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The Public Trust Doctrine: A New Approach to Environmental Preservation

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THE PUBLIC TRUST DOCTRINE: A NEW APPROACH TO ENVIRONMENTAL PRESERVATION

In the ever-growing field of environmental law the public trust doctrine provides yet another legal theory which environmental advocates should consider. The doctrine has remained for the most part a vague legal concept filled with misconceptions and subject to a traditionally narrow application. The public trust doctrine in West Virginia is not applied as a rule of law; it has been recognized by the courts, but never to its logical extent. The purpose of this Note is to define the public trust doctrine; to provide an analysis of its historical origin; to survey the modern expansion of the doctrine; to discuss its application in West Virginia; and to propose that West Virginia attorneys urge the courts and the legislature to recognize the existence of the public trust doctrine as a rule of law applicable to the protection of West Virginia's valuable natural resources.

The public trust doctrine embodies the concept that the government is the trustee of certain natural resources with the obligation to preserve those resources for the benefit of its citizens. The concept of a trust obligation which resides in the sovereign is not of modern origin. The general proposition that man should protect and preserve his environment for himself and for succeeding generations was found in the philosophies of the ancient Greeks as well as in the Bible.\(^1\) The public trust concepts gleaned from these sources are ethereal; nevertheless, they do indicate that early civilizations recognized that man has an obligation to serve as guardian of the natural resources. The modern public trust doctrine arises from the civil law of Rome and the early common law of England.\(^2\) An examination of the doctrine's historical origin is a prerequisite to a thorough understanding of the public trust doctrine as it exists today.

Victor Yannacone, an authority on the public trust doctrine, credits the Romans with the first clear statement of the doctrine in the fourth and third centuries B.C.\(^3\) Property at this time was

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\(^1\) V. YANNACONE, B. COHEN, & S. DAVISON, ENVIRONMENTAL RIGHTS AND REMEDIES 12 (1972).

\(^2\) Id.

classified res publicum or res privatum. Those lands which were
classified res publicum or as "common things" were typically riv-
ers, harbors, public roads, air, running water, the sea, and the
shores of the sea. The title to these "common things" was in the
sovereign subject to the beneficial use and enjoyment of the pub-
lic. The rights of the beneficiaries were defined by Justinian to
provide that:

All rivers and harbors are public, so that all persons have a right
to fish therein . . . everyone is entitled to bring his vessel to the
bank [of a river], and fasten cables to the trees growing there
and use it as a resting place, as freely as he may navigate the
river itself . . . But they cannot be said to belong to anyone
as private property, but rather subject to the same law as the
sea itself, with the soil or sand which lies beneath it.5

The Romans found the common ownership concept essential
to the maintenance of an economy based primarily on navigation,
and thus preserved the trust concept as the most basic natural
law.6 This concept found its way into English law, but as the
Roman Empire declined and the feudal system developed in the
late 10th century and early 11th century, the ownership of certain
tidal areas became the subject of an intense struggle between the
Crown and the Parliament since the King claimed an absolute
right of ownership in the tidal areas. In order to assert more effec-
tive control over the tidal lands, absolute rights of ownership were
granted by the King to favored feudal lords and barons. The con-
cept of public ownership was seriously diminished until the Parlia-
ment, in an effort to restrict further alienation of tidal lands, en-
acted several statutes which prohibited such grants. The power of
the King to grant such land was thus clarified:

The ownership of the shore, as between the public and the King,
has been settled in favor of the King; but, as before observed,
this ownership is, and had been immemorially, liable to certain
general rights of egress and regress for fishing, trading, and
other uses claimed and used by his subjects. These rights are
variably modified, promoted, or restrained by the common

1 W. Burdick, Principles of Roman Law and their Relation to Modern Law
293, 307 (1938).

2 Justinian, Institutes 2.1.1-2.1.6, quoted in Note, The Public Trust Doctrine
in Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 Yale L. J. 762, 763

3 Note, The Public Trust Doctrine in Tidal Areas: A Sometime Submerged
law, and by numerous acts of parliament, relating to the fisheries, the revenues and the public safety. . . .

The apparent resurgence of the public ownership concept was somewhat curtailed in the 17th and 18th century with the developing philosophy of laissez-faire. The laissez-faire philosophy required control of the land to shift from the state to private individuals to be free from governmental interference. Consequently, the public trust doctrine was modified to reflect the change in philosophy. Land was to be held by private individuals subject to limited public rights akin to "easements for public use." Although this approach was inconsistent with the public ownership concept, it was seen as a means of assuring public access to the tidal areas, while upholding the concept of private ownership.

The trust concept, or some modification of it, existed in the common law of England at the time the colonies were founded. The trust theory and the concomitant duties and obligations were exported to the new colonies and later incorporated in the newly formed American legal system. However, the American courts initially had difficulty determining the exact application of the trust theory. Several early Supreme Court cases discuss at length the migration of the public trust doctrine to the United States. In Martin v. Waddell the Court considered whether certain letters of patent to land underlying navigable waters conveyed absolute title to the land or whether the letters of patent reserved the public's right to beneficial use and enjoyment of the tidal areas. The Court decided that the letters of patent to coastal lands also transferred certain trust obligations and did not include the power to grant absolute title to land in tidal areas. It was concluded that unless there were plain words to the contrary in the letters of patent, a right which had been "so long and carefully guarded in England" could not be given away.

Martin v. Waddell clearly established that the trust doctrine existed in the law of the thirteen original states. Several years later the Supreme Court determined that the public trust doctrine also applied to states which were formed from territory which was later

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1 Hall, Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm 106 (2d ed. 1875) (cited in Sax, supra note 3).
3 Id.
acquired by the United States.\footnote{Shively v. Bowlby, 152 U.S. 1 (1893).} Shively v. Bowlby involved a contested title to certain lands below the high water mark of the Columbia River in Oregon. The conflict centered on a deed from the United States to Shively for lands that included part of the river bed and a subsequent deed by the state of Oregon to Bowlby for some of the same land. Bowlby maintained that the deed from the United States was invalid on the grounds that the state of Oregon had the paramount right to the land below the high water mark of navigable waters. Shively argued that the King's power to hold such land for the public use had been conferred upon the colonies, and subsequently upon the United States, without reserving any power to the states. The Supreme Court upheld the deed from the state of Oregon, concluding that while the United States could grant title in the soils below the high water mark, it had never done so, choosing instead to allow the various states to continue to control such land.\footnote{Id. at 58.}

The dominant theme of these two Supreme Court cases—that grants of tidal areas by the sovereign convey only limited rights to such land unless there is an express intention to the contrary—remains the basis of the public trust doctrine. Alienation of these areas is not prohibited; however, such grants must be subjected to close scrutiny in order to determine whether the public's beneficial interest was considered in making such conveyance.

