CALIFORNIANS NEED BEACHES—MAYBE YOURS!

> The shoreline of the United States will always be our edge, our continental definition. As such it has significance for every American. We each have a right to our individual odyssey on a stretch of sand, to look outward and to look inward as a nation and as man, inspired by the sea lapped shore.[1]

A. INTRODUCTION

Our nation faces a serious problem of congested recreational resources as a result of a rapid increase in population[2] compounded by concomitant increases in urbanization and leisure time.[3] These factors simultaneously increase the demand for more public recreational areas and reduce the amount of space available. Necessarily, this expanding demand comes into conflict with the private property rights of those who hold title to lands particularly suited for public recreational purposes. A recently litigated aspect of this conflict involves the ownership of the beach areas of our nation's sea coasts. Public interest demands public use, access, and enjoyment; traditional property concepts permit title to the vast majority of beaches to be privately held.[4]

> Americans by the millions are accoutred with sunglasses, bathing suits, clam rakes, bird guides, and leisure time for their odyssey by the sea, but in a crowded age the shore itself is becoming preëmpted by uses which outlaw its public recreation and re-creation possibility.[5]

It will be the purpose of this note to examine the effectiveness of some current judicial and legislative attempts to resolve this conflict. In addition, possible alternative approaches, in accordance with general public policy, will be suggested.

Public use of the seashore has been encouraged, as a matter

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1. Udall, *Foreward* to H. GILLIAM, ISLAND IN TIME at 7 (1962). (A Sierra Club publication).

2. At present the world population has a doubling time of only 35 years. P. EHRLICH, THE POPULATION BOMB 18 (12th ed. 1968).

3. *See* U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, LIFETIME ALLOCATION OF WORK AND LEISURE 22 (1968) in which it is estimated that the employed worker has about 1,200 hours per year more leisure time than did his 1890 counterpart.

4. Udall, *Foreward* to H. GILLIAM, ISLAND IN TIME at 7 (1962).

5. *See* note 7 *infra*.

of public policy, from the nation's earliest history.[6] At one time, the nation's seashores must have seemed more than ample to meet the recreational needs of a future populace, since much of the nation's seacoast was converted to private ownership by states anxious for development and reclamation.[7] Now, the public beaches are rapidly becoming congested and are no longer adequate to meet public needs.[8]

Although legislatures and courts are aware of this problem, they are confronted by the dilemma inherent in honoring private rights obtained through valid state conveyances while at the same time meeting a burgeoning public need. State constitutional provisions apparently requiring access[9] are not being enforced and the power of eminent domain[10] is not being utilized by the states to place the beaches in public ownership. Therefore, the judiciary has been left to implement public policy in a case by case struggle "in the face of a clamoring national need."[11] Some courts, demonstrating a willingness to go beyond their traditional applications of property law, have been able to find that the public does in fact have an established right to the access and use of what have been formerly considered strictly "private" beaches. Some of the doctrines which have been relied on to find these public rights are custom, prescription, and dedication.[12]

Before embarking upon a general discussion of these judicial solutions, it becomes necessary to more accurately define the physical area in controversy. In common parlance, the word

6. *See, e.g.*, Jackvony v. Powel, 21 A.2d 554, 558 (1941) for a discussion of an early state constitutional provision protecting the "common law rights of the people" in the shore.

7. "Only two percent of our extraordinary coastline, the Atlantic, the Gulf Stream, and the Pacific . . . is devoted to public use." Address by John F. Kennedy, Great Falls, Montana, Sept. 26, 1963, in AMERICA THE BEAUTIFUL 28 (R. Polley ed. 1964).

8. Acutely demonstrated, for example, by visualizing the 200,000 people who crowd the six miles of Jones Beach each summer's day. Udall, *Forward* to H. GILLIAM, ISLAND IN TIME at 7 (1962).

9. CAL. CONST. art. XV, § 2 provides that no private property owner shall be permitted to exclude the right of way to navigable waters whenever it is required for a public purpose. Recreation has been termed a public purpose. This provision, however, may be violative of the 5th Amendment. *See* note 10, *infra*.

10. U.S. CONST. amend. V provides that private property shall not be taken for public use without just compensation. See CAL. CONST. art. 1, § 14 for a similar state provision. The extremely high cost of acquiring beach property through eminent domain proceedings is prohibitive.

11. *Foreward* to H. GILLIAM, *supra* note 8.

12. See text accompanying notes 30, 35, 55 *infra*.

"beach" refers to that portion of littoral land which consists primarily of sand and pebbles washed upon the land by the action of the sea.[13] By this descriptive definition then, "beach" includes all of the land from the water's edge inland to the beginning of vegetation or to an artificial border. Legally, however, the beach is divided between 1) the foreshore, or wet-sand area, which extends from the water to the mean high tide line, and 2) the remaining area of dry-sand, which has the mean high-tide line as its seaward boundary.

With few exceptions, and as a generally accepted doctrine, ownership of the foreshore is in the state, as public land, and is held in trust for the people.[14] Unfortunately, the foreshore, or wet-sand area, is limited in its use for many water-related activities. The center of controversy is the remaining portion of the "beach" which is not subject to a public trust and which has been granted to private interests. The dry-sand area has as its principle value its usefulness as a recreational adjunct to the wet-sand and water. The question is whether the public has the right to use the dry-sand area over the objections of the title holder.

