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Richard C. Lane

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# Comment

## The Pennsylvania Public Trust Doctrine: Its Use as a Restraint on Government

The public trust theory of natural resource management was established as the law of the Commonwealth of Pennsylvania in 1971, with the adoption of article I, section 27 of the Constitution of Pennsylvania.<sup>1</sup> This section declares that certain environmental rights belong to the citizens of Pennsylvania, and imposes upon the Commonwealth, as trustee, the duty to conserve and maintain the public natural resources for the benefit of the people.<sup>2</sup>

The public trust doctrine was a part of the body of common law in Pennsylvania prior to the adoption of article I, § 27; however, the common law public trust doctrine applied exclusively to waterways of the Commonwealth and the submerged land thereunder.<sup>3</sup> The constitutional public trust doctrine applies to all of the public natural resources of the Commonwealth.

It is the premise of this comment that the constitutional amendment is more than a general statement of environmental policy; it is a declaration of substantive rights in the people and an establishment of an active trust. The scope of the discussion will be limited to the public trust doctrine in Pennsylvania. The doctrine as it exists at common law will be presented for its dependent significance to the development of the constitutional public trust doctrine.

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1. PA. CONST. art. I, § 27 reads as follows:

Article I: Declaration of Rights

That the general, great and essential principles of liberty and free government may be recognized and unalterably established, WE DECLARE THAT—. . . § 27: Natural resources and the public estate. 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.

Actually, two amendments to article I were adopted, both numbered § 27, the other being "Prohibition against denial or abridgment of equality of rights because of sex."

2. PA. CONST. art. I, § 27.

3. See text accompanying notes 5-8 *infra*.

## I. THE PENNSYLVANIA COMMON LAW PUBLIC TRUST DOCTRINE

### A. *Background*

As with any trust, the common law public trust comprises the trust res, property which is the subject matter of the trust; a trustee, who holds legal title to the res; and a beneficiary or beneficiaries, for whose benefit the res is held, and who have equitable rights in the res.<sup>4</sup> Under English common law all navigable waters and the submerged lands thereunder were held by the Crown in its public and regal character, as representative of the people; *i.e.*, as the sovereign. The Crown held this legal title in trust for the benefit of the whole community to be freely used by all.<sup>5</sup>

After the revolution, the Commonwealth of Pennsylvania succeeded to these rights, adopting the public trust doctrine as part of the common law of the Commonwealth.<sup>6</sup> The legal title to the res vested in the sovereign, the collective body of all the people. The citizens of the Commonwealth became the beneficiaries of the trust, not as a collective body, but as individuals. As a result, each citizen has a right enforceable in equity to use the res for his own benefit.

In adopting the common law public trust doctrine, Pennsylvania made certain changes as to the terms of the trust. By English common law, the term "navigable waters" was defined by the ebb and flow of the tide; thus, the sea, arms of the sea, and rivers where the tide ebbed and flowed, and the submerged land thereunder were subject to the trust. Pennsylvania adopted a "navigable in fact" test, thereby adding the great rivers of the Commonwealth as subjects of the trust.<sup>7</sup> The land between the high and low water marks

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4. 1 G.G. BOGERT & G.T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 1 (2d ed. 1965); *RESTATEMENT (SECOND) OF TRUSTS* § 2(h) (1959).

5. *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367 (1842). In England, the trust res was considered incapable of private occupation, cultivation, or improvement. The uses of the res were to be public in nature, for highways of navigation and commerce, and for fishing. For extensive historical background of the common law public trust in England and its adoption by the various states of the United States see *Shively v. Bowlby*, 152 U.S. 1 (1894).

6. *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 30 (1869).

7. *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810). See also *Conneaut Lake Ice Co. v. Quigley*, 225 Pa. 605, 74 A. 648 (1909) (applying the "navigability in fact" test to lakes as well as rivers); *Flanagan v. City of Philadelphia*, 42 Pa. 219 (1862); *Barclay R.R. v. Ingham*, 36 Pa. 194 (1860); *Shrunk v. Schuyekill Navigation Co.*, 14 S. & R. 71 (Pa. 1826).

In *Cleveland & Pgh. R.R. v. Pittsburgh Coal Co.*, 317 Pa. 395, 176 A. 7 (1935), the court held that where a stream, which is non-navigable and therefore the private property of the riparian owners, is flooded by a dam project and thereby made navigable, by operation of law, it becomes the property of the Commonwealth. Presumably, by operation of law, it also

of the tide belonged to the Crown as part of the *res*, in England; in Pennsylvania the title to this land vested in the riparian owners, subject to the right of navigation in the public.<sup>8</sup>

As beneficiaries, the public have equitable rights to use the *res* for their own benefit. In England, the *res* could be used for the purposes of navigation and fishing.<sup>9</sup> To these uses, Pennsylvania added the right to use the *res* for manufacturing purposes,<sup>10</sup> for dredging,<sup>11</sup> for gathering stones, for removing ice, for bathing, and for removing water for domestic and farming purposes.<sup>12</sup> In sum, the citizens of the Commonwealth have the right to use the *res* for all practical, personal reasons.

### B. *Operation of the Pennsylvania Common Law Public Trust*

The operation of the common law public trust doctrine involves two inquiries. The first is to determine whether or not the property involved in a dispute is part of the trust *res*, and hence subject to the terms of the trust. The second inquiry is to determine whether, if the property is subject to the trust, the equitable rights of the beneficiaries have been improperly invaded.

The public trust doctrine recognizes a distinction between the government's ownership of the *res* and the government's ownership of other property. An interesting example of this distinction appears in an opinion of the Attorney General, *The Waters of Presque Isle Bay*.<sup>13</sup> The Commonwealth owned land on Presque Isle on the shore of the bay, which was administered by the State Park and Harbor

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becomes subject to the public trust. The court expressly left open the question of whether this constitutes a "taking." See also *Scanlon v. Iron City Sand & Gravel Co.*, 345 Pa. 535, 29 A.2d 82 (1942).

8. *Shively v. Bowlby*, 152 U.S. 1, 23 (1894).

9. *Flanagan v. City of Philadelphia*, 42 Pa. 219, 229 (1862).

10. See, e.g., *City of Philadelphia v. Gilmartin*, 71 Pa. 140 (1872).

11. E.g., *McGrady-Rogers Co. v. Commonwealth*, 43 Dauph. 275 (C.P. Pa. 1937).

12. *Hunt v. Graham*, 15 Pa. Super. 42, 46-47 (1900).

13. 12 Pa. D. & C. 88 (1928). In *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892), the United States Supreme Court, in speaking of a grant by the state legislature to a private company of the shorelands for a distance of one mile within the limits of Chicago, stated:

The character of the title or ownership by which the State holds the state house is quite different from that by which it holds the land under the navigable waters in and around its territory. . . . [The navigable waters are held by the state] *in trust* for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris*; in other words, they were held for the use of the people at large.

*Id.* at 457.

Commission of Erie. A request was made by the Commission to the Attorney General for his opinion on the jurisdiction of the Commission in the land and the adjoining waters of the bay. Specifically, the issue was whether or not private citizens had the right to use those waters for the mooring of houseboats and boats used by duck hunters, and for the anchoring of a grain fleet. It was the Attorney General's opinion that the Commission had no jurisdiction to prevent such use of the waters by citizens of the Commonwealth. He stated that the Commonwealth held title to the shorelands in its proprietary capacity, and had rights and duties in that land similar to those of any corporate landowner. The nature of the Commonwealth's ownership of the bed of the bay, however, was found to be quite different. This title was held by the Commonwealth in its sovereign capacity in trust for the use and enjoyment of the people. The opinion stated that the legislature might make grants of the res only if such grants recognized the public's rights in the trust. While the Commission had the full power to keep others from coming upon the *land* except on its terms, without specific legislative authority, it had no power to exercise similar dominion over the *waters*.

