Protection, Preservation, and Conservation of Our Oceans

Protection, Preservation, and Conservation of Our Oceans:

An Ocean Public Trust

By

Ralph J. Gillis

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You don’t understand something unless you understand
how it comes into existence and how it is formed.

Professor Hakeem Musta Oluseyi
Astrophysicist and Cosmologist
September 4, 2002

Mining the seafloor could boost
Production of clean energy technology.
It might destroy irreplaceable
Ocean ecosystems in the process.

Olive Heffernan
Deep-Sea Mining Dilemma
Scientific American, September 2023 p. 35

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FOREWORD

Given the present concerns and interests in oceans issues across a broad array of academic disciplines, especially political theory, social science, historiography, engineering and biology, it is necessary to make clear at the beginning that this work is focused elsewhere.

This work is about law; the jurisprudence of an Oceans Public Trust and its provenance in the 1776 *Declaration of Independence*.

It is about law as it has evolved and developed in regard to the conservation and preservation of the ocean systems of this planet.

Therefore in order to maintain a critical examination herein of the evolutionary processes for maritime legal concepts it is necessary to set aside the concerns of these parallel disciplines.

Such parallel disciplines are not to be eschewed. Rather they are to be understood in the context of the public trust concept described herein. That context, as developed for oceans matters, provides the framework upon which such disciplines will find a basis for their existential identity and conceptual expansion.

Simply put, without fundamental natural law there is no basis for reliable positive law, and without reliable positive law there can be no dependable conservation and preservation of the oceans. This nexus of distinct legal provenances is the basis for the international law of the Oceans Public Trust.

PREFACE

The American experience happily gives a documented international law temporal starting point for examining the evidentiary basis of beneficial human rights inherent in Peoples, and administered and applied by States, individually and in concert, on their People's behalf with authority derived from those People, the 1776 *Declaration of Independence*.

Application of the inherent beneficial rights of Peoples in the law of the sea context manifests that the customs, treaties and conventions of States are applied through law of the sea principles to conserve, protect, preserve the beneficial maritime inherent human rights of Peoples. That arrangement by and action of States through customs, treaties and conventions is a pattern defined herein as the Oceans Public Trust.

By design the jurisprudential analysis contained herein is intended to support the involved legal concepts presented and consequently may read as a brief. Primary documentary sources are quoted at length to confirm not only the existence of a conventionally based Oceans Public Trust, as identified in *Navigational Servitudes,* but as well a public trust rooted in the navigational freedom principle of *res communis* oceans as a fundamental inherent human rights of each State's People.

The particular issue considered is the administration of international law principles which benefit all juridical Peoples and are applied and preserved on their behalf by their respective States. These maritime or law of the sea principles are within the concept of the navigational freedom principle held by all Peoples and persons as an inherent fundamental right—not a dependent positive law right created by governmental authority. The juridical Peoples, holders of the human rights of their constituent demographic populations, now benefit from those rights as applied by States within the concept of the Common Heritage of Mankind.[1]

The inherent rights of juridical Peoples over coastal waters and the high seas as a matter of law is already manifest by international agreements protecting the living and non-living natural resources of the Oceans, seabed, subsoil and environment, as well as by usage and exercises of navigational freedom without underlying singular occupation by constituent demographic populations, hence the term used herein is "juridical People".

[1] Oceans Public Trust is used a defined term in this work.

That effect is described in *Navigational Servitudes, Sources, Applications, Paradigms* (hereinafter *Navigational Servitudes*) published by Martinus Nijhoff (Brill) in 2007,[2] wherein this Oceans Public Trust is presented as a jurisprudential principle of international law holding all juridical Peoples as beneficiaries; a new trust concept for administering the juridical Peoples' rights over the oceans.

Juridical Peoples is the lynchpin concept within the Oceans Public Trust as a principle of international law. Juridical Peoples are the result of demographic populations or peoples coming together and exercising the inherent human rights of the constituent individuals in the aggregate to form governments for the protection, preservation and conservation of those inherent rights and such derivative positive law rights as the Juridical People may establish both fundamentally and derivatively through their positively adopted form of government. This perspective was brought to mind in 2012, at Jesus College Cambridge while researching both the Commerce Clause and Amendment IX to the 1789 *United States Constitution* as fundamental positive law derivatively applied by municipal federal and state law to protect and preserve the inherent fundamental or natural law rights of the American People. The thought occurred that those municipal law constitutional rights and the counterpart international law rights of all juridical Peoples present a nexus of recognized extant principles including *res communis* oceans, the navigational freedom principle, and maritime customs, treaties and conventions within international law, all of which begged for further attention.

Perhaps the thought trigger was a pleasant and informative conversation with a noted scholar of American history at Jesus College Cambridge, Professor Michael O'Brien.[3] The point issuing from that conversation was the lack of clarity as to the relationship between the 1789 *United States Constitution* and the legal status of the 1776 *Declaration of Independence*. As presented in this work that legal status of fundamental positive law reveals the juridical nexus between inherent sovereign rights of Peoples and the derivative positive law high seas freedoms of navigational freedom and *res communis* oceans as proposed both in *Navigational Servitudes* and as herein jurisprudentially examined a public trust.

