Chapter VII

Navigational Servitudes: Public Trust of the Oceans

This chapter title is not used in parody but in humility and respect for the work of Professors Myres McDougal and William T. Burke. The overall order which Professors McDougal and Burke describe in *Public Order of the Oceans* is that of a public trust. All of the navigation aspects and the respective derivatives discussed by Professors McDougal and Burke are the evolved public rights of the Grotius/Selden dispute as now developed under the high seas regime *res communis* public trust. That *res communis* public trust reflects the commonality of Mankind’s interests in high seas usages together with the collective community of States’ responsibility for protection and preservation of those usages in accord with equitable principles.

Apart from the various extended jurisdictions of littoral States this *res communis* responsibility has evolved during the 20th and into the 21st century largely in the area of multilateral conventions and regional agreements addressing navigation, safety of life and property at sea, pollution, assistance to developing State populations and fishing. Navigational freedom remains the common underlying principle, equitably maintained under these agreements. But something more has and is occurring. A framework has evolved to which such agreements relate either as subsets of particular conventional arrangements, or as coordinated conventional parallels designed to achieve the oceans’ protection and preservation responsibility of *res commnis* and the navigational freedom principle overall.

This conventional framework is truly an administrative Oceans Public Trust and includes such significant conventional structures as UNCLOS and various United Nations agencies. The overarching public trust remains the

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1 Myres McDougal, *Public Order Of The Oceans: A contemporary International Law of the Sea* (1965), the referenced work.
fundamental res communis and its common navigational freedom principle, but the evolutionary point has expanded to include not only customary law but also these many conventional solutions in protection and preservation of navigational freedom within the equitable responsibility of the public trust.

The fundamental equitable principle of navigational freedom remains at all times applicable in the administrative framework of an “Oceans Public Trust” as applied for the regulation of and access to the living and nonliving resources of the sea, the seabed and the subsoil, as well as to the usages of the oceans and their foundations. How then is the evolutionary definition of the high seas regime res communis public trust proceeding to move forward in the 21st century? The residual point of development remains with the conventional organizations and organs established to administer and address the public needs for use of the oceans, which achieve multiple layers of agreed navigational servitudes on topical navigational usages within the res communis. The common navigational freedom principle is clearly the guiding consideration, high seas freedoms as res communis public rights, so that things common to all can be appropriated by none, such as “light, air and the sea”.

For the high seas beyond littoral State jurisdiction Grotius needs to prevail over Selden and the particular interests of littoral States as the Oceans Public Trust becomes the new crucible defining administration of equitable responsibility for the collective community of States in custody of the high seas regime res communis.

A. Jurisdictional Dichotomy of the Oceans

Within the high seas regime provisions for littoral State extended jurisdiction in marginal sea areas located seaward of the territorial sea, such as the 200-mile EEZ, the United States has recently moved forward legislatively to address the ongoing issue of critical fisheries protection and preservation subject to its marginal sea jurisdictions in areas out to 200 nautical miles. The Magnuson-Stevens Fish Management Reauthorization Act of 2006 (2006 Magnuson Amendments) has been implemented to require conservation.

2 Black's at 1308.