

use and zoning codes, requirements, and restrictions; the need for intergovernmental cooperation and respective exercise (or forbearance) of legal authorities; tax codes and incentives; plumbing and building codes; water rights; property acquisition and other private versus public property considerations; allocation of financial and legal liability; and contracting and insurance needs. In a nutshell, GI requires a significant commitment to coordination, cooperation, and change.

## CONCLUSION

Green infrastructure is a growing trend for addressing urban wet-weather issues that arise under the CWA and state water quality laws. Its multiple positive attributes and its potentially attractive cost compared to gray infrastructure have garnered support from the EPA, states, and municipalities; the regulated community; the environmental community; and policy makers. GI entails many important and complex legal considerations and is not without some legal and financial risk, as the examples included in this article highlight. That said, these risks are manageable with informed decision making, and there are many tools for addressing the legal risks and uncertainties. The GI work that is under way around the country is, in many cases, in the early stages, and as this article indicates, the EPA's guidelines suggest the on-the-ground effectiveness of GI over time will be critical to its success as a long-term alternative to gray infrastructure. Nevertheless, it is an important trend that is well supported and worth exploring in appropriate circumstances.

## ENDNOTE

1. The purpose of this article is to provide general information. It is not intended as, nor is it a substitute for, legal advice.

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# Climate Change and the Public Trust Doctrine<sup>1</sup>

Patrick C. McGinley

## INTRODUCTION

The public trust doctrine, an ancient canon rooted in Roman law and long recognized in Anglo-American jurisprudence, has been invoked in recent state and federal court litigation and citizen administrative actions that seek to compel the federal and state governments to confront the threat of climate change. The plaintiffs in these "Atmospheric Trust Litigation" (ATL) cases are young people who assert that a climate crisis exists and that their futures and those of succeeding generations are in jeopardy because of the failure of the federal and state governments to act expeditiously to protect the earth's atmosphere from the adverse impacts of climate-changing carbon emissions. In this commentary, I discuss the history and evolution of the public trust doctrine and efforts of concerned citizens to use it to move governments to address the crisis in a comprehensive, meaningful manner.

## THE CLIMATE CRISIS

The existence of a climate crisis is a claim substantiated by an overwhelming consensus among scientists who have studied the issue.<sup>2</sup> Eminent public trust scholar Mary Christina Wood has described the scope of the crisis:

Leading climate scientists warn that Earth is in "imminent peril," on the verge of runaway climate heating that will impose catastrophic conditions on generations to come. In their words, continued carbon pollution will cause a "transformed

planet"—an Earth obliterated of some major fixtures including the polar ice sheets, Greenland, the coral reefs, and the Amazon forest. The trajectory of civilization over the past century threatens to trigger the planet's sixth mass extinction—the kind that hasn't occurred on Earth for sixty-five million years. Should business as usual continue even for a few more years, future humanity for untold generations will be pummeled by floods, hurricanes, heat waves, fires, disease, crop losses, food shortages, and droughts as part of a hellish struggle to survive in deadly greenhouse conditions. In a world of runaway climate heating, these unrelenting disasters would force massive human migrations and cause staggering numbers of deaths—culminating in, as more and more analysts predict, humanity's own "self-destruction."<sup>3</sup>

Scientists warn that there is little time to begin reducing global emissions of carbon before a "tipping point" is passed.<sup>4</sup>

The "tipping point" theory of nonlinear climate change "posits that at a certain point the changes associated with global warming will become dramatically more rapid and out of control."<sup>5</sup> In the absence of limits placed on carbon emissions, some scientists predict rapid sea-level rise, extinctions, and other regional effects accompanying a projected atmospheric warming of two to three degree Celsius.<sup>6</sup> Scientists warn that if greenhouse

gas emissions continue at their present rate, and a tipping point is passed, rapid changes could occur “locking in” future catastrophic global heating.<sup>7</sup>

It is in this context of overwhelming scientific consensus and warnings of an impending global emergency that the public trust doctrine has reemerged. It is seen as a tool to be used by citizens to call upon judicial branches of governments to force carbon reduction as a fiduciary responsibility to protect the public trust.