While the American courts recognized the basic premises of the trust concept, certain modifications were made to reflect the social, economic and geographical conditions which existed at the time.\footnote{The individual states were allowed to determine for themselves whether the high water mark or the low water mark would control the boundaries of the trust area. In addition, the courts adapted the trust doctrine to the particular geographic conditions of the United States by applying the doctrine to navigable waters and rivers as well as tidal areas and submerged lands.} In order to promote a vigorous economy based on navigation, restraint on the alienation and use of the tidal areas was partially lifted to allow greater development of the shorelines, and the doctrine remained a narrow concept confined to tidal areas and submerged lands. For centuries the public trust doctrine accurately reflected the interests which the public sought to have protected which were primarily the freedoms of navigation, fishing and commerce. While the public trust doctrine has remained static, the public's interests have not, and environmental advo-
cates have urged the courts to adopt a broader concept in order to
expand the rights afforded public interest litigants.\(^{14}\)

Recognizing that the potential scope of the public trust doc-
trine is much broader than a conventional application would sug-
gest, Professor Sax concluded that:

\[(I)t \text{ is clear that the judicial techniques developed in public}
\text{trust cases need not be limited either to those few conventional}
\text{interests or to questions of disposition of public properties. Pub-
\text{lic trust problems are found whenever government regulation}
\text{comes into question, and they occur in a wide range of situ-
\text{ations in which diffuse public interests need protection against}
\text{tightly organized groups with clear and immediate goals . . . .}
\text{[T]he protection which the courts have applied in conven-
\text{tional public trust cases would be equally applicable and}
\text{equally appropriate in controversies involving air pollution, the}
\text{dissemination of pesticides, the location of rights of way for}
\text{utilities, and strip mining or wetland filling on private lands in}
\text{a state where governmental permits are required.}^{15}\]

An equally forceful argument for the expansion of the public trust
document is provided by Yannacone who advises attorneys involved
in environmental litigation to make the "logically imperative ex-
tension" of the theory by applying the principles to the closely
related areas of air, forests, public lands, and oil and mineral re-
sources, as well as other areas commonly called natural resources.\(^{16}\)
Other discussions have focused on expansion of the doctrine into
areas of water and prime agricultural lands.\(^{17}\) Despite the encour-
agement of these scholars, the incorporation of the public trust
document into environmental law has proceeded very slowly or not
at all. Expansion of the public trust doctrine has only been accom-
plished to a limited extent through legislation and judicial develop-
ment of established common law principles.

As a common law theory, the public trust doctrine has the
inherent qualities of flexibility and adaptability.\(^{18}\) Theoretically

\(^{14}\) Sax, supra note 3; Yannacone, supra note 1; W. Rodgers, Environmental
Law 170-86 (1977); Water Pollution Control in Texas, 48 Tex. L. Rev. 1029, 1175

\(^{15}\) Sax, supra note 3, at 556-57.

\(^{16}\) Yannacone, supra note 1, at 15.

\(^{17}\) Yannacone, Agricultural Lands, Fertile Soils, Popular Sovereignty, The
Trust Doctrine, Environmental Impact Assessment and the Natural Law, 51
N.D.L. Rev. 615 (1975); Water Pollution Control in Texas, 48 Tex. L. Rev. 1029

the common law should reflect the conditions and progress of society and adapt to the gradual changes in the country's trade, commerce, inventions and arts while continuously serving the public welfare. As the public interest shifts, so should the focus of the trust theory. In 1890, the Supreme Court declared that the United States was the trustee of all public lands for the benefit of the ultimate sovereign, the people.\(^\text{19}\) Six years later the Supreme Court expanded the trust protection to include animals *ferae naturae.*\(^\text{20}\) Subsequent decisions recognized the public trust concept as it applied to parklands and public highways and roads.\(^\text{21}\)

Until the 1907 decision in *Georgia v. Tennessee Copper Co.*,\(^\text{22}\) the Supreme Court had limited the trust concept to conventional property interests. With the *Tennessee Copper* decision the Court for the first time recognized the trust obligation of the states in the protection of the citizens' right to a clean environment. Justice

\(^\text{19}\) United States v. Trinidad Coal Co., 137 U.S. 160 (1890). In Light v. United States, 220 U.S. 523 (1911), the Supreme Court once again addressed the ownership of public lands as it concerned fencing laws. At issue was a dispute between a Colorado cattle owner and officials of the United States Department of Agriculture. Congress had set aside certain areas in Colorado as forest reserves and had prohibited the grazing of cattle thereon. Light was charged with knowingly allowing his cattle to graze on the forest reserves without obtaining prior consent from the Department of Agriculture. Light alleged that the creation of the forest reserve without the consent of the state of Colorado was contrary to and in violation of the trust in which the United States held public lands for the several states. The Supreme Court held that the United States government can prohibit absolutely or fix the terms on which its property may be used and it was therefore not subject to the laws of Colorado which required landowners to have properly fenced their lands before they could obtain a remedy for trespass.