This thought-provoking O'Brien discussion further bought to mind that the 1789 *United States Constitution* exists only as a fundamental positive law instrument adopted by the juridical American People and contains only certain delegated governmental responsibilities within a particular

[2] This volume continues to be sold which may only reflect its niche as a door stop rather than its readership.

[3] Michael O'Brien, 1 & 2 CONJECTURES OF ORDER (2004).

organizational model while preserving other human rights of that juridical People. It is the action of the juridical American People, established by their self-constituting exercise of fundamental natural law in the *Declaration of Independence*, which empowers the derivative adoption of the *United States Constitution* as the fundamental national positive law endowed with governmental authority from which positive laws are subsequently derived.

But there is no fundamental positive law which empowers the formation of a juridical People. The power to form a People is an act of fundamental natural law which when exercised constitutes the mooring and anchors derivative fundamental positive law while protecting and preserving the inherent natural law rights of a juridical People. The juncture of these two fundamental sources of law, the inherent natural law and the base positive law, in the maritime context form the basis in international law for the Oceans Public Trust.

That nexus of fundamental positive law with fundamental natural law is the constant theme of this work. Thus the nexus of natural law and positive law is the basis for the concept of an Oceans Public Trust because it joins the international fundamental positive law concept of a State as derived from the inherent natural law human rights of a demographic population as a juridical People when presented in the Common Heritage Rights principle. Peoples' inherent human rights preserved within the concept of a Common Heritage of Mankind, include the international law principles of *res communis* and navigational freedom. Those inherent high seas or oceans rights of juridical Peoples are not derived from the Common Heritage principle but are conserved protected and preserved by application of the Common Heritage principles through positive laws established by States within custom, treaty and conventions of international law. Such State's conservation governing the living and non-living resources of the oceans and maritime environment is submitted herein to exemplify by definition a public trust; in this case, the Oceans Public Trust concept. Note the trustee responsibility of the particular government is that defined by its juridical People which may or may not be that of a common law fiduciary concept but certainly is held to the terms of the existential purpose of government as established, and for treaty based or conventional trust arrangements trustee performance is to be as contractually agreed and defined.

The determinative point of the instant work appears in the jurisprudential distinction between the 1776 *Declaration of Independence* and the 1789 *Constitution of the United States*, and the juridical nexus of inherent natural law and positive law concepts which unites them and cements State action with beneficial interests of peoples now appearing in contemporary international law principles. Simply stated, without a

juridical People as an entity to establish a State and adopt a form of government, such as by a constitution, the entity would be wholly a positive law exercise and subject to change by the positive law author without the essential anchor based in inherent natural law. In that context no fundamental human rights, regardless of whether labeled the Common Heritage of Mankind, would have any inherent basis in natural law and thus would be subject to revision without reference to any controlling inherent natural fundamental law. Thus there would be no protection by fundamental natural law on positive law or its derivate regulations which would restrain fundamental human rights otherwise to be exercised by the demographic population. It is in this context that the 1776 *Declaration of Independence* establishes the natural law authority to select and implement a government, such as the 1789 *United States Constitution*, and the ultimate question remains—from whence does the *Declaration of Independence* derive that authority to enact fundamental positive law adopting a form of government when there is no prior positive law source for the juridical "one People" to so act. The answer submitted herein is inherent natural law, and that inherent natural law is the ultimate protection for individuals, and demographic population segments, to come together as juridical Peoples constituting a State which then enacts positive laws to protects, preserve and conserve fundamental and inherent human rights including law of the sea principles such as *res communis* and navigational freedom whether municipally or within the international fora of States.

Restated here, the focus of this work looks to the evolution of demographic populations of individuals when grouping to act as a juridical People, becoming cognizable as a sovereign State entity in international law capable of adopting its respective form of municipal government for the enactment of positive laws, and especially for acting within the community of States on law of the sea matters. This work is thus focused on the interrelation and co-dependency of fundamental natural law, fundamental positive law, and derived positive law from a jurisprudential perspective applied to the legal concept of an underlying Oceans Public Trust—not as a trust entity but rather as a principle of international law. When that Oceans Public Trust principle is applied by juridical Peoples acting through their States with regard to customary, treaty or conventional matters of international law the legal obligation is that of the Oceans Public Trust to conserve, protect and preserve the living and non-living natural resources and environment of the high seas and seabed.

Therefore the focus herein reveals the entwined and co-dependent relationship, the nexus, between inherent natural fundamental law and fundamental positive law which recognizes the Common Heritage of

Mankind to include the *res communis* high seas and navigational freedom principles as inherent beneficial interests of the world's Peoples thereby forming the underlying principle of an Oceans Public Trust as already applied in multiple instances by States whether unilaterally or through positive law exercises in treaties and conventions to conserve, preserve and protect the associated inherent human rights of all Peoples. The end point is to identify, for application in international law of the sea matters, the Oceans Public Trust principle.

