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The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources

John C. Dernbach
Widener University Commonwealth Law School

THE ROLE OF TRUST LAW PRINCIPLES IN DEFINING PUBLIC TRUST DUTIES FOR NATURAL RESOURCES

John C. Dernbach*

ABSTRACT

Public trusts for natural resources incorporate both limits and duties on governments in their stewardship of those natural resources. They exist in every state in the United States—in constitutional provisions, statutes, and in common law. Yet the law recognizing public trusts for natural resources may contain only the most basic provisions—often just a sentence or two. The purpose and terms of these public trusts certainly answer some questions about the limits and duties of trustees, but they do not answer all questions. When questions arise that the body of law creating or recognizing a public trust for natural resources does not fully answer, trustees, lawyers, and courts often look to trust law for help. In fact, they have been doing so for more than a century, including in the U.S. Supreme Court's landmark 1892 public trust decision, Illinois Central Railroad Co. v Illinois. *In this sense, trust law provides a set of background or underlying principles for interpreting and applying public trusts.*

Using cases from around the country, this Article sets out a four-step methodology for determining when and how to use trust law principles to help interpret public trusts. This methodology can be applied in any case involving the use of specific trust principles to help interpret any particular public trust. This Article also explains that the relevant trust law should not be limited to private trust law, but rather it should include general trust principles, charitable trust law principles, and private (or noncharitable) trust law principles.

This Article uses a 2019 Commonwealth Court of Pennsylvania decision, Pennsylvania Environmental Defense Foundation v. Commonwealth, *as a case study. The case applies article I, section 27 of the Pennsylvania Constitution, which requires that public natural resources be conserved and maintained for the benefit of present and future generations. In that case, the court used an interpretation of private trust law to decide that the state could spend some bonus and rental payment money from oil and gas leasing on state forest and park land, which is constitutional public trust property, for non-trust purposes. This Article applies the four-part methodology to the case, explains*

* John Dernbach is Commonwealth Professor of Environmental Law and Sustainability at Widener University, Commonwealth Law School, and Director of its Environmental Law and Sustainability Center. He can be reached at jcdernbach@widener.edu. For help with research and footnotes, thanks to Richard Marcil, Widener University Commonwealth Law School Class of 2021; Jesse Miles, Lewis & Clark Law School Class of 2020; Frank Pryzbilkowski, Widener University Commonwealth Law School Class of 2020; and Ed Sonnenberg, Research Librarian, Widener University Commonwealth Law School. Thanks to Michael Blumm, Robin Kundis Craig, Karen A. Fahrner, Alexandra Klass, Ken Kristl, Michael Hussey, Jim May, Zygmunt Plater, J.B. Ruhl, Kurt Weist, Mary Wood, and Bridget Whitley for comments on earlier drafts. Thanks also to Kathleen Stephenson and John A. Terrill, II for answering questions on trust law. Any remaining errors, of course, are the author's responsibility.

general trust law and charitable trust law principles that the Commonwealth Court of Pennsylvania did not address, and argues that the use of these principles better fits the constitutional public trust. It concludes that the money from bonus and rental payments should be spent entirely for the purposes of the trust.

This Article draws attention to both the potential value of trust law principles and also to their potential danger in the interpretation and application of public trust laws for natural resources. Trust law has the potential to enhance the protectiveness of public trusts by imposing various fiduciary duties on trustees. It also has the potential to undermine public trusts, particularly through rules requiring or encouraging that trust assets be financially productive. To vindicate public trusts for natural resources, environmental and natural resources lawyers need to become better trust lawyers.

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INTRODUCTION

Public trusts for natural resources incorporate both limits and duties on governments in their stewardship of those resources.[1] They exist in every state in the United States—in constitutional provisions, statutes, and common law.[2] These public trusts reflect fundamental public legacy values for the use and protection of particular natural resources and for their continuing availability to the public, both present and future generations.[3] They are designed and implemented to protect natural, ecological, recreational, navigational, fishing, and similar public values of these resources, primarily on publicly-owned property, and to ensure that they are accessible to the public. They involve different kinds of natural resources, impose different duties on states, and

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1. The first and most influential statement of these limits and duties is Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

2. Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PA. ST. ENV'T L. REV. 1, 26–113 (2007); Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 93–197 (2010); *see also* Alexandra B. Klass, *The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study*, 45 ENV'T L. 431 (2015) (detailing the relationship between the Minnesota Environmental Rights Act and Minnesota's public trust doctrine).

3. Sax, *supra* note 1, at 477 (explaining three limits and duties on government for public trust property: 1) the property must "not only be used for a public purpose, but it must be held available for use by the general public;" 2) limits on sale of property; and 3) maintenance of property "for particular types of uses"). On intergenerational equity, see Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of* National Audubon Society v. Superior Court, 45 ENV'T L. 561, 633 (2015):

> [A]n important difference between a state's public trust obligations and its authority to protect public welfare under the police power more generally is that the public trust doctrine puts more focus on the welfare of future generations. In that way, the 'public' of the public trust doctrine requires consideration of intergenerational equity, necessarily infusing the doctrine with undertones of sustainability.

See also Donna R. Christie, *Marine Reserves, the Public Trust Doctrine and Intergenerational Equity*, 19 J. LAND USE & ENV'T L. 427, 433–34 (2004) (explaining the importance of intergenerational equity in public trust doctrine). Probably the most influential work on intergenerational equity in this context is EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989).

provide different rights to the public. They include, but are not limited to, trusts that fit within the more familiar public trust doctrine restricting transfer of title to trust resources exemplified in the U.S. Supreme Court's iconic 1892 decision, *Illinois Central Railroad Co. v. Illinois*.[4] They also include public trusts identified by state courts in terms of the public trust doctrine for those states.[5] All public trusts for natural resources, however, reflect a fundamental societal mandate to provide legacy protection to natural values in these resources so that the public, present and future, will continue to have and enjoy them.

Yet the law recognizing public trusts for natural resources may contain only the most basic provisions—often just a sentence or two. The purpose and terms of these public trusts certainly answer some questions about the limits and duties of trustees, but they do not answer all questions. When questions arise that the body of law creating or recognizing a public trust for natural resources does not fully answer, trustees, lawyers, and courts often look to trust law for help. Although public trust law for natural resources has ancient Roman roots,[6] it is not as well developed in the United States as the law of trusts. In this sense, trust law provides a set of background or underlying principles for interpreting and applying public trusts.

But what trust law should be considered? The answer to this would seem to be easy, but it has not been easy. Traditional trust law, or simply trust law, is the large body of common law and statutory trust law that is ordinarily labeled as such in texts, treatises, and restatements on the subject. It includes principles that apply to all trusts, such as the overall structure of trusts, principles requiring the trustee to adhere to the terms of the trust, and principles defining the responsibility of trustees toward beneficiaries. Public trusts for natural resources are not ordinarily described as part of trust law. Trust law, thus understood, could be described as private trust law, because it is not public trust law. That is how

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4. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892). In that case, the U.S. Supreme Court held that states hold title to the land under navigable waters in trust for public benefits like navigation and fishing, that the trust "is governmental," and that such lands cannot be alienated except to the extent that doing so would be consistent with the purposes and fiduciary requirements of the trust. *Id.* at 452, 455–56.

5. Brooks v. Wright, 971 P.2d 1025, 1032–33 (Alaska 1999); Slocum v. Borough of Belmar, 569 A.2d 312, 317 (N.J. Super. Ct. Law Div. 1989).

6. Sax, *supra* note 1, at 475. For a recent and detailed exploration of the Roman roots of the public trust doctrine by a natural resources law scholar and a Roman history scholar, see J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?*, 47 ECOLOGY L.Q. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440244. *See also* Bruce W. Frier, *The Roman Origins of the Public Trust Doctrine*, 32 J. ROMAN ARCHAEOLOGY 641 (2019).

judges and lawyers writing on public trusts for natural resources have often appeared to understand what private trust law means.[7]

But private trust law has a second and narrower meaning. Trust law generally divides express trusts into two categories: charitable trusts and noncharitable (or private) trusts.[8] Trust lawyers thus tend to refer to private trust law as the law for trusts that are not charitable trusts. That is the meaning used in this Article.

Not surprisingly, the two meanings of private trust law are often conflated. When that occurs, lawyers and judges may look only to private trust law for help in interpreting public trusts for natural resources. They do not consider general trust law principles, even though they have played a formative role in the development of public trusts for natural resources. Nor do they consider the use of charitable trust law—particularly the law for perpetual charitable trusts—despite the great similarities between public trusts for natural resources and perpetual charitable trusts. By limiting their search to private law principles, lawyers and judges fail to consider trust law principles that could more fully effectuate the terms and purpose of public trusts for natural resources.

This Article explores circumstances under which trust law, including not only private trust law but also general trust law principles and charitable trust law, should be used to help interpret the meaning of any particular public trust for natural resources. It clarifies and expands the range of traditional trust law principles for understanding and applying public trust laws. In so doing, it provides an approach for more fully effectuating, and even strengthening the protectiveness of, public trusts for natural resources.

This Article also sets out a four-step methodology for determining when and how to use specific trust law principles to help interpret public trusts. Under this methodology, a court first examines the language and purpose of the law recognizing the public trust.

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7. *See, e.g.*, Alabama v. Texas, 347 U.S. 272, 277 (1954) (Reed, J., concurring) ("The United States holds resources and territory in trust for its citizens in one sense, but not in the sense that a private trustee holds for a *cestui que trust*."); Pa. Env't Def. Found. v. Commonwealth (PEDF II), 161 A.3d 911, 940–49, (Pa. 2017) (Baer, J., concurring and dissenting) (contrasting public trust with private trust); New York State Bar Ass'n Env't & Energy L. Section, *Report and Recommendations Concerning Environmental Aspects of the New York State Constitution,* 38 PACE L. REV. 182, 204–05 (2017) ("We are doubtful about the propriety of applying technical aspects of private trust law to a constitutionally-expressed environmental public trust right and recommend that the drafting and legislative history accompanying the adoption of an environmental right in New York should indicate that it is grounded in the traditional public trust doctrine."). Similarly, when I have used "private trust law" in my previous articles on public trusts for natural resources, I have used private trust law to describe trust law that is not public trust law. *E.g.*, John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II - Environmental Rights and Public Trust*, 104 DICK. L. REV. 97 (1999) (using "private trust law" as synonymous with "trust law").

8. *See infra* note 161 and accompanying text.

Courts are duty-bound, after all, to carry out the trust. The second step is to analyze whether the law recognizing the public trust supplies an answer to the question being asked. To the extent that the public trust provision does not answer the question, the third step is to identify what trust principles can be employed to help provide an answer. The fourth and final step in giving determinative meaning to a public trust duty is to evaluate which of the relevant principles best fits the public trust at hand.

In many ways, the application of trust law principles to public trusts for natural resources makes perfect sense. After all, the basic structure of public trusts for natural resources is similar to that of a standard trust.[9] Both involve specified property or natural resources, called the trust corpus or res. Both are to be administered by a trustee in accordance with the trust terms for the benefit of specified beneficiaries or the public. For public trusts, the trustee is typically the relevant government or governments. Both involve a settlor who created the trust and established its terms.[10] Both trusts and public trusts have rules prohibiting or sharply limiting the use of the trust corpus for purposes other than those stated in the trust.[11]

In fact, much of the attractiveness of public trust law for natural resources is that it borrows from a body of law—trust law, including both charitable and private trust law—with which lawyers are

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9. MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 3 (2d ed. 2015) ("The basic construct, as well as many of the same principles" of trust law also apply to the public trust.).

10. For the public trust, the definition of a settlor is more complicated. For a constitutional provision adopted by public referendum, the settlor could be understood as the people. For a statutory provision, the settlor could be the legislature. But rights, including public trust rights concerning natural resources, can also be said to derive from inherent human rights. In this sense, lawmakers do not *create* rights as a settlor does in an ordinary trust; lawmakers *recognize* pre-existing (or inherent) human rights. For example, the rights contained in article I of Pennsylvania's constitution including the environmental public trust contained in article I, section 27, "are inherent in man's nature and preserved rather than created by the Pennsylvania Constitution." Robinson Twp. v. Commonwealth, 83 A.3d 901, 948 (Pa. 2013) (plurality opinion by Castille, C.J.); *see also* Juliana v. United States, 217 F. Supp. 3d 1224, 1261 (D. Or. 2016) (public trust doctrine for natural resources is an inherent right of people grounded in Due Process Clause), *rev'd on other grounds*, 947 F.3d 1159 (9th Cir. 2020); Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 43 (2017) (the public trust doctrine for natural resources "is an inherent constitutional limit on sovereignty."); Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281, 316 (2014) ("Pursuant to the public trust doctrine, our government has a fundamental obligation to protect the resources that are central to our society—land, water, wildlife, and air. This obligation predates the Constitution and actually underlies the very purpose of the Constitution.").

11. BLUMM & WOOD, *supra* note 9, at 5–8 (explaining trustees, beneficiaries, trust assets, and fiduciary duties of trustees).

already familiar.[12] Because trust law generally tends to be better developed and more detailed than public trust law, trust law is an especially valuable analogy. It provides a resource for addressing issues that may be new in the public trust context but that have already been addressed not only in general trust law but also in charitable and private trust law.[13]

But how far should that analogy be taken?

Intuitively, the conclusion that the government has a fiduciary duty toward certain natural resources would appear to mean that the government has a greater duty toward those resources than it would otherwise have.[14] After all, the level of protection contained

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12. ZYGMUNT J.B. PLATER, ROBERT H. ABRAMS, ROBERT L. GRAHAM, LISA HEINZERLING, DAVID A. WIRTH & NOAH D. HALL, ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 887 (5th ed. 2016) (explaining that trust law is "more commonly litigated" than public trust law).

13. Kenneth T. Kristl, *The Devil Is in the Details: Articulating Practical Principles for Implementing the Duties in Pennsylvania's Environmental Rights Amendment*, 28 GEO. ENV'T L. REV. 589, 602 (2016) ("[T]he well-developed law of private and charitable trusts provides familiar guideposts that can make navigating the perhaps less-familiar waters of public trust doctrine easier for trustees, beneficiaries, and judges."); Mary Turnipseed, Stephen E. Roady, Raphael Sagarin & Larry B. Crowder, *The Silver Anniversary of the United States' Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine*, 36 ECOLOGY L.Q. 1, 16 (2009) ("[T]he nature of the public trust and the duties it imposes on state trustees can be elucidated by comparison to the well-developed body of law regarding private and charitable trusts."); Kent D. Morihara, Comment, *Hawai'i Constitution, Article XI, Section I: The Conservation, Protection, and Use of Natural Resources*, 19 U. HAW. L. REV. 177, 185 (1997) ("Because little has been said in the courts defining the precise scope of the public trust doctrine in the United States, the laws of private and charitable trusts may be useful to provide insight in determining the rights a state has and the duties a state must observe as trustee."). Trust law also provides tools for public trust advocates. Susan D. Baer, Comment, *The Public Trust Doctrine—A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources*, 15 B.C. ENV'T AFF. L. REV. 385, 419–21 (1988) (arguing that principles of traditional trust law, including charitable trust law, provide a set of tools for advocates for greater protection of public trust resources that specify with greater precision the duties that trustees have for those resources).

14. The most well-developed argument for applying trust law principles to the public trust is contained in MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE (2014). She posits six substantive and five procedural duties for natural resource public trustees that are based on, or adapted from, trust law. She writes:

> The six substantive fiduciary duties require a public trustee to: (1) protect the *res*; (2) conserve the natural inheritance of future generations (the duty against waste); (3) maximize the societal value of natural resources; (4) restore the trust *res* where it has been damaged; (5) recover natural resource damages from third parties that have injured public trust assets; and (6) refrain from alienating (that is, privatizing) the trust except in limited circumstances.

Id. at 167; *see also id.* at 167–87 (explaining each). In addition:

> Procedurally, a trustee has five main duties: (1) maintain uncompromised loyalty to the beneficiaries; (2) adequately supervise agents; (3) exercise good faith and reasonable skill in managing the assets; (4) use caution in managing the assets; and (5) furnish information to the beneficiaries regarding trust management and asset health.

in environmental and natural resources laws tends to be couched in terms of economic and technical feasibility, the balancing of environmental and economic interests, or consideration of environmental impacts and alternatives.[15] Trustees, by contrast, are not allowed to simply balance away their duties regarding the trust corpus or allow it to degrade based on the claimed interests of others who are not designated beneficiaries. What can trust law tell us in specific terms about what difference, if any, fiduciary responsibility for public natural resources makes for the level of protection afforded to those resources?

On the other hand, there may be situations where trust law principles are less protective of public natural resources or beneficiaries than the public trust terms would indicate. Should a private trustee's duty to balance the financial interest of the income and principal beneficiaries be applied to lands that are to be held in trust for their environmental value? Can private trust law principles water down or weaken a public trust for natural resources?[16] In fact, many are averse to the use of any trust law to interpret public trusts for natural resources because they fear what private trust law could do to these public trusts.[17]

This Article draws attention to both the potential value of trust law principles in the interpretation and application of public trust laws for natural resources and to their potential danger. Just as judicial decisions applying certain traditional trust law principles can enhance the effectiveness of these public trusts, so, too, can judicial decisions applying other trust law principles weaken the effectiveness of public trust laws for natural resources. The four-step methodology described in this Article provides an analytical framework for deciding whether a specific trust law principle should be applied in a particular setting. The short answer to the general question of whether to apply traditional trust law for public natural resources trusts is not "yes" or "no," but rather, "it depends." To vindicate public trusts for natural resources, environmental and natural resources lawyers need to become better trust lawyers.

This Article uses Pennsylvania as a case study. Pennsylvania has a public trust provision for natural resources—article I, section 27—

Id. at 189; *see also id.* at 189–204 (explaining each).

15. Every student and practitioner of environmental law is constantly exposed to these limitations, and they are taught in environmental law classes. *See, e.g.*, PLATER ET AL., *supra* note 12; JOEL A. MINTZ, JOHN C. DERNBACH, STEVE C. GOLD, KALYANI ROBBINS, CLIFFORD VILLA & WENDY WAGNER, A PRACTICAL INTRODUCTION TO ENVIRONMENTAL LAW (2017).

16. *See infra* Section I.A.

17. *See, e.g.*, New York State Bar Ass'n Env't & Energy L. Section, *supra* note 7.

in its constitution[18] and has decided expressly to use trust law to help interpret that provision.[19] The public trust part of section 27, which is only two sentences in length, requires the Commonwealth to conserve and maintain public natural resources for the benefit of present and future generations.[20] Pennsylvania is among a handful of states that are making express use of trust law principles to help interpret public trusts.[21] While no state has yet fully thought through the consequences of this endeavor or how to properly go about it, Pennsylvania provides useful lessons for other states—both those that have already applied trust law principles to their public trust and those that have not.

Part I of this Article surveys how courts have addressed the question of whether and how to use trust law principles to help interpret their public trusts for natural resources. It shows that, for more than a century, including in the U.S. Supreme Court's landmark 1892 public trust decision, *Illinois Central Railroad Co. v Illinois,*[22] courts have employed trust law principles to help determine the meaning of public trusts for natural resources, although in some cases they have refused to apply these principles. It also shows the importance of examining all relevant trust law, not just private trust law.

Part II explains the case study, describing a 2019 Pennsylvania Commonwealth Court decision, *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF III).*[23] In that case, the court used an interpretation of private trust law to decide that the state could spend some bonus and rental payment money from oil and gas leasing on state forest and park land, which is constitutional public trust property, for non-trust purposes. Part II also explains the background against which this case was decided, including two

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18. PA. CONST. art. I, § 27.

