§ 2:1. In general

The cornerstone of Environmental Law is the assertion that all of our national natural resource treasures are held in trust for the full benefit, use and enjoyment of all the people of the United States, not only of this generation but of those generations yet unborn, subject only to wise use by the current nominal titleholder. This assertion underlies every claim by citizens to protection of the nation's resource treasures.

The basic principle underlying the Trust Doctrine is that: "There are things which belong to no one, and the use of which is common to all."[1]

1. Geer v Connecticut, 161 US 519, 526, 40 L Ed 793, 16 S Ct 637 (1896); New Orleans v United States, 10 Pet 662, 720, 9 L Ed 573 (1836, US). "Domat, liv. 1, tit. 8, § 1, art. 1, says, there are two kinds of things destined to the common use of men, and of which every one has the enjoyment. The first are those which are so by nature; as rivers, the sea and its shores. The second, which derive their character from the destination given them by man; such as streets, highways, churches, market-houses, court-houses and other public places; and it belongs to those in whom the power of making laws and regulations in such matters is vested, to select and mark out the places which are to serve the public for these different purposes." As to the use of the public trust doctrine in challenging the disposition of natural resources by state governments and by other governmental bodies, see Note, The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 Yale LJ 762 (1970).

The Trust Doctrine is the principle which determines the dominion and responsibility over valuable natural resources as opposed to other resources which man can reproduce or which are capable of self-regeneration.

Recognition of the guardianship of man over the environment and the natural urge of man to preserve his existence and his property can be found in the Bible,[2] in the writings of the ancient Greeks,[3] in the literature of the western world's great thinkers,[4] and the numerous case decisions in Anglo-American law.[5]

But the principles of the Bible, the reasoning of the ancient Greeks and the rationale of the early philosophers were eventually to be tempered by the assertion of the private property right over the public property right. It was this deep concern with the private property right by John Locke and others that subverted the reasoning of the early thinkers, and caused a gradual deterioration of the recognition of the importance of the trust over public property. Locke's shortsightedness was evidenced by his reasoning that there would always be enough left over for others.[6] We know now that such a view was indeed naive.

2. In ancient times, the earth's fertility was thought to be related to the conduct of men. The belief that man's misdeeds caused drought or blight originated from the notion that human misbehavior upset the balance and order of nature in general. Thus, in Deuteronomy 11:12–18 the Israelites are reminded of the great value of the land, "A land which the Lord thy God careth for: the eyes of the Lord thy God are always upon it, from the beginning of the year even unto the end of the year."

The first chapter of the book of Joel mourns the desolation caused by waste and notes that "The rivers of waters are dried up, and the fire hath devoured the pastures of the wilderness."

It should also be noted that ancient Hebrew law required that the earth lie fallow every seventh year. (Exodus 23:10–12; Deut. 31:10.)

3. "When many streams flow together from many sources, whether springs or mountain torrents, into a single lake, we ought to attend to take care that the confluent waters should be perfectly clear, and in order to effect this, should pump and draw off and divert impurities, . . ." Dialogues of Plato, Laws, Book V. See also the dialogue, Critias, in which the ancient Athenians are praised as guardians of the environment.

4. "And from this followeth another law: that such things as cannot be divided be enjoyed in common, if it can be; and if the quantity of the thing permit, without stint; otherwise proportionably to the number of them that have right." Leviathan, Thomas Hobbes, Part 1, Chapter 15, "Of Man."

See also John Locke's essay, Concerning The True Original Extent And End Of Civil Government, Chapter V, entitled "Of Property."

5. §§ 2:2–2:8, infra.

6. "Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough and as good left, and more that the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself. For he that leaves as much as another can make use of does as good as take nothing at all. Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst. And the case of land and water, where there is enough of both, is perfectly the same. . . . [God] gave it [the world] to the use of the industrious and rational (and labour was to be his title to it) . . . The same measure

More than sixty years ago the special recognition due our irreplaceable natural resources was eloquently and dramatically articulated by J.A. Holmes, Secretary of President Roosevelt's "National Conservation Commission." Holmes stated that: "The resources which have required ages for their accumulation, to the intrinsic value and quantity of which human agency has not contributed, which there are no known substitutes, must serve as the welfare of the Nation. In the highest sense, therefore, they should be regarded as property held in trust for the use of the race rather than for a single generation and for the use of the Nation, rather than for the benefit of a few individuals who may hold them by right of discovery or by purchase." (Report of the Commission, 1909, p 110 vol 1). The Trust Doctrine provides a substantial foundation for the environmental advocate.

The Trust Doctrine must be urged in as many courts in the land as necessary. Suits must be brought each time a smoke stack spewing forth sulphur dioxide threatens to degrade the quality of the air that belongs to all of us; each time the waste from a paper mill pollutes the water we all have to drink; each time a pesticide or herbicide contaminates the air, water or vegetation we own in common; each time a "fast-buck" developer landfills a wetland or estuary and damages the important base of our marine food chain; and each time a governmental authority callously decides to build a road or other public project in such manner as to threaten regional ecological systems.

