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Cc: [Thompson, Steve D](mailto:Thompson.Steve.D); [Stevens, Paul](mailto:Stevens.Paul)
Subject: RE: NC Public Trust Doctrine
Date: 06/21/2010 02:56 PM

-----Original Message-----

From: Mike_Murray@nps.gov [mailto:Mike_Murray@nps.gov]
Sent: Thursday, June 17, 2010 9:08 AM
To: Stevens, Mike; Harrington, John
Cc: Thompson, Steve D; Stevens, Paul
Subject: NC Public Trust Doctrine

Mike or John,

(I copied you both since both of you have worked on some aspects of the issue. It is fine with me if you consult each other and decide who should take the lead, or it is fine with me if you both want to be involved.)

As we continue to work on our ORV plan/EIS, I want to be sure that I clearly understand the implications of the North Carolina Public Trust Doctrine as it applies to the intertidal zone at Cape Hatteras National Seashore. John has previously written an opinion (attached) about park jurisdiction in the intertidal zone in locations in front of villages where the original 500 feet of NPS ocean-front property has been lost to erosion. The opinion was essentially that, because of the 1958 deed that transferred the intertidal zone from the State to the Seashore, NPS has jurisdiction over the intertidal zone even if the original upland property no longer exists.

My questions is this: Does NPS have a legal obligation, under that 1958 deed, to allow public access to the intertidal zone? In other words, is there a legal assumption that, even though NC transferred the public trust property to NPS, the fundamental "right of access" to the navigable waters is implicit in that deed? See attached excerpt from an article, which makes the case for that assumption (or if you want to see the full article, follow link). According to this paper (if it is valid legal analysis)...the public trust doctrine will create a presumption that the Legislature did not intend to convey lands that would impugn trust rights in navigable waters; that presumption can be rebutted by "a special grant of the General Assembly conveying lands...free of all public trust rights." When I review the 1958 deed, I do not find any specific reference to "free of all public trust rights" so does that mean the assumption is that the public trust doctrine remains in effect?

The relevance of the question: Can/should NPS allow continual (uninterrupted; unrestricted) public access (presumably pedestrian, not ORV, access) within the intertidal zone when shorebird or sea turtle protection measures are in effect that, under current practice, precludes public access? I am trying to determine if there is a valid legal basis (or, in fact, an underlying legal assumption) that the State deed carried with it the implication that NPS would/should (always) allow access in such areas. See attached 1958 deed. Relevant sections are located on pp.9 (last two paragraphs) and 10.

Note: I am not looking for any particular answer; just an answer. It some ways it would make deciding how to manage access in the intertidal zone (i.e., deciding whether to prohibit, restrict, or allow during nesting periods), if the legal doctrine issue were definitive (i.e., it applies, or it does not apply to the deeded property). My intention is to simply confirm our understanding of how the public trust doctrine applies to these situations, so we can make some decisions needed soon for the FEIS.

www.law.sc.edu/environmental/papers/200611/eas/vulkin.pdf

(See attached file: 1958 NC Deed.pdf) (See attached file: NC Public Trust Doctrine brief.docx) (See attached file: 2009 SOL Opinion.Foreshore Jurisdiction.082709.pdf)

Thank you for any assistance you can provide. If it would be productive to discuss, perhaps we could hold a conference call next few week after you have had a chance to review the material.

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