseeable plaintiff because the railroad knew the area was used by homeless persons). The contributory negligence of a plaintiff, however, will reduce the plaintiff's award in proportion to the plaintiff's fault. N.Y. CIV. PRAC. L. & R. § 1411 (McKinney 1976).

352. For example, where ordinary negligence by Conrail resulted in permanent and serious injuries to a homeless plaintiff, the court found an award of \$2,854,741.10 reasonable for plaintiff's pain and suffering, lost wages, and medical expenses. This award had been substantially reduced due to the plaintiff's percentage of fault. *Fuentes*, 789 F. Supp. at 638.

353. *Sharapata v. Town of Islip*, 437 N.E.2d 1104 (N.Y. 1982) (personal injury action).

354. *Clark-Fitzpatrick, Inc. v. Long Island R.R.*, 516 N.E.2d 190 (N.Y. 1987) (punitive damages sought in tort claim arising from contract dispute).

munity does not apply to Conrail, a for-profit corporation, nor to Amtrak.³⁵⁵ Amtrak has requested legislative relief from punitive damages awards to passengers.³⁵⁶

Although liability is a significant issue, the limitations on recovery generally relieve the burden on the railroads, and consequently, the importance of the issue to public access. Nonetheless, federal regulations, existing liability, and public safety combine to require the removal of grade access (formal and informal) especially as a condition of high-speed rail service.

C. Property Law

1. Riparian Rights

Riparian rights in regard to public trust lands and waters are essentially ones of access.³⁵⁷ These rights relating to public trust waters are not absolute, rather they are subordinate to the state and federal governments when acting under the public trust to improve navigation. The riparian right of access is adversely affected in two situations: first, where the government interferes with riparian rights to improve navigation, and second, where the state grants public trust lands to a third party, for purposes unrelated to navigation, resulting in an interference with the upland owner's

355. See *Hearings*, *supra* note 15, at 29 (statement of W. Graham Claytor, Jr., President, Amtrak).

356. *Id.* Despite requests, no congressional bill has contained tort reform provisions. However, the Federal Railroad Administration (FRA) has requested public comment concerning railroad liability and possible tort reform. 60 Fed. Reg. 15,814-815 (1995).

357. The right of access includes the right to build a dock on underwater lands held by the sovereign, provided the dock is not inconsistent with applicable law and does not interfere with navigation. *Town of Brookhaven v. Smith*, 80 N.E. 665 (N.Y. 1907); *People v. Vanderbilt*, 26 N.Y. 287 (1863) (holding that construction of a dock outside the authorized pier line of New York City was a public nuisance).

This traditional right has been modified by statute. As of 1992, docks or wharves may no longer be built on state owned trust lands without the authorization of the state. 1992 N.Y. Laws 1368, 1369 (codified at N.Y. PUB. LANDS LAW § 75(6) (McKinney 1993)).

riparian rights. The second situation arises when submerged lands are granted to the railroad.³⁵⁸

In the first situation, where interference results from improvements to navigation, complete severance of the upland owner's riparian rights, standing alone, does not effect a taking.³⁵⁹ Riparian rights are always subject to the implied reservation of the sovereign's rights to improve navigation, even where the riparian rights are bolstered by a grant of submerged lands.³⁶⁰ If the upland owner pays for a grant of adjacent submerged lands, however, and improves them by constructing authorized wharves, the wharfage rights cannot be cut off without compensation.³⁶¹ The obligation to make payment does not rest on the loss of riparian rights, but rather on the loss of specifically conveyed wharfage rights which were subsequently relied upon.³⁶² The state's para-

358. The Board of Land Commissioners' power to grant lands under water is restricted to grants to the upland owner. The only pertinent exception concerns the railroads. See *supra* part III.A.3.b.ii.

359. *Sage v. City of New York*, 47 N.E. 1096, 1100 (N.Y. 1897).

360. *Id.*; *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 91 N.E. 846 (N.Y. 1910) (holding that dredging a channel to improve navigation which destroyed valuable oyster beds on submerged lands received under a colonial grant was not a taking); *Slingerland v. International Contracting Co.*, 61 N.E. 995 (N.Y. 1901) (holding that dredging operation to improve channel in Hudson River that interfered with upland owner's fishing, ice collection, and access to waters over submerged lands held under letters patent from the state did not effect a taking). But see *Appleby v. City of New York*, 271 U.S. 364 (1926) (holding that grant of submerged lands vested rights against the state, or its instrumentality, to improve navigation by dredging). *Appleby* distinguished *Lewis Blue Point Oyster Cultivation Co.* on two grounds. First, the colonial grant was merely proprietary and did not convey the public interest which could have been conveyed only by Parliament. Second, the interference with the submerged lands resulted from federal improvement of navigation, "and of course [the owners of the submerged lands] had to yield." *Id.* at 393.

361. *Langdon v. Mayor of New York*, 93 N.Y. 129 (1883); *Williams v. Mayor of New York*, 11 N.E. 829 (N.Y. 1887).