### EVOLUTION OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine holds that certain crucial natural resources are the shared, common property of all citizens that cannot be subject to private ownership and must be preserved and protected by the government.<sup>8</sup> As sovereign trustee of such resources, government has a fiduciary obligation to protect such natural assets for the beneficiaries of the trust, which include both present and future generations of citizens.<sup>9</sup>

In *Geer v. Connecticut*, the Supreme Court of the United States recognized that “[t]he ownership of the sovereign authority is in trust for all the people of the state; and hence, by implication, it is the duty of the legislature 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.”<sup>10</sup> The doctrine has been interpreted as identifying the legislature as the primary trustee and the executive branch as an agent of the trustee vested with the same public trust obligation.<sup>11</sup>

The public trust doctrine speaks to one of the most essential purposes of government: protecting natural resources for the common benefit. Four decades ago, Professor Joseph Sax observed that the public trust duty underpins democracy itself, delimiting a nation of “citizens rather than of serfs.”<sup>12</sup> The origins of the public trust doctrine have been traced by the courts to the English legal system and back to Roman and natural law as a foundational principle of organized civilization.<sup>13</sup> The public trust doctrine is also a central tenet of legal systems of many countries around

the world and is recognized as an attribute of sovereignty itself.<sup>14</sup>

In a seminal American public trust case, *Illinois Central Railroad v. Illinois*, the U.S. Supreme Court emphasized that, like the police power, the public trust doctrine is a foundational principle of government.<sup>15</sup> The Court declared, “The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace. . . . Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it.” Thus, the Court recognized that the public trust doctrine imposed governmental duties as well as governmental authority.

The public trust doctrine, sovereign immunity, eminent domain, and the police power have been recognized as inherent attributes of sovereignty.<sup>16</sup> As *Illinois Central Railroad Co. v. Illinois* made clear, the Illinois legislature could not convey title to the harbor of Lake Michigan to a private railroad corporation:

The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it.<sup>17</sup>

The essence of the trust responsibility is the sovereign fiduciary duty to protect the public’s crucial assets from irrevocable damage.<sup>18</sup> Under well-established core principles of trust law, a trustee may not ignore threats of harm to trust property. As one leading treatise explains, “[t]he trustee has a duty to protect the trust property against damage or destruction.”<sup>19</sup> Impor-

tantly, these mandatory fiduciary duties radically differ from the permissive character of administrative discretion attendant statutory law. By failing to act decisively in the face of an unprecedented ecological crisis, governments can be seen as abdicating their sovereign public trust responsibility to act to safeguard the climate for current and future generations.

### THE ATMOSPHERE AS PUBLIC TRUST ASSET

Despite the sheer novelty of climate change as an imminent threat to human survival—and ultimately, to civilization itself—the notion of air as a public trust resource is as old as the ancient foundations of our legal system. The history, principles, and intent of the public trust doctrine support judicial recognition of the atmosphere as a fundamental asset of the public trust. As the U.S. Supreme Court has observed, Roman law recognized a public trust that included air—along with water, wildlife, and the sea—as *res communes*, or “things which remain common.”<sup>20</sup> Roman jurisprudence recognized that “individual control of some resources would run counter to what [they] conceived of as their natural purpose, and this property could not therefore be subject to public ownership.”<sup>21</sup>

In *Geer v. Connecticut*, the Court relied on this ancient Roman law classification of *res communes* to find the public trust doctrine applicable to wildlife.<sup>22</sup> The Court similarly has recognized states’ sovereign property interests in air and found those interests superior to private title. In *Georgia v. Tennessee*, the Court upheld an action by the state of Georgia against Tennessee copper companies for transboundary air pollution, declaring that “the state has an interest independent of and behind the titles of its citizens, in all the earth *and air* within its domain.”<sup>23</sup>

The public trust doctrine requires the state to protect those resources necessary for public survival and welfare. Arising from the “public character of the property,” the public trust doctrine views such resources as owned in common by the people and requires that they be maintained,

protected, and preserved by the state for the public interest.<sup>24</sup> The resources that fall within the protective scope of the public trust are traditionally those, as Professor Charles F. Wilkinson has explained, “so central to the well-being of the community that they must be protected by distinctive, judge-made principles.”<sup>25</sup>

Rather than restrictively defining assets imbued with a public trust, courts have articulated principles that have guided the evolution of public trust property over time. In *Illinois Central*, the U.S. Supreme Court established the analytical framework with its seminal characterization of public trust assets as those that present “a subject of concern to the whole people of the state.”<sup>26</sup> Describing public trust assets as “public property, or property of a special character,” the Court observed they “cannot be placed entirely beyond the direction and control of the state” and that an overarching public interest prevents such resources from being subject to private ownership.<sup>27</sup>