The bold assertion of the Trust Doctrine and the unenumerated rights reserved to the people by the Ninth Amendment, protected and enforced by the authority of the equal protection and due process clauses of the Fifth Amendment and the rights, privileges and immunities, equal protection and due process clauses of the Fourteenth Amendment, represent the major legal arsenal of the environmental rights lawyer. When the courts fully recognize that there is a constitutionally protected right to breathe clean air, drink clean water, eat uncontaminated food, and have wilderness areas preserved, they will also have to recognize that the state or federal governments having dominion, control or regulation over air, water, food or other valuable resources, have obligations imposed as a public trust, to guard against environmental insults and the resulting degradation of the environment. The failure to carry out the obligations of the trust amounts

may be allowed still, without prejudice to anybody, full as the world seems. . . . We shall find that the possessions he could make himself, upon the measures we have given, would not be very large, nor, even to this day, prejudice the rest of mankind or give them reason to complain or think themselves injured by this man's encroachment, though the race of men have now spread themselves to all the corners of the world, and do infinitely exceed the small number there was at the beginning." John Locke, Concerning Civil Government, Chapter V, "Of Property," at page 32. (Great Books Edition).

to a breach of constitutionally protected rights which no court may permit.

In addition to supplying a jurisdictional basis and the shield of constitutional protection, the Trust Doctrine has many other benefits in the fight to save the environment. The Doctrine will help the environmental advocate cut through the morass of legal technicalities raised by the problems of jurisdiction and standing. For example, where cases have been brought under traditional nuisance doctrines, the plaintiffs have often been denied relief because the nuisance they sought to enjoin was a public nuisance rather than a private nuisance and the court held that they had no standing to sue.[7] Generally, nuisance suits can be brought by private persons only where damages from the nuisance are special to the plaintiff.[8] If the nuisance complained of has equal applicability to the public at large, then an individual may not bring such a suit. Such suits are deemed to be public nuisances and may only be brought by the Attorney General or other public official charged with the responsibility of abating public nuisance.[9]

Since federal constitutional issues may be raised, the Trust Doctrine provides a vehicle for entry to federal court, and Federal Rule 23 regarding class actions will apply.[10]

Plaintiffs bringing suit under the Trust Doctrine will have the benefits of presumptions in favor of the protection of trust resources. Classical trust law regarding the continuance of the trust and the prohibition against invasion of corpus, can be asserted. The duty of the trustee to preserve the resource and protect it against loss, dissipation or diminution and to act with diligence, fairness and faithfulness in doing so, is well established in trust law.[11] These presumptions result in shifting the burden to the despoiler of the environment to come forward with the evidence to prove the *necessity* for damaging the trust corpus. In many instances the despoiler of the environment will be unable to meet that burden. The burden will not be met merely by showing that it is expensive to avoid the resultant pollution or despoliation. The burden cannot be met merely by showing that the proposed project is desirable; the burden can only be met in extraordinary circumstances when the defendants can show that their actions

7. See Chapter 4 concerning the relation between nuisance and trust doctrine.

8. See Am Jur, Nuisances (1st ed §§ 120–127).

9. See Chapter 4 concerning the distinction between public, private, and mixed nuisance.

10. See Chapter 6 on class actions.

11. See Am Jur, Trusts (1st ed §§ 339, 602, 605).

are for the promotion of the public benefit, consistent with the public trust.

While the Trust Doctrine has a case history several hundred years old in Anglo-American law, its application has been largely applied to water and submerged lands under navigable waters.[12] However, its application to air, forests, public lands, oil and mineral resources and other categories commonly called natural resources, is logical and the environmental advocate should not hesitate to urge its adoption in these closely related areas. Indeed, the old legal precedents applying the doctrine to other resources must be brought to the attention of the courts.

To make the logically imperative extension of the Trust Doctrine into the whole area of environmental law, it is necessary to make an historical study of the evolution of the Trust Doctrine, otherwise one cannot make an intelligent reply to the cases unfortunately existing which improperly apply or erringly emasculate the Trust Doctrine. Such cases exist in almost every state and rise like a phoenix from the ashes to haunt the environmental lawyer who attempts to assert the Trust Doctrine but does not fully understand it.

13. See Irwin v Dixon, 9 How 10, 13 L Ed 25 (1850, US); New Orleans v United States, 10 Pet 662, 9 L Ed 573 (1836, US); President, Recorder & Trustees of Cincinnati v Lessee of White, 6 Pet 431, 8 L Ed 452 (1832, US).

14. New Orleans v United States, 10 Pet 662, 712, 9 L Ed 573 (1836, US); President, Recorder & Trustees of Cincinnati v Lessee of White, 6 Pet 431, 8 L Ed 452 (1832, US).

15. Summerville v Duke Power Co. 115 F2d 440 (1940, CA4 NC).

16. President, Recorder & Trustees of Cincinnati v Lessee of White, 6 Pet 431, 437, 8 L Ed 452 (1832, US); Carter Oil Co. v Myers, 105 F2d 259, 261 (1939, CA7 Ill).

17. Summerville v Duke Power Co. 115 F2d 440, 441 (1940, CA4 NC).