THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW

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CLASS 2 READINGS

(read after notes following *Shively v. Bowlby* on page 82)

Pa. Envtl. Def. Fund v. Commonwealth

Supreme Court of Pennsylvania
640 Pa. 55 (2017)

DONOHUE, J (for a 4-2 court):

In 1971, by a margin of nearly four to one, the people of Pennsylvania ratified a proposed amendment to the Pennsylvania Constitution's Declaration of Rights, formally and forcefully recognizing their environmental rights as commensurate with their most sacred political and individual rights. Article I, Section 27 of the Pennsylvania Constitution provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. I, § 27. In this case, we examine the contours of the Environmental Rights Amendment in light of a declaratory judgment action brought by the Pennsylvania Environmental Defense Foundation ("Foundation"), an environmental advocacy entity, challenging, inter alia, the constitutionality of statutory enactments relating to funds generated from the leasing of state forest and park lands for oil and gas exploration and extraction. Because state parks and forests, including the oil and gas minerals therein, are part of the corpus of Pennsylvania's environmental public trust, we hold that the Commonwealth, as trustee, must manage them according to the plain language of Section 27, which imposes fiduciary duties consistent with Pennsylvania trust law. We further find that the constitutional language controls how the Commonwealth may dispose of any proceeds generated from the sale of its public natural resources. After review, we reverse in part, and vacate and remand in part, the Commonwealth Court's order granting summary relief to the Commonwealth and denying the Foundation's application for summary relief.

* * *

Section 27 contains an express statement of the rights of the people and the obligations of the Commonwealth with respect to the conservation and maintenance of our public natural resources. In *Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (Pa. 2013) (plurality), a plurality of this Court carefully reviewed the reasons why the Environmental Rights Amendment was necessary, the history of its enactment and ratification, and the mischief to be remedied and the object to be attained. At the outset of this opinion, we reiterate this historical background, which serves as an important reminder as we address the issues presented in the present case:

* * *

> The decision to affirm the people's environmental rights in a Declaration or Bill of Rights, alongside political rights, is relatively rare in American constitutional law. In addition to Pennsylvania, Montana and Rhode Island are the only other states of the Union to do so. *See*

> Pa. Const. art. I, § 27 (1971); Mt. Const. art. II, § 3 (1889); R.I. Const. art. I, § 17 (1970). Three other states—Hawaii, Illinois, and Massachusetts—articulate and protect their citizens' environmental rights in separate articles of their charters. *See* Hi. Const. art. XI, §§ 1, 9 (1978); Ill. Const. art. XI, §§ 1, 2 (1971-72); Ma. Const. amend. 49 (1972). Of these three states, Hawaii and Illinois, unlike Pennsylvania, expressly require further legislative action to vindicate the rights of the people. By comparison, other state charters articulate a "public policy" and attendant directions to the state legislatures to pass laws for the conservation or protection of either all or enumerated natural resources. *See, e.g.*, Ak. Const. art. VIII, §§ 1-18 (1959); Colo. Const. art. XXVII, § 1 (1993); La. Const. art. IX, § 1 (1974); N.M. Const. art. XX, § 21 (1971); N.Y. Const. art. XIV, §§ 1-5 (1941); Tx. Const. art. XVI, § 59 (1917); Va. Const. art. XI, §§ 1-4 (1971). Some charters address the people's rights to fish and hunt, often qualified by the government's right to regulate these activities for the purposes of conservation. *See, e.g.*, Ky. Const. § 255A (2012); Vt. Const. Ch. II, § 67 (1777); Wi. Const. art. I, § 26 (2003). Still other state constitutions simply authorize the expenditure of public money for the purposes of targeted conservation efforts. *See, e.g.*, Or. Const. art. XI-H, §§ 1-6 (1970); W.V. Const. art. VI, §§ 55, 56 (1996). Finally, many of the remaining states do not address natural resources in their organic charters at all. *See, e.g.*, Nv. Const. art. I, § 1 *et seq*.
>
> That Pennsylvania deliberately chose a course different from virtually all of its sister states speaks to the Commonwealth's experience of having the benefit of vast natural resources whose virtually unrestrained exploitation, while initially a boon to investors, industry, and citizens, led to destructive and lasting consequences not only for the environment but also for the citizens' quality of life. Later generations paid and continue to pay a tribute to early uncontrolled and unsustainable development financially, in health and quality of life consequences, and with the relegation to history books of valuable natural and esthetic aspects of our environmental inheritance. The drafters and the citizens of the Commonwealth who ratified the Environmental Rights Amendment, aware of this history, articulated the people's rights and the government's duties to the people in broad and flexible terms that would permit not only reactive but also anticipatory protection of the environment for the benefit of current and future generations. Moreover, public trustee duties were delegated concomitantly to all branches and levels of government in recognition that the quality of the environment is a task with both local and statewide implications, and to ensure that all government neither infringed upon the people's rights nor failed to act for the benefit of the people in this area crucial to the well-being of all Pennsylvanians.

Id. at 960-63 (footnotes and some citations omitted).

* * *

While the issues in this case arise from the recent leasing of Commonwealth forest and park lands for Marcellus Shale gas extraction, the Commonwealth has a history of leasing its land to private parties for oil and gas exploration dating back to 1947.

* * *

In 1995, the Legislature enacted the Conservation and Natural Resources Act ("CNRA"), which created the Pennsylvania Department of Conservation and Natural Resources ("DCNR") as a "cabinet-level advocate" for the State parks, forests, and other natural resources. 71 P.S. §

1340.101(b)(1). Referencing the Environmental Rights Amendment, Article I, Section 27, of the Pennsylvania Constitution, the CNRA indicates that the prior "structure of the Department of Environmental Resources impede[d] the Secretary of Environmental Resources from devoting enough time, energy and money to solving the problems facing our State parks and forests," such that the state parks and forests had "taken a back seat to other environmental issues . . . ." 71 P.S. § 1340.101(a)(7), (8).

The CNRA sets forth the DCNR's primary mission as follows:

> [T]o maintain, improve and preserve State parks, to manage State forest lands to assure their long-term health, sustainability and economic use, to provide information on Pennsylvania's ecological and geologic resources and to administer grant and technical assistance programs that will benefit rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental education programs across Pennsylvania.

71 P.S. § 1340.101(b)(1). To pursue this mission, the DCNR is "empowered to make and execute contracts or leases in the name of the Commonwealth for the mining or removal of any valuable minerals that may be found in State forests" if the DCNR determines that it "would be for the best interests of this Commonwealth." 71 P.S. § 1340.302(a)(6). Moreover, the DCNR replaced the Department of Forests and Waters as the relevant entity for purposes of the Lease Fund. 71 P.S. § 1340.304. Accordingly, the CNRA altered the Lease Fund to provide that "all moneys" paid in to the Lease Fund were "specifically appropriated to" the DCNR. 71 P.S. § 1333.

* * *

Distinguished Professor John C. Dernbach of the Widener University Law School Environmental Law and Sustainability Center recently summarized the significance of Fiscal Code amendments for purposes of the claims at bar:

> Three legislative amendments to the state fiscal code between 2008 and 2014 redirected a total of $335 million that would have been used for conservation purposes under the [Lease Fund Act] to the general fund, where it is appropriated for a variety of state government purposes. In addition, the Legislature prevented DCNR from spending any [Lease Fund Act] royalties without prior legislative authorization. Finally, the Legislature began using [Lease Fund] revenue to support the overall budget of DCNR, rather than obtaining that budget money from the general fund and using [Lease Fund] money for conservation purposes related to oil and gas extraction

John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 Envtl. L. 463, 488 (2015) (footnotes omitted)).

* * *

Appellant, the Foundation, brought a claim in the Commonwealth Court under the fiduciary provisions of the Declaratory Judgment Act against the Commonwealth of Pennsylvania and the Governor, in his official capacity (collectively, "the Commonwealth") regarding the 2009-2015 budget related decisions that resulted in the additional lease sales. The Foundation contends that these decisions violated the rights of all Commonwealth citizens conferred by the Environmental Rights Amendment, the CNRA, and the Lease Fund Act. *PEDF*, 108 A.3d at 154. * * *

The Commonwealth Court observed that the Foundation filed a brief in excess of 100 pages raising over twenty issues focused primarily on Section 27's protection of the Commonwealth's natural resources. The court found that some of the issues were inappropriate for decision under the Declaratory Judgment Act (such as issues relating to budget proposals rather than enactments) and dismissed others for failure to join the lessees of the leases, whom the court deemed indispensable parties.

The court narrowed the remaining issues before it to three questions:

> (1) Whether Sections 1602-E and 1603-E of the Fiscal Code, which respectively provide that the General Assembly shall appropriate all royalty monies [of] the Lease Fund and that, subject to availability, up to $50 million of the Lease Fund royalties shall be appropriated to [the] DCNR, violate Article I, § 27;
> (2) Whether the General Assembly's transfers/appropriations from the Lease Fund violate Article I, § 27; and
> (3) Who within the Commonwealth has the duty and thus bears the responsibility to make determinations with respect to the leasing of State lands for oil and natural gas extraction.

PEDF, 108 A.3d at 155.

The Commonwealth Court recognized that the Foundation's challenges to some extent overlapped with legislative policy decisions resulting from the need to balance the state budget. While observing that the review of legislative appropriation decisions is generally outside the authority of the courts, the court opined that the propriety of the use of special fund money, such as money from the Lease Fund, is a legal question subject to judicial review. It further concluded that "a decision to lease Commonwealth property protected by the Constitution and held in trust for the benefit of all current and future Pennsylvanians is an appropriate subject of judicial scrutiny." *Id.*

* * *

The Commonwealth Court, therefore, determined that its prior decision in *Payne v. Kassab*, 11 Pa. Commw. 14, 312 A.2d 86 (Pa. Commw. 1973) (*Payne I*), controlled the questions presented in the case at bar, even though the plurality in *Robinson Township* criticized the test announced in *Payne I* as "lack[ing] foundation" in Section 27. *PEDF*, 108 A.3d at 159 (citing *Robinson Twp.*, 83 A.3d at 966-67). The Commonwealth Court in *Payne I* set forth a three-part test to determine whether a use of Commonwealth land violated Section 27:

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

Id. at 158 (quoting *Payne I*, 312 A.2d at 94).

Notably, this Court affirmed the judgment in *Payne I* without adopting the three-part test, instead concluding that the "elaborate safeguards" of the challenged statute provided adequate protection

such that breach of the trust created by Section 27 would not occur. *Payne v. Kassab*, 468 Pa. 226, 361 A.2d 263, 273 (Pa. 1976) (*Payne II*).

* * *

The Commonwealth Court first addressed the Foundation's challenge that Sections 1602-E and 1603-E of the 2009 Fiscal Code Amendments violated Section 27.... The change, the Foundation argued, violated Section 27 because it (1) took away DCNR's ability to use the revenues to mitigate the damage from oil and gas exploration, (2) removed DCNR's ability to act as trustee because the funds were placed in the General Fund, potentially for non-conservation purposes, and (3) eliminated revenues that would otherwise have built the corpus of the Lease Fund to protect Pennsylvania's natural resources. *PEDF*, 108 A.3d at 160.

* * *

Reiterating its reluctance to "second guess" the amounts appropriated by the General Assembly to Commonwealth agencies, the Commonwealth Court applied what it viewed as this Court's requirement that a challenger demonstrate that "the amount funded is so inadequate that it impairs the proper functioning" of the DCNR. *Id.* at 166.

It concluded that the Foundation "presented no evidence that the current funding appropriated to the DCNR from all sources is inadequate — i.e., that the funding is so deficient that the DCNR cannot conserve and maintain our State natural resources." *Id.* Accordingly, the court granted the Commonwealth's motion for summary relief, concluding that the Foundation failed to demonstrate that Sections 1602-E and 1603-E violate the Constitution.

* * *

In regard to Sections 1604-E and 1605-E and the other budgetary transfers… the Foundation argued that the money generated by oil and gas exploration "must be committed to furthering the purposes, rights, and protections afforded" under Section 27, rather than being intermingled with the General Fund. *Id.* at 167. Considering the constitutional language, the Commonwealth Court held that Section 27 "does not expressly command that all revenues derived from the sale or leasing of the Commonwealth's natural resources must be funneled to those purposes and those purposes only." *Id.* at 168.

The court reiterated that the Lease Fund was merely a statutory special fund, rather than a trust fund, and opined that there was "no constitutional mandate that monies derived from the leasing of State lands for oil and natural gas development be reinvested into the conservation and maintenance of the Commonwealth's public natural resources." *Id.* at 169. Accordingly, the Commonwealth Court again held that the Foundation failed to demonstrate that the Fiscal Code Amendments, General Appropriations Act transfers, and Act 13 transfers from the Lease Fund to the General Fund violate the Environmental Rights Amendment, because funds appeared to be used for the general "benefit of all the people." *Id.* The court, therefore, denied summary relief to the Foundation, granting in substantial part the Commonwealth's cross-motion for summary relief.

* * *

The Foundation filed a direct appeal as of right from the final order of the Commonwealth Court, pursuant to 42 Pa.C.S. § 723(a), raising ten issues. We entertained oral argument to examine the following two overarching issues:

> 1. The proper standards for judicial review of government actions and legislation challenged under the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution, in light of *Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (Pa. 2013) (plurality);
> 2. Constitutionality under Article I, [Section] 27 of Section 1602-E and 1603-E of the Fiscal Code and the General Assembly's transfers/appropriations from the Lease Fund.

* * *

A. <u>Proper Standard of Judicial Review</u>

The parties, various amici, and the plurality in *Robinson Township* all reject the three-part test developed by the Commonwealth Court in *Payne I* as the appropriate standard for examining Section 27 challenges. The Commonwealth observes that the *Payne I* test has been criticized as "ill-fitted" to the language of Section 27 and as frustrating the development of a "coherent environmental rights jurisprudence." Commonwealth's Brief at 25 (citing *Robinson Township*, 83 A.3d at 964). Similarly, the Foundation urges "the issues in this case do not fit the mold of the *Payne* test crafted by the Commonwealth Court." Foundation's Reply Brief at 5 (discussing the *Robinson Township* plurality's three part criticism of the *Payne* test).

We agree. The *Payne I* test, which is unrelated to the text of Section 27 and the trust principles animating it, strips the constitutional provision of its meaning.*See Robinson Twp.*, 83 A.3d at 967; *see also* Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 Envtl. L. 463, 499 (2015). Accordingly, we reject the test developed by the Commonwealth Court as the appropriate standard for deciding Article I, Section 27 challenges.

Instead, when reviewing challenges to the constitutionality of Commonwealth actions under Section 27, the proper standard of judicial review lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment. We must therefore carefully examine the contours of the Environmental Rights Amendment to identify the rights of the people and the obligations of the Commonwealth guaranteed thereunder.

B. <u>The Contours of Section 27</u>

This is not the first time we have been called upon to address the rights and obligations set forth in the Environmental Rights Amendment. We did so in *Robinson Twp.*, and we rely here upon the statement of basic principles thoughtfully developed in that plurality opinion. To start, the General Assembly derives its power from Article III of the Pennsylvania Constitution which grants broad and flexible police powers to enact laws for the purposes of promoting public health, safety, morals, and the general welfare. *Id.* at 946. These powers, however, are expressly limited by fundamental rights reserved to the people in Article I of our Constitution. *Id.* at 946. Specifically, Section 1 affirms, among other things, that all citizens "have certain inherent and indefeasible rights." *Id.* at 948 (quoting Pa. Const. art. I, § 1). As forcefully pronounced in Section 25, the rights

contained in Article I are "excepted out of the general powers of government and shall forever remain inviolate." *Id.* (quoting Pa. Const. art. I, § 25).

Among the "inherent and indefeasible" rights in Article I of the Pennsylvania Constitution are the rights set forth in the Environmental Rights Amendment, which we quote again for ease of discussion:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. I, § 27. This constitutional provision grants two separate rights to the people of this Commonwealth. The first right is contained in the first sentence, which is a prohibitory clause declaring the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment. *Robinson Twp.*, 83 A.3d at 951. This clause places a limitation on the state's power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional. *Id.*

The second right reserved by Section 27, set forth in its second sentence, is the common ownership by the people, including future generations, of Pennsylvania's public natural resources. *Id.* at 954. The "public natural resources" referenced in this second sentence include the state forest and park lands leased for oil and gas exploration and, of particular relevance in this case, the oil and gas themselves. *Id.* at 955; *see also* Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2271-75 (1970). In a statement offered to the General Assembly in connection with the proposed Environmental Rights Amendment, Professor Robert Broughton explained that the provision was initially drafted as "Pennsylvania's natural resources, including the air, waters, fish, wildlife, and the public lands and property of the Commonwealth ...." but was revised to remove the enumerated list and thereby discourage courts from limiting the scope of natural resources covered. Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2274 (1970) (Broughton Analysis).[22]

The third clause of Section 27 establishes a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries. *Robinson Twp.*, 83 A.3d at 955-56. The terms "trust" and "trustee" carry their legal implications under Pennsylvania law at the time the amendment was adopted. *See Appeal of Ryder*, 365 Pa. 149, 74 A.2d 123, 124 (1950) (providing that "words having a precise and well-settled legal meaning must be interpreted" accordingly); *see also Robinson Twp.*, 83 A.3d at 956 (citing Pa.C.S. § 1903). Notably, Professor Broughton explained that the Commonwealth's role was plainly intended to be that of a "trustee," as opposed to "proprietor." *See* Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2269, 2273 (1970) (Broughton Analysis). As a trustee, the Commonwealth must deal "with its citizens as a fiduciary, measuring its successes by the benefits it bestows upon all its citizens in their utilization of natural resources under law." *Id.* Under

[22] The sentence was also amended to include the term "public" to indicate that it did not apply to purely private property rights. However, Representative Kury opined that the trust nevertheless applied to "resources owned by the Commonwealth and also to those resources not owned by the Commonwealth, which involve a public interest." Pa. L. Journal, 154th General Assembly, No. 118, Reg. Sess., 2271-72 (1970) (statement by Rep. Kury).

Section 27, the Commonwealth may not act as a mere proprietor, pursuant to which it "deals at arms['] length with its citizens, measuring its gains by the balance sheet profits and appreciation it realizes from its resources operations." *Id.*

The *Robinson Township* plurality aptly described the Commonwealth's duties as the trustee of the environmental trust created by the people of Pennsylvania as follows:

> As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. The explicit terms of the trust require the government to "conserve and maintain" the corpus of the trust. *See* Pa. Const. art. I, § 27. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.

Robinson Twp., 83 A.3d at 956-57.

Under Pennsylvania trust law, the duty of prudence requires a trustee to "exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." *In re Mendenhall*, 484 Pa. 77, 398 A.2d 951, 953 (Pa. 1979) (quoting Restatement (Second) of Trusts § 174).[24] The duty of loyalty imposes an obligation to manage the corpus of the trust so as to accomplish the trust's purposes for the benefit of the trust's beneficiaries. *See Metzger v. Lehigh Valley Trust & Safe Deposit Co.*, 220 Pa. 535, 69 A. 1037, 1038 (Pa. 1908); *see also In re Hartje's Estate*, 345 Pa. 570, 28 A.2d 908, 910 (Pa. 1942) (citing Restatement (Second) of Trusts § 186 for the proposition that "the trustee can properly exercise such powers and only such powers as (a) are conferred upon him in specific words by the terms of the trust, or (b) are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust"). The duty of impartiality requires the trustee to manage the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust. 20 Pa.C.S. § 7773; *Estate of Sewell*, 487 Pa. 379, 409 A.2d 401, 402 (Pa. 1979) (citing Restatement (Second) of Trusts § 183).

Pennsylvania's environmental trust thus imposes two basic duties on the Commonwealth as the trustee. First, the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties. *Robinson Twp.*, 83 A.3d at 957. Second, the Commonwealth must act affirmatively via legislative action to protect the environment. *Id.* at 958 (citing *Geer v. Connecticut*, 161 U.S. 519, 534, 16 S. Ct. 600, 40 L. Ed. 793 (1896) (trusteeship for the benefit of state's people implies legislative duty "to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state")). Although a trustee is empowered to exercise discretion with respect to the proper treatment of the corpus of the trust, that discretion is limited by the purpose of the trust and the trustee's fiduciary duties, and does not equate "to mere subjective judgment." *Id.* at 978 (citing *Struthers Coal & Coke Co. v. Union Trust Co.*, 227 Pa. 29, 75 A. 986, 988 (Pa. 1910); *In re Sparks' Estate*, 328 Pa. 384, 196 A. 48, 57 (Pa.

[24] The Uniform Trust Act confirms that the duty to administer with prudence involves "considering the purposes, provisions, distributional requirements and other circumstances of the trust and ... exercising reasonable care, skill and caution." 20 Pa.C.S. § 7774. In furtherance of this duty, the trustee "shall keep adequate records of the administration of the trust" and "shall keep trust property separate from the trustee's own property." 20 Pa.C.S. § 7780.

Super. 1938)). The trustee may use the assets of the trust "only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries."

*** * ***

… [T]he Environmental Rights Amendment mandates that the Commonwealth, as a trustee, "conserve and maintain" our public natural resources in furtherance of the people's specifically enumerated rights. Thus understood in context of the entire amendment, the phrase "for the benefit of all the people" is unambiguous and clearly indicates that assets of the trust are to be used for conservation and maintenance purposes. *See Robinson Twp.*, 83 A.3d at 957 (holding that the "explicit terms of the trust require the government to 'conserve and maintain' the corpus of the trust"). Only within those parameters, clearly set forth in the text of Section 27, does the General Assembly, or any other Commonwealth entity, have discretion to determine the public benefit to which trust proceeds — generated from the sale of trust assets — are directed.

