

## The Fact Sheet itself

### The Public Trust Doctrine

By Carolyn Raffensperger, Peter Montague, and Maria Pellerano

In the earliest beginnings of law – many centuries before we had a Constitution or a Bill of Rights – there was the public trust doctrine. This ancient and enduring legal doctrine – still very much with us today – demands that government protect our natural inheritance (air, water, soil, forests, oceans, fish, wildlife, and more) by holding it in trust for the benefit of present and future generations.

Overlaid on this ancient "public trust" legal foundation, modern legislatures and judges have built the current system of environmental law and regulation, which is producing environmental ruin.<sup>1</sup> These two systems of law – the public trust doctrine vs. the failed regulatory approach – are now contending for primacy in courts, legislatures, and public discourse.<sup>2</sup> The winner in this life-or-death struggle over ideas will be determined by citizen activism and advocacy.

#### **Where did the public trust doctrine originate?**

The public trust doctrine was codified in 530 A.D. in the *Institutes of Justinian*, the first textbook for law students in ancient Rome. In the *Institutes* we read, "Thus, the following things are by natural law common to all – the air, running water, the sea, and consequently the seashore. No one therefore is forbidden access to the seashore...." In later paragraphs we learn that wild animals, birds, and fish are included, as are harbors and river banks.<sup>3</sup> As John Cronin and

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<sup>1</sup> Our ruinous system of environmental law and regulation has been described in lucid detail by Mary Christina Wood in her book, *Nature's Trust; Environmental Law for a New Ecological Age* (N.Y.: Cambridge University Press, 2014). Wood's book begins, "Environmental Law has failed us all. As ecosystems collapse across the globe and the climate crisis intensifies, environmental agencies worldwide use their authority to permit the very harm they are supposed to prevent." Wood writes (pg. 16), "Much of the [public trust] scholarship focuses on the public aspects of natural resource ownership without fully reconciling the doctrine with *private* property ownership – or explaining how ownership rules must adjust to a new era of natural scarcity and uncertainty. Few scholars have discussed in any detail how the trust might impart global obligations for planetary resources such as the oceans and atmosphere. And finally, the existing scholarship confines its characterization of the public trust to the legal sphere, whereas the trust also inspires as a political concept, an ethical mooring, a diplomatic framework, and an economic principle. This book builds on the public trust foundation to create a full paradigm shift in environmental law." <http://goo.gl/r8mrRK> Only citizen-advocates can make that paradigm shift happen.

<sup>2</sup> Jeremy Brecher, "Climate activist argues resistance is necessary to protect the public trust," *Waging Nonviolence* Oct. 17, 2014, describing Alec Johnson who faces trial in Tushka, Oklahoma for chaining himself to construction machinery to protect the public trust against damage by an oil pipeline. It is the first time a "necessity defense" for the public trust has been used in a U.S. court. <http://goo.gl/kLdSeH>

<sup>3</sup> Caesar Flavius Justinian, *The Institutes of Justinian*, first published in 530 AD; translated into English by J.B. Moyle (5th edition, 1913). Available from Project Gutenberg: <http://goo.gl/1gURxx>

Robert F. Kennedy, Jr. tell us, "The Romans vigorously protected public resources of the sea, seashore, estuaries, wetlands, and fisheries from control by private individuals."<sup>4</sup>

After the Roman empire disintegrated, the laws of Justinian were eventually incorporated into the laws of England (and other nations<sup>5</sup>). In 1215, after the barons defeated King John in battle at Runnymede, they negotiated limits on royal discretion, memorialized in the Magna Carta. Thereafter, the Roman idea that "none shall be forbidden access" to the running water, forests, wildlife, seashores, harbors, and river banks began to appear in English law as a limitation on the power of the sovereign. As Cronin and Kennedy explain it, "Subsequent [English] court decisions interpreted [the Magna Carta] to mean that 'the King was trustee' holding public lands and waters 'as protector of public and common rights' and 'he could not appropriate them to his own use.'"<sup>6</sup>

After the American Revolution, the sovereign powers of the English king were transferred directly to the states.<sup>7</sup> State governments, and in some cases the federal government, now hold "natural resources" in trust for the people -- the phrase "natural resources" meaning all the things that nature provides, which people need to live and thrive. Several state governments have incorporated the public trust doctrine in their constitutions and many more have embedded it in their common-law history.<sup>8</sup> (Common law is judge-made law, as distinct from laws enacted by legislatures.)

