THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW

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p. 39, n.1: Add at the end of the note.

Updating the Frank article with some post-2012 developments is Michael C. Blumm & Zachery A. Schwartz, The Public Trust Doctrine Fifty Years After Sax and Some Thoughts on its Future, 44 Pub. Land & Res. L. Rev. 1, 26-48 ((2021). An early, overlooked critical review of the Sax’s book was A. Dan Tarlock, Defending the Environment: A Strategy for Citizen Action, by Joseph L. Sax (Book Review), 47 Ind. L. Rev. 406, 409 (1972) (noting, inter alia, that one effect of Sax’s vision of the public trust was to shift the burden of proof to the proponents of development rather than the objectors); see also Gerald Torres, Joe Sax and the Public Trust, 45 Envtl. L. 379, 386-91 (2015) (emphasizing Sax’s contributions to the understanding of the social function of property and to increasing the democratic legitimacy of the non-judicial branches of government); Holly Doremus. In Honor of Joe Sax: A Grateful Appreciation, 39 Vt. L. Rev. 399 (2015) (collecting numerous tributes to Sax’s scholarship, both before and after his death in 2014, and emphasizing his roles as an architect of early environmental law, his guidance as a teacher and mentor, and his enduring contributions to the takings puzzle).

p. 78, n. 8: Add a new paragraph to the note.

In Lakefront: Public Trust and Private Rights in Chicago (Cornell U. Press, 2021), Joseph Kearney and Thomas Merrill examine the Illinois Central RR case in the context of the public preservation of the Lake Michigan shoreline in Chicago. They find that the public trust doctrine played little role between the 1892 decision and the publication of Professor Sax’s pioneering article in 1970, asserting that the public dedication doctrine was of greater significance. They observe that the railroad was allowed to maintain ownership of all land it filled and document the extensive public and private filling that took place along the shoreline before the last half-century. They complain that the public trust doctrine casts a shadow of uncertainty concerning future shoreline developments, overlooking the fact many property law concepts, such as nuisance and riparian rights, have similar uncertainties. Unlike decisions of a number of recent courts, the authors do not recognize the doctrine as imposing sovereign limitations on trustees, as they assume that the public trust doctrine, at least in Illinois, is subject to override by the state legislature. That certainly is not true in states like Pennsylvania, Arizona, and Nevada.

pp. 98: Add a new note 1a.

On July 21, 2021, the Pennsylvania Supreme Court reaffirmed its 2017 PEDF decision and extended it to rental payments and other revenue streams received from oil and gas leasing on state lands. Pennsylvania Environmental Defense Foundation v. Commonwealth, 2021 WL 3073335 (Pa. 2021). Although the Supreme Court employed essentially the same analysis as it did in the earlier case, its analysis of the cross-generational aspect of the Environmental Rights Amendment (ERA) is particularly striking. This analysis grows out of the fact that the ERA expressly requires
the Commonwealth to “conserve and maintain” public natural resources for the benefit of present and future generations.

The Supreme Court reversed a 2019 Commonwealth Court decision holding that the state could spend one third of the rental payments and other nonroyalty shale gas income for purposes other than conserving and maintaining public natural resources—that is, it could spend this money any way it saw fit. *PEDF v. Commonwealth*, 214 A.3d 748 (Pa. Commw. 2019). As a practical matter, under this decision, that money would be spent for the present generation of beneficiaries. The court used a 1947 trust statute to arrive at this conclusion, reasoning that the ERA is like other trusts, which allow one third of the income from the trust to be distributed to life beneficiaries while the rest of the income remains in the trust corpus, to be distributed later to remaindermen. The Supreme Court decided that the text of the Environmental Rights Amendment does not allow the diversion of the public trust money in this way; it contains no express language allowing this result. The Supreme Court also held that the “cross generational” nature of the beneficiaries of the trust, both present and future generations—forbade the expenditure of trust money for the present generation only. “Far from setting up any kind of conflict between these beneficiaries regarding profiting from trust assets, the express inclusion of generations yet to come in ‘all of the people’ establishes that current and future Pennsylvanians stand on equal footing and have identical interests in the environmental values broadly protected by the ERA.” *PEDF v. Commonwealth*, 2021 WL 3073335, * 16. “The language unmistakably conveys to the Commonwealth that when it acts as a trustee it must consider an incredibly long timeline and cannot prioritize the needs of the living over those yet to be born.” *Id.* * 17.


pp. 98: Add a new note 1b.