19. *See infra* Part II.

20. PA. CONST. art. I, § 27.

21. States identified in Section I.B.1—California, Hawai'i, Mississippi, and New Jersey—are among the others.

22. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

23. Pa. Env't Def. Found. v. Commonwealth (PEDF III), 214 A.3d 748 (Pa. Commw. Ct. 2019). In Pa. Env't Def. Found. v. Commonwealth (PEDF I), 108 A.3d 140 (Pa. Commw. Ct. 2015), the Commonwealth Court of Pennsylvania decided against PEDF's article I, section 27 claim that royalties received from oil and gas production in state forests should be used exclusively for trust purposes—to conserve and maintain public natural resources. *See infra* notes 189–90 and accompanying text. In *PEDF II*, 161 A.3d 911 (Pa. 2017), the Pennsylvania Supreme Court reversed that decision, holding that these royalties must be used for trust purposes under article I, section 27. The state supreme court remanded to the Pennsylvania Commonwealth Court the question of whether bonus and rental money from oil and gas leasing must also be limited to trust purposes. The Commonwealth Court of Pennsylvania's decision on that remand is *PEDF III*.

Pennsylvania Supreme Court decisions that have revitalized section 27.

Part III applies the four-part methodology to *PEDF III*, explains general trust law and charitable trust law principles that the Commonwealth Court of Pennsylvania did not address, and argues that these latter principles better fit the constitutional public trust. It concludes that the money from bonus and rental payments should be spent entirely for the purposes of the trust.

The use of traditional trust law is important in Pennsylvania, where the state supreme court has brought section 27 out of more than four decades of near dormancy, because it will likely affect the trajectory of future jurisprudence under the amendment. Because the new section 27 jurisprudence is still at an early stage, the trajectory of that jurisprudence is still fluid. But these questions also matter in other states and countries. For a long time, Pennsylvania probably has been the most prominent of any U.S. state with constitutional environmental protection.[24] Now, after recent Pennsylvania Supreme Court decisions revitalizing section 27, it is at least as prominent, if not more so. For example, it is informing a global discussion about environmental provisions in constitutions.[25] Pennsylvania's experience has also prompted advocacy for similar "green amendments" in other state constitutions.[26] In addition, there is a growing global movement toward constitutionalizing environmental protection.[27] This movement exists among U.S. states[28] and in other countries.[29]

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24. John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I—An Interpretative Framework for Article I, Section 27*, 103 DICK. L. REV. 693, 697–98 (1999) (citing various sources).

25. JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM 223–28 (2014) (describing Pennsylvania case law in detail and describing the state as an "outlier" among states "in engaging constitutional environmental rights"). For an explanation of *Robinson Township*'s potential to influence global developments, see James R. May & Erin Daly, Robinson Township v. Pennsylvania*: A Model for Environmental Constitutionalism*, 21 WIDENER L. REV. 151 (2015).

26. MAYA VAN ROSSUM, THE GREEN AMENDMENT: SECURING OUR RIGHT TO A HEALTHY ENVIRONMENT 221–48 (2017); *see also* Devra R. Cohen, Note, *Forever Evergreen: Amending the Washington State Constitution for a Healthy Environment*, 90 WASH. L. REV. 349 (2015).

27. *See generally* MAY & DALY, *supra* note 25.

28. More than two-thirds of state constitutions contain provisions concerning natural resources and the environment, and all state constitutions written since 1959 have such provisions. Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 865, 871 (1996). For a more recent account of state constitutional provisions and caselaw, see James R. May & William Romanowicz, *Environmental Rights in State Constitutions*, *in* PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 305 (James R. May ed., 2011).

29. The constitutions of nearly 170 countries, containing three-fourths of the world's population, include some form of environmental protection. John C. Dernbach, Kenneth T. Kristl & James R. May, *Recognition of Environmental Rights for Pennsylvania Citizens:* Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, 70 RUTGERS L. REV. 803, 844–45 (2018).

Some national constitutions contain public trust provisions for such resources.[30] More broadly, as already noted, there are already constitutional, statutory, and common law public trusts for natural resources in every state.[31] In all states, as well as in countries with constitutional, statutory, or judicially recognized public trusts for natural resources, the proper use of trust law to help interpret the meaning of public trusts—and to enhance their effectiveness—is likely to be of considerable value.[32]

Finally, a plurality of the Pennsylvania Supreme Court has emphasized that section 27, properly understood and applied, should have the effect of promoting sustainable development.[33] Sustainable development is a normative conceptual framework for integrating social and economic development with environmental protection in a way that fully realizes both, instead of treating them as inherently opposing concepts.[34] A major challenge in realizing the transition to sustainability is to more fully and effectively convert that framework into law.[35] The application of traditional trust principles to public trusts for natural resources will help test the effectiveness of this legal tool in fostering sustainable development.

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30. MAY & DALY, *supra* note 25, at 267–69 (identifying Bhutan, Ethiopia, Ghana, Papua New Guinea, Swaziland, Tanzania, and Uganda as having general public trust provisions in their constitutions, and explaining that the India Supreme Court has read the public trust doctrine into its constitution).

31. *See supra* note 2 and accompanying text.

32. This approach is broadly consistent with the proposal contained in Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006) (advancing a theoretical framework for public trust law for natural resources that blends this law with relevant statutes and regulations).

33. Robinson Twp. v. Commonwealth, 83 A.3d 901, 958, 963, 978, 980–81 (Pa. 2013).

34. JOHN C. DERNBACH, ROBERT ADLER, RACHEL ARMSTRONG, JENNIFER BAKA, ATHENA BALLESTEROS, GARY D. BASS, DONALD A. BROWN, CARL BRUCH, WYNN CALDER, FEDERICO CHEEVER, MARIAN R. CHERTOW, JAIMIE P. CLOUD, ILONA COYLE, ROBIN KUNDIS CRAIG, JULIAN DAUTREMONT-SMITH, MICHAEL DIRAMIO, CATHERINE EASTON, ANNE H. EHRLICH, JOEL B. EISEN, JONATHAN BARRY FORMAN, LYNN R. GOLDMAN, KIRK HERBERTSON, DIETER T. HESSEL, KEITH H. HIROKAWA, LEO HORRIGAN, FRANCES IRWIN, KEVIN KENNEDY, JOHN A. LAITNER, JEANNINE M. LA PRAD, AMY E. LANDIS, ROBERT LAWRENCE, MARK D. LEVINE, REID LIFSET, ROBERTA MANN, BRIAN MCNAMARA, JOEL A. MINTZ, CRAIG OREN, BRADLEY C. PARKS, TRIP POLLARD, DAVID REJESKI, EDWARD P. RICHARDS, J. TIMMONS ROBERTS, K.W. JAMES ROCHOW, PATRICIA E. SALKIN, JIM SALZMAN, BRENT STEEL, KURT A. STRASSER, SUSANNA SUTHERLAND, DAN TARLOCK, MICHAEL J. TIERNEY, JONATHAN WEISS & CHRISTOPHER WILLIAMS, ACTING AS IF TOMORROW MATTERS: ACCELERATING THE TRANSITION TO SUSTAINABILITY 3–7 (2012) (explaining sustainable development).

35. *Id.* at 241–65 (outlining legal changes required to effectuate transition to sustainability).

I. THE USE OF TRUST LAW PRINCIPLES TO INTERPRET NATURAL RESOURCES PUBLIC TRUSTS

Courts frequently analyze public trusts of all kinds with the aid of trust law principles. Just as traditional trustees are judicially accountable for their management of the trust corpus, courts say, so also are government trustees for their management of the public trust corpus.[36] This is not a recent phenomenon. Nineteenth-century courts came to treat the disposition of public property by cities as subject to the same fiduciary rules as private trustees, and modern courts still do. [37]

This also applies to public trusts for natural resources. Courts have made implicit use of trust law principles to interpret these public trusts for well over a century. They have also expressly considered the use of trust law, applying these principles when they would effectuate the terms and purpose of public trusts, and refusing to do so when they would not. Although charitable trusts are similar to public trusts for natural resources, the law of charitable trusts seems to have received much less attention in this context.

A. Illinois Central *and the Implicit Judicial Use of Traditional Trust Law*

Because trust law is so well developed and recognized, the conceptual framework of trust law and many of its principles inform cases involving natural resources public trusts to some degree even when courts do not expressly explain their decisions in these terms. The U.S. Supreme Court's famous decision in *Illinois Central Railroad Co. v Illinois* is illustrative.[38] In his influential 1970 law review article on the public trust, Professor Joseph Sax described this case as "the most celebrated case in American public trust law."[39] The courts in at least thirty-five states have cited the

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36. Ariz. Ctr. for L. in the Pub. Int. v. Hassell, 837 P.2d 158, 169 (Ariz. Ct. App. 1991) ("Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for their dispositions of the public trust.") (citation omitted); *In re* Water Use Permit Applications, 9 P.3d 409, 455 (Haw. 2000) (quoting prior statement from *Hassell*); *see also* State v. Hale, 573 N.E.2d 46, 50 (Ohio 1991) (noting it is "well settled" under American law that a public official entrusted with public money is a trustee of public trust fund with the same level of responsibility as a trustee of private trust fund).

37. Max Schanzenbach & Nadav Shoked, *Reclaiming Fiduciary Law for the City*, 70 STAN. L. REV. 565, 585–95 (2018).

38. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

39. Sax, *supra* note 1, at 489.

case in articulating their public trust laws for natural resources.[40] The Supreme Court in that case held that states hold submerged lands under navigable waters in trust for certain public purposes and cannot alienate those lands except in conformance with those purposes and their fiduciary responsibilities. Although *Illinois Central* is probably *the* landmark case in American public trust law, it is also a breach of trust case.[41] This fact has profound consequences because it means that traditional trust law is a foundation of public trust law for natural resources.

The case involved the lawfulness of the Illinois legislature's 1869 fee simple grant to the Illinois Central Railroad Company of more than 1,000 acres of submerged lands in Lake Michigan.[42] The parcel, one mile in length, was on Chicago's lakefront in Lake Michigan.[43] It was also three times the size of Chicago's outer harbor.[44] The legislature's evident purpose was to enable the railroad, after filling in these lands (or "reclaiming" them), to "construct such wharves, piers, docks, and other works therein as it may deem proper for its interest and business."[45] More likely than not, corrupt means were used to procure adoption of the 1869 act,[46] a point that the court alluded to when it said that the circumstances of the Act's passage had been "the subject of much criticism."[47] In 1873, the Illinois legislature repealed the grant.[48] The case involved the lawfulness of the repeal, which turned on the lawfulness of the original 1869 grant.

While the court does not use "breach of trust" in its analysis, the basis for that conclusion is not hard to discern. The court first explained the scope and terms of the trust, based on "numerous" prior cases.[49] It held that the state of Illinois holds title to submerged lands under the navigable waters of Lake Michigan "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, freed from the obstruction or interference of private parties."[50] The trust relationship between the state and the

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40. Crystal S. Chase, *The* Illinois Central *Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 HASTINGS W.-N.W. J. ENVT. L. & POL'Y 113, 151–53 (2010).

41. Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799, 920–21 (2004) (describing the Court as holding that there was a "clear breach of trust").

42. Ill. Cent., 146 U.S. at 45.

43. *Id.* at 433.

44. *Id.* at 454.

45. *Id.* at 448 (summarizing company's claim for relief).

46. Kearney & Merrill, *supra* note 41, at 887–94.

47. *Ill. Cent. R.R. Co.*, 146 U.S. at 451.

48. *Id.* at 449.

49. *Id.* at 455.

50. *Id.* at 452.

public is stated in terms akin to the traditional trust relationship between trustee and beneficiary. Submerged lands, the court stated, are "held by the state, by virtue of its sovereignty, in trust for the public."[51] That means the state is not holding them in a proprietary capacity, which would have allowed the state to sell them. The court also stated that the state's trust responsibility "can only be discharged by the management and control of property in which the public has an interest, [and] cannot be relinquished by a transfer of the property."[52]

The terms of the trust limit what the state can do with trust property. While the state can grant parcels of submerged lands for construction of wharves, docks, and piers to aid in navigation, the court explained, it cannot abdicate general control "over lands under the navigable waters of an entire harbor or bay, or of a sea or lake."[53] The court reasoned that "[s]uch abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public."[54] The court did not say that the state was prohibited from alalienating these public trust lands; it said only that the state did not have the power to do so in a way that violated the terms of the public trust.

Yet that is what the state had done. By granting more than 1,000 acres of submerged lands to the railroad, the court held, the legislature breached the terms of the public trust:

> The harbor of Chicago is of immense value to the people of the state of Illinois, in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the state of control over its bed and waters, and place the same in the hands of a private corporation, created for a different purpose, one limited to transportation of passengers and freight between distant points and the city, is a proposition that cannot be defended.[55]

The breach of trust issue is a recurring theme in cases involving public trusts for natural resources, including submerged land cases decided in the decades immediately following *Illinois Central*. While the courts often found that there was no breach, they used trust

51. *Id.* at 455.
52. *Id.* at 453.
53. *Id.* at 452–53.
54. *Id.* at 453.
55. *Id.* at 454.

law concepts to explain their decisions. They did not, however, cite to trust law. Two cases are illustrative.[56]

In a 1916 case, *State v. Cleveland & Pittsburgh Railroad Co.*, three railroads, littoral owners of land on Lake Erie, filled in submerged lands "for the purpose of enabling them to reach navigation and to perform their duties as common carriers," and for no other purpose.[57] The Ohio Supreme Court held that this did not violate the public trust. It explained: "The littoral owner has an undoubted right of access to the water, and if this right is to be of value, it must be such access as will enable him to reach navigable water and to do the things necessary to that end."[58] The Ohio court said that the railroads' exercise of their property rights was consistent with the public trust right of navigation, and the state had not defined what constitutes a violation of public rights. It therefore held that the public trust was not violated.[59]

The court's explanation of the state's public trust duties makes clear its view that trust law principles are helpful in understanding the meaning of the public trust for submerged lands:

> The state as trustee for the public cannot, by acquiescence, abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created. If it is once fully realized that the state is merely the custodian of the legal title, charged with the specific duty of protecting the trust estate and regulating its use, a clearer view can be had.[60]

Unlike *Illinois Central*, where the court did not expressly describe Illinois as a trustee, the Ohio Supreme Court described Ohio as the trustee and referred to the submerged bottomlands as "the trust estate." The court also indicated that the case can be understood with "a clearer view" if trust concepts are employed.[61]

In its 1927 decision in *City of Milwaukee v. State*,[62] the Wisconsin Supreme Court upheld the Wisconsin legislature's grant of a smaller parcel of submerged land under Lake Michigan to the city of Milwaukee, in order to enable the city's subsequent conveyance of the parcel to a steel company. The court held that this grant did

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56. Both of these were quoted by Professor Sax in his 1970 article. Sax, *supra* note 1, at 486, 515–16.
57. State v. Cleveland & Pittsburgh R.R. Co., 113 N.E. 677, 683 (Ohio 1916).
58. *Id.* at 681.
59. *Id.* at 683.
60. *Id.* at 682.
61. *See id.*
62. City of Milwaukee v. State, 214 N.W. 820 (Wis. 1927).

not violate the state's public trust law. The grant was for a parcel of submerged land that extended 1,500 feet from Milwaukee's Lake Michigan shoreline and was to be filled in and used for wharves, docks, and similar navigation structures as part of an overall development scheme for the entire harbor.[63] The court distinguished *Illinois Central*, holding that the grant was instigated by a public purpose consistent with the public trust in the lake—navigation—not for the private purposes of a corporation.[64]

The Wisconsin Supreme Court explained its decision in terms that read very much like those used in traditional trust law. In trust law, including Wisconsin trust law at the time of this decision, the trustee has legal title to the trust corpus while the beneficiary has equitable title.[65] The Wisconsin court explained the public trust in submerged lands in those terms:

> The trust reposed in the state is not a passive trust; it is governmental, active, and administrative. Representing the state in its legislative capacity, the Legislature is fully vested with the power of control and regulation. The equitable title to these submerged lands vests in the public at large, while the legal title vests in the state, restricted only by the trust, and the trust, being both active and administrative, requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it.[66]

The public trust for submerged lands under navigable waters is a public trust for natural resources. Yet this public trust is not an ecological trust in any modern sense of the term. Filling in lakeshore is not an environmentally protective practice. Indeed, the Clean Water Act of 1972 prohibits the filling of such bottomlands without a permit, and the requirements for obtaining such a permit are stringent.[67] Moreover, the public trust's orientation toward promoting commerce and navigation is not balanced by any broad environmental protection duty on the part of the state. To the extent that such a duty exists, it is provided primarily by modern envi-

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63. *Id.* at 824.
64. *Id.* at 831–32.
65. Danforth v. City of Oshkosh, 97 N.W. 258, 263 (Wis. 1903).
66. *City of Milwaukee*, 214 N.W. at 830. For a thorough analysis of Wisconsin's recent administration of its public trust responsibilities, see generally Melissa Kwaterski Scanlan, Comment, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 ECOLOGY L.Q. 135 (2000).
67. *See* Clean Water Act, 33 U.S.C. §§ 1311(a), 1344; 40 C.F.R. pt. 230 (2020) (guidelines for issuing or denying such a permit).

ronmental law. To be sure, these lands must also be held open to the public for fishing, and it is possible to infer from this duty that states have some correlative duty to protect and conserve fisheries.

The more critical point is that traditional trust law and public trust law for natural resources are not two entirely different bodies of law. Rather, they have the same fundamental structures and share many of the same principles. While the *Illinois Central* court and many subsequent courts were not explicit about this point, they were fitting traditional trust law to the special public circumstances of these cases, and their decisions were built upon their implicit understanding of this point. Traditional trust law is not a stranger to public trust law. For all practical purposes—going back at least to *Illinois Central*—it has been a core part of public trust law for natural resources for a long time.

B. *Explicit Consideration of Trust Law Principles*

In the cases that follow, courts are explicit about their consideration of trust law. Although not all states have found trust principles applicable to their natural resources public trusts, some states have applied trust law principles when these principles would further a public trust for natural resources. When these principles would undermine or impede a natural resources public trust, courts tend to refuse to apply them.

1. Use of Trust Law Principles to Further Public Trusts

Courts often use trust law principles to help answer questions about the meaning of public trusts for natural resources. In so doing, the central objective is effectuating the purpose of the particular public trust in question. In the cases below, various constitutional and statutory public trusts are directed, to some degree, at protecting natural resources. These cases involve general trust principles, not trust principles for private trusts or charitable trusts. Courts have used general trust law to determine the duty or standard of care that a trustee must employ for these resources. These duties include the duty to monitor trust property, the duty to manage trust property with prudence, and the duty of undivided loyalty to beneficiaries. Courts have also used trust principles to decide that revenues from the use or sale of natural resources can be expended only in ways that are consistent with the terms of the trust. When trusts are created for purposes other than natural resources protection, however, using trust principles

to help interpret their meaning will not make them more protective. The purpose and terms of the trust are the primary determinants of its protectiveness.

A useful starting point is the Hawai'i Supreme Court's 2019 decision in *Ching v. Case*, which employed the duty of care under trust law.[68] In this case, the court used the trustee's duty of care to help determine the state's responsibility for managing land for which it has a constitutional public trust responsibility. Under Hawai'i's constitution, "[a]ll public natural resources are held in trust by the State for the benefit of the people," including present and future generations.[69] In 1964, Hawai'i's Department of Land and Natural Resources leased 22,900 acres of public trust land to the United States for military purposes for a sixty-five-year period.[70] The lease contained conditions intended to protect the land from damage and contamination.[71] Plaintiffs sued the state for failure to protect these lands in accordance with the lease terms and the state's constitutional public trust duties.[72] The trial court agreed with the plaintiffs, and the state supreme court affirmed.