In the late 1800s, at the time of *Illinois Central*, the natural resources deemed to be most exposed to the greatest threat and in scarcest supply were principally water based—where fishing, navigation, and commerce interests were implicated. In that case, the threat of privatization of the Chicago harbor inspired Justice Field to characterize submerged harbor lands as “a subject of concern to the whole people” clothed with sovereign trust interests compelling protection.<sup>28</sup> Over time, consistent with *Illinois Central*, courts have expanded the reach of the public trust doctrine to protect other categories of public resources as their integrity has come under threat.<sup>29</sup>

In the 19th century, state courts expanded public navigation rights from tidal waters to inland waters that were navigable-in-fact. As the New Jersey Supreme Court held, the public trust is not a doctrine “‘fixed or static,’ but one to be ‘molded and extended to meet changing conditions and needs of the public it was created to benefit.’”<sup>30</sup> Numerous courts have relied upon the doctrine in response to societal concerns such as habitat fragmentation, biodiversity, aesthetics, and public recreation that were generally unvalued a few

decades ago.<sup>31</sup> The concept of a public trust asset recognized in the navigable waters of Chicago’s harbor embraced in *Illinois Central* has evolved so as to allow courts to protect resources as diverse as nonnavigable tributaries, groundwater, wetlands, dry sand areas, and wildlife.<sup>32</sup>

The notion of the atmosphere as a quintessentially public resource subject to evolving notions of government stewardship is a settled feature of American law. For example, Congress articulated the public nature of the air resource in the Air Commerce Act of 1926, which recognized that the United States “has complete and exclusive national sovereignty in [its] air space.”<sup>33</sup> Like waterways, air lends itself to navigability, which presents a classic trust interest articulated in original public trust decisions.<sup>34</sup> Absent public ownership of navigable airspace, this critical resource could have been the subject of private monopolies.

In *United States v. Causby*, the U.S. Supreme Court warned, “To recognize private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which *only the public has a just claim*.”<sup>35</sup> Not surprisingly, given the crucial public interest in air, numerous state constitutions and codes explicitly recognize air as part of the *res* of the public trust.<sup>36</sup> Moreover, federal statutory law already includes air as a trust asset for which the federal government, states, and tribes can gain recovery of natural resource damages.<sup>37</sup>

Throughout history, law has evolved as courts have responded to unforeseen, often urgent, circumstances. The same principles that have informed all historic public trust cases apply with regard to fiduciary duties to protect the atmosphere. As the U.S. Supreme Court said in applying the public trust doctrine to an unprecedented set of circumstances in *Illinois Central*, “We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the deci-

sions are numerous which declare that such property is held by the state, by virtue of its sovereignty, in trust for the public.”<sup>38</sup>

As scientific consensus and human experience reveal, the air that comprises the atmosphere and the climate associated with it are critical resources facing a historically unparalleled threat. The ancient doctrine as it has evolved to create modern governmental fiduciary trust obligations is a rational and viable vehicle to apply to this extraordinary crisis.

The submerged lakebed was viewed by the *Illinois Central* Court as a critical public resource falling within the purview of the public trust doctrine. The critical distinction between the lakebed and the degrading atmosphere of our time, which makes recognition of the trust doctrine all the more critical, is that atmospheric degradation poses a catastrophic threat to human society of a magnitude unimaginable when *Illinois Central* was decided. As important as preservation of the harbor lakebed was a century ago, the public interest in protecting the atmosphere from climate catastrophe is infinitely more important.<sup>39</sup>

Although conditions change with time, the basic task and the principles informing judicial discretion remain constant. The public trust doctrine provides courts with a solid legal rationale upon which to base recognition of the atmosphere as a vital and appropriate asset falling within the scope of the public trust doctrine.