362. *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71 (1877) (holding that unexercised right of wharfage was merely a license subject to subsequent limitations by legislation). *First Const. Co. v. State*, 116 N.E. 1020 (N.Y. 1917) (holding that if the state conveys a wharfage right, without conveying any fee interest in the submerged lands, the holder is entitled to compensation to the extent the right is exercised if the state subsequently extinguishes the right). But see *Appleby*, 271 U.S. at 364 (holding that an appropriation is not necessary to vest rights). See *supra* notes 162-70 and accompanying text for an analysis of *Appleby*. *Appleby*, however, suggests that no rights vest against the

mount interest is based in public trust doctrine, which limits riparian interests as against the state.³⁶³

In the second situation, where a railroad takes submerged lands under a grant from the state, and fills them to construct its road, the upland owner's riparian rights are not cut off.³⁶⁴ When a railroad takes title to a strip of uplands together with submerged lands from a private owner for a right-of-way, the railroad's title to the uplands does not sever the upland grantor from its riparian rights, nor does it make the railroad an upland owner within the meaning of the Public Lands Law.³⁶⁵ The rule is that the railroad's right to obtain lands for a right-of-way provides it with a limited fee which does not carry riparian rights, and thus cannot extin-

United States when improving navigation. 271 U.S. at 393 (citing *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (1913) (no taking where private oyster beds were destroyed to improve navigation)).

363. *Sage*, 47 N.E. at 1101 ("[I]n every grant of lands bounded by navigable waters where the tide ebbs and flows . . . there is reserved by implication the right to so improve the water front as to aid navigation for the benefit of the general public, without compensation to the riparian owner.").

364. *Rumsey v. New York & New England R.R.*, 30 N.E. 654 (N.Y. 1892) (holding that riparian right of access to the river may be condemned by eminent domain, otherwise holder is entitled to damages if a railroad blocks access); *Saunders v. New York Cent. & Hudson River R.R.*, 38 N.E. 992 (N.Y. 1894) (holding that riparian right of access enforceable in equity against the railroad). The uplands owner who takes title after the construction of a railroad, however, may not enlarge access, if access provided by the railroad was reasonable at the time the railroad was constructed. *Hedges v. West Shore R.R.*, 44 N.E. 691 (N.Y. 1896).

365. *New York Cent. & Hudson River R.R. v. Aldridge*, 32 N.E. 50 (N.Y. 1892). Under the Public Lands Law, only an upland owner can obtain a grant to adjacent submerged lands. See *supra* note 185 and accompanying text. The inability of the railroad to become vested with riparian rights by virtue of holding title to uplands for a right-of-way is clearly illustrated in *In re Buffalo*, 99 N.E. 850 (N.Y. 1912). There, the court held a railroad, who took title to uplands for a right-of-way, did not obtain riparian rights even when all uplands between its right-of-way and Lake Erie completely eroded, vesting the state with title in the resulting submerged lands. Riparian rights, however, might attach to appurtenant uplands held for general railroad yard purposes. *Id.* at 853-54 (stating in dicta that although the railroad may not have riparian rights by virtue of statutory limitations concerning use, a non-railroad grantee of the railroad's uplands might obtain riparian rights).

guish the riparian rights appurtenant to the upland owner's remaining lands.³⁶⁶

2. Adjoining Public Highways

Public roads that are adjacent to, or terminate upon, navigable waters serve as public access to the waters.³⁶⁷ Where a bulkhead or pier is constructed at the end of a public street, the law will construe an easement across the improvement in favor of the public for access to the navigable waters unless the legislative authorization for the improvement explicitly restricts public access.³⁶⁸ A grant of wharfage rights and submerged lands to the adjacent upland owner will not be construed as inconsistent with a public easement over a pier erected at the end of a public street.³⁶⁹

3. Public Streets By Usage

New York does not recognize a common law public easement by prescription, nor the more limited customary right of an identifiable community to use private property.³⁷⁰ There are statutory provisions, however, by which streets may become public by usage.³⁷¹ These statutory provisions provide

366. *Aldridge*, 32 N.E. at 54. One court attempted to distinguish the right of the state to interfere with riparian rights, as opposed to a railroad's inability to so interfere, on the grounds that a railroad takes submerged lands for private ends. *Slingerland v. International Contracting Co.*, 61 N.E. 995 (N.Y. 1901). Such reasoning would render unconstitutional the authority of a railroad to acquire its right-of-way by eminent domain, a power that may only be exercised for a public purpose. See *supra* part III.B.4. The better reasoning, therefore, is that the railroad takes only a limited fee.

367. *Knickerbocker Ice Co. v. Forty-Second St. & Grand St. Ferry R.R.*, 68 N.E. 864, 866 (N.Y. 1903) (citing *People v. Lambier*, 5 Denio 9 (1847); *In re City of Brooklyn*, 73 N.Y. 179 (1878) (holding that public streets in New York City are held as public trust lands)).

368. *Knickerbocker Ice Co.*, 68 N.E. at 866.

369. *Id.* at 866-67.

370. *Post v. Pearsall*, 22 Wend. 425 (N.Y. 1839); *Gilles v. Orienta Beach Club*, 289 N.Y.S. 733 (Sup. Ct. 1935), *aff'd* 288 N.Y.S. 136 (App. Div., 2d Dep't 1936). For a discussion of customary rights see Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

371. N.Y. HIGH. LAW § 189 (McKinney 1979); N.Y. VILLAGE LAW § 6-626 (McKinney 1973).

that continuous use as a public road shall make the road public.³⁷² But, the courts have interpreted these statutory provisions to require more than public use. In addition to public use, the applicable local government must have adopted the road, usually by undertaking its maintenance.³⁷³ The use does not have to be hostile to the owner, but may be with the owner's permission.³⁷⁴

While usage may create public streets, their abandonment for six years may cut off the public right of use.³⁷⁵ Abandonment by non-usage only applies to streets where the fee to the underlying land is privately held.³⁷⁶ Abandonment depends upon the facts of the specific case.