B. THE CALIFORNIA APPROACH: DEDICATION

Congestion resulting from overpopulation in combination with increased leisure time is acutely evident in the nation's "Golden State." In addition to its notoriously idyllic climate, California is one of the most industrial states in the nation and is the most urbanized.[15] The total state population, already the largest in the country, is also one of the fastest growing at the rate of 900 residents per day.[16] Furthermore, the vast majority of both population and industrial organization is located on the coasts.[17]

Notwithstanding the residential, business, and industrial congestion, the coasts, or more specifically, the beach areas, are a focal point for recreational activities. It is estimated that in 1969 the amount of "people days" spent on just the beaches in Orange

13. Borden v. Town of Westport, 151 A. 512, 515, 112 Conn. 152 (1930).

14. 3 AMERICAN LAW OF PROPERTY § 12.27 (A.J. Casner ed. 1952).

15. See, STATE OF CALIFORNIA, 1969 CALIFORNIA STATISTICAL ABSTRACT Los Angeles—Long Beach, for example, ranks as the 3rd largest metropolitan area in the United States; San Francisco-Oakland is ranked 6th.

16. *Id.*

17. 1 CALIFORNIA ADVISORY COMM'N ON MARINE AND COASTAL RESOURCES, DEFINING THE CALIFORNIA PUBLIC INTEREST IN THE MARINE ENVIRONMENT 25 (1969).

County alone was two and a half times greater than the days spent at all of the state's 4.2 million acres of national parks.[18]

> Everything and everybody crowds to the coastline in California and wants all other activities there suppressed . . . . The natural beauties of the . . . coastline are gnawed away into the insatiable maw of civilization and commerce. Because many of the changes, if not most, are irreversible, permanent damage is done which cannot be repaired.

A horrifying portent of the future is the estimate that "in 1980 the crowds at Los Angeles' 34 miles of beaches alone will almost equal the number of people who used the entire coastline last year."[20] Hardly consoling, then, is the fact that the public is possessed of the "wet-sand" area of the entire length of the state's coast, since a fence to the mean high tide line can effectively prevent access much of the time, and public rights in the wet sand area are of little benefit or use without reasonable access. The 1,051[21] miles of coast cannot be lengthened to accomodate for such increased use. Even more distressing is the fact that only 40 percent of the length of the coast is publicly owned—a mere 89 miles of which are classified as sandy-swimming beaches.[22] Privately owned sandy beaches are often fenced off to prevent public access to the wet sand and water. But, public policy, as expressed by the State Constitution and as recently reaffirmed by the State Supreme Court seems quite clear on this point.[23] Article XV, § 2, provides that no one shall be permitted to exclude the right of way to the water whenever it is required for any public purpose. In explicit language, it seems to require public access to the wet-sand. Fencing off the dry-sand, a reasonable route of

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18. Address by Assemblyman Sieroty, San Clemente, Calif., Jan. 1970, in L.A. Times, *It's Time to Stop Drilling Off the Coast*, Feb. 1, 1970 at § D, p. 1, col. 1.

19. 1 CALIFORNIA ADVISORY COMM'N, *supra* note 17.

20. Address by Assemblyman Sieroty, *supra* note 18.

21. CALIFORNIA DEPARTMENT OF PARKS AND RECREATION, CALIF. STATE PARK SYSTEM PLAN in which the following statistics are pointed out:

A. Total coast miles-1,051.43 (Publicly owned-425.17 or 40%).
B. Public ownership by shoreline type:
   1. Sandy swimming beaches-50% of the 179 mile total.
   2. Sandy-non swimming beaches-42%.
   3. Pebble beaches-27%.
   4. Rocky Shore, headlands, and cliffs-35%.

22. *Id.*

23. CAL. CONST. art XV § 2; Gion v. The City of Santa Cruz, 2 C.3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

access, would thus seem to exclude the right of way to the public and therefore violate the State Constitution.

The constitutionality of a similar provision has been questioned and remains a matter of conjecture since this issue has not yet been litigated.[24] It is possible that a constitutional guarantee of public access through private property would be considered a "taking" and therefore, under the Fifth Amendment, require compensation. However, the use of a doctrine such as dedication, by virtue of which the court may determine that the public has previously acquired rights in the property, avoids a conclusion of "taking" and bypasses the possible constitutional issue. As the available beaches become more crowded, the probability of utilizing Article XV, § 2, as a basis to find public rights of access through private beach property increases almost to the point of certainty. At some future time, its constitutionality will be an issue which must be decided. One possible conclusion may be a finding that it is constitutional to provide that certain rights of the public are to be considered paramount to private property rights of littoral owners and that these rights may exist concurrently.

The strong public policy expressed in the State Constitution, Article XV, § 2, is reflected in other legislative enactments.[25] The policy of encouraging public use of shoreline areas is not unique to California as a state particularly suited by climate, populace, and geography to recreation-orientation, but can also be found expressed in other coastal states.[26] The seashores of this nation are generally regarded, at least verbally, as a valuable part of the national heritage.

