

V.S.A. Chapter 11." Department of Conservation's Memo.andum in Support of their Motion to Alter Judgment, pp.1-2. In fact, the Order was not intended, nor does the Court read it, to prohibit delegation to administrative bodies in the Executive Branch. The Order clearly states that "[t]he Board is given specific authority to make rules which the Department must follow in managing the public trust property. 29 V.S.A. s.401." Order at p.5. The Order is also clear that the Legislature has provided the Department with the guidelines necessary to a determination of public good, citing 29 V.S.A. s.405(b). Id. at p.4. Thus, the Department has the authority to apply the statutory criteria set out to determine whether the encroachment will adversely affect the public good. They cannot, however, pass substantive rules, as to do so would infringe on the powers specifically granted to the Board by the Legislature. See 29 V.S.A. s.401.

The Department's second argument is twofold. To begin, they contend that the Court exceeded its authority because, as they interpret the Order, this Court invalidated the Department's interim procedures in toto. The Order was only intended to invalidate s.3(a) of the interim procedures. That was the only issue before the Court, as that is the section which sets forth the factors the Department will consider in making a public trust determination, and only s.3(a) was invalidated by the Board in the Angney's appeal to that body. The Order shall be amended to reflect this clarification.

The Department further argues that this Court was without jurisdiction to invalidate the interim procedures, claiming that, under 3 V.S.A. s.807, challenges to the validity of an agency rule must be brought as a declaratory judgment action in Washington Superior Court. Section 807 only applies if a rule is at issue, which is not the case here. The interim procedures specifically state that they were "duly adopted in accordance with the

provisions of 3 V.S. s.835." Interim Procedures p. 3 V.S.A. s.801(8), defining "procedures", states that same "shall be adopted in the manner provided in s.835 of this title." The court concludes that the interim procedures are, and were considered by the Department to be, procedures, not rules. The Department nonetheless argues that they come under the rubric of 3 V.S.A. s.801(9), which defines "rule" as an "agency statement of general applicability which implements, interprets, or prescribes law or policy..." Even if this definition encompasses the procedures at issue here, this would not divest this court of jurisdiction. 29 V.S.A. s.407 specifically authorizes appeals by any party aggrieved by an action of the Board to the "superior court of the county in which the proposed or existing encroachment is located." Moreover, 3 V.S.A. s.807 uses permissive, not mandatory language: "[t]he validity of applicability of a rule may be determined in an action for declaratory judgment in the Washington superior court." (emphasis added). Section 807 does not divest other courts of statutorily authorized jurisdiction over matters that may also entail consideration of the validity of an agency rule.

Where the legislature has provided that certain rights (here the right to have one's sentence modified) are enforceable in specified tribunals (here the superior court in which sentence was imposed), the declaratory judgments vehicle should not be used to frustrate that legislative choice.

Triviento v. Commissioner of Corrections, 135 Vt. 475, 478 (1977). The legislature provided in 29 V.S.A. s.407 that one who seeks to appeal a Board ruling should go to the specified county's superior court. "The declaratory remedy, ... does not enlarge the jurisdiction of the court... If the Legislature has designated another tribunal to hear certain claims, the declaratory judgment statutes do not ipso jure vest jurisdiction over those claims in the superior court." Williams v. State, 156 Vt. 42, 58 (1990).

The Department's final contention is that the Order erroneously equates

consideration of the "public good" criteria with consideration of "public trust" factors. This issue was argued extensively in the Department's original memoranda on the underlying action, and is not reconsidered at length here.

The public trust is the doctrine which ensures that certain lands, designated by statute, are held "in trust", i.e. for the benefit of, the people of the Vermont. Central Vermont Railway, 153 Vt. at 341. The doctrine evolves over time, Id. at 342, as it is the purpose of the public trust to serve the public good, and the definition of public good evolves "in tandem with the changing public perception of the values and uses of waterways." Id.

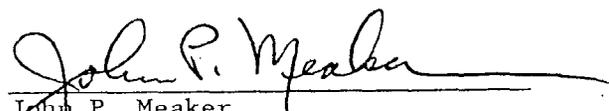
The concept of the public trust is the backdrop against which private use must be controlled. A determination of "public good" is intrinsic to proper management of public trusts. The factors to be considered in determining public good are outlined by statute, and are only applied once it has been determined that the land at issue is held subject to the public trust. 29 V.S.A. s.401 and s.405. This Court's September Order applies this interpretation of these concepts, and, as such, will not be altered.

ORDER

This Court's Order of September 4, 1992, is hereby amended in the following manner: The first sentence of the first full paragraph of page six shall now read "The Department has exceeded its delegated authority in promulgating s.3(a) of the interim procedures."

In all other respects the Motion of the Department of Conservation to Alter the Judgment of this Court is hereby DENIED.

Dated at Woodstock, Vermont this 5th day of March 1993.


John P. Meaker
Presiding Judge