By arguing that proceeds obtained from the sale of our natural resources are not part of the corpus of the trust, the Commonwealth improperly conceives of itself as a mere proprietor of those public natural resources, rather than as a trustee. In the Commonwealth's view, it may dispose of our public natural resources as it so chooses and for any purpose it so conceives, so long as such disposition broadly benefits the public (apparently without regard to "generations yet to come"). *See* Commonwealth's Brief at 45. As such, it urges us to substantially diminish its fiduciary obligation to prevent and remedy the degradation of our natural resources. We decline to do so.

The Foundation contends that all revenues generated by oil and gas leases remain in the corpus of the trust. We are without sufficient advocacy to rule on the correctness of this proposition. We note again that Pennsylvania trust law dictates that proceeds from the sale of trust assets are trust principal and remain part of the corpus of the trust. *McKeown's Estate*, 106 A. at 190. When a trust asset is removed from the trust, all revenue received in exchange for the trust asset is returned to the trust as part of its corpus. *See Bolton v. Stillwagon*, 410 Pa. 618, 190 A.2d 105, 109 (Pa. 1963) (explaining that when "the relation of trustee and [beneficiary] has once been established as to certain property in the hands of the trustee, no mere change of trust property from one form to another will destroy the relation"). As a result, royalties — monthly payments based on the gross production of oil and gas at each well — are unequivocally proceeds from the sale of oil and gas resources. *See* Petitioner's Brief for Summary Judgment, Pet. Ex. X. They are part of the corpus of the trust and the Commonwealth must manage them pursuant to its duties as trustee.

… [I]t is up to the Commonwealth Court, in the first instance and in strict accordance and fidelity to Pennsylvania trust principles, to determine whether these funds belong in the corpus of the Section 27 trust.

In this regard, it must be remembered that the Commonwealth, as trustee, has a constitutional obligation to negotiate and structure leases in a manner consistent with its Article 1, Section 27 duties. Oil and gas leases may not be drafted in ways that remove assets from the corpus of the trust or otherwise deprive the trust beneficiaries (the people, including future generations) of the funds necessary to conserve and maintain the public natural resources.

On remand, the parties should be given the opportunity to develop arguments concerning the proper classification, pursuant to trust law, of any payments called "rental payments" under the lease terms. To the extent such payments are consideration for the oil and gas that is extracted, they are proceeds from the sale of trust principal and remain in the corpus. These proceeds remain in the trust and must be devoted to the conservation and maintenance of our public natural resources, consistent with the plain language of Section 27.

C. Need for Implementing Legislation

The Foundation contends that Section 27 is self-executing, based in part on the plurality opinion in *Robinson Township*. Foundation's Brief at 49-50. While the Commonwealth does not take a position on this issue, the Republican Caucus, as amicus, argues that Section 27 is not self-executing. Republican Caucus' Brief at 48-60. It analyzes decisions from others states regarding their environmental rights amendments and observes that, while a few states have specific language dictating that the amendment is self-executing, no state has read the language of the amendment as self-executing when the language does not explicitly so provide. *Id.* at 56-60.

The plurality in *Robinson Township* recognized that our prior case law has not resolved the issue of whether Section 27 is self-executing or whether it requires implementing legislation to be effective, at least in regard to an attempt to enforce the people's rights against owners of private property. *Robinson Township*, 83 A.3d at 964-65; *see also* Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 Envtl. L. at 474-75.

Although refusing to speak to whether the right was self-executing for purposes of enforcement against private property, this Court in *Payne II*, nevertheless concluded that the trust provisions in the second and third sentences of Section 27 do not require legislative action in order to be enforced against the Commonwealth in regard to public property. In *Payne II*, we stated:

> There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these broad purposes and establish these relationships; the [A]mendment does so by its own *ipse dixit*.

Payne II, 361 A.2d at 272.

Former Chief Justice Castille echoed this concept in the *Robinson Township* plurality, concluding that the Commonwealth's obligations as trustee "create a right in the people to seek to enforce the obligations." *Robinson Township*, 83 A.3d at 974. Accordingly, we re-affirm our prior pronouncements that the public trust provisions of Section 27 are self-executing.

D. Foundation's Challenges

In the Commonwealth Court, the Foundation sought declarations that the Commonwealth has certain duties as constitutional trustee and that various acts or decisions by the Governor and General Assembly violated those constitutional duties. As noted, the challenged acts and decisions primarily relate to the propriety of the Commonwealth's use of revenue generated from oil and gas leases for purposes not authorized by Section 27. Also implicated is the propriety of the Commonwealth's decision-making process with respect to leasing state land. *See* Foundation's

Reply Brief at 13 (arguing that leasing and selling the state park and forest land, and the oil and gas thereon for the purpose of generating revenue for the General Fund is improper because balancing the budget "is not one of the purposes of the trust"). Having determined that proceeds representing payment for extracted oil and gas remain as part of the corpus of our environmental public trust, and that royalties are unquestionably such proceeds, we are able to make specific rulings with respect to only some of the challenged legislation.

Sections 1602-E and 1603-E relate exclusively to royalties. On their face, these amendments lack any indication that the Commonwealth is required to contemplate, let alone reasonably exercise, its duties as the trustee of the environmental public trust created by the Environmental Rights Amendment. The Commonwealth itself readily acknowledges that revenue generated by oil and gas leases is now spent in a multitude of ways entirely unrelated to the conservation and maintenance of our public natural resources. *See* Commonwealth's Brief at 46. Section 1602-E merely requires the General Assembly to "consider" allocating these funds to municipalities impacted by a Marcellus well. Section 1603-E limits DCNR's allocation from the Lease Fund to "up to $50,000,000" from royalties and requires DCNR to "give preference to the operation and maintenance of State parks and forests" rather than to conservation purposes. Again, however, there is no indication that the General Assembly considered the purposes of the public trust or exercised reasonable care in managing the royalties in a manner consistent with its Section 27 trustee duties.

We hold, therefore, that sections 1602-E and 1603-E, relating to royalties, are facially unconstitutional. They plainly ignore the Commonwealth's constitutionally imposed fiduciary duty to manage the corpus of the environmental public trust for the benefit of the people to accomplish its purpose — conserving and maintaining the corpus by, inter alia, preventing and remedying the degradation, diminution and depletion of our public natural resources. *See Robinson Twp.*, 83 A.3d at 957. Without any question, these legislative enactments permit the trustee to use trust assets for non-trust purposes, a clear violation of the most basic of a trustee's fiduciary obligations. *Id.* at 978 ("[T]he trustee may use the assets of the trust only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries."); *see also* 20 Pa.C.S. §7780 (providing that the duty to administer a trust with prudence involves "considering the purposes" of the trust and "the exercise of reasonable care, skill, and caution"). To the extent the remainder of the Fiscal Code amendments transfer **proceeds from the sale of trust assets** to the General Fund, they are likewise constitutionally infirm.

Based on its conclusion that no revenue from the leasing and sale of trust assets is part of the corpus of the trust as well as its interpretation of Section 27's plain language, including the Commonwealth's fiduciary obligations that arise therefrom, the Commonwealth Court denied the Foundation's application for summary relief. It erroneously concluded that all of the General Assembly's transfers and appropriations from the Lease Fund were wholly proper because they appeared generally to benefit all the people of the Commonwealth and "there is no constitutional mandate that monies derived from the leasing of State lands for oil and gas development be reinvested into the conservation and maintenance of the Commonwealth's natural resources." *PEDF*, 108 A.3d at 169.

Having established, to the contrary, that all proceeds from the sale of our public natural resources are part of the corpus of our environmental public trust and that the Commonwealth must manage

the entire corpus according to its fiduciary obligations as tsrustee, the Commonwealth Court's decision cannot stand. In light of our specific holding that sections 1602-E and 1603-E are facially unconstitutional, the pre-2008 appropriations scheme as set forth in the Lease Fund Act and the CNRA again controls, with all monies in the Lease Fund specifically appropriated to the DCNR. As to the remaining acts and decisions the Foundation challenges, we clarify that their constitutionality depends upon whether they result from the Commonwealth's faithful exercise of its fiduciary duties vis a vis our public natural resources **and** any proceeds derived from the sale thereof. For example, the Governor's ability to override decisions by the DCNR regarding leasing is contingent upon the extent to which he does so in a manner that is faithful to his trustee obligations, not his various other obligations.

We also clarify that the legislature's diversion of funds from the Lease Fund (and from the DCNR's exclusive control) does not, in and of itself, constitute a violation of Section 27. As described herein, the legislature violates Section 27 when it diverts proceeds from oil and gas development **to a non-trust purpose** without exercising its fiduciary duties as trustee. The DCNR is not the only agency committed to conserving and maintaining our public natural resources, and the General Assembly would not run afoul of the constitution by appropriating trust funds to some other initiative or agency dedicated to effectuating Section 27. By the same token, the Lease Fund is not a constitutional trust fund and need not be the exclusive repository for proceeds from oil and gas development. However, if proceeds are moved to the General Fund, an accounting is likely necessary to ensure that the funds are ultimately used in accordance with the trustee's obligation to conserve and maintain our natural resources.

The Commonwealth (including the Governor and General Assembly) may not approach our public natural resources as a proprietor, and instead must at all times fulfill its role as a trustee. Because the legislative enactments at issue here do not reflect that the Commonwealth complied with its constitutional duties, the order of the Commonwealth Court with respect to the constitutionality of 1602-E and 1603-E is reversed, and the order is otherwise vacated in all respects. The case is remanded to the Commonwealth Court for further proceedings consistent with this Opinion.

Notes

1. The Court referenced the writings of Professor John C. Dernbach of the Widener University Law School Environmental Law and Sustainability Center. After the decision, Professor Dernbach provided his comments on his website:

> In *Pennsylvania Environmental Defense Foundation v Commonwealth*, the Supreme Court decided by a clear majority that the state has a constitutional obligation under Article I, Section 27, to manage state parks and forests, including the oil and gas they contain, as a trustee. The Court also held that the "constitutional language controls how the Commonwealth may dispose of any proceeds generated from the sale of its public natural resources." Justice Baer described the decision as "monumental."
>
> And he is right. The Court set aside the three-part balancing test that had been used for more than four decades, and it did so by a majority decision. It held that the text of Article I, Section 27 provides the rules to be applied in any case. It also reaffirmed that the constitutional public trust is self-executing; it does not need

> further legislation in order to be applied. The Court's attentiveness to the text of Article I, Section 27 was underscored by its careful analysis of the legislative history, showing, among other things, how the Environmental Rights Amendment had been amended several times during the legislative process before it was approved by Pennsylvania voters in 1971 by a four-to-one vote. It also held that the rules governing management of public trust resources also apply to the expenditure of… royalties and perhaps other funds received from oil and gas leases on those resources.
>
> More broadly, the case signaled the Court's willingness to enforce the public trust doctrine. This case was decided on same day as another public trust case, *In Re: Petition of the Borough of Downingtown*, in which the Court used common law public trust principles to invalidate the transfer of significant parts of a public park to a real estate developer.
>
> *** * ***
>
> Immediately after the decision, I spoke with Franklin Kury, who as a young lawyer and Pennsylvania House of Representatives member authored and championed Article I, Section 27 between 1969 and 1971. For more than four decades, he never gave up hope that the Environmental Rights Amendment would have a bigger impact. "There is always the potential," he wrote in 2011, "for a future court to apply the amendment in ways that we cannot now imagine…." Now 80, he said, "I'm glad I lived long enough to see this."
>
> He added: "Both the *PEDF* and *Robinson Township* cases underscore the critical importance of building a solid legislative record in the official records of the House (or Senate) before the proposal is enacted. I was well aware of this while the environmental amendment proposal was going through the House and Senate. I made two floor speeches explaining the intent of the proposal and inserted into the House Journal Professor Robert Broughton's legal analysis."
>
> "It took over four decades, but when the Supreme Court researched the legislative record, they found it all and used great portions of it. I feel really good about this. It was well worth the wait."

John Dernbach, *Taking the Public Trust Seriously: The Pennsylvania Supreme Court's Landmark Decision in PEDF v. Commonwealth* (July 1, 2017), https://johndernbach.com/2017/07/taking-public-trust-seriously-pennsylvania-supreme-courts-landmark-decision-pedf-v-commonwealth/.

CLASS 3 READINGS

(read after notes following *Glass v. Goeckel* on page 124)

Notes

1. In *Gunderson v. State*, 90 N.E.3d 1171 (2018), the Indiana Supreme Court recognized that the submerged lands of navigable waters, Lake Michigan in particular, were held in trust by the state. Like the Michigan Supreme Court in *Glass*, the court found that the boundary between public trust land and privately-owned land "is the common-law ordinary high water mark." *Id.* at 1173. The court also referred to this boundary as the natural ordinary high water mark (OHWM). This ruling effectively voided the Indiana Department of Natural Resource (DNR) administrative OHWM, a static boundary, as a legal boundary. However, the court acknowledged continued relevance of the administrative boundary because it serves "as a jurisdictional benchmark for administering regulatory programs by the DNR and U.S. Army Corps of Engineers." *Id.* at 1187.

The primary issue before the court, which had remained undecided to that point in Indiana, was determining "the precise boundary at which the State's ownership interests ends and private property interests begin." *Id.* at 1173. The court relied on *Glass* in recognizing the difficulty in identifying such a boundary due to the fluctuating levels of the Great Lakes. *Id.* at 1181. Ultimately, the Indiana Supreme Court agreed with the Michigan court in *Glass* and found that temporarily submerged lands where the lake has not permanently receded remain within the State's ownership interest—suggesting that the OHWM is the limit of the PTD. *Id.* at 1180.

Regarding the issue of what the public trust entails, the court held that "walking below the natural OHWM along the shores of Lake Michigan is a protected public use in Indiana. This public right of passage, inherent in the exercise of the traditional protected uses we recognize today, would not infringe on the property rights of adjacent riparian landowners." *Id.* at 1188. The court also noted that enlarging the public rights beyond the holding in *Gunderson* is an issue best suited for other branches of government. *Id.*

2. Rhode Island courts have taken a very narrow view of the effects of a 1986 constitutional amendment that affirmed the public's right to "passage along the shore," limiting the scope of public trust access rights to the mean high water mark, which is often under water. For criticism and a suggestion that the drafters of the constitutional amendment aimed to protect for public access above mean high water, see Sean Lyness, *A Doctrine Untethered: "Passage Along the Shore" Under the Rhode Island Public Trust Doctrine,*23 Roger Williams U. L. Rev. 127 (2018).

3. In *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019) (*Sturgeon II*), the Supreme Court barred the National Park Service from prohibiting the use of hovercraft over the Nation River in Alaska, despite the fact that the relevant portion of the river flows through the federal Yukon-Charley Rivers National Preserve. *Id.* at 1072-73. The Court noted that Alaska was the exception, not the rule because the Alaska National Interest Lands Conservation Act (ANILCA) limits federal regulatory power over lands and waters owned by the federal government. *Id.* (citing *Sturgeon v. Frost*, 136 S. Ct. 1061, 1071 (2016) (*Sturgeon I*). Specifically, the Court held that National Park

Service regulation over the Nation River was inappropriate because running waters cannot be owned, and the title of the submerged lands in question belonged to Alaska under the Submerged Lands Act. *Id.* at 1078. Thus, the petitioner could continue his hovercraft use while hunting for moose.

4. The question of navigability, at least according to the Fourth Circuit, is one of federal law in all states. In *North Carolina v. Alcoa Power Generating, Inc.*, the State failed to persuade the court that the Equal Footing Doctrine applies only to states that entered the Union after the federal Constitution was ratified. 853 F.3d 140, 147 (4th Cir. 2017), *as amended* (Apr. 18, 2017), *as amended* (May 3, 2017), *cert. denied sub nom. North Carolina v. Alcoa Power Generating, Inc.*, 138 S. Ct. 981 (2018). North Carolina argued that its pre-Constitution sovereignty demanded that its ownership of lands underlying navigable waters was not grounded in federal law and must be a question of state law for all original states. *Id.* at 147-48. In disagreeing with the origin of such ownership, the court noted that title to such lands is "conferred by the Constitution itself" for all states. *Id.* at 148. Therefore, the court decided that the state's articulation of the Equal Footing Doctrine would "posit[] an unacceptable inequality among the states." *Id.* at 148-49. Thus, the Fourth Circuit ruled that navigability is a question of federal law in every state in the Union. *Id.* at 147. The Supreme Court subsequently denied certiorari meaning that original states within the Fourth Circuit are subject to equal footing. *North Carolina v. Alcoa Power Generating, Inc.*, 138 S. Ct. 981, 200 L. Ed. 2d 248 (2018).

5. In federal litigation concerning Nevada's Walker Lake and the public trust doctrine, the Ninth Circuit certified the issue of whether the public trust doctrine applies to appropriative water rights to the Nevada Supreme Court. The issue is currently pending before the state court. Writing as amici curiae, Bret Birdsong of the William S. Boyd School of Law—and fellow law professors—argue that the public trust doctrine applies to appropriative water rights as an essential limit on Nevada's sovereign power to transfer public trust assets. Brief *Amicus Curiae* of Law Professors in Support of Appellant., Mineral County v. Lyon County, No. 75917 (Nev. Dec. 6, 2018). The professors relied on *Lawrence v. Clark Cty.*, 127 Nev. 390, 254 P.3d 606 (2011), to conclude that this limit should apply to rights to appropriate water from the tributaries of Walker Lake. *Id.*

6. In *San Francisco Baykeeper, Inc. v. State Lands Com.*, 242 Cal. App. 4th 202, 194 Cal. Rptr. 3d 880 (2015), the California Court of Appeal determined that the State Lands Commission (SLC) was required to determine that leases for sand mining in submerged lands were permissible uses of public trust property before issuing their approval. *Id.* at 232.The SLC had approved the leases to dredge mine sand from state lands under the San Francisco Bay without any such public trust review. *Id.* at 201. The court ruled that private commercial sand mining did not amount to an unquestionable public trust use and was not so obviously consistent with the public trust to only require a cursory review. *Id.* at 243. Therefore, the SLC failed to establish that its environmental impact review satisfied its obligations under the public trust doctrine. *Id.*

CLASS 5 READINGS

(read after notes following the *Waiahole Ditch* decision on page 203)

Notes

1. In *Kauai Springs, Inc. v. Planning Comm'n of Cty. of Kauai*, the Supreme Court of Hawai'i affirmed that the County Planning Commission properly rejected a water bottling company's application for a use permit to continue operating a spring water bottling facility. 133 Haw. 141, 175, 324 P.3d 951 (2014). The court summarized how state agencies should apply the public trust doctrine from the state constitution:

> To assist agencies in the application of the public trust doctrine, we distill from our prior cases the following principles:
>
> a. The agency's duty and authority is to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial use.
> b. The agency must determine whether the proposed use is consistent with the trust purposes:
> i. the maintenance of waters in their natural state;
> ii. the protection of domestic water use;
> iii. the protection of water in the exercise of Native Hawaiian and traditional and customary rights; and
> iv. the reservation of water enumerated by the State Water Code.
> c. The agency is to apply a presumption in favor of public use, access, enjoyment, and resource protection.
> d. The agency should evaluate each proposal for use on a case-by-case basis, recognizing that there can be no vested rights in the use of public water.
> e. If the requested use is private or commercial, the agency should apply a high level of scrutiny.
> f. The agency should evaluate the proposed use under a "reasonable and beneficial use" standard, which requires examination of the proposed use in relation to other public and private uses.
>
> Applicants have the burden to justify the proposed water use in light of the trust purposes.
>
> a. Permit applicants must demonstrate their actual needs and the propriety of draining water from public streams to satisfy those needs.
> b. The applicant must demonstrate the absence of a practicable alternative water source.
> c. If there is a reasonable allegation of harm to public trust purposes, then the applicant must demonstrate that there is no harm in fact or that the requested use is nevertheless reasonable and beneficial.
> d. If the impact is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved.

Id. at 174-75.

Environmental Law Foundation v. State Water Resources Control Bd.

Court of Appeal of California, Third Appellate District
26 Cal. App. 5th 844 (2018)

RAYE P. J.:

This appeal presents two important questions involving the application of the public trust doctrine to groundwater extraction—whether the doctrine has ever applied to groundwater and, if so, whether the 2014 Sustainable Groundwater Management Act (SGMA; Wat. Code, § 10720 et seq.) abrogated whatever application it might have had, replacing it with statutory rules fashioned by the Legislature….

* * *

The subject of the public trust is the Scott River in Siskiyou County, a tributary of the Klamath River and a navigable waterway for the purposes of the public trust doctrine. This case does not involve any of the water or water rights previously adjudicated in the Scott River decree in 1980. The Scott River decree does not adjudicate groundwater extractions from wells outside the geographical area covered by the decree. Yet pumping of interconnected groundwater in the Scott River system that has an effect on surface flows is occurring outside of the geographical area covered by the decree. The County established a permit program for the construction standards for new wells and a groundwater management program that regulates the extraction of groundwater for use outside the basin from which it is extracted.