> But on shore after shore
> the barriers are going up—
> highways and houses, fences and signs,
> Keeping people out, displacing wild things,
> Blotting out a heritage.[27]

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24. *See also*, Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964).

25. Other enactments encouraging public use of shoreline areas are: CAL. CIV. CODE § 830 (West 1954), CAL. CONST. art. 1 § 25, GOV. CODE §§ 54090-93, 39933-37 (West 1954), FISH AND GAME CODE § 6511 (West 1958); PUBLIC RESOURCES CODE §§ 6008, 6210.4, and 6323 (West 1956).

26. *See, e.g.*, "Open Beaches Bill", Acts 56th Leg. of Texas 1959, 2nd Called Session, Ch. 19 at 108 (VERNON'S ANN. CIV. STAT. art. 5415d, § 1 *et seq.*) which creates a prima facie presumption of private rights in beach areas.

27. *Preface*, H. GILLIAM, ISLAND IN TIME (1962). (Hereinafter cited as GILLIAM).

Unfortunately, words of policy have not been effective in keeping our shores open to the public.

Once a strong public policy has been established, however, the problem becomes one of implementation and application. Since there are not enough public beaches to accomodate California's rapidly growing, leisure-oriented society, how can the State, through its courts and legislature, best act to improve, or hopefully, to rectify the situation? The companion cases of *Dietz v. King* and *Gion v. City of Santa Cruz*,[28] illustrate a recent judicial attempt to arrive at a solution. The facts of each case, briefly stated, are as follows:

1. Gion v. City of Santa Cruz

Gion owned property overlooking the ocean. Part of the land was level and contiguous to a city owned road; the remainder dropped off, cliff-like, onto a shelf area, and from there to the sea. Since 1900, members of the public parked their vehicles on the land near the road and freely used the property to "fish, swim, picnic, and view the ocean" unrestrained by any "significant" objection by the owners. Gion's grantor, who owned the property for twenty years, had occasionally posted signs indicating private ownership, but had never asked anyone to leave and freely gave permission to anyone who asked to use the property. Prior to 1941, apparently no one exerted any proprietory interest in the property at all. However, the city of Santa Cruz took a growing interest in making the area safe for the public, beautifying it, and improving it to facilitate public use. The court below held that the Gions still had title to the property but that their title was subject to an easement in the city, for itself and on behalf of the public, for recreational purposes. The Supreme Court affirmed this decision, upholding the easement on behalf of the public, in, on, over and across said property for public recreation purposes, and uses incidental thereto, including, but not limited to, parking, fishing, picnicking, general viewing . . . .[29]

2. Dietz v. King

Dietz brought a class suit on behalf of the public to enjoin the private property owner, King, from blocking public use of a

28. 2 C.3rd 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970). (Hereinafter cited as *Gion-Dietz*).

29. *Id.* at 35.

dirt road leading to a beach. The road which crosses three separate private properties, including King's which is the nearest to the beach, is the only convenient access to the beach by land. The public had used both beach and road for at least 100 years, in ever increasing numbers, with no objections from previous owners. King's grantors, in fact, testified that they actually "encouraged the public to use the beach." King bought the property for investment purposes in 1960 and a year later made his first attempt to halt public use of the road by placing a large log across it. Beachgoers removed it two hours later. King posted "No Trespassing" signs which were always removed by the time he next visited the property. The public continued to use the beach until 1966 when King finally sent in a caterpillar crew to permanently blockade the road. A temporary restraining order halted this attempt. The court below ruled in favor of King on the basis that there was no dedication of the beach or road to the public and that widespread public use does not lead to an implied dedication. The court reversed this decision, holding that there had been, as a matter of law, a common-law dedication of King's property to the public. This decision is very important in that it marks the first time the court has so willingly applied the doctrine of dedication to beach areas.

Dedication, the donation of land by its owner for public use, is not a new doctrine.[30] That property may be dedicated to the public use and benefit is a well established principle of common law, but it is only in recent times that dedication has assumed much importance. In most jurisdictions, as in California, dedication according to common law principles is possible regardless of statutory dedication provisions. However, the principles of common law dedication vary from jurisdiction to jurisdiction.

The history of California's application of dedication principles is summarized in *Union Transportation Co. v. Sacramento County*,[31] the most recent discussion of implied dedication prior to *Gion-Dietz*. In that case, the court found an implied dedication of a private road to the public and defines a

30. Dedication: "An appropriation of land to some public use, made by the owner, and accepted for use by or on behalf of the public." BLACK'S LAW DICTIONARY 500 (4th ed. 1951).

31. 42 Cal. 2d 235, 267 P.2d 10 (1954). (Hereinafter cited as *Union*).

common-law dedication as: A voluntary transfer of an interest in land . . . (which) partakes both the nature of a grant and a gift, and is governed by the fundamental principles which control such transactions.[32]

The court points out that an offer by the owner, clearly and unequivocally indicated by his words or acts, to dedicate the land to public use and an acceptance by the public are essential to such a dedication.[33] Cases also hold that an offer to dedicate land may be inferred from the owner's long acquiescence in public use under circumstances which negate the idea of license.[34] By analogy to prescription, other cases hold that after the public has freely used a road for more than five years, with the knowledge of the owner, and without objections being made, then a conclusive presumption of dedication to the public arises.[35] If the dedication is by adverse user, the court points out that it must be shown that the user was adverse, continuous, and with the knowledge of the owner for the required period of time.[36] Whether the user is adverse is a question of fact to be determined from the circumstances of each case.