\(^\text{20}\) In Greer v. Connecticut, 161 U.S. 519 (1896), the Supreme Court was called upon to determine the constitutionality of a Connecticut statute which regulated the transportation of certain wildlife outside the state's boundaries. The plaintiff was charged with unlawful receipt and possession of certain woodcock, ruffled grouse, and quail for the purposes of transportation outside the state of Connecticut. The Court decided that Connecticut could constitutionally exercise this power. The Court based its decision on Roman law which had considered animals *ferae naturae* as having no owner, but rather as belonging in common to all the public. In Roman law an individual's right to acquire these animals by possession was subject to governmental authority. Justice White elaborated on this principle explaining that, "[w]hile the fundamental principles upon which the common property in game rests have undergone no change . . . the power or control lodged in the State, resulting from this common ownership, is to be exercised . . . as a trust for the benefit of the people." *Id.* at 529.

\(^\text{21}\) Davenport v. Buffington, 97 F. 234 (8th Cir. 1899); Jefferson County v. Tennessee Valley Auth., 146 F. 2d 564 (6th Cir. 1945).

\(^\text{22}\) 206 U.S. 230 (1907).
Holmes characterized Georgia's interest in her state's air as "independent of and behind the titles of its citizens, in all the earth and air within its domain." The next important expansion of the trust doctrine was forty years later in United States v. California, in which the Supreme Court determined that the United States had paramount rights in the oil and other resources in the soil of the seas off the coast of California. The United States government was deemed to be the trustee of these resources for the benefit of all the people and could therefore determine, in the first instance, when, how and by what agencies such resources could be developed. Although these Supreme Court decisions offer valuable precedent for the expansion of the public trust doctrine to protect further environmental interests, few lower courts have used these precedents to apply the public trust doctrine in other than the conventional cases involving navigable waters and tidal areas.

Similarly, significant judicial expansion of the doctrine in state courts has been limited to a few instances. The most important state court decision applying the public trust doctrine in an unconventional case is Gould v. Greylock Reservation Commission. In 1898 the Massachusetts legislature created the Greylock Reservation Commission and declared some 90,000 acres of land to be parkland. For fifty-five years the park remained relatively undeveloped. In 1953 the legislature created an Authority to construct and operate an aerial tramway and certain other facilities. The Greylock Reservation Commission was granted the authority to lease any portion of the parkland to the Authority. The Authority, being otherwise unable to obtain financing, arranged to lease 4,000 acres of the reservation to American Resorts Services which planned to construct an elaborate ski resort. Before the project was begun, the plaintiff, on behalf of the beneficiaries of the public trust, successfully brought suit to invalidate the lease to American Resort Services. In holding this lease invalid, the court

\[21\] Id. at 237.

\[22\] 332 U.S. 19 (1947). The United States Attorney General brought suit against the State of California to enjoin the state and all persons claiming under it from further trespass in the area seaward of the ordinary low water mark off the California coast. The United States claimed fee simple ownership of the lands and things of value underlying the Pacific Ocean. The State of California had negotiated and executed numerous leases with private individuals which authorized their entry onto the disputed area to take petroleum, gas and other mineral deposits in return for the payment of royalties.

applied the principles of the public trust doctrine to reach the conclusion that the state, in establishing the commission, had divested itself of its trust property in such a manner as to lessen public uses.\textsuperscript{26} The significance of the Gould decision is that it illustrates the efficacy of such citizen actions against administrative agencies which fail to consider the public's beneficial interests in transfers or modifications of trust properties. Modifications in existing uses are not expressly prohibited; however, the court warned that where such modifications are primarily for the commercial purposes of a private party, close judicial scrutiny is necessary.\textsuperscript{27}

Another unconventional public trust action was initiated in 1969 by a group of citizens who wanted to save certain fossils in the Florissant beds of Colorado from the threat of a developer's bulldozer. \textit{Defenders of Florissant v. Park Land Corp.}\textsuperscript{28} provides an excellent example of innovative legal action. The plaintiffs were faced with virtually insurmountable obstacles, including private ownership of the affected land and a paucity of environmental regulations which could apply to the circumstances. In spite of these obstacles, the plaintiffs initiated an action under the fifth, ninth and fourteenth amendments to the Constitution as well as under the common law theory of the public trust. The plaintiffs sought an injunction which would prevent the Park Land Corporation from taking any action which would directly affect the irreplaceable fossils which, under the plaintiffs' theory, were protected. Before the environmentalists' constitutional and trust theories were tested by the district court in Colorado, the United States Congress rushed through legislation\textsuperscript{29} declaring the area a national monument, thus rescuing the fossils from imminent destruction. Though the court did not have the opportunity to rule on the case, there are indications that judicial response to the plaintiffs' trust theory might have been favorable.\textsuperscript{30}

\textsuperscript{26} \textit{Id.} at 426, 215 N.E.2d at 126.

\textsuperscript{27} \textit{Id.}


\textsuperscript{30} The plaintiffs' initial application with the district court for a temporary restraining order was denied; however, the court noted the importance of preserving these endangered fossils. On appeal, the Tenth Circuit issued an order which restrained the Park Land Company from engaging in any action which would be detrimental to the preservation of the fossils until a hearing and determination by the district court on the application for a preliminary injunction. The application
Generally, effective judicial expansion of the public trust doctrine has not occurred. As a result the common law doctrine does not accurately protect existing public interests. There are several reasons for the lack of judicial development of this doctrine. Most of the developments in the field of environmental law have taken place outside the courts. Senator Henry Jackson gives several explanations:

[M]any of the encroachments of modern society on an individual’s right to a quality environment are gradual, subtle and unforeseen. They have not often, at least until recently, generated litigation. Moreover, when an individual does decide to exert a legal claim to environmental quality, he may find that he has taken on the legal and economic resources of an entire industry.31

The public trust doctrine, despite its long history, has remained a rather obscure and vague concept subject to much misconception. Perhaps the primary reason for the lack of development is that the common law theory of nuisance has served, for many years, as the inland version of the public trust theory;32 hence, there appeared to be no need for the development of “new” theory. Some legal scholars today doubt the effectiveness of common law nuisance theories in future environmental litigation.33 The attorney searching for a viable alternative to the nuisance theory should consider the possibility of employing the public trust doctrine which is inherently amenable to expansion.

Most of the expansion of the public trust doctrine has occurred through legislative action either by statutory enactment of the doctrine or by constitutional provisions which incorporate the trust theory. The extent to which legislatures have been willing to expand the scope of the public trust doctrine is illustrated by a survey of some of the more significant statutes and constitutional provisions.