The Hawai'i Supreme Court held that "an essential component of the State's duty to protect and preserve trust land is an obligation to reasonably monitor a third party's use of the property."[73] This duty, the court said, "exists independent of whether the third party has, in fact, violated the terms of any agreement governing its use of the land."[74] The court further held that the state "breached its constitutional trust duties by failing to reasonably monitor or inspect the trust land at issue."[75] "The most basic aspect of the State's trust duties," the court explained, is the "obligation 'to protect and maintain' the trust property and regu-

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68. Ching v. Case, 449 P.3d 1146 (Haw. 2019).
69. HAW. CONST. art. 11, § 1.
70. *Ching*, 449 P.3d at 1150.
71. *Id.* at 1150–51
72. *Id.* at 1152–53.
73. *Id.* at 1150.
74. *Id.* The common law duty to protect the trust corpus, embodied in the public trust doctrine, is also a fundamental part of plaintiffs' argument in *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016), *rev'd on other grounds*, 947 F.3d 1159 (9th Cir. 2020). The district court held that plaintiffs could validly use substantive due process as a basis for enforcing the public trust doctrine to protect the atmosphere from climate change. "The natural resources trust operates according to basic trust principles, which impose upon the trustee a fiduciary duty to 'protect the trust property against damage or destruction.' " *Id.* at 1254 (quoting GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, BOGERT'S THE LAW OF TRUSTS AND TRUSTEES (2016)). "The government, as trustee, has a fiduciary duty to protect the trust assets from damage so that current and future trust beneficiaries will be able to enjoy the benefits of the trust." *Id.* (citing WOOD, *supra* note 14, at 167–75).
75. *Ching*, 449 P.3d at 1150.

late[] its use."[76] The court then stated that, "[u]nder the common law, this obligation includes an obligation to reasonably monitor the trust property."[77] "Reasonable monitoring ensures that a trustee fulfills the mandate of 'elementary trust law' that trust property not be permitted to 'fall into ruin on [the trustee's] watch.' "[78]

The Hawai'i Supreme Court upheld the trial court's determination that the state had breached this duty; the state provided evidence of only three inspection reports over the many decades of the lease, all of which were inadequate.[79] The limited evidence that did exist indicated significant damage to environmental, cultural, and historic resources, and the state's failure to restore that damage.[80] The state thus "breached its constitutional trust duties by failing to reasonably monitor or inspect the trust land at issue."[81]

Another basic duty of trustees toward beneficiaries is the duty to use ordinary prudence and skill. This duty means "that trustees are bound in the management of all the matters of the trust to act in good faith and employ such vigilance, sagacity, diligence and prudence as in general prudent [persons] of discretion and intelligence in like matters employ in their own affairs."[82] The duty of prudence helped justify the Mississippi Supreme Court's decision in *Columbia Land Development, LLC v. Secretary of State*, to uphold the state Secretary of State's decision to disapprove a proposed lease of the state's public tidelands for a marina and gaming vessel.[83] The Mississippi Secretary of State's decision came after the Mississippi Department of Marine Resources and the United States Army Corps of Engineers had issued permits for construction of the marina and after the Mississippi Gaming

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76. *Id.* at 1168 (quoting State *ex rel.* Kobayashi v. Zimring, 566 P.2d 725, 735 (Haw. 1977)).

77. *Ching*, 449 P.3d at 1168 (citing RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. b (AM. L. INST. 2007); Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828 (2015)).

78. *Id.* (quoting United States v. White Mt. Apache Tribe, 537 U.S. 465, 475 (2003)).

79. *Id.* at 1178–80.

80. *Id.* at 1179–80; *see also*, Kelly v. 1250 Oceanside Partners, 140 P.3d 985, 1011 (Haw. 2006) (concluding that the state Health Department's constitutional public trust duty to protect coastal waters required Department to "not only issue permits after prescribed measures appear to be in compliance with state regulation, but also to ensure that the prescribed measures are actually being implemented").

81. *Ching*, 449 P.3d at 1150.

82. Turney v. Marion Cnty. Bd. of Educ., 481 So. 2d 770, 777 (Miss. 1985) (quoting GEORGE G. BOGERT & GEORGE T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS, § 93 (5th ed.1973)).

83. Columbia Land Dev., LLC v. Sec'y of State, 868 So. 2d 1006, 1008, 1015 (Miss. 2004).

Commission had approved the site.[84] Columbia challenged the Secretary of State's denial of the lease.[85]

The Mississippi Supreme Court decided that the public tidelands are held by the state in public trust and that the legislature authorized the Secretary of State to be the trustee for the public tidelands.[86] The legislature, the court said, has given the Secretary of State the following guidance in the Tidelands Act for making leasing decisions: "Absent a higher public interest, the natural state of the public trust tidelands is paramount."[87] This legislative guidance is only a statement of purpose or policy, however; such guidance in other contexts might not constitute a binding legal rule. But because the Secretary of State is a trustee for these resources, the Mississippi Supreme Court explained, it has a trustee's duty to exercise prudence.[88] In this context, the court held, the duty of prudence means that the Secretary of State has a "duty to exercise discretion in a manner consistent with the public policy as stated in the Tidelands Act."[89] In short, the duty of prudence significantly strengthened the Secretary of State's statutory authority.

The Mississippi Secretary of State denied the lease for a variety of reasons, including the rural and remote nature of the site; the likelihood of pollution of the bay in which the casino would be located; "the relatively pristine nature of the site and surroundings;" and the likelihood that the casino would not be financially viable, further contributing to its adverse environmental effect.[90] Columbia argued this decision was arbitrary and capricious because these issues had already been addressed by other agencies in their approvals. The Mississippi Supreme Court disagreed, citing the Secretary of State's unique role as trustee for the tidelands and his duty as a trustee to exercise prudence in protecting the tidelands. It upheld the trial court's decision that the secretary's

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84. *Id.* at 1009.
85. *Id.* at 1010–11.
86. *Id.* at 1011–14.
87. *Id.* at 1015, citing MISS. CODE. ANN. § 29-15-3(1) (2000), which provides:

> It is declared to be the public policy of this state to favor the preservation of the natural state of the public trust tidelands and their ecosystems and to prevent the despoliation and destruction of them, except where specific alteration of specific public trust tidelands would serve a higher public interest in compliance with the public purposes of the public trust in which such tidelands are held.

88. *Id.* at 1014.
89. *Id.*
90. *Id.* at 1015.

decision was "based on the secretary's understanding of his trusteeship," and that it was not arbitrary or capricious.[91]

Trustees also owe beneficiaries a duty of undivided loyalty. Under the common law of trusts, "[e]xcept as otherwise provided in the terms of the trust, a trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose."[92] Courts have used this principle to help determine the meaning of public trusts.

In *Slocum v. Borough of Belmar*,[93] the New Jersey Superior Court held that Belmar violated its duty of loyalty under the state's public trust law by using beach admission fees to pay for municipal expenses.[94] Under New Jersey's public trust law, the public is entitled to access municipally-owned dry sand areas as well as the wet sand beach between the high and low tide lines.[95] While municipalities may charge access fees to public beaches, they may not discriminate between residents and non-residents.[96] The case was a challenge to Belmar's use of beach admission fees.

The court held that by using beach fees to pay municipal expenses, Belmar violated its duty of loyalty to the beneficiaries of the public trust—those who used the beach. "A public trustee is endowed with the same duties and obligations as an ordinary trustee," the court reasoned, including the duty of loyalty.[97] The court explained:

> The evidence in this case clearly indicates that Belmar breached its duty of loyalty to the public by increasing beach admission fees, rather than real estate taxes, in order to raise the borough's general revenues. . . . It operated the

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91. *Id.* at 1016.

92. RESTATEMENT (THIRD) OF TRUSTS § 78(1) (AM. L. INST. 2007); *see also id.* § 78(1) cmt. b ("The trustee owes a duty to the beneficiaries to administer the affairs of the trust solely in the interests of the beneficiaries, and to exclude from consideration his own advantages and the welfare of third persons.") (quoting GEORGE T. BOGERT, TRUSTS § 95 (6th ed. 1987)) [hereinafter BOGERT, TRUSTS].

93. Slocum v. Borough of Belmar, 569 A.2d 312 (N.J. Super. Ct. Law Div. 1989).

94. *See also* Kealoha v. Machado, 315 P.3d 213 (Haw. 2013) (holding a breach of the duty of loyalty when "the trustees' decision conflicts with the purpose of [the trust] or is made for the purpose of benefiting a non-beneficiary rather than the trust"); Day v. Apoliona, 616 F.3d 918 (9th Cir. 2010) (same result in parallel federal case); Att'y Gen. v. President & Fellows of Harvard Coll., 213 N.E.2d 840 (Mass. 1966) (holding public trustees did not violate duty of loyalty when they moved bulk of library and herbarium from Arnold Arboretum in Boston to Cambridge). For an explanation of how Canadian courts have used the duty of loyalty in a public trust context for natural resources, see Stéphanie Roy, *Fiduciary Duties Under the Trusteeship Theory: The Contribution of Canadian Case Law in Judicial Review of Environmental Matters*, 43 VT. L. REV. 485 (2019).

95. *Slocum*, 569 A.2d at 315–16 (citing Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47 (N.J. 1972)).

96. *Borough of Neptune City*, 294 A.2d at 55.

97. *Slocum*, 569 A.2d at 317.

> beach area as though it were a commercial business enterprise for the sole benefit of its taxpayers. This conduct resulted in surplus beach fee revenues being used to subsidize other municipal expenditures for the exclusive benefit of the residents of Belmar, rather than being set aside to meet future beach-related costs. These actions place the interest of Belmar's residents before those of the beachgoers, in violation of the borough's duty under the public trust doctrine.[98]

Finally, courts have used trust law principles to decide how proceeds from the sale of public trust natural resources can lawfully be expended. In a 1947 decision, *City of Long Beach v. Morse*,[99] the California Supreme Court used trust law to help decide that the City of Long Beach could not use revenue[100] from oil and gas leases of public trust tidelands for its own municipal purposes.

In 1911, the state legislature granted certain tidelands and submerged lands within the City of Long Beach to the city in trust for specific purposes associated with the development of its harbor. The legislature's trust grant provided:

> [N]one of said lands shall be used or devoted to any purposes other than public park, parkway, highway, playground, the establishment, improvement and conduct of a harbor and the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation . . . .[101]

At issue was the use of funds derived from oil and gas leasing on those lands; the city sought to use the money "for general municipal improvements not limited to the purposes specified in

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98. *Id.*

99. City of Long Beach v. Morse, 188 P.2d 17 (Cal. 1947).

100. The court repeatedly refers to the moneys received from oil and gas leasing as "revenue," not as royalties. *E.g.*, *id.* at 18 ("The revenue in question was derived from the production of oil and gas from the tide lands and submerged lands . . . ."). This, of course, suggests that the moneys received were not just in the form of royalties but also rentals or other income. As discussed in detail in Part II, the Pennsylvania Supreme Court in *PEDF II* held that the state could not use royalties from oil and gas leasing for non-trust purposes, but it did not decide the question of whether the expenditure of bonus and rental payments for non-trust purposes is permissible. The California Supreme Court's use of "revenue" in *City of Long Beach* suggests that the trust limitation applies to not only royalties but also bonus and rental payments.

101. *City of Long Beach*, 188 P.2d at 19 (quoting 1935 Cal. Stat. 793–94).

the legislative grants under which the city claims title to the lands."[102] The city argued that the trust restriction applied only to the use of lands, not to income from those lands. The court disagreed, citing both charitable and private trust law.[103] Because the lands are held in trust, the court said, proceeds from their sale or lease must also be held in trust.[104] The court explained:

> If the proceeds from the sale of oil and gas are regarded as corpus, they must be used for the purposes set forth in the legislative grants in trust, for the City, as trustee, clearly has no authority to appropriate the corpus to its own uses contrary to the terms of the trust. If the proceeds are regarded as income from trust property, the trustee, in the absence of a legislative provision to the contrary, has no more right to them than it has to the corpus.[105]

Even if other language in the 1911 legislative grant authorized the city to conduct oil and gas leasing on those lands, the court said, "it does not follow" that the city may use the income "for general municipal purposes unconnected with the expressed purposes of the trust."[106]

City of Long Beach is not the only case in which a court has used trust law principles to limit how proceeds from the sale of public trust resources can be spent. As more fully discussed in Section II.A, the Pennsylvania Supreme Court in *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF II)*[107] used trust law principles to help decide that royalties from oil and gas leasing of public trust resources must be used for the purposes expressed in the public trust.

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102. *Id.*

103. *Id.* at 20 (citing RESTATEMENT OF TRUSTS § 238 (AM. L. INST. 1935); GEORGE GLEASON BOGERT, TRUSTS AND TRUSTEES, §§ 789, 828 (1935); Provident Land Corp. v. Zumwalt, 85 P.2d 116, 120 (Cal. 1938) (holding rents and profits from private trust property are also subject to the trust); Methodist Benev. Ass'n v. Bank of Sweet Spring, 54 S.W.2d 474, 478 (Mo. Ct. App. 1932) (holding dividends from stock held in charitable trust are part of trust corpus).

104. *City of Long Beach*, 188 P.2d at 20 ("Once it is made clear that the lands are held in trust, it necessarily follows that their proceeds, whether by sale or lease, are likewise subject to the trust.") (quoting *Zumwalt*, 85 P.2d at 120).

105. *Id.* at 20 (citations omitted).

106. *Id.* at 22. While the legislature separately authorized the city to use a fraction of the proceeds of oil and gas drilling for its own purposes, it did so subject to the requirement that such expenditures must not violate the terms of the public trust. *Id.* at 21. *But see id.* at 23–27 (Schauer, J., dissenting) (arguing (1) that the trust language did not apply to income from oil and gas drilling and (2) that the legislative limit on the city's use of a fraction of oil and gas proceedings for its own purposes therefore did not apply).

107. 161 A.3d 911 (Pa. 2017)

These cases all involve public trusts that provide some level of environmental protection for, or public access to, natural resources. In all of these cases, the incorporation of trust law into a public trust for natural resources strengthened the protection already provided by the public trust by adding structure to support the intended protection. But some public trusts were not created or designed for protecting natural resources.[108] A problem occurs when the public trust involves natural resources but is not in any way intended or designed for protection of the environmental attributes of those resources. In these cases, the application of trust law principles to the public trust is not likely to provide any greater environmental protection.

Public school land trusts provide an example. Although these trusts involve natural resources, they are not public trusts for natural resources because they were not designed in any way to protect these resources or provide public access to them. The use of trust law principles to help interpret the meaning of these trusts shows the primacy of the text and purpose of the law creating them. The U.S. Supreme Court's 1967 decision, *Lassen v. Arizona* ex rel. *Arizona Highway Department,*[109] involved the New Mexico-Arizona Enabling Act of 1910, which granted to Arizona 9.2 million acres in trust for the development and operation of schools.[110] Congress intended that the grant "provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust."[111] The Enabling Act contains detailed provisions concerning the transfer of school trust lands to non-state parties, and how the money from such transfers is to be used. These provisions are consistent with the trustee's common law duty to manage the trust corpus on behalf of the beneficiaries so that the income from the trust corpus is reasonably maximized.[112] But the statute "does not directly refer to the conditions or consequences

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108. Some public trusts have both natural resources protection and other purposes, such as promotion of navigation and commerce. *See, e.g.*, *supra* Section I.A (discussing public trusts for bottomlands under navigable waterways).

109. Lassen v. Arizona *ex rel.* Ariz. Highway Dep't, 385 U.S. 458 (1967).

110. *Id.* at 460 n.2; New Mexico-Arizona Enabling Act of 1910 §§ 24–29, 36 Stat. 557, 572–76 (1910).

111. *Lassen*, 385 U.S. at 467. These rules include, for example, requirements that the lands be "appraised at their true value" prior to sale, that the land is to be sold after public notice for at least that value "to the highest and best bidder" at a public auction, and that money or other receipts from the sale of the land can only be used for the purposes for which the land was granted in trust. *Id.* at 466–67; New Mexico-Arizona Enabling Act § 28, 367 Stat. at 574–75 (relevant part reproduced as an appendix in 385 U.S. at 470–74).

112. RESTATEMENT (SECOND) OF TRUSTS § 181 (AM. L. INST. 1959) ("The trustee is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive."). In addition, a "trustee of land is normally under a duty to lease it or to manage it so that it will produce income." *Id.* at cmt. a.

of the use by the State itself of the trust lands for purposes not designated in the grant."[113]

This case arose when the Arizona Highway Department sought to acquire rights of way and material sites on school trust lands.[114] Because the land transfers were to another agency of the state, rather than a non-state party, the Enabling Act did not apply.[115] The Arizona Supreme Court ordered the trustee—the State Land Commissioner—to grant the lands to the Department of Highways without compensation.[116] It reasoned that "it may be conclusively presumed that highways constructed across trust lands always enhance the value of the remaining trust lands in amounts at least equal to the value of the areas taken."[117] The U.S. Supreme Court disagreed, holding that "Arizona must actually compensate the trust in money for the full appraised value of any material sites or rights of way which it obtains on or over trust lands."[118] "This standard," the Court said, "most consistently reflects the essential purposes of the grant."[119] In a later case, the Court described *Lassen* as holding that "even where the State itself is the acquisitor, the Act's designated beneficiaries were to derive the full benefit of the grant."[120]

Courts around the country[121] have employed that rationale to reach similar decisions on below-market-value sale or lease of school trust lands.[122] While this rationale is fine for trusts designed to maximize financial returns to the public beneficiaries, it does not address the question of whether these lands may also have environmental, historical, archeological, or cultural values. In fact, it can override these values. One tension between school land trusts and public trusts for natural resources is the emphasis placed in school trusts on generating a reasonable financial return. By

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113. *Lassen*, 385 U.S. at 461.
114. *Id.* at 459–61.
115. *Id.* at 461–65.
116. State *ex rel.* Ariz. Highway Dep't. v. Lassen, 407 P.2d 747, 752 (Ariz. 1965).
117. *Lassen*, 385 U.S. at 460 (summarizing reasoning of Arizona Supreme Court).
118. *Id.* at 469.
119. *Id.* at 469–70.
120. Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295, 302 (1976).
121. *See, e.g.*, State *ex rel.* Ebke v. Bd. of Educ. Lands & Funds, 47 N.W.2d 520 (Neb. 1951); Okla. Educ. Ass'n v. Nigh, 642 P.2d 230 (Okla. 1982); Cnty. of Skamania v. State, 685 P.2d 576 (Wash. 1984).
122. This approach has been applied to public lands granted to states for university purposes, even when giving effect to that purpose ran counter to the state's interest in creating a public park. State v. Univ. of Alaska, 624 P.2d 807 (1981). The court reached a similar conclusion in a later case involving lands designated by Congress as public trust lands for mental health programs. State v. Weiss, 706 P.2d 681, 683, 683 n.3 (Alaska 1985) (holding state redesignation for "general grant land" of lands designated in trust for mental health programs is breach of trust under "basic trust law principles"); *see also* Weiss v. State, 939 P.2d 380 (1997) (approval of settlement in that case).

contrast, public trusts for natural resources are generally intended to correct market failures; the value to the public of these natural resources generally is not recognized by the market.