The court cites *Schwerdle v. County of Placer*[37] to illustrate the distinction between dedication by acquiescence in public use and dedication by adverse use. When a dedication is sought to be established by a use for a short period of time, then true consent or acquiescence is essential since without it dedication will not be presumed. Where actual consent and/or acquiescence in public use can be proved, however, the length of the public use is immaterial since the public rights immediately vest once there is an offer, manifested by words or conduct, and an acceptance by public use.

On the other hand, when the claim of the public rests upon a long continued adverse use, the adverse use itself establishes a conclusive presumption of consent and so of dedication. In this case, knowledge and acquiescence are also conclusively presumed, negating the idea of license. The court in *Union* states that dedication by adverse use has been characterized as one implied by law, while a dedication inferred from the acts of the owner or

32. County of Inyo v. Given, 183 Cal. 415, 418, 191 P. 688, 690 (1920).
33. 42 Cal. 2d at 240, 267 P.2d at 13 (1954).
34. F.A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 448, 150 P. 62 (1915).
35. *Union*, note 31, *supra*.
36. *Id.*
37. Schwerdtle v. County of Placer, 108 Cal. 589, 41 P. 448 (1895).

from his acquiescence in public use may be termed a dedication implied in fact.[38]

When litigants attempt to prove dedication by implication, a myriad of problems arise. One of the problems involves the determination of just what conduct will suffice to imply the necessary intent. At common-law there can be no dedication without intent either express or implied. In California, the intent to dedicate may be implied from either the conduct or words of the owner or, as in adverse use cases, from the conduct of the public itself in the use of the land. Although previous decisions have required a clear manifestation of intent for an implied dedication, cases have also held that a dedication by implication may arise when the necessary intent is implied by law from acts which may not directly manifest any intent.

As stated in *Gion-Dietz*, implied dedication in California can be proven by showing either acquiescence by the owner in public use under circumstances which negate the idea of license or by open and continuous use for five years. If either of the above criteria is met, then as a matter of law the owner has dedicated his property to the public benefit and welfare.

Dietz and *Gion* were decided together because both raised the issue of how to determine when an implied dedication has been made. The court points out that both contain evidence in support of the "acquiescence" theory, but since that point was not argued the court would restrict its consideration to the other means of establishing implied dedication—adverse user. Under the first theory, the owner's intent, as implied from his acquiescence in the public's use of his property, is a crucial factor. In showing dedication by adverse use, however, the intent and activities of the public, rather than the owner, are the critical factors and are what the court will examine. The court must determine whether or not the public has engaged in sufficient adverse use to raise the conclusive presumption of knowledge and acquiescence, and to negate the idea of license.

Under the *Gion-Dietz* holding, the degree of adverse use sufficient to raise this presumption still remains somewhat vague. Presenting a *modus operandi* for future litigants, the court states that they must show that various groups used the property in the

38. 42 Cal. 2d at 241, 267 P.2d at 13 (1954).

belief that the public had such a right, i.e. without objection or interference from the owner, and that they used it in this manner for more than five years. It is clear that this use need not be "adverse" to the property owner in the same sense that it would have to be in an "adverse possession" or "prescription" case and that a separate finding of adversity is not necessary. In view of the fact that the court points out in *Union Transportation Co. v. Sacramento County* that "it must be shown that the user was adverse"[39] and that whether or not it is adverse is a question of fact, the court in *Gion-Dietz* indicates a slightly altered view of the nature of adversity in dedication cases. The court, rather summarily, arrives at the conclusion that public use, unhindered, and continuous for five years will be deemed "adverse."[40] Since it may result in dedication, this use certainly is adverse to the owner's private property interests in the truest, if not the traditional sense of the word.

The law at one time presumed that public use was under license by the owner, which had the effect of negating an adverse use. Therefore, the public had the difficult burden of proving the absence of license. The court rejected this presumption in *O'Banion v. Borba*,[41] shifting the burden of proof to the owner who must affirmatively prove either license or significant attempts to prevent public use. Unless one of these is proved to the satisfaction of the trier of fact, the owner will find, regardless of actual intent, that the land is no longer his to do with as he wishes.

Questions raised or left open in the instant cases will no doubt form the basis for much future litigation. For example, the question of what attempts will be considered adequate to halt public use becomes basic. In *Dietz*, King made many "reasonable" attempts, he thought, to prevent public use of his property. The court states that whether or not the owner's efforts are adequate will depend upon the means used in relation to the property and upon the extent of the public use. The court points out that King's attempts were not adequate since the huge crowds of beach goers were not dissuaded by the "No trespassing" signs

39. Diamond Match Co. v. Savercool, 218 Cal. 665, 669, 24 P.2d 783, 784 (1933).

40. For a similar treatment of adversity, *see* Seaway Co. v. Attorney General, 375 S.W.2d at 937, 938 (Tex. Civ. App. 1964).