The second component in the operation of the common law public trust doctrine, once it is established that the trust res is involved, is to determine whether the equitable rights of the beneficiaries have been improperly invaded. The key question to be asked here is whether, and to what extent, the doctrine constrains the Commonwealth, *qua* trustee, in its dealings with the trust res.<sup>14</sup> In terms of judicial review of government action dealing with the res, will the court look only to whether or not due process has been satisfied, or will it inquire further to see whether the res is being maintained for the free and unrestrained use by the public?<sup>15</sup>

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14. See Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter cited as Sax].

15. One commentator has raised the issue in this manner:

Whether and to what extent that trusteeship constrains the states in their dealings with such lands has, however, been a subject of much controversy. If the trusteeship puts such lands wholly beyond the police power of the state, making them inalienable and unchangeable in use, then the public right is quite an extraordinary one . . . . Conversely, if the trust in American law implies nothing more than that state authority must be exercised consistent [*sic*] with the general police power, then the trust imposes no restraint on government beyond that which is implicit in all judicial review of state action—the challenged conduct, to be valid, must be exercised for a public purpose . . . .

*Id.* at 476-77.

A determination by the courts that the government should be constrained in dealing with the res seems to be a function of two factors: the extent to which the government action has infringed upon certain of the public's identifiable equitable rights in the property, and the particular branch or political subdivision of the government that has acted.

At the heart of the doctrine is the right of the people to use the res for their own benefit.<sup>16</sup> If a governmental action has the effect of denying the public access to the res, the courts have held that it may be void as a violation of the trust. An example of such an action arose in the case of *Reighard v. Flinn*.<sup>17</sup> The City of Pittsburgh was authorized by the legislature to develop a public landing on the Allegheny River, and was vested with authority to regulate and control its use. To this end, the city leased the property to a private company to erect and operate the landing. Suit was brought by adjacent landowners to have the lease declared null and void and to compel, on the grounds of public nuisance, the removal of the buildings erected. The court stated that disposition of the case depended solely on the issue of whether the city had a lawful right to make the lease. The city's action was found to be in violation of the public trust, and therefore was held to be unlawful. The court stated that the public's right to use the landing as access to the river for navigation must be totally unrestrained from regulation and control by, or subject to the consent of private individuals. It was of no consequence that the people would still have access to the landing conditioned on the payment of a fee to the lessee. Such subservience of the public's rights would be in violation of the public trust as an

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16. For examples of these rights see text accompanying notes 9-12 *supra*.

17. 189 Pa. 355, 42 A. 23 (1899).

18. In *Reighard v. Flinn*, 194 Pa. 352, 44 A. 1080 (1900), the court allowed the city to maintain and use the structures built under the lease according to a new scheme which was consistent with the rights of the public as beneficiaries of the public trust. It was made clear that the erection of buildings for the improvement of the landing for docking purposes was not inconsistent with the terms of the trust. It was also reasonable to charge a fee reasonably related to such improvements. The two decisions, taken together, show that it is not the erection of buildings, or the charging of a fee, which is a *per se* violation of the trust; rather, it is the abdication of the duties of the trustee by placing the res in the control of private individuals, that constitutes such a violation. In *Flanagan v. City of Philadelphia*, 42 Pa. 219 (1862), the court said:

There is no natural right of the citizen, except the personal rights of life and liberty, which is paramount to his right to navigate freely the navigable streams of the country he inhabits. It ranks immediately after those great personal rights.

*Id.* at 228.

impermissible delegation of the duties of the trustee. The lease was declared void and the structures were ordered to be removed.<sup>18</sup>

The court will not interfere with a profitable governmental use of the res unrelated to the trust where it feels that the public's right to enjoy such res has not been impaired. In *James Rees & Sons v. Pittsburgh*,<sup>19</sup> the court held that it was permissible for the city to use a public wharf on the Allegheny River for a public parking lot. The court stated that in *Reighard* the right of the public to use the wharf in connection with navigation was superior to the city's right to adopt the wharf as a parking lot; but it found that in this case, the superior right of the beneficiaries had not been violated because suitable and adequate space for docking was otherwise available.

From these two cases, it can be seen that the court will only strike down a governmental action as violative of the trust when a specific right of the public has been violated. A governmental use need not enhance the rights of the beneficiaries, but it must not diminish them.

The court will also consider which branch or political subdivision of the government has acted. It has been suggested that the primary function of the doctrine is one of democratizing the government processes as they relate to our natural resources.<sup>20</sup> The problem is most acute at the level of "low-visibility" decision-making in administrative agencies. Here, the inherent inequality of access to and influence over the government decision-making process is the greatest.<sup>21</sup>

Massachusetts has applied the public trust doctrine in an attempt to bring the decision-making process out into the open where it can be more responsive to the political process. The Massachusetts rule, by what has been characterized as "a simple but ingenious flick of the doctrinal wrist, . . ." <sup>22</sup> states that any change in the use of public lands, or any governmental action which tends to lessen the public uses of them, is impermissible without a clear showing of legislative approval.<sup>23</sup> Such approval is defined so as to require specific legislative identification of the property, a state-

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19. 316 Pa. 356, 175 A. 420 (1934).

20. Sax, *supra* note 14, at 561.

21. *Id.* at 498.

22. *Id.*

23. *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 215 N.E.2d 114 (1966). The court found a "presumption" that the state does not ordinarily intend to lessen public uses.

ment of the new use, and a showing of the willingness to surrender the existing use.<sup>24</sup> This rule requires the administrative agency, or the party seeking to change the use of public lands, to make a positive case to the legislature.

The Pennsylvania common law doctrine, in a more general way, also seems to require legislative approval if the public's right to use the res is to be compromised. In terms of the extent to which the doctrine is a constraint on government action dealing with the res, administrative agencies and local governmental bodies would seem to be severely constrained if their actions infringe upon the public's rights. In 1939, for example, the Secretary of Property and Supplies notified companies conducting dredging operations in the rivers of Pennsylvania that they would be required to apply for a permit and pay a fee to the Water and Power Resources Board for such a privilege. A suit was brought to enjoin the Commonwealth from enforcing this order, and the injunction was issued.<sup>25</sup> The court held that the title to the river beds was in the Commonwealth, but that the public trust required specific legislation to deny the public the right to conduct dredging operations as they had been doing for years.<sup>26</sup>

The Commonwealth, when acting through the legislature, is substantially less restrained by the trust doctrine than when acting through administrative agencies. The courts have said that the public trust doctrine is a common law principle that can be overridden by legislative action. In *Flanagan v. City of Philadelphia*,<sup>27</sup> suit was brought to enjoin the building of a bridge by the city over the Schuylkill River because of its adverse affect on the navigation of the river. The legislature had specifically approved the project. In denying the injunction, the court held that as important as the right to navigation is, it may be impaired by the legislature because it enjoys no constitutional guaranty.<sup>28</sup> The legislature has the authority to determine that the public convenience requires a partial restraint on the rights of the beneficiaries of the trust.

The aspect of the public trust doctrine which prevents the govern-

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24. *Robbins v. Department of Pub. Works*, 355 Mass. 328, 244 N.E.2d 577 (1969).