The closure to vehicles is not determinative. If the obstruction is not across the entire width of the road, and a discernable path remains that follows the route of the prior road, the highway has not been abandoned.³⁷⁷ Even if the closure was wrongful, for example, by the construction of a building blocking the public road, discontinuance of public use for the statutory period of six years extinguishes the public right of use.³⁷⁸ The presumption is in favor of continued use, and the burden of proof lies with the party asserting abandonment.³⁷⁹

372. *Id.* Village Law requires public use for ten years. VILLAGE LAW § 6-626. The Highway Law, applicable to towns, requires public use for twenty years. HIGHWAY LAW § 189.

373. *People v. Underhill*, 39 N.E. 333, 335-36 (N.Y. 1895).

374. *Spier v. Town of Utrecht*, 24 N.E. 692, 694 (N.Y. 1890). There is doubtful authority for the proposition that if the use is hostile, then adoption by the local government is unnecessary to make the road public. *Village of Wellsville v. Hallock*, 139 N.Y.S. 961 (Sup. Ct. 1913).

375. N.Y. HIGH. LAW § 205 (McKinney 1979).

376. *Barnes v. Midland R.R. Terminal Co.*, 112 N.E. 926, 929 (N.Y. 1916).

377. *Town of Leray v. New York Cent. R.R.*, 123 N.E. 145 (N.Y. 1919); *Mangam v. Village of Sing Sing*, 50 N.Y.S. 647 (1898), *aff'd* 58 N.E. 1089 (N.Y. 1900). A court may find abandonment, however, where the road is overgrown and the use is sporadic and does not follow a clear trail. *Hallenbeck v. State*, 299 N.Y.S.2d 329 (Ct. Cl. 1969).

378. *Barnes*, 112 N.E. at 928. *See also Town of Leray*, 123 N.E. at 145 (where road was closed to public use by the railroad's construction of a terminal).

379. *Hallenbeck*, 299 N.Y.S.2d at 333.

4. Private Easements and Farm Crossings

Where the railroad acquires a right-of-way that divides private property under single ownership, the railroad is obliged to provide a crossing to join the divided estate.³⁸⁰ Although such crossings are termed "farm crossings" in the statute, the courts have held that the statutory duty applies to any use by the owner of the divided estate.³⁸¹ Once the portion of the estate which used the farm crossing is sold, the obligation to provide a farm crossing ceases.³⁸²

Where the language in the conveyance suggests an easement was retained by the grantor, the court will recognize the easement.³⁸³ Unlike a farm crossing, a private easement continues to serve the dominant estate regardless of common ownership, and consequently, may serve a residential subdivision.³⁸⁴

The conversion of a private railroad crossing to a public crossing (after 1897) requires the consent of the DOT.³⁸⁵ The private or public status of the crossing does not control public use of the crossing.³⁸⁶ There are several principles that support the right of the public to use a private crossing,³⁸⁷ at least where the crossing directly serves public trust lands and waters.

380. N.Y. R.R. LAW § 52 (McKinney 1991).

381. *Syracuse Ready-Mix Concrete Co. v. New York*, 350 N.Y.S.2d 474 (App. Div., 4th Dep't 1973).

382. *Smith v. New York Cent. R.R.*, 257 N.Y.S. 313 (App. Div., 4th Dep't 1932) (holding that "farm crossing" rights are extinguished when title to the properties served by the crossing are severed, thus preventing the use of a farm crossing for the purposes of a residential subdivision).

383. *Neuhaus v. Long Island R.R.*, 292 N.Y.S.2d 930 (App. Div., 2d Dep't 1968) (holding that language of conveyance reserving a "road or a farm crossing" sufficient to create an easement).

384. See RESTATEMENT OF PROPERTY § 488 cmt. b (1944).

385. See *supra* note 287 and accompanying text.

386. The property served by the easement could be a business, in which case the public could use the crossing as invitees.

387. The issue considered here is the right of the public to use a private crossing as against the railroad. If the crossing is part of a private road, the owner of the road controls use of the crossing. Under the railroad law, it is possible to have a public road where the crossing is private.

Since the railroad has the paramount right-of-way at grade crossings, an increase in the burden to the railroad from public use of a private crossing is nominal.³⁸⁸ The legislation defining a private crossing also recognizes that the public may actually use the private crossing.³⁸⁹ Although the railroad is protected in its reasonable use of its tracks, including its paramount right-of-way at the crossing, the railroad may not enjoin the reasonable use of a crossing within the expectations of the parties at the time the easement was created, or as shown by the subsequent use of the crossing.³⁹⁰ Where a crossing provides direct access to public trust lands and waters, public use of the crossing is a reasonable expectation of the parties.³⁹¹

D. The Effect of Substantive Law on Public Access

There is an array of legal doctrines that protect public access to the Hudson River, despite principles of railroad law that limit public access to protect operations and public safety.³⁹² Some of these doctrines are explicit,³⁹³ however,

388. The railroad could argue, however, that increased use of the crossing burdens the railroad by increasing the likelihood of an accident for which the railroad may be liable.

389. N.Y. R.R. LAW § 97 (McKinney 1991).

390. See *Board of Education v. Nielsen*, 195 N.Y.S.2d 169 (Sup. Ct. 1959).

391. This proposition is strongest where the crossing directly serves trust lands. The state's policy against the creation of new public crossings appears adverse to the public use of private grade crossings. Through public dedication of a private road, a crossing can become public in fact, except in the technical sense under the railroad law. The only recourse the state has, however, is closure of the crossing. See N.Y. R.R. LAW § 93-a (McKinney 1991) (decision to remove grade crossing must include a determination that removal is in the public interest).