## ATMOSPHERIC TRUST LITIGATION

ATL provides a rational legal mechanism for courts to hold governments accountable for reducing carbon emissions. The premise of ATL is that every government holds its natural resources in trust for citizens and has a fiduciary obligation to protect such resources for present and future generations. ATL plaintiffs assert that this trust responsibility is an attribute of sovereignty. While it has been found most frequently applicable to state governments, public trust theory applies with equal force to any sovereign. As discussed above, ATL plaintiffs characterize the atmosphere as a trust asset shared as property among all nations and their

citizens. Professor Mary Christina Wood has described the role of ATL in efforts to address climate change as the atmosphere moves ever closer to the critical tipping point:

Protection of the trust through judicial oversight lies at the heart of the public trust jurisprudence in this country. [C]ourts have the ability to enforce a fiduciary obligation to reduce carbon at all levels of government. Whether they will do so or not depends largely on individual judges' perception of the urgency of climate crisis, their belief as to whether the political system will address the issue, and their view of the role of the judiciary in confronting climate change. While atmospheric trust litigation bears the risk of any untested strategy, it is perhaps the only macro approach that can empower courts to effectuate the reductions in emissions within the limited time frame afforded to us before critical climate thresholds are exceeded.<sup>40</sup>

Since 2011 ATL or public trust-related cases have been filed in 13 states, and one case has been litigated in the U. S. District Court for the District of Columbia. These cases continue at various stages before trial and appellate courts. Several cases have been dismissed on standing, political question, ripeness, and failure to exhaust administrative remedies grounds. A Texas trial court has held that the atmosphere falls within the purview of the Texas public trust doctrine.<sup>41</sup> Dismissals of ATL cases on various grounds are currently pending on appeal before the Washington, Oregon, Alaska, and Iowa supreme courts.

In the federal case *Alec L. v. Jackson*, the District Court stated that "the key question here is whether Plaintiffs' public trust claim is a creature of state or federal common law."<sup>42</sup> The court observed that "recently, courts have applied the public trust doctrine in a variety of contexts."<sup>43</sup> However, it found that "the manner in

which Plaintiffs seek to have the public trust doctrine applied in this case represents a significant departure from the doctrine as it has been traditionally applied." Because the court found no cases that have expanded the doctrine to protect the atmosphere or impose duties on the federal government, it was persuaded that "[i]n this country the public trust doctrine has developed *almost exclusively as a matter of state law*" and that "the doctrine has functioned as a constraint on states' ability to alienate public trust lands."<sup>44</sup> The court granted the United States' Motion to Dismiss on the grounds that the no federal claim had been presented and that, alternatively, the plaintiffs' federal common law claim directed to the reduction or regulation of carbon dioxide emissions is displaced by the Clean Air Act. As of June 2013 an appeal has been taken to the Court of Appeals of the District of Columbia.

## CONCLUSION

As Professor Wood has observed, ATL bears the risk of any untested strategy. The context in which atmospheric public trust cases come to the courts is unique and extraordinary. Powerful economic and political forces resist government action to address climate change. Opposition by powerful interests stood in the way in other times when new strategies have challenged the judiciary to address grave moral issues when other branches of government have been unwilling or unable to act. For example, the civil rights movement culminated in the landmark *Brown v. Board of Education of Topeka*<sup>45</sup> decision striking down government-sanctioned racial discrimination. Most recently, a judicial remedy nullified a federal law that discriminated against same-sex marriage sanctioned by more than a quarter of the states.<sup>46</sup> The threat of climate catastrophe looms as ATL cases wind their way through the courts. It remains to be seen whether the ancient Roman public trust doctrine will be recognized by the judiciary as a basis to move governments to meaningfully address the climate change crisis.