25. *McGrady-Rogers Co. v. Commonwealth*, 43 Dauph. 275 (C.P. Pa. 1937).

26. For an example of the same principle relating to local governmental bodies see text accompanying notes 16-18 *supra*. In *Reighard*, the court specifically left open the question of whether Pittsburgh could have leased the wharf to private citizens if the state legislature had given specific approval for such action.

27. 42 Pa. 219 (1862).

28. *Id.* at 230.



ment from irrevocably conveying the corpus to private individuals appears to apply to the legislature as well as to other branches of government, at least to the extent that they divert the res from the proper uses by the public. If such a grant were made by the legislature, the grant would be revocable, notwithstanding language in the grant itself to the contrary.<sup>29</sup> This does not mean that the Commonwealth cannot make incidental grants which would improve the facility, so long as they do not substantially impair the public interest in the use of the res.<sup>30</sup>

## II. THE PENNSYLVANIA CONSTITUTIONAL PUBLIC TRUST DOCTRINE

### A. *Scope of the Trust*

Under the Pennsylvania common law public trust doctrine, the Commonwealth holds the legal title to the navigable waterways subject to certain equitable rights of the citizens to use the res for their own benefit, *i.e.*, the common law trust exists primarily to insure the public's access to the navigable waterways of Pennsylvania.<sup>31</sup> The Pennsylvania declaration of environmental rights amendment declares that all of the public natural resources of the Commonwealth shall be held subject to a public trust, thereby protecting all such resources from abuse by the government or the public itself.<sup>32</sup>

Although the general purpose of the amendment is clear, the exact constitutional language employed gives rise to various conceptualizations of the trust:

§ 27: Natural resources and the public estate. 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.<sup>33</sup>

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29. Although this exact determination has never been made by a Pennsylvania court, the proposition has been generally accepted. *See* *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

30. *See* note 26 *supra*.

31. *See, e.g.,* *McGrady-Rogers Co. v. Commonwealth*, 43 Dauph. 275 (C.P. Pa. 1937).

32. PA. CONST. art. I, § 27. There is some overlap between the two trusts. The navigable waterways continue to be subject to the common law public trust, but, as a public natural resource, also become a part of the res of the constitutional public trust.

33. *Id.*

One such conceptualization of the amendment was characterized by Chief Justice Jones, dissenting in *Commonwealth v. National Gettysburg Battlefield Towers, Inc.*<sup>34</sup> The Chief Justice saw all three sentences of the amendment as defining the trust. The amendment “confers certain enumerated rights upon the people . . . and imposes upon the executive branch a fiduciary obligation to protect and enforce those rights.”<sup>35</sup> The trust res was conceptualized as the “natural, scenic, historic and aesthetic values of the environment;” the Commonwealth, through its executive branch, as the trustee; and the people of the Commonwealth, as the beneficiaries. He also stated that the amendment raised the common law trust doctrine to a constitutionally protected level and bestowed upon the trust beneficiaries general “constitutional right[s] to environmental protection.”<sup>36</sup>

Although Chief Justice Jones seemed to consider the common law public trust doctrine in his analysis, it is generally unclear whether it has merged into the constitutional public trust or operates independently. In either case, the legal principles which were judicially developed to handle the trust at common law would seem to be relevant in administering the constitutional trust. At common law, the actions of the trustee in dealing with the res were inhibited only to the extent that they infringed upon judicially recognized equitable rights of the beneficiaries. Extending this principle to the constitutional trust, then, the first sentence of the amendment would indicate an intention to declare these enumerated rights as the equitable rights of the beneficiaries rather than to define such rights on a case-by-case basis.

Moreover, Chief Justice Jones' conclusion that the “natural, scenic, historic, and aesthetic values of the environment” constitute the trust res seems to contradict the wording of the amendment itself. That phrase, as part of the first sentence, appears to be a statement of the rights of the people, and not a declaration of the res. To define the res as a set of values, rather than as definite property or property interests, can only add confusion. The concept of a set of enumerated values suggests a subjective judgment, but a determination of whether a government decision relates to the res should be an objective decision. Values should come into play only

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34. 454 Pa. 193, 208, 311 A.2d 588, 595 (1973).

35. *Id.* at 209, 311 A.2d at 596.

36. *Id.*, 311 A.2d at 596.

in determining whether a governmental action adversely affects the rights of the beneficiaries in a manner violative of the trust.

One commentator has suggested that the *res* should encompass all of Pennsylvania's public natural resources, however defined at the time.<sup>37</sup> Such a conceptualization seems logical, since the legislature rejected a listing of the resources which comprise the *res*, in favor of leaving the category open. To replace the deleted list with this list found in the first sentence would seem contrary to the legislative intent. This view of the *res* appears most workable. By not being tied to the enumerated list of rights in the amendment's first sentence, the concept of the *res* is allowed to expand or contract as contemporary notions of property change. Moreover, the stated rights then remain available as an enumeration of the rights of the beneficiaries in the constitutional trust.

## B. *Implementation of the Trust*

### 1. *Powers and Duties of the State as Trustee*

Having determined the scope of the trust *res* and the extent of the beneficiaries' interests therein, it becomes important to explore the powers and duties of the Commonwealth to deal with the natural resources concomitant with its role as trustee. Regarding the power of the Commonwealth to regulate the use of land, the Constitutional trust doctrine reaffirms the police power to establish standards for the public health. It also establishes new powers to regulate the use of land with aesthetic and historic considerations in mind.<sup>38</sup> These new *powers*, at the time of this writing, have not been implemented by the legislature; however, the *obligations* imposed by the trust which limit the powers of the trustee to act, where such acts affect the *res*, are being enforced.

The language of the amendment imposes the duty upon the Commonwealth, as trustee, to conserve and maintain the public natural resources for the benefit of the people. The Pennsylvania Commonwealth Court has rejected the strict view that this imposes a duty to refrain from *any* action which might result in some degree of

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37. Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of H. B. 958*, 41 PA. B. ASS'N Q. 421, 422 (1970).

38. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 200-01, 311 A.2d 588, 592 (1973).

environmental harm.<sup>39</sup> Rather the amendment has been held to require that decision-makers consider environmental factors and weigh them against potentially conflicting social concerns before determining a course of action.<sup>40</sup> The court's role in reviewing such decisions is to insure that these factors are adequately considered.

In the case of *Payne v. Kassab*,<sup>41</sup> the commonwealth court announced that the standard for review of governmental decisions relating to the administration of the trust involves the following questions:

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 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?<sup>42</sup>

*Payne* dealt with a suit by citizens against the Pennsylvania Department of Transportation to enjoin the use of a portion of a public park for highway expansion. The plaintiffs contended that this

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39. *Payne v. Kassab*, 11 Pa. Commw. 14, 29, 312 A.2d 86, 94 (1973). See also *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 249, 302 A.2d 886, 895 (1973).

40. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 249, 302 A.2d 886, 895 (1973).

41. 11 Pa. Commw. 14, 312 A.2d 86 (1973).

42. *Id.* at 29-30, 312 A.2d at 94. Compare *Camp Hill Borough Condemnation*, 43 Pa. D. & C.2d 418 (C.P. Cumberland Co. 1967), which was decided prior to the adoption of PA. CONST. art. I, § 27, and prior to the passage of PA. STAT. ANN. tit. 71, § 512(b) (Supp. 1974) (see note 43 *infra* and accompanying text). The court heard a challenge to the condemnation of a borough park for highway construction; it said that in order to subject the Department of Transportation to restraint by the courts, it must be shown that its actions were fraudulent, arbitrary or capricious.