* * *

On appeal, the County contends the Board has neither the authority nor the duty to consider how the use of groundwater affects the public trust in the Scott River; nor does the County have a public trust duty to consider whether groundwater uses by new wells affect public trust uses in the Scott River….

* * *

From ancient Roman roots, the English common law has developed a doctrine enshrining humanity's entitlement to air and water as a public trust. The public trust doctrine rests on several related concepts. "First, that the public rights of commerce, navigation, fishery, and recreation are so intrinsically important and vital to free citizens that their unfettered availability to all is essential in a democratic society… 'An allied principle holds that certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace. … [¶] Finally, there is often a recognition, albeit one that has been irregularly perceived in legal doctrine, that certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate. The best known example is found in the rule of water law that one does not own a property right in water in the same way he owns his watch or his shoes, but that he owns only a usufruct—an interest that incorporates the needs of others. It is thus thought to be incumbent upon the government to regulate water uses for the general benefit of the community and to take account

thereby of the public nature and the interdependency which the physical quality of the resource implies.'" (*Zack's, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1175–1176 [81 Cal. Rptr. 3d 797].)

In a then shocking renunciation of the fee title to the submerged lands in the harbor of Chicago the State of Illinois had transferred to a railroad, the United States Supreme Court in 1892 first enunciated the sanctity of a public trust over navigable waterways. *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018, 13 S.Ct. 110], established that "the title which a State holds to land under navigable waters is … held in trust for the people of the State, in order that they may enjoy the navigation of the waters and carry on commerce over them, free from obstruction or interference by private parties; that this trust devolving upon the State in the public interest is one which cannot be relinquished by a transfer of the property; that a State can no more abdicate its trust over such property, in which the whole people are interested, so as to leave it under the control of private parties, than it can abdicate its police powers in the administration of government and the preservation of the peace; and that the trust under which such lands are held is governmental so that they cannot be alienated, except to be used for the improvement of the public use in them." (*Long Sault Development Co. v. Call* (1916) 242 U.S. 272, 278–279 [61 L.Ed. 294, 37 S.Ct. 79].)

Illinois Central remains the seminal case on the public trust doctrine. (*San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 234 [194 Cal. Rptr. 3d 880] (*Baykeeper*).) The case instructs courts to "'look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.' [Citation.]" (*Zack's, Inc. v. City of Sausalito, supra*, 165 Cal.App.4th at p. 1176.)

The doctrine is expansive. (*Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 416–417 [62 Cal. Rptr. 401, 432 P.2d 3].) "The range of public trust uses is broad, encompassing not just navigation, commerce, and fishing, but also the public right to hunt, bathe or swim… Furthermore, the concept of a public use is flexible, accommodating changing public needs… For example, an increasingly important public use is the preservation of trust lands '["]in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." (*Baykeeper, supra*, 242 Cal.App.4th at p. 233.)

Moreover, the public trust doctrine is more than a state's raw power to act; it imposes an affirmative duty on the state to act on behalf of the people to protect their interest in navigable water. As our Supreme Court has mandated: "[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." (*National Audubon, supra*, 33 Cal.3d at p. 441.)

What *Illinois Central* was on the national level in the 19th century, *National Audubon* was to California in the 20th century—a monumental decision enforcing, indeed expanding, the right of the public to benefit from state-owned navigable waterways and the duty of the state to protect the public's "common heritage" in its water. We reject the County's effort to diminish the importance of the opinion, including its mistaken labeling of its central holdings as dicta. To the contrary,

National Audubon is binding precedent, factually analogous, precisely on point, and indeed dispositive of the threshold question in this appeal: does the public trust doctrine apply to the extraction of groundwater that adversely impacts the Scott River, a navigable waterway?

We begin with the extraordinary collision of values exposed in *National Audubon*. The Department of Water and Power of the City of Los Angeles (DWP), pursuant to a permit issued by the Division of Water Resources, the predecessor to the Board, diverted water from nonnavigable tributaries that would have otherwise flowed into Mono Lake. (*National Audubon, supra*, 33 Cal.3d at p. 424.) The diversion of the water caused the level of the lake to drop, thereby imperiling its scenic beauty and ecological value. (*Id.* at pp. 424–425.) The permit was issued under the appropriative water rights system, a system that dominated California water law since the gold rush (*id.* at p. 442) and was formally enshrined in statute with the enactment in 1913 of the Water Commission Act (§ 1003). (*People v. Shirokow* (1980) 26 Cal.3d 301, 308 [162 Cal. Rptr. 30, 605 P.2d 859].) In *National Audubon*, the values undergirding that legislative mandate collided with those that had been, until then, embodied but ignored in the public trust doctrine. (*National Audubon, supra*, at p. 445.)

… Despite the historical significance of appropriative water rights in the state, the comprehensiveness of the water rights system, the threat to the water supply for the City of Los Angeles, and perhaps, most significantly, the fact that the tributaries from which the water was being diverted were not themselves navigable, the public trust prevailed. Yet the County would have us now dilute or ignore the trust for far less compelling reasons.

Pointing out that groundwater is not navigable, the County insists that it should not be subject to the public trust doctrine, reminding us that no court has held that groundwater is a public trust resource. But the trial court did not find the public trust doctrine embraces all groundwater. To the contrary, the water subject to the trust is the Scott River, a navigable waterway. "[T]he court does not hold the public trust doctrine applies to groundwater itself. Rather, the public trust doctrine applies if extraction of groundwater adversely impacts a navigable waterway to which the public trust doctrine does apply."

Thus, the trial court's finding is unremarkable and well supported by the facts and logic of *National Audubon* and the precedent upon which it relies. The most notable similarity between this case and *National Audubon* is the fact that nonnavigable water was diverted or extracted. In *National Audubon*, the diversion of nonnavigable tributaries had a deleterious effect on Mono Lake, a navigable waterway. (*National Audubon, supra*, 33 Cal.3d at pp. 424–425.) Similarly, ELF alleges in this case that the extraction of groundwater potentially will adversely impact the Scott River, also a navigable waterway. The fact the tributaries themselves were not navigable did not dissuade the Supreme Court from concluding the public trust doctrine protects the navigable water (Mono Lake) from harm by diversion of nonnavigable tributaries. (*Id.* at p. 437.) Nor does the fact that nonnavigable groundwater rather than nonnavigable tributaries is at issue here dissuade us where, in both cases, it is alleged the removal of water will have an adverse impact on navigable water clearly within the public trust.

* * *

The authority provided by the County does not persuade us otherwise. The County cites *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689 [7 Cal. Rptr. 3d 868]

for the bold assertion that the public trust doctrine does not apply to groundwater, ignoring, as we explained above, the crucial detail that the trial court did not find the public trust doctrine applies to groundwater. But more importantly, *Santa Teresa* is not on point because there was no evidence in that case of any negative impact on the surface water body and, therefore, no showing of a harmful impact on public trust resources. Here, the issue is not about protecting public trust uses in groundwater, but about protecting the public trust uses of the Scott River that are at risk of being impaired due to groundwater pumping of contributory flows.

* * *

National Audubon and its progeny recognize that government has a duty to consider the public trust interest when making decisions impacting water that is imbued with the public trust. The County raises two additional objections to imposition of the duty to consider the public's inherent interest in its navigable waterways. First, the County insists that the constitutional imperative compelling the reasonable use of water subsumes any parallel duty under the public trust doctrine. And, secondly, the County rejects the notion that any duty imposed upon the state to enforce the public trust devolves to it as a mere political subdivision of the state.

* * *

The County asserts that article X, section 2 of the California Constitution subjects groundwater to the reasonable use standard, and "thus there is no basis or need to apply the public trust doctrine to groundwater." *National Audubon* answers the County's argument. The Supreme Court quoted article X, section 2 and expressly recognized that public trust uses of water remain subject to reasonable use. Nevertheless, the court rejected the notion that reasonable use or the appropriative rights system supplanted the public trust doctrine. The court wrote: "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests… As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust [citation], and to preserve, so far as consistent with the public interest, the uses protected by the trust." (*National Audubon, supra*, 33 Cal.3d at pp. 446–447, fn. omitted.)

Despite such a formidable acknowledgment by the Supreme Court that multiple standards can exist simultaneously, the County claims the public trust doctrine and the reasonable use standard are incompatible. Missing is any citation to authority. *National Audubon* rebuts the County's unsupported and unsupportable assertion that the reasonable use standard obliterates the public trust doctrine.

Finally, the County contends the Water Code restricts the Board's authority to protect the public trust. The argument leads us down a now familiar rabbit hole. The County argues that sections 1200 and 1221 restrict the Board's authority by defining its permitting authority. But the Board's authority to apply the public trust doctrine extends to rights not covered by the permit and license system. (*In re Water of Hallet Creek Stream System* (1988) 44 Cal.3d 448, 472, fn. 16 [243 Cal.Rptr. 887, 749 P.2d 324].) In fact, the Board's authority to protect the public trust is

independent of and not bounded by the limitations on the Board's authority to oversee the permit and license system. (*Ibid.*) The County offers no compelling argument to the contrary and we see no rationale for finding the permitting and licensing system incompatible with the public trust doctrine.

* * *

Although one-third of Californians' water is extracted from groundwater basins and many of the state's basins are suffering from overdraft, it was not until 2014 that the California Legislature passed the Sustainable Groundwater Management Act. (§ 10720 et seq., added by Stats. 2014, ch. 346, § 3.) SGMA allows local agencies to voluntarily form groundwater sustainability agencies (GSA's) over a number of years. (§§ 10723, 10727.2.) They manage and regulate groundwater basins through adoption and implementation of groundwater sustainability plans (GSP's). (§§ 10723, 10727.) The GSA's are charged with procedural and substantive obligations designed to balance the needs of the various stakeholders in groundwater in an effort to preserve, and replenish to the extent possible, this diminishing and critical resource. (§§ 10721, subds. (u), (v), (x)(6), 10723.2, 10725.2, 10725.4, 10726.2, 10726.4, 10726.5.) The County hails the legislation as a general and comprehensive regulatory scheme fulfilling the Legislature's duty to protect the public trust. Specifically, the County points out that GSA's are required to regulate groundwater extractions from wells (§ 10726.4, subd. (a)(2)), the same obligation the trial court thrust upon it under the public trust doctrine. The occupation of the field by SGMA absolves the County and the Board of any common law duty it might have to consider and protect the Scott River from harmful groundwater extraction. We disagree.

* * *

As a general rule, statutes do not supplant the common law. (*I. E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285 [216 Cal. Rptr. 438, 702 P.2d 596].) "'Accordingly, "[t]here is a presumption that a statute does not, by implication, repeal the common law… Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws."' (*Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 326 [173 Cal. Rptr. 3d 662, 327 P.3d 774] (*Verdugo*).) But the County relies on an exception to the general rule. A statute may supplant the common law if "it appears that the Legislature intended to cover the entire subject or, in other words, to 'occupy the field.' '[G]eneral and comprehensive legislation, where course of conduct, parties, things affected, limitations and exceptions are minutely described, indicates a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter.'" (*I. E. Associates, supra*, at p. 285.) The County insists (1) the general rule does not apply because no court has found a duty under the public trust doctrine to regulate groundwater, and (2) SGMA is a comprehensive statutory scheme reflecting the Legislature's intent to occupy the field of groundwater management and the statute, therefore, does supplant the common law public trust doctrine. *National Audubon* persuades us otherwise.

The County mischaracterizes the public trust duty. By repeatedly referring to the fact that no court has held that groundwater constitutes a public trust resource nor imposed on the state or a county the duty to regulate groundwater, the County begins with a false premise. The trial court did not find that groundwater itself was protected by the public trust doctrine; nor did it find either the Board or the County had the duty to regulate groundwater. To the contrary, the trial court found a duty to consider any adverse impacts groundwater extraction would have on a public trust resource,

the Scott River. The duty, the court found, was not to regulate but to consider the impact on the public trust resource and, where feasible, to preserve the public interest in the Scott River, a navigable waterway. The trial court's narrow rulings are fully supported by *National Audubon*.

National Audubon clarifies the common law public trust doctrine as we discussed in part I, *ante*. The court emphasized that no public agency had ever considered the adverse impacts on Mono Lake, a navigable waterway protected by the public trust doctrine, by diverting the entire flow of the Mono Lake nonnavigable tributaries into the Los Angeles Aqueduct. (*National Audubon, supra*, 33 Cal.3d at p. 447.) The DWP acquired the rights to the entire flow in 1940 from a water board "which believed it lacked both the power and the duty to protect the Mono Lake environment." (*Ibid.*) Those rights were acquired pursuant to a comprehensive appropriative water rights system administered by the Division of Water Resources. The Supreme Court analyzed the relationship between the public trust doctrine and the California water rights system. (*Id.* at pp. 445–448.) Its analysis is equally apt to the relationship between the public trust doctrine and SGMA.

* * *

The court concluded that neither system of thought occupied the field and both ought to be accommodated. In other words, the court endorsed two parallel systems. Moreover, the court provided a concise statement of the state's common law duty under the public trust doctrine. "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests… As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust…, and to preserve, so far as consistent with the public interest, the uses protected by the trust." (*National Audubon, supra*, 33 Cal.3d at pp. 446–447, fn. omitted.)

The SGMA is not as comprehensive as the appropriative water rights system. As ELF points out, SGMA's coverage of groundwater is incomplete by its own terms in at least four ways. First, a covered basin for purposes of SGMA means only a designated basin or subbasin identified and defined in the Department of Water Resources' Bulletin 118 or as modified pursuant to a procedure outlined in SGMA. (§ 10721, subd. (b).) Second, SGMA does not apply to any groundwater basin listed in section 10720.8, including the adjudicated portions of the Scott River stream system. (§ 10720.8, subds. (a)–(e).) Third, many requirements in SGMA do not take effect for a number of years, and even then only for some subset of the total corpus of groundwater in the state. (See, e.g., §§ 10720.7, subd. (a) [setting deadlines of 2020 or 2022 for adopting groundwater sustainability plans for certain identified basins], 10735.8, subd. (h) [delaying until 2025 any SGMA-based Board interim plan intended to remedy depletions of interconnected groundwater in probationary basins].) Finally, 26 fully adjudicated basins and three pending adjudicated basins are exempted from SGMA under section 10720.8.

We reject, therefore, the County's position that because SGMA is comprehensive it occupies the field and supplants the common law. But even if the legislation was deemed comprehensive,

National Audubon teaches the two systems can live in harmony. If the expansive and historically rooted appropriative rights system in California did not subsume or eliminate the public trust doctrine in the state, then certainly SGMA, a more narrowly tailored piece of legislation, can also accommodate the perpetuation of the public trust doctrine.

* * *

Similarly, we can evince no legislative intent to eviscerate the public trust in navigable waterways in the text or scope of SGMA. While the public trust is not expressly mentioned in SGMA, there are many provisions that reflect a legislative desire not to interfere with the existing law…. And by whatever measure is used, the County has fallen far short of overcoming the presumption that a statute does not supplant the common law, particularly when the common law at issue embodies a doctrine as significant to the people of the state as a trust on their water. We conclude the enactment of SGMA does not, as the County maintains, occupy the field, replace or fulfill public trust duties, or scuttle decades of decisions upholding, defending, and expanding the public trust doctrine.

The County makes a valiant effort to demonstrate that the public trust doctrine does not apply to groundwater under the common law and, even if it did, SGMA abolishes any fiduciary duties the Board or the County have to take the public trust interests into account when making decisions involving groundwater that will adversely impact navigable waterways. That effort fails. Independent of these claims, however, remains the County's contention that even if the Board's fiduciary duties survive SGMA, its own duties do not. In the County's view, it never had and, continues not to have, any fiduciary duties involving groundwater. Not so.

A county is a legal subdivision of the state and references to the "state" may include counties. (*Baldwin v. County of Tehama, supra*, 31 Cal.App.4th 166, 175–176.) Although the state as sovereign is primarily responsible for administration of the trust, the county, as a subdivision of the state, shares responsibility for administering the public trust and "may not approve of destructive activities without giving due regard to the preservation of those resources." (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1370, fn. 19 [83 Cal. Rptr. 3d 588].)

We need only address one further argument raised by the County. The County asserts the Legislature, by enacting SGMA, rendered a conclusive judgment about the administration of the public trust, and the venerable separation of powers principle prohibits courts from intruding on the legislative prerogative. In this scenario, the Legislature is the sole keeper of the trust…

* * *

… If the Legislature determines public trust lands or waterways are no longer useful for trust purposes and frees them from the trust, that determination is conclusive. It will not be second guessed by the courts… The Legislature has not released the Scott River from the public trust. Therefore, requiring the County to consider the public trust in approving well permits does not infringe upon any 'conclusive' legislative determination."

* * *

Whether the Legislature could supersede or limit the Board's public trust authority if it wanted to is a question for another day. At present, we can find no violation of the separation of powers because, as we explained at length above, we have found no legislative intent to occupy the field and thereby to dissolve the public trust doctrine within the text or scope of SGMA.

The judgment is affirmed.

CLASS 6 READINGS

(read following notes on page 255)

The Public Trust in Wildlife

Michael C. Blumm and Aurora Paulsen
2013 Utah L. Rev. 1437, 1466-68 (2013)

* * *

V. EMPLOYING THE WILDLIFE TRUST

Perhaps the most important effect of marrying states' sovereign ownership of wildlife with the public trust doctrine is that citizens gain the right to enforce states' responsibilities to preserve this resource. If a state owns wildlife in trust, and the public is the beneficiary, citizens may enforce the state's fiduciary obligations.[359] Courts have generally held that private parties can assert the public trust doctrine against the states. For example, the Alaska Supreme Court permitted a private individual to sue a state agency in Owsichek v. State Guide Licensing & Control Board.[360] Similarly, in *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, the California Court of Appeals indicated that a nonprofit organization had standing to sue the state.[361]

Beyond authorizing public enforcement against states, the marriage of the doctrines of sovereign ownership of wildlife and the public trust would allow state governments to enforce the doctrine against private parties who harm wildlife or wildlife habitat.[362] Examples of cases supporting states' enforcement of a public trust in wildlife include *In re Steuart Transportation Co.*[363] and *McHugh*…[364] In fact, a number of courts have recognized that states have not only a right to enforce the public trust doctrine, but also a fiduciary obligation to seek compensation for damage to the wildlife trust.[366] In addition to empowering states, the wildlife trust enables public entities

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[359] See Horner, supra note 15 15, at 25-26 ("Under established trust principles, if there is a trust, there must be one or more identifiable trustees. If there are trustees, there are also beneficiaries. If there are beneficiaries, the beneficiaries have a right to enforcement of the trustee's fiduciary obligations. In the public trust context this means identifying with clarity the rights of the public to challenge government action that does not comport with trust obligations.") (citation omitted).

[360] 763 P.2d 488, 491 (Alaska 1988).

[361] 83 Cal. Rptr. 3d 588, 604-05 (Cal. Ct. App. 2008) ("A challenge to the permissibility of defendants' conduct must be directed to the agencies that have authorized the conduct.") (citation omitted).

[362] See, e.g., Lazarus, supra note 28, at 645-46 ("The [public trust] cases since 1970 fall into three basic categories: (1) private citizens suing the government for allegedly violating the doctrine; (2) private citizens suing other private parties for allegedly violating the doctrine; and (3) the government suing private parties for allegedly violating the doctrine.") (citations omitted).

[363] 495 F. Supp. 38 (E.D. Va. 1980).

[364] 630 So. 2d 1259, 1265 (La. 1994).

[366] See In re Steuart Transp. Co., 495 F. Supp. at 40 (finding a "duty to protect and preserve the public's interest" in the context of federal and state claimed recompense for damages to migratory waterfowl caused by an oil spill); State Dep't of Fisheries v. Gillette, 621 P.2d 764, 767 (Wash. Ct. App. 1980) ("Representing the people of the state - the

or individual citizens to vindicate public trust duties by maintaining actions against private parties who damage wildlife or wildlife habitat.

CONCLUSION

The overwhelming majority of states claim sovereign ownership of wildlife, confirming that states own wild animals in a sovereign, rather than a proprietary, sense. However, the applicability of the public trust doctrine to wildlife is not widely recognized. *The Center for Biological Diversity, Inc. v. FPL Group, Inc.* decision is a milestone, recognizing the linkage between the two doctrines and confirming that the state not only has the authority to regulate wildlife and protect wildlife habitat, but also a duty to do so enforceable by the public.[369] Given the states' widespread statutory and constitutional recognition of the wildlife trust, it is likely that more courts will soon recognize that state ownership of wildlife is part of the public trust doctrine, thus imposing duties and empowering states to ensure wise stewardship of wild animals and their habitats.

Note

Recent studies show that "animal populations have declined by more than 50 percent on average in the last two generations." Elizabeth Anne Brown, *Widely misinterpreted report still shows catastrophic animal decline*, National Geographic, (Nov. 1, 2018), https://www.nationalgeographic.com/animals/2018/11/animal-decline-living-planet-report-conservation-news/. The global Living Planet Index (LPI)—a method that measures diversity and abundance of animals worldwide estimated by the World Wildlife Fund for Nature's Living Planet Report—has fallen 60 percent since 1970. *Id.* It is important to sparse out what a 60 percent decrease in the LPI indicates:

> Stated another way, the report found that populations of vertebrates (animals with backbones) declined by 60 percent on average. But that's not the same as saying that we've wiped out 60 percent of all animals, which the report makes clear.
>
> Let's say for example you have 50 tigers, 200 falcons, and 10,000 squirrels. Let's say the first population declines by 90 percent, to 5 tigers. The second declines 80 percent, to 40 falcons.