This book of necessity begins with the process which came together in North America wherein the 1776 *Declaration of Independence* became the first document asserting Peoples as an international law entity. The legal roots of that self-constitutive declaration go back centuries, but this is the first self-assertion of a juridical People by unitary declaration and it is an instructive focal point for analysis throughout this work.

While the author holds an American passport, this work is the perspective an international lawyer[4] presenting an international law concept which is essential to understand the validity of the Oceans Public Trust principle as already present in international law and the underlying nexus of fundamental inherent huma rights, natural law rights, and positive laws adopted to protect, preserve, and conserve those rights.

[4] Cf. *Gulf of Maine Case (Canada v. United States),* [1984] I.C.J. 246, 250.

ACKNOWLEDGEMENTS

Age clarifies the memory with just how significant the teachers and professors under whom I have had the privilege to study have both challenged and inspired the message which is delivered in this work as well as in *Navigational Servitudes*.[1] I especially desire to acknowledge Dr. Zita Fleming, CSJ, who inspired my scholarship early on. And, as this work spends much time addressing the sixteenth, seventeenth, and eighteenth century writings and concepts of legal scholars, special acknowledgement must be made both to Professor Frank Harrison (Dunel), of St. Francis Xavier University, Antigonish, who guided, discussed, challenged and challenges me in political theory, and my friend and guide through chats and readings, Philip Allot, Professor of Law, Cambridge University and Fellow of Trinity College Cambridge.

At the study of law level, each of these good lawyers, the Honorable Edward S. Godfrey, III, former Justice of the Maine Supreme Judicial Court, and Professor and Dean of the University of Maine School of Law, L. Kinvin Wroth, Professor and Dean of the University of Maine School of Law and later Professor and Dean of the Vermont Law School, Professor Dennis Driscoll of the University of Edinburgh Law School and later Professor of Law at the University of Galway School of Law, Professor Patricia Birnie of the University of Edinburgh Law School, Professor Iain MacGibbon of the University of Edinburgh Law School, and the Honorable Sir Robert Jennings, Q.C., past President of the International Court of Justice and Whewell Professor of International Law at the University of Cambridge, and Fellow of Jesus College Cambridge, have made helpful comments on my concepts. Again, no blame is theirs for faults in this volume, but indeed all credit is due them.

Over the many years since 1972, when I became a member of the Massachusetts Bar as well as later when, in 1976, I became a member of the District of Columbia Bar and the Bar of the United States Supreme Court, it has become patently apparent to me that no one engages in scholarship without help, direction, and the restraint of mirth by others. In this regard particular appreciation is expressed both to Dr. Geoffrey C. Harcourt and to

[1] R.J. Gillis, NAVIGATIONAL SERVITUDES, SOURCES, APPLICATIONS, PARADIGMS (2007); hereinafter "*Navigational Servitudes*".

Professor Peter R. Glazebrook, Esq., both Fellows of Jesus College Cambridge, as well as the insightful Professor John Hopkins, Esq., Professor of Law at the University of Cambridge and Fellow of Downing College Cambridge.

Librarians, often underappreciated, must also be noted, but without whom research would be impossible. Many of their individual names are unknown to me, but their libraries are especially well-known, such as the University of Cambridge Squire Law Library, the University of Cambridge Library, the University of Edinburgh Law Library, the Scottish National Library, the Oxford Bodleian Law Library, the British Public Record Office, the University of Maine Garbrecht Law Library, the Harvard University Library, the Library of the United States Department of Justice, the Library of Congress, and the United States Supreme Court Law Library.

Particular gratitude must of course continue to be extended to The Lauterpacht Centre for International Law at Cambridge University, especially to the Honorable James Crawford of the International Court of Justice, Cambridge University Professor of Law and Fellow of Jesus College Cambridge, Dr. Rodger O-Keefe, Mrs. Anne Skinner, Ms. Karen Lee, Dr. Thomas D. Grant, Dr. John Barker, and Ms. Katie Hargreaves, whose welcome and support during my two years (2005-2006) there as a Visiting Fellow while writing *Navigational Servitudes* continues to be appreciated.

Finally, as acknowledged in my Ph.D. dissertation of 1978, *Sea Boundaries In The Gulf Of Maine*, there continues to be the one person without whom it is fair to say, "this would not have been done." This is of course, Jane, my wife of over forty-eight years. Her support and endless proof reading of *Navigational Servitudes* and now of *Protection, Preservation, And Conservation Of Our Oceans: An Oceans Public Trust,* as always is indispensable and she truly is the co-author.