From September 2016 through September 2020, Pennsylvania’s Commonwealth Court issued 13 opinions that produced a holding on the ERA. These holdings involve a wide range of issues, and illustrate the many ways that the ERA is being invoked. John C. Dernbach, *Thinking Anew About the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions*, 30 WIDENER COMMONWEALTH L. REV. 147 (2021). These cases are a fraction of the recent cases in which a plaintiff or petitioner has alleged a violation of the ERA.

p. 98: Add a new note 1c.


p. 138: Add a new note 3a.
A Great Lakes controversy of considerable import concerns Enbridge Line 5 pipeline that conveys petroleum from western to eastern Canada, traversing the Straits of Mackinac (which divide the upper and lower peninsulas of Michigan and Lake Michigan from Lake Huron). The pipeline’s easement dates to 1953. The Michigan governor wants the pipeline removed, since a recent study showed that a spill under the straits could jeopardize over 700 miles of shorelands. In 2019, the state filed suit to compel the decommissioning of the segment of Line 5 that runs under the straits, claiming that the pipeline is a public nuisance and violates the Michigan Environmental Protection Act since it may become a source of pollution. It is unclear if Line 5 could operate without the straits segment. The company sought to remove the case from state to federal court, but the state filed another suit in 2020 on public trust and easement violation grounds, seeking revocation of the pipeline’s easement. Meanwhile, Canada submitted an amicus brief supporting Enbridge and asserting treaty rights against pipeline shutdowns between the two countries. These issues were unresolved as of this writing, but the state’s use of the public trust doctrine affirmatively bears watching. See Robert Tuttle, *Michigan eyes Enbridge profits as Line 5 clash intensifies*, Bloomberg News (May 11, 2021), https://www.bnnbloomberg.ca/michigan-eyes-enbridge-profits-as-line-5-clash-intensifies-1.1602164.

**p. 168, n. 5:** Add 77 in place of the blank in the last sentence and strike “forthcoming,” and add the following at the end of the note:


**p. 215:** Add at the end of the note on the Nevada public trust doctrine.

For a brief comment on the Mineral County case, see Daniel Rothberg, *Nevada Supreme Court Says State Cannot Change Water Rights for “Public Trust,” A loss for Environmentalists, County Seeking to Bring More Water to Walker Lake*, The Nevada Independent (Sept. 18, 2020), https://thenevadaindependent.com/article/nevada-supreme-court-says-state-cannot-change-water-rights-for-public-trust-a-loss-for-environmentalists-county-seeking-to-bring-more-water-to-walker-lake. The case is back in the federal Decree Court, where the county is alleging that there are a variety of measures that the court can order short of reallocating vested rights to restore the trust resource of Walker Lake.

**p. 221, n. 5:** Add to the end of the note.


**p. 275, n. 5:** Add 77 in place of the blank in the last sentence and strike “forthcoming.”

**p. 293:** Add a new note 3.
Professor Karen Bradshaw proposes that the law should allow animals to own land, just as humans do. Under her proposal, animal ownership of land would be in trust, and managed by a human trustee for their benefit at an ecosystem level. Judges would help oversee the system, just as they do for other trusts, deciding whether the trustee is acting in the best interest of the animal beneficiaries. WILDLIFE AS PROPERTY OWNERS: A NEW CONCEPTION OF ANIMAL RIGHTS 3 (2020).


An empirical study of the application of the public trust doctrine by state fish and wildlife agencies in 13 states over two decades shows significant gaps between the legal statements these agencies make about the public trust doctrine and their actual practice. Martin Nie, Nyssa Landres, & Michelle Bryan, The Public Trust in Wildlife: Closing the Implementation Gap in 13 Western States, 50 ENVTL. L. REP. 10909 (2020). The authors also make recommendations for improving implementation of the public trust.

p. 378: Add at the end of the first paragraph.

New evidence showed that in 2020, the global average temperature was 1.2 C above the pre-industrial baseline, and there was a 40% chance of exceeding the 1.5 C goal of lower target of the Paris Agreement on Climate Change in at least one of the next five years. World Meteorological Organization, New climate prediction increase likelihood of temporarily reach 1.5 C in next 5 years (May 27, 2021), https://public.wmo.int/en/media/press-release/new-climate-predictions-increase-likelihood-of-temporarily-reaching-15-c-next-5 (annual update by the WMO).

p. 407, n. 3: Add to the end of the note.


p. 408, n. 6. Add to the end of the footnote:

For a spirited defense of the constitutionality of the public trust claim in Juliana, see James R. May & Erin Daly, Can the U.S. Constitution Accommodate a Right to a Stable Climate? (Yes,
maintaining that constitutional protections are not abrogated simply because threats to life and liberty are from decades of governmental actions and inactions contributing to climate change).

p. 492, n. 5. Add to end of note.

In Ecuador, the first nation to expressly recognize rights of nature in its 2008 constitution, a proposed gold mining operation by a Canadian company in the Los Cedros Reserve is under challenge in the Constitutional Court. The affected area is one of the most biologically diverse habitats in the world, with nearly 12,000 acres of primary cloud forest safeguarding the headwaters of four important watersheds. Some observers believe that the court’s decision will determine the future enforcement of the country’s rights of nature. See Rebekah Hayden, Rights of Nature in Ecuador, Ecologist (Nov. 6, 2020), https://theecologist.org/2020/nov/06/rights-nature-ecuador.

In Australia, a federal court ruled that the environment minister has a legal duty to not cause harm to the young people of the country by exacerbating climate change by approving mining projects, although the court dismissed a requested injunction of an expansion of a New South Wales coal mining operation on technical grounds. See Australian teenagers’ climate change class action opens “a big crack in the wall,” expert says, ABC News (May 26, 2021), https://www.abc.net.au/news/2021-05-27/climate-class-action-teenagers-vickery-coal-mine-legal-precedent/100169398.