392. Limiting public access to increase train speed is extrinsic to the public right to obtain access. See *supra* parts II.B.-D. and III.B.6. While the state has police power control over public safety, to the extent it is merely standing in the shoes of the railroad and closing crossings to improve operations at the least cost, the state is not acting in its police power capacity, but as a surrogate railroad which is unauthorized to eliminate public access. While place and manner restrictions on access are fully justified, see *supra* part III.C.4, these are properly micro adjustments and not prohibitions on accessing miles of shoreline in favor of one public park.

If state actions crossed an undefined threshold in limiting access (the courts have never attempted to define the exact extent to which the state may

the applicability of trust doctrine to public access in view of railroad grants and certain private grants has not been determined.

Grants to upland owners generally do not reserve a public interest by implication.³⁹⁴ Grants to the railroads have not been judicially construed in this regard. While railroad lands do not cut off private rights to access the Hudson River,³⁹⁵ public rights to access to the river across railroad lands have not been litigated. There is every reason to conclude that the public has a right to access public waters equal to that of upland owners.³⁹⁶

Whether railroad grants are defeasible estates has not been tested.³⁹⁷ Despite the unsettled law, applicable statutes and case law strongly suggest that the courts should find that the railroad takes no more than an easement to public trust

abdicate its trust, *see supra* part III.A.3.c.iii), it is possible that a public trust argument could be employed successfully, at least in the defense of a particular crossing, especially in view of the state's failure to formulate a comprehensive access plan despite the extensive closures that have adversely affected public access. *See supra* notes 8-10 and accompanying text. Insofar as public safety is the issue, safety is protected equally by limiting rail traffic and speed as by limiting public access.

393. *See supra* parts III.B.1, III.C.2.

394. The Court of Appeals has held that commercial or beneficial enjoyment grants convey unrestricted fee, subject to state and federal regulation of navigation. Some grants contain a condition subsequent, however, limiting the use to commercial purposes and docks. *See supra* part III.A.3.c.ii. Railroad grants, however, do not contain either beneficial enjoyment or commercial purposes language. The grants convey under a recital of the applicable railroad law, which permit grants for the purposes of the road. *See supra* part III.A.3.b.ii.

395. *See supra* part III.C.1.

396. The right of public access to trust waters is an essential element of the public's right to use trust waters. *See supra* part III.A.1. Points of access, where a public street runs along or terminates on the river, are not cut off by the filling of adjacent submerged lands. *See supra* part III.C.2. Furthermore, the railroad's statutory duty to extend docks and wharves impaired by the railroad implicitly requires the preservation of access to such places. *See supra* note 277 and accompanying text.

397. Although abandonment may be a fact sensitive question, when the railroad sells formerly granted lands, abandonment is conclusive. The state has not attempted to assert control of abandoned lands and there are procedural obstacles to alternate private actions challenging the validity of a grant. *See supra* part III.A.C.3.i. *See also infra* note 410 (concerning the public's ability to force the state to bring an action).

lands for the purpose and time necessary for its operations. Several principles support such a rule.

The general rule of construction is that nothing is taken from the sovereign by implication.³⁹⁸ This rule has added stature where the sovereign grants a specific use for lands held in trust for the public. The Board has no power to alienate trust lands, except as authorized by law: and the applicable statute allows the Board only to grant lands to railroads "for the purposes of their road."³⁹⁹

The courts have held that such conveyances impart a limited fee for the purposes of the road.⁴⁰⁰ This fee does not carry riparian rights, nor does it permit the railroad to block access to the Hudson River.⁴⁰¹ In addition, the legislature is powerless to grant fee simple absolute to approximately one hundred miles of the Hudson River shore under *Coxe, Long Sault, and Marba Sea Bay*.⁴⁰²

In sum, the fee is held for a reasonable and specific railroad use subject to the public interest in navigable waters. Therefore, the fee should be construed as no more than an easement subject to a condition subsequent.⁴⁰³ The reasoning is not limited to the right-of-way, but should apply to railroad stations, depots, or yards built upon formally submerged lands. Such improvements may warrant greater restrictions on public rights of access when in use. Upon abandonment,

398. *Shively v. Bowlby*, 152 U.S. 1, 10 (1894); *People v. New York and Staten Island Ferry Co.*, 68 N.Y. 71, 77 (1877); *Lansing v. Smith*, 4 Wend. 9, 18 (N.Y. 1829).

399. Act of Apr. 2, 1850, ch. 140, § 25, 1850 N.Y. Laws 223 (current version at N.Y. R.R. LAW § 18 (McKinney 1991)).

400. See e.g., *New York Cent. & Hudson River R.R. v. Aldridge*, 32 N.E. 50, 54 (N.Y. 1892).

401. See *supra* parts III.C.1. (Riparian Rights); III.C.2. (Adjoining Public Highways); III.B.1. (Statutory Protection of Access).

402. See *supra* part III.A.3.c.iii.

403. The effect of abandonment on the railroad's title normally depends upon whether the railroad took the lands by eminent domain or purchase. See *supra* part III.B.4. Railroad grants are taken neither by purchase nor eminent domain. The effect of abandonment on trust lands is a question of first impression in New York. In Vermont, however, the state supreme court has held that grants of trust lands to railroads contain a condition subsequent and that the state has the power of re-entry upon abandonment. *State v. Central Vt. Ry., Inc.*, 571 A.2d 1128, 1135 (Vt. 1989).

however, the limited purpose for which they were carved out of public trust lands should not create a residual private property interest superior to the paramount interests of the people and the sovereign power of the state.