In 1963 Michigan citizens ratified a constitutional amendment which incorporated environmental protection as a fundamental

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33 Sax, *supra* note 3 at 485 n.45.
right. This amendment did not expressly impose a trust obligation on the state, but the enabling legislation which followed clearly established the public trust doctrine in Michigan. This enabling legislation, the Michigan Environmental Protection Act, does not contain an elaborate scheme of detailed provisions designed to cover every conceivable type of environmental protection or impairment; instead one of its legislative sponsors indicated that the act should "permit courts to develop a common law of environmental quality, much as courts have developed a right to privacy." The Michigan court stated that

[w]hile the language of the statute paints the standard for environmental quality with a rather broad stroke of the brush, the language used is neither illusive nor vague . . . . The development of a common law of environmental quality under the EPA is no different from the development of the common law in other areas such as nuisance or torts in general, and we see no valid reason to block the evolution of this new area of common law.

This approach, which falls between the pure common law development of the doctrine and legislative development, has been highly successful in Michigan: the public trust doctrine is providing a powerful tool in environmental protection.

The Pennsylvania Constitution, as amended in 1971, contains one of the most expansive expressions of the public trust doctrine. The provision enumerates specific interests in clean air and pure water and in the conservation and preservation of the natural, scenic, historic and aesthetic values of the environment.

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21 Mich. Const. art. 4, § 52. Natural resources; conservation, pollution, impairment, destruction.

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.


26 Immediately following the adoption of the environmental amendment a group of private citizens concerned about the preservation of certain historical values in the Gettysburg area brought an action to enjoin the developers of an
In 1971 Virginia also elevated environmental protection to a constitutional level by declaring that it is the obligation of the commonwealth to conserve, develop, and utilize its natural resources in order that its citizens may enjoy clean air, pure water, and the use and enjoyment of adequate public lands, waters and other natural resources. The trust doctrine was statutorily established a year later in the Virginia Environmental Quality Act which provides that:

In furtherance of Article XI of the Constitution of Virginia and in recognition of the vital needs of citizens of the Commonwealth to live in a healthful and pleasant environment, it is hereby declared to be the policy of the Commonwealth to promote the wise use of its air, water, land and other natural resources and to protect them from pollution, impairment or destruction so as to improve the quality of the environment.

It shall be the continuing policy of the government of the Commonwealth—in cooperation with the federal government, other state governments, local governments, other public and private organizations, and individuals—to initiate, implement, improve, and coordinate environmental plans, programs, and functions of the State in order to promote the general welfare of the people of the Commonwealth and fulfill the State's re-

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40 VA. CONST. art. XI, §§ 1-3.
sponsibility as trustee of the environment for the present and future generations.\(^{41}\)

Similar provisions in South Dakota\(^{42}\) and Connecticut\(^{43}\) expressly impose the trust obligation on the state and provide protection for a wide range of natural resources. It appears that the most satisfactory approach to expanding the public trust doctrine has been through the elevation of environmental protection to a constitutional level followed by legislation which specifically defines the resources covered by the trust, and the rights and duties created by the trust.

At least two states, New York\(^{44}\) and Maryland,\(^{45}\) have set up trust commissions to oversee the protection and preservation of the states' natural resources. In New York the Trust Commission was established to protect lands of "special natural beauty, wilderness character or geological, ecological or historical significance." The Board of Trustees is charged with the responsibility of assisting and advising the legislature and governor in the implementation of the environmental policies set forth in the New York constitution. Although the Trust Commission's authority does not expressly extend to the conservation of air and water, the constitutional provision from which the Trust Commission emanates specifically protects the citizens' interests in "the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands and waters, wetlands and shorelines, and the development and regulation of water resources. In Maryland the legislature created the Maryland Environmental Trust, a state agency, responsible for the conservation and improvement of the "aesthetic, natural, health and welfare, scenic and cultural qualities of the environment." The protection extends, but is not limited to, land, water, air, wildlife, scenic qualities, and open spaces. As in New York, the Maryland Environmental Trust is authorized only to assist and advise the state and its agencies and, as such, is not given the power to initiate litigation. Although the powers of the Trust are somewhat limited, the utility of this approach should not be disparaged. The existence of such an agency may force the state and its agencies to be more aware of environmental concerns in their decision-making process.

\(^{41}\) VA. CODE § 10-178 (1978).
\(^{43}\) CONN. GEN. STAT. ANN. § 22a-1a to -1d (West 1977).
\(^{44}\) N.Y. [ENVIR. CONSERV.] LAW § 45-0101 (McKinney 1973).
As the preceding discussion demonstrates, notable progress has been made in the expansion of the public trust doctrine and its principles. However, West Virginia has not recognized the public trust doctrine beyond its conventional application.

West Virginia acknowledges a limited public trust concept as it applies to navigable waters, but the trust theory has advanced very little since it was first recognized in 1883 by the court in *Ravenswood v. Flemings.* This early case involved a dispute between a riparian owner and the town of Ravenswood over the construction of a wharf and landing on the Ohio River. The defendant, claiming a right through riparian ownership, began construction of a wharf and landing on his property without prior consent of the Ravenswood town council. The town asserted that it held the right to control construction within the high-water marks based on a legislative delegation of the state's trustee powers over navigable waters. The court took judicial notice of the fact that the Ohio River was a navigable river within the common law definition as it had been adapted to this country's conditions. Consequently, the court held that riparian owners of land on the Ohio River had no title as against the state beyond the ordinary high-water mark since title to the bed, the shores and the banks was in the state for the use of the public. Such areas were deemed to be held in trust for the public to preserve free navigation. The legislature consequently could confer on municipal corporations the exclusive right to build wharves within their corporate limits, and the municipal corporation could limit the rights of riparian owners to do so.