If the testimony produced by the borough is accepted in all respects, it would seem that the Highway Department officials may have made a mistake in their judgment as to the site for the bridge. This, however, is insufficient to set aside their decision . . . . We cannot find from the testimony presented that the action of the secretary has been based on his will rather than upon the exercise of his judgment. It is, therefore, not arbitrary. Likewise, although the decision may have been erroneous, it was not freakish or whimsical, and it was, therefore, not capricious.

43 Pa. D. & C.2d at 426.

For the general rule, absent application of the constitutional public trust, for the scope of judicial review of decisions made by authorities, administrative agencies, or local governmen-

would be an improper use of the res by the trustee. The standard announced by the court actually had little impact on the result of this particular suit since in undertaking the design of any new transportation route or program requiring the acquisition of a new or additional right-of-way, the Department of Transportation is required by statute to prepare environmental impact statements and hold public hearings to consider, among other things, various environmental factors.<sup>43</sup> Indeed, the statutory requirements in this case were at least as strict as the requirements imposed by the trust.

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tal bodies see *Blumenschein v. Pittsburgh Housing Authority*, 379 Pa. 566, 109 A.2d 331 (1954):

[The] Courts will not review the actions of government bodies or administrative tribunals involving acts of discretion in the absence of bad faith, fraud, capricious action or abuse of power; they will not inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution.

*Id.* at 572-73, 109 A.2d at 335. See also *Price v. Philadelphia Parking Authority*, 422 Pa. 317, 221 A.2d 138 (1966); *Schwartz v. Urban Redevelopment Authority*, 416 Pa. 503, 206 A.2d 789 (1965); *Keystone Raceway Corp. v. State Harness Racing Comm'n*, 405 Pa. 1, 173 A.2d 97 (1961); *Eways v. Reading Parkway Authority*, 385 Pa. 592, 124 A.2d 92 (1956); *Schenck v. City of Pittsburgh*, 364 Pa. 31, 70 A.2d 612 (1950); *Floersheim Appeal*, 348 Pa. 98, 34 A.2d 62 (1943); *City of Pittsburgh v. Milk Marketing Bd.*, 1 Pa. Commw. 300, 275 A.2d 115 (1971); *Redevelopment Authority v. Owners or Parties in Interest*, 1 Pa. Commw. 378, 274 A.2d 244 (1971).

43. PA. STAT. ANN. tit. 71, § 512 (b) (Supp. 1974).

Upon the submission of the preliminary plan or design to the Department of Transportation for any transportation route or program requiring the acquisition of new or additional right-of-way, the Department of Transportation except in cases involving complaint proceedings under the jurisdiction of the Public Utility Commission shall have the power and its duty shall be to follow the hearing procedures now or hereafter required by the Federal Government for Federal-aid transportation programs pursuant to Titles 23 and 49 of the United States Code as amended and the regulations and procedures thereunder even though the transportation route or program does not contemplate the use of or actually employ Federal funds. At the hearings required by this subsection the Department of Transportation shall consider the following effects of the transportation route or program:

- (1) Residential and neighborhood character and location;
- (2) Conservation including air, erosion, sedimentation, wildlife and general ecology of the area;
- (3) Noise, and air and water pollution;
- (4) Multiple use of space;
- (5) Replacement housing;
- (6) Displacement of families and businesses;
- (7) Recreation and parks;
- (8) Aesthetics;
- (9) Public health and safety;
- (10) Fast, safe and efficient transportation;
- (11) Civil defense;
- (12) Economic activity;
- (13) Employment;

The importance of the three-fold *Payne* standard, however, transcends the facts of that case since the same standard of review has been held appropriate in cases involving the public trust res, notwithstanding the absence of any statutory requirement that environmental factors be considered.<sup>44</sup> For instance, that test has been employed by the commonwealth court to review a challenged decision of the Public Utility Commission to issue a certificate of public convenience,<sup>45</sup> and by the Environmental Hearing Board,

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- (14) Fire protection;
  - (15) Public utilities;
  - (16) Religious institutions;
  - (17) Conduct and financing of government including the effect on the local tax base and social service costs;
  - (18) Natural and historic landmarks;
  - (19) Property values;
  - (20) Education, including the disruption of school district operations;
  - (21) Engineering, right-of-way and construction costs of the project and related facilities;
  - (22) Maintenance and operating costs of the project and related facilities;
  - (23) Operation and use of existing transportation routes and programs during construction and after completion.

At the hearings required by this section, the public officials named in clause (15) of subsection (a) of this section shall make a report indicating the environmental effects of the proposed transportation route or program. The Department of Transportation shall not construct or reconstruct any portion of the transportation route or program unless the Secretary of Transportation makes a written finding published in the Pennsylvania Bulletin that;

- (1) No adverse environmental effect is likely to result from such transportation route or program; or
- (2) There exists no feasible and prudent alternative to such effect and all reasonable steps have been taken to minimize such effect. For the purpose of this subsection environmental effect shall refer to the effects enumerated in this subsection.

44. In deciding a case prior to the decision in *Payne*, the Court of Common Pleas of Bucks County had held that the failure of a municipal water authority to consider the environmental factors of a decision for the location of a well and storage tower would be, in light of PA. CONST. art. I, § 27, a capricious and arbitrary act. *Flowers v. Northampton Bucks County Municipal Authority*, 57 Pa. D. & C.2d 274, 279 (C.P. Bucks Co. 1971). Presumably now, where a municipal authority makes decisions affecting the res, the three-fold standard of *Payne* will be applied.

45. *Bucks County Bd. of Comm'rs v. Public Util. Comm'n*, 11 Pa. Commw. 487, 313 A.2d 185 (1973). The court held that the three-fold *Payne* test supplemented the statutory scope of review for any appeal from an order of the commission. The following are the pertinent statutory provisions governing the scope of review of commission determinations. PA. STAT. ANN. tit. 66, § 1437 (1959):

Any appeal . . . shall be determined upon the record certified by the commission to the court. . . . The order of the commission shall not be vacated or set aside . . . except for error of law or lack of evidence to support the finding, determination, or order of the commission, or violation of constitutional rights.

the quasi-judicial arm of the Pennsylvania Department of Environmental Resources, to review decisions of the Department to issue various permits under the authority of the Clean Streams Law<sup>46</sup> and/or the Sewage Facilities Act.<sup>47</sup>

The first inquiry under the *Payne* test, to see whether there has been compliance with applicable statutes and regulations relevant to the res, adds little to the substantive body of law dealing with review of governmental action. Once a question is before the court, statutes and regulations relevant to the issue have always been proper subjects for judicial inquiry. Holding that such compliance is constitutionally required by the public trust doctrine, however, could have important implications in considering the standing of a particular plaintiff to challenge the government action at issue. To the extent that the requirements of standing under the public trust doctrine are held to be less restrictive than those necessary to challenge government action under a statute or regulation claimed by plaintiff to have been violated, the concept of standing may be expanded in some cases where environmental damage is at issue.

The *Payne* standard also requires the court to determine whether the environmental harm so clearly outweighs the social benefits of the action that it would be an abuse of discretion to proceed. This indicates that one of the traditional techniques of judicial review of governmental action—inquiry into whether there has been an abuse of discretion—will be applied in public trust cases. Failure to give adequate consideration to the environmental factors may be found to be such an abuse of discretion.

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PA. STAT. ANN. tit. 66, § 1442 (Supp. 1974):

Whenever the commission shall make any rule, regulation, finding, determination, or order, under the provisions of this act, the same shall be prima facie evidence of the facts found . . . .