Public use of idle railroad lands to access the river also is consistent with the principle that the railroad only takes trust lands as an easement.⁴⁰⁴ The only question, therefore, is whether public use unreasonably interferes with railroad operations, viewed at the time the easement was granted.⁴⁰⁵ Although the state might prohibit such use, and the necessary crossing of the right-of-way, it has not done so.⁴⁰⁶

The grant of trust lands to the upland owner also adversely affects public access to the river.⁴⁰⁷ There is a presumption against the right of the public to use lands granted to the upland owner.⁴⁰⁸ Where grants contain a condition

404. Without clear abandonment, the state is unlikely to seek annulment of grants made to the railroad. The state is actively seeking to expand passenger service on the eastern shore. See *supra* part II.B. In addition, the courts tend to protect the property interests of grantees who improved submerged lands in reliance on their grants. See, e.g., *Williams v. Mayor of New York*, 11 N.E. 829 (N.Y. 1887). Nonetheless, because the magnitude of the railroad grants was so great, the courts may avoid the issue of validity by construing the grants as reserving public interests that do not unreasonably interfere with the operation of the railroad. See e.g., *Marba Sea Bay*, 5 N.E.2d 824, 829 (O'Brien, J., dissenting) (arguing that although a grant conveyed trust lands to the low water mark, the grant conveyed no more than a fee subject to public use under the trust doctrine).

405. See *supra* notes 389-91 and accompanying text.

406. The statutory prohibition on public use of the railroad right-of-way does not prohibit the public from crossing the tracks. See *supra* note 349.

407. The New York Court of Appeals has validated the piecemeal privatization of trust lands while espousing general principles inconsistent with such privatization. See e.g., *supra* notes 237-47 and accompanying text. The contradiction, and unwillingness to unequivocally approve the power of the state to absolutely alienate trust lands, see *supra* notes 245-46 and accompanying text, illustrates judicial restraint and an appreciation of separation of powers. Nonetheless, the reluctance of the court to approve conveyances that serve no public purpose, and indeed injure the public, serves as a warning that the legislative and executive branches must not go too far.

408. See *supra* part III.A.3.c.ii. *In re Waterfront* allowed some exceptions by recognizing two cases which engrafted a public use on private grants because of the factual circumstances. *In re Waterfront*, 157 N.E. 911, 916-17 (distinguishing *Thousand Island Steamboat Co.*, 71 N.E. at 764; *Harper v. Williams*, 18 N.E. 77 (N.Y. 1888)).

subsequent, however, the state may retain the power of re-entry.⁴⁰⁹ There is a basis for public enforcement of the power of re-entry regardless of state cooperation.⁴¹⁰

IV. Recommendations

A. Introduction

There are two primary areas of concern that affect access to the Hudson River. First, the privatization of the shore is inimical to access. In this area there are two related issues which require determination. One, the railroad's title to excess lands and its ability to convey excess lands to private parties is an issue. The second issue is whether the state has any remaining interest in previously submerged shore parcels granted by the state to the adjacent upland owners.

The second area of concern is the closure of crossings. This area also raises two related issues. First, the impetus for crossing closures, safety and high-speed rail proposals, should not be accepted without question. Second, the present methods employed by the state to close crossings also warrant critical inquiry. The public should require the state to provide a coherent Hudson River access plan, in view of present and anticipated use requirements.

Each of these issues shall be developed below. Some of these recommendations call for a clarification, or a development, of existing law. Law is not immutable, but serves public policy. The health of the river was ignored for centuries. Over the past thirty years, the degradation of the river became contrary to public policy and laws designed to protect the river developed. Likewise, as the health of the river is restored, and with it meaningful recreational use and commercial fishing, the policy which ignored public access should change, and with this change in policy, the development of

409. The power is restricted by the statute of limitations. *See supra* part III.A.3.c.i. The statute permits adverse possession against the sovereign. The permission is not constitutionally required, but is only a matter of policy.

410. The statute requires the Attorney General to bring an action to void a grant for failing to fulfill a condition subsequent. A member of the public should be able to compel the state to bring the action because the duty is mandatory. *See supra* part III.A.3.c.i.

law designed to protect access is required. Accordingly, legal principles concerning access will need refinement, and in some instances, reconsideration, in view of the needs of today and tomorrow.

B. Privatization of the Hudson River Shoreline

1. Grants to the Railroads

The railroads, as they appear today, are the result of a long history. Stations have opened and closed, the right-of-ways have been realigned and widened, additional tracks have been laid and some tracks have been abandoned. Partly as a result of these changes,⁴¹¹ the railroads have come to own excess lands, many of which were formerly submerged lands.⁴¹² The extent to which these lands are truly excess can be debated in any particular case. Nonetheless, the railroads, throughout their history, have sold excess lands for profit.⁴¹³ Where these sales created private property, the public has, in certain situations, been cut off from the river.

The state legislature and the courts have distinguished the rights of the railroads to sell excess lands depending upon the use made of the land (for a right-of-way or a station) and the form of acquisition (by purchase or condemnation).⁴¹⁴ These limitations and rights do not apply, however, to formerly submerged lands. Such lands were acquired by grant (neither through purchase nor condemnation), although nominal sums may have been paid.⁴¹⁵ The state, through legislation or litigation, has never attempted to define the railroads'

411. The railroads have also purchased lands which were never necessary for their use as railroads. The purchases with which the author is familiar may have been negotiated with grantors of additional rights-of-way where the remaining shore lands were not wanted by the grantors.