### **Role of Government: A Fiduciary Duty to Protect and Preserve the Public Trust**

There is nothing mysterious about a trust, which is another invention of Roman law. A trust is a legal arrangement requiring one person or entity to manage property for the benefit of another person or entity. The trust concept is deeply embedded in American law.<sup>9</sup>

A trust has four parts -- the trust creator, the trust property (sometimes called by its Latin name, the trust *res*), the trust beneficiary, and the trustee (who has a fiduciary duty to preserve and protect the trust *res* on behalf of the trust beneficiary). The law is crystal clear: the trustee has an unalterable obligation to protect the trust property from invasion or harm by *anyone*. The

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<sup>4</sup> John Cronin and Robert F. Kennedy, Jr., *The Riverkeepers* (N.Y.: Simon & Schuster, 1999), pg. 141. <http://goo.gl/yYWQT3>

<sup>5</sup> Michael C. Blumm and Rachel D. Guthrie, "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision," *UC Davis Law Review* Vol. 45 (Feb., 2012), pgs. 741-808. <http://goo.gl/0CsUjp>

<sup>6</sup> John Cronin and Robert F. Kennedy, Jr., *The Riverkeepers* (N.Y.: Simon & Schuster, 1999), pg. 142.

<sup>7</sup> "The Public Trust Doctrine in Tidal Areas: A Sometime Submerged Traditional Doctrine," *Yale Law Journal* Vol. 79 (1970), pg. 772 footnote 40. <http://goo.gl/CtXMjK> And see: Matthew Thor Kirsch, "Upholding the Public Trust in State Constitutions," *Duke Law Journal* Vol. 46 (1997), pgs. 1169-1210. <http://goo.gl/n3YaJC>

<sup>8</sup> Matthew Thor Kirsch, "Upholding the Public Trust in State Constitutions," *Duke Law Journal* Vol. 46 (1997), pgs. 1169-1210. <http://goo.gl/n3YaJC>

<sup>9</sup> Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," *Michigan Law Review* Vol. 68 (1969), pgs. 471-566. <http://goo.gl/DdEC3a>

trustee must protect the trust property even from the trustee and even from the beneficiaries themselves.

In the case of the public trust, the trust was created by centuries of legal decisions in ancient Rome, then in England after 1215, then in the laws and traditions of the 13 colonies and then of the 13 original states.<sup>10</sup> The trust property, or *res*, is all the "natural resources" that people need to live and thrive. In modern terms, it is the global ecosystem – our only home – without which we humans cannot exist. The trust beneficiary is present and future generations. The trustee is government, state and federal.

As legal scholar Peter Manus describes it, "Under American democratic theory, the nation's people possess an abstract form of sovereignty over the land and its natural resources that may be termed original ownership. In creating the government, the people delegated many powers and duties to its sovereign authority, including managerial responsibilities over the country's resources. In trust terms, the people designated the government as trustee of the land and other natural resources and themselves as beneficiaries. This framework is particularly analogous to that of a charitable trust, which may incorporate a public purpose, government trustee, and generalized beneficiaries."<sup>11</sup>

Professor Manus goes on: "Certainly the trust concept, as a structure of law, was part of the common law upon which American constitutional protections were founded. Thus, the idea that a party may exercise control over the assets of a second party on that party's behalf, and not in subjugation of the second party, is a principle that was among the fundamental presumptions of the original American settlers as well as the constitutional framers."<sup>12</sup>

Here is another way of phrasing the public trust concept:

"Government has a fundamental duty to adhere to a program of environmental husbandry aimed at maintaining a regenerative natural environment. This obligation is perpetual and requires both preventive measures to protect environmental health and remediative measures where past behavior has breached the trust. The public trust thus serves the general citizenry, including future citizens, by ensuring that the natural environment thrives and will continue to thrive as a healthy and diverse human habitat."<sup>13</sup>

In sum: Government has a duty to maintain a healthy natural environment on behalf of current and future citizens. This duty is not optional: it is a mandatory, affirmative duty that government cannot alienate, repudiate, or deny.

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<sup>10</sup> Matthew Thor Kirsch, "Upholding the Public Trust in State Constitutions," *Duke Law Journal* Vol. 46 (1997), pgs. 1169-1210. <http://goo.gl/n3YaJC>

<sup>11</sup> Peter Manus, "To a Candidate in Search of an Environmental Theme: Promote the Public Trust," *Stanford Environmental Law Journal* Vol. 19 (May 2000), pg. 325. <http://goo.gl/WzfNH1>

<sup>12</sup> Peter Manus, "To a Candidate in Search of an Environmental Theme: Promote the Public Trust," *Stanford Environmental Law Journal* Vol. 19 (May 2000), pg. 361. <http://goo.gl/WzfNH1>