41. 32 Cal.2d 145, 149-50, 195 P.2d 10 (1948).

or by the logs placed in the road. It is interesting to note that at one time, when fewer people used the beach, such attempts might have been adequate but when King, in the face of ever growing hordes of people with campers and trailers, finally attempted to do an effective job of blockading the road, he was enjoined. The question is one of fact to be determined from the circumstances of each case, but the court makes it clear that the owner must prove that he has made more than "minimal" and "ineffectual" efforts in order to even raise the issue.

The question of use under license is also one of fact. The owner faces the problem of how to grant the public a license to use his property. He must choose between attempting to prevent public use by "adequate" means or by giving the public license or permission to use his property in order to prevent adverse use. Giving permission to some of the beach users does not extend the license to all. Since it appears impossible to give each member of the public a personal license, the problem of granting a general license to the public rests upon the owner.

Another question not fully discussed in the opinion is what property rights remain to a private owner after his property has been found dedicated to the public. The common law provided that full title to the fee passed in the event of a dedication. In the instant cases, the court states that full title, as in *Gion*, need not necessarily pass just because it has in the past.[42] Evidently, the public obtains the right of use while the fee owner relinquishes exclusive possession.

The status of current beach property owners is uncertain. Their property may have already been dedicated by previous owners. If not, what attempts to halt public use will be deemed adequate becomes an important question. Whether or not the activities of Dietz or Gion's predessessors in title were "adequate" attempts to halt the influx of beachgoers to their properties was not determinitive of the outcome, since:

> Previous owners, . . . by ignoring the wide spread use of the land for more than five years have impliedly dedicated the property to the public. Nothing can be done by the present owners to take back that which was previously given away.[43]

42. *Gion-Dietz* at 44, n.3.
43. *Id.*

This language raises one of the most crucial questions left unanswered by this decision. Is this applicable to *any* five year period of time?

While generating doubt and uneasiness in the minds of "private" beach owners, the court simultaneously offers encouragement to those concerned over the diminuation of available recreational resources to a rapidly growing populace. How this finding actually affects public use of the beaches and its effectiveness in implementing the State public policy encouraging such use will be discussed below.

Gion-Dietz offers the people of California a guarantee that all of the beach areas and accesses which have been in public use for more than five years can now be kept public, regardless of the fee owner's current or future attempts to prevent such use. The State, through its Department of Justice, has promised to aid in enforcing this guarantee. The Attorney General's office is preparing similar cases "to insure public access to other coastal areas in California."[44] Just how many seashore miles this decision could affect is unknown.

> No survey has been taken of what portion of this shoreline (privately owned) has been used for beach access by the public over a period of five years.[45]

Of the approximately 625 miles[46] of private beach, the 89 miles of private sandy-swimming beaches probably have been the most in public use. The public has no doubt also acquired rights in some of the 540[47] miles of private beach unsuitable for swimming but suitable for picnicking, camping, fishing, and other water related activities. The court does not limit its application of implied dedication to any particular geographic area such as "dry sand" nor does it designate only existing roads as means of ingress and egress, but simply uses the term "beach area." This undefined phrase could conceivably apply to any publicly used land which is close to a beach or connected with beach use. The decision in this context offers a means of preserving the status quo.

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44. Fradkin, *State Promises Aid in Enforcing Public Access to Beaches*, L.A. Times, Feb. 25, 1970, § A, P.3, col. 3.

45. *Id.*

46. *See* note 21 *supra.*

47. *Id.*

The court has difficulty in explaining its former reluctance to apply the principles of dedication to beach areas. It states that the doctrine has been readily applied to find implied dedication of roads, parks, and other "well-defined" areas and that the court has previously preferred to use the doctrine in cases involving a "well-defined" property. For that reason, the court points out, "most of the case law involving dedication in this state has concerned roads and land bordering roads."[48] The court's explanation for this former reluctance is that roads are easily defined, frequently needed through private property, and are also frequently the subject of express dedications.

This reasoning seems specious since it is strongly arguable that beach areas are not "open" in the sense of being undefined, but are as well defined as a road in area, since they are bordered on one side by the mean high tide line and on the inland side by the vegetation line.[49] At any rate, the court reached the conclusion that now the "rules governing implied dedication apply with equal force . . . to land used by the public for purposes other than as a roadway."[50] The growing public need for beaches, intensification of land use, and "clear public policy in favor of encouraging and expanding public access to and use of shoreline areas"[51] are the reasons the court gives for its new willingness to apply the arguments of implied dedication to open beach areas. As conditions change, so must the traditional application of established doctrines.

The first application of this landmark decision occurred recently in Northern California. San Mateo County brought suit against the heirs of an estate claiming that eleven acres of privately-owned beach had become public by virtue of unhampered use by the public for a five year period. In finding for the county, the court not only ruled that the public had acquired the eleven acres as public beach but had also acquired an additional few acres as a recreational easement to the beach because "the public, without restriction, had used the easement for five years or more."[52] The court honored the *Gion-Dietz*

48. *Gion-Dietz* at 41.

49. 375 S.W. 2d 923 contains a good discussion of defining the beaches as a definite area.

50. *See* note 48 *supra*.