412. See, e.g., PACE REPORT, *supra* note 7, at B-11.

413. See, e.g., *id.* The railroad title maps of 1917 indicate many sales of railroad lands (the maps were updated sporadically with title information until the 1960s).

414. See *supra* part III.B.5. (Abandonment of Railroad Lands).

415. See *supra* notes 212-20 and accompanying text (e.g., \$500 compensation paid by the New York Central and Hudson River Railroad for the entire right-of-way and stations built upon submerged lands along the eastern shore of the river).

right to sell those lands.⁴¹⁶ The state has routinely acquiesced, however, to the sale of such lands by granting to the railroads' grantees any residual interest the state may have in the lands.⁴¹⁷

The legislature should require a right of first refusal, for a nominal sum, in favor of the state for all railroad sales of formerly submerged lands. The state should be obliged to exercise the right unless it finds that the lands in question cannot serve a public use related to the Hudson River. The findings should be made only after public notice and comment with a final determination not to purchase subject to judicial review.⁴¹⁸

In addition, the state should be authorized to re-enter and take title to idle lands conveyed by grant to the railroad.⁴¹⁹ The public should be permitted to petition the state to re-enter railroad lands and to obtain judicial review if the state refuses to take action.⁴²⁰ In any action by the state to quiet title, a summary proceeding should be provided to lessen the state's burden of proof. The state should prevail upon proof that the formerly submerged lands were granted by the state. The railroads must carry the burden to prove that the lands are still required for railroad purposes.

416. Some grants, however, contain an express reservation on the part of the state to revoke the grant. See *supra* note 215 and accompanying text.

417. The state may grant all its remaining interest in previously granted lands without public notice. See *supra* notes 192-93 and accompanying text.

418. This procedure would halt the sale of excess railroad lands to private parties unless there are exceptional circumstances. The procedure merely ensures that the state is aware that its power of re-entry has matured, see *supra* notes 221-25 and 274, and accompanying text, which serves to protect trust interests as well as the title of railroad grantees. Finally, judicial review of a state decision not to purchase merely provides an alternate to an action to compel the state's power of re-entry. See *supra* text accompanying note 224.

419. Where the right of first refusal will halt the sale of railroad lands, it will also deter the railroad from attempting the sale of excess lands. A right of re-entry asserts the state's continuing interest in trust lands granted to the railroad and provides a mandate for the state to assert title. The codification of the procedure is consistent with a long line of judicial cases construing the railroad's fee in submerged lands. See generally part III.D.

420. To deter frivolous litigation, the petitioner could have the obligation of presenting a *prima facie* case that the idle lands have not been used for railroad purposes for five years.

This proposed legislation clearly asserts the state's control over formerly granted lands which are not used for railroad purposes. Such legislation, however, should not be viewed as creating a new property interest in the state, but rather as providing a procedure for discharging an existing obligation under public trust doctrine. This obligation should be recognized by the courts if the legislature fails to act.⁴²¹

2. Grants to Upland Owners

While the proposed legislation concerning railroad grants does not directly conflict with existing law, any reversionary interest in the state for grants to upland owners may conflict with private property interests which have been recognized for too long to permit their loss without effecting a constitutional taking.⁴²² Nonetheless, the state has at least two options to mitigate the harm caused by granting trust lands without effecting a reversal of judicial precedent, however questionable that precedent may be.⁴²³

Although law in New York concerning the state's reserved interests in grants of trust lands is complex, the law is reasonably clear that the state may convey title without any reservations under certain circumstances.⁴²⁴ This rule conflicts with trust doctrine because it permits the interference with public rights merely to confer a private benefit to an up-

421. The danger of the state asserting a "new" property interest is that the state's action may give rise to a takings claim under the state or federal constitution. See *supra* part III.A.2.c.v. The proposed legislation, however, is consistent with principles of public trust doctrine and railroad law.

422. Grants to the upland owner generally convey absolute fee unless they contain a condition subsequent or an explicit reservation. See *supra* part III.A.3.c.ii.

423. For a discussion of the cases which concern extinguishment of the public trust, see *supra* notes 162-70 (*Appleby*), 236-51 (*Steeplechase*), and 228-31 (*In re Water Front*).

424. For example, grants of trust lands for unrestricted "beneficial enjoyment," for consideration, and where the lands are appropriated by the grantee, are held in fee simple absolute, provided the grant is not of such magnitude as to be void as an impermissible alienation of the public trust. See *supra* part III.A.3.c.ii. One United States Supreme Court decision, however, holds that appropriation of the submerged lands is not essential to vesting absolute title, where compensation is paid. *Appleby v. City of New York*, 271 U.S. 364 (1926). For a criticism of *Appleby*, see *supra* notes 165-70 and accompanying text.

land owner.⁴²⁵ The state serves no public interest by abdicating its sovereign duty as trustee. Consequently, the state should be prohibited from conveying absolute grants of trust lands and from conveying any remaining interest it may have in lands previously granted.⁴²⁶

In addition to a prohibition on absolute grants, the state should assert a retained interest in grants subject to the condition subsequent that the lands may only be used for the purposes of erecting docks and commerce.⁴²⁷ Public use of commercial grants should be encouraged where feasible.⁴²⁸ Where granted trust lands have become so polluted that they

425. The case which stated the rule attempted to reconcile the interference with trust doctrine: "During all our history the Legislature and the courts have recognized that the public interest may require or at least justify a limited restriction of the boundaries of navigable waters." *People v. Steeplechase Park Co.*, 113 N.E. 521, 526 (N.Y. 1916). No justification in the public interest, however, was offered in the case and none seriously can be argued now. Only three of the seven judges concurred in the opinion, thus the court was unable to agree on a rationale for the rule. See *supra* notes 418-26 and accompanying text.