<sup>13</sup> Peter Manus, "To a Candidate in Search of an Environmental Theme: Promote the Public Trust," *Stanford Environmental Law Journal* Vol. 19 (May 2000), pg. 322. <http://goo.gl/WzfNH1>

As public trust scholar Mary Wood tells us in *Nature's Trust*, as trustee, government has five distinct obligations: 1) Uncompromised loyalty to the beneficiaries; 2) Adequate supervision of its agents; 3) Exercise of good faith and reasonable skill in managing the assets; 4) Use of caution in managing the assets, aiming to prevent harm; 5) Furnishing information to the beneficiaries regarding trust management and asset health.<sup>14</sup>

The role of trustee casts government in a new and positive light. In fulfilling its central duty to protect the future for us and for those unborn, government has a heroic role to play. Government is the protector, the guardian, the shield of the public trust. This is a role that government officials can proclaim proudly, for it is their unique, specific duty to protect our common heritage so that we can pass it on to the future undamaged and, ideally, improved.

How can we express this fundamental role of government? Here are some nouns:

Caretaker, champion, custodian, defender, fiduciary, guardian, keeper, paladin, protector, sentinel, steward, trustee.

And here are some verbs:

Defend, guard, hold, husband, keep, protect, safeguard, save, secure, shield, shelter, watch over.

The following phrases try to capture the elements of the trust property:

- \*\* the things that we share in common, which none of us owns individually
- \*\* air
- \*\* water
- \*\* wildlife and biodiversity
- \*\* fertile and self-regenerating soils
- \*\* our genetic heritage (the human and wild genomes)
- \*\* self-regulating, self-regenerating ecosystems
- \*\* the sky, the moon, the stars
- \*\* outer space
- \*\* the electromagnetic spectrum (carries radio and TV signals)
- \*\* the natural beauty of a place
- \*\* recreational amenities provided by nature
- ... and so on

### **The Public Trust and Private Property**

We must acknowledge that, in fulfilling its affirmative public trust duty, government will have an obligation from time to time to limit the prerogatives of private property:

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<sup>14</sup> Mary Christina Wood, *Nature's Trust; Environmental Law for a New Ecological Age* (N.Y.: Cambridge University Press, 2014), pg. 189.

"A public trustee aims to protect individual citizens from their own trust-destructive instincts."<sup>15</sup>

"A public trust perspective on takings law protects against the hoarding of nature's gifts by refusing to allow private property interests to presumptively include the right to destroy natural resources."<sup>16</sup>

"...[T]he government's overarching sovereign duty to protect the environmental rights of citizen beneficiaries from the exploitive tendencies of the beneficiaries themselves. Access rights must be secondary."<sup>17</sup>

"[T]he duty of this generation to future generations must be the key ingredient of an effective modern public trust."<sup>18</sup> In other words, the future comes first.

### **The Public Trust Requires Precautionary Action**

"In essence, public trustees must recognize that future patterns in land use and resource consumption may create ecological problems that trigger public trust duties to regulate these uses and, consequently, impact private property owners."<sup>19</sup>

This is an important point: the trustee must recognize that circumstances change, and changing circumstances may bring new threats to the trust that never existed before. The trustee must foresee and forestall.

The trustee must be alert, vigilant, attentive, heedful, mindful, prudent, prepared and cautious. Like any good sentinel, the trustee must boldly anticipate and explore potential threats to the trust property. In this duty, the trustee will find the precautionary principle an essential guide.

If the trustee waits for threats to fully manifest themselves, it will be too late -- the trust property will have been harmed before action is taken. Precautionary action is *essential* for safeguarding

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<sup>15</sup> Peter Manus, "To a Candidate in Search of an Environmental Theme: Promote the Public Trust," *Stanford Environmental Law Journal* Vol. 19 (May 2000), pg. 342-343.

<http://goo.gl/WzfNH1>

<sup>16</sup> Peter Manus, "To a Candidate in Search of an Environmental Theme: Promote the Public Trust," *Stanford Environmental Law Journal* Vol. 19 (May 2000), pg. 356. <http://goo.gl/WzfNH1>

<sup>17</sup> Peter Manus, "To a Candidate in Search of an Environmental Theme: Promote the Public Trust," *Stanford Environmental Law Journal* Vol. 19 (May 2000), pg. 334. <http://goo.gl/WzfNH1>

<sup>18</sup> Peter Manus, "To a Candidate in Search of an Environmental Theme: Promote the Public Trust," *Stanford Environmental Law Journal* Vol. 19 (May 2000), pg. 334. <http://goo.gl/WzfNH1>

<sup>19</sup> Peter Manus, "To a Candidate in Search of an Environmental Theme: Promote the Public Trust," *Stanford Environmental Law Journal* Vol. 19 (May 2000), pg. 342. <http://goo.gl/WzfNH1>

the public trust. Indeed, the Supreme Court of Hawaii has determined that the public trust doctrine *requires* use of the precautionary principle.<sup>20</sup>

### **For the Good of All: What Government Can Do**

There is a strong consensus among biologists and other scientists that the natural world is in deep trouble. The biosphere, upon which all life depends, is being shredded. And there is abundant evidence that environmental deterioration has led to serious chronic disease among humans, especially among people of color and low-income populations.<sup>21</sup> This is environmental injustice.