51. *Id.*

52. L.A. Times, April 1, 1970, § 1, at 32, col. 3.

guarantee that the public shall continue to use what it has been using provided that the public and its agents are vigilant (as they apparently are in view of this litigation) and do not permit private interests to encroach upon public rights.

In *Gion-Dietz* the court notes a recent Oregon Supreme Court decision "for a similar result."[53] Eventually, the results in each state will no doubt coincide since the aims of each court as expressed in their opinions are the same. The Oregon decision, however, has certain advantages not found in the California approach. An illustration of how another state, after contemplating the same problems, facts, and public policy, arrived at a "similar result" through the application of a rather unique doctrine may serve to demonstrate the variety of possible judicial solutions and approaches available.

C. THE OREGON APPROACH: CUSTOM

Thorton v. Hay[54] involved an action brought by the state to enjoin the defendant tourist facility from constructing fences and making improvements in the dry-sand area to which they held title. The lower court found that the public had acquired a right of use in the dry-sand by both implied-dedication and prescription. Consequently, it granted an injunction. On appeal, the Oregon Supreme Court affirmed the lower court's holding but disagreed with its legal basis for conclusion. Because of the *sui generis* nature of the land and the great value of the right to its use, the trial court should not have to rely on the traditional theories which have produced complex and overlapping precedent. Specifically criticizing dedication, it stated that whether implied or express the doctrine requires an intent to dedicate, and, too often the requirement is tenuously satisfied. Prescription is disfavored because it can only be applied to a specific tract of land and as such requires repeated litigation of substantially the same issue.

To obviate the need to employ these traditional theories and yet find a right acquired by the public, the court adopted the English Doctrine of Custom. A custom is defined as "such usage

53. State *ex rel.* Thorton v. Hay, 89 Adv. Ore. Rpts. 897, 462 P.2d 671 (1969).
54. *Id.*

as by common consent and uniform practice has become the law of the place, or of the subject matter, to which it relates."[55]

In order to justify the adoption of the doctrine, the court had to considerably expand the traditional geographical limitations put upon its use. The doctrine had its roots and principle application in feudal England, and most case reference to customary rights has been local in scope.[56] Furthermore, many American jurisdictions have rejected the doctrine on the theory that the antiquity requirement could not be satisfied in such a new country.[57] However, the court rather convincingly overcomes this argument by stating:

> It is true that the Anglo-American legal system on this continent is relatively new. Its newness has made it possible for government to provide for many of our institutions by written law rather than by customary law. This truism does not, however, militate against the validity of a custom when the custom does in fact exist. If antiquity were the sole test of validity of custom, Oregonians could satisfy that requirement by recalling that the European settlers were not the first people to use the dry sand as public land.[58]

It would seem that if we accept the court's argument in this regard, the fact that the doctrine has not before been applied to include such expansive geographic regions should not stand as a sole stumbling block to the doctrine's application.[59] Transportation and communication in the United States is such that most people traverse the expanses of their state as freely as did the feudal inhabitants their villages. In essence, what is local is relative to the extent the populace makes use of its physical surroundings.

If we assume that the court has successfully justified a new use of the old doctrine we must consider whether or not the public use has been such as to satisfy the basic requirements for its application. Although the court treats each of the requirements individually, essentially all are met by the assertion that the public has used the dry-sand in Oregon since the beginning of the state's

55. 1 BOUV. LAW DICTIONARY 742 (Rawle's Third Rev.).
56. R. POWELL, REAL PROPERTY § 934 (1949).
57. J. GRAY, THE RULE AGAINST PERPETUITIES § 585 (1942).
58. 89 Adv. Ore. Rpts. 900, 901, 462 P.2d 667, 668 (1969).
59. *Id.*

political history. The court refers to *Shively v. Bowlby*[60] which affirmed that the land under tide waters had its title and control in the hands of the sovereign and is held in trust for the people, that any rights acquired in it by individuals were subordinate to the public use. Those lands specifically referred to were those which were incapable of cultivation or improvement as opposed to those above the high water mark—where vegetation is possible. The public did, then, have a recognized right as benficiaries of the public trust in all of the sand up to the vegetation line. It was not until 1935 when the Supreme Court in *Borax Consolidated Ltd. v. Los Angeles*[61] redefined the term "high water mark" that the public's right in the beach was virtually confined to the wet-sand area.

Regardless of whether or not the court in *Borax* was justified in limiting the public trust, the public had none-the-less effectively used the entire beach under a claim of right from our nation's earliest beginning until 1935. It would seem that this fact alone would suffice to meet the requirements necessary to make the use a custom which would have the protection of law. As such, the littoral owner's title boundaries, although expanded by *Borax* are still subject to the public right of use in the dry-sand portion.

Recognition of this continued right raises the question of whether or not the private improvements made in the dry-sand area have been made without license, and if so, what recourse does the public have. Although this seems to be a problem with which the Oregon court and those which follow it must eventually face, further consideration of it at this juncture must be deferred.

The practical value of accepting the doctrine and its application is that it makes it possible to treat all of the state beach property with uniformity. Regardless of whether or not the public is able to prove the specific requirements for prescription or dedication, the right to use *all* of the state's dry-sand area for recreational purposes is recognized.

Assuming that the Oregon judiciary was justified in applying the doctrine of custom and recognizing the expediency of its use, it may be well for California to use the same approach.