The 1993 Utah Supreme Court decision in *National Parks and Conservation Association v. Board of State Lands*[123] is illustrative. The case involved the state's approval of an exchange of state school trust land within a national park for county land. The county sought to acquire the school trust land to pave part of a dirt road to improve public access to the park.[124] The National Parks and Conservation Association (NPCA) argued "the scenic and recreational qualities of the park will be adversely affected" if the county acquired and then paved that part of the dirt road.[125] In approving the land exchange, the Board of State Lands concluded that it "could not give priority to nonmonetary values because of its fiduciary duty to manage school trust land for the exclusive economic benefit of the common schools."[126]

NPCA argued that the Board of State Lands erred in approving the land exchange because it did not prioritize "the scenic, aesthetic, and recreational values" of public trust lands.[127] The Utah Supreme Court disagreed, holding that public trust law does not apply to school trust lands.[128] While Utah law recognizes a natural resources public trust, which "protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large for some natural resources," school trust lands are not among these lands.[129] In contrast to public trust lands, the court explained, "the primary objective of the school land trust is to maximize the economic value of school trust lands."[130]

This conflict between natural resources protection and income maximization plays out in other school trust contexts as well. When these lands contain old-growth forests, for example, the school trust law approach to valuation "can only hamper efforts to protect ecological values on state lands."[131] But school trusts were not established to protect natural resources.

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123. Nat'l Parks & Conservation Ass'n v. Bd. of State Lands, 869 P.2d 909 (Utah 1993).
124. *Id.* at 911.
125. *Id.* at 913.
126. *Id.* at 916.
127. *Id.* at 916–17.
128. *Id.* at 919–21.
129. *Id.* at 919.
130. *Id.* at 920.
131. John B. Arum, Comment, *Old-Growth Forests on State School Lands—Dedicated to Oblivion?—Private Trust Theory and the Public Trust*, 65 WASH. L. REV. 151, 159 (1990).

2. Refusal to Use Trust Law Principles When They Would Undermine Public Trusts

In the preceding section, some courts have used trust law principles to further the purposes of different public trusts for natural resources because they concluded that these principles were of assistance in doing so. But that does not mean that trust law principles are, or should be, applied indiscriminately to natural resources public trusts. In the cases below, courts also effectuated the purpose and structure of various public trusts or public trust-like laws for natural resources. But they did so by refusing to apply trust principles—frequently private trust law principles—that would undermine public trusts for natural resources or laws akin to such public trusts.

In *City of Coronado v. San Diego Unified Port District*,[132] the California Court of Appeals ruled that trust law did not prevent the California legislature from revoking a public trust grant of tidelands to the City of Coronado. In the same act, the legislature regranted those tidelands in public trust to the San Diego Unified Port District, which includes not only Coronado but also the other cities on San Diego Bay. Coronado argued, citing trust law, that a grant of property in trust "is irrevocable unless an express power of revocation has been reserved" and that the legislature had not reserved a power of revocation.[133] The California Court of Appeals disagreed, explaining that "private trust principles cannot be called upon to nullify an act of the Legislature or modify its duty, under the California Constitution . . . to do all things necessary to the execution and the administration of the public trust."[134]

The court explained that this outcome is essential to the state's effective administration of its public trust for these tidelands. "[W]hen the State acts in any way to alter or amend a statutory grant in trust made by it, it acts both as [settlor] and in behalf of the beneficiaries of the trust," the court said.[135] "To hold that the State of California through its Legislature is without power to change from a small municipal trustee to a port district comprised

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132. City of Coronado v. San Diego Unified Port Dist., 227 Cal. App. 2d 455, 481 (Cal. Ct. App. 1964).

133. *Id.* at 473 (citing CAL. CIV. CODE § 2280).

134. *Id.* (citing CAL. CONST. art. XV, § 2; Mallon v. City of Long Beach, 44 Cal. 2d 199 (1955)); *see also id.* at 473–74 ("Viewing the subject from a slightly different aspect no grant of lands covered by navigable waters can be made which will impair the power of a subsequent Legislature to regulate enjoyment of the public right.") (citing Ill. Cent. R. R. Co. v. Illinois, 146 U.S. 387 (1892)); Evans v. City of Johnstown, 410 N.Y.S.2d 199, 208 (N.Y. App. Div. 1978) ("While the use of the name 'public trust' may suggest duties similar to those under a private trust, that interpretation is not feasible.").

135. *Coronado*, 227 Cal. App. 2d at 474–75.

of five municipalities would be to place San Diego harbor beyond the direction and control of the State for the benefit of the general public."[136]

In *Owsichek v. State, Guide Licensing & Control Board*,[137] the Alaska Supreme Court applied a "close scrutiny" standard, rather than the trust law standard of abuse of discretion, to legislation that allowed the state's Guide Licensing and Control Board "to grant hunting guides 'exclusive guide areas,' geographic areas in which only the designated guide may lead hunts and from which all other guides are excluded."[138] Owsichek, a licensed guide, challenged the legislation after being granted an area he regarded as "unhuntable."[139] He based much of his claim on Article VIII, Section 3 of the Alaska Constitution, which provides: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[140]

The Alaska Supreme Court held that the new legislation violated this provision of the state constitution, which is also called the common use clause. In prior cases, the court explained, "we have indicated an intent to apply the common use clause in a way that strongly protects public access to natural resources."[141] After reviewing the constitutional history of the common use clause, the court stated that "the minimum requirement of this duty is a prohibition against any monopolistic grants or special privileges."[142] This history "reinforces our conclusion that grants of exclusive rights to harvest natural resources listed in the common use clause should be subjected to close scrutiny."[143] The court explained:

> We conclude that exclusive guide areas and joint use areas fall within the category of grants prohibited by the common use clause. These areas allow one guide to exclude all other guides from leading hunts professionally in "his" area. These grants are based primarily on use, occupancy and investment, favoring established guides at the expense of new entrants in the market, such as

136. *Id.* at 474.
137. Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488 (Alaska 1988).
138. *Id.* at 489.
139. *Id.* at 491.
140. ALASKA CONST. art. VIII, § 3.
141. *Owsichek*, 763 P.2d at 492.
142. *Id.* at 496.
143. *Id.* at 494.

> Owsichek. To grant such a special privilege based primarily on seniority runs counter to the notion of 'common use.'[144]

In another case, *Brooks v. Wright*, the Alaska Supreme Court explained its standard of review in *Owsichek*: "[A]lthough trust law dictates that the acts of a trustee should be reviewed for abuse of discretion, we have held that grants of exclusive rights to harvest natural resources listed in the common use clause are subject to close scrutiny."[145] To vindicate the purpose of the common use clause, the court refused to apply trust law.

Brooks provides another example of a court's refusal to apply trust law to a public-trust-like law. It involved a ballot initiative in Alaska that would have prohibited the use of snares to trap wolves. Wright and others sought to remove the initiative from the ballot. They based their argument on Article VIII, Sections 3 and 4 of the Alaska constitution.[146] These provisions, they argued, "establish a 'public trust' for management of the state's wildlife, with the State of Alaska as 'trustee' and the people of Alaska as the intended beneficiaries."[147] They then invoked trust law to claim that the state legislature, as part of its fiduciary duty, retains "exclusive law-making authority over natural resource issues."[148] As a result, they argued, a ballot initiative in which the public decided this question was unlawful.

The Alaska Supreme Court held otherwise, concluding that the ballot initiative was lawful.[149] To begin with, it said that while Article VIII "does not explicitly create a public trust," it creates a "trust-like relationship."[150] As the court later explained, it "used the analogy of a public trust [in *Brooks*] to describe the nature of the state's duties [under Article VIII] with respect to wildlife and other natural resources meant for common use."[151] In applying this analogy, the *Brooks* court reasoned, "the applicability of private trust law depends greatly on both the type of trust created and the

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144. *Id.* at 496.

145. Brooks v. Wright, 971 P.2d 1025, 1032 (Alaska 1999).

146. ALASKA CONST. art. VIII, § 3 is quoted in the text accompanying *supra* note 140; *id.* at § 4 ("Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.").

147. *Brooks*, 971 P.2d at 1031.

148. *Id.*

149. In an earlier order, in August 1998, the court permitted the ballot initiative to go forward, stating that an opinion would follow. In November 1998, the ballot initiative was defeated. The court issued its opinion in this case in January 1999. *Id.* at 1027.

150. *Id.* at 1033.

151. Kanuk *ex rel.* Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, 1099 n.57 (Alaska 2014) (quoting *Brooks*, 971 P.2d at 1033).

intent of those creating the trust."[152] In some cases, it is appropriate to use private trust principles. For instance, the court said, it is appropriate to apply private trust law to trust lands granted by the federal government to the state for public school purposes.[153]

Wright went further, arguing that "private trust law should be applied wholesale to the public trust doctrine."[154] The court answered that this conclusion is not consistent with the court's own precedent.[155] "[W]hile general principles of trust law do provide some guidance, they do not supersede the plain language of statutory and constitutional provisions when determining the scope of the state's fiduciary duty or authority."[156] Alaska's law on this public trust-like relationship, the court held, does not grant the legislature exclusive law-making authority over natural resources.[157] The "purpose of the public trust doctrine," the court explained, is "not to grant the legislature ultimate authority over natural resource management, but rather to prevent the state from giving out 'exclusive grants or special privilege as was so frequently the case in ancient royal tradition.' "[158] Moreover, "general trust law should not be applied to the public trust doctrine in a way that limits or destroys the democratic process."[159] The court explained:

> [A]pplication of private trust principles may be counterproductive to the goals of the trust relationship in the context of natural resources. For instance, private trusts generally require the trustee to maximize economic yield from the trust property, using reasonable care and skill. But Article VIII requires that natural resources be managed for the benefit of all people, under the assumption that both development and preservation may be necessary to provide for future generations, and that income generation is not the sole purpose of the trust relationship.[160]

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152. *Brooks*, 971 P.2d at 1032.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 1031 (quoting Owsichek v. State, Guide Licensing & Control Bd., 763 P.2d 488, 493 (Alaska 1988)).
159. *Id.* at 1033 ("It would be a strict violation of democratic principle for the original voters and legislators of a state to limit, through a trust, the choices of the voters and legislators of today.") (quoting James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy,* 19 ENV'T L. 527, 544 (1989)).
160. *Id.* at 1032 (citations omitted).

The Alaska Supreme Court's distinction between the purposes of a private trust and the purposes of a public trust, of course, is essential to the effective implementation of many public trusts for natural resources. It also provides a key reason for refusing to apply at least some trust principles, particularly private trust principles, to public trusts.

C. *Charitable Trusts Versus Private Trusts*

The potential for trust law to help interpret the meaning of public trust law does not automatically answer a basic question: which trust law? As we have seen, a great many trust principles apply to all traditional trusts—including the basic structure of trusts; the general duty of trustees to adhere to the terms of the trust; the trustee's duties of prudence and loyalty toward beneficiaries; and the duty to monitor trust property. When courts apply trust principles to public trusts for natural resources, they often apply these principles.

But other trust law principles apply only to certain kinds of trusts. As trust lawyers know well, there are a variety of different kinds of trusts, each with unique rules. It is hornbook law that there are two basic types of express trusts, private and charitable.[161] Although private and charitable trusts do not exhaust the range of possible options for help in interpreting the public trust, they represent major categories. They also demonstrate that the question—which trust law?—could in at least some circumstances have more than one answer. In fact, public trust law for natural resources in some states draws from both charitable and private trust law. When courts are forced to choose between charitable trust law and private trust law to help interpret public trusts for natural resources, they should strongly consider charitable trust law.

Charitable trusts and private trusts are different in at least four major ways. First, they have different purposes. Private trusts are used to create financial advantages or benefits for individuals or corporations.[162] They are often referred to simply as trusts.[163] A charitable trust, by contrast, is intended to "accomplish a substantial amount of social benefit to the public or some

161. BOGERT, TRUSTS, *supra* note 92, § 45. There are also two different categories of implied trusts—resulting trusts (§§ 71–76) and constructive trusts (§§ 77–87). But they do not appear to be significant here.

162. *Id.* at § 45.

163. *See, e.g.*, JULIEANNE E. STEINBACHER & SAMANTHA K. WOLFE, PENNSYLVANIA TRUST GUIDE: A HANDBOOK FOR TRUSTEES AND THEIR ADVISORS (4th ed. 2019).

reasonably large class thereof."[164] The purposes of a charitable trust can include poverty relief, education, "promotion of health," or any other purpose that is "designed to accomplish objects that are beneficial to the community—i.e., to the public or indefinite members thereof—without also serving what amount to private trust purposes . . . ."[165] Many charitable trusts involve public parks.[166]

Second, charitable trusts differ from private trusts in the definiteness of who is affected. Those affected by charitable trusts tend to be the public or some class of persons that are not specifically identified by name.[167] By contrast, the beneficiaries of a private trust are "specified persons who are designated as beneficiaries of the trust."[168] The individuals who benefit from a charitable trust are not the beneficiaries of a charitable trust. If a charitable trust "is set up to aid the poor of the city of Yorkville, the residents of that city who are from time to time selected to receive food, clothing and the like are not beneficiaries of the charitable trust but are merely the means through which the public receives benefits."[169] The public nature of a charitable trust is underscored by the fact that the state attorney general, a public official, is nearly always responsible for enforcing the trust, rather than the individuals affected by the trust.[170]

Third, private trusts tend to be limited in duration by the rule against perpetuities in states that still recognize the rule. Charitable trusts, unaffected by that rule, can be perpetual.[171] These three differences have all been subject to extensive litigation.[172]

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164. BOGERT, TRUSTS, *supra* note 92, § 54.

165. RESTATEMENT (THIRD) OF TRUSTS § 28 & cmt. a, at 9–10 (AM. L. INST. 2007).

166. *See, e.g.*, Kapiolani Park Pres. Soc. v. City & Cnty. of Honolulu, 751 P.2d 1022 (Haw. 1988); State v. Rand, 366 A.2d 183 (Me. 1976); Schaeffer v. Newberry, 50 N.W.2d 477 (Minn. 1951).

167. GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 363 (2020) [hereinafter BOGERT ET AL.] ("Some [charitable trusts] are completely uncertain in that respect throughout their existence; others are partly or at times definite and partly indefinite; and in rare cases the persons concerned may at all times be identifiable and definite and yet the element of public interest may be supplied through the large size of the group.").

168. Olivas v. Bd. of Nat'l Missions of Presbyterian Church, 405 P.2d 481, 485 (Ariz. Ct. App. 1965) ("[T]here cannot be a private trust unless there is a beneficiary who is definitely ascertainable within the period of the rule against perpetuities." (citing GEORGE T. BOGERT, TRUST & TRUSTEES § 362 (1946)).

169. BOGERT ET AL., *supra* note 167.

170. *Id.*; Degiacomo v. City of Quincy, 63 N.E.3d 365, 371–72 (Mass. 2016).

171. *See, e.g.*, Long Green Valley Ass'n v. Bellevale Farms, Inc., 46 A.3d 473, 489 (Md. Ct. Spec. App. 2012); Hornets Nest Girl Scout Council, Inc. v. Cannon Found., Inc., 339 S.E.2d 26, 29–30 (N.C. Ct. App. 1986).

172. *See supra* notes 162–71.

Fourth and finally, in addition to these trust law differences, there is a tax law difference between charitable and private trusts. Charitable trusts are entitled to different and more beneficial tax consequences than private trusts.[173]

In many ways, public trusts for natural resources are like perpetual charitable trusts.[174] Both are intended to benefit the public or some part of the public. Both are of unlimited duration. Both involve a large and unnamed class of beneficiaries. And both necessarily require the trustee to protect and maintain the trust corpus so that it can be available to the public in perpetuity. Indeed, courts have sometimes described charitable trusts as a form of public trust.[175]

Perpetual charitable trusts, however, are not the same as public trusts. Indeed, in some other ways, public trusts are more like private trusts. Perhaps the most important difference is who can sue to enforce the trust. While charitable trusts are primarily enforced by a state's attorney general, private trusts generally can be enforced by anyone who benefits from the trust. Similarly, members of the public may sue to enforce a public trust.[176]

Still, the similarities between public trusts and charitable trusts are greater than the similarities between public trusts and private trusts.[177] That does not mean that courts should automatically

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173. RICHARD L. FOX, CHARITABLE GIVING: TAXATION, PLANNING, AND STRATEGIES (2008).

174. Edith Brown Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495, 503–04 (1984).

175. *See, e.g.*, Hallinan v. Hearst, 66 P. 17, 19 (Cal. 1901) (treating public trusts and charitable trusts as synonymous); Troutman v. De Boissiere Odd Fellows' Orphans' Home & Indus. Sch. Ass'n, 71 P. 286, 300 (Kan. 1903) ("The definition of and distinction between private and public trusts or charities here made is accepted by text-writers and courts the world over as correct."); Nixon v. Brown, 214 P. 524, 530 (Nev. 1923) (contrasting private trust with "charitable public trust"); Frost Nat'l Bank v. Boyd, 188 S.W.2d 199, 207 (Tex. Civ. App. 1945) ("A 'charitable trust' is a 'public trust.' ").

176. *See, e.g.*, Price v. Akaka, 3 F.3d 1220, 1224–25 (9th Cir. 1993) (citing common law of trusts to hold that a federal public trust "by its nature creates a federally enforceable right for its beneficiaries to maintain an action against the trustee in breach of the trust"); Paepcke v. Pub. Bldg. Comm'n of Chicago, 263 N.E.2d 1, 18 (Ill. 1974) ("If the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time."); *see also* Parsons v. Walker, 328 N.E.2d 920, 926 (Ill. App. 1975) (noting that the circumstances, rather than the label attached to the trust at the time it is created, determine whether a trust is a public trust or a charitable trust).

177. *See* Turnipseed et al., *supra* note 13, at 16 n.90 (2009) ("Charitable trusts are a superior analogy to public trusts than private trusts, because, like public trusts, they too benefit numerous and generally unidentified communities or citizenries and may be of indefinite durations. Private trust instruments, on the other hand, generally specify the beneficiaries and are of limited duration."); Peter Manus, *To a Candidate in Search of an Environmental Theme: Promote the Public Trust*, 19 STAN. ENV'T L.J. 315, 324 (2000) ("[Public trust] framework is particularly analogous to that of a charitable trust, which may incorporate a public purpose, government trustee, and generalized beneficiaries.").

privilege a charitable trust principle over a private trust principle in defining the duties of a public trustee for natural resources. Nevertheless, it does suggest that charitable trust principles, particularly those that apply to perpetual charitable trusts, are more likely than private trust principles to further public trusts for natural resources.

Two broader points emerge from this analysis. Most obviously, conflation of the two meanings of private trust law in the context of public trusts for natural resources can lead courts and lawyers to view traditional trust law in a misleading way. If courts or lawyers view all of trust law as the law of noncharitable trusts, then their choice of trust law principles to help interpret public trusts for natural resources is greatly limited. Not only do they miss a whole set of trust principles that apply to all trusts, they also miss the law of charitable trusts. Put differently, they are not even considering what is likely to be the most relevant and important trust law. In addition, there will sometimes be cases where courts have to choose between private trust law, on one hand, and charitable trust law and general trust law, on the other, to help interpret a particular public trust. We now turn to a case that involves both of these points.

II. *PENNSYLVANIA ENVIRONMENTAL DEFENSE FOUNDATION V. COMMONWEALTH*

In 1971, near the beginning of the modern environmental era, the voters of Pennsylvania overwhelmingly approved an environmental rights amendment to the state constitution.[178] The amendment has two parts. The first sentence of article I, section 27, of the Pennsylvania Constitution provides: "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."[179] The last two sentences recognize a constitutional public trust for certain natural resources: "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."[180]

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178. John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania*, 24 WIDENER L.J. 181, 273–79 (2015). The vote was 1,021,342 in favor and 259,797 against, *id.* at 280, which is a margin of four to one.