INTRODUCTION

The accepted international law principles of navigational freedom and *res communis*, both limiting State acquisitions of ocean areas, show the high seas and associated navigable water zones as inherently subject to unimpeded usage by nations and individuals within the ambit of international law. But there is something more apparent in those law of the sea principles, and that is the acceptance of the oceans and the living and non-living natural resources as heritable common property of mankind; that is, inherent human rights of Juridical Peoples and their constituent demographic populations. In *Navigational Servitudes* those maritime usage rights are analyzed as jurisprudential principles identifying the subject ocean areas as a *res communis* (trust property), subject to common freedom of navigation by all Peoples, administered on behalf of those Peoples for all demographic peoples acting through their States as a matter of positive law in various aspects such as fisheries and the contiguous zones, territorial seas, custom zones, and high seas navigational limitations. The administration of maritime interests and rights by several or many States (trustees) separately or in concert is recognition of and administration for these beneficial human rights as an inherent Common Heritage of Mankind (beneficiary). That administration determines and defines the herein described international law principle of the Oceans Public Trust, the appropriate label for this heretofore unarticulated principle of international law upon which the foregoing system and systems of maritime customs, treaties and conventions nonetheless are based.

The responsibility of the Oceans Public Trust trustee State(s) is a matter of custom, treaty or convention as required by the maritime international law right to be administered, without regard as to whether a respective State has a municipal law of trusts or a common/law equity concept of fiduciary duty. The point for this work is that juridical People as a legal concept exist as a matter of fundamental natural law and are the existential beneficiary element of the Oceans Public Trust concept. The juridical Peoples of the world in their demographic constituent peoples are the beneficiaries for whom the trust concept must apply and, as a jurisprudential concept, regardless of labels does aptly apply to the international ocean areas. Without a beneficiary there is no essential trust to be administered pursuant to positive law for the protection and preservation of maritime natural

resources as an inherent human right of mankind, the beneficiary. Individuals and groups of people not yet within a juridical People, or otherwise limited by governmental positive laws, would benefit nonetheless from administration of ocean resources according to the principle of a public trust.

The point of this work is that juridical Peoples established under fundamental natural law principles, are the beneficiaries who act through the positive laws of their respective States in concert to administer the common heritage of mankind in the living and non-living ocean natural resources and usages within customs, treaties and conventions; a nexus of trust. Jurisprudential examination identifies the oceans navigational freedom and *res communis* principles as administered by States as the nexus providing the validity for State administrative actions within the Oceans Public Trust concept. The acting government(s) have an organic basis in the respective juridical People(s) with the result that fundamental natural law and human rights therein, such as freedom of navigation and *res communis* oceans, are inherent sovereign rights of all juridical Peoples and are not subject to unilateral actions by any one State's positive law impacting the *res communis*. As a result, it is the jurisprudence of "juridical People" as a sovereign entity within fundamental natural law acting through fundamental positive law and derivative positive law enactments which constitutes a nexus that defines the Oceans Public Trust.

Simply put, it is the Oceans Public Trust as an unarticulated juridical principle of international law of the sea which requires State responsibility for the conservation, protection and preservation of inherent human rights of Peoples over the living and non-living natural resources of the sea and seabed within the Common Heritage of Mankind. The 1948 *Universal Declaration of Human Rights* is the latest in a series of human rights documents beginning with the 1776 *United States Declaration of Independence*, the 1789 *United States Constitution*, the 1791 *French Declaration of the Rights of Man*, and the 1793 *French Constitution*. The point of these declarations is the self-declared establishment of Peoples as Public Sovereign acting only within natural law, without positive law authorization, and as sovereign they then act positively to adopt municipal law governments which in turn act as States for their respective juridical People in international law. It is these sovereign People which inherently hold the rights of the natural law navigational freedom principle and the high seas *res communis* usage right as those rights are to be conserved, protected and preserved by States consistent with the Oceans Public Trust principle.

The concept of rights as a legal interest is essential to the existence of any trust charged with their conservation, protection and preservation. The dead hold no rights; the living hold human rights by definition, which definition includes power to constitute a juridical sovereign People as a present and continuing living entity and thereby enable adoption of government (State) and pronouncement of positive municipal law rights. These inherent natural law and positive law rights of juridical People are the jurisprudential basis for the navigational freedom principle and the confirmation of the Oceans Public Trust as a principle of international law already in application through the freedom of navigation and *res communis* principles. The matters of demographic populations becoming a juridical People having the aggregate inherent rights of those constituent people, and the obligation to conserve, protect and preserve those rights through establishment of governments acting as States in international law, are the combined elements of the human rights nexus to navigational freedom and *res communis* oceans presented here for jurisprudential examination and confirmation. The concept of juridical People is essential to the concept of a public trust and the focal point of formation for a juridical People is the 1776 *Declaration of Independence* which as paramount value for the international law of a judicial People holding inherit human rights.