## ENDNOTES

- Two sections of this commentary, "Evolution of the Public Trust Doctrine" and "The Atmosphere as Public Trust Asset," contain extensive quotes and citations from the Brief for Amicus Curiae Law Professors, Alec L., et al. v. Jackson, 863 F.Supp.2d 11, 15 (D.D.C., 2012) in the drafting of which Professor McGinley participated.
- See, generally Climate Change Science Compendium II, United Nations Environment Programme (2009) available at: [http://www.unep.org/pdf/ccScienceCompendium2009/cc\\_ScienceCompendium2009\\_full\\_en.pdf](http://www.unep.org/pdf/ccScienceCompendium2009/cc_ScienceCompendium2009_full_en.pdf) (statement of Ban Ki-moon, Secretary-General of the United Nations).
- Mary Christina Wood, *Atmospheric Trust Litigation Across the World*, ch. 6 in FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST (KEN COGHILL, CHARLES SAMPFORD, TIM SMITH, EDs.), 2012, available at: <http://law.uoregon.edu/wp-content/uploads/2011/11/ATL-Across-the-World.pdf> (hereafter, FIDUCIARY DUTY).
- FRED PEARCE, WITH SPEED AND VIOLENCE: WHY SCIENTISTS FEAR TIPPING POINTS IN CLIMATE CHANGE, 2007; DAVID SPRATT AND PHILIP SUTTON, CLIMATE CODE RED: THE CASE FOR AN EMERGENCY ACTION, 2008 (summarizing science).
- Green Mountain Chrysler v. Crombie, 508 F. Supp. 2d 295, 313-17 (D. Vermont 2007).
- See, e.g., James Hansen, *Dangerous Human-Made Interference with Climate, Testimony Before Select Committee on Energy Independence and Global Warming*, U.S. House of Rep., 5 (April 26, 2007), available at: [http://www.columbia.edu/~jeh1/testimony\\_26april2007.pdf](http://www.columbia.edu/~jeh1/testimony_26april2007.pdf).
- Id.*
- See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).
- See Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 455 (1892) ("ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. . . . The trust with which they are held, therefore, is governmental, and cannot be alienated. . . .").
- 161 U.S. 519, 533-34 (1896) (quoting *Magner v. People*, 97 Ill. 320, WL 10415 at 8 (Ill. 1881)).
- See *Ctr. for Biological Diversity v. FPL Group*, 166 Cal.App.4th 1349, 1365-66 (Cal. App. 1 Dist. 2008) (discussing "public agencies'" public trust obligations); *In re Water Use Permit Applications, Waihole Ditch Combined Contested Case Hearing*, 94 Haw. 97, 9 P3d 409 (Haw. 2000) (applying public trust obligations to state agency).
- Sax, at 484.
- Geer v. Connecticut 161 U.S. 519, 525-28, 533-34 (1896) (the sovereign trust over wildlife resources is manifest "through all vicissitudes of government"); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 456 (1892) (declaring that a state legislature "cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right") (citing *Arnold v. Mundy*, 6 N.J.L. 1, 53 (N.J. 1821)).
- See, e.g., *Geer v. Connecticut* 161 U.S. 519, 525-28, 533-34 (1896) (describing the sovereign trust over wildlife resources as an "attribute of government"); Ill. Cent. 146 U.S. at 455; *Arnold v. Mundy*, 6 N.J.L. 1, 76-77 (N.J. 1821); *Waihole Ditch*, 94, 97, 131, 9 P3d 409, 443 (Haw. 2000) ("[H]istory and precedent have established the public trust as an inherent attribute of sovereign authority. . . ."). See also Karl S. Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?* 35 COLUM. J. ENVTL. L. 287, 311 (2010) ("[T]he idea that public trust limits and powers inhere in the very nature of sovereignty is one consistent thread in public trust cases").
- Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