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owners of the [spawning grounds that were] destroyed … the Department of Fisheries thus has a right of action for damages. In addition, the state, through the Department, has the fiduciary obligation of any trustee to seek damages for injury to the object of its trust."); State Dep't of Envtl. Prot. v. Jersey Cent. Power & Light Co., 336 A.2d 750, 759 (N.J. Super. Ct. App. Div. 1975) ("The State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected, and to seek compensation for any diminution in that trust corpus.") (citation omitted), rev'd on other grounds, 351 A.2d 337, 344 (N.J. 1976); State v. City of Bowling Green, 313 N.E. 2d 409, 411 (Ohio 1974) ("We conclude that where the state is deemed to be the trustee of property for the benefit of the public it has the obligation to bring suit … to protect the corpus of the trust property … . An action against those whose conduct damages or destroys such property, which is a natural resource of the public, must be considered an essential part of a trust doctrine, the vitality of which must be extended to meet the changing societal needs … . The state's right to recover exists simply by virtue of the public trust property interest which is protected by traditional common law … .").

[369] See Musiker et. al, supra note 16, at 91-92 ("Like their ownership of the beds beneath navigable waterways, states own wildlife in their sovereign capacity and thereby have a public trust duty to prevent impairment of this common resources.").

> And the squirrels drop to 9,000—a 10 percent fall. That's a 60 percent average decline of these three fictitious populations, but only a total decline of 12 percent of the individuals.
>
> Or take the example of a single species: Imagine gray wolf populations are declining by an average of 60 percent. That doesn't mean we've lost 60 percent of, say, all individual gray wolves. It means that some gray wolf packs have suffered horrific losses, perhaps even local extinction, while others have declined less sharply—but remember, packs aren't all the same size. Local extinction in rural Idaho could mean the loss of only four animals, but since each distinct population makes the species more resilient, it's still important information for biologists to capture.

Id. In an attempt to quantify the value that nature provides—such as water filtration from mollusks—the Living Planet Report estimates a total value of $125 trillion across the globe. *Id.* These financial numbers are intended to highlight the potential effects of abundancy and diversity loss in the worldwide animal population. Ultimately, "[a]nimal conservation isn't a special interest anymore. It's a human interest." *Id.*

CLASS 7 READINGS

(read after notes following *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club* on page 268)

Notes

1. In *City of Long Branch v. Jui Yung Liu*, the Supreme Court of New Jersey ruled that a beach replenishment project which created more dry land was state-owned land subject to the public trust doctrine. 203 N.J. 464, 482 4 A.3d 542 (2010). The court emphasized that the replenishment project was a rapid and significant change in the shoreline—an avulsion—that the landowners were aware of, rather than a slower moving accretion.

> Unlike accretion and erosion, an avulsion is "a sudden and perceptible loss or addition to land by the action of water or otherwise." *Garrett, supra*, 118 N.J. Super. at 601, 289 A.2d 542 (citation and internal quotation marks omitted); *Dickinson v. Fund for the Support of Free Public Sch.*, 95 N.J. 65, 77, 469 A.2d 1 & n.7 (1983) (citing Garrett); *see also Stop the Beach Renourishment, Inc., supra*, __ U.S. at __, 130 S. Ct. at 2598, 177 L. Ed. 2d at 193. An avulsion, therefore, is "more rapid [and] easily perceived" than accretion and erosion, and comes about by "sometimes violent shifts of land incident to floods, storms or channel breakthroughs." *Garrett, supra*, 118 N.J. Super. at 601, 289 A.2d 542. An avulsion, which produces a sudden gain or loss of shoreline, does not result in a shifting of the property line. *See id.* at 601-02, 289 A.2d 542; *see also Dickinson, supra*, 95 N.J. at 77, 469 A.2d 1. The prior mean high water mark remains the demarcation line between the property rights of the oceanfront owner and the State. *See Garrett, supra*, 118 N.J. Super. at 601-02, 289 A.2d 542; see also *Stop the Beach Renourishment, Inc., supra*, __ U.S. at __, 130 S. Ct. at 2599, 177 L. Ed. 2d at 193 (describing how under common law "regardless of whether an avulsive event exposes land previously submerged or submerges land previously exposed, the boundary between littoral property and sovereign land does not change; it remains (ordinarily) what was the mean high-water line before the event"); *Bryant v. Peppe*, 238 So. 2d 836, 837-38 (Fla.1970) (finding that formerly submerged land, exposed by hurricane, "was originally sovereignty land; and it did not lose that character merely because, by avulsion, it became dry land"); *Black's Law Dictionary* 157 (9th ed. 2009) (describing that land covered by water due to "avulsion remains the property of the original owner"). The principles of accretion and avulsion date back to English common law and Roman jurisprudence. *See* 2 William Blackstone, *Commentaries* *262; Justinian, *supra*, at 2.1.20, 2.1.21.
>
> The doctrine of avulsion "mitigate[s] the hardship of drastic shifts in title that would result if the doctrines of accretion, erosion, and reliction were applied to sudden and unexpected changes in the shoreline." *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1114 (Fla.2008), *aff'd*, __ U.S. __, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010). The practical result of an avulsion is that when land is added to the beach, the prior mean high water mark will be located on dry land and the State will have title to the beach seaward of that point. On the other hand, when an avulsion results in the tides covering what was earlier dry sand, the mean high water mark probably will be located under the ocean, and the upland owner will

> have title to tidally flowed beach. Because the preexisting mean high water mark does not change with an avulsion, if a hurricane washes away one hundred feet of beach and is followed by a hurricane adding one hundred feet of beach, there is neither a gain nor a loss to the upland owner or the State.
>
> The law, generally, makes no distinction between whether an accretion or avulsion is the product of natural forces or manmade efforts. *See Masciarella, supra*, 51 N.J. at 354-55, 359, 240 A.2d 665 (making no distinction between accretion that is caused by natural means or government-constructed jetty); *Garrett, supra*, 118 N.J. Super. at 597, 601, 289 A.2d 542 (finding railroad's filling and rerouting of tidal stream was artificial avulsion); *see also New Jersey v. New York*, 523 U.S. 767, 770-71, 784, 118 S. Ct. 1726, 1730-31, 1737, 140 L. Ed. 2d 993, 1005-06, 1013-14 (1998) (holding that federal government's filling of Hudson River next to Ellis Island was avulsion, therefore sovereignty to new dry land remained with New Jersey, because new land fell on New Jersey's side of river).

Id. at 477-79.

2. For a historical overview of the public trust doctrine, as applied to public beach access in New Jersey, and an argument that other states should apply a similarly robust public trust doctrine, *see* Jack Potash, *The Public Trust Doctrine and Beach Access: Comparing New Jersey to Nearby States*, 46 Seton Hall L. Rev. 661 (2016).

Nies v. Town of Emerald Isle

Court of Appeals of North Carolina
244 N.C. App. 81, 780 S.E.2d 187 (2015)

McGEE, Chief Judge:

Gregory P. Nies and Diane S. Nies ("Plaintiffs") purchased an oceanfront property ("the Property") in Defendant Town of Emerald Isle ("the Town") in June of 2001. Plaintiffs had been vacationing in the Town from their home in New Jersey since 1980. Plaintiffs filed this matter alleging the inverse condemnation taking of the Property by the Town.

*** * ***

The seaward boundary of private beach *ownership* in North Carolina is set by statute:

> (a) The seaward boundary of all property within the State of North Carolina, not owned by the State, which adjoins the ocean, is the mean high water mark. Provided, that this section shall not apply where title below the mean high water mark is or has been specifically granted by the State.
>
> (b) Notwithstanding any other provision of law, no agency shall issue any rule or regulation which adopts as the seaward boundary of privately owned property any line other than the mean high water mark. The mean high water mark also shall be used as the seaward boundary

> for determining the area of any property when such determination is necessary to the application of any rule or regulation issued by any agency.

N.C. Gen. Stat. § 77-20 (2013).

None of these natural lines of demarcation are static, as the beaches are continually changing due to erosion or accretion of sand, whether through the forces of nature or through human intervention. Furthermore, the State may acquire ownership of public trust *dry sand* ocean beach if public funds are used to raise that land above the mean high water mark:

> Notwithstanding the other provisions of this section, the title to land in or immediately along the Atlantic Ocean raised above the mean high water mark by publicly financed projects which involve hydraulic dredging or other deposition of spoil materials or sand vests in *the State*. Title to such lands raised through projects that received no public funding vests in the adjacent littoral proprietor. *All such raised lands shall remain open to the free use and enjoyment of the people of the State, consistent with the public trust rights in ocean beaches, which rights are part of the common heritage of the people of this State*.

N.C. Gen. Stat. § 146-6(f) (2013) (emphasis added).

The Town, from time to time, has engaged in beach "nourishment" projects. The purpose of these projects has been to control or remediate erosion of the Town's beaches. The Town embarked on one such project in 2003 ("the Project"). According to Plaintiffs, the result of the Project was an extension of the dry sand beach from Plaintiffs' property line—the pre-Project mean high water mark—to a new mean high water mark located seaward of their property line. Therefore, the State now owns dry sand beach—which it holds for the public trust—between Plaintiffs' property line and the current mean high water mark—which no longer represents Plaintiffs' property line.

The Town was incorporated in 1957. The public has enjoyed access to its beaches, including both the publicly-owned foreshore—or wet sand beach—and the private property dry sand beaches, since at least that date. This access has included fishing (both commercial and recreational), sunbathing, recreation, horseback riding, and the driving of automobiles upon the beach strand…. [S]ince at least 1980, the Town had been restricting beach driving within its borders to a "permitted driving area," which was defined in the Emerald Isle Code of Ordinances (Oct. 2010) ("the Ordinances" generally, or "the 2010 Ordinances" specifically).

* * *

According to Plaintiffs: "Historically, the [Ordinances] permitted public driving on"

> the foreshore and area within the [T]own consisting primarily of hardpacked sand and lying *between the waters of the Atlantic Ocean . . . and a point ten (10) feet seaward from the foot or toe of the dune closest to the waters of the Atlantic Ocean[.]*

This is the language from Section 5-21 of the 2010 Ordinances, and accurately reflects the defined permitted driving area from the time Plaintiffs purchased the Property in June of 2001 until the filing of this action on 9 December 2011. [The Court also considered contested ordinances from

2013. Later references to "the Ordinances" in this edited opinion encompass Court discussion of both the 2010 Ordinances and the 2013 Ordinances.]

* * *

Relevant to this appeal, Plaintiffs claim that the effect of the contested Ordinances was the taking of the dry sand beach portion of the Property by the Town.

* * *

Plaintiffs' sole argument on appeal is that the trial court erred in granting summary judgment in favor of the Town because the contested ordinances effected a taking of the Property in violation of the Takings Clause of the Fifth Amendment. In support of their argument, Plaintiffs contend that the dry sand ocean beach portion of their property is not subject to public trust rights[.]

* * *

Plaintiffs first argue that privately owned dry sand beaches in North Carolina are not subject to the public trust doctrine. We disagree.

* * *

This Court has recognized both public trust lands and public trust *rights* as codified by our General Assembly:

> The public trust doctrine is a common law principle providing that certain land associated with bodies of water is held in trust by the State for the benefit of the public. As this Court has held, "public trust rights are 'those rights held in trust by the State for the use and benefit of the people of the State in common. . . . . They include, but are not limited to, the right to navigate, swim, hunt, fish and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches.'" *Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Pres., Inc. v. Coastal Res. Comm'n*, 117 N.C. App. 556, 574, 452 S.E.2d 337, 348 (1995) (emphasis omitted) (quoting N.C. Gen. Stat. § 1-45.1 (1994)).

Fabrikant, 174 N.C. App. at 41, 621 S.E.2d at 27 (citation omitted). Public trust rights are associated with public trust lands, but are not inextricably tied to ownership of these lands. For example, the General Assembly may convey ownership of public trust land to a private party, but will be considered to have retained public trust rights in that land unless specifically relinquished in the transferring legislation by "the clearest and most express terms." *Gwathmey*, 342 N.C. at 304, 464 S.E.2d at 684. Public trust rights are also attached to public trust resources which, according to our General Assembly, may include both public and private lands:

> "public trust resources" means land and water areas, *both public and private*, subject to public trust rights as that term is defined in G.S. 1-45.1.

N.C. Gen. Stat. § 113-131(e) (2013) (emphasis added). As noted above, N.C. Gen. Stat. § 1-45.1 defined public trust rights as including the "right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches." *Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27 (citation and quotation marks omitted). This Court has adopted the N.C. Gen. Stat. § 1-45.1 definition of public trust rights. *Id.*

Concerning "ocean beaches," the General Assembly has found:

> The public has traditionally fully enjoyed the State's beaches and coastal waters and public access to and use of the beaches and coastal waters. The beaches provide a recreational resource of great importance to North Carolina and its citizens and this makes a significant contribution to the economic well-being of the State. The General Assembly finds that the beaches and coastal waters are resources of statewide significance and have been customarily freely used and enjoyed by people throughout the State.

N.C. Gen. Stat. § 113A-134.1(b) (2013). The General Assembly considers access to, and use of, ocean beaches to be a public trust right. N.C. Gen. Stat. § 1-45.1; N.C. Gen. Stat. § 113A-134.2 (2013). This Court has indicated its agreement. *Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27.

N.C. Gen. Stat. § 77-20(e) defines "ocean beaches" as follows:

> "[O]cean beaches" means the area adjacent to the ocean and ocean inlets that is *subject to public trust rights*. This area is in constant flux due to the action of wind, waves, tides, and storms and *includes the wet sand area of the beach that is subject to regular flooding by tides and the dry sand area of the beach that is subject to occasional flooding by tides*, including wind tides other than those resulting from a hurricane or tropical storm. The landward extent of the ocean beaches is established by the common law as interpreted and applied by the courts of this State. Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line.

N.C. Gen. Stat. § 77-20(e) (emphasis added). Having attempted to define "ocean beaches," N.C. Gen. Stat. § 77-20(d) further states the position of the General Assembly that the public trust portions of North Carolina ocean beaches include the dry sand portions of those beaches:

> The public having made frequent, uninterrupted, and unobstructed use of the *full width and breadth of the ocean beaches of this State from time immemorial*, this section shall not be construed to impair the *right of the people to the customary free use and enjoyment of the ocean beaches, which rights remain reserved to the people of this State under the common law and are a part of the common heritage of the State recognized by Article XIV, Section 5 of the Constitution of North Carolina. These public trust rights in the ocean beaches are established in the common law as interpreted and applied by the courts of this State*.

N.C. Gen. Stat. § 77-20(d). N.C. Gen. Stat. § 77-20 was last amended in 1998, before Plaintiffs purchased the Property.

The Executive Branch, through a 1996 opinion of the Attorney General, also adopted this assessment.

> Because the public ownership stops at the high water line, the public must either be in the water or on the dry sand beach when the tide is high. The term "dry sand beach" refers to the flat area of sand seaward of the dunes or bulkhead which is flooded on an irregular basis by storm tides or unusually high tides. *It is an area of private property which the State maintains is impressed with public rights of use under the public trust doctrine and the doctrine of custom or prescription*.

*Opinion of Attorney General Re: Advisory Opinion Ocean Beach Renourishment Projects, N.C.G.S. § 146-6(f), 1996 N.C. AG LEXIS 55, 1996 WL 925134, *2* (Oct. 15, 1996) ("Advisory Opinion") (emphasis added) (citation omitted)…

The General Assembly has made clear its understanding that at least some portion of privately-owned dry sand beaches are subject to public trust rights. The General Assembly has the power to make this determination through legislation, and thereby modify any prior common law understanding of the geographic limits of these public trust rights. *Gwathmey*, 342 N.C. at 296, 464 S.E.2d at 679.

* * *

N.C. Gen. Stat. § 77-20 establishes that some portion, at least, of privately-owned dry sand beaches are subject to public trust rights. Lacking further guidance from prior opinions of our appellate courts, we must determine the geographic boundary of public trust rights on privately-owned dry sand beaches. We adopt the test suggested in N.C. Gen. Stat. § 77-20(e): "Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line." *Id.* We adopt this test because it most closely reflects what the majority of North Carolinians understand as a "public" beach. *See, e.g.*, Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. Rev. 1869, 1877 (2000) ("the custom of the dry sand beaches being open to public trust uses has a long history in North Carolina"). We hold that the "ocean beaches" of North Carolina include both the wet sand beaches—generally, but not exclusively, publically owned—and the dry sand beaches—generally, but not exclusively, privately owned.

For the purposes of N.C. Gen. Stat. § 77-20, the landward boundary of North Carolina ocean beaches is the discernable reach of the "storm" tide. This boundary represents the extent of semi-regular submersion of land by ocean waters sufficient to prevent the seaward expansion of frontal dunes, or stable, natural vegetation, where such dunes or vegetation exist. Where both frontal dunes and natural vegetation exist, the high water mark shall be the seaward of the two lines. Where no frontal dunes nor stable, natural vegetation exists, the high water mark shall be determined by some other reasonable method, which may involve determination of the "storm trash line" or any other reliable indicator of the mean regular extent of the storm tide. The ocean beaches of North Carolina, as defined in N.C. Gen. Stat. § 77-20(e) and this opinion, are subject

to public trust rights unless those rights have been expressly abandoned by the State. *See Gwathmey*, 342 N.C. at 304, 464 S.E.2d at 684.

The limits of the public's right to use the public trust dry sand beaches are established through appropriate use of the State's police power. As the United States Supreme Court has stated:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power."

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027, 112 S. Ct. 2886, 120 L. Ed. 2d 798, 820 (1992) (citations omitted).

The right to prevent the public from enjoying the dry sand portion of the Property was never part of the "bundle of rights" purchased by Plaintiffs in 2001. Because Plaintiffs have no right to exclude the public from public trust beaches, those portions of the Ordinances regulating beach driving, even if construed as ordinances "allowing" beach driving, cannot effectuate a Fifth Amendment taking.

* * *

We must next determine whether the Town, pursuant to public trust rights or otherwise, may enforce ordinances reserving unimpeded access over portions of Plaintiffs' dry sand beach without compensating Plaintiffs. We hold, on these facts, that it may.

Public trust rights in Plaintiffs' property are held by the State concurrently with Plaintiffs' rights as property owners. Though the Town may prevent Plaintiffs from denying the public access to the dry sand beach portion of the Property for certain activities, that does not automatically establish that the Town can prevent, regulate, or restrict other specific uses of the Property by Plaintiffs without implicating the Takings Clause of the Fifth Amendment to the United States Constitution:

> The Takings Clause—"nor shall private property be taken for public use, without just compensation," U.S. Const., Amdt. 5—applies as fully to the taking of a landowner's [littoral] rights as it does to the taking of an estate in land. Moreover, though the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing. Thus, when the government uses its own property in such a way that it destroys private property, it has taken that property. Similarly, our doctrine of regulatory takings "aims to identify regulatory actions that are functionally equivalent to the classic taking."

Stop the Beach, 560 U.S. at 713, 177 L. Ed. 2d at 195 (citations omitted).

* * *

Plaintiffs cannot establish that the contested beach driving ordinances constitute physical invasion of the Property for purposes of the Takings Clause. The majority of Plaintiffs' argument is predicated on Plaintiffs' contention that the dry sand portion of the Property is not encumbered by public trust rights. We have held that the dry sand portion of the Property is so encumbered. Because public beach driving across the Property is permissible pursuant to public trust rights, regulation of this behavior by the Town does not constitute a "taking."

Plaintiffs have never, since they purchased the Property in 2001, had the right to exclude public traffic, whether pedestrian or vehicular, from the public trust dry sand beach portions of the Property. The Town has the authority to both ensure public access to its ocean beaches, and to impose appropriate regulations pursuant to its police power. *See Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27; *see also Kirby v. N.C. Dep't of Transp.*, 239 N.C. App. 345, 359, 769 S.E.2d 218, 230 (2015), *disc. rev. allowed*, 368 N.C. 279, 775 S.E.2d 829 (2015); *Slavin v. Town of Oak Island*, 160 N.C. App. 57, 584 S.E.2d 100 (2003). The contested beach driving portions of the Ordinances do not create a right of the public relative to the Property; they regulate a right that the public already enjoyed. *See also, e.g.*, N.C. Gen. Stat. § 160A-308 (2013) ("A municipality may by ordinance regulate, restrict and prohibit the use of dune or beach buggies, jeeps, motorcycles, cars, trucks, or any other form of power-driven vehicle specified by the governing body of the municipality on the foreshore, beach strand and the barrier dune system. . . . . Provided, a municipality shall not prohibit the use of such specified vehicles from the foreshore, beach strand and barrier dune system by commercial fishermen for commercial activities.").

* * *

… We have already held that the public, including the Town, has the right to drive on public trust beaches. This right may be regulated, within the Town's limits, through the Town's police power. Therefore, no part of [the Ordinances] "allowing" or regulating driving on the dry sand portion of the Property can constitute a taking.

*** * ***

… The only "physical invasion" of the Property arguably resulting from [the Ordinances] is Town vehicular traffic. However, we have held that Town vehicular traffic is allowed pursuant to the public trust doctrine and, therefore, cannot constitute a taking.