179. PA. CONST. art. I, § 27.

180. *Id.*

In *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF III)*,[181] the Commonwealth Court interpreted private trust law to decide that the state could spend some bonus and rental payment money from oil and gas leasing on state forest and park-land, which is constitutional public trust property, for non-trust purposes. That decision is the ultimate focus of this part of the Article and the case study for the Article as a whole. But to understand the case, it is first necessary to have some additional background.

Section 27 played only a minimal role in environmental protection for more than four decades because of a 1973 case, *Payne v. Kassab*, which substituted a three-part test for the text of the amendment.[182] In 2013, in *Robinson Township v. Commonwealth*, the Pennsylvania Supreme Court held unconstitutional several provisions of a state statute governing shale gas extraction.[183] Three justices, a plurality of the seven-member court, based their decision on section 27. The plurality opinion, written by then-Chief Justice Ronald Castille, contains a detailed exposition of the text of section 27 and how it should be applied.[184] Still, this opinion was signed by only three of the court's seven justices and did not constitute binding precedent on section 27.[185] Four years later, in 2017, in the landmark case of *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF II)*, a majority of the Pennsylvania Supreme Court held several other statutes unconstitutional under section 27, applying much of the *Robinson Township* plurality opinion.[186]

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181. 214 A.3d 748 (Pa. Commw. Ct. 2019).

182. The test was set forth in *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff'd on other grounds*, 361 A.2d 263 (Pa. 1976):

> The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

For a detailed explanation of the effect of, and case law under, the *Payne v. Kassab* test, see John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335 (2015).

183. Robinson Twp. v. Commonwealth, 83 A.3d 901 (Pa. 2013); *see also* John C. Dernbach, James R. May & Kenneth T. Kristl, Robinson Township v. Commonwealth of Pennsylvania*: Examination and Implications*, 67 RUTGERS U. L. REV. 1169 (2015).

184. *Robinson Twp.*, 83 A.3d at 947–63.

185. The fourth vote for holding parts of the statute unconstitutional came from Justice Baer, who based his opinion on substantive due process. *Robinson Twp.*, 83 A.3d at 1000 (Baer, J., concurring).

186. PEDF II, 161 A.3d 911 (Pa. 2017).

PEDF II had its origins in two major changes that occurred in Pennsylvania's longstanding oil and gas leasing program on public lands. For well over half a century, the program involved relatively small wells that brought several million dollars per year to the Department of Conservation and Natural Resources (DCNR) and its predecessor agencies. Under the state statute in effect at the time, the state spent the money on a variety of conservation projects.[187] When private companies discovered how to recover large amounts of gas from shale, DCNR was able to enter into leases that brought in hundreds of millions of dollars per year. At about the same time, in 2008, a major recession caused Pennsylvania to incur significant budget deficits. Both the governor and the legislature made a series of decisions that allocated about half of the oil and gas leasing money to the General Fund to help balance the budget. The state received $926 million in oil and gas lease revenues between Fiscal Years 2008–2009 and 2014–2015. DCNR received about half of that. The rest was spent as part of the General Fund.[188]

In *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF I)*, PEDF sued the state in the Commonwealth Court, seeking declaratory relief that the variety of legislative and administrative decisions to lease state land for oil and gas development, and divert royalties received from oil and gas leasing to the General Fund in 2009–2015, violated the public trust provisions of section 27.[189] The Commonwealth Court, applying the three-part *Payne* test to interpret section 27 because the *Robinson Township* decision tacitly preserved that test, granted the Commonwealth's request for summary relief.[190]

This part first explains the Pennsylvania Supreme Court's landmark decision in *PEDF II* on the use of royalties received from oil and gas leasing on state lands. In that case, the court remanded to the Commonwealth Court a question about the use of bonus and rental payments from oil and gas leasing. This part then describes the Commonwealth Court's decision on that issue in *PEDF III*.

187. See *infra* note 276.
188. *PEDF II*, 161 A.3d at 925.
189. PEDF I, 108 A3d 140 (Pa. Commw. Ct. 2015).
190. *Id.* at 172–73.

A. *Pennsylvania Supreme Court: Royalties from Oil and Gas Leasing*

In *PEDF II*, the Pennsylvania Supreme Court reversed the commonwealth court's decision and held that the use of royalties from oil and gas leasing for non-trust purposes violated section 27.[191] The court began its analysis by addressing the three-part test that the Pennsylvania Commonwealth Court first used in *Payne v. Kassab* in 1973. Stating that the test "is unrelated to the text of section 27 and the trust principles animating it," and that it "strips the constitutional provision of its meaning," the court rejected the test as the proper standard to apply.[192] It held that the interpretation of section 27 should be guided in substantial part by the text of the amendment itself.[193]

This, by itself, was a "sea-change."[194] The text had never mattered before and had not been read seriously. The three-part *Payne* test had been used for so long, and had substituted so effectively for the text of section 27, that lawyers, judges, and public and private decisionmakers were now obliged to look at section 27 "for the first time."[195]

Article I of Pennsylvania's constitution, in which section 27 is located, is Pennsylvania's Declaration of Rights, the state's analog to the U.S. Bill of Rights. A careful analysis of the text,[196] the court said, showed that section 27 recognizes two distinct rights. The first, which is contained in the first sentence, is a right to certain qualities or values in the environment. The second, which is contained in the remaining two sentences, is a right to have the Commonwealth of Pennsylvania conserve and maintain public natural resources for the benefit of present and future generations. These two sentences, in effect, create a constitutional public trust for those resources.[197] Under these two sentences, the court noted, the Commonwealth is the trustee.[198] The corpus, or body, of the

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191. *PEDF II*, 161 A.3d at 939; *see also* Dernbach et. al., *supra* note 29, at 822–23.
192. *PEDF II*, 161 A.3d at 930.
193. *Id.* at 916 ("Because state parks and forests, including the oil and gas minerals therein, are part of the corpus of Pennsylvania's environmental public trust, we hold that the Commonwealth, as trustee, must manage them according to the plain language of Section 27, which imposes fiduciary duties consistent with Pennsylvania trust law.").
194. *Id.* at 940 (Baer, J., concurring and dissenting).
195. T.S. ELIOT, *Little Gidding*, *in* FOUR QUARTETS 39 (1943):

> We shall not cease from exploration
> And the end of all our exploring
> Will be to arrive where we started
> And know the place for the first time.

196. PA. CONST. art. I, § 27.
197. *PEDF II*, 161 A.3d at 931–32.
198. *Id.*

trust is public natural resources, which the court said includes state parks and forests, as well as the oil and gas they contain.[199] The people, including present and future generations, are "the named beneficiaries" of this trust.[200] The court also explained that "all agencies and entities of the Commonwealth government, both statewide and local," have a constitutional trust responsibility.[201]

The court then explained the basic duties of the Commonwealth as a trustee:

> Pennsylvania's environmental trust thus imposes two basic duties on the Commonwealth as the trustee. First, the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties. Second, the Commonwealth must act affirmatively via legislative action to protect the environment.[202]

But the court did not limit the standard of judicial review to the text of section 27. Instead, it said: "[W]hen reviewing challenges to the constitutionality of Commonwealth actions under section 27, the proper standard of judicial review lies in the text of section 27 itself *as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.*"[203]

The use of trust language in the public trust part of section 27, the court said, indicates the value of drawing on pre-existing trust law principles to determine their meaning.[204] Thus, in exercising its public trust duties, the Commonwealth is bound by the general trust duties of prudence, exercising "such care and skill as a man of ordinary prudence would exercise in dealing with his own property"; loyalty, managing the trust corpus "so as to accomplish the trust's purposes for the benefit of the trust's beneficiaries"; and impartiality, managing "the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust."[205]

The court added that a trustee's discretion under the public trust is bound by the terms of the trust. "Although a trustee is

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199. *Id.* at 916.
200. *Id.* at 931–32.
201. *Id.* at 931 n.23.
202. *Id.* at 933 (citing Robinson Twp. v. Commonwealth, 83 A.3d 901, 957–58 (Pa. 2013)).
203. *PEDF II*, 161 A.3d at 930 (emphasis added).
204. *Id.* at 932.
205. *Id.* at 932–33 (citations omitted).

empowered to exercise discretion with respect to the proper treatment of the corpus of the trust, that discretion is limited by the purpose of the trust and the trustee's fiduciary duties," the court said, citing trust law.[206] Even when the trustee says it is acting in other ways to protect the beneficiaries, the trustee cannot use trust assets in these other ways.[207]

The Pennsylvania Supreme Court then used trust law principles to help answer two arguments by the Commonwealth that "the revenue obtained from the disposition of trust assets need not be returned to the corpus of the trust or otherwise dedicated to trust purposes."[208] First, the Commonwealth argued, "the Environmental Rights Amendment is 'silent' as to the use of proceeds from the sale of natural resources, and 'addresses neither the appropriations process nor funding for conservation purposes.' "[209] "This is plainly inaccurate," the court responded, "as Section 27 expressly creates a trust, and pursuant to trust law in effect at the time of the enactment, proceeds from the sale of trust assets are part of the corpus of the trust."[210] In reaching this conclusion, the court relied on both private trust law and charitable trust law.[211] The court explained how the constitutional text and trust law principles work together in this context:

> [T]he creation of a trust in the Environmental Rights Amendment obviates the need for additional language indicating that funds should be dedicated for a specific purpose. Section 27 itself establishes that the purpose of the trust is to ''conserve and maintain'' the public natural resources *and basic trust principles require that the proceeds from their sale remain part of the corpus.*[212]

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206. *Id.* at 933 (citing Struthers Coal & Coke Co. v. Union Tr. Co., 75 A. 986, 988 (Pa. 1910); *In re* Sparks' Estate, 196 A 48, 57 (Pa. 1938)).

207. *PEDF II*, 161 A.3d at 933. For example, a private trust may provide only for the education of the beneficiary. If the beneficiary has a serious and expensive health issue, the trustee cannot spend trust money on the best medical experts without a court order, even if those experts would help the beneficiary.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 933–35 (citing *In re* McKeown's Estate, 106 A. 189, 190 (Pa. 1919) (applying private trust law and finding that "[b]eing a sale of assets in the corpus of the trust, presumptively all of the proceeds are principal"); Bolton v. Stillwagon, 190 A.2d 105, 109 (1963) (applying charitable trust law and holding that "where the relation of trustee and [beneficiary] has once been established as to certain property in the hands of the trustee, no mere change of trust property from one form to another will destroy the relation").

212. *PEDF II*, 161 A.3d 933 n.26 (emphasis added).

The court also used that approach to reject an argument that the constitutional public trust under section 27 should be interpreted to follow the public trust law that has been applied by other courts and jurisdictions.[213] As explained in greater detail below, Justice Baer's concurring and dissenting opinion argued that, under "the classic public trust doctrine," the resources themselves are subject to the public trust but not proceeds from the sale of those resources.[214] The majority, however, explained that Pennsylvania is not governed by this law:

> At most, the public trust doctrine provides a framework for states to draft their own public trust provisions, which (like many trust instruments) will ultimately be interpreted by the state courts. In Pennsylvania, established private trust principles provide this Court with the necessary tools to properly interpret the trust created by Section 27.[215]

The Commonwealth's second argument was that the section 27 phrase, "for the benefit of all the people," means that the General Assembly can "direct the proceeds from oil and gas development toward any uses that benefit all the people of the Commonwealth, even if those uses do nothing to 'conserve and maintain' our public natural resources."[216] Responding that it was "wholly unconvinced," the court said the phrase could not be pulled out of the context in which it is used in section 27, which requires the Commonwealth to conserve and maintain public natural resources for the benefit of present and future generations.[217] The Commonwealth, the court said, must use public natural resources as a trustee, and not as a "mere proprietor."[218]

The Pennsylvania Environmental Defense Foundation argued that all proceeds from oil and gas leasing—not just royalties, but also bonuses and rents—are subject to the public trust. The court said it could not decide that question because it had not been sufficiently argued and briefed by the parties.[219] Because proceeds

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213. *Id.* at 934–35.
214. *Id.* at 944.
215. *Id.* at 933 n.26. In general, public trust laws vary from state to state; there is no single version of a public trust for natural resources. *See supra* note 2 and accompanying text. On the use of the term "private trust law" in this quotation, see *infra* notes 245, 295–97 and accompanying text.
216. *Id.* at 934.
217. *Id.* at 934–35.
218. *Id.* at 935, 939.
219. *Id.* at 935 ("[T]he record on appeal is undeveloped regarding the purpose of up-front bonus bid payments, and thus no factual basis exists on which to determine how to categorize this revenue.").

from the sale of the trust corpus are subject to public trust restrictions, the court held, royalties based on gross production from oil and gas wells are subject to the public trust.[220] The court cited a private trust law case for the proposition that "rents from realty held by a trust have traditionally been treated as income (and payable to the beneficiary) rather than principle."[221] The court said it did not know how to categorize other receipts to the state from leasing, particularly bonus and annual rental fees.[222] It therefore remanded that issue to the Pennsylvania Commonwealth Court.[223] The commonwealth court, the Pennsylvania Supreme Court said, must make that decision "in strict accordance and fidelity to Pennsylvania trust principles"[224] that were "in effect at the time" of section 27's enactment.[225] The court added: "Oil and gas leases may not be drafted in ways that remove assets from the corpus of the trust or otherwise deprive the trust beneficiaries (the people, including future generations) of the funds necessary to conserve and maintain the public natural resources."[226]

The court then addressed the constitutionality of two sections of the Fiscal Code that allocated oil and gas royalty receipts to the General Fund. The court held both provisions to be unconstitutional on their face,[227] explaining that "royalties—monthly payments based on the gross production of oil and gas at each well—are unequivocally proceeds from the sale of oil and gas resources."[228] One provision authorized $50 million in royalty receipts to DCNR in the Oil and Gas Lease Fund to carry out the various conservation provisions of the 1955 Oil and Gas Lease

220. *Id.*

221. *Id.* (citing *In re* Estate of Rosenblum, 328 A.2d 158, 163 (Pa. 1974)). That case involved four trusts, one for each of four beneficiaries. Under each, one beneficiary was the life tenant of the trust. "The net income from each trust was to be paid to the life tenant during his or her lifetime, and on the death of the life tenant, the corpus was to be distributed free of the trust to his or her descendants, per stirpes." *Id.* at 160. The court held that the trustee did not err by paying rental income from the trust corpus to the life tenants. *Id.* at 163. "In general, rents received from realty held in trust are income, and except as otherwise provided by the terms of the trust, they are payable to the beneficiary entitled to income from the trust." *Id.*

222. *PEDF II*, 161 A.3d at 935–36.

223. *Id.* at 936 ("[I]t is up to the Commonwealth Court, in the first instance and in strict accordance and fidelity to Pennsylvania trust principles, to determine whether these funds belong in the corpus of the Section 27 trust.").

224. *Id.*

225. *Id.* at 930.

226. *Id.* at 936.

227. *Id.* at 938, 938 n.31 ("A statute is facially unconstitutional only where no set of circumstances exist under which the statute would be valid.").

228. *Id.* at 935.

Fund Act, which authorized oil and gas leasing on state lands.[229] This provision also required DCNR to "give preference to the operation and maintenance of State parks and forests."[230] The other provision stated that no other royalty money in this fund "may be expended unless appropriated or transferred to the General Fund by the General Assembly from the fund."[231] This other provision also required the General Assembly to "consider" allocating some of the money to municipalities affected by shale gas wells.[232]

The court faulted the General Assembly not only for failure to consider its section 27 responsibilities[233] but also for breach of the public trust.[234] In its brief, the Commonwealth admitted "that revenue generated by oil and gas leases is now spent in a multitude of ways entirely unrelated to the conservation and maintenance of our public natural resources."[235] Because "these legislative enactments permit the trustee to use trust assets for non-trust purposes," they constitute "a clear violation of the most basic of a trustee's fiduciary obligations."[236] The $50 million allocation to DCNR, the court explained, requires DCNR to give preference to maintenance of state parks and forests, "rather than to conservation purposes."[237] The requirement to "consider" allocating royalty funds to municipalities affected by shale gas is insufficient to meet the Commonwealth's substantive responsibilities.[238] The court also held: "To the extent the remainder of the Fiscal Code amendments transfer proceeds from the sale of trust assets to the General Fund, they are likewise constitutionally infirm."[239]

The court nonetheless made clear that diversion of funds from the Lease Fund or from DCNR's exclusive control would not, by itself, constitute a breach of the constitutional public trust:

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229. 72 PA. CONS. STAT. § 1603-E (2019) (providing "for conservation, recreation, dams, and flood control; authorizing the Secretary of Forests and Waters to determine the need for and location of such projects and to acquire the necessary land").

230. *Id.*

231. 72 PA. CONS. STAT. § 1602-E (2019).

232. *Id.*

233. *PEDF II*, 161 A.3d at 937 ("On their face, these amendments lack any indication that the Commonwealth is required to contemplate, let alone reasonably exercise," its section 27 trust responsibilities.); *id.* at 938 ("[T]here is no indication that the General Assembly considered the purposes of the public trust . . . .").

234. *Id.* at 938 ("[T]here is no indication that the General Assembly . . . exercised reasonable care in managing the royalties in a manner consistent with its Section 27 trustee duties.").

235. *Id.* at 937.

236. *Id.* at 938 (citing Robinson Twp. v. Commonwealth, 83 A.3d 901, 950 (Pa. 2013)).

237. *Id.*

238. *Id.* at 937.

239. *Id.* at 938 (emphasis omitted).

> [T]he legislature violates Section 27 when it diverts proceeds from oil and gas development to a non-trust purpose without exercising its fiduciary duties as trustee. The DCNR is not the only agency committed to conserving and maintaining our public natural resources, and the General Assembly would not run afoul of the constitution by appropriating trust funds to some other initiative or agency dedicated to effectuating Section 27.[240]

Justice Baer filed a concurring and dissenting opinion. He said that he was in "full agreement" with the "dismantling" of the *Payne* test."[241] He also agreed that, in managing public natural resources, the Commonwealth trustees must adhere to the trustee's duties of loyalty, impartiality, and prudence.[242] He nonetheless dissented from "the primary holding of the case declaring various fiscal enactments unconstitutional or potentially unconstitutional based upon the Majority's conclusion that the proceeds from the sale of natural resources are part of the 'trust corpus' protected by section 27."[243] Section 27's "conserve and maintain" requirement applies to public natural resources, he contended, "not the money gained from the resources."[244] Essentially, he argued the majority used private trust law[245] to reach the conclusion that royalties from the leasing of public natural resources are also part of the trust corpus. The "classic public trust doctrine"—reflected in the particular public trust involved in *Illinois Central*—does not contemplate this outcome, he wrote, nor does section 27's text and legislative history.[246]

B. *Pennsylvania Commonwealth Court: Bonus and Rental Payments from Oil and Gas Leasing*

While the Pennsylvania Supreme Court held that royalties from oil and gas leasing are subject to the section 27 public trust, it

240. *Id.* at 939.
241. *Id.* at 940 (Baer, J., concurring and dissenting).
242. *Id.* at 945–46.
243. *Id.* at 940.
244. *Id.* at 946.
245. While Justice Baer uses the term "private trust" repeatedly through his opinion, for example, *id.* at 940, 942–43, 945, there is no indication in his opinion that he is using the term to distinguish it from charitable trust law. In fact, his endorsement of the general trust law principles of loyalty, impartiality, and prudence would seem to preclude a reading of his opinion as limited to noncharitable trust law. Thus, it appears that he likely meant traditional trust law in general when he used the term "private trust."
246. *Id.* at 940–48.

remanded the case to the commonwealth court for a determination on whether proceeds other than royalties from oil and gas leasing are subject to the public trust.[247] While this question seems technical on its face, it has significant practical consequences. The bonus payments alone totaled $383 million.[248]

As the Pennsylvania Supreme Court stated in *PEDF II*, "the proper standard of judicial review" for this question "lies in the text of section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment."[249] In *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF III)*,[250] the commonwealth court applied private trust law to decide that two-thirds of the proceeds from bonus and rental payments belong in the constitutional public trust, while one-third can be spent in any way the Commonwealth sees fit.