In applying the statutory scope of judicial review, the court is bound by the substantial evidence test. See *Modern Transfer Co. v. Public Util. Comm'n*, 182 Pa. Super. 110, 125 A.2d 463 (1956). "Substantial evidence is such relevant evidence as a reasonable mind can accept as adequate to support a conclusion . . ." *Bucks County Bd. of Comm'rs v. Public Util. Comm'n*, 11 Pa. Commw. 487, 493, 313 A.2d 185, 190 (1973). See generally *Pittsburgh Rys. v. Public Util. Comm'n*, 198 Pa. Super. 415, 182 A.2d. 80 (1962); *Johnstown-Pittsburgh Express, Inc. v. Public Util. Comm'n*, 5 Pa. Commw. 521, 291 A.2d 545 (1972); *Erie L. Ry. v. Public Util. Comm'n*, 2 Pa. Commw. 396, 278 A.2d 188 (1971).

46. PA. STAT. ANN. tit. 35, §§ 691.1-.801 (1964).

47. *Id.* §§ 750.1-.15 (Supp. 1974). See, e.g., *Fox Appeal*, No. 73-078-B (Pa. Environmental Hearing Bd. May 16, 1974). See also *In re S & F Builders, Inc.*, 60 Pa. D. & C.2d 115 (Pa. Environmental Hearing Bd. 1971) (the amendment was found to be relevant, in an appeal from a denial of a permit to change the course of a stream, to the interpretation and application of the Water Obstructions Act, PA. STAT. ANN. tit. 32, §§ 681-91 (1967)).

Finally, the court must determine whether the record demonstrates a reasonable effort to reduce environmental incursion to a minimum. This determination has potentially the most far-reaching impact on government action dealing with the res, for it requires that the government, as trustee, actively consider and weigh the environmental factors involved when dealing with the res. This raises a question as to which record the court will look for a demonstration of this reasonable effort.

In the *Payne* case itself, this was not a problem. The public hearings required by statute to be held by the Department of Transportation created the public record which was scrutinized by the court. In other situations, however, such hearings and studies will not be statutorily required. For instance, the Department of Transportation must hold hearings and undertake environmental impact studies only if the scope of the project is such that it will be considered a "transportation route or program."<sup>48</sup> In smaller projects, where no hearing is required,<sup>49</sup> it is unclear to what record the court will look for review under the *Payne* analysis.<sup>50</sup>

If no public record were established, it would seem that some other type of inquiry would have to be made to determine if environmental damage has been kept to a minimum. The court could establish its own record by studying the matter *de novo*, but this would create the logical inconsistency of creating a broader scope of review in these instances than in cases where the legislature has required the agency itself to establish a record. An alternative position would be to hold that the constitutional public trust doctrine itself requires that where there is a possibility of environmental damage resulting from a governmental decision, the agency involved must establish a public record adequate for the court to be able to determine how the particular decision was reached.

## 2. *The Self-Execution Issue*

One last issue remains to be discussed—whether the constitutional amendment *standing alone* confers trust duties upon the Commonwealth, *i.e.*, are the amendment's provisions self-executing? To the extent that the provisions are not deemed to be

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48. PA. STAT. ANN. tit. 71, § 512 (b) (Supp. 1974), the text of which appears in note 43 *supra*.

49. See *Cowell v. Commonwealth*, 6 Pa. Commw. 974, 297 A.2d 529 (1972).

50. Cf. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).



self-executing supplementary legislative action is required.<sup>51</sup> To shed light on this issue the amendment must be further explored.

The general rule is that the sections of the constitution contained in article I are self-executing to the extent that they limit the powers of government.<sup>52</sup> The constitutional public trust doctrine presents a unique situation in that it both limits and expands the powers of the government. The amendment imposes certain obligations upon the trustee that limit its activities if they would have an adverse affect upon the trust.<sup>53</sup> On the other hand, the amendment expands the powers of the government to regulate a use of land that affects the natural resources. It therefore becomes difficult to make a general statement concerning the self-execution of the amendment's provisions since the resolution may depend upon whether a particular application expands or limits the trustee's powers.

An example of an attempted use of these expanded powers by the executive branch, without any legislative implementation, is contained in *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*<sup>54</sup> The Commonwealth, by the Governor and the Attorney General, brought suit to enjoin the construction of an observation tower near the Gettysburg battlefield. At issue was the potential damage to the historic and environmental value of the battlefield.

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51. 1 T. COOLEY, CONSTITUTIONAL LIMITATION 165 (8th ed. 1927).

But although none of the provisions of a constitution are to be looked upon as immaterial or merely advisory, there are some which, from the nature of the case, are as incapable of compulsory enforcement as are directory provisions in general. The reason is that, while the purpose may be to establish rights or to impose duties, they do not in and of themselves constitute a sufficient rule by means of which such right may be protected or such duty enforced. In such cases, before the constitutional provision can be made effectual, supplemental legislation must be had; and the provision may be in its nature mandatory to the legislature to enact the needful legislation, though back of it there lies no authority to enforce the command. Sometimes the constitution in terms requires the legislature to enact laws on a particular subject; and here it is obvious that the requirement has only a moral force: the legislature ought to obey it; but the right intended to be given is only assured when the legislation is voluntarily enacted.

*Id.* (footnotes omitted), *quoted in* *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 198-99, 311 A.2d 588, 591 (1973).

52. Justice O'Brien recognized this general rule as being established in article I, § 25 of the state constitution:

Reservation of Powers in People:

To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of the government and shall forever remain inviolate.

PA. CONST. art. I, § 25.

53. See, e.g., *Payne v. Kassab*, 11 Pa. Commw. 14, 312 A.2d 86 (1973).

54. 454 Pa. 193, 311 A.2d 588 (1973).

At trial, the chancellor found that the amendment was self-executing for this purpose, but denied the injunction on the merits.<sup>55</sup> On appeal the commonwealth court affirmed both the decision and the resolution of the self-execution issue.<sup>56</sup> The Supreme Court of Pennsylvania also affirmed, but it is unclear whether the court held the provisions of the amendment to be self-executing for this purpose since no opinion commanded a majority of the court.<sup>57</sup>

Justice O'Brien stated that the provisions of the amendment, as they were at issue in this case, are not self-executing.<sup>58</sup> The Commonwealth was attempting to use the constitutional public trust to *expand* its powers into areas where it previously had no authority to act. This, Justice O'Brien said, it could not do without legislative authority.

The issue of self-execution in this case actually presented the question of which governmental branches were vested with the powers of the trustee. Specifically, the court had to decide if the executive branch could, without implementing legislation, protect the res from potential damage by individuals. Justice O'Brien's opinion indicates a belief that this power vests in the legislative branch exclusively, and cannot be exercised by the executive unless authorized by the legislature. This position is consistent with the principle

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55. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 13 Adams 75 (C.P. Pa. 1971).

56. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 302 A.2d 886 (1973).

57. The case was heard before the seven member court; Justice O'Brien, announcing the decision of the court, held that the provisions in question were not self-executing for this purpose. Justice Nix, without opinion, concurred in the result. 454 Pa. at 206, 311 A.2d at 595. Justice Roberts, in a concurring opinion in which Justice Manderino joined, found that the chancellor had ruled properly on the merits. Although he did not expressly address the "self-execution" issue, he did state that he had "serious reservations as to the propriety of granting the requested relief in this case in the absence of appropriate and articulated substantive and procedural standards." *Id.* at 208, 311 A.2d at 596. He did not explain whether these standards must come from the legislature, or whether the executive branch, through appropriate administrative agencies, could promulgate such regulations. Chief Justice Jones filed a dissent, in which Justice Eagen joined, stating that the amendment should be held self-executing. *Id.* at 208-15, 311 A.2d at 596-99.