* * *

We hold that passage of [the Ordinances], constituted legitimate uses of the Town's police power. We hold that the regulation of the use of certain beach equipment, on public trust areas of the ocean beaches within the Town's jurisdiction, to facilitate the free movement of emergency and service vehicles, was "'within the scope of the [police] power[.]'" *Finch v. City of Durham*, 325 N.C. 352, 363, 384 S.E.2d 8, 14 (1989) (citation omitted). Further, the "'means chosen to regulate,'"

prohibiting large beach equipment within a twenty-foot-wide strip along the landward edge of the ocean beach, were "'reasonable.'" *Id.* (citation omitted).

* * *

The contested provisions in [the Ordinances] did not result in a "taking" of the Property. First, though Plaintiffs argue that the Ordinances deprived them of "the right to control and deny access to others," as discussed above, it is not the Ordinances that authorize public access to the dry sand portion of the Property; public access is permitted, and in fact guaranteed, pursuant to the associated public trust rights. *See Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27. The Ordinances restrict and regulate certain public and private uses pursuant to the Town's police power. The Town's reservation of an obstruction-free corridor on the Property for emergency use constitutes a greater imposition on Plaintiffs' property rights, but does not rise to the level of a taking.

Though Plaintiffs argue that "the Town has made it impossible for [them] to make any meaningful use of the dry [sand] [P]roperty[,]" Plaintiffs retain full use of, and rights in, the majority of the Property. *Tahoe-Sierra*, 535 U.S. at 327, 152 L. Ed. 2d at 543. Plaintiffs' rights in the dry sand portion of all but the twenty-foot-wide strip of the Property are the same as when they purchased the Property. *Id.* Concerning the twenty-foot-wide strip, Plaintiffs retain all the rights they had when they purchased the Property other than the right to use large beach equipment on that portion of the Property "between May 1 and September 14 of each year." The Town, along with the public, already had the right to drive on dry sand portions of the Property before Plaintiffs purchased it. We affirm the judgment of the trial court.

AFFIRMED.

CLASS 8 READINGS

(read before Section A (State Parklands) on page 290)

THE FEDERAL PUBLIC TRUST DOCTRINE: MISINTERPRETING JUSTICE KENNEDY AND ILLINOIS CENTRAL RAILROAD

Michael C. Blumm & Lynn S. Schaffer

45 Envtl. L. 399, 400-03; 418-23 (2015)

*** * ***

I. INTRODUCTION

Alec L. v. Jackson (*Alec. L.*),[1] a 2012 decision of the federal district court for the District of Columbia, rejected the children plaintiffs' argument that the public trust doctrine imposed a fiduciary duty on the federal government to take action to prevent the emission of unsafe amounts of greenhouse gas emissions into the atmosphere.[2] The court's opinion relied heavily on the Supreme Court's decision in *PPL Montana, L.L.C. v. Montana* (*PPL Montana*)[3] for the proposition that the public trust doctrine is exclusively a matter of state law, inapplicable to the federal government.[4] Thus, the district court concluded that the children failed to raise a federal question sufficient to invoke the court's jurisdiction.[5]

The D.C. Circuit affirmed in a brief, unreflective, unpublished opinion on the same grounds.[6] These decisions might convince other courts that the public trust doctrine has no applicability to the federal government, not only in the case of greenhouse gas emissions but also in other areas of federal preeminence like public lands management, ocean governance, and wetlands protection.[7]

This Article maintains that the D.C. courts misinterpreted the scope of the public trust doctrine in the *Alec L.* cases by failing to understand the limited nature of Justice Kennedy's dicta in his *PPL Montana* opinion. Kennedy's interpretation of the source and significance of the public

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[1] 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd sub nom.* Alec L. ex rel. Loorz v. McCarthy, 561 F. App'x 7 (D.C. Cir.), *cert denied* 135 S. Ct. 774 (2014).

[2] *See Alec L.*, 863 F. Supp. 2d at 11.

[3] 132 S. Ct. 1215 (2012).

[4] *Alec L.*, 863 F. Supp. 2d at 15 (citing *PPL Montana*, 132 S. Ct. at 1235).

[5] *Id.*

[6] Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7, 8 (D.C. Cir. 2014) ("The Supreme Court in *PPL Montana*, however, repeatedly referred to "the' public trust doctrine and directly and categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation.") (citing *PPL Montana*, 132 S. Ct. at 1234-35).

[7] The *Alec L.* case is among several recent cases that have interpreted Justice Kennedy's statements to foreclose a federal public trust, but it is the first to arise out of the District of Columbia. *See, e.g.*, Sansotta v. Town of Nags Head, 724 F.3d 533, 537 n.3 (4th Cir. 2013); United States v. 32.42 Acres of Land, 683 F.3d 1030, 1038 (9th Cir. 2012); Nat'l Post Collaborative v. Donahoe, 2014 WL 4544094, at 2 (D. Conn. Sept. 12, 2014); Brigham Oil & Gas, LP. v. N. Dakota Bd. of Univ. & Sch. Lands, 866 F. Supp. 2d 1082, 1084 (D.N.D. 2012). Each of these federal cases relied on *PPL Montana* to support the proposition that there is no federal public trust. For an example of a similar analysis in the state context, see Butler *ex rel.* Peshlakai v. Brewer, 2013 WL 1091209, at 3 n.3 (Ariz. App. Div. Mar. 14, 2013).

trust doctrine was unassailable,[8] but the D.C. courts' extrapolation of his opinion—concluding that he denied the applicability of the doctrine to the federal government[9]—was more than the *PPL Montana* opinion said and inconsistent with the origin and practical effect of the public trust doctrine. The public trust doctrine, properly understood, is an inherent limit on all sovereigns—not merely state sovereigns. Some recent decisions recognize this fact,[10] and nothing in Justice Kennedy's *PPL Montana* opinion is inconsistent with such an interpretation.

Admittedly, dicta in some Supreme Court opinions have suggested that the public trust doctrine is of state law origin[11] but, upon close examination, these statements have no real basis in fact. On the other hand, there is considerable precedent applying the public trust doctrine to the federal government, particularly to public land management,[12] and there is ample evidence that Congress intended the doctrine to be more widely applied than the courts have thus far recognized.[13]

The mistake of the D.C. courts was, in part, their failure to carefully examine the so—called lodestar case[14] of the public trust doctrine, *Illinois Central Railroad v. Illinois*,[15] (*Illinois Central*) an 1892 opinion written by Justice Stephen J. Field, the longest serving justice of the nineteenth century.[16] A close look at *Illinois Central* reveals that the decision had no state law

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[8] *See PPL Montana*, 132 S. Ct. at 1226-35.

[9] *See supra* notes 3-6 and accompanying text.

[10] *E.g.*, Robinson Twp. v. Pennsylvania, 83 A.3d 901, 948 n. 36 (Pa. 2013) (plurality opinion) ("Certain rights are inherent to mankind, and thus are secured rather than bestowed by the Constitution."); Parks v. Cooper, 676 N.W.2d 823, 837 (S.D. 2004) ("History and precedent have established the public trust doctrine as an inherent attribute of sovereign authority."); Citizens for Responsible Wildlife Mgmt. v. State, 103 P.3d 203, 208 (Wash. 2004) ("The sovereign's duty to manage its natural resources recognized in the public trust doctrine is not time limited, and the primary beneficiaries of the sovereign's exercise of its public trust are those who have not yet been born or who are too young to vote."); *In Re* Water Use Permit Applications (*Waiahole Ditch*), 9 P.3d 409, 443 (Haw. 2000) ("Regarding water resources in particular, history and precedent have established the public trust as an inherent attribute of sovereign authority that the government ought not, and ergo, … cannot surrender.") (internal quotation marks omitted); see also infra note 47 and accompanying text.

[11] *See infra* Part IV.

[12] *See infra* Part VI.A.

[13] *See infra* Part VI.B.

[14] Professor Sax referred to the *Illinois Central* case as the "Lodestar in American Public Trust Law." Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 489 (1970).

[15] 146 U.S. 387 (1892).

[16] Justice Field broke Chief Justice John Marshall's record for longevity, serving for 34 years. His opinions profoundly influenced American legal doctrine:

> As a westerner from California, [Field] wrote many influential public lands decisions and was also influential in the Court's adoption of the doctrine of substantive due process to reign in state police powers, which might help explain his unwillingness to rely on the state's police power to regulate the railroad in *Illinois Central*. His reasoning in dissent in the *Slaughterhouse Cases*, 83 U.S. 36 (1873), and *Munn v. Illinois*, 94 U.S. 113 (1877), eventually became majority opinions after he left the Court in decisions like *Lochner v. New York*, 198 U.S. 45 (1905).

MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 74 n.9 (1st ed. 2013).

basis,[17] despite the unreasoned dicta in later Supreme Court cases, which claimed that it did.[18] If, as we maintain, the Supreme Court grounded its *Illinois Central* decision in federal law, the D.C. courts' rationale in *Alec L.* is flawed and should not prevail in other circuits or in the Supreme Court.

We reexamine the basis of the federal public trust doctrine in this Article. Part II considers Justice Kennedy's statements about the nature of the public trust in *PPL Montana* and in his earlier 1997 opinion in *Idaho v. Coeur d'Alene* Tribe.[19] Part III briefly unpacks the seminal *Illinois Central* case, in which the Court used the public trust doctrine to strike down an attempted privatization of the inner Chicago Harbor. Although that decision was the subject of a comprehensive historical analysis a decade ago,[20] that analysis did not attempt to locate the source of the public trust doctrine that the Court employed.[21]

Part IV proceeds to describe the ensuing judicial interpretation of *Illinois Central*, upon which Justice Kennedy relied, and which we claim amounts to mere conclusory dicta. Part IV also explains that most states have interpreted *Illinois Central* in stark contrast to the Supreme Court's dicta, since most state courts consider the case to establish binding federal law. Part V discusses why statutory displacement—which the Supreme Court recently applied in the case of common law nuisance—cannot credibly be applied to the public trust doctrine. Part VI considers both Supreme Court case law and congressional statutes recognizing the federal public trust doctrine. We conclude that the D.C. courts' assumption that there is no federal public trust doctrine is neither supported by Justice Kennedy's opinions nor a fair reading of *Illinois Central* and should not be considered persuasive by other federal circuit courts of appeal or the Supreme Court.

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V. THE CONGRESSIONAL DISPLACEMENT ISSUE

[17] *See infra* notes 65-95 and accompanying text.
[18] *See infra* notes 23-64, 114-138 and accompanying text.
[19] 521 U.S. 261 (1997).
[20] Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. Chic. L. Rev. 799 (2004); *see infra* notes 66-68 and accompanying text.
[21] *Id.* at 803, 928-29. Kearney and Merrill observed that the question of whether the public trust doctrine rests on federal or state law remains one of the enduring ambiguities resulting from the *Illinois Central* decision, and although they did not directly address the issue, they concluded that the possibility of a federal law basis for the decision was not frivolous:

> Our story also sheds some light on whether the doctrine implicates federal interests in such a way as to justify grounding it in federal rather than state law. The federal government played a much larger role in the Chicago lakefront controversy than would appear from just reading the *Illinois Central* opinion, where, for peculiar reasons, the United States asked that the Court not rule on the issues that it had presented in the court below… . Whether [the underlying facts] might justify a federal rule of decision is a topic for another day. But they surely suggest that the possibility is not frivolous—at least if the doctrine is confined to controversies over lands beneath navigable waters.

Id. at 928-29.

As a constitutionally based inherent attribute of sovereignty, the relationship between the public trust doctrine and federal statutes is fundamentally different from the relationship between common law and federal statutes. As Justice Kennedy observed in the *Coeur d'Alene* decision, "navigable waters uniquely implicate sovereign interests."[134] This unique sovereign role in trust resources limits as well as empowers and is not based on common law that is reversible by statutes.[135] If the public trust were merely a common law doctrine, the statutory grant in *Illinois Central* would not have been reversed by the Supreme Court.[136]

Federal statutes may, of course, displace common law remedies.[137] A recent example was *American Electric Power Co. v. Connecticut* (*AEP*),[138] in which the Supreme Court decided that the Clean Air Act[139] displaced a common law nuisance cause of action against greenhouse gas emitting electric power plants.[140] However, a sovereign obligation to protect public trust assets not only for present but also future generations is fundamentally different than a common law right, like allocating rights among neighboring landowners. Consequently, the public trust doctrine is not displaceable by a statute, even when that statute "speaks directly" to the question at issue.[141] Instead, a sovereign trustee—just like a private trustee—is judged on the effectiveness of its acts in protecting trust assets.[142]

Unlike the public nuisance claim in *AEP*, which asked the judiciary to determine a reasonable level of emissions for the electric utilities,[143] a public trust claim inquires as to whether the sovereign is protecting trust assets sufficiently to safeguard the interest of present and future beneficiaries.[144] The Supreme Court decided in *Illinois Central* that the doctrine protects against sovereign "substantial impairment" of trust resources. The Court explained that the public trust cannot be lost or extinguished, except in the case of conveyances that promote trust purposes or avoid "substantial impairment of the public interest in the lands and waters remaining."[145] Applying this standard involves a fundamentally different—and much simpler—judicial calculus

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134 *Coeur d' Alene Tribe*, 521 U.S. at 284.
135 *See* discussion *infra* Part V.
136 *See* discussion *infra* Part V.
137 *See, e.g.*, Int'l Paper Co. v. Oulette, 479 U.S. 481 (1987) (holding that the Clean Water Act preempted state nuisance common law claims against an out-of-state source, but did not preempt state claims against parties under the common law of the source state); City of Milwaukee v. Illinois, 451 U.S. 304, 315 (1981) (holding that the Clean Water Act displaced any federal common law of nuisance, at least as applied to claims brought by the state).
138 131 S. Ct. 2527 (2011).
139 42 U.S.C. §§7401-7671q (2012)
140 *AEP*, 131 S. Ct. at 2532.
141 *Id.* at 2537.
142 *See* Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 Wake Forest J. L. & Pol'y 281, 310-11 (2014).
143 The plaintiffs in the *AEP* case asked the lower court to determine a "practical, feasible, and economically viable" level of emissions reduction. *AEP*, 131 S. Ct. at 2540 (internal quotation marks omitted).
144 *See, e.g.*, Gerald Torres & Nathan Bellinger, *supra* note 147, at 305, 307; *see generally* Lynn S. Schaffer, Comment, *Pulled From Thin Air: The (Mis)Application of Statutory Displacement to a Public Trust Claim in* Alec. L v. Jackson, 19 Lewis & Clark L. Rev. 169 (2015).
145 *Illinois Central*, 146 U.S. 387, 453 (1892).

than attempting to determine whether a particular emitter of pollution is acting reasonably under the circumstances—as required by the nuisance claim at issue in the *AEP* case.[146]

As noted above,[147] Justice Kennedy described equal footing lands—those conveyed under federal trust to the state as part of statehood and now subject to the public trust doctrine—as implicating unique sovereign interests.[148] The Supreme Court earlier referred to sovereign ownership of lands submerged beneath navigable waters as "an incident of sovereignty."[149]

State courts agree that the public trust doctrine implicates unique and inherent sovereign interests. For example, the Washington Supreme Court has repeatedly declared that the "doctrine has always existed in Washington law."[150] The Pennsylvania Supreme Court recently expressed similar sentiments when construing that state's constitutional amendment codifying the public trust doctrine: "The Declaration of Rights assumes that the rights of the people articulated in Article I of our Constitution … are inherent in man's nature and preserved rather than created by the Pennsylvania Constitution."[151] The Hawaiian Supreme Court has also described its constitutionally grounded public trust doctrine as "an inherent attribute of sovereign authority that the government … "cannot surrender.'"[152] As in *Illinois Central*, the Hawaiian court rejected legislative extinguishment of the trust.[153]

Many other state courts have expressly articulated the basic understanding that the public trust doctrine is an inherent attribute of sovereignty that cannot be legislatively abrogated.[154] These include the Nevada Supreme Court,[155] the South Dakota Supreme Court,[156] and the Arizona Supreme Court,[157] among others.[158] As the federal District Court of Massachusetts stated when

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[146] *See AEP*, 131 S. Ct. at 2534.
[147] *See supra* note 41 and accompanying text.
[148] *Coeur d' Alene Tribe*, 521 U.S. 261, 284 (1996).
[149] Montana v. United States, 450 U.S. 544, 551 (1981) ("The ownership of land under navigable waters is an incident of sovereignty.").
[150] Citizens for Responsible Wildlife Mgmt. v. State, 103 P.3d 203, 208 (Wash. 2004) (Quinn-Brintall, J., concurring); Weden v. San Juan Cnty., 958 P.2d 273, 283 (Wash. 1998); Caminiti v. Boyle, 732 P2d. 989, 994 (Wash. 1987); Orion Corp. v. State, 747 P.2d 1062, 1072 (Wash. 1987).
[151] Robinson Twp. v. Commonwealth, 83 A.3d 901, 948 (Pa. 2013) (plurality opinion).
[152] *In re* Water Use Permit Applications, 9 P.3d 409, 443 (Haw. 2000).
[153] *Id.* at 442-43 ("The further suggestion that such a statute could extinguish the public trust, however, contradicts the doctrine's basic premise, that the state has certain powers and duties which it cannot legislatively abdicate.").
[154] *See infra* notes 155-158 and accompanying text.
[155] Lawrence v. Clark Cnty., 254 P.3d 606 (Nev. 2011) ("As an initial matter, we note that the public trust doctrine is not simply a common law remnant. Indeed, in addition to the Nevada caselaw discussed above, public trust principles are contained in Nevada's Constitution and statutes and are inherent from inseverable restraints on the state's sovereign power.").
[156] Parks v. Cooper, 676 N.W.2d 823, 837 (S.D. 2004) ("History and precedent have established the public trust doctrine as an inherent attribute of sovereign authority.").
[157] San Carlos Apache Tribe v. Superior Court, 972 P.2d 179, 199 (Ariz. 1999) ("The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people… . The Legislature cannot by legislation destroy the constitutional limits on its authority.").
[158] *See supra* note 10; *see also* Arizona Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 168 (Ariz. App. 1991) ("From *Illinois Central* we derived the propositions that the state's responsibility to administer its watercourse lands for the public benefit is an inabrogable attribute of statehood itself … [and that] the state must administer its interest in lands subject to the public trust consistently with trust purposes."); Karam v. Dep't of Envtl. Protection, 705

recognizing the trust's applicability to both the federal and state governments, the trust "can only be destroyed by the destruction of the sovereign."[159] And more than a century ago, the U.S. Supreme Court characterized sovereign controls over the taking of wildlife as an "attribute of government … which was thus recognized and enforced by the common law of England … passed to the States with separation from the mother country, and remains in them at the present day."[160] The Court did not hesitate to recognize a public trust in such common property resources:

> Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people … .[161]

This widespread judicial recognition that the public trust doctrine is inherent in sovereignty makes statutory displacement of the doctrine beyond legislative authority.

VI. Federal Recognition of the Public Trust Doctrine

There is, in fact, widespread recognition of the existence of the federal public trust doctrine, particularly with respect to federal public lands.[162] This acknowledgement is reflected both in case law and in federal statutes.[163]

A. Federal Case Law

Several Supreme Court decisions have recognized a public trust obligation in the federal government's management of public lands.[164] The Court first acknowledged the applicability of the public trust doctrine in 1890—two years before the *Illinois Central* decision—in a case

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A.2d 1221, 1228 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 723 A.2d 943, *cert. denied*, 528 U.S. 814 (1999), *abrogated in part on other grounds in* Panetta v. Equity One, Inc., 920 A.2d 638, 646 (N.J. 2007) ("The sovereign never waives its right to regulate the use of public trust property."); State v. Central Vt. Ry., 571 A.2d 1128, 1136 (Vt. 1989), *cert. denied*, 495 U.S. 931 (1990) ("[Public trust claims] cannot be barred through either laches or estoppel… . The state acts as administrator of the public trust and has a continuing power that extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust.") (internal quotation marks omitted).

[159] United States v. 1.58 Acres of Land, 523 F. Supp. 120, 124 (D. Mass. 1981).

[160] Geer v. Conn., 161 U.S. 519, 527-28 (1896).

[161] *Id.* at 529.

[162] *But see* Eric Pearson, *The Public Trust Doctrine in Federal Law*, 24 J. Land Resources & Envtl. L. 173, 174 (2004) (suggesting that the public trust doctrine exists "only nominally" in federal law).

[163] *See infra* Part VI.A-B.