The only other significant discussion of the public trust concept is in *Campbell Brown & Co. v. Elkins* where, once again, the rights of a riparian owner were balanced against the rights of the state or its agencies as trustees of the navigable waters. The plaintiff, Campbell Brown & Co., was a licensee of the Public Land Corporation which had been authorized by the state to lease certain mineral rights to private individuals. The plaintiff sought an injunction to enjoin the Guyan River Company from removing minerals from the bed of the Guyandotte River. The plaintiff purported to retain the exclusive right to the minerals by virtue of a lease from the Public Land Corporation. The Guyan River Com-

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22 W. Va. 52 (1883).

Id. at 69.

141 W. Va. 801, 93 S.E.2d 248 (1956).
pany maintained that it had received these rights through a series of private conveyances originating in the 1870's. In support of its position, the Guyan River Company alleged that Guyandotte River was not a navigable stream, so that the state would have had no title in the river bed to convey through the Public Land Corporation. In the alternative, the defendant contended that even if the Guyandotte River were held to be navigable, the state only reserved in such waters an easement in the public which it held in trust for purposes of navigation, and that the underlying minerals would not be included in the public trust. The court found that the Guyandotte River was in fact a navigable stream and that title to the river as well as title to the minerals was vested in the state in trust for all people. In addition, the court determined that since the Public Land Corporation was vested with the title to all public lands in West Virginia, including the minerals under such lands, it had a duty to ensure that the public lands would be used so as to best inure to the interest of the people of the state. The lease by the Public Land Corporation to Campbell Brown & Company was found to be in the best interests of the state and therefore clearly within the authority of the Public Land Corporation.

While the courts do not enunciate the public trust doctrine in either of these cases, they do seem to accept the concept that certain lands are to be held in trust by the state for all the people. Acceptance of this basic premise imposes certain trust obligations and duties upon the trustee regarding the use and disposition of trust properties. Expansion of the public trust doctrine into the field of environmental law thus far has not occurred in West Virginia.

Whether the West Virginia courts would be receptive to a revival and expansion of the trust concept is unclear. The cases which have been before the court are illustrative of the public trust theory's narrowest application; however, courts in other jurisdictions have been persuaded to adapt the most basic and narrow trust principles to a broader class of environmental concerns. Therefore, attorneys in West Virginia should be aware that this often vague concept, which deems the state to be trustee of certain natural resources, exists as an alternative legal theory for environ-

49 141 W. Va. at 836, 93 S.E.2d at 266. For further discussion of the public trust in West Virginia waters, see Note, The Public Status of West Virginia Streams, 80 W. Va. L. Rev. 356 (1978).
51 141 W. Va. at 821, 93 S.E.2d at 259.
mental protection. Through imaginative legal action the public trust theory can be revived and expanded to meet the current environmental concerns of West Virginia residents. The following discussion will illustrate those areas in which the existing common law theories and statutory provisions are not sufficient to protect the public interest in areas of environmental concern and to demonstrate how the concepts of the public trust doctrine can be used as a means of providing access to the courts in otherwise restricted areas.

The public’s desire to preserve and protect certain property interests has been manifested historically by the common law theories of nuisance, trespass, strict liability, dedication, prior public use, prior appropriation and riparian rights. These theories were used to ensure that a property owner’s interests would not be subjected to unreasonable interference. More recently the inverse condemnation theory, land use planning, and state and local zoning laws have been utilized to accomplish these same goals. While these theories continue to serve the public interest in some respects, they are by their nature somewhat limited. Most of these approaches require the ownership of real property as a prerequisite to their application. The common law theories leave little room for the inclusion of the public’s right to clean air, pure water or the preservation of historic, scenic or aesthetic values as protected interests or environmental rights.

The common law theory which has been most frequently applied in environmental litigation is the nuisance theory. Although it has been used successfully in air and water pollution cases, the theory has inherent limitations which restrict its application in the broader scope of environmental concerns. The inherent limitations of the nuisance theory arise from the historic distinctions made between a public nuisance and a private nuisance. The significance of the distinction appears most clearly in problems of standing, where generally a private individual lacks standing to maintain a private action to abate a public nuisance, unless he can allege special injury. A further limitation of the nuisance theory

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See generally W. RODGERS, ENVIRONMENTAL LAW (1977); for a collection of decisions see 61 Am. Jur. 2d, Pollution Control § 145 (1972).


W. PROSSER, THE LAW OF TORTS § 88, at 586 (4th ed. 1971); RESTATEMENT
is the requirement that a nuisance cannot be established until there has occurred an unreasonable invasion of the plaintiff's interest which causes substantial harm. This theory does little to further the public interest in preventing environmental degradation if the remedies must be sought ex post facto.

In response to the increasing public demand for environmental quality, Congress has enacted numerous laws in the past decade to protect the environment and to preserve the country's natural resources. Representative of recent legislation is the National Environmental Policy Act of 1969, which has been heralded as the "Sherman Act of environmental law." The Act placed environmental questions within federal court jurisdiction for the first time by requiring the courts to oversee agency actions which might result in adverse environmental effects. While NEPA has significantly surpassed the expectations of its creators, it remains a limited tool for the environmental advocate since, by its terms, it is restricted to federal actions which significantly affect the quality of the human environment. Generally, NEPA would have little or no relevance to the actions of state or local governments and private individuals.

The environmental protection acts which presently exist in West Virginia are specific to the particular resource and contain definitional limitations which restrict broad application. In addition the agencies which are created by these statutes are governed by the West Virginia Administrative Procedure Act. The Act places limitations on the persons who may make appeals and appears to restrict the participation of citizens in agency decision-making processes.

The public trust doctrine can be used to effectively avoid most of the limitations which are imposed on the environmental advo-

(Second) of Torts § 821 C, Comment b (Tent. Draft No. 17, 1971).


58 E.g., The Water Pollution Control Act, W. VA. CODE § 20-5A-1 to -3a, -5 to -8, -10, -12, -13, -15 to -17, -19 (Cum. Supp. 1978) (the term "pollutant" is closely defined and is limited to industrial waste, sewage or other wastes defined by § 20-5A-2(x)); The Air Pollution Control Act, W. VA. CODE § 16-20-1 to -13 (1972 Replacement Vol.).