426. Limited absolute conveyances were permitted, in part, to bring what were considered waste lands (wetlands) into productivity. The policy was based upon ignorance and the law that advanced the policy is no longer appropriate. See *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (stating that newly recognized scientific and ecological values of wetlands are not subordinate to "outmoded" use preferences). A major doctrinal problem under the present jurisprudence is that the state may incrementally achieve what it is prohibited from doing with a single grant, that is, the privatization of miles of waterfront. See *supra* part III.A.3.c.iii. The logical inconsistency is solved by prohibiting absolute alienation.

427. Commercial grants between 1835 and *circa* 1890 probably contain a condition subsequent restricting use to docks and commercial use, see *supra* notes 227-32 and accompanying text; consequently, the state retains the power of re-entry.

428. The assertion of a public right to use some privately held trust lands would open new opportunities for public access, and help facilitate a system for public trails along the river. New York has not recognized the absolute right to exclude the public from formerly submerged lands (under lesser grants than for unrestricted beneficial enjoyment). See *supra* note 410 and accompanying text. Public use may be, therefore, a fact sensitive legal question. To avoid uncertain, case by case litigation, a legislative declaration would create a presumption in favor of public access to lands granted for commercial purposes. The owner of such lands would then have the burden of showing that public access is incompatible with the adapted use. Such a burden could be met by proof, for example, that the property is adopted to private residences. However, where the trust lands have become derelict industrial sites, or abandoned wharves, then a right of public access should prevail. Such legislation would alter the

pose a danger to remaining trust lands and waters, the state should revoke the grant.⁴²⁹

C. Closure of Crossings

1. High-Speed Rail

Under Governor Cuomo, New York State formalized a long-standing plan to create a high-speed inter-city rail system along the Hudson River. The premise for the plan is that the state should encourage the best transportation at the least cost. The premise appeals to common sense, but the costs are more difficult to quantify than the state proposal acknowledges.

The construction of the railroad on the shores of the river during the last century also provided, in theory, the best transportation for the least cost. Along the Hudson was a great supply of public lands, dramatically reducing the railroad's cost of land acquisition for the right-of-way. In addition, the river offered a grade superior to any inland route. This least cost route, however, has bound the shores in rip rap and iron and created the access problem that is the subject of this article.

Further development of the railroad infrastructure to support high-speed rail will exacerbate the problems associated with the railroads.⁴³⁰ The removal of grade crossings (without alternate access provided for the informal crossings not recognized by the DOT), fencing the right-of-way, increased rail traffic (and consequent increase in noise) will all serve to solidify the barrier to the river by enlarging a loud, dangerous,⁴³¹ and unsightly presence on the river. Because

law by turning the limited exception recognized in *In re Waterfront* into a limited presumption in favor of public access. *Id.*

429. A sufficient showing for revocation could be found where the site is subject to enforcement actions under federal and state environmental laws. There are numerous abandoned industrial sites built on public trust lands that pose a hazard to the river. See e.g., Editorial, *Havoc-on-Hudson*, N.Y. TIMES, Oct. 21, 1995, at A20 (describing a contaminated thirty-two acre industrial site in Hastings-on-Hudson). The application of trust lands to uses that injure remaining trust waters arguably violates the condition subsequent where it applies.

430. See *supra* part II.C.

431. See *supra* part III.B.6. (Tort Liability and Public Safety).

this process is "incremental," the state has refused to consider these adverse effects, alternate routes or taking no action in an appropriate EIS process.⁴³²

The state should not assume that high-speed rail is good for New York without consideration of its adverse impacts, nor for the river communities which will receive little benefit from high-speed rail service, and yet will bear most of the burdens associated with the service. The decision should be reconsidered, the feasibility of alternate routes and services should be analyzed, and the adverse effects of high-speed rail should be carefully weighed with the purported benefits of such service along the Hudson River line.

In short, the state should undertake its responsibility to carefully study the high-speed rail proposal through the appropriate EIS process in which the public has an opportunity to comment.⁴³³ The DOT should stop making "improvements" for railroad operations until the state formulates a transportation plan that is consistent with a plan for public access to the Hudson River.

2. Comprehensive Planning

Grade crossings are closed under a case by case process. Although there is public notice,⁴³⁴ the closure is typically negotiated between the DOT and the affected local community.⁴³⁵ As a consequence, there is no statewide planning as part of the process.⁴³⁶

The decision of the DOT, supported by the State Department and DEC, not to develop a general access plan through

432. See *supra* part II.D

433.