When an international law trust arrangement is set forth in a treaty or convention the trust instrument will set forth the identity of the trustee (State or States), the *res* (maritime matters), and the beneficiary juridical People. The responsibility and liability of the State(s) trustee would also be set forth in that instrument of trust so that for treaty based or conventionally constructed trusts there is no fiduciary duty issue. In contrast the Oceans Public Trust applied as a principle does not textually define trustee responsibility, but State trustee responsibility is defined when some aspect of the living and non-living resources of the high seas and associated human rights become the *res*. In that context the public trust concept of governmental responsibility mandates State action toward the *res* consistent with the Oceans Public Trust principle of conservation, protection and preservation of the living and non-living resources of the oceans so as not to impact the rights of all States toward those resources as the Common Heritage of Mankind. The interesting point here is that without the People there is no beneficiary and no States trustee so there would be no unarticulated trust and no Oceans Public Trust principle to apply for the benefit of the *res*. Consequently, the jurisprudential review of the Peoples as sovereigns establishing governments to act as States to protect the inherent human rights of those Peoples *per force* requires determination of the organic source of law for formation of juridical Peoples and the basis of

law upon which the juridical sovereign People act both municipally and in international law.

The foundation point of Oceans Public Trust jurisprudence chosen here is the demographic concept of "people" in English political/legal thought of the seventeenth century, and as the demographic people emerge becoming a juridical People through time, ultimately inherently self-constituting by natural law as the juridical American People in their 1776 *Declaration of Independence*; a seminal event. Indeed, this self-constituting action has recognition in international law and was the precedent for the development and evolution of sovereign Peoples and their derivative governments from that point until 1948 and the *Universal Declaration of Human Rights*. The British experience as the heart of the matter came to a head with the American Revolution, 1774—1783, which in its initial stage was a British civil war when the demographic English People residing in North America as colonists asserted an organic dispute with Parliament as to the governmental authority to enact certain legislation affecting the British colonies within their respective polities. In this author's view, what both sides seem to have missed is that they were a nascent federation.[1] The key point of dispute from the colonial perspective is that North American local government was the right of Englishmen established under exercise of the Royal Prerogative, which was the juridical basis for the establishment of their colonial settlements outside the Realm. These colonial English peoples held that Parliament held no legislative authority except on national governmental matters. More to the point, these North American Englishmen insisted that as members of the English People their inherent and derivative positive law rights under the common law continued and that the Stamp Act and the other "Intolerable Acts" of the Townsend administration were obnoxious and odious, being penultimately resisted at the 1773 Boston Tea Party and ultimately at Philadelphia with the 1776 *Declaration of Independence* where the North American English People separated as "one

[1] This work is not intended to participate in early modern history efforts by other authors on empire and jurisprudence, nor on settler colonialism. Those would be worthy efforts, but they are not material to this work which is an effort to examine certain materials for presence of a juridical concept of sovereign Peoples, and is not an effort to write a history. This work follows on the scholarship of *Navigational Servitudes* and is intended and directed as a second volume on the narrow point of a public trust.

People" from the juridical English People to become the juridical American People.[2] The King in Parliament did not share that juridical perspective.

The point here, and for the American People as North American successors to the English People is that these "rights" include both the fundamental natural law inherent human right to constitute a juridical People cognizable in international law and the municipal positive law right as sovereign to select and form governments. When so acting, as the "people of the United States", the self-constituted American People of 1776 adopted the 1789 *United States Constitution*. They then amended that 1789 *United States Constitution* making clear under *Amendment IX* that rights of the People not enumerated by the first *Ten Amendments* continued to be sacrosanct.

This simple fact of government organization is frequently overlooked in subsequent political, historical and judicial analyses of the 1789 *United States Constitution* because *Amendment IX* excerpts and preserves as extra constitutional the *ab initio* inherent human rights of the American People to sovereignty which jurisprudentially is the ultimate juridical basis for the validity of the 1789 *United States Constitution*. It is as if only rights enumerated in the *Bill of Rights* applied, which has resulted in astounding juridical convolutions of penumbral logic to achieve a desired interpretive constitutional conclusion which could otherwise easily be reached through *Amendment IX* and the unalienable personal human rights to life, liberty and the pursuit of happiness plainly set out in the 1776 *Declaration of Independence*.

Without life there is no demographic population with inherent authority to form a sovereign continuing juridical People. Issues of inclusion and exclusion, immigration and conquest in regard to the demographic population and racial as well as groups of native peoples do not limit the constitution of a juridical People sufficient to form a government cognizable in international law as an inherent human right. Nonetheless, as constituted by a juridical People such government as is adopted must positively provide the derivative forum and means for resolution of any and all failures to include any excluded or impacted population constituencies.

Frequently the constitutional antecedent to the 1789 *United States Constitution*, the 1776 *Declaration of Independence*, is set aside in legal discussions as interesting but listing rights as principles without legal effect in constitutional judicial interpretations. That is wholly inaccurate. Protection and preservation of the rights of the American People remains a

[2] Book shelves are replete with writings of historians on these points. They are not relevant for the narrow point here of sovereign People as a juridical concept, nor the history of how this concept was applied.

clear responsibility of the National Government in *Amendment IX*. The ultimate fundamental, natural and human rights of the American People are patently set out in the 1776 *Declaration of Independence*, which is the self-constituting act establishing the American People and their inherent non-positive law rights and sovereignty. The *Declaration of Independence* renders the American People successors to the North American English People as a matter of international law, the same international law which has been specifically recognized as part of American law,[3] and it is the American People who select and organize their form of constitutional government while reserving to themselves their superior human rights as the Sovereign American People. That is what the framers of the *United States Constitution* understood as patent, that is what the opponents to ratification understood as requiring extra constitutional protection and preservation, and that is what produced the first *Ten Amendments* to protect certain specific rights of the American People and especially, under *Amendment IX*, reserving their human and natural law rights as a sovereign American People.