59 W. VA. CODE § 29A-1-1 to -7-4 (1976 Replacement Vol.).
cate proceeding under specific statutes or common law theories. Professor Sax established three criteria which must be met by the doctrine to ensure its utility as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management. The public trust doctrine must embody the concept of a legal right in the general public; it must be enforceable against the government; and it must be capable of interpretation consistent with current environmental concerns for environmental quality.62

A legal right in the general public is established through the broad standing provisions found in most interpretations of the public trust doctrine. Standing to sue requires in part that the plaintiff be seeking to protect a right which is granted to him by law which is sufficient to allow for a binding and final determination of the case.63 Where the plaintiff is seeking to enforce the general public's right to a clean environment the requirement of standing may not be met. The public trust doctrine will usually provide for expanded concepts of standing either by statute or through a constitutional provision which gives all citizens an enforceable right. The three states which have explicitly recognized the public trust doctrine by statute have broadly granted standing to "any person, partnership, corporation, association, organization or other legal entity."64 Two of these states further expand the standing provisions to include "[t]he attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof."65

In McCloud v. City of Lansing, the plaintiff brought a class action under Michigan's Environmental Protection Act challenging the construction of a utility line through a public park. In determining that the plaintiff had standing to sue the trial judge said:

The plaintiff, Mr. McCloud, put it well with reference to the public trust and the public domain and the public interest—an

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63 For an excellent discussion of the problems with standing to sue in environmental litigation see McCarthy, Recent Legal Developments in Environmental Defense, 19 Buffalo L. Rev. 195, 196-99 (1970).
interest which is there to be protected, an interest which Mr.
McCloud possesses . . . and an interest which our children born
and yet to be born possess, in maintaining that public domain.66

The Pennsylvania constitutional amendment,67 which incorp-
orates environmental protection through the public trust concept
as a fundamental right, has been interpreted as giving standing to
plaintiffs without special interests as beneficiaries of the state’s
fiduciary duty to conserve and maintain the resources of the
trust.68 The Illinois constitutional provision states that “[e]ach
person has a right to a healthful environment. Each person may
enforce this right against any party, governmental or private,
through appropriate legal proceedings subject to reasonable limi-
tation as the General Assembly may provide by law.”69 The public
trust doctrine recognizes the justiciability of current environmen-
tal issues in actions brought by citizens, and no requirement of
land ownership is invoked. While many common law doctrines are
limited to that class of citizens who own resources which are af-
fected by the environmental incursion, the trust protection applies
to any person with a beneficial interest in the trust property which
may be subjected to substantial or detrimental interference.70

The public trust theory envisions a right in the public which
is generally enforceable against the government in its role as the
trustee of the protected resources. Who shall be deemed the trustee
of a particular resource is typically provided for by the statute
which establishes the doctrine as a rule of law. The general rules
of trust law which are invoked by the doctrine provide that the
trustee owes to the beneficiaries the duty of loyalty in their fidu-
ciary relationship. As such, it is the trustee’s duty to use skill and
care to preserve the trust property against loss, dissipation, or
diminution.71 Unlike other common law theories, which may re-

Environmental Citizen Suits: Three Years’ Experience Under the Michigan Envi-
ronmental Protection Act, 4 Ecology Law Q. 1, 36 (1974)).
67 PA. CONST. art. 1, § 27.
86 (1973).
69 ILL. CONST. art. XI, § 2.
70 A Florida court, however, has refused to allow a private citizen to maintain
an action apparently brought under the public trust doctrine without the allegation
of special damages in addition to those inflicted on the public at large. Bertram v.
quire an actual showing of harm before a remedy may be sought, the trust doctrine can be invoked to prevent the destruction of trust property in advance of the occurrence of any destruction.

The most significant impact of the public trust doctrine is apparent in the standards which are created for the review of governmental or private action which affects the trust resource. The duties imposed on the trustee or the agency charged with the trust responsibility have typically been developed through the judiciary, although some states delineate specific duties by statute. In addition to the general duties of the trustee, the courts have interpreted the trustee’s duties to include holding hearings to determine whether a particular disposition of the trust properties is proper;72 setting forth findings of fact;73 and exploring available alternatives before the proposed action may be commenced.74

The public trust doctrine has also been interpreted as establishing a standard by which the actions of agencies charged with the conservation of trust properties may be reviewed.75 A primary element of this standard of review is a system of balancing the competing interests. In Payne v. Kessab the Pennsylvania Supreme Court announced that the balancing of environmental and social concerns must be realistic and not merely legalistic, but also expedient and reflective of “the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historical resources.”76 Bucks County Board of Com- misioner v. Commonwealth, Public Utility Commission77 was decided on the basis of balancing the environmental concerns against the need for increased energy resources. The plaintiffs had argued that a proposed electrical generating plant would adversely affect their environmental rights under the Pennsylvania Constitution. The court determined that given the increased public need for electrical energy, as well as the appropriateness of the proposed

75 Professor Sax’s thesis is that the public trust doctrine can prevent the problem of “low visibility” policy decisions where commercial or highly organized private interest groups often infringe directly on public uses. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 496-502 (1970).
facility's location, the Public Utility Commission's grant of a certificate of public convenience did not violate the rights of the beneficiaries under the public trust doctrine.78

The balancing test was applied by the Wisconsin court in *State v. Public Service Commission*79 at an early date in modern public trust litigation. The state alleged that a statute which authorized the city of Madison to fill and dredge a portion of Lake Wingra was in violation of the trust in which the state held the lake bed since it would destroy the public's rights of freedom of navigation. The statute's purpose was to provide a park and recreational area for use by the general public. The court concluded that this new use of the lake, to the extent authorized by statute, would not violate the trust.80 The court’s determination was based, in part, on a balancing of the conflicting interests affected by the present and proposed use. It was noted that “the disappointment of those members of the public who may desire to boat, fish or swim in the area to be filled is negligible when compared with the greater convenience to be afforded those members of the public who use the park.”81 The court further elaborated on the issue of changes in use of trust lands by requiring that “the degree of impairment must be weighed against the other public interests to be served and unless the impairment so viewed is substantial, the impairment is not a violation of the trust.”82 This case has been subsequently cited with approval as establishing an effective and realistic standard by which administrative action may be guided.83