In Brazil, a class action filed in October 2020 by the Institute of Amazonian Studies against the federal government of Brazil seeks recognition of a fundamental right to a stable climate for present and future generations under the Brazilian Constitution. The Institute has asked for an order requiring the government—which has failed to prevent deforestation, as required by its own plans, and failed to adapt to climate by missing emissions targets established by federal statutes—to comply with national climate law. The case asks the court for an order requiring the federal government to comply with existing policies, reforest an area equivalent to what was deforested beyond the statutory limit, and allocate sufficient budgetary resources for this purpose. See http://climatecasechart.com/climate-change-litigation/non-us-case/institute-of-amazonian-studies-v-brazil/.

In Chile, whose voters opted for the drafting of a new constitutional in late 2020 by an overwhelming 78%, the constitutional convention that will draft the new constitution has been urged to adopt a public trust doctrine provision by an interdisciplinary group of scholars from both Chile and the U.S. See Carl Bauer, et al., The Protection of Nature and a New Constitution for Chile: Lessons from the Public Trust Doctrine (May 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3847110.

In Portugal, six youth plaintiffs sued 33 European Union member countries in the European Court of Human Rights in September 2020, alleging that the governments have violated their human rights by permitting activities that release greenhouse gases into the atmosphere, and these releases have harmed their physical and mental wellbeing. The plaintiffs requested that the court issue binding orders on 33 European countries to cut greenhouse gas emissions. See Duarte
Agostinho and Others v. Portugal and 32 Other States, no. 39371/20, ECHR (2020),

The Ireland Supreme Court held that a national mitigation plan, adopted for the purpose of transitioning to a low carbon economy by the end of 2050, was neither sufficient to carry out climate goals or comprehensive enough to allow the public to evaluate these policy objectives. Although the plan was challenged as a violation of constitutional rights, the Court dismissed these claims because the plaintiff, Friends of the Irish Environment, is a corporate entity and not entitled to assert the right to life. However, the Court did not foreclose the possibility of a constitutional right to life existing in an environmental case when brought forth by a proper plaintiff. See Friends of the Irish Environment v. Ireland, [2020] IR 793 (Ir.), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200731_2017-No.-793-JR_opinion.pdf.

In Germany, plaintiffs filed a lawsuit challenging provisions of a climate protection act and the government’s failure to take adequate measure to reduce greenhouse gas emissions to limit an increase in global temperatures to well-below 2°C. The federal Constitutional Court held that the act was incompatible with the human rights enshrined in the German constitution, and these fundamental rights required the government to manage CO₂ reductions “in a forward-looking way.” The court’s reasoning discussed intergeneration justice and explained that the current generation could not consume large portions of the CO₂ budge while future generations experience the consequences of those actions. The court ordered the government to set emissions reduction goals by the end of 2022. See Neubauer, et al. v. Germany, BVerfGE, 1 BvR 2656/18, Mar. 24, 2021, http://climatecasechart.com/climate-change-litigation/non-us-case/neubauer-et-al-v-germany/.


p. 527, n. 8. Add to the end of the note.

In November 2020, voters in Orange County, Florida approved a Rights of Nature amendment titled “Right to Clean Water, Standing and Enforcement” to the Orange County Charter, which recognized the rights of rivers, streams, and wetlands within Orange County. In April 2021, a case was filed on behalf of Orange County waterways to enforce their legal rights that would be harmed by defendant Beachline South Residential, LLC proposal to fill roughly 115 acres of wetlands for a residential and commercial development. The plaintiff water bodies sought
injunctive and declaratory relief preventing the issuance of a wetland fill permit, maintaining that they have a right to exist and be protected under the law. See Complaint for Plaintiff, Wilde Cypress Branch et al. v. Beachline South Residential, LLC, Filing # 125602282 (Fla. Cir. Ct. Apr. 26, 2021), https://static1.squarespace.com/static/5e3f36df772e5208fa96513c/t/608837c15b1c8231ebf a7f28/1619539905869/Rights+of+Waterways+Legal+Complaint+April+26+2021.pdf.

In April 2021, the Supreme Court of Pakistan upheld a local zoning law that prevented the expansion of a cement plant because of the associated harmful environmental effects and the damage to groundwater supplies. In rejecting the cement company’s challenges to the zoning law, the Court discussed the local government’s obligation to take a precautionary approach, as codified in the IUCN World Declaration on the Environmental Rule of Law and “act in line with the principle of in dubio pro natura” (when in doubt, favor nature). Further, the Court highlighted the importance of the rights of nature and recognized that “the environment needs to be protected in its own right.” Finally, the Court discussed the case in the context of climate change and intergenerational justice, recognizing the courts’ role in protecting future generations from the harmful effects of climate change by upholding climate justice whenever possible. D. G. Khan Cement Company v. Government of Punjab, (2021) C.P.1290-L of 2019 (SC) at 1 (Pak.), http://climatecasechart.com/climate-change-litigation/non-us-case/d-g-khan-cement-company-v-government-of-punjab/.