The sovereign rights of a juridical People have become a general principle of law referenced as human rights. As international law, the American People's self-constituting 1776 *Declaration of Independence* set the world stage for recognition and definition of those inherent human rights as preserved for juridical Peoples in their respective representative international States and for ocean areas including navigational freedom and *res communis* status as inherent human rights within the unarticulated international law principle of the Oceans Public Trust; the trust is a public

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[3] "The law of nations, although not specially adopted by the constitution, or any municipal act, is essentially a part of the law of the land." - Edmund Randolph, first Attorney General of the United States, writes in 1792 that, "International law is part of our law, and must be ascertained and administered by the courts of justice." *The Paquette Habana*, 175 U.S. 677, 175 (1900). The full quotation is as follows:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton v. Guyot,* 159 U. S. 113, 159 U. S. 163-164, 159 U. S. 214-215.

trust, demonstrably existing with regard to ocean areas but not yet identified as such. Nonetheless, the principle of an Oceans Public Trust is present as an international law principle patent in various aspects.

Note, the jurisprudential review of the Oceans Public Trust as an unarticulated principle of international law undertaken here employs the nexus analysis as a concept pairing both natural law and positive law with temporal references beginning in 1776. Inherent human rights are distinct from administrative positive laws; there is no merger of interests which is essential to the trust concept.

This is a jurisprudential analysis designed to confirm juridical existence of People as sovereign with inherent rights for all individuals to be protected and preserved by positive international legal principles. This work relies on historical materials to trace the development of People as a juridical entity but it is not a period history. Rather this work is about international law as applied to evidence which is derived from materials, jurists, authors, and cases throughout the temporal period of analysis to confirm the existence, role, and necessity of sovereign juridical Peoples as natural law beneficiaries and their States as guardians of inherent maritime rights.

America represents the beginning because that is where self-constituting declarations of Peoples began, and this jurisprudential analysis embraces ultimately the entire law of the sea, international law principles of navigational freedom and *res communis* access and usage manifesting the Oceans Public Trust concept. Specifically, the nexus, which is the constant theme, is in a "public trust" which is the responsibility of governments to demographic populations even before the population evolves as a juridical People. It is that nexus of government applied in international law as States to conserve, protect and preserve the inherent rights of juridical Peoples which in concert are responsible for management of the oceans, living and non-living natural resources as well as the international law rights of unimpeded navigational access as well as *res communis* usage without occupation and acquisition. Herein a public trust is defined as a principle "that navigable waters are preserved for public use, and that the States are responsible for protecting the juridical Peoples' to that use".[4] State responsibility is that of a government towards its sovereign juridical People, a paramount responsibility if not fiduciary.

The 1776 *Declaration of Independence* is a case study for juridical People as Public Sovereign acting through international positive law.

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[4] *Cf.* BLACK'S LAW DICTIONARY, 1268 (8th ed., 1999). *See also* BLACK'S LAW DICTIONARY, 1682 (4th ed. 1951), where public trust is defined as "One constituted either for the benefit either for the public at large or of some considerable portion of it answering a particular description."

CHAPTER ONE

OCEANS PUBLIC TRUST— ORIGINS/PEOPLES/PUBLIC SOVEREIGN

Usage of the oceans is a commercially and technologically evolving matter which requires continuing administrative and regulatory control in preservation of the inherent human interests of all juridical Peoples in the management of maritime natural resources of the *res communis* oceans, their Common Human Heritage of Mankind. This management responsibility of all States exercising the navigational freedom principle is described in *Navigational Servitudes* as being subject to the high seas *res communis* equitable responsibilities within an apparent public responsibility approaching a public trust:

> The overarching public trust remains the 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 to the administrative framework of an "Oceans Public Trust" as applied for the regulation and access to the living and nonliving resources of the sea, the seabed and subsoil, as well as to the usages of the oceans and their foundation.[1]

This trust relationship of all States, regardless of the several municipal concepts of trust (if any), remains apparent in the international law context of *res communis* and the navigational freedom principle as explained in *Navigational Servitudes* and as herein continues to be defined within the concept of an "Oceans Public Trust" as a yet unarticulated principle of international law. Importantly the elements of a trustee (States, whether acting under customary, treaty or conventional international law) and a

[1] Ralph J. Gillis, NAVIGATIONAL SERVITUDES, SOURCES, APPLICATIONS, AND PARADIGMS, 321-22 (2007).

trust property or right, the *res* (oceans held to be *res communis* and not *res nullius*, as well as subject to the principle of navigational freedom, and international law principles) are apparent, but the existential element, without which there can be no trust relationship, are the beneficiaries (juridical People). The Oceans Public Trust concept therefore applies to juridical Peoples established as a matter of natural law and their fundamental positive law States because maritime rights are inherent in such Peoples, but for States not dependent on natural law formation there are no inherent rights because there is no juridical source beyond positive law.