The Commonwealth Court of Pennsylvania began by explaining the meaning of bonuses and rental payments in the context of DCNR's oil and gas leasing process. DCNR puts out competitive bids for oil and gas production on specific tracts in state forests and other lands. While there is a standard royalty payment, different companies seeking to operate on the same tract submit different bids, and the highest bidder wins. "The bonus payment is money paid to DCNR after successfully obtaining a lease."[251] For two leases identified in the opinion as illustrative, the bonus payments for entering a lease were $12.3 million and $23.3 million.[252]

The winning bidder enters a lease with DCNR.[253] The lessee is required to pay annual rental fees, which tend to be $20 to $25 per acre of leased property, beginning the first year of the lease.[254] If the lessee does not "commence a well" within the first five years, the lease ends automatically.[255] If oil and gas are produced, the lessee must make monthly royalty payments based on the quantity of oil and gas. The lease continues on a year-to-year basis if oil and gas are produced in paying quantities or if the lessee can demonstrate to DCNR that it "is attempting to secure or restore

247. *Id.* at 936, 939.
248. Jon Hurdle, *Court to Decide if Nearly $400 Million in State Oil and Gas Bonuses Fund Conservation*, STATE IMPACT PA. (July 4, 2017, 8:38 AM), https://stateimpact.npr.org/pennsylvania/2017/07/04/advocate-says-state-should-use-oil-gas-lease-revenue-to-fund-conservation/.
249. *PEDF II*, 161 A.3d at 930.
250. PEDF III, 214 A.3d 748 (Pa. Commw. Ct. 2019).
251. *Id.* at 772.
252. *Id.* at 770–71.
253. *Id.* at 769 (citing 71 PA. STAT. § 1340.302(a)(6)).
254. *Id.* at 770.
255. *Id.*

the production of oil and gas."[256] The rental payments are reduced and possibly eliminated if oil and gas production on the lease—and consequently the royalty payment—is high enough.[257] Significantly, DCNR terminated 16 oil and gas leases between 2003 and 2015 for lack of any oil and gas production, even though it received $120.5 million in bonus payments and $3.5 million in rental payments on those leases.[258]

According to the commonwealth court, the private trust law governing the disposition of bonus and rental payments when section 27 was adopted—May 1971—was section 9 of the Principal and Income Act of 1947, as amended.[259] The Pennsylvania Act is based on the Uniform Principal and Income Act, which was promulgated in 1931 by the National Conference of Commissioners on Uniform State Laws.[260] The Uniform Act has been updated several times since then, including in 1997, and most recently in 2018.[261] According to the American Bar Association, "all but four states have adopted a statute based on the 1997 act."[262]

In a private trust context,[263] the trustee "has a fiduciary obligation to satisfy both the interests of the trust's income beneficiaries during the life of the trust, and the interests of the remainder beneficiaries at the trust's termination."[264] Commonly, a private trust instrument provides that the trustee is to distribute income from the trust to certain beneficiaries while they are alive, and further provides that the trustee must distribute the principal of the trust to certain other beneficiaries who survive them. Of course, the trust then terminates. Determination of what is income and what is principal "is not always self-evident."[265] The statute addresses this issue by setting out default rules for trustees to determine what is principal and what is income, and how they are

256. *Id.* at 748.
257. *Id.* at 771.
258. *Id.* at 772.
259. *Id.* at 776; *see also* Principal and Income Act of 1947, 1947 Pa. Laws 1283 (amended 1963).
260. *PEDF III*, 214 A.3d at 765.
261. *See, e.g.*, FIDUCIARY INCOME AND PRINCIPLE ACT (UNIF. LAW COMM'N 2018).
262. A.B.A. Real Property, Trust & Estate Law Section, *UFIPA: Trust Accounting for the 21st Century*, PROB. & PROP. MAG., Nov. 2018, https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2018/november-december-2018/uniform-laws-update.
263. While the Act is directed toward trustees of a trust, it is also directed at personal representatives of a decedent's estate "to the extent that the trust is a beneficiary of the estate." FIDUCIARY INCOME AND PRINCIPLE ACT (UNIF. L. COMM'N 2018).
264. *Summary: Uniform Principal and Income Act (1997)*, UNIF. LAW COMM'N (Mar. 20, 2006), https://www.thefirma.org/2006_conference/Personal%20Trust%20Administration/DeMaris-Admin4.pdf [https://perma.cc/6WZ9-TX2C].
265. *Id.*

to be distributed when the trust instrument is silent on this question. Section 9 of the 1947 Act, which concerns natural resources, provides in part:

> Where any part of the principal consists of property in lands from which may be taken timber, minerals, coal, stone, oil, gas or other natural resources and *the trustee* or tenant *is authorized by the terms of the transaction by which the principal was established* or by order of court *to sell, lease or otherwise develop such natural resources* or where such natural resources have been leased or developed prior to the transaction by which the principal was established, *and no provision is made for the disposition of the net proceeds* thereof after the payment of expenses and carrying charges on such property, *one-third of the net proceeds, if received as rent or payment on a lease, or as royalties, shall be deemed income, and the remaining two-thirds thereof shall be deemed principal to be invested to produce income . . . Such proceeds if received as consideration for the permanent severance of such natural resources from the land, payable otherwise than as rents, or royalties, shall be deemed principal to be invested to produce income.*[266]

The Commonwealth Court of Pennsylvania found one case interpreting and applying this section of the 1947 Act.[267] *In re McLean's Estate*, a court of common pleas decision, involved a trust for a coal mining lease that paid a royalty of twenty-five cents per ton of coal mined. The trust was to exist for ten years after the testator's death, and income from the trust during that period was to be paid to designated beneficiaries (certain children and grandchildren). At the end of ten years, the principal was to be distributed to his executors. Using the 1947 Act, the common pleas court held that one-third of the royalties for that period were to be paid to the designated beneficiaries, with the balance to the trustees as principal.[268]

Section 27 is analogous to this form of trust, the commonwealth court reasoned. In this case, the court noted, the principal consists of "property in lands" from which oil and gas may be taken. Section 27 operates as the "terms of the transaction" by authorizing the Commonwealth to lease public lands for oil and gas

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266. PEDF III, 214 A.3d 748, 766–67 (Pa. Commw. Ct. 2019) (emphasis in original) (quoting former section 9 of the 1947 Act, formerly 20 PA. STAT. § 3470.9).

267. *Id.* at 767 (citing *In re* McLean's Estate, 85 Pa. D. & C. 129 (Orphans' Ct. Wash. Cnty. 1952)).

268. *In re* McLean's Estate, 85 Pa. D. & C. 129 (Orphans' Ct. Wash. Cnty. 1952).

production. Quoting Justice Baer's concurring and dissenting opinion in *PEDF II*, which in turn cited the legislative history of section 27, the commonwealth court explained that "[s]ection 27 contemplates the Commonwealth's 'continued, but judicious, use of the resources,' " and that "the drafters 'did not intend to freeze the current status of the natural resources nor to prevent the Commonwealth's ability to utilize the resources.' "[269] Moreover, the court reasoned, section 27 makes no provision for disposition of the proceeds from oil and gas production on state lands.[270] Thus section 9 provides the governing law for this issue.

Bonus and rental payments were "received as rent or payment on a lease," and not "for the permanent severance of such natural resources from the land." The court reasoned:

> [B]onus and rental payments are not for the severance of natural resources. Rather, these payments are consideration for the exploration for oil and gas on public land. More particularly, the rentals secure the lessee's right to enter the property for exploratory and development purposes and the rents accrue based on mere passage of time, not the production of oil or gas. The purpose of the bonuses is to determine the highest bidder for the award of the lease. The bonuses are consideration for the execution of the lease, and not consideration for severance of the mineral.
>
> Though bonuses and rental payments are made in anticipation of extraction, these payments relate directly to the lessee's ability to secure the lease and the right to explore for oil and gas on the property. As demonstrated by the evidence presented, the Commonwealth is entitled to keep this money regardless of production, even when the lease is terminated.[271]

Therefore, the court held, one-third of those payments are to be deemed as income and therefore not subject to the terms of the constitutional public trust. On the other hand, "the remaining two-thirds thereof shall be deemed principal," and are therefore subject to the "conserve and maintain" requirement. The 1947 Act provides "an equitable balance between the needs of present and

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269. *PEDF III*, 214 A.3d at 768 (citing *PEDF II*, 161 A.3d at 947 (Baer, J., concurring and dissenting)).
270. *Id.*
271. *Id.* at 773.

future generations of Pennsylvanians," which the court said is consistent with section 27.[272] PEDF has appealed this decision to the Pennsylvania Supreme Court.[273]

III. A FOUR-STEP METHODOLOGY FOR DETERMINING APPLICATION OF TRUST LAW PRINCIPLES TO NATURAL RESOURCES PUBLIC TRUSTS

As we have seen, courts have resisted claims that trust law principles should be applied wholesale to public trusts for natural resources.[274] The cases described in Part I, however, suggest a methodology for determining, on a case-by-case basis, whether and how to use specific trust law principles to help interpret public trusts. This part sets out and applies this methodology to the issue decided by the commonwealth court in *PEDF III*—how to allocate bonus and rental payments from oil and gas leasing. This methodology has four steps.

A. *Step 1: What Are the Terms and Purpose of the Public Trust?*

All of the cases described in Part I recognize the paramount value of the purpose and terms of the particular public trust in question.[275] The applicability or inapplicability of particular trust law principles depended on whether they would further or impede the purpose and terms of the public trust in question. Even though the various public trusts for natural resources differ from one another, and even though some of these trusts (particularly the school lands trusts) did not even involve natural resources protection, the terms and purposes of the trust are consistently enforced.

As the Pennsylvania Supreme Court made clear in *PEDF II*, the terms and purpose of section 27 provide the frame for any discussion about the applicability of the constitutional public trust

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272. *Id.* at 774.

273. Pa. Env't Def. Found. v. Commonwealth, (No. 64 MAP 2019 (Pa. filed Aug. 12, 2019)).

274. *See supra* notes 154–60 and accompanying text; *see, e.g.*, Price v. Hawaii, 921 F.2d 950, 953 (9th Cir. 1990) (rejecting claim that school trust lands granted by federal government to Hawai'i "are, as a matter of federal law, subject to the strictures imposed upon private trustees and that they must manage the granted lands in accordance with private trust principles"). The court explained that applying "all provisions of the common law of trusts would manacle the State as it attempted to deal with the vast quantity of land conveyed to it" in public trust." *Id.* at 955.

275. This is also the starting point for analysis in traditional trust cases. *See, e.g.*, Nebraska v. Rural Electrification Admin., 23 F.3d 1336 (8th Cir. 1994) (holding that Platte River Whooping Crane Maintenance Trust had not violated the terms of the trust).

to public natural resources. Thus, the Commonwealth is obliged to "conserve and maintain" public natural resources for the benefit of present and future generations. The *PEDF II* court held that royalties from oil and gas leasing should be used to conserve and maintain public natural resources and not for other purposes. While the *PEDF II* court obviously did not decide how bonus and rental payments from oil and gas leases could be expended, it emphasized the importance of the text and purposes of section 27 in deciding that question.

The primacy of the law recognizing the public trust is particularly compelling when it is contained in a constitution. The Pennsylvania Supreme Court in *PEDF II* made that point clear by holding that several legislative enactments violated section 27. In *PEDF III*, the commonwealth court seems to suggest that section 27 should be interpreted in light of legislative enactments authorizing oil and gas leasing on state lands. But if so, that suggestion is not correct.[276] Rather, the oil and gas leasing legislation should be interpreted and applied in light of section 27. The commonwealth court concluded that, because the legislative history of section 27 contemplates oil and gas leasing on state forest land, section 27 authorizes oil and gas leasing.[277] Actually, the legislative history is silent on the leasing of state lands for nonrenewable resources like oil and gas. Instead, it addresses the harvesting of renewable

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276. It is true that limited leasing of state forest and park lands was occurring when article I, section 27 was adopted. Since at least 1955, the Pennsylvania Department of Conservation and Natural Resources (DCNR) and its predecessor agencies have leased state forests for oil and gas drilling. The Oil and Gas Lease Fund Act of 1955 set out DCNR's responsibilities for administering that program, and assigned all rents and royalties received from leasing to DCNR, to be used for "conservation, recreation, dams, or flood control." 71 PA. STAT. §§ 1331–33 (West 1955), *repealed by* 2017 Pa. Laws 725 §20(2)(i). The wells under this program, mostly small in size and impact, generated a modest amount of money that DCNR used to offset the environmental impacts of the program and for other conservation purposes. *See* Pa. Env't Def. Found. v. Commonwealth, No. 228 M.D. 2012, 2013 WL 3942086, at *3 (Pa. Commw. Ct. Jan. 22, 2013). This case is a predecessor to *PEDF I* and its progeny.

The level of activity and the revenues generated were relatively small, and the moneys were expended on conservation and related purposes. This activity is a far cry from the vastly greater scale of oil and gas leasing of forest and park land and moneys received that the shale gas revolution created. Leasing revenues grew from several million dollars per year to several hundred million dollars per year. *See* John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENV'T L. 463, 488 (2015) (summarizing data).

The relatively small scale and impact of oil and gas leasing on state lands in 1971, when section 27 was adopted, simply do not compare with the scale and impact of oil and gas leasing at present. No one in 1971 could have expected that hydraulic fracturing of Marcellus Shale—a rock layer that previously had little if any commercial value—could be used to exploit gas commercially—much less the future scale of production on state forest and park land. The first use of hydraulic fracturing for gas production did not occur in Pennsylvania until 2004. RUSSELL GOLD, THE BOOM: HOW FRACKING IGNITED THE AMERICAN ENERGY REVOLUTION AND CHANGED THE WORLD 227–28 (2014).

277. *PEDF III*, 214 A.3d at 768.

resources like timber and game. At the request of Dr. Maurice Goddard, who was then Secretary of the Department of Forests and Waters, the legislature substituted "conserve" for "preserve" in the amendment's second sentence.[278] While it is true that DCNR has statutory authorization to lease state land for oil and gas development,[279] there is no comparable authorization in section 27. The "governing instrument"—section 27—says only that these resources must be conserved and maintained for the benefit of present and future generations. That is the "expressed intention" of the settlor. Oil and gas drilling on state forest land may be consistent with section 27, but so would a moratorium on oil and gas drilling on state forest land. Indeed, there have been several moratoria on further leasing of state lands for oil and gas in recent years.[280] In either case, under trust law, the question to be asked is whether the action in question is consistent with the text and purpose of section 27.

B. *Step 2: Do the Terms and Purpose of the Public Trust Answer the Question?*

When courts use trust law to help interpret public trusts law and construe the text of the governing law, they do so only when the public trust text does not answer the question being asked. These courts interpreted the meaning of public trusts for natural resources in light of the duty to monitor (*Ching v. Case*[281]), the duty of prudence (*Columbia Land Development, LLC v. Secretary of State*[282]), and the duty of loyalty (*Slocum v. Borough of Belmar*[283]). They have also used trust law to decide how the proceeds from oil and gas leasing on public trust lands can be expended (*City of Long Beach v. Morse*[284]). In each of these cases, the court did so because the text

278. *See* ROBERT BROUGHTON, ANALYSIS OF HB 958, THE PROPOSED PENNSYLVANIA ENVIRONMENTAL DECLARATION OF RIGHTS, LEGIS. J.–HOUSE, April 14, 1970, at 2273, *reprinted in* Dernbach & Sonnenberg, *supra* note 178, at 218–50. Broughton's article also was published as Robert Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of HB 958*, 41 PA. BAR ASS'N Q. 421 (1970). Dr. Goddard worried that "preserve" might prohibit his department from authorizing "trees to be cut on Commonwealth land" or prohibit the game commission from licensing hunters to "harvest game." *Id.* at 424.

279. *See* Conservation and Natural Resources Act § 302(a)(6), 71 PA. CONS. STAT. § 1340.302(a)(6) (2012).

280. *See, e.g.*, Pa. Exec. Order No. 2010-05 (Oct. 26, 2010), http://www.pedf.org/uploads/1/9/0/7/19078501/executive_order_2010-05.pdf [https://perma.cc/XC8Q-6E28]; Pa. Exec. Order No. 2015-03 (Jan. 29, 2015), https://www.oa.pa.gov/Policies/eo/Documents/2015_03.pdf [https://perma.cc/LS6R-HZ4M].

281. Ching v. Case, 449 P.3d 1146 (Haw. 2019).

282. Columbia Land Dev., LLC v. Sec'y of State, 868 So. 2d 1006 (Miss. 2004).

283. Slocum v. Borough of Belmar, 569 A.2d 312 (N.J. Super. Ct. Law Div. 1989).

284. City of Long Beach v. Morse, 188 P.2d 17 (Cal. 1947).

of the public trust did not fully address the legal claims being made. As a result, any argument for the use of trust law principles in construing a public trust must begin with a demonstration that the public trust text does not answer the question.

On the question of how rental and bonus payments can be expended, there is a strong, but perhaps not conclusive, argument that section 27, as interpreted in *PEDF II*, answers the question. In *PEDF II*, the Commonwealth argued that it had discretion to decide how moneys received from the sale of oil and gas resources would be spent because section 27 was silent on the matter.[285] By contrast, the Commonwealth reasoned, two other constitutionally established funds expressly state how the money in those funds is to be spent.[286] The Pennsylvania Supreme Court disagreed:

> [T]he creation of a trust in the Environmental Rights Amendment obviates the need for additional language indicating that funds should be dedicated for a specific purpose. Section 27 itself establishes that the purpose of the trust is to ''conserve and maintain'' the public natural resources and basic trust principles require that the proceeds from their sale remain part of the corpus.[287]

In *PEDF III*, the Pennsylvania Commonwealth Court relied on the same argument for bonus and rental payments that the Pennsylvania Supreme Court rejected for royalties in *PEDF II*:

> Although Section 27 expressed the intent to conserve and maintain the corpus – public natural resources – for the benefit of all the people, it made no provision for the disposition of the net proceeds obtained from the use thereof. In other words, it did not specify the method for allocating receipts. Though Section 27's intent was clear, the directions for administration of the trust were not expressly delineated. Consequently, Section 9 of the 1947 Act governs the ascertainment of income and principal and

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285. PEDF II, 161 A.3d 911, 933–34 (Pa. 2017).

286. *Id.* at 934 n.26; *see also, e.g.*, PA. CONST. art VIII, § 15 (authorizing the Commonwealth "to create debt and to issue bonds in the amount of $70,000,000 for the acquisition of land for State parks, reservoirs and other conservation and recreation and historical preservation purposes"); *id.* § 16 (authorizing the Commonwealth to create debt and issue bonds for $500 million for, among other things, "the conservation and reclamation of land and water resources of the Commonwealth, including the elimination of acid mine drainage, sewage, and other pollution from the streams of the Commonwealth").

287. *PEDF II*, 161 A.3d at 933 n.26 (distinguishing the two funds because they do not establish trusts).