The Pennsylvania courts have several times addressed the question of the applicable standard of review for agency decisions under the public trust doctrine. The most recent decision on this question confirms as the applicable standard the requirements set

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78 Id. at 497, 313 A.2d at 190. These Pennsylvania decisions employ a balancing test which appears to be heavily weighted in favor of the environmental values which are enumerated in the constitution of the state. For this reason the public trust balancing test may be more advantageous to environmental litigants than the balancing process involved in the nuisance analysis which often favors economic and industrial development. See, e.g., Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).
79 275 Wis. 112, 81 N.W.2d 71 (1957).
80 Id. at 117, 81 N.W.2d at 73.
81 Id. at 118, 81 N.W.2d at 73-74.
82 Id. at 118, 81 N.W.2d at 74.
forth in *Payne v. Kessab* in 1973. Under these judicial guidelines the court is required to analyze agency decisions or actions through the following series of questions:

1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?

2) Does the record demonstrate a reasonable effort to reduce environmental incursion to a minimum?

3) Does the environmental harm which will result from the challenged decision or action clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?²⁴

Other jurisdictions which recognize the public trust doctrine have judicially or statutorily adopted similar standards of review. The typical standards resemble the obligations imposed on federal agencies by the National Environmental Policy Act.²⁵ The public trust standards of review do not include many of the procedural aspects found under NEPA, but most of the substantive requirements under NEPA are also required by public trust standards of review.

It is not uncommon that the West Virginia citizen is denied access to the courts as a consequence of the deficiencies in present environmental protection laws and common law theories. A recent incident in Fayette County is illustrative of the difficulties which West Virginia citizens may encounter with an unconventional pollution problem.²⁶ In September of 1978 a Fayette County landowner noticed spotted red water seeping into her mobile home. In November the ground erupted near the driveway of the home spewing out great quantities of polluted water. This polluted water was gushing out of a mine which had been abandoned five years earlier by the New River Mining Company. It has been estimated that the water will take from six to nine months to completely drain out of the abandoned mine. Meanwhile, Laurel Creek, a popular trout stream, is being ruined by the reddish-orange water which is flowing into it. The deputy director of the West Virginia Department of Natural Resources predicted that the sediment from the abandoned mine would coat the bottom of the stream and

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²⁵ Id. at 29-30, 312 A.2d at 94.
eventually kill all aquatic life. For quite some time it appeared that the liability of the New River Mining Company for this ongoing pollution of Laurel Creek was limited by law. Current state and federal environmental protection laws offered no remedy. The Department of Natural Resources' original assessment that there was no adequate remedy at law appeared to be correct until quite recently when the state Attorney General's office obtained a temporary injunction based on the common law theory of public nuisance. The eventual effectiveness of this approach has not yet been determined.

Of the legal concepts currently available, the public trust doctrine would seem to be the most propitious. Under a simple trust theory the plaintiffs would allege that the New River Mining Company was causing substantial impairment of their beneficial interest in Laurel Creek. The state according to its fiduciary duties would then have the obligation to bring suit against the mining company for its unreasonable interference or impairment of the trust property. Theoretically, if the state refused to initiate this action, the beneficiaries, through mandamus, could compel such action.

The recent decision of the West Virginia Supreme Court of Appeals in McGrady v. Callaghan, further demonstrates the deficiencies in West Virginia's present environmental protection policies. McGrady, a landowner in Raleigh County, initiated a proceeding in mandamus to compel the Department of Natural Resources to revoke a surface mining permit which it had issued to the L. & F. Mining Company. The petitioners had objected to the issuance of the surface mining permit in the first instance on the grounds that such activity would cause "possible damage due to blasting and possible damage to wells and wildlife." The objection also included allegations that the mining activity, if permitted, would cause damage to aesthetic values and would cause pollution. The Department of Natural Resources received and acknowledged these objections but nevertheless issued a surface mining permit to the L. & F. Mining Company without a hearing on the merits. The petitioners alleged that they were constitutionally entitled to a hearing prior to the issuance of this permit since they were being deprived of a property interest. The court declined to afford such relief on the basis that the permittee would not be

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244 S.E.2d 793 (W.Va. 1978).

Id. at 794.
given any right to take or directly affect any property of the petitioners. While recognizing that the petitioners' property might be indirectly affected by the mining operation, the court reiterated that the petitioners were not in the position to allege that their property was being taken without due process of law. In addition, the court held that a writ of mandamus would not issue because the petitioners were afforded an adequate remedy through administrative procedures but did not avail themselves of this relief.  

If the petitioners had brought their action under the public trust doctrine they conceivably would have been provided some measure of relief. The petitioners' property interest, under the public trust doctrine, would have been much greater, perhaps sufficient to have motivated the court to find that they were entitled to a hearing before the permit was issued. Even if the courts could still refuse to recognize a property interest of sufficient importance to allow a hearing, the public trust doctrine would require that the agency make its decision with the beneficiaries' interests in mind. The agency would be required to balance the conflicting interests in reaching its decision on the issuance of the permit. Following the precedent of states which have recognized the public trust doctrine in environmental law, the agency could require that the permittee make all reasonable efforts to avoid substantial interference with the public's rights to the environmental and scenic qualities in the affected area. As the dissent in McGrady noted, the administrative remedy which the majority determined was available to the petitioners is not really adequate. The permittee, after the issuance of the permit, is free to begin all mining operations even though an appeal of the agency decision is pending. It is quite possible that the surface mining would be completed and the environmental damage would be incurred before the administrative appeal procedure was completed. The public trust doctrine, on the other hand, would provide for an immediate challenge in the pre-issuance stages.