If the trustee is also the beneficiary, the essential distinction of trustee and beneficiary merges, and without separation of entities there can be no trust of distinct rights and responsibilities as with a trustee and a beneficiary. Governments are commonly described as having public trust responsibilities, and it is the separation of a natural law juridical Peoples from their positive law States which enables the same concept of a public trust to be applied through the principle of an Oceans Public Trust. Significantly that separation occurs in the Oceans Public Trust concept where States acting in concert as trustees for the benefit of plural Peoples as beneficiaries are distinct from their individual sovereign People. The result is that the combined sovereign Peoples become the essential multiple beneficiaries on whose behalf multiple States act in a trustee relationship within *res communis* and navigational freedom under international law principles; hence the concept of an unarticulated Oceans Public Trust principle of international law.

Notably that relationship of States to sovereign Peoples, trustee to beneficiary, viewed as an international law principle in regard to customs, treaties or conventions, is not bound by municipal law concepts regardless either of whether the trust concept is present or whether a defined responsibility of the trustee is set in equity (fiduciary) or custom or contract. It would be a flaw to examine the trusts developing over maritime areas, as well as over Antarctica and the moon, as well as the Oceans Public Trust concept, by common law or equity or other municipal laws regardless of whether a municipal system has the trust concept, as much as it would be a flaw to determine that there are no maritime trusts nor an acceptable Oceans Public Trust because they do not contain a municipal law element such as fiduciary responsibility. The critical point for identification of a trust relationship in international law, regardless of whether labeled a trust, are the three elements of trustee, trust *res*, and beneficiaries. Herein the jurisprudential basis for identifying the Peoples of mankind as the beneficiaries of the Oceans Public Trust concept is

tested for international law within the principles both of the Common Heritage of Mankind in *res communis* oceans over living and non-living resources of the water column, seabed and subsoil, and the principle of the navigational freedom.

Importantly the point is not that there is an existing singular trust entity, but rather that the common actions of States toward the oceans demonstrates deference to the role of the oceans as common human heritage of all Peoples to be protected and preserved by State actions in international law whether simply in accordance with recognition of *res communis* limitations preventing acquisition, dominance and exclusion of or by other States from high seas areas, or managing the living and non-living resources of high sea areas both on the basis of custom and treaty or convention. The status of Peoples as the beneficiaries of their Oceans Public Trust finds root in the seventeenth century and the eighteenth century when the concept of "peoples" developed from a demographical reference to become a juridical term of sovereignty providing the source of governmental polities, i.e., States. This evolution of "peoples" into "Peoples" as a documented matter of international law began with the self-constituting declaration of nationhood by the American People in the 1776 *Declaration of Independence,* followed by the French People in the 1789 *Declaration of the Rights of Man*. These two declarations cement the concept of a People as sovereign, which evolved over time and continues to evolve.

The capstone of that period appears in three instruments: the 1776 *Declaration of Independence*, the 1789 *United States Constitution*, and the 1789 *Declaration of the Rights of Man*. And these are based on the works of English and European jurists as well as the American "Founding Fathers".[2] Tracing the development of juridical People as the holder of sovereignty requires examining the textual evidence demonstrating that evolution from demography to juridical principle, as in the hereinafter quoted material.[3]

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[2] *See* K.M Kostyal, FOUNDING FATHERS, THE FIGHT FOR FREEDOM AND THE BIRTH OF AMERICAN LIBERTY (2014).

[3] This not a history but the selection of evidence supporting the proposition of People as the repository of ultimate sovereignty and inherent human rights in regard to the jurisprudence of the Oceans Public Trust principle applied for the preservation and protection of the inherent human maritime rights of the common heritage of mankind.

A. American Capstone—Sovereign People

The significance of the seventeenth century and eighteenth century juridical/political concept for this work is that Peoples became recognized as juridical, the ultimate sovereigns of their respective polities, and that the inherent rights of juridical Peoples are human rights which as a matter of *res communis* extend over the oceans and are administered by their representative State governments within the principle of the Oceans Public Trust. That recognition begins with the curious fact that the sovereign American People is an amalgam of demographic peoples. Somewhat like the residents of Noah's ark, the American People is a composite representative humanity. America, as a sovereign People, is demographically all of us[4], and to the extent individuals or groups are unable to secure their inherent human rights it is the responsibility of the State government established by that juridical People to eliminate discriminations through exercise of positive law and the inherent human right of the demographic population to be included, represented, and participate.[5] For that reality alone there is sufficient reason to look first to

[4] A perceptive T-shirt slogan recently seen reads, "We the People means all of us:" And for readers interested in social science and political theory concept of people, the author highly recommends P. Johnson, A HISTORY OF THE AMERICAN PEOPLE (1997).