[164] For a survey of the federal case law acknowledging the public trust authority in the public lands context, *see* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev. 269, 279-80 (1980); Susan D. Baer, *The Public Trust Doctrine—A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources*, 15 B.C. Envtl. Aff. L. Rev. 385, 391 (1988) (both noting that in the mid-nineteenth century the federal government saw its role as merely a temporary custodian of public lands intended for sale, but federal policy began to change during the last quarter of the nineteenth century toward the protection and management of public property for future generations). *See also* George C. Coggins & Robert L. Glicksman, 1 Public Natural Resources Law § 2:10-15 (2nd ed. 2007) (observing that in the beginning of the twentieth century, congressional policy shifted towards government retention of remaining public lands).

involving public coal lands in Colorado.[165] The Court stated that "in the matter of disposing of the vacant coal lands of the United States, the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value… . [These lands] were held in trust for all the people … ."[166] The following year the Court referred to the Secretary of the Interior as the "guardian of the people of the United States over the public lands," noting that the "obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted."[167] In upholding the application of the Unlawful Enclosures Act[168] to prevent a landowner from enclosing public lands, the Court observed that Congress "would be recreant in its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain."[169] The public trust as an anti—monopolization doctrine is thus quite evident in public land law.[170]

In 1911, the Court reiterated that "all public lands of the nation are held in trust for the people of the whole country" in a case upholding the federal Forest Service's authority to impose criminal sanctions against violators of its grazing regulations, even though the regulations imposed fencing rules inconsistent with state law.[171] The Court viewed the alternative to trust management of the public lands—that is, proprietary management—as unpalatable in a nation that had rejected the special privileges associated with Royal management of public lands in aristocratic England: "the United States does not and cannot hold property as a monarch may, for private and personal purposes."[172]

Consequently, the federal public land trust is the vehicle to ensure that federal land management reflects the republican values that animated the American Revolution,[173] not the monopolistic practices that characterized Royal public land management.[174] As the Court later stated:

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165 United States v. Trinidad Coal & Coking Co., 137 U.S. 160 (1890).
166 *Id.* at 170.
167 Knight v. U.S. Land Ass'n, 142 U.S. 161, 181 (1891).
168 43 U.S.C. §§1061-1066 (2012).
169 Camfield v. United States, 167 U.S. 518, 524 (1897).
170 In addition to the federal cases discussed here, the Department of Interior has recently recognized its role as trustee of the public lands under its jurisdiction. Interior Secretary Sally Jewell stated, in reference to new regulations requiring detailed information from the oil and gas industry on hydraulic fracturing operations; "We really are upholding the public trust here … . There's a lot of fear, a lot of public concern, particularly about groundwater and the safety of water supplies … I think the industry recognizes that thoughtful regulation can help them, because it reassures the public that we're protecting them." *See* Kate Sheppard, *Department Of Interior Issues New Rules For Fracking On Public Lands*, Huffington Post (Mar. 20, 2015), *available at* http://www.huffingtonpost.com/2015/03/20/fracking-public-land-rule_n_6910922.html. The Department cited authority for the rules in the Federal Public Lands Management Act.80 Fed. Reg. 16,141 (Mar. 26, 2015) (citing 43 U.S.C. § 1740).
171 Light v. United States, 220 U.S. 523, 537 (1911) (quoting United States v. Trinidad Coal & Coking Co., 137 U.S. 160 (1890)).
172 *Id.* at 536 (quoting Van Brocklin v. Tennessee, 117 U.S. 151, 158 (1886)).
173 See Dale D. Goble, *Three Cases/Four Tales: Commons, Capture, the Public Trust, and Property in Land*, 35 Envtl. L. 807, 833 (2005).
174 *See id.* at 832.

> The United States holds resources and territory in trust for its citizens in one sense, but not in the sense that a private trustee holds for [a private beneficiary]. The responsibility of Congress is to utilize the assets that come into its hands as sovereign in the way that it decides is best for the future of the Nation.[175]

Creating the kind of monopolies characteristic of Royal management would presumably violate the trust responsibility and trigger judicial oversight.

[175] Alabama v. Texas, 347 U.S. 272, 277 (1954) (Reed, J., concurring) (holding that Congress had authority to dispose of property belonging to the United States without limitation and denying states leave to file complaints challenging the constitutional validity of the Submerged Lands Act of 1953).

CLASS 9 READINGS

(read after notes following *British Columbia v. Canadian Forest Products Ltd.* on page 364)

The State of the Netherlands (Ministry Of Infrastructure And The Environment) V. Urgenda Foundation

THE HAGUE COURT OF APPEAL, Civil-law Division
ECLI:NL:RBDHA:2015:7196 (2018)

ASSESSMENT OF THE APPEAL

Introduction of the dispute and the factual framework

1. In brief, the proceedings on appeal in this climate case concern Urgenda's claim to order the State to achieve a level of reduction of greenhouse gas emissions by end-2020 that is more ambitious than envisioned by the State in its policy.

* * *

(3.1) Urgenda ('Urgent Agenda') is a citizens' platform with members from various domains in society. The platform is involved in the development of plans and measures to prevent climate change. Urgenda is a foundation whose purpose, according to its by-laws, is to stimulate and accelerate the transition processes to a more sustainable society, beginning in the Netherlands.

* * *

(3.8) Urgenda is of the opinion that the reduction efforts, at least those covering the period up to 2020, are not ambitious enough and claimed in the first instance – among other things – that the State be ordered to achieve a reduction so that the cumulative volume of the greenhouse gas emissions will have been reduced by 40%, or at least by 25%, by end-2020, relative to 1990.

(3.9) In brief, the district court ordered a reduction of at least 25% as of end-2020 relative to 1990 and rejected all other claims of Urgenda. Urgenda did not put forward grounds of appeal against the rejection of the other claims nor against the rejection of a reduction of more than 25%. This means that in these appeal proceedings, a reduction of more than at least 25% by 2020 cannot be awarded and that the other claims of Urgenda are no longer in dispute.

Treaties, international agreements, policy proposals and actual situation

* * *

The IPCC
12. In the context of these proceedings, the following [Intergovernmental Panel on Climate Change (IPCC)] reports are particularly important:

AR4 (IPCC Fourth Assessment Report, 2007):
This report describes that global warming of more than 2º C results in a dangerous and irreversible climate change. To have a chance of more than 50% ('more likely than not') that the 2º C threshold is not exceeded, the report states that the concentration of greenhouse gases in the atmosphere must

stabilise at a level of about 450 ppm in 2100 (hereinafter: the '450 scenario'). Following an analysis of several reduction scenarios, the IPCC arrives at the conclusion in this report (see Box 13.7) that in order to achieve the 450 scenario, the total emission of greenhouse gases by [developed countries as determined by the United Nations Framework Convention on Climate Change (Annex I countries)], including the Netherlands, in 2020 must be 25-40% lower than in 1990. This report also describes that mitigation is generally better than adaptation.

AR5 (IPCC Fifth Assessment Report, 2013-2014):
According to this report, there is a 'likely' (> 66%) chance that the rise of the global temperature can stay below 2° C when the concentration of greenhouse gases in the atmosphere in 2100 stabilises at about 450 ppm. This scenario seems more advantageous than the projection of AR4, in which the chances of achieving the 2° C target at a concentration level of 450 ppm is assessed at 'more likely than not' (> 50%). However, it should be noted that in 87% of the scenarios included in the AR5 assessment assumptions have been included with respect to negative emissions, that is to say the extraction of CO2 from the atmosphere. AR4 does not assume negative emissions. Stabilisation at about 500 ppm in 2100 gives a more than 50% chance ('more likely than not') to achieve the 2° C target. Only a limited number of studies has looked at scenarios that lead to a limitation of global warming to 1.5º C. Such scenarios assume concentrations of less than 430 ppm in 2100.

*** * ***

Urgenda's claim and its basis (in brief)

27. As has been considered above in legal grounds 3.8 and 3.9, the appeal proceedings concern Urgenda's claim, allowed by the district court, that the State be ordered to achieve a reduction so that the cumulative volume of Dutch greenhouse gas emissions will have been reduced by at least 25% by end-2020, relative to the year 1990…

28. Urgenda largely agrees with the court's judgment. Urgenda believes that the State is doing too little to limit greenhouse gas emissions and that it should assume its responsibility. Urgenda believes that much is at stake (dangerous climate change) and that without swift intervention the world is headed for a planet that will largely be inhabitable for a substantial portion of the world population, and which cannot or hardly be made inhabitable due to inertia in the climate system. In this context, Urgenda refers to authoritative publications, mainly AR4 and AR5 of the IPCC, which have been extensively set out in the judgment.

Urgenda acknowledges that this is a global problem, that the State can only intervene in the emissions from Dutch territory and that in absolute terms the Dutch emissions are minor and that the reduction it has claimed represents a drop in the ocean on a global scale, considering that the climate problem is a worldwide issue. On the other hand, or so Urgenda continues to argue, the Netherlands is a rich and developed country, an Annex I country in terms of the UN Climate Convention, that has profited from the use of fossil energy sources since the Industrial Revolution, and continues to profit from them today, that the Netherlands is one of the countries with the highest per capita greenhouse gas emissions in the world — mainly of dangerous CO2, which lingers long in the atmosphere — and that the signing and ratification of the UN Climate Convention by the Netherlands should not be a mere formality. For reasons of equity, the

Convention stipulates that the developed countries should take the lead… at a national level. Furthermore, Urgenda points out that up to 2011 the Netherlands had taken as a starting point its own formulated reduction target of 30% by end-2020. This was then reduced to an – EU-wide – reduction target of only 20% by end-2020, apparently due to tough political decision-making. However, the State failed to specify any scientific (climate science) arguments for this reduction. Meanwhile… the Netherlands has committed to achieve a reduction of greenhouse gas emissions in order to stay well below the 2° C limit for global warming. The Netherlands also expressed its intention to aim for a global warming limit of 1.5° C and called for a strengthening of reduction efforts up to 2020. The State cannot shirk its responsibility with the argument that in absolute terms its emissions are minor. Considering the major risks associated with uncontrollable climate change, the duty of care of the State requires it to take measures forthwith.

29. In view of all of the above, and particularly the State's 'procrastination', meaning its failure to commit to a greater emission reduction by end-2020, Urgenda is of the opinion that the State has acted unlawfully towards it, because such conduct violates proper social conduct and is contrary to the positive and negative duty of care expressed in Articles 2 (the right to life) and 8 [of the European Convention on Human Rights (ECHR)] (the right to family life, which also covers the right to be protected from harmful environmental influences of a nature and scope this serious).

* * *

Articles 2 and 8 ECHR and the State's plea of (partial) inadmissibility

*** * ***

40. The interest protected by Article 2 ECHR is the right to life, which includes environment-related situations that affect or threaten to affect the right to life. Article 8 ECHR protects the right to private life, family life, home and correspondence. Article 8 ECHR may also apply in environment-related situations. The latter is relevant if (1) an act or omission has an adverse effect on the home and/or private life of a citizen and (2) if that adverse effect has reached a certain minimum level of severity.

41. Under Articles 2 and 8 ECHR, the government has both positive and negative obligations relating to the interests protected by these articles, including the positive obligation to take concrete actions to prevent a future violation of these interests (in short: a duty of care). A future infringement of one or more of these interests is deemed to exist if the interest concerned has not yet been affected, but is in danger of being affected as a result of an act/activity or natural event. As regards an impending violation of an interest protected under Article 8 ECHR, it is required that the concrete infringement will exceed the minimum level of severity…

42. Regarding the positive obligation to take concrete actions to prevent future infringements – which according to the claim is applicable here – the European Court of Human Rights has considered that Articles 2 and 8 ECHR have to be explained in a way that does not place an 'impossible or disproportionate burden' on the government. This general limitation of the positive obligation, which applies here, has been made concrete by the European Court of Human Rights by ruling that the government only has to take concrete actions which are reasonable and for which it is authorised in the case of a real and imminent threat, which the government knew or ought to

have known. The nature of the (imminent) infringement is relevant in this. An effective protection demands that the infringement is to be prevented as much as possible through early intervention of the government. The government has a 'wide margin of appreciation' in choosing its measures.

43. In short, the State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right to home and private life. This obligation applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous. If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible. In light of this, the Court shall assess the asserted (imminent) climate dangers.

*** * ***

45. * * * [T]he Court believes that it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life. As has been considered above by the Court, it follows from Articles 2 and 8 ECHR that the State has a duty to protect against this real threat.

Is the State acting unlawfully by not reducing by at least 25% by end-2020?

46. The end goal is clear and is not disputed between the parties. By the year 2100, global greenhouse gas emissions must have ceased entirely. Nor do the parties hold differing opinions as to the required interim target of 80-95% reduction relative to 1990 by 2050. And Urgenda endorses the reduction target of 49% relative to 1990 by 2030, as established by the government. The dispute between the parties focuses on the question if the State can be required to achieve a reduction of at least 25% relative to 1990 by end-2020. Urgenda is of the opinion that such a reduction is necessary to protect the citizens of the Netherlands against the real and imminent threats of climate change. But the State does not want to commit to more than the 20% reduction relative to 1990 by 2020, as agreed at the EU level. It has to be examined whether the State is acting unlawfully towards Urgenda by not reducing by at least 25% by end-2020 despite the real and imminent threats mentioned above. The following considerations are relevant in this context.

47. In the first place, the Court takes as a point of departure that the emission of all greenhouse gases combined in the Netherlands had dropped by 13%, relative to 1990, in 2017… It is also an established fact that it is desirable to start the reduction efforts at as early a stage as possible in order to limit the total emissions in this period. Delaying the reduction will lead to greater risks for the climate. A delay would, after all, allow greenhouse gas emissions to continue in the meantime; greenhouse gases which linger in the atmosphere for a very long time and further contribute to global warming… An even distribution of reduction efforts over the period up to 2030 would mean that the State should achieve a substantially higher reduction in 2020 than 20%. An even distribution is also the starting point of the State for its reduction target of 49% by 2030, which has been derived in a linear fashion from the 95% target for 2050. If extrapolated to the present, this would result in a 28% reduction by 2020, as confirmed by the State in answering the Court's questions.

48. In AR4, the IPCC concluded that a concentration level not exceeding 450 ppm in 2100 is admissible to keep the 2º C target within reach. The IPCC then concluded, following an analysis of the various reduction scenarios, that in order to reach this concentration level, the total greenhouse gas emissions in 2020 of Annex I countries, of which the Netherlands is one, must be 25-40% lower than 1990 levels. In AR5, the IPCC also assumes that a concentration level of 450 ppm may not be exceeded in order to achieve the 2º C target.

49. The State has argued that in AR5 multiple emission reduction pathways are presented with which this target may be reached. Based on this, the State is of the opinion that the district court was wrong to take a 25-40% reduction by 2020, as mentioned in AR4, as a starting point. The Court does not endorse the position of the State in this…87% of the scenarios presented in AR5 are based on the existence of negative emissions. In the report of the European Academies Science Advisory Council ('Negative emission technologies: What role in meeting Paris Agreement targets?')… the following is noted about negative emissions:

> *"(...)We conclude that these technologies* [Court: negative emission technologies, or NETs] *offer only limited realistic potential to remove carbon from the atmosphere and not at the scale envisaged in some climate scenarios (...)"* (p. 1)*"Figure 1 shows not only the dramatic reductions required, but also that there remains the challenge of reducing sources that are particularly difficult to avoid (these include air and marine transport, and continued emissions from agriculture). Many scenarios to achieve Paris Agreement targets have thus had to hypothesise that there will be future technologies which are capable of removing CO2 from the atmosphere.*" (p. 5) "*(...) the inclusion of CDR* [Court: removal of CO2 from the atmosphere] *in scenarios is merely a projection of what would happen if such technologies existed. It does not imply that such technologies would either be available, or would work at the levels assumed in the scenario calculations. As such, it is easy to misinterpret these scenarios as including some judgment on the likelihood of such technologies being available in the future.*" (p. 5)

The State has failed to contest this by not providing adequate substantiation. Therefore, the Court assumes that the option to remove CO2 from the atmosphere with certain technologies in the future is highly uncertain and that the climate scenarios based on such technologies are not very realistic considering the current state of affairs. AR5 might thus have painted too rosy a picture, and it cannot be assumed outright that the 'multiple mitigation pathways' listed by the IPCC in AR5 (p. 20) can lead to the 2º C target. Furthermore, as asserted by Urgenda and not contested by the State by stating reasons, it is plausible that no reduction percentages as of 2020 were included in AR5, because in 2014 the focus of the IPCC was on targets for 2030. In this respect too, the report does not give cause to assume that the reduction scenario in AR4, which does not take account of negative emissions, is superseded and that today a reduction of less than 25-40% by 2020 would be sufficient to achieve the 2º C target. In order to assess whether the State has met its duty of care, the Court shall take as a starting point that an emission reduction of 25-40% in 2020 is required to achieve the 2º C target.

50. Incidentally, the 450-scenario only offers a more than 50% ('more likely than not') chance to achieve the 2º C target. A real risk remains, also with this scenario, that this target cannot be achieved. It should also be noted here that climate science has meanwhile acknowledged that a

safe temperature rise is 1.5º C rather than 2º C. This consensus has also been expressed in the Paris Agreement, in which it was agreed that global warming should be limited to well below 2º C, with an aim for 1.5º C. The ppm level corresponding with the latter target is 430, which is lower than the level of 450 ppm of the 2º C target. The 450-scenario and the identified need to reduce CO2 emissions by 25-40% by 2020 are therefore not overly pessimistic starting points when establishing the State's duty of care.

51. The State has known about the reduction target of 25-40% for a long time. The IPCC report which states that such a reduction by end-2020 is needed to achieve the 2º C target (AR4) dates back to 2007. Since that time, virtually all COPs (in Bali, Cancun, Durban, Doha and Warsaw) have referred to this 25-40% standard and Annex I countries have been urged to align their reduction targets accordingly. This may not have established a legal standard with a direct effect, but the Court believes that it confirms the fact that at least a 25-40% reduction of CO2 emissions as of 2020 is required to prevent dangerous climate change.

52. Finally, it is relevant noting that up to 2011 the Netherlands had adopted as its own target a reduction of 30% in 2020… That was, as evidenced by the letter from the Minister of Housing, Spatial Planning and the Environment dated 12 October 2009, because the 25-40% reduction was necessary '*to stay on a credible track to keep the 2 degrees objective within reach*'. No other conclusion can be drawn from this than that the State itself was convinced that a scenario in which less than that would be reduced by 2020 was not feasible. The Dutch reduction target for 2020 was subsequently adjusted downwards. But a substantiation based on climate science was never given, while it is an established fact that postponing (higher) interim reductions will cause continued emissions of CO2, which in turn contributes to further global warming. More specifically, the State failed to give reasons why a reduction of only 20% by 2020 (at the EU level) should currently be regarded as credible, for instance by presenting a scenario which proves how – in concert with the efforts of other countries – the currently proposed postponed reduction could still lead to achieving the 2º C target. The EU itself also deemed a reduction of 30% for 2030 necessary to prevent dangerous climate change…

53. The Court is of the opinion that a reduction obligation of at least 25% by end-2020, as ordered by the district court, is in line with the State's duty of care. However, the State has put forward several arguments… based on which it is of the opinion that it is nevertheless not obliged to take further reduction measures other than those it currently proposes. Insofar as not discussed above, the Court shall now assess these arguments.

Defences of the State

* * *

62. * * * The Court… acknowledges that this is a global problem and that the State cannot solve this problem on its own. However, this does not release the State from its obligation to take measures in its territory, within its capabilities, which in concert with the efforts of other states provide protection from the hazards of dangerous climate change.

63. The precautionary principle, a generally accepted principle in international law included in the United Nations Framework Convention on Climate Change and confirmed in the case-law of the European Court of Human Rights (*Tătar/Romania*, ECtHR 27 January 2009, no. 67021/01 section 120), precludes the State from pleading that it has to take account of the uncertainties of climate change and other uncertainties (for instance in ground of appeal 8). Those uncertainties could after all imply that, due to the occurrence of a 'tipping point' for instance, the situation could become much worse than currently envisioned. The circumstance that full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking therefore does not mean that the State is entitled to refrain from taking further measures. High plausibility, as described above, suffices.

*** * ***

Conclusion

71. To summarise, from the foregoing it follows that up till now the State has done too little to prevent a dangerous climate change and is doing too little to catch up, or at least in the short term (up to end-2020). Targets for 2030 and beyond do not take away from the fact that a dangerous situation is imminent, which requires interventions being taken now. In addition to the risks in that context, the social costs also come into play. The later actions are taken to reduce, the quicker the available carbon budget will diminish, which in turn would require taking considerably more ambitious measures at a later stage, as is acknowledged by the State…, to eventually achieve the desired level of 95% reduction by 2050. In this context, the following excerpt from AR5… is also worth noting: *"(...) Delaying mitigation efforts beyond those in place today through 2030 is estimated to substantially increase the difficulty of transition to low-longer-term emissions levels and narrow the range of options consistent with maintaining temperature change below 2º C relative to pre-industrial levels."*

72. Neither can the State hide behind the reduction target of 20% by 2020 at the [European Union (EU)] level. First of all, also the EU deems a greater reduction in 2020 necessary from a climate science point of view. In addition, the EU as a whole is expected to achieve a reduction of 26-27% in 2020; substantially more than the agreed on 20%. The Court has also taken into consideration that in the past the Netherlands, as an Annex I country, acknowledged the severity of the climate situation time and again and, mainly based on arguments from climate science, for years assumed a reduction of 20-45% by 2020, with a concrete policy objective of 30% by that year. After 2011, this policy objective was adjusted downwards to 20% by 2020 at the EU level, without any scientific substantiation and despite the fact that more and more became known about the serious consequences of greenhouse gas emissions for global warming.

73. Based on this, the Court is of the opinion that the State fails to fulfill its duty of care pursuant to Articles 2 and 8 ECHR by not wanting to reduce emissions by at least 25% by end-2020. A reduction of 25% should be considered a minimum, in connection with which recent insights about an even more ambitious reduction in connection with the 1.5° C target have not even been taken into consideration. In forming this opinion, the Court has taken into consideration that based on the current proposed policy the Netherlands will have reduced 23% by 2020. That is not far from 25%, but a margin of uncertainty of 19-27% applies. This margin of uncertainty means that there

is real chance that the reduction will be (substantially) lower than 25%. Such a margin of uncertainty is unacceptable. Since moreover there are clear indications that the current measures will be insufficient to prevent a dangerous climate change, even leaving aside the question whether the current policy will actually be implemented, measures have to be chosen, also based on the precautionary principle, that are safe, or at least as safe as possible. The very serious dangers, not contested by the State, associated with a temperature rise of 2° C or 1.5° C – let alone higher – also preclude such a margin of uncertainty…

74. …The Court furthermore points out that the State does have this margin in choosing the measures it takes to achieve the target of a minimum reduction of 25% in 2020.