In *Commonwealth v. Abington Township Zoning Hearing Bd.*, No. 72-12524, at 13 (C.P. Montgomery Co., Pa., filed Sept. 30, 1974), the court held that the amendment was self-executing and enforceable by the Attorney General of the Commonwealth under circumstances similar to *Gettysburg*. The court stated that the Pennsylvania Supreme Court in *Gettysburg* had not definitively ruled on this issue. *Id.* at n.2. Therefore the court considered itself bound by the decision of the commonwealth court, the highest court in the state to definitively rule on the matter, that the amendment was self-executing for this purpose.

58. 454 Pa. at 199-200, 311 A.2d at 592.

established under the common law public trust doctrine that the legislature, not the executive, is empowered to exercise the discretion vested in the trustee.<sup>59</sup>

Even if Justice O'Brien's position were to be adopted by a majority of the court, its impact would merely be to state that the amendment is not self-executing where it is used to expand the powers of the government. This position, however, does not undermine the general rule declaring the provisions of article I to be self-executing. Indeed, the commonwealth court has held that the *limiting* aspects of the amendment fall within that general rule.<sup>60</sup>

### C. *Enforcement of the Trust—Standing*

In order to raise the issue of whether an action of the trustee relating to the res violates the duties of the trustee, a party must demonstrate to the court that he is a proper party to bring an action for judicial review of the decision in question. In most situations, the challenged decision will have been made by a state administrative agency, and administrative law will then provide the framework for affected members of the public to challenge these actions as unconstitutional, unlawful, arbitrary and capricious, or abusive of discretion. A complete treatment of the subject of standing to challenge administrative decision-making is beyond the scope of this comment; therefore, the treatment of the issue here will be limited to a brief discussion of several of the theories which have been suggested as being appropriate when the claim is based on the public trust doctrine.

Whether a violation of a citizen's rights as beneficiary of the trust is sufficient by itself to accord standing to challenge governmental action has not yet been decided by the courts. In *Payne v. Kassab*,<sup>61</sup> a taxpayer's suit by members of the community who used the park, the court did not explain the basis for according standing to the plaintiffs to raise the issues involved. Generally, if a public project of this type is financed with state tax dollars from a fund into which a Pennsylvania citizen has paid taxes, that citizen has standing to

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59. See, e.g., *McGrady-Rogers Co. v. Commonwealth*, 43 Dauph. 275 (C.P. Pa. 1937).

60. Only the commonwealth court has thus far ruled on these limiting aspects. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 8 Pa. Commw. 231, 302 A.2d 886 (1973). See also *Bucks County Bd. of Comm'rs v. Public Util. Comm'n*, 11 Pa. Commw. 487, 313 A.2d 185 (1973); *Payne v. Kassab*, 11 Pa. Commw. 14, 312 A.2d 86 (1973).

61. 11 Pa. Commw. 14, 312 A.2d 86 (1973).

challenge the legality of the project by means of a taxpayer's suit.<sup>62</sup>

It has been stated that the public is given standing to maintain taxpayers' suits in order to provide a means of "mobilizing the self-interest of individuals with the body politic to prevent illegal and unwarranted governmental action."<sup>63</sup> Similarly, it has been suggested that one of the primary purposes of a public trust doctrine

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62. In order to maintain a taxpayer suit to seek injunction of state governmental action in Pennsylvania, the taxpayer must show that the challenged action involves a wrongful expenditure of tax monies or the wasting of government assets. He need not show that he has a special interest in the suit that is distinct from other members of the public, or that he will be injured in any way other than as a taxpayer. It has been held, however, that the taxpayer must show some pecuniary loss to himself as a taxpayer to have standing; in the proper circumstances, he will need to show that he is a taxpayer into the particular fund from which monies will be expended for the challenged action. See generally *Price v. Philadelphia Parking Authority*, 422 Pa. 317, 221 A.2d 138 (1966); *Mayer v. Hemphill*, 411 Pa. 1, 190 A.2d 444 (1963); *Loewen v. Shapiro*, 389 Pa. 610, 133 A.2d 525 (1957); *Regan v. Stoddard*, 361 Pa. 469, 65 A.2d 240 (1949); *Schlanger v. West Berwick Borough*, 261 Pa. 605, 104 A. 764 (1918); *Altomose v. Higher Educ. Facilities Authority*, 7 Pa. Commw. 596, 300 A.2d 827 (1973). If the challenged action is the granting of a tax exemption, or the removing of property from the tax roles, he will need to show that he pays taxes into the fund from which that property would pay if not exempt, thereby showing that his tax burden is increased. *Price v. Philadelphia Parking Authority*, *supra* at 325-26, 221 A.2d at 143. See *Pennsylvania Gas & Water Co. v. Kassab*, 14 Pa. Commw. 564, 322 A.2d 775 (1974). This action was in the nature of a taxpayer's suit, by a water company and its customers, to restrain the Pennsylvania Secretary of Transportation from undertaking to relocate, grade, reconstruct and widen a highway. The project was to be accomplished by the use of funds from the Motor License Fund, to which the company had contributed by the payment of title and registration fees, and fuel taxes. The company claimed that the project would violate its rights under article I, § 27 of the Pennsylvania constitution in that it would cause runoff of earth, soils and other impurities into the company's reservoir which would pollute it and reduce its capacity. Compare *Vance v. Kassab*, 325 A.2d 924 (Pa. Commw. 1974), where, in a similar suit by an individual claiming environmental damage to his property, the court said that plaintiff's exclusive remedy was resort to the procedures of the Eminent Domain Code, PA. STAT. ANN. tit. 26, §§ 1-101 to -903 (Supp. 1974). The court distinguished this case from *Pennsylvania Gas & Water Co. v. Kassab*, *supra*, first, on the basis that the customers of the water company had no remedy under the Eminent Domain Code, and, second, as a matter of degree—damage to a large sector of public as opposed to damage to individual property.

63. *Price v. Philadelphia Parking Authority*, 422 Pa. 317, 327 n.15, 221 A.2d 138, 144 n.15 (1966). The court went on to say:

Our conclusion is reinforced by a recognition of the need to subject the activities of public authorities to judicial scrutiny. As public bodies, they exercise public powers and must act strictly within their legislative mandates. Moreover, they stand in a fiduciary relationship to the public which they are created to serve and their conduct must be guided by good faith and sound judgment. . . . The mushrooming of authorities at all levels of government and the frequent complaint that such bodies act in an arbitrary and capricious manner in violation of existing law dictate that a check rein be kept upon them. . . . These considerations dictate that the independence of authorities from some of the usual restrictions on governmental activities not be extended so as to insulate them from judicial scrutiny through the medium of taxpayers' suits.

*Id.* at 329, 221 A.2d at 145 (citations and footnotes omitted).

in natural resources management is to afford a democratization of government processes relating thereto.<sup>64</sup> The trust theory can provide a means for insuring that administrative agencies and public authorities are held more accountable to the public they serve.<sup>65</sup> The taxpayer's suit seems to be a natural tool for this purpose, and a suit in the nature of a taxpayer's suit, therefore, should be available where resources, rather than tax dollars, are being wasted or illegally used.