> the apportionment of proceeds between income and principal.[288]

Because section 27 and trust law require royalty payments to be used to conserve and maintain public natural resources, however, it would seem to follow that section 27 requires the same of bonus and rental payments, unless the relevant trust law for bonus and rental payments is different from the relevant trust law for royalties. (As explained below, it is not.) This is also consistent with the California Supreme Court's holding in *City of Long Beach* that, because the tidelands are held in trust, revenues (not just royalties) from the sale or lease of oil and gas rights must also be held in trust.[289] While the Pennsylvania Supreme Court in *PEDF II* left open the issue of how bonus and rental payments are to be expended, its reasoning at least points in the direction of a limitation to the same public trust purposes.

C. *Step 3: If the Terms and Purpose of the Public Trust Do Not Answer the Question, What Underlying Principles of Trust Law Can Help Provide an Answer?*

Not surprisingly, the interpreting principles in these cases appear to be supplied primarily by the litigants themselves or by prior judicial decisions. In some cases, as Part I indicates, parties succeed in claiming that an interpretive principle should be applied, and in other cases, they do not. It is also likely that some courts may have conducted their own research.

However these principles come before a court, the threshold question is what pool of trust principles they should be drawn from. The other question is what particular trust principles from this pool are most relevant.

1. Meaning of "Underlying Principles"

As a general matter, the pool of trust law principles in any state should include general trust law principles, charitable trust law principles, and private trust law principles, unless prior judicial decisions limit the scope of the inquiry in some way. Here, the *PEDF*

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288. PEDF III, 214 A.3d 748, 768 (Pa. Commw. Ct. 2019).

289. *City of Long Beach*, 188 P.2d at 20 ("Once it is made clear that the lands are held in trust, it necessarily follows that their proceeds, whether by sale or lease, are likewise subject to the trust.") (quoting Provident Land Corp. v. Zumwalt, 85 P.2d 116, 120 (Cal. 1938)).

II court focused on Pennsylvania trust law in general as an interpretative tool: "[W]e hold that the Commonwealth, as trustee, must manage [public natural resources] according to the plain language of section 27, *which imposes fiduciary duties consistent with Pennsylvania trust law.*"[290] In articulating the standard of review, the court stated that section 27 is to be interpreted and applied in accordance with both its text and "underlying principles of Pennsylvania trust law in effect at the time of its enactment."[291] Finally, for the remand, it directed the commonwealth court, "in the first instance and in strict accordance and fidelity to *Pennsylvania trust principles*, to determine whether [bonus and rental payments] belong in the corpus of the section 27 trust."[292] These broad references to trust law would seem to embrace not only general trust law principles but also principles based on any type of trust Pennsylvania trust law recognizes, including both charitable and private trusts.[293] In addition, the court made clear that the general trustee duties of loyalty, impartiality, and prudence apply to the section 27 public trust.[294] These principles, which apply to both private and charitable trusts, would thus be in play in the remand.

The Commonwealth Court of Pennsylvania believed, based on a reference to "private trust principles" in an explanatory footnote, that it was limited to private trust principles.[295] In that footnote, the Pennsylvania Supreme Court said:

> [T]he public trust doctrine provides a framework for states to draft their own public trust provisions, which (like many trust instruments) will ultimately be interpreted by the state courts. In Pennsylvania, established private trust principles provide this Court with the necessary tools to properly interpret the trust created by Section 27.[296]

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290. *PEDF II*, 161 A.3d at 916 (emphasis added).
291. *Id.* at 930.
292. *Id.* at 935–36 (emphasis added).
293. The distinction between private and charitable trust law is reflected in Pennsylvania's Uniform Trust Act. 20 PA. CONS. STAT. ANN. § 7702 (2014) ("This chapter applies to express trusts, charitable and noncharitable, and trusts created pursuant to a statute, judgment or decree that requires the trust to be administered in the manner of an express trust.").
294. *PEDF II*, 161 A.3d at 932–33 (citations omitted).
295. PEDF III, 214 A.3d 748, 755 (Pa. Commw. Ct. 2019) (citing *PEDF II*, 161 A.3d at 933 n.26).
296. *PEDF II*, 161 A.3d at 934 n.26. Significantly, the state supreme court was apparently responding to Justice Baer's concurring and dissenting opinion in this footnote. Justice Baer repeatedly referred to trust law as private trust law. *See supra* note 245 and accompanying text. Except in this footnote, the majority did not refer to private trust law. Nor is there any reference to private trust law in any of the *Robinson Township* opinions. *Robinson Township*, as

While the footnote creates some ambiguity about the scope of trust principles that may be considered, use of "private trust" in this context is best understood as contrasting ordinary or traditional trust principles (i.e., the body of law governing trusts generally) with public trust principles. By this reading, private trust law is simply trust law that is not public trust law. Given the state supreme court's three other references to trust law in general in the text of its opinion—and its use of these broad references to state the holding, standard of review, and remand directions to the commonwealth court—this understanding makes sense. After all, if the Pennsylvania Supreme Court had intended to limit the range of trust principles to "private trust principles," it would surely have said so in these key statements. When it analyzed which trust principles to apply to determine whether royalties from oil and gas leasing are part of the public trust corpus, it made no distinction between private trust law principles and other trust law principles. In fact, it cited both private trust law and charitable trust law.[297] Nor is it likely that the state supreme court would have used an explanatory footnote to limit the meaning of its holding, standard of review, and remand instructions. This is particularly true when this footnote contains the only reference to "private trust" in the majority opinion. Moreover, given the care that the Pennsylvania Supreme Court in *PEDF II* took in explaining how section 27 is to be applied, the omission of any explanation for limiting the scope of this review to private trust law is telling. There is no explanation of different types of trust law, or why private trust law principles are to be preferred to those for charitable trusts, if at all. The Pennsylvania Supreme Court could not have intended the remand to be limited to private trust law.

In interpreting and applying section 27, moreover, courts should have the ability to consider trust law principles from any relevant type of trust. As noted earlier, and further explained below, charitable trusts in some ways have more in common with public trusts for natural resources than private trusts. After all, charitable trusts involve substantial social or public benefits, and section 27 is intended to conserve and maintain public natural resources for the benefit of the public, including future generations. More basically, perhaps, the Commonwealth under section 27 is supposed to act as a trustee, not a proprietor. There

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previously explained, provides the foundation for the *PEDF II* majority opinion. *See supra* text accompanying note 186.

297. *PEDF II*, 161 A.3d at 932–36; *see also supra* note 211 (summarizing key charitable and private trust law cases cited therein).

does not appear to be any reasonable basis for limiting these trust law principles to those for private trusts.

It may also be appropriate for courts to consider trust principles that developed after 1971. In *PEDF II*, the state supreme court created a time limit for these "underlying principles of Pennsylvania trust law"; they must be "in effect at the time of [Section 27's] enactment."[298] Presumably, it did so to preserve the original intent of the amendment. But trust law in general is not written that way. The Pennsylvania Uniform Trust Act of 2006, with limited exceptions, applies to "all trusts created before, on, or after" its effective date.[299]

Moreover, section 27 was specifically written to allow for its evolution over time, which suggests that the trust law principles to be considered in interpreting it should not be limited to trust law in effect in 1971. When the amendment was debated in the legislature, for example, it originally contained a list of protected resources: "air, waters, fish, wildlife, and the public lands and property of the Commonwealth."[300] There was concern that listing the specific resources subject to the public trust might forever limit the public trust corpus to those resources.[301] As a result, the list was removed.[302] While there was no evident objection to the listed subjects, at least insofar as they constitute public natural resources, the drafters intended to authorize the continuing development of public trust law, including its application to public resources not previously recognized as such. The amendment's supporters observed that neither public trust resources nor private property are legally fixed.[303] Previously recognized forms of private property have disappeared, and future public property rights, perhaps

298. *PEDF II*, 161 A.3d at 930. None of the cases described in Part I include any comparable temporal limitation on the choice of trust principles to be employed to supplement the meaning of a public trust.

299. 2006 Pa. Laws No. 98 § 16(3). In addition, the current version of the Principal and Income Act, adopted in 2002, states that it is applicable to a trust existing on or after the effective date of the Act. 2002 Pa. Laws No. 50 § 14(a).

300. *See* H.B. 958, 153d Leg., 2nd Sess. (Pa. 1969) (Printer's No. 1105); BROUGHTON, *supra* note 278, at 424; COMMONWEALTH OF PA. LEGIS. J., 154 Gen Assemb., Sess. of 1970, at 2272 (1970).

301. BROUGHTON, *supra* note 278, at 425–26 ("The introducing word, 'including,' would not ordinarily be so interpreted, but a list always presents some danger that a court may sometime use the list to limit, rather than expand, a basic concept.").

302. *Compare* H.B. 958, 153d Leg., 2nd Sess. (Pa. 1969) (Printer's No. 2860), *with* H.B. 958 153d Leg., 2d Sess. (Pa. 1969) (Printer's No. 1105) (changing the proposed amended language to section 27 by removing the listed resources from the second sentence, among other revisions).

303. *See, e.g.*, BROUGHTON, *supra* note 278, at 425–26.

relating to ecological diversity, might someday be recognized.[304] The final language neither requires nor prohibits further changes in the boundary between public natural resources and private property rights.[305] Similarly, it seems appropriate to allow for the development of future trust law principles.

2. Principles to Consider

After identifying the relevant sources of trust law, courts should then determine what specific trust law principles should be considered. The question in this step is not whether any particular principle actually applies to the particular public trust in question. The question, rather, is whether there is a legally plausible argument that a particular principle could apply.

As the distinction between private trusts and perpetual charitable trusts makes clear, more than one trust principle may be available to help interpret the meaning in a public trust provision. In addition, more than one general trust law principle may be plausibly applicable. When the provision does not answer the question being asked, the parties and the court should identify all relevant trust law principles, so that there can be sufficient argument and informed judicial decision about which principles will most further the terms and purpose of the public trust (established in Step 1 of the analysis).

Assuming for the sake of argument that section 27 does not supply an answer to the question of how bonus and rental payments should be expended, does the law of private trusts provide the only possible trust principle that can be applied here? The answer is no. Several general trust law principles are potentially applicable. In addition, the law of charitable trusts provides another relevant trust law principle.

To begin with, the principle that the commonwealth court applied is not just a private law principle (although it applied the principle in a private law context), and this principle does not allow money from the trust to be expended for non-trust purposes. So its consideration appears questionable unless one believes, as the commonwealth court did, that it could look only at private law principles. The Commonwealth Court of Pennsylvania treated the

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304. *See id.* at 425 ("At one time, for example, an advowson, a right to appoint a clerk at a church, was a real property right, inheritable by heirs, and the subject of real property actions. Today, an advowson is strictly an historical curiosity.").

305. *See id.* at 426. Restrictions on the use of public natural resources do, of course, indirectly affect uses of private property.

Principal and Income Act of 1947 as a form of private trust law. Although this conclusion is incorrect, it is not hard to see why the Commonwealth Court reached it. As the commonwealth court explained, the 1947 Act was based on the 1931 Uniform Principal and Income Act, which was intended to ascertain which moneys from income-producing trusts should be treated as income and which should be treated as principal. It was also intended to allocate those moneys between those with a life estate in the trust and those who hold the remainder interest.[306]

This kind of private trust is commonplace. As a prominent trust treatise explains:

> Nearly all trustees act for two classes of beneficiaries, namely, income beneficiaries who are to receive the net income from the trust property for a period of years or lives, and remainder beneficiaries who at the termination of the income administration are given the capital or principal of the trust.[307]

Put differently, these trusts are income-producing trusts. If such trusts were created before January 1, 2007, the effective date for the Pennsylvania legislature's abolition of the rule against perpetuities, they were governed by that rule, and are thus are also inherently limited in duration.[308]

It is important to emphasize, however, that section 9 of the Principal and Income Act of 1947 provides a rule of trust law, not just private trust law, even though the commonwealth court treated it as a private trust law rule. Section 9 provides for the allocation of receipts from natural resources between income and principal to be disposed of when the trust instrument is silent regarding allocation. This allocation is clearly suitable for private trusts where the trust instrument is silent on allocation. In the absence of the 1947 Act, the income beneficiary would seek allocation of receipts to income, while the principal beneficiary would seek allocation of receipts to principal. But however principal and income are allocated, the allocation cannot be inconsistent with the terms and

306. PEDF III, 214 A.3d 748, 765–66 (Pa. Commw. Ct. 2019).

307. BOGERT, TRUSTS, *supra* note 92, § 111.

308. *In re* Stephan's Estate, 195 A. 653 (Pa. Super. Ct. 1937) (holding that noncharitable trust cannot be perpetual because it would violate rule against perpetuities). In 2006, the Pennsylvania General Assembly abolished the rule against perpetuities for trusts created after December 31, 2006. 20 PA. CONS. STAT. ANN. § 6107.1 (2019). That means that private or noncharitable trusts could now be perpetual. If courts are limited to consideration of trust principles that existed in 1971 when section 27 was adopted, then for section 27 purposes courts must continue to understand the trusts covered under section 9 of the Principal and Income Act as limited in duration.

purpose of the trust. Section 9 can fill in missing terms of a private trust instrument, but it cannot change the terms of the instrument. Similarly, in the charitable trust context, the 1947 Act is suitable for determining the allocation of receipts between principal and income where the trust instrument is silent on allocation. Without the 1947 Act, the charity entitled to receive income would seek allocation of receipts to income while the Pennsylvania Attorney General would seek a portion of receipts to be allocated to principal. Even in the case of a charitable trust, the income derived from the corpus must be applied for the same charitable purpose.

The Commonwealth Court of Pennsylvania limited its inquiry to private trust law principles and did not also consider general principles of trust law. As the Pennsylvania Supreme Court made clear in *PEDF II*, however, section 27 must be interpreted and applied in light of certain general trust law duties. These include the duties of loyalty, prudence, and impartiality.[309]

Each of these is worth considering in this context. The trustee's duty of prudence, which means that the trustee must manage the trust corpus with "such care and skill as a man of ordinary prudence would exercise in dealing with his own property,"[310] is relevant because a diversion of funds from the section 27 trust could deprive the state of needed funds to conserve and maintain public natural resources. Loyalty, managing the trust "so as to accomplish the trust's purposes for the benefit of the trust's beneficiaries,"[311] is also relevant because the commonwealth court allows the state to use trust money for non-trust purposes. Finally, the trustee's duty of impartiality, which requires the trustee to manage the trust "so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust,"[312] is relevant. The commonwealth court's decision appears to allow the present generation to receive a cash benefit from the depletion of nonrenewable resources that, according to section 27, are for the benefit of both present and future generations. If so, that could violate the duty of impartiality.

The duty of charitable trustees, particularly for perpetual charitable trusts, provides another principle that should be considered. There are a variety of types of partially charitable trusts, many of which are finite in duration.[313] In a charitable lead trust, a "certain

309. PEDF II, 161 A.3d 911, 932–33 (Pa. 2017) (citations omitted).
310. *Id.* (citations omitted).
311. *Id.* (citations omitted).
312. *Id.* at 933 (citations omitted).
313. STEINBACHER & WOLFE, *supra* note 163, § 4.9 (explaining charitable lead trusts and charitable remainder trusts as the two basic types of charitable trusts for charitable planning purposes).

amount is paid to the charity for a period of years and then the remainder interest is paid to the non-charitable beneficiaries."[314] In a charitable remainder trust, "the trust document provides that payments are made to a non-charitable beneficiary first and then the remainder is paid to a charitable beneficiary."[315] Both types of trust are limited in duration. But some trusts are purely charitable, and many have no termination date. These perpetual charitable trusts have long been recognized in Pennsylvania.[316] Typically, the settlor creates the trust to provide perpetual funding for a specified charitable purpose, such as an educational institution, scholarships at that institution, or the like.[317]

As a general principle, it is impermissible to use charitable trust property, whether income or principal, for purposes other than those specified in the trust instrument.[318] Deviation from this principle is permitted only under limited circumstances. Perhaps the most well-known allowable deviation is provided by the *cy pres* doctrine, which applies only to charitable trusts,[319] and which comes into play "if a particular charitable purpose becomes unlawful, impracticable or wasteful."[320] When that occurs, "the court shall apply *cy pres* to fulfill as nearly as possible the settlor's charitable intention, whether it be general or specific."[321] Other allowable exceptions to the terms of charitable trusts also require modification to adhere as closely as possible to the settlor's intentions.[322]

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314. *Id.*

315. *Id.*

316. *See, e.g.*, *In re* McKee's Estate, 108 A.2d 214, 232 (Pa. 1954) (citing City of Philadelphia v. Girard's Heirs, 45 Pa. 9 (Pa. 1863)).

317. *See, e.g.*, *In re* Milton Hershey School, 911 A.2d 1258 (Pa. 2006); *In re* Wright's Estate, 131 A. 188 (Pa. 1925).

318. *See* Bolton v. Stillwagon, 190 A.2d 105 (Pa. 1963) (holding that it was impermissible for the trustee of a charitable trust for the perpetual care of a cemetery to expend trust funds for other purposes), *cited with approval in* PEDF II, 161 A.3d 911, 935 (Pa. 2017). This principle appears to derive from the trustee's "duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law." RESTATEMENT (THIRD) OF TRUSTS § 76(1) (AM. L. INST. 2007). The trustee's duties include "applying or distributing trust income and principal during the administration of the trust" *Id.* § 76(2)(d). If the trust provides for distribution for charitable purposes, it must be distributed for those purposes. *Id.* cmt. f.

319. BOGERT, TRUSTS, *supra* note 92, § 147; *In re* Dreisbach's Estate, 121 A.2d 74, 76 (Pa. 1956).

320. 20 PA. CON. STAT. ANN. § 7740.3(a) (2014).

321. *Id.* § 7740.3(a)(3) (2014)*; see also In re* Kay's Estate, 317 A.2d 193, 198 (Pa. 1974) ("The application of the doctrine of cy pres should effectuate the intent of the testator as nearly as humanly possible.").

322. *See, e.g.*, 20 PA. CONS. STAT. ANN. § 7735(b) (authorizing court to "select one or more charitable purposes or beneficiaries" if "the provisions of a charitable trust instrument do not indicate or authorize the trustee to select a particular charitable purpose or beneficiary," but requiring that the court's "selection must be consistent with the settlor's intention to the extent it can be ascertained"); 20 PA. CONS. STAT. ANN. § 7740.3(d)

The section 27 public trust is similar to a perpetual charitable trust because it involves a public purpose—conservation and maintenance of public natural resources. Because it has no termination clause or express means of termination, it is perpetual. And the class of beneficiaries—present and future generations—is large and unnamed. In both, the trustee has an obligation to protect and maintain the trust corpus for public benefit indefinitely. So long as the purposes of the constitutional public trust are being achieved, the extent to which each member of the class benefits from the public trust does not matter. The trust principle limiting the use of moneys contained in a perpetual charitable trust to the purpose stated in the trust is thus another candidate for consideration to help interpret the meaning of the section 27 public trust.

D. *Step 4: Which Principles Would Most Fully Effectuate the Terms and Purpose of the Public Trust?*

The fourth and final stage in the decision-making process is to determine whether the proffered principles would further or undermine the terms and purpose of the public trust. As discussed in Part I, judicial decisions on this issue turn on the terms and purpose of the particular law recognizing the public trust in question. Of course, a court only needs to get to this stage if it believes that the law recognizing the public trust—in Pennsylvania, section 27—needs interpretative clarification. Given the terms of section 27, the general duties of trustees and the charitable trust principle are better than section 9 at furthering the purpose of the section 27 public trust.