* * *

76. All of the above leads to the conclusion that the State is acting unlawfully (because in contravention of the duty of care under Articles 2 and 8 ECHR) by failing to pursue a more ambitious reduction as of end-2020, and that the State should reduce emissions by at least 25% by end-2020.

Notes

1. In 2015, an appellate court in Pakistan similarly relied on fundamental legal principals to direct the national government to take action on climate change. *Leghari v. Federation of Pakistan*, W.P. No. 25501/201 (2015). Plaintiff, Pakistani farmer Ashgar Leghari, sued the Pakistan government for inaction and failure to implement the National Climate Change Policy, 2012 and the Framework for Implementation of Climate Change Policy (2014-2030). Leghari alleged that the inaction of the Ministry of Climate Change and other government agencies violated his fundamental rights under the Pakistan Constitution and also invoked international environmental principles such as the public trust doctrine, sustainable development, precautionary principle, and intergenerational equity. The court ruled in favor of the plaintiff, finding that "the delay and lethargy of the State in implementing the Framework offends the fundamental rights of the citizens which need to be safeguarded." *Id.* Further, the court directed government ministries, departments, and authorities to nominate "a climate change focal person" to work with the Ministry of Climate Change in order to ensure the implementation of the Framework. *Id.* In a supplemental 2015 decision, the court also named 21 individuals to a Climate Change Commission, comprised of individuals from governmental ministries and departments, non-government organizations, and technical experts, to monitor the government's progress in implementing the framework. On January 25, 2018 the same court acknowledged the Climate Change Commission's report noting, in part, that between September 2015 and January 2017, 66 percent of the priority actions from the Framework were addressed. To review any of the three decisions in English, *see Leghari v. Federation of Pakistan*, Climate Case Chart: Non-U.S. Litigation, http://climatecasechart.com/non-us-case/ashgar-leghari-v-federation-of-pakistan/.

2. A recent lawsuit in India has invoked the public trust doctrine, to allege that the Government of India has failed to mitigate climate change. In addition, nine-year-old Ridhima Pandey's March 2017 petition before the National Green Tribunal based allegations on India's

Constitution, intergenerational equality, and a failure to enforce a select number of environmental laws. *Ridhima Pandey v. Union of India & Ors.*, Original Application No. 187/2017 (National Green Tribunal, Court No. 1 2019). The National Green Tribunal is a court specially designed for environmental disputes under a 2010 law. *See* National Green Tribunal, http://www.greentribunal.gov.in/ (last visited May 27, 2019). The petition was dismissed on January 15, 2019. The court, found that "[t]here is no reason to presume that Paris Agreement and other international protocols are not reflected in the policies of the Government of India or are not taken into consideration in granting environment clearances." Early indications are that Ridhima and her team plan to appeal the dismissal to the Supreme Court of India. *See India*, Our Children's Trust: Global Legal Actions, https://www.ourchildrenstrust.org/india. English versions of the opinion are available on the National Green Tribunal Website or at the following link. https://static1.squarespace.com/static/571d109b04426270152febe0/t/5cb424defa0d60178b2900b6/1555309792534/2019.01.15.NGT+Order-Pandey+v.+India.pdf.

3. For a broader discussion on how the public trust doctrine is applied in India, *see* Robert Verchick, *A Conversation about the Public Trust in India: Public Participation, Climate Adaptation, and India's 2G Network*, Center for Progressive Reform (Dec. 3, 2012), http://www.progressivereform.org/CPRBlog.cfm?idBlog=612C3B8C-AB0E-C2F9-F3EE8EAC3404DAE9.

4. For an argument that New Zealand inherited the public trust doctrine as part of the common law and has not been displaced by statutes, *see* N. J. Hulley, *New Zealand's Public Trust Doctrine* (Victoria U. of Wellington LLM Thesis 2018) (maintaining that the doctrine imposes "a higher norm" on administrative decision making"

5. One commentator described the public trust doctrine in Australia as a "sleeping doctrine" that has survived the development of Anglo-Australian common law with recognition of public rights in seashore and tidal waters. For a closer look at the similarity of language used by United States courts and Australian courts when delineating the public trust in navigable waters and tidal fisheries *see* Gary D. Meyers, *Divining Common Law Standards for Environmental Protection: Application of the Public Trust Doctrine in the Context of Reforming NEPA and the Commonwealth Environmental Protection Act*, 11 Environmental and Planning Law 289, 297 (1994). "To date, there has been only limited consideration of the potential applicability of the public trust doctrine to an Australian environmental litigation and policy context and limited opportunity for Australian judges to consider its applicability." Jacqueline Peel, Hari Osofsky, and Anita Foerster, *Shaping the 'Next Generation' of Climate Change Litigation in Australia*, 41 Melb. U. L. Rev. 793, 844 (2017) (footnote 94). For an argument of how United States precedent can drive the application of the public trust doctrine to the coastal areas of Australia, *see* Bruce Thom, *Climate Change, Coastal Hazards and the Public Trust Doctrine*, 8 Macquarie Journal of International and Comparative Environmental Law 21 (2012).

6. For a review of international PTD cases in 2017, *see* Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit:" Climate Change, Due Process, and the Public Trust Doctrine*, 67

American L. Rev. 1, 78-84 (2017) (discussing cases from The Philippines, India, The Netherlands, Pakistan, and Ukraine).

CLASS 10 READINGS

(read after notes following *Angela Bosner-Lain, et al. v. Texas Commission on Environmental Quality* on page 399)

Juliana v. United States

United States District Court for the District of Oregon, Eugene Division
217 F.Supp.3d 1224 (2016)

AIKEN, J:

Plaintiffs in this civil rights action are a group of young people between the ages of eight and nineteen ("youth plaintiffs"); Earth Guardians, an association of young environmental activists; and Dr. James Hansen, acting as guardian for future generations. Plaintiffs filed this action against defendants the United States, President Barack Obama, and numerous executive agencies. Plaintiffs allege defendants have known for more than fifty years that the carbon dioxide ("CO_2") produced by burning fossil fuels was destabilizing the climate system in a way that would "significantly endanger plaintiffs, with the damage persisting for millenia." Despite that knowledge, plaintiffs assert defendants, "[b]y their exercise of sovereign authority over our country's atmosphere and fossil fuel resources, . . . permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels, . . . deliberately allow[ing] atmospheric CO_2 concentrations to escalate to levels unprecedented in human history[.]" Although many different entities contribute to greenhouse gas emissions, plaintiffs aver defendants bear "a higher degree of responsibility than any other individual, entity, or country" for exposing plaintiffs to the dangers of climate change. Plaintiffs argue defendants' actions violate their substantive due process rights to life, liberty, and property, and that defendants have violated their obligation to hold certain natural resources in trust for the people and for future generations.

Plaintiffs assert there is a very short window in which defendants could act to phase out fossil fuel exploitation and avert environmental catastrophe. They seek (1) a declaration their constitutional and public trust rights have been violated and (2) an order enjoining defendants from violating those rights and directing defendants to develop a plan to reduce CO_2 emissions.

Magistrate Judge Coffin issued his Findings and Recommendation ("F&R") and recommended denying the motions to dismiss.Judge Coffin then referred the matter to me for review pursuant to *28 U.S.C. § 636* and *Federal Rule of Civil Procedure 72*…

For the reasons set forth below, I adopt Judge Coffin's F&R as elaborated in this opinion and deny the motions to dismiss.

* * *

This lawsuit is not about proving that climate change is happening or that human activity is driving it. For the purposes of this motion, those facts are undisputed. The questions before the Court are whether defendants are responsible for some of the harm caused by climate change, whether plaintiffs may challenge defendants' climate change policy in court, and whether this Court can direct defendants to change their policy without running afoul of the separation of powers doctrine.

* * *

The Magistrates Act authorizes a district court to "accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *28 U.S.C. § 636(b)(1)*. When a party objects to any portion of the magistrate's findings and recommendation, the district court must review *de novo* that portion of the magistrate judge's report. *Fed. R. Civ. P. 72(b)(3)*.

* * *

Judge Coffin recommended denying defendants' and intervenors' motions to dismiss and holding that plaintiffs' public trust and due process claims may proceed. Defendants and intervenors object to those recommendations on a number of grounds. They contend plaintiffs' claims must be dismissed for lack of jurisdiction because the case presents non-justiciable political questions, plaintiffs lack standing to sue, and federal public trust claims cannot be asserted against the federal government. They further argue plaintiffs have failed to state a claim on which relief can be granted. I first address the threshold challenges to jurisdiction, and then proceed to address the viability of plaintiffs' due process and public trust claims.

* * *

Questions about difficulty of proof, however, must be left for another day. At the motion to dismiss stage, I am bound to accept the factual allegations in the complaint as true. Plaintiffs have alleged that defendants played a significant role in creating the current climate crisis, that defendants acted with full knowledge of the consequences of their actions, and that defendants have failed to correct or mitigate the harms they helped create in deliberate indifference to the injuries caused by climate change. They may therefore proceed with their substantive due process challenge to defendants' failure to adequately regulate CO_2 emissions.

IV. *Public Trust Claims*

In its broadest sense, the term "public trust" refers to the fundamental understanding that no government can legitimately abdicate its core sovereign powers. *See Stone v. Mississippi, 101 U.S. 814, 820, 25 L. Ed. 1079, 1 Ky. L. Rptr. 146 (1879)* ("[T]he power of governing is a trust committed by the people to the government, no part of which can be granted away.") The public trust doctrine rests on the fundamental principle that "[e]very succeeding legislature possesses the same jurisdiction and power with respect to [the public interest] as its predecessors." *Newton v. Mahoning Cnty. Comm'rs, 100 U.S. 548, 559, 25 L. Ed. 710 (1879)*. The doctrine conceives of certain powers and obligations — for example, the police power — as inherent aspects of sovereignty. *Id. at 554*. Permitting the government to permanently give one of these powers to another entity runs afoul of the public trust doctrine because it diminishes the power of future legislatures to promote the general welfare.

Plaintiffs' public trust claims arise from the particular application of the public trust doctrine to essential natural resources. With respect to these core resources, the sovereign's public trust obligations prevent it from "depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens." Application of the public trust doctrine to natural resources predates the United States of America. Its roots are in the Institutes of Justinian, part of the Corpus Juris Civilis, the body of Roman law that is the "foundation for modern civil

law systems." The Institutes of Justinian declared "the following things are by natural law common to all — the air, running water, the sea, and consequently the seashore." J. Inst. 2.1.1 (J.B. Moyle trans.). The doctrine made its way to the United States through the English common law…

The first court in this country to address the applicability of the public trust doctrine to natural resources was the New Jersey Supreme Court, in 1821. The court explained that public trust assets were part of a taxonomy of property:

> Every thing susceptible of property is considered as belonging to the nation that possesses the country, as forming the entire mass of its wealth. But the nation does not possess all those things in the same manner. By very far the greater part of them are divided among the individuals of the nation, and become *private property*. Those things not divided among the individuals still belong to the nation, and are called *public property*. Of these, again, some are reserved for the necessities of the state, and are used for the public benefit, and those are called "*the domain of the crown or of the republic*," others remain common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use, and are called *common property*. Of this latter kind, according to the writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish, and the wild beasts.

Arnold v. Mundy, 6 N.J.L. 1, 71 (N.J. 1821) (emphasis in original).

The seminal United States Supreme Court case on the public trust is *Illinois Central Railroad Company v. Illinois*. The Illinois legislature had conveyed to the Illinois Central Railroad Company title to part of the submerged lands beneath the harbor of Chicago, with the intent to give the company control over the waters above the submerged lands "against any future exercise of power over them by the state." *Id. at 452*, The Supreme Court held the legislature's attempt to give up its title to lands submerged beneath navigable waters was either void on its face or always subject to revocation. *Id. at 453*. "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Id.* In light of the "immense value" the harbor of Chicago carried for the people of Illinois, the "idea that its legislature can deprive the state of control over its bed and waters, and place the same in the hands of a private corporation" could not "be defended." *Id. at 454*.

The natural resources trust operates according to basic trust principles, which impose upon the trustee a fiduciary duty to "protect the trust property against damage or destruction." George G. Bogert et al., Bogert's Trusts and Trustees, § 582 (2016). The trustee owes this duty equally to both current and future beneficiaries of the trust. *Restatement (Second) of Trusts § 183* (1959). In natural resources cases, the trust property consists of a set of resources important enough to the people to warrant public trust protection. *See* Mary C. Wood, A Nature's Trust: Environmental Law for a New Ecological Age 167-75 (2014). The government, as trustee, has a fiduciary duty to protect the trust assets from damage so that current and future trust beneficiaries will be able to enjoy the benefits of the trust. The public trust doctrine is generally thought to impose three types of restrictions on governmental authority:

> [F]irst, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses.

Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 477 (1970).

This lawsuit is part of a wave of recent environmental cases asserting state and national governments have abdicated their responsibilities under the public trust doctrine. *See, e.g., Alec L. v. Jackson, 863 F. Supp. 2d 11 (D.D.C. 2012)*; *Sanders-Reed ex rel. Sanders-Reed v. Martinez, 2015- NMCA 063, 350 P.3d 1221 (N.M. Ct. App. 2015)*; *Kanuk ex rel. Kanuk v. State, Dep 't of Natural Res., 335 P.3d 1088 (Alaska 2014)*; *Chernaik v. Kitzhaber, 263 Ore. App. 463, 328 P.3d 799 (Or. Ct. App. 2014)*. These lawsuits depart from the "traditional" public trust litigation model, which generally centers on the second restriction, the prohibition against alienation of a public trust asset, Instead, plaintiffs assert defendants have violated their duties as trustees by nominally retaining control over trust assets while actually allowing their depletion and destruction, effectively violating the first and third restrictions by excluding the public from use and enjoyment of public resources.

Defendants and intervenors argue the public trust doctrine has no application in this case. They advance four arguments: (1) the atmosphere, the central natural resource at issue in this lawsuit, is not a public trust asset; (2) the federal government, unlike the states, has no public trust obligations; (3) any common-law public trust claims have been displaced by federal statutes; and (4) even if there is a federal public trust, plaintiffs lack a right of action to enforce it. I address each contention in turn.

A. *Scope of Public Trust Assets*

The complaint alleges defendants violated their duties as trustees by failing to protect the atmosphere, water, seas, seashores, and wildlife. Defendants and intervenors argue plaintiffs' public trust claims fail because the complaint focuses on harm to the atmosphere, which is not a public trust asset. I conclude that it is not necessary at this stage to determine whether the atmosphere is a public trust asset because plaintiffs have alleged violations of the public trust doctrine in connection with the territorial sea.

The federal government holds title to the submerged lands between three and twelve miles from the coastlines of the United States. *See Restatement (Third) of The Foreign Relations Law of the United States § 511(a)* (1987) (international law permits a nation to claim as its territorial sea an area up to twelve miles from its coast); Presidential Proclamation of Dec. 27, 1988, No. 5928, 3 C.F.R. § 547 (1989) (President Reagan expanding United States' claim from three-mile territorial sea to twelve-mile territorial sea); *43 U.S.C. § 1312* (seaward boundary of a coastal state is "a line three geographical miles distant from its coast line"). Time and again, the Supreme Court has held that the public trust doctrine applies to "lands beneath tidal waters." *See Phillips Petroleum Co., 484 U.S. at 474* (discussing *Shively, 152 U.S. at 57* and *Knight v. U.S. Land Ass'n, 142 U.S. 161, 183 (1891)), 12 S. Ct. 258, 35 L. Ed. 974*; *Alabama v. Texas, 347 U.S. 272, 278, 74 S. Ct. 481, 98 L. Ed. 689 (1954)* (Black, J., dissenting) ("In ocean waters bordering our country, if nowhere else, day-to-day national power — complete, undivided, flexible, and immediately available — is an essential attribute of federal sovereignty."); *id. at 282* (Douglas, J., dissenting) ("Thus we are

dealing here with incidents of national sovereignty . . . . The authority over [the sea] can no more be abdicated than any of the other great powers of the Federal Government. It is to be exercised for the benefit of the whole."); *see also* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 556 (1970) (public trust law covers "that aspect of the public domain below the low-water mark on the margin of the sea and the great lakes, the waters over those lands, and the waters within rivers and streams of any consequence"). Because a number of plaintiffs' injuries relate to the effects of ocean acidification and rising ocean temperatures, they have adequately alleged harm to public trust assets.

B. *Applicability of Public Trust to the Federal Government*

Defendants and intervenors contend that in the United States, the public trust doctrine applies only to the states and not to the federal government. This argument rests primarily on a passing statement in *PPL Montana, LLC v. Montana, 565 U.S. 576, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012)*. A close examination of that case reveals that it cannot fairly be read to foreclose application of the public trust doctrine to assets owned by the federal government.

PPL Montana was not a public trust case. Its central concern was the equal footing doctrine. PPL Montana, LLC used three rivers flowing through the state of Montana for hydroelectric projects. *Id. at 580*. Montana sought rent for the use of the riverbeds, arguing it had gained title to the rivers pursuant to the equal footing doctrine when it became a state in 1889. *Id.* The Montana Supreme Court granted summary judgment on title to Montana. On writ of certiorari to the United States Supreme Court, review hinged on whether the rivers in question were "navigable" in 1889, because the "title consequences of the equal-footing doctrine" are that "[u]pon statehood, the State gains title within its borders to the beds of waters then navigable (or tidally influenced . . .)[.]" *Id. at 589-90*. The Court reversed and remanded, holding that the Montana courts had applied the wrong methodology for determining navigability.
In addition to its main argument that the rivers were navigable, Montana argued that denying it title to the riverbeds in dispute would "undermine the public trust doctrine." *Id. at 601*. The Supreme Court rejected this argument in short order:

> Unlike the equal-footing doctrine, . . . which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law, subject as well to the federal power to regulate vessels and navigation under the *Commerce Clause* and admiralty power. While equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, the contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.

Id. at 603 (citations omitted).

Defendants and intervenors take the phrase "the public trust doctrine remains a matter of state law," and interpret it in isolation to foreclose all federal public trust claims. That is not a plausible interpretation of *PPL Montana*. The Court was simply stating that federal law, not state law, determined whether Montana has title to the riverbeds, and that if Montana had title, state law would define the scope of Montana's public trust obligations. *PPL Montana* said nothing at all about the viability of federal public trust claims with respect to federally-owned trust assets.

In a string citation, *PPL Montana* cited *Coeur d'Alene, 521 U.S. at 285*, and *Appleby v. City of New York, 271 U.S. 364, 395, 46 S. Ct. 569, 70 L. Ed. 992 (1926)*, for the proposition that *Illinois Central* "was necessarily a statement of Illinois law." *132 S. Ct. at 1235*. That statement is not surprising given the nature of the public trust doctrine. Public trust obligations are inherent aspects of sovereignty; it follows that any case applying the public trust doctrine to a particular state is necessarily a statement of that state's law rather than a statement of the law of another sovereign, In *Coeur d'Alene*, the Supreme Court explained that even though *Illinois Central* interpreted Illinois law, its central tenets could be applied broadly (for example, to Idaho) because it "invoked the principle in American law recognizing the weighty public interests in submerged lands." *521 U.S. at 285*. The Court then detailed how the American public trust doctrine, which has diverged from the English public trust doctrine in important ways, has developed as "a natural outgrowth of the perceived public character of submerged lands, a perception which underlies and informs the principle that these lands are tied in a unique way to sovereignty." *Id. at 286*. There is no reason why the central tenets of *Illinois Central* should apply to another state, but not to the federal government.

Defendants and intervenors also contend recognizing a federal public trust claim is contrary to *United States v. 32.42 Acres of Land, More or Less, Located in San Diego County, California, 683 F.3d 1030, 1038 (9th Cir. 2012)*, which repeated *PPL Montana*'s statement that "the public trust doctrine remains a matter of state law" in concluding that the federal government's eminent domain powers trumped any state-law public trust concerns. That case did not foreclose a federal public trust claim, however, because the Ninth Circuit *expressly* declined to address the viability of the federal public trust the district court imposed on the federal government after it ruled the land could be taken pursuant to eminent domain. *Id. at 1033 & 1039 n.2*.

In 2012, the federal district court for the District of Columbia held the public trust doctrine does not apply to the federal government. *Alec L.* was substantially similar to the instant action: five youth plaintiffs and two environmental advocacy organizations sued a variety of heads of federal agencies, alleging the defendants had "wasted and failed to preserve and protect the atmosphere Public Trust asset." *863 F. Supp. 2d at 12*. The court dismissed the suit with prejudice, holding the plaintiffs' federal public trust claims were foreclosed by *PPL Montana*'s statement that "the public trust doctrine remains a matter of state law." *Id. at 15* (quoting *PPL Montana, 565 U.S. at 603*). The court also relied on the D.C. Circuit's observation that "'[i]n this country the public trust doctrine has developed almost exclusively as a matter of state law.'" *Id.*'" (quoting *District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1082, 243 U.S. App. D.C. 1 (D.C. Cir. 1984))*. In an unpublished memorandum decision, the D.C. Circuit affirmed, holding that "[t]he Supreme Court in *PPL Montana* . . . directly and categorically rejected any federal constitutional foundation for that doctrine, without qualification or reservation." *Alec L. ex rel. Loorz v. McCarthy, 561 F. App'x 7, 8 (D.C. Cir. 2014)*.