Standing to challenge a government project on the basis that the requirements of the public trust doctrine have not been met may also be accorded to one whose property is being condemned for that project. This is accomplished by raising a preliminary objection to the declaration of taking.<sup>66</sup> The preliminary objection may raise not only matters pertaining to the specific property being condemned, but if the property is to be used as part of a larger project, the challenge may be based on the illegality of the project as a whole.<sup>67</sup> Failure to consider adequately the relevant environmental factors may be considered such an illegality.

Where a citizen seeks to challenge the grant of a permit or license by an administrative agency to a private individual, the problem of standing becomes most significant. A suit to enjoin the Public Utility Commission from issuing a certificate of public convenience, for instance, raises the typical problems in this area. A state statute requires that before such a certificate shall be issued, the Commission shall hold public hearings.<sup>68</sup> In order to challenge the decision of the Commission, the challenging party must show that he

64. Sax, *supra* note 14, at 561.

65. *Id.* at 495.

66. PA. STAT. ANN. tit. 26, § 1-406 (1974). *See generally* Eminent Domain Code, PA. STAT. ANN. tit. 26, §§ 1-101 to -903 (Supp. 1974). The preliminary objection to the declaration of taking has been held to be the exclusive remedy to attack the lawfulness and propriety of a condemnation proceeding. *Valley Forge Golf Club v. Upper Merion Township*, 422 Pa. 227, 221 A.2d 292 (1966); *Hanni Appeal*, 420 Pa. 289, 216 A.2d 774 (1966); *Faranda Appeal*, 420 Pa. 295, 216 A.2d 769 (1966); *Mahon v. Lower Merion Township*, 418 Pa. 558, 212 A.2d 217 (1965).

67. *See, e.g.*, *Washington Park, Inc. Appeal*, 425 Pa. 349, 229 A.2d 1 (1967).

68. PA. STAT. ANN. tit. 66, § 1123 (1959). This requires that a certificate of public convenience shall be granted:

[O]nly if and when the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public . . . .

*Id.* § 1123(a). Subsection (b) provides:

For the purpose of enabling the commission to make such finding or determination,

was a "party to the proceedings affected thereby."<sup>69</sup> In such cases users of the utility have been made formal parties to the proceedings, and have been held to have sufficient interest to appeal orders of the Commission on matters affecting service.<sup>70</sup> Similarly, as to matters affecting the environment or the allocation of public natural resources, it would seem that any citizen, as beneficiary of the public trust, would have sufficient interest in the matter to become a party or to take an appeal.<sup>71</sup> Where the Constitution of Pennsylvania establishes rights in the people, and those rights are threatened, the people have a significant interest in the matter.

A basic question which is thus far unanswered by the courts, is whether the people, as beneficiaries of the trust, have a right, *qua* beneficiaries, to sue to enforce their constitutional equitable rights in the res. Under the common law public trust, the rights to use the corpus were enforceable in equity. It has been suggested that the

it shall hold such hearings, which shall be public, . . . as it may deem necessary or proper in enabling it to reach a finding or determination.

*Id.* § 1123(b).

69. *Id.* § 1431. Generally, one becomes a party to the proceedings by filing a formal protest prior to the hearing and by testifying at the hearing. *Id.* § 1391. However, "party to the proceedings" is not defined in the statute.

Every person who files a protest in a proceeding pending before the Commission, and who is given an opportunity to testify, is not *ipso facto* a party to the proceedings with a right to maintain an appeal from the Commission's order.

*Arsenal Bd. of Trade v. Public Util. Comm'n*, 166 Pa. Super. 548, 551-52, 72 A.2d 612, 614 (1950). See also *State Bd. of Undertakers v. Joseph T. Sekula Funeral Homes, Inc.*, 339 Pa. 309, 14 A.2d 308 (1940); *Seitz Liquor License Case*, 157 Pa. Super. 553, 43 A.2d 547 (1945). In order to show that he was affected by the proceedings, the challenging party must show that he had an interest that was adversely affected; it must be a direct interest in the subject matter, and it must be immediate, pecuniary, and substantial (although in some cases, these formal requirements have been somewhat relaxed, such as in the instance where users of the utility are challenging a decision affecting service). See, e.g., *Smith v. Public Util. Comm'n*, 174 Pa. Super. 252, 101 A.2d 435 (1953); *Arsenal Bd. of Trade v. Public Util. Comm'n*, 166 Pa. Super. 548, 72 A.2d 612 (1940); *Dutchland Tours, Inc. v. Public Util. Comm'n*, 13 Pa. Commw. 54, 318 A.2d 394 (1974).

70. See, e.g., *Rydal-Meadowbrook Ass'n v. Public Util. Comm'n*, 173 Pa. Super. 380, 98 A.2d 481 (1953); *Commuter's Comm. v. Public Util. Comm'n*, 170 Pa. Super. 596, 88 A.2d (1952).

71. See, e.g., *Bucks County Bd. of Comm'rs v. Public Util. Comm'n*, 11 Pa. Commw. 487, 313 A.2d 185 (1973). The suit involved the issuance of a certificate of public convenience authorizing a carrier to construct a pipeline for the transportation of petroleum products for use by an electricity generating facility. Without much discussion of the issue of standing, the court heard the appeal taken by: Board of County Commissioners, Bucks County; Bucks County Planning Commission; Montgomery County Board of Commissioners; Montgomery County Planning Commission; Trustees of Reading Railroad; an ad hoc citizens committee; a regional environmental protection committee; and one individual.

right of the people to have the res preserved and maintained under the constitutional public trust should be similarly enforced.<sup>72</sup>

As a final consideration, if the public trust is thought of as a special type of charitable trust, to allow the public to sue to compel performance of the duties of the trustee would be contrary to the general rule. Such a suit, in the case of an ordinary charitable trust, may be brought only by the Attorney General, as representative of the people, *parens patriae*.<sup>73</sup> A departure from that general rule would seem to be warranted in this area, however, since the Commonwealth is the trustee of the natural resources, and the Attorney General is the trustee's chief counsel. To hold that the Attorney General is the only party who may seek to enforce the terms of the trust, would be to hold, in effect, that only the trustee could question its own performance.<sup>74</sup>

### III. SOME PRACTICAL PROBLEMS POSED BY THE TRUSTS

The common law and constitutional public trust doctrines have been held to preclude the trustee both from using the res itself, and from granting to others the right to use the res in such a way that the equitable rights of the beneficiaries would be violated. While it is thus an established concept that notwithstanding the trust the Commonwealth may, in certain situations grant permits and licenses,<sup>75</sup> the limits and guidelines of this concept are as yet unclear. Therefore, some hypothetical examples may be helpful in analyzing a few of the issues involved in such situations.

Assume that Blackpark Wildlife Preserve is a Pennsylvania-owned parkland which requires a delicate ecological balance to maintain its use as a wildlife sanctuary.

*Example 1.* The Pennsylvania Department of Transportation pro-

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72. See Fox Appeal, No. 73-078-B at 34 (Pa. Environmental Hearing Bd. May 16, 1974); Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 224-29 (1972).

73. See, e.g., Pruner Estate, 390 Pa. 529, 136 A.2d 107 (1957); Curry Appeal, 390 Pa. 105, 134 A.2d 497 (1957); Wiegand v. Barnes Foundation, 374 Pa. 149, 97 A.2d 96 (1953). If a beneficiary of a charitable trust has some special financial interest in the trust, which is more than that interest which is generally held by the public, he may maintain a suit to enforce that right. The general beneficiaries, however, have no power of enforcement. There are two exceptions to this general rule; a member of the corporate trustee may sue to enforce the trust; and the rule is not applicable to suits for cy pres, in accordance with The Estates Act of 1947, PA. STAT. ANN. tit. 20, § 301.10 (1950). See Wiegand v. Barnes Foundation, *supra*.