[5] The concept of Peoples is a fundamental natural law matter essential for the establishment of an entity to act in international law as able to form a government. Whether that government once formed acts through positive law to preserve and protect the natural lawful human rights of its constituent individuals and groups is a matter of positive law and failures of positive law do not impact universal membership in juridical sovereignty of the people where the human rights asserted are grounded and present the cause for positive law action. This is why it is essential to distinguish fundamental natural law and fundamental positive law with its derivative positive law; without the fundamental natural law, only the whims of positive law exert control, hence discrimination continues. Importantly it is true to state "America is all of us", which is the very legal basis for individuals and groups experiencing discrimination and denial of the inherent human rights of that People to assert those rights and continue to repulse discrimination. It is false to consider failures of demographic groups such as Haitians, Native Americans, First Nation Canadians, the Mi'gmaq Nation with unceded lands, and ethnic groups as not included within a juridical People, because it is in a juridical People that those rights are held and must be asserted by individuals. The point is that the inherent human rights of Peoples acting as sovereign States in international law are distinct from the positive law achievements or failures of their governments giving access to and enforcement of those rights. This work is focused only on the Peoples

this amalgam of humanity for the constitutive assertion of constitutionally protected human rights, followed by the French People and thereafter by others, for the sovereign Peoples' capstone exercises of Public Sovereignty. It is here that the jurisprudential analysis of People as founded and existing in the fundamental natural law of human rights supplies the fundamental positive law basis for the government established by the juridical People to enact laws protecting and preserving the fundamental natural law of human rights for each and all constituent individuals and groups.[6]

As with so much that is American or America, the American People as sovereign with inherent fundamental human rights emerged out of the evolving seventeenth century and eighteenth century recognitions of the Rights of Englishmen. Those human rights of seventeenth century and eighteenth century English colonists in North America are confirmed in their respective colonial charters and therein is set out their unique extension of English common law. These charter rights continued to be asserted as those North American Englishmen in their thirteen original colonies became proto-Americans. Then in the eighteenth century these North American Englishmen initiated what became in 1776 the War of the American Revolution, but it began as yet another English civil war and not as Americans against the British; the Americans were the British despite the erroneously alleged announcement of Paul Revere on April 15, 1775, that the "British are coming".[7] That continuity of disputes among Englishmen is significant. The American Revolution, where the North American Englishmen asserted their perceived Rights of Englishmen, conceptually followed on much of what had developed previously as a result of the seventeenth century English Civil War during and after the period of the Commonwealth, especially with the accession of William

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achieving sovereign status and able to be recognized and act as States in international law.

[6] Slavery as an unresolved antithetical institution as continuing in the 1789 United States Constitution ultimately was resolved by the Civil War (1860-1865) and the Thirteenth Amendment (1856) to the Constitution, but ethnicity issues continue to be addressed as constituent members of the American People assert their inherent human rights. This American experience demonstrates that achievement of the fundamental natural law rights of the American People, outlined in the 1776 *Declaration of Independence* together with the fundamental positive rights of the American People as set out in the Constitution and its *Amendment IX*, required an effort of blood and property.

[7] "Paul Revere's Ride" *in* Henry Wadsworth Longfellow, THE POETICAL WORKS OF LONGFELLOW, 207 (1975).

and Mary to the throne and with the 1701 Act of Settlement thereby closing out the Stuart era of government in 1689.

The "origins" here described are those of the navigational freedom principle addressed in *Navigational Servitudes*, which is there identified as a fundamental right of Peoples to be protected and held within the high seas *res communis* in public trust, that is the Oceans Public Trust, under international law by the representative actions of their respective States. But the instant examination of "origins" is antecedent. Here the focus is jurisprudential. Thus examined herein is the constitution and establishment of "peoples" as juridical entities existing under international law with sufficient self-evident natural law political/juridical existence and inherent human rights to enact positive law provisions; that is "Public Sovereignty". As in *Navigational Servitudes,* there again is a *fulcrum*, and herein it balances on the one hand the conceptual development of a juridical People as the Public Sovereign holding fundamental rights *ab initio* as inherent human rights, with the subsequent derivative positive law enactments of their positively created State governments. More to the point, the jurisprudential issues here examined are, what does it mean as a principle of law to say that a juridical People exist and are sovereign and why is that significant for the Oceans Public Trust concept?

It is fortuitous that we have the instrumental history of this emerging juridical balance of popular interests versus governmental interests coming together as Public Sovereignty—the patent establishment of the juridical People as Public Sovereign. The American colonial experience of British North America and the resident North American Englishmen became the action focal point for those evolving European seventeenth century and eighteen century political concepts and principles. The jurisprudential effect of that evolution is with us today as the general law principle that a juridical People is the Public Sovereign and thus the source from which a State organizes and is cognizable in international law with the capacity to adopt its municipal government structure. Thereunder governance is the will of the people rather than of those exercising municipal governmental functions. This general law principle does not seem to have been ever better stated than as follows:

> In Congress. July 4, 1776
> The unanimous Declaration of the thirteen United States of America.
>
> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a