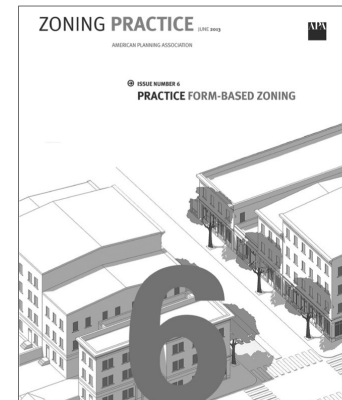
16. See Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. REV. 425, 431 (1989).
17. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. at 460 (1892). See generally, Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 48 ARIZ. ST. L.J. 849 (2001).
18. See Geer v. Connecticut at 534, (quoting *Magner v. People*, 97 Ill. 320, WL 10415 at 8 (Ill. 1881)). ("the duty of the legislature 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"); *State v. City of Bowling Green*, 313 N.E.2d 409, 411 (Ohio 1974) ("[W]here 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"); *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 724 (Cal. 1983) (identifying "duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands").
19. GEORGE G. BOGERT, ET AL., *BOGERT'S TRUSTS AND TRUSTEES*, § 582 (2011); see also *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927) ("trust reposed in the state is not a passive trust; it is governmental, active, and administrative [and] requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it. . . ."); *Just v. Marinette County*, 201 N.W.2d 761, 768-70 (1972) (emphasizing "active public trust duty" on the part of the state).
20. See Geer v. Connecticut, 161 U.S. at 525 (1896) ("These things are those which the juris condults called 'res communes'—the air, the water which runs in the rivers, the sea and its shores . . . [and] wild animals"); Gerald Torres, *Who Owns the Sky?* 19 PACE ENVTL. L. REV. at 529-530 (2002) (discussing res communes).
21. Torres, *Who Owns the Sky?* at 529.
22. 161 U.S. at 523-525.
23. 206 U.S. 230, 237 (1907) (emphasis added).
24. *Id.* at 455-56 (1892).
25. Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 315 (1980).
26. 146 U.S. at 455.
27. *Id.* at 454.
28. *Id.* at 455.
29. See generally *Marks v. Whitney*, 491 P.2d 374, 380 (1971) ("In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another"); Charles Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. REV. 425 (1989) (noting expansion of the public trust doctrine).
30. *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984).
31. See *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 724.
32. See, e.g., *Nat'l Audubon*, 658 P.2d at 719 (nonnavigable tributaries); *Owsichek v. State Guide Licensing and Control Bd.*, 763 P.2d 488, 493 (Alaska, 1988) (wildlife); *Matthews Bay Head Improvement Ass'n*, 471 A.2d at 358 (dry sand area); *Robinson v. Ariyoshi*, 658 P.2d 287, 311 (Haw. 1982) (groundwater); *Just v. Marinette County*, 201 N.W.2d 761, 769 (Wis. 1972) (wetlands).
33. 49 U.S.C.A. § 176(a).
34. See Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, at 452 ("It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein . . .").
35. 328 U.S. 256, 261 (1946) (emphasis added).
36. See, e.g., *Her Majesty v. City of Detroit*, 874 F.2d 332, 337 (6th Cir. 1989) (citing a Michigan statute that codifies public trust to include "air, water, and other natural resources" and Mich. Const. art. IV, §, stating, "The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people"); Haw. Const., art. XI, §1 (stating, "All public natural resources are held in trust by the State for the benefit of the people," and "the State and its political subdivisions shall conserve and protect Hawaii's . . . natural resources, including land, water, air, minerals and energy resources . . ."); R.I. Const., art. I, §17 (duty of legislature to protect air), interpreted as codification of Rhode Island's public trust doctrine in *State ex. Rel. Town of Westerly v. Bradley*, 877 A.2d 601, 606 (R.I. 2005); *Nat'l Audubon Soc'y v. Superior Ct. of Alpine County*, 658 P.2d 709, at 718-720 ("purity of the air" protected by the public trust).
37. See 42 U.S.C. § 9601 (CERCLA)(2006) (defining air as among the natural resources subject to trust claims for damages).
38. Ill. Cent. R.R. Co. v. Illinois at 455.
39. Commentators emphasize the appropriateness of judicial application of the public trust doctrine in this context. See, e.g., Torres, *Who Owns the Sky?* ("Properly understood . . . the traditional rationale for the public trust doctrine provides a necessary legal cornerstone . . . to protect the public interest in the sky"); Mary Christina Wood, *Nature's Trust: A Legal, Political and Moral Frame for Global Warming*, 34 B.C. ENVTL. AFF. L. REV. 577, 595 (2007); Patrick Parenteau, *Come Hell And High Water: Coping with the Unavoidable Consequences of Climate Disruption*, 34 Vt. L. REV. 957, 963-64 (2010); Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 Vt. L. REV. 781 (2010).
40. FIDUCIARY DUTY at 102.
41. *Bonser-Lain v. Tex. Comm'n on Envtl. Quality*, No. D-1-GN-11-002194, 1 (Tex. Dist. Ct., Aug. 2, 2012).
42. *Alec L. v. Jackson*, 863 F.Supp.2d 11, 15 (D.D.C., 2012).
43. *Id.* at 13, citing *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1083(D.C.Cir. 1984) ("the doctrine has been expanded to protect additional water-related uses such as swimming and similar recreation, aesthetic enjoyment of rivers and lakes, and preservation of flora and fauna indigenous to public trust lands").
44. *Id.* at 15, quoting *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1082 (D.C.Cir.1984) (emphasis in original) and citing dicta in *PPL Montana, LLC v. Montana*, 565 U.S. \_\_\_, 132 S.Ct. 1215, 1235, 182 L.Ed.2d 77 (2012), ("the public trust doctrine remains a matter of state law" and its "contours . . . do not depend upon the Constitution").
45. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).
46. *United States v. Windsor*, \_\_\_ U.S. \_\_\_, 2013 WL 3196928, June 26, 2013.

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