I am not persuaded by the reasoning of the *Alec L.* courts. As explained above, a close reading of *PPL Montana* reveals that it says nothing about the viability of federal public trust claims. And in *Air Florida*, the D.C. Circuit emphasized that "we imply no opinion regarding either the applicability of the public trust doctrine to the federal government or the appropriateness of using the doctrine to afford trustees a means for recovering from tortfeasors the cost of restoring public waters to their pre-injury condition." *750 F.2d at 1084*.

Two federal courts — the district courts for the Northern District of California and the District of Massachusetts — have concluded the public trust doctrine applies to the federal government. The decisions, from the 1980s, concerned the federal government's acquisition of various state-owned public trust assets — for example, submerged land beneath navigable rivers or tidelands — through the power of eminent domain. The courts held that the federal government has no public trust obligations under *state* law, but does take the land subject to a *federal* public trust. As one court explained, "[t]he trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign." *United States v. 1.58 Acres of Land Situated in the City of Boston, Suffolk Cnty., Mass., 523 F. Supp. 120, 124 (D. Mass. 1981)*. Through eminent domain, the federal government "may take property . . . in 'full fee simple' insofar as no other principal may hold a greater right to such land. It must be recognized, however, that the federal government is as restricted as the Commonwealth in its ability to abdicate to private individuals" its title to the land. *Id. at 124-25*. In other words, "[b]y condemnation, the United States simply acquires the land subject to the public trust as though no party had held an interest in the land before." *City of Alameda v. Todd Shipyards Corp., 635 F. Supp. 1447, 1450 (N.D. Cal. 1986)*. *32.42 Acres of Land* is wholly consistent with these opinions; in that case, the Ninth Circuit held that when the federal government condemns state land, it takes title free and clear of any *state* public trust obligations — and that to hold otherwise would violate the *Supremacy Clause* by subjugating the federal eminent domain power to state public trust law. *683 F.3d at 1038*. As noted, however, the court said nothing about the lower court's determination that the condemned tidelands had been taken subject to a federal public trust. *32.42 Acres of Land, 683 F.3d at 1033 & 1039 n.2*.

I am persuaded that the *City of Alameda* and *1.58 Acres of Land* courts were correct. Their decisions rested on the history of the public trust doctrine and the public trust's unique relationship to sovereignty. I can think of no reason why the public trust doctrine, which came to this country through the Roman and English roots of our civil law system, would apply to the states but not to the federal government.

Defendants' final argument is that recognition of a federal public trust doctrine cannot be reconciled with *Kleppe v. New Mexico, 426 U.S. 529, 539, 96 S. Ct. 2285, 49 L. Ed. 2d 34 (1976)*, in which the Supreme Court stated that "[t]he power over public land" entrusted to Congress by the *Property Clause of the United States Constitution* is "without limitations." Again, defendants take the Supreme Court's statement out of context. In *Kleppe*, New Mexico challenged the federal government's authority to regulate and protect wild horses and burros, arguing that the Constitution granted Congress only the power to "dispose of and make incidental rules regarding the use of federal property" and "the power to protect" the federal property itself, *i.e.*, the land but not animals living on it. *426 U.S. at 536*. The Supreme Court rejected New Mexico's attempt to limit Congress's power to regulate wildlife living on federal lands. It is in that context that the Court stated the "power over public land" was "without limitations." *Id. at 539*. Indeed, in the *very same sentence* the Supreme Court acknowledged that "the furthest reaches of the power granted by the *Property Clause* have not yet been definitively resolved[.]" *Id.* The Supreme Court in *Kleppe* simply did not have before it the question whether the Constitution grants the federal government unlimited authority to do whatever it wants with any parcel of federal land, regardless of whether its actions violate individual constitutional rights or run afoul of public trust obligations.

The federal government, like the states, holds public assets — at a minimum, the territorial seas — in trust for the people. Plaintiffs' federal public trust claims are cognizable in federal court.

C. *Displacement of Public Trust Claims*

Defendants and intervenors next argue that any common-law public trust claims have been displaced by a variety of acts of Congress, including the Clean Air Act and the Clean Water Act. For this proposition, they rely on *American Electric Power Company, Inc. v. Connecticut, 564 U.S. 410, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011)* ("*AEP*"). In *AEP*, the plaintiffs sued five power companies, alleging the companies' CO_2 emissions were a public nuisance under federal common law. *Id. at 415*. The Supreme Court held the nuisance claim could not proceed because "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Id. at 424*.

Defendants and intervenors contend that *AEP* controls the displacement analysis. The district court in *Alec L.* agreed with them. The court relied heavily on *AEP*'s statement that the Clean Air Act displaces "'any federal common law right'" to challenge CO_2 emissions, and also discussed at length the *AEP* court's concerns that authorizing a judicial order setting CO_2 emissions limits would require federal judges to make decisions involving competing policy interests — decisions an "expert agency is surely better equipped to [make] than individual district judges issuing ad hoc, case-by-case injunctions.'" *Alec L., 863 F. Supp. 2d at 16* (quoting *AEP, 564 U.S. at 424, 428)*.

I am not persuaded by the *Alec L*. court's reasoning regarding displacement. In *AEP*, the Court did not have public trust claims before it and so it had no cause to consider the differences between public trust claims and other types of claims. Public trust claims are unique because they concern inherent attributes of sovereignty. The public trust imposes on the government an obligation to protect the *res* of the trust. A defining feature of that obligation is that it cannot be legislated away. Because of the nature of public trust claims, a displacement analysis simply does not apply.

* * *

D. *Enforceability of Public Trust Obligations in Federal Court*

As a final challenge to plaintiffs' public trust claims, defendants contend that even if the public trust doctrine applies to the federal government, plaintiffs lack a cause of action to enforce the public trust obligations. Relatedly, defendants argue that creation of a right of action to permit plaintiffs to assert their claims in federal court would be an exercise in federal common law-making subject to the same statutory displacement arguments outlined above.

In order to evaluate the merits of these arguments, I must first locate the source of plaintiffs' public trust claims. I conclude plaintiffs' public trust rights both predated the Constitution and are secured by it. *See* Gerald Tones & Nathan Bellinger, *The Public Trust: The Law's DNA, 4 Wake Forest J. L. & Pol'y 281, 288-94 (2014)*.

The public trust doctrine defines inherent aspects of sovereignty. The Social Contract theory, which heavily influenced Thomas Jefferson and other Founding Fathers, provides that people possess certain inalienable rights and that governments were established by consent of the

governed for the purpose of securing those rights.[13] Accordingly, the Declaration of Independence and the Constitution did not *create* the rights to life, liberty, or the pursuit of happiness — the documents are, instead, vehicles for protecting and promoting those already-existing rights. *cf. Robinson Twp., 83 A.3d at 948* (plurality opinion) (rights expressed in the public trust provision of Pennsylvania Constitution are "preserved rather than created" by that document); *Minors Oposa*, 33 I.L.M. at 187 (the right of future generations to a "balanced and healthful ecology" is so basic that it "need not even be written in the Constitution for [it is] assumed to exist from the inception of humankind"). Governments, in turn, possess certain powers that permit them to safeguard the rights of the people; these powers are inherent in the authority to govern and cannot be sold or bargained away. One example is the police power. *Stone, 101 U.S. at 817*. Another is the status as trustee pursuant to the public trust doctrine. *Illinois Central, 146 U.S. at 459-60*.

Although the public trust predates the Constitution, plaintiffs' right of action to enforce the government's obligations as trustee arises from the Constitution. I agree with Judge Coffin that plaintiffs' public trust claims are properly categorized as substantive due process claims. As explained, the *Due Process Clause*'s substantive component safeguards fundamental rights that are "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." *McDonald, 561 U.S. at 761, 767* (internal citations, quotations, and emphasis omitted). Plaintiffs' public trust rights, related as they are to inherent aspects of sovereignty and the consent of the governed from which the United States' authority derives, satisfy both tests. Because the public trust is not enumerated in the Constitution, substantive due process protection also derives from the *Ninth Amendment*. *See U.S. Const. amend. IX* ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *Raich v. Gonzales, 500 F.3d 850, 861-66 (9th Cir. 2007)* (considering whether the right to use medical marijuana was a fundamental right safeguarded by the *Ninth Amendment* and the *Fifth Amendment's* substantive *due process clause*). But it is the *Fifth Amendment* that provides the right of action.

Plaintiffs' claims rest "directly on the *Due Process Clause of the Fifth Amendment*." *Davis, 442 U.S. at 243 (1979)*; *see also Carlson v. Green, 446 U.S. 14, 18, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980)* ("[T]he victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.") They may, therefore, be asserted in federal court.

* * *

I ADOPT Judge Coffin's Findings & Recommendation , as elaborated in this opinion. Defendants' Motion to Dismiss and Intervenors' Motion to Dismiss are DENIED.

Notes

[13] * * * Although I find it unnecessary today to address the standing of future generations or the merits of plaintiffs' argument that youth and posterity are suspect classifications, I am mindful of the intergenerational dimensions of the public trust doctrine in issuing this opinion.

1. For a detailed review of *Juliana*, *see* Michael C. Blumm and Mary Christina Wood, "*No Ordinary Lawsuit:" Climate Change, Due Process, and the Public Trust Doctrine*, 67 American U. L. Rev. 1 (2017). The article highlights multiple important aspects of the *Juliana* decision:

A. The PTD as Implicit in Sovereignty

*** * ***

As [Judge] Aiken noted, the PTD is an ancient doctrine, originating in Roman law and finding its way to the United States through England. The doctrine therefore applies equally to the federal as well as state governments, as discussed below. Moreover, the PTD should raise no separation of power concerns when the courts merely pronounce the law and require the political branches to exercise their discretion within those bounds. The *Juliana* decision is certainly one in which the court aimed to invigorate, not intrude upon, the political branches of government.

* * *

B. The Scope of the PTD and the Duty of Protection

Juliana was not the only decision to interpret the scope of the PTD to reach the atmosphere because of its effects on navigable waters. In *Foster v. Washington Department of Ecology*, a Washington Superior Court stated that "[the youths'] very survival depends upon the will of their elders to act now, decisively and unequivocally, to stem the tide of global warming," emphasizing the inextricable relationship between navigable waters and the atmosphere and deciding that separating the two was "nonsensical." The Alaska Supreme Court also suggested that the close relationship between the pollution of the atmosphere and the pollution of the oceans raised a PTD issue. Although there is growing precedent that the atmosphere is a PTD resource, even courts that do not expressly acknowledge the doctrine as a trust asset recognize a PTD claim when atmospheric pollution adversely affects traditional trust resources.

* * *

C. The PTD as an Implicit Constitutional Right

The court's recognition of the public trust as protecting inalienable, inherent rights reserved by citizens in the original creation of government paralleled the approach forged in two important public trust decisions, both cited by the *Juliana* court. The first was *Robinson Township v. Commonwealth*, a 2013 plurality opinion of the Pennsylvania Supreme Court that defined public trust rights as "inherent and indefeasible" rights impliedly reserved by the citizens when forming government. The second was *Oposa v. Factoran*, a 1993 opinion of the Philippines Supreme Court, declaring that "these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind."

Building on the inalienable rights frame that preceded the *Juliana* case, Judge Aiken broke new ground by deciding that the PTD--although antedating the Constitution--was secured by and enforceable through the due process clause of the Fifth Amendment of the Constitution, which protects against the deprivation of life, liberty, and property from arbitrary federal or state governmental action. Deciding that "public trust claims are properly categorized as substantive due process claims," the court looked to tests defining the scope of fundamental

rights under the due process clause: such rights must be "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." The court concluded that "public trust rights, related as they are to inherent aspects of sovereignty and the consent of the governed from which the United States' authority derives, satisfy both tests." Thus, the right to a stable climate system, implicit in due process, is a constitutionally protected right, a consequence of the government's dominion over trust resources like submerged lands and oceans. Although the Fifth Amendment provided the plaintiffs' cause of action, Judge Aiken declared that since the PTD was not explicit in the due process clause, it fell within the scope of Ninth Amendment protection as well.

D. The Federal Public Trust Doctrine

*** * ***

Judge Aiken recognized that no Supreme Court decision had denied the existence of the federal PTD, and, in fact, well-reasoned lower court opinions recognized a federal PTD. Aiken explained that although the Supreme Court stated in its *Coeur d'Alene Tribe* decision that *Illinois Central* involved an interpretation of state law, that decision also recognized that the PTD's "central tenets ... applied broadly." Moreover, Judge Aiken pointed out that, despite the *PPL Montana* Court's statement that "the public trust doctrine remains a matter of state law," the Court proceeded to describe how the American PTD diverged from the English PTD. This led Judge Aiken to state, "I can think of no reason why the public trust doctrine, which came to this country through the Roman and English roots of our civil law system, would apply to the states but not to the federal government." Judge Aiken decided that, because the PTD is an inherent attribute of sovereignty, the federal sovereign is just as subject to the PTD as are the state sovereigns.

E. The PTD and Congressional Displacement

The government argued in *Juliana* that the Clean Air Act ("CAA") displaced the federal public trust claim, relying on an earlier Supreme Court case, *American Electric Power Co. v. Connecticut*. That decision concluded that the Clean Air Act displaced a federal common law nuisance claim brought against coal-fired plants for greenhouse gas pollution. In the earlier federal ATL [atmospheric trust litigation] case, *Alec L.*, the government convinced the U.S. District Court for the District of Columbia that the CAA displaced the PTD under the *American Electric Power* holding. But the *Alec L.* court made no inquiry into the differences between a common law nuisance claim against polluters that could be regulated under the CAA and a public trust claim brought by citizens against government actors which failed to fulfill their constitutional fiduciary duty to protect the trust resource.

… Aiken recognized that the PTD--as an inherent limit on sovereignty and implicit in the Constitution's due process clause--imposed a non-displaceable obligation different from a federal common law nuisance claim.…

However prominent the displacement issue will be in the decision's appeal, if the Ninth Circuit recognizes the constitutional force of the public trust, the appeals court should categorically reject the displacement argument raised by the government. As the *American Electric Power*

Court noted, displacement analysis applies to common law: "The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." However, the trust represents a constitutional limit on sovereign authority. Thus, the *American Electric Power* inquiry, which looked simply to what the statutes address, is inappropriate in a constitutional context. For even when a government enacts laws to prevent harm to the assets held in trust, the basic trust question remains as to whether the laws are adequate, as implemented, to protect the natural asset for present and future generations.

F. The PTD and the Federal Property Clause

The *Juliana* decision rejected the government's claim that a federal PTD was inconsistent with federal authority under the Constitution's Property Clause. The Supreme Court has ruled numerous times that the scope of federal authority under that provision is "without limitations." But, as Judge Aiken noted that the Court has qualified its broad pronouncement, stating that "the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved."

Judge Aiken characterized the "defining feature" of the PTD as the duty to protect the corpus of the trust, a duty which "cannot be legislated away." Thus, Aiken observed that the Court has never ruled that the federal government had authority under the Property Clause to "violate individual constitutional rights or run afoul of public trust obligations." In other words, while the Property Clause may provide broad discretion for the federal trustee to choose between appropriate trust uses to benefit the public, it may not breach the trust by allowing wholesale impairment or destruction of the national wealth. Doing so would contravene the very purpose of the trust: to protect an endowment for present and future generations of the nation. The Property Clause authority--while expansive--is thus subject to constitutional rights, including the PTD.

*** * ***

Judge Aiken denied the federal government's and the industry intervenors' motions to dismiss. After discovery, the plaintiffs must prove that the federal government's past and ongoing actions and inactions violated their constitutional rights as articulated by Judge Aiken.

2. Claims similar to those presented in *Juliana* have seen less success in state court. Minors in Oregon brought a nearly identical lawsuit to *Juliana* in state court. *Chernaik v. Brown*, 295 Or. App. 584, 436 P.3d 26 (2019). In January 2019, the Oregon Court of Appeals held that there is "no source under the Oregon conception of the public-trust doctrine for imposing fiduciary duties on the state to affirmatively act to protect public-trust resources from the effects of climate change." *Id.* at 600. The court declined to address the plaintiff's contention that the doctrine applies beyond the context of submerged lands and extends to "all essential natural resources." *Id.* 594-95. By doing so, the court left the narrow interpretation of the doctrine issued by the trial court undisturbed. Such a narrow interpretation seems inconsistent with the view the state has with respect to its trust responsibility over the resources of the state. In ongoing superfund litigation,

the State of Oregon acknowledged the broad trust responsibility imposed by the public trust doctrine within its own briefs:

> The State brings this action in its sovereign capacity *as trustee for all natural resources within its borders, which it holds in trust for the benefit of all Oregonians.* Those natural resources included the bed and banks of every river within the State; all waters within the State from all sources of water supply.

Complaint at 4, para. 9, *State of Oregon v. Monsanto Co.*, Mult. Co. Circuit Court No. 18-cv-00540 (Jan. 4, 2018) (citing ORS 537.110: "All water with the state from any sources of water supply belongs to the public") (emphasis added). See also:

> The State holds in trust for the public the bed and banks, and waters between the bed and banks, of all waterways within the State. *By virtue of its public trust responsibilities, all such lands are to be preserved for public use* in navigation, fishing and recreation. *The State is also the trustee of all natural resources—including land, water, wildlife, and habitat areas*—within its borders. As trustee, *the State holds these natural resources in trust for all Oregonians—preserving, protecting, and making them available to all Oregonians to use and enjoy* for recreation, commercial, cultural, and aesthetic purposes.

Id. at 5, para. 10 (emphasis added). The Oregon Supreme Court accepted review of the *Chernaik* case on May 23, 2019.

3. For a discussion regarding which natural resources are subject to the public trust doctrine throughout the United States, *see* Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. Davis L. Rev. 671-80 (2012).

4. Minors have also sued the state of Alaska for failing to protect the atmosphere in violation of the State Constitution and the public trust doctrine. *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088 (Alaska 2014). The Alaska Supreme Court ultimately affirmed the dismissal of the action. *Id.* at 1103 ("Concluding that there were valid prudential reasons to dismiss the plaintiffs' claims for declaratory judgment, we affirm the dismissal of their otherwise justiciable claims on that basis."). Importantly, however, the court provided important discussion regarding the relationship of the atmosphere and the State's public trust responsibilities. First, the court hinted at a possible determination in future litigation that the atmosphere is a public trust resource:

> As for the remaining claims—that the atmosphere is an asset of the public trust, with the State as trustee and the public as beneficiaries—the plaintiffs do make a good case. The Alaska Legislature has already intimated that the State acts as trustee with regard to the air just as it does with regard to other natural resources. We note, however, that our past application of public trust principles has been as a restraint on the State's ability to restrict public access to public resources, not as a theory for compelling regulation of those resources, as the plaintiffs seek to use it here.
>
> Although declaring the atmosphere to be subject to the public trust doctrine could serve to clarify the legal relations at issue, it would certainly not "settle" them. It would have no immediate impact on greenhouse gas emissions in Alaska, it would not compel the State to

> take any particular action, nor would it protect the plaintiffs from the injuries they allege in their complaint. Declaratory relief would not tell the State what it needs to do in order to satisfy its trust duties and thus avoid future litigation; conversely it would not provide the plaintiffs any certain basis on which to determine in the future whether the State has breached its duties as trustee. In short, the declaratory judgment sought by the plaintiffs would not significantly advance the goals of "terminat[ing] and afford[ing] relief from the uncertainty, insecurity, and controversy giving rise to the proceeding" and would thus fail to serve the principal prudential goals of declaratory relief.

Id. at 1101–02. Second, the court acknowledged that the atmosphere effects other public trust resources, which may provide an avenue to relief:

> We also observe that if the plaintiffs are able to allege claims for affirmative relief in the future that are justiciable under the political question doctrine, they appear to have a basis on which to proceed even absent a declaration that the atmosphere is subject to the public trust doctrine. In their complaint they allege that the atmosphere is inextricably linked to the entire ecosystem, and that climate change is having a detrimental impact on already-recognized public trust resources such as water, shorelines, wildlife, and fish.[84] Allegations that the State has breached its duties with regard to the management of these resources do not depend on a declaratory judgment about the atmosphere. In short, we are not convinced that declaratory relief on the scope of the public trust doctrine, as requested in this case, will advance the plaintiffs' interests any more than it will shape the future conduct of the State.

Id. at 1103.

5. In Iowa, the public trust doctrine is limited to a narrow scope. In *Filippone ex rel. Filippone v. Iowa Dep't of Nat. Res.*, 829 N.W.2d 589, *3 (Iowa Ct. App. 2013), minors petitioned the Iowa Department of natural resources for new rules regulating greenhouse gas emissions. The state agency denied their petition, and the trial court dismissed the following appeal. In upholding the trial court's dismissal, the Iowa Court of Appeals held that "there is no precedent for extending the public trust doctrine to include the atmosphere." *Id.* Thus, the court ruled it was appropriate for the agency to deny plaintiff's petition because the state had no "duty under the public trust doctrine to restrict greenhouse gases to protect the atmosphere." *Id.*