It must be obvious that we need to develop an environmentally-compatible industrial base. It is also clear that corporations, as presently constituted under law, are not, by themselves, up to the task.<sup>22</sup>

There is precious little evidence that corporate managers (in their role as corporate officials) are able to conceive of this goal, much less articulate the goal or prescribe steps for getting there. Furthermore, corporate managers spend enormous resources defending the status quo, attacking positive new ideas like the precautionary principle, and deflecting peoples' concerns away from the main sources of environmental harm.<sup>23</sup>

No, after a sober (and sobering) review of the available evidence, one is forced to conclude that the corporate sector, in its present legal form,<sup>24</sup> can never be the engine for protecting the public trust.

Protecting the natural world (and achieving social justice) is the duty – and the honor – of government. Government has a clear mandate to do the job, to protect our common heritage, *and* to achieve justice.<sup>25</sup>

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<sup>20</sup> James T. Paul, "The Public Trust Doctrine: Who Has the Burden of Proof?" Paper presented at the July 1996 meeting of the Western Association of Wildlife and Fisheries Administrators. <http://goo.gl/QUA0JG>

<sup>21</sup> Michael McCally, editor, *Life Support: The Environment and Human Health* (Cambridge, Mass.: MIT Press, 2002).

<sup>22</sup> See for example, Eduardo Porter, "Motivating Corporations to Do Good," *New York Times* July 15, 2014. <http://goo.gl/u6cikg>

<sup>23</sup> For an extensive analysis of the fossil fuel industry's role in the media's failed coverage of global warming see Elliott Negin, "Unreliable Sources: How the News Media Help the Kochs and ExxonMobil Spread Climate Disinformation," Six-Part series published on *Huffington Post* by the Union of Concerned Scientists, 2013. <http://goo.gl/X7EcpA> See also Naomi Oreskes and Erik M. Conway, *Merchants of Doubt* (N.Y.: Bloomsbury Press, 2010); James Hoggan and Richard Littlemore, *Climate Cover-Up; The Crusade to Deny Global Warming* (Vancouver, B.C.: Greystone Books, 2009); and Haydn Washington and John Cook, *Climate Change Denial* (London: Earthscan, 2011).

<sup>24</sup> Robert Hinkley, "Twenty Eight Words to Redefine Corporate Duties," *Multinational Monitor* Vol. 23, Nos. 7 and 8 (July/August 2002). <http://goo.gl/1duyQ4>

## What government is *not* for

It is *not* the role of government to auction off the public trust to the highest bidder.

It is *not* the role of government to "achieve a balance" between those who want to preserve our common heritage and those who want to use it up or throw it away. Too often we hear from disheartened government officials that they must be doing something right if "both sides" are dissatisfied with the job they are doing. This is nonsense. Government has a duty to come down squarely and proudly on the side of protecting our common heritage, including the natural environment and the conditions that make justice possible – including environmental justice.

Increasingly we hear the language that polluters are "stakeholders." In *Nature's Trust*, Mary Wood puts this language into perspective:

"The very notion of industry 'stakeholder' refutes the trust approach, which more properly views polluters as marauders of the trust. The primary fiduciary duty to protect the *res* [the trust property] for the beneficiaries requires trustees to maintain a scrupulous, ever-distant, and suspicious demeanor toward parties that could damage the trust. The duty of loyalty [to the beneficiary] demands that a trustee 'refrain from placing himself in a position where his personal interest or that of a third person does or may conflict with the interest of the beneficiaries.' This rule should provoke considerable wariness toward any collaboration with plunderers of the trust through 'stakeholder' partnerships. While industry has a right to engage public processes just as citizens do, the practices of captured agencies trespass appropriate boundaries of fiduciary behavior, as earlier chapters explained."<sup>26</sup>

At their best, government officials provide inspiring examples of service to community. Protecting the public trust through precautionary action provides a way for government to celebrate and rededicate itself in its role of service for the common good. As guardian of the public trust, government can help America regain its balance, heal itself, and rediscover its core spiritual values of stewardship and self-sacrifice. As Peter Manus has written,