60. 152 U.S. 1 (1894).

61. 296 U.S. 10 (1935). The Court defined "ordinary high water" as the "mean high water" determined by a period of tidal observation.

Obviously, to successfully do so, its judiciary would have to demonstrate that California's history of beach use is similar to that of Oregon's as presented in the *Hay* case. It would seem that one could assume that prior to achieving statehood their histories of beach use would be similar. The difficulty, however, would lie in demonstrating a similar public usage since achieving statehood even though their property law and application of the public trust somewhat differ.[62]

D. THE DOCTRINES: DEDICATION V. CUSTOM

Ideally, a resolution of the conflict between public and private interests should be not only an implementation of public policy but also equitable and expedient. Both of the recent judicial approaches discussed above support public policy encouraging public use of beaches. The doctrines diverge, however, in the realm of expediency.

Dedication is too time consuming to be of immediate value in relieving congestion. It doesn't open up new areas, but maintains what is already in public use. Considering congested court calendars, tract by tract litigation could keep the courts busy for years. Furthermore, this doctrine is not an affirmative direct approach in that it puts the onus on the people to prove their right to use rather than recognizing that the public's right to use exists.[63] However, dedication, as applied by California, has the virtue of flexibility in that it can take place in a relatively short period of time and be applied to any land in dispute.

The Oregon court, in declaring the right of the people to use the beaches of the state, from the northern to southern borders, has acted expediently. In a single finding of custom, the court enabled itself to recognize the public's right to use all of the state's beaches inland to the vegetation line. The decision is clear and the doctrine eliminates any previous uncertainty over who had a right

62. For a discussion of the public trust in California *see* Sax, *The Public Trust Doctrine in Natural Resource Law—Effective Judicial Intervention*, 68 MICH. L. REV. 473, 524 (1970).

63. Assuming that the public, at some period in the history of the state, has used all of the seashore areas possibly amienable to public use, it follows that the decision could conceivably be used as a springboard for acquiring all privately owned, but publicly usable, beach in the State. This resultant expansion of seashore recreation areas is what is so urgently needed, not just preservation of the status-quo.

to the dry-sand area. Yet, custom is limited to just those lands used by the public from "time immemorial."

Custom and dedication are both deemed equitable by the courts since neither doctrine theoretically takes away any rights a private property owner would have reason to believe he had, or that he in fact did have. In practice however, a private property owner would have good reason to believe that what he bought was his, if unaware of any previous dedication, he purchased in reliance on his grantor's belief that the full incidents of ownership were being conveyed. This might be particularly true in seasonal areas where there would be a lack of actual notice during the off-season. It is debatable whether or not this might also be true of a land owner under a "custom" doctrine state unless the custom was so well known and accepted by all as to negate any idea of exclusive private ownership.

When a private owner is divested of some of his property rights, or of the property itself, through the application of a doctrine which establishes that he never really owned what he thought he purchased, the result is an economic loss to the owner. This is compounded by a sense of injustice, for the loss is not compensable unless his grantor, still alive and solvent, could be held for breach of warranty. Certainly full use and enjoyment are hampered if not rendered impossible by the presence of sunworshippers, campers, and trailers using his property.

E. Alternative Legislative Solutions

Existing side by side with possible judicial approaches are the possibilities of eminent domain[64] and the exercise of police power.[65] Eminent domain is considered a taking within the

64. *See* note 10, *supra*. The California Constitution provides for the right of eminent domain over beaches in the same article providing for public access to the beaches. Art. XV, § 1 provides that the right of eminent domain is declared to exist in the state to all frontages on the navigable waters of this state.

65. Discussing the difference between police power and eminent domain, the court in Mid-way Cabinet Fixture v. County of San Joaquin, 257 Cal. App. 2d 181, 186, 65 Cal. Rptr. 37, 40 (1967) stated:

> Theoretically, not superimposed upon but coexisting alongside the power of eminent domain is the police-power, unwritten except in case law. It has been variously defined—never to the concordant satisfaction of all courts or legal scholars—and frequently it has been inconsistently applied by different courts . . . sometimes, to our belief, by the same court. The police power is described more readily than it can be defined.

meaning of the Fifth Amendment and legislatures have been extremely hesitant in exercising this power—such an obvious, equitable solution to the public need. Further, and aided by hindsight, courts have also seemed reluctant to find that a taking has occurred.[66] This is due in part to the prohibitive expense of beach property—an inflated valuation symptomatic of the underlying problem—a small supply in large demand. The value of beach property will continue to inflate as the demand continues to increase.

However, the expense of acquisition could be apportioned in taxes with the result that the public, recipient of the ultimate benefit, would also share the burden. A plan could be adopted to acquire the beaches for public use in a piece meal fashion which would even further minimize the cost. Federal aid is also available to those states wishing to acquire beach property under the "Open Spaces" Program.[67] In this way, private property owners would receive compensation for their loss and the economic burden would be shared by the general public.

The state has an inherent power to regulate the use and enjoyment of private properaty for the promotion of public health, safety, and welfare.