74. Fox Appeal, No. 73-078-B at 4 (Pa. Environmental Hearing Bd. May 16, 1974).

75. *Id.*

poses the construction of a highway through Blackpark which will upset the ecological balance of the park to such an extent that its value as a wildlife sanctuary will be destroyed. The court is asked to enjoin construction.

*Example 2.* X, a developer, proposes to build a resort community on Whiteacre, a large tract of land adjacent to Blackpark. Blackpark lies between Whiteacre and an interstate highway, and X seeks to obtain a right-of-way through the park to serve as a main entrance to the resort. The proposed roadway would cause similar damage to Blackpark as would the highway in *Example 1*. The right-of-way is granted, and the court is asked to intervene.

The first example describes a situation that is almost identical to that which arose in *Payne v. Kassab*.<sup>76</sup> The Commonwealth, in deciding whether to construct this highway, is bound by its duties as trustee since Blackpark is a public natural resource, and the decision to build will adversely affect the environment and ecology of that resource. The court should apply the *Payne* standard to review the actions of the trustee,<sup>77</sup> and upon the facts of this example, might reasonably find a violation of the trust under each of the three parts of that test.

In the second example, the Commonwealth is granting a right to a private individual to build a road, an act which if done by the Commonwealth itself, would violate the trust. In making such a decision, the trustee should be held to at least as strict a standard as when its own actions affect the res. In reviewing this decision, the court should again apply the *Payne* standard of review, and issue the requested injunction.

*Example 3.* X, again proposing to develop Whiteacre as a resort community, applies for a permit to dump water from a sewage treatment plant into a stream which is on the boundary of Blackpark and Whiteacre. If the permit is issued, the water will become polluted to such an extent that serious ecological damage to Blackpark will result. The permit is issued, and the court is asked to intervene.

*Example 4.* Same facts as *Example 3*, except X proposes to use a treatment plant that will purify the water to such a degree that no pollution of the stream will result. By building this treatment plant and disposing of the water into this stream on Blackpark, X will be able to service the planned resort community. However, it is shown

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76. 11 Pa. Commw. 14, 312 A.2d 86 (1973).

77. See text accompanying note 45 *supra*.



that development of Whiteacre as proposed will cause drastic ecological changes to the entire watershed of which Blackpark and Whiteacre are parts, rendering Blackpark unsuitable for use as a wildlife preserve. The agency involved decides to issue the permit and the court is asked to intervene.

*Example 5.* Y owns Greenacre, a tract of land adjacent to Blackpark. Y proposed to construct a lumber mill and to use the timber on Greenacre to supply its needs. The use of Greenacre for this purpose will cause serious and substantial environmental damage to Blackpark. In order to build the mill, Y must obtain permits from the Department of Labor and Industry. Y is in compliance with all applicable codes and ordinances relating to the proposed construction. The Department decides to issue the permits and the court is asked to intervene.

In the third example, the stream, as well as Blackpark, is a public natural resource and as such is part of the res. By issuing the permit, the Commonwealth is allowing X to dump water under such conditions that it will result in direct environmental damage to the stream. The Environmental Hearing Board has held that, in granting permits of this type, the Commonwealth is bound by its duties as trustee to consider the environmental implications of such decisions.<sup>78</sup> If this position is adopted by the courts, the *Payne* test should apply here to determine the scope of judicial review.

In the fourth example, the Commonwealth is also granting a right to dump water into the stream. The distinction from the third example, however, is that the resulting environmental damage will not be caused directly by the water, but by the development made possible by the issuance of the permit. Any environmental damage (e.g., silting of the stream) which would occur could be thought of, then, as an indirect result of the granting of the permit.<sup>79</sup> The issue thus raised is the extent to which the Commonwealth, in issuing permits to use the res, must consider their indirect effects upon the environment. The corollary to this is presented in the fifth example, where the permit granted did not give access to a portion of the res at all. Rather, it represents an exercise of the general police power

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78. Fox Appeal, No. 73-078-B at 7 (Pa. Environmental Hearing Bd. May 16, 1974).

79. Another situation where environmental damage could be thought of as an indirect result of a permit would be where the damage was not to the stream at all, but to a related resource. These examples are not intended to suggest answers to the problem of when an effect is direct or indirect; rather, they assume directness or indirectness, and illustrate that such a determination may have implications for the administration of the trust.

for the public welfare. The issue raised here involves the extent to which the Commonwealth, in issuing permits unrelated to the public natural resources or environmental protection, must consider the effects of the permit upon the res.

One approach to these issues would be to apply a two-step analysis. The first step would be to determine whether the granting of the permit constituted the granting of the right to use the res. If not, the Commonwealth would merely have been exercising its general police powers to regulate the use of land, and would not have been bound by its duties as trustee. If, on the other hand, the permit constituted a granting of the right to use the res, the Commonwealth, acting as trustee, would have been bound to consider all the environmental factors involved, direct and indirect, before reaching a determination.

Applying this analysis to the fourth example, the Commonwealth should have considered the environmental impact of its decision upon Blackpark, and failure to do so would constitute a breach of its obligations as trustee. In the fifth example, the issuance of the Labor and Industry permit did not involve a situation where the Commonwealth was acting as trustee, and therefore it was not bound to consider the environmental effects of such a grant. If the issuance of the permit is to be enjoined, it must be on the basis of some statute or regulation.<sup>80</sup>

#### IV. CONCLUSION

At a time when the energy crisis has created mounting pressure to lessen environmental controls, the constitutional public trust doctrine should take on added significance; constitutionally mandated safeguards ought not to be cast aside with ease. The implementation of this trust, however, remains somewhat in doubt. There are many issues concerning the doctrine which must be resolved by the courts<sup>81</sup> or the legislature. Foremost among such questions is

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80. This is not to suggest that a department such as the Department of Labor and Industry could not choose to consider environmental factors, but merely, that in such a situation, it is not bound by the public trust doctrine.

81. One issue which has not been dealt with by the courts is the extent to which, in deciding appeals from administrative decisions, the court must exercise independent judgment as to law and facts when constitutional questions are involved. In cases involving the United States Constitution, this question has arisen from time to time. See Larson, *The Doctrine of "Constitutional Fact,"* 15 TEMP. L.Q. 185 (1941). *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920), held that when dealing with appeals from administrative

what role the legislature, the executive (acting through administrative agencies), the courts, and private citizens will play in the administration of the constitutional trust? Additionally, the limits of the trust's enforcement powers are as yet undefined. Within this realm, it is important that the requirements of the constitutional mandate be construed to be flexible; the doctrine should act as a fluid check against decisions which would ignore important aspects of environmental protection.

RICHARD C. LANE

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bodies which involve constitutional questions, a reviewing court is required to exercise independent judgment as to law and facts.

It is doubtful whether *Ben Avon, supra*, is applicable here since the constitutional issue here raised [is] not confiscation of property. *Cf. Acker v. United States*, 298 U.S. 426, 80 L. Ed. 1257 (1936). In any case, however, without overruling *Ben Avon*, the United States Supreme Court has tended to ignore the *Ben Avon* doctrine in later cases and has usually applied the substantial evidence rule to findings of fact made by administrative agencies. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 20 L. Ed. 2d 312 (1968) . . . .

*Surrick v. Upper Providence Township Zoning Hearing Bd.*, 11 Pa. Commw. 607, 612, 314 A.2d 565, 567 (1974) (some citations omitted).