"Defined as a government responsibility to preserve a healthy natural environment for the American people, the public trust captures the essence of the stewardship principle. At the same time, by stressing the duty of all parties – government trustees, market participants, and citizen beneficiaries – to compromise personal exploitation values before the needs of the environment, the public trust captures the ideal of a democratic society of individuals working for the greater good even as they work for individual benefits."<sup>27</sup>

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<sup>25</sup> Text of the Preamble to the U.S. Constitution [with numbers and italics added for emphasis]: "We the People of the United States, in Order to (1) form a more perfect Union, (2) *establish Justice, insure domestic Tranquility, provide for the common defence*, (3) *promote the general Welfare*, and (4) *secure the Blessings of Liberty to ourselves and our Posterity*, do ordain and establish this Constitution for the United States of America." <http://goo.gl/JLNfoJ>

<sup>26</sup> Mary Christina Wood, *Nature's Trust; Environmental Law for a New Ecological Age* (N.Y.: Cambridge University Press, 2014), pgs. 190-191.

<sup>27</sup> Peter Manus, "To a Candidate in Search of an Environmental Theme: Promote the Public Trust," *Stanford Environmental Law Journal* Vol. 19 (May 2000), pg. 334. <http://goo.gl/WzfNH1>

## Citizen Advocacy

As Mary Wood and others<sup>28</sup> recount in detail, our present system of environmental law and regulation is wrecking the planet as a place suitable for human civilization. Wood writes,

"In *Collapse*, Jared Diamond studies why notably flourishing societies throughout history collapsed precipitously. These societies, he notes, often exhibited a characteristic mismatch between the society's consumption and the resources available. Less obvious is why the governing structure of the society sometimes allowed consumption to reach disastrous proportions grossly exceeding Nature's limits. Diamond attributes this in part to a conflict of interest between the short-term interests of the decision-making elite and the long-term interests of the society as a whole. As he describes, when members of the ruling elite pursue goals that become 'good for themselves but bad for the rest of the group,' they lead society on an unsustainable track, heading it toward collapse. Today, the decision-making elite includes thousands of environmental agencies in nations across the world. Collectively, they rule over Earth's natural resources. Like the collapsed societies Diamond inventories, these officials now make decisions that are good for themselves but bad for society and future generations. Behind a veil of environmental law, their decisions push the entire world toward collapse."<sup>29</sup>

Guided by elites who are profiting from Business as Usual, the system is not going to spontaneously reform itself. Only citizens can do that. They can begin to use "public trust" language with their friends, their families, their legislators, and with environmental agency staff. They can give talks at garden clubs, schools, chambers of commerce, service clubs. They can start a neighborhood study group. They can persuade their community college to teach it. They can write letters to the editor, demanding that the public trust be recognized, valued, and protected. They can start petition drives, create a buzz on social media, and do all the other things that creative citizens have always done to make change happen. They can raise money to bring lawsuits.<sup>30</sup> They can put their bodies upon the gears, chaining themselves to the machine – because nonviolent civil disobedience has always played a central role in bringing madness to a halt.<sup>31</sup> In sum, they can use all their creative energy to embrace, internalize and unleash this powerful, ancient doctrine, handed down to us over the ages from emperors to kings to town meetings. It is the birthright of all of us, to protect our only home in the universe. Without it, we are lost. With it, all grandchildren can have a future.

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<sup>28</sup> See also James Gustave Speth, *The Bridge at the Edge of the World*, paperback edition (New Haven, Conn.: Yale University Press, 2009). And see Craig Collins, *Toxic Loopholes; Failures and Future Prospects for Environmental Law* (N.Y.: Cambridge University Press, 2010).

<sup>29</sup> Mary Christina Wood, *Nature's Trust; Environmental Law for a New Ecological Age* (N.Y.: Cambridge University Press, 2014), pg. 6, quoting Jared Diamond, *Collapse: How Societies Choose to Fail or Succeed: Revised Edition* (N.Y.: Penguin Books, 2011).

<sup>30</sup> <http://goo.gl/wy0yFU>

<sup>31</sup> Jeremy Brecher, "Climate activist argues resistance is necessary to protect the public trust," *Waging Nonviolence* Oct. 17, 2014, describing Alec Johnson who faces trial in Tushka, Oklahoma for chaining himself to construction machinery to defend and protect the public trust against damage by an oil pipeline. It is the first time a "necessity defense" for the public trust has been developed. <http://goo.gl/kLdSeH>