434. See *supra* part II.C.2.a.

435. See, e.g., PACE REPORT, *supra* note 7, at B-35 to B-36 (closure proceeding in Cornwall-on-Hudson).

436. The input of the Greenway Council provides, to some extent, oversight of closures from the broader perspective of public access to the river as a whole. See *supra* note 141 and accompanying text. Participation by the Greenway, however, has been insufficient to promote general public participation, largely because Greenway has conceded that closures should be accorded a case by case treatment.

an EIS process,⁴³⁷ facilitates closures in two ways. First, a decision concerning a grade crossing elimination is made by the DOT and a local community. The DOT is in a strong position to negotiate, because of its jurisdictional power and control over funds which it can make available to a community to improve or create public amenities. Second, the one on one negotiations fostered by the DOT exclude input from the public at large on the broader issue of access generally. Whereas local communities may view waterfront development as a potential source of tourist revenue, they frequently are not interested in providing an access point for the general public.⁴³⁸

The Hudson River is a public resource and a comprehensive plan to provide access is a public concern. The means adopted by the state government concerning the elimination of public access have precluded general public participation. This position by the state is strengthened by the interests of local communities, who might be appalled by the idea that outsiders should have a voice in the decision-making of "local" access questions.⁴³⁹

The problem is one of priority. The present system facilitates closures.⁴⁴⁰ The priority, however, should not be closures, but enhancement of public access. The state should place a moratorium upon closures until it creates a river wide plan for public access. Part of the plan should consist of a thorough inventory of existing and potential crossings, and an inventory of public crossings that have been closed illegally (without formal proceedings).

437. See *supra* part II.B.3.c.iii.

438. For example, many communities limit outside use of a public boat ramps and waterfront parks by prohibiting parking without a local permit.

439. Regulations under the Coastal Law require state agency consideration of access for "all the public." See *supra* note 74.

440. The mandate to close crossings applies to railroads generally. See *supra* part III.B.2. The mandate to improve and protect access is both independent of railroad law, see *supra* notes 70-75 and accompanying text (describing coastal policy) and a part of railroad law. See *supra* part III.B.1. An executive decision to subordinate public access to railroad operations, without formal analysis or consideration, see *supra* part II.D., is an arbitrary and capricious election in contravention of relevant statutory and case law.

The DOT may be institutionally unable to prioritize public access over its primary mission, the safe improvement of the transportation infrastructure.⁴⁴¹ The presence of grade crossings, especially informal pedestrian crossings, is an obstacle to the DOT mission. The study, therefore, should not be conducted by the DOT, but by the State Department of New York, which the legislature has charged with the duty of protecting and enhancing coastal resources and access to the same.⁴⁴² By placing the jurisdiction over crossings and fencing that implicate coastal access in the hands of the Secretary of State, the DOT will be relieved of an inherent conflict between access and transportation improvements. At the same time, access to the Hudson River, will be given priority over transportation improvements. The structural reordering of these priorities is essential to the preservation and enhancement of access to the Hudson River.

V. Conclusion

An appreciation for the Hudson River is where efforts for improved access must begin. The pollution the river has suffered has unquestionably tainted public perception. Underlying the recommendations of this report is a view of what the river may become again: a resource that may be used for swimming and fishing without apprehension, a place where

441. In certain instances, the DOT has done an excellent job to improve public use of the Hudson River. The DOT activities concerning Castleton Island State Park and the Village of Castleton-on-Hudson provide an excellent example. See PACE REPORT, *supra* note 7, at B-3 to B-5. Nonetheless, the DOT is seeking to concentrate public use of the river by restricting access points to discrete parks and public facilities served by grade-separated structures. As a consequence, the DOT has a strong incentive not to raise the question of public access to an old wharf or spit of undeveloped land, used by the public despite a lack of improved access. Access is an obstacle for the DOT, it has no incentive to multiply the crossings that it must face. It is unreasonable to expect the DOT, faced with the task of eliminating grade crossings, to multiply its work, and the cost of accomplishing its work, by seeking out new crossing opportunities, identifying illegal closures, and by formally recognizing existing informal crossings.

442. Under the Coastal Law, any state action that affects public access to the Hudson River is subject to approval by the Secretary of State, thus it should be the lead agency in the preparation of an EIS. See *supra* part II.D. (summarizing New York State coastal management law).

birdwatchers may enjoy a flock of mergansers without the nagging concern that the ducks' fatty tissues are contaminated by PCBs. These fears and concerns subtly influence the public. A walk in the mountains may be preferred to a canoe trip or a walk along the river, without full awareness that the preference is influenced by an aversion to the river's pollution. This subtle influence is a contaminant, precisely of the same nature as the contaminants that have been allowed to pollute the river. In this frame of mind, a permanent loss of access becomes secondary to the running of a faster train.

Improving public access turns the public's face to the river and provides a plan to enjoy the river for what it offers today and tomorrow. Ready access to quiet spots where one can picnic, swim, fish, or launch a kayak, are precious to the quality of life. The alternative, highly controlled access to limited public parks, creates a gauntlet of highways, user permits, parking lots, weekend crowds, and lines to the snackbar. Large public parks can provide excellent amenities, and can serve to protect fragile ecosystems, however, these functions are maximized where they do not provide the only access.

The concern for public access is not new. The protection of access is embodied in the public trust doctrine, a tradition of law reaching into antiquity. The right to use a healthy river is implicit in the trust doctrine, and measures that deny public use, whether through the removal of access or through the pollution of the river, are highly suspect under established principles of law. Although some of the proposed recommendations for improving public access call for a modification of the law, the changes are designed to protect traditional public rights that changing conditions have eroded.

By subordinating the interests of the railroads to the public's right of access, and by limiting the power of the state to alienate its responsibilities under the public trust, the judiciary has affirmed a doctrinal basis upon which the public can assert a right of meaningful access to the Hudson River. While the judiciary has prohibited the substantial alienation of the Hudson's shore, the state's executive and legislature

have been allowing or aiding this very result. Such governmental abdication and complicity are illegitimate. The current administration, under Governor Pataki, has the opportunity to reverse this tendency. The legislature and executive have the opportunity to build upon the doctrinal basis and assert what is both a sovereign duty and a sovereign power: the public trust interests of the people of the State of New York through the protection and enhancement of public access to the Hudson River.