The environmental advocate in search of an appropriate legal theory to protect his client's environmental rights cannot ignore

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80 Id. at 797.
81 But see, Superior Public Rights, Inc. v. State Dept. of Natural Resources, 80 Mich. App. 72, 263 N.W.2d 290 (1977). The Michigan court recognized that although the citizens' "property rights in public trust lands may be superior to their rights in public property in general, due process is not an appropriate vehicle to use for the protection of those rights." Id. at 295.
82 Id. at 799.
the potential of the public trust doctrine. In jurisdictions which have statutorily recognized the public trust theory, the attorney's task is much easier. In West Virginia attorneys have the burden of persuading the courts that the public trust doctrine can be utilized outside the scope of the conventional application.

The elevation of the public trust doctrine to constitutional status is a viable alternative to judicial recognition of the doctrine through the development of the common law. In the post-World War II movement to revise and update state constitutions, the protection of the environment provided an important impetus. Illustrative of the public concern for a constitutionally protected environment is a plea made to the Montana legislature in 1972:

It has become imperative that we face the reality of air and water pollution and combat it with positive, preventative law. Obviously the more rational approach is to exercise some foresight; to adopt a positive, preventative policy whereby we ensure that the air, water, and public lands are initially used in the public interest. Such an approach will not only protect our resources and welfare but will also eliminate the expense of punishing the offenders and repairing the damage.\(^\text{93}\)

An amendment to the Montana constitution was proposed based on the assumption that modern reality demands that:

(1) We abandon any hope that individual man on his own initiative will recognize the folly of polluting the environment and reform his way accordingly; (2) We recognize the inadequacy of administrative agencies whose power is too discretionary and susceptible to being influenced by the very people who are supposedly being controlled; and (3) We recognize that "remedial" and "punitive" measures alone are entirely inadequate to deal with the pollution problem.\(^\text{94}\)

Frye, an authority on constitutional revisions, has noted that of all the proposed amendments to state constitutions between 1966 and 1972 those concerning the state function of environmental protection and conservation constituted a higher percentage of proposed amendments than any other subject surveyed.\(^\text{95}\) Given the nature of constitutions, the inclusion of environmental protection bestows upon it the stature of a fundamental right, to be

\(^{93}\) Note, "Public Trust" as a Constitutional Provision in Montana, 33 Mont. L. Rev. 175, 175 (1972).
\(^{94}\) Id. at 175.
accorded the same respect as all other fundamental rights.\textsuperscript{96} It is significant that in a time when most state constitutions are being streamlined to reflect only the most basic rights, a new right is being added.\textsuperscript{97}

A majority of the states now have constitutional provisions which deal with the preservation and protection of the environment and its natural resources.\textsuperscript{98} Most states which have constitutionalized environmental protection have done so through general statements of public policy.\textsuperscript{99} Several states have adopted environmental amendments which either expressly or through subsequent interpretation give the public trust doctrine a constitutional basis.\textsuperscript{100} Prior to the amendments the public trust doctrine had been incorporated as part of the common law. The resulting elevation of the public trust doctrine to a constitutional right serves to reinforce the validity of the doctrine, making it less subject to legislative limitations or to the restrictions of the doctrine of stare decisis.\textsuperscript{101} Depending on the language of the specific constitutional provision, the public trust doctrine can be either clearly defined or broadly stated and awaiting interpretation; the trust can be either self-executing or dependent on the legislature for enabling legislation; the trust may either give standing to any citizen or it may give standing only to the state.\textsuperscript{102}

The West Virginia Constitution does not contain any provisions to ensure as a fundamental right the preservation of the environment either generally or through the public trust doctrine. No such proposals have ever been before the electorate. All of the contiguous states except Kentucky have some constitutional or statutory protection for the environment.\textsuperscript{103} The citizens of West Virginia must demand more protection for their state's natural resources and environment. Neither federal law nor state law


\textsuperscript{97} Frye, supra note 95.

\textsuperscript{98} For a collection of states which have enacted environmental protection provisions see generally Frye, supra note 95.

\textsuperscript{99} Frye, supra note 95, at 5033.

\textsuperscript{100} ILL. CONST. art. 11, § 1; MICH. CONST. art. 4, § 52; MONT. CONST. art. 9, § 1; PA. CONST. art. 1, § 27; VA. CONST. art 11, § 1.


\textsuperscript{102} See text accompanying notes 63-66, supra.

provides an adequate remedy in many instances. If the state is to be certain of preserving the environment for its citizens, action must be taken in the form of an environmental amendment to the constitution. The twenty-nine states which currently have a constitutionally protected environment can provide the model for a West Virginia provision.

The following proposed constitutional amendment would give the citizens of West Virginia a basic right to the protection of their environment through the public trust doctrine:

All persons, now and of future generations, have the fundamental right to a healthful environment which includes, but is not limited to, clean water, clean air, and the preservation of the land and its natural resources. The State as trustee shall preserve the environment for the beneficial use and enjoyment of its citizens in a way such that its citizens' fundamental rights are not unreasonably impaired. Any citizen may enforce this right on behalf of the State or against the State for the breach of this trust.

The proposed amendment would give the public trust doctrine a broad constitutional basis in West Virginia, ensuring its continued effectiveness. The amendment is designed to give all citizens an equitable interest in the environment and to eliminate the problems of standing that have hampered citizen suits in the past. Access to the courts would be assured by granting individuals the right to proceed against the state whenever it has failed in its fiduciary duty. A standard of judicial review is created by the amendment; this standard would require that any proposed use of the land be weighed against the beneficial use of the land by the general public. In general, the proposed amendment would not create new rights; it would only serve to ensure that such rights as have existed will be more freely exercised.

Threats to the environment are not imagined; in West Virginia, perhaps, they are even more real since the citizens at large lack an effective means of countering these threats. In 1968, Representative Robert Ottinger, who joined a group in proposing an environmental amendment to the United States Constitution, perceived the threat aptly, stating, "[a]s recently as five years ago [an environmental amendment] might have seemed extreme. Today, however, the threats to our environment and to our survival are as real as were the dangers to free speech and free assembly to
The public trust doctrine was conceived to protect those interests which the citizens in common deem to be of particular importance. In a time where the natural resources and the environmental quality of West Virginia are being threatened because of ineffective judicial and legislative remedies, the public interest requires that the state of West Virginia be impressed with a trust obligation to protect the environment.

Joan E. Van Tol

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