> Governments find their reason for existence and their justification for continuance in the services which they render to the health, safety, morals, conservation of resources, and general welfare of the group governed. It is therefore, not surprising to find courts repeatedly asserting that property rights are always held subject to the police power, that is, the power of the government to do that for which it exists . . . . The criterion is whether the restriction "is reasonably in the interest of the public health, welfare, comfort and morals and is not arbitrary or discriminatory.[68]

The prevalent view is that police power may be used to

66. "A Court assigned to differentiate among impacts which are and are not 'takings' is essentially engaged in deciding when the government may execute public programs while leaving associated costs disproportionately concentrated upon one or a few persons." Michelman, *Property, Utility, & Fairness; Comments on the Ethical Foundation of Just Compensation Law*, 80 HARV. L. REV. 1165 (1967).

67. The Federal "Open Spaces" Program provides funds to the States for acquisition of land with the provision that it will be kept open to the public. *See* the Open Space Land Act, 42 U.S.C.A. § 1500 *et. seq.* (1966).

68. POWELL § 955.

promote public welfare. It does not necessitate compensation as does eminent domain, since its exercise is considered a regulation or a restriction of use and enjoyment rather than a taking.[69] If the legislature could regulate the use and enjoyment of beach property to the vegetation line, it would eliminate current conflict over the dry-sand area. This is in effect what the Oregon court has done, through the exercise of police power. As a private property owner's use is curtailed by zoning, sanitation, fire and a variety of other governmental regulations, why a similar regulation of the dry-sand area would be deemed any greater an infringement upon private property rights is difficult to conceptualize. The beach owner in an area zoned against high rise can not make as much money as those who can build multi-complex apartments but the power to zone remains even though resulting in economic "loss" in some cases. A littoral owner could perhaps benefit economically from a private beach area, but that is no reason to avoid a use restriction. As in other regulations affecting use and enjoyment, there is no actual physical acquisition of the land.

One very important legislative development is the emergence of "stop gap" bills designed to temporarily halt unplanned use of the coast until more feasible solutions can be devised.[70] Since the natural beauties of our seashores are a fragile resource, one that can be easily destroyed but never replaced, this type of a moratorium on beach use is a wise, though temporary solution. It is also extremely necessary. Bill No. 493[71] introduced into the California Assembly in February, 1970, prohibits further unnecessary prevention of public access to the ocean, or bays, by requiring subdivisions to provide reasonable access from public highways to land below the ordinary high-water mark. If the subdivision map shows no provision for such access then no city or county would be able to approve it. This is the type of legislation which is needed to protect the rights of the public to the use of or access over land adjacent to navigable waters.

69. The boundary between the two is vague. For a discussion of eminent domain and police power, see 20 HASTINGS L. REV. 735 (1969).

70. "Legislation has been introduced which would form a statewide agency to draw up and implement a plan for the best use of the shoreline. Until the plan is completed, a moratorium would be placed on further development." L.A. Times, April 6, 1970, § 2, at 1, col. 4.

71. Introduced by Assemblymen Dunlap, Sieroty, and Z'berg and referred to the Committee on Local Government.

F. CONCLUSION

As the population continues to grow at an unprecedented rate, other precedents will also be broken. Many private rights will inevitably give way to public necessity, just as they have in the past. Courts and legislatures will be called upon to adopt new approaches to new problems. As examples, the *Gion-Dietz* decision represents a willingness to adapt a traditional doctrine to a different situation; *Thorton v. Hay* illustrates a willingness to adopt a doctrine quite unique in this country, in order to establish the customary rights of the public.

The attempts by private owners, beach clubs, hotels, and even municipalities, to fence off and keep private certain beach areas for their own guests and residents to the complete exclusion of all others, seem abhorent in the face of rapidly growing public recreational needs. It is estimated that America will be a completely urbanized nation of 300 million or more in 30 years.[72] Hopefully, the beaches devoted to public use will have been greatly increased by that time. We need the foresight to realize that our actions must ensure that our city-bound citizens of the future will have opportunities to enrich their lives. We must be careful not to condemn our future citizens to a neon-lighted concrete world in the name of progress:[73]

> We need the sea.
> We need a place to stand
> and watch and listen—
> to feel the pulse-beat of the world
> as the surf rolls in.
> . . . . . .
> We need to keep some of
> our vanishing shoreline an unspoiled place,

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72. Udall, *Introduction* to AMERICA THE BEAUTIFUL 10 (R. Polley ed. 1964).

73. In an address, John F. Kennedy observed:

> Government must provide a national policy framework for this new conservation emphasis; but in the final analysis, it must be done by the people themselves. The American people are not by nature wasteful. They are not unappreciative of our inheritance, but unless we, as a country, with the support and sometimes the direction of Government, [work] with state leaders, [work] with the community, [work] with all our citizens, we are going to leave an entirely different inheritance in the next 25 years than the one we found.

Address, J.F. Kennedy, Pinchot Institute for Conservation Studies, Milford, Pa., Sept. 24, 1963, in AMERICA THE BEAUTIFUL at 20 (R. Polley ed. 1964).

where all men, a few at a time,
can discover what really belongs there—
can find their own Island in Time.[74]

SUSAN P. FINLAY
DAVID J. VANTIL

74. *Preface*, to H. GILLIAM, ISLAND IN TIME (1962).