1. General Duties of Trustees

The trustee duties of loyalty, prudence, and impartiality—general trust duties under section 27 that the Pennsylvania Supreme Court recognized in *PEDF II*—all support using the bonus

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(authorizing administrative termination of small charitable trusts but requiring that the trust corpus be handled so as to "fulfill as nearly as possible the settlor's intention"); 20 PA. CONS. STAT. ANN. § 7740.3(e) (authorizing judicial termination of charitable trusts under limited circumstances but requiring that trust corpus be distributed "to fulfill as nearly as possible the settlor's intentions other than any intent to continue the trust"). Another limited exception also exists. 20 PA. CONS. STAT. ANN. § 7740.3(c) (authorizing judicial modification of administrative provisions of charitable trust "to the extent necessary to preserve the trust").

and rental income from oil and gas leasing only for the purposes specified in section 27. In other words, these principles support adherence to the terms of the trust.

A loyal trustee administers the trust entirely for the beneficiaries and for trust purposes, and not for others or other purposes. This principle also does not encourage the Commonwealth to act as a proprietor, using the public trust corpus to balance the budget or fund non-trust activities.[323] This result is consistent with the New Jersey Superior Court's decision in *Slocum v. Borough of Belmar* that Belmar violated its duty of loyalty under the state's public trust law by charging and using beach admission fees to pay for municipal expenses.[324] Thus, bonus and rental receipts are to be used for the conservation and maintenance of public natural resources.[325] Use of section 9 as a private trust principle could help encourage the Commonwealth to lease state forest and park lands for oil and gas drilling to help balance the budget. Although much less money would be received for general fund purposes than from royalties—one-third of the income and bonus payments—it would still create some incentive for leasing to balance the budget.

Section 9, as understood by the commonwealth court, also undermines the trustee's duty of prudence. As the Mississippi Supreme Court explained in *Columbia Land Development, LLC v.*

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323. PEDF II, 161 A.3d 911, 932 (Pa. 2017); *see also* DAVID C. SLADE, R. KERRY KEHOE & JANE K. STAHL, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS, AND LIVING RESOURCES OF THE COASTAL STATES 326 (1997) ("If the State exercises its rights and authorities for the particular benefit of the State itself (e.g., selling public trust lands simply to raise revenues or balance its budget) or for the benefit of any one individual, or small group of individuals, that act could be challenged in most State courts as a violation of the State's duty of loyalty to the beneficiaries as a whole.").

324. Slocum v. Borough of Belmar, 569 A.2d 312 (N.J. Super. Ct. Law Div. 1989).

325. The specific purpose for which these funds can be expended, consistent with the duty to conserve and maintain public natural resources, is beyond the scope of this Article. But it is worth noting that some states have created special trust funds for money from oil and gas leasing, which stipulate in greater detail the uses to which those funds may be put. *See, e.g.*, MICH. CONST. art. 9, § 35 (creating Michigan Natural Resources Trust Fund). The fund generally consists of "all bonuses, rentals, delayed rentals, and royalties collected or reserved by the state under provisions of leases for the extraction of nonrenewable resources from state owned lands." *Id.* Up to 75 percent of the total amounts made available for expenditure each year are to be "expended for acquisition of land and rights in land" and up to 25 percent is to "be expended for development of public recreation facilities." *Id.* The fund is capped at $500 million in accumulated principal. *Id.* "The fund, bankrolled by royalties paid on the sale and lease of state-owned oil, gas and mineral rights, has quietly generated more than a billion dollars to buy land or land rights, and to develop quality outdoor recreational facilities and opportunities in Michigan." *See Michigan Natural Resources Trust Fund Celebrates 40th Anniversary*, MICHIGAN.GOV (Mar. 31, 2016), https://www.michigan.gov/dnr/0,4570,7-350-79137_79770_79873_80003-381073—,00.html [https://perma.cc/WDY4-HD7Z]. For a proposal to establish a comparable trust fund in Pennsylvania, see KATE KONSCHNIK & GENEVIEVE PARSHALLE, HARVARD L. SCH. ENV'T L. PROGRAM, PUBLIC CONSERVATION TRUST FUND DESIGN OPTIONS: ENDOWING PUBLIC LANDS CONSERVATION IN PENNSYLVANIA WITH SHALE GAS REVENUES (2013).

Secretary of State, the trustee's duty of prudence means that it must administer the public trust in a manner that ensures that the trust purposes are achieved.[326] Here, the use of proceeds from bonus and rental payments for trust purposes is more likely to ensure that enough money is available to conserve and maintain public natural resources. Oil and gas exploration and production cause a variety of environmental impacts on state forest and park land.[327] Including all of the rental and bonus payments in the trust corpus will enhance the likelihood that enough money will be available to cover these costs. There is nothing in the Pennsylvania Commonwealth Court's opinion supporting the conclusion that diversion of one-third of the rental and bonus receipts to the general fund will allow the Commonwealth to conserve and maintain all of the public natural resources for which it has a public trust responsibility. Diversion of this money reduces the likelihood that the Commonwealth will have sufficient funds to conserve and maintain these resources.[328]

Finally, section 9 as understood by the commonwealth court also undermines the duty of impartiality toward beneficiaries. Section 27's trust obligations are specifically for the benefit of both present and future generations. The state cannot put its thumb on the scale in favor of the present generation over future generations, particularly because that is precisely how natural resources historically have been degraded. The commonwealth court's decision allows the state to use a fraction of bonus and rental payments from oil and gas leasing to provide cash for the present generation in return for the permanent extraction of nonrenewable public natural resources that are also intended to benefit future generations. It is true, as the commonwealth court explained, that sites where no gas production occurs bring in much of the bonus and rental money

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326. *See* Columbia Land Dev., LLC v. Sec'y of State, 868 So. 2d 1006, 1015–16 (Miss. 2004) (holding that the Secretary of State's duty of prudence in managing and protecting tidelands for public trust purposes authorized Secretary of State to deny lease for use of those tidelands even though three other agencies had approved the lease project).

327. *See, e.g.*, *Natural Gas Management*, PA. DEP'T CONSERVATION & NAT. RES., https://www.dcnr.pa.gov/Conservation/ForestsAndTrees/NaturalGasDrillingImpact/Pages/default.aspx [https://perma.cc/G3KF-6TAY].

328. *Cf.* Snyder Brothers, Inc. v. Pa. Pub. Util. Comm'n, 198 A.3d 1056 (Pa. 2018), which involved the meaning of a state statute imposing an "impact fee" on wells that produced more than 90,000 cubic of gas in "any" month. The Pennsylvania Supreme Court recognized "the evident intent of the legislature that the impact fee provide an adequate and stable source of revenue for counties and municipalities to offset the adverse effects of unconventional gas well production. . . ." *Id.* at 1075. The court decided that "any" month meant that this production level needed to occur in only one month of the calendar year, not every month. *Id.* at 1076. Among other things, the court explained, this "will result in more producers paying the impact fee – exactly what the General Assembly intended," a construction "which best effectuates" the purpose of the Act. *Id.*

under these leases. But sites where gas production does occur also generate bonus and rental money. In addition, as explained more fully below, the entire leasing process, including the generation of bonus and rental money, is directed toward gas extraction.

These three general trust principles provide ample grounds for requiring that expenditure of bonus and rental payments be limited to the purposes of the section 27 public trust. An additional principle supporting this result is provided by the law of charitable trusts.

2. Perpetual Charitable Trust Principle

In the cases in Section I.B.1 where courts expressly applied principles of trust law to public trusts for natural resources, the courts explained how these trust law principles would further the public trust. The perpetual charitable trust principle limiting the use of moneys received from the sale or lease of the trust corpus to trust purposes would further the purposes of section 27. In fact, this is the same result obtained by simply following the text of section 27. It is also consistent with the Pennsylvania Supreme Court's analysis in *PEDF II*, which focused on the Commonwealth's constitutional duty to "conserve and maintain" public natural resources as the guiding principle in determining how to allocate royalty money from oil and gas leasing. It follows that the use of this principle would not undermine the constitutional public trust.

Because moneys received from the perpetual charitable trust corpus, or otherwise received by the trustee, are devoted to stated charitable trust purposes, these trusts benefit both present and future generations in a manner that is similar to section 27—equally and without distinction. That is, perpetual charitable trusts and the section 27 public trust benefit those who are now living and those who are yet to be born, and do not distribute benefits differently to each. In perpetual charitable trusts, present and future generations may both receive benefits, but they are not treated as separate. While the present generation represents a large class of discrete people, the identity of these people changes over time as people die and others are born. When people are born, they move from being part of future generations to being part of the present generation. When people die, they are no longer part of the present generation. For both section 27 and perpetual charitable trusts, the present generation's membership is fluid and constantly changing, and the identity of members of future generations is unknown. While all living and future members of these classes may benefit from each of these trusts,

these trusts do not specifically direct trust benefits to named individuals or classes of individuals. For both charitable trusts and the section 27 trust, a defining characteristic is that the public benefits, not specified individuals.

This perpetual charitable trust principle would not impede or undermine the section 27 public trust. It keeps money from bonus and rental payments in the public trust, where it can be used to conserve and maintain public natural resources, whether it is accounted for as income or principal. This principle also would encourage the Commonwealth to act as a trustee and not as a proprietor. This perpetual charitable trust law principle is thus a good fit for section 27, and, like the general trust principles, would keep all of the moneys received from oil and gas leasing in the public trust.

3. Private Trust Principle

In the cases in Section I.B.2 where courts refused to apply trust principles to help interpret public trusts, the courts explained how these principles would undermine or weaken the public trust for natural resources. A continuing theme in many of these cases is that the proffered private trust law principles would weaken constitutional protection for natural resources. As the Alaska Supreme Court explained in *Brooks v. Wright*, "application of private trust principles may be counterproductive to the goals of the trust relationship in the context of natural resources."[329] The same is true here.

The Commonwealth Court of Pennsylvania, of course, concluded that application of the 1947 Act as a principle of private trust law furthers the purposes of section 27. "In essence, today's generation represents life tenants or life beneficiaries of the trust and tomorrow's generation represents the remainder interest."[330] By allocating two-thirds of the payments from bonuses and rentals to the constitutional trust as principal and one-third of the payments to income for use as the Commonwealth sees fit, the Act provides "an equitable balance between the needs of present and future generations of Pennsylvanians."[331] "This disposition fulfills Section 27's purpose and intent to 'conserve and maintain' Pennsylvania's public natural resources for the benefit of all the

329. Brooks v. Wright, 971 P.2d 1025, 1032 (Alaska 1999).
330. PEDF III, 214 A.3d 748, 761 (Pa. Commw. Ct. 2019).
331. *Id.* at 774.

people while also allowing today's generation of Pennsylvanians to benefit *in other ways* from the revenue produced."[332]

While the commonwealth court's analogy of present and future generations to trust beneficiaries and remaindermen has some appeal, closer inspection renders it less appealing.[333] The purpose of the private trusts covered by section 9 of the Principal and Income Act of 1947 is to create financial benefits for the beneficiaries, whether they are income beneficiaries or remainder beneficiaries. The one case applying section 9 cited by the commonwealth court, *In re McLean's Estate*, involved precisely that kind of trust.[334] By contrast, while section 27 resources are being leased to produce income, income generation is not a specified purpose of the trust. Rather, the specified purpose of the trust is to "conserve and maintain" public natural resources.

The beneficiaries of private trusts governed by the 1947 Act, moreover, are discrete people who are identified by name or class in the trust instrument. The identity of tenants and remaindermen in private trusts is fixed more or less permanently in the trust instrument. By contrast, as people are born, and as people die, no permanent distinction exists between present and future generations in section 27. The large, continually shifting current population of Pennsylvanians is simply not analogous to the limited and identifiable set of beneficiaries of a financial trust.

In addition, as already suggested, the private trusts involved in the Principal and Income Act of 1947 have been bounded in time—usually by the lives of the beneficiaries. When such a trust terminates, it is perfectly fine for the remainder beneficiaries to spend the money that was in the trust however they see fit. The section 27 trust, by contrast, is effectively perpetual. It contains no termination date or ground for termination. There is thus no comparable basis for saying that trust fund moneys are free of the trust obligation. The section 27 trust is also constitutional law, which enhances its durability.

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332. *Id.* (emphasis added).

333. This analysis assumes that section 9 embodies a principle of trust law, and is not simply a statutory provision. If section 9 is the latter, it is unresponsive to the state supreme court's remand directions that the commonwealth court consider "underlying principles of Pennsylvania trust law in effect at the time of its enactment." PEDF II, 161 A.3d 911, 930 (Pa. 2017) A principle is a "basic rule, law, or doctrine," and especially "one of the fundamental tenets of a system." *Principle*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also Principle*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3rd ed. 1992) (defining principle as a "basic truth, law, or assumption"). A principle is thus quite different from a statute. Section 9 could arguably embody a principle—that certain proceeds from natural resources extraction should be allocated two-thirds to principal and one-third to income—but the commonwealth court did not analyze it in that way.

334. *See supra* notes 267–68 and accompanying text.

Finally, the proper allocation of income and principal between different specified individuals and classes of individuals in a private trust has important financial consequences for each. By contrast, in the public trust context, while all of those affected by section 27 may benefit from the public trust, none of them are directed by section 27 to receive any financial benefit or, for that matter, any benefit at all. Rather, the benefits involve quality of life, recreation, a healthy and unpolluted environment, and the like—benefits whose value is difficult to measure in economic terms and which may not be personally experienced by each current individual member of the present generation, let alone future generations. Thus, the present generation is not analogous to the income beneficiaries from a private trust and entitled to one-third of receipts from bonus and rental payments free and clear of the constitutional public trust obligation.

There is also a strong basis for concluding that using the Principal and Income Act of 1947 as a principle of private trust law would undermine or frustrate the section 27 public trust. The commonwealth court's conclusion contradicts *PEDF II* because the 1947 Act on its face applies not just to bonus and rental payments from natural resources extraction; it also applies to royalties. Section 9 of that Act—the basis for the commonwealth court's decision—provides that "one-third of the net proceeds, *if received as rent or payment on a lease, or as royalties*, shall be deemed income, and the remaining two-thirds thereof shall be deemed principal to be invested to produce income."[335] Yet in *PEDF II* the Pennsylvania Supreme Court decided that all royalty money from oil and gas leases is to be used to "conserve and maintain" public natural resources. It did so largely on the strength of the "conserve and maintain" requirement in section 27. The Pennsylvania Supreme Court also employed a mix of charitable and private law—not a private law interpretation of the Principal and Income Act of 1947—to decide the proper allocation of royalty payments.[336] If that Act is not the proper trust law for determining allocation of royalties, then it is hard to see a plausible basis for using it to determine the allocation of bonus and rental payments. Of course, a trust instrument could be drafted to treat royalties differently than bonus and rental income, in which case it would be proper to apply the trust principle directing that proceeds be distributed according to the trust instrument. But section 27 is not drafted that

335. 1947 PA. LAWS 1283, *as amended*, *formerly* 21 PA. STAT. § 3470.9 (emphasis added).

336. *PEDF II*, 161 A.3d at 933–35; *see also supra* note 211 (summary of key private and charitable trust law decisions cited therein).

way, and no other principle of trust law appears to direct such a distribution under these circumstances.

Is there any other proper basis for treating rental and bonus payments differently from royalty payments? The Commonwealth Court of Pennsylvania thought so. Rentals, the commonwealth court said, "secure the lessee's right to enter the property for exploratory and development purposes and the rents accrue based on the mere passage of time, not the production of oil or gas."[337] Similarly, the commonwealth court reasoned, bonuses "are consideration for the execution of the lease, and not consideration for severance of the mineral."[338] The Commonwealth can keep this money even if no oil and gas are produced.[339]

But focusing on the narrow question of oil and gas production misses the bigger picture: These leases all involve public natural resources, and every one of them involves bonuses and rentals, as well as potential royalties. Bonus and rental money is paid on leases that generate no royalties, and it is also paid on leases that generate royalties. These leases all permit the same activities. In these instruments, DCNR

> does hereby grant, demise, lease, and let, exclusively unto Lessee for the purposes only of exploring, drilling, operating, producing, and removing of oil, gas and liquid hydrocarbons; and at locations subject to the approval of District Forester, acting for [DCNR], the laying of pipelines and the building of roads, tanks, towers, stations, and structures thereon to produce, save, take care of, and transport said products . . . .[340]

Every lease gives the lessee the right to exclude activities that would interfere with its rights under the lease, including activities by the public. Every lease to a particular company necessarily excludes other companies from the same public lands. And all of them involve some environmental impact, or the potential for some environmental impact, on public natural resources. These leases would not be entered into but for the possibility of obtaining oil, gas, or other hydrocarbons; the bonus and rental payments derive from that purpose.[341] As the Commonwealth Court of Penn-

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337. PEDF III, 214 A.3d 748, 773 (Pa. Commw. Ct. 2019).
338. *Id.*
339. *Id.*
340. *Id.* at 771.
341. *See PEDF II*, 161 A.3d at 935–36 (directing the Commonwealth Court, on remand, to determine the "true purpose" of these payments, whether it be "rental of a leasehold interest in the land, payment for the natural gas extracted, or some other purpose").

sylvania explained in *PEDF III*, the leasing process that results in bonus and rental payments is the same leasing process that results in oil and gas royalties;[342] there is no separate leasing process for state lands that involves only bonus and rental payments. In leasing for oil and gas, DCNR does not and cannot know in advance which leases will produce only bonus and rental payments, and which will also produce royalties.[343] Even if oil and gas are not extracted under a particular lease, the lease still has an impact on the use, condition, and availability of public forest resources. The bonus and rental money is consideration for the legal right to have those impacts.

The use of section 9 of the 1947 Act as a principle of private trust law impedes the purpose of section 27 in at least three additional ways, all identified above. It allows the use of public trust resources to generate income for non-trust purposes; it reduces the likelihood that sufficient funds will be available to conserve and maintain those resources; and it prioritizes the present generation over future generations. The use of this principle to interpret the meaning of section 27 is not appropriate.

CONCLUSION

The many different public trusts for natural resources reflect fundamental public values about the public use and availability of those resources over many generations. Because public trusts for these resources operate as both a limit and a duty for the governmental trustees, because trust law permeates the background understanding of what these limits and duties mean, and because the contours of the public trust are often not well defined, it is both necessary and appropriate to consider the use of traditional trust law for guidance. But the judicial use of these principles can further or hinder these public trusts, depending on which principles are chosen.

Some traditional trust law principles, such as prudence, loyalty, and impartiality toward beneficiaries, should strengthen and clarify the duties and limits of natural resource trustees in nearly any context. Other principles apply only to charitable trusts, private

342. *PEDF III*, 214 A.3d at 773.

343. If there is a significant difference in the leases between bonuses and rentals, on one hand, and royalties on the other, it would seem to run afoul of the Pennsylvania Supreme Court's injunction in *PEDF II*. *See PEDF II*, 161 A.3d at 936 ("Oil and gas leases may not be drafted in ways that remove assets from the corpus of the trust or otherwise deprive the trust beneficiaries (the people, including future generations) of the funds necessary to conserve and maintain the public natural resources.").

trusts, or other types of trusts. Courts have decided to apply these other trust law principles to specific natural resources trusts when these principles further the language and purpose of these trusts, and courts have refused to apply these trust law principles when they would hinder or undermine public trusts.

When courts are forced to choose between charitable trust law and private trust law, courts should strongly consider (but not automatically favor) the law of charitable trusts—particularly perpetual charitable trusts. These trusts are in many ways analogous to natural resources trusts. Both are created for public purposes, have no termination date, have a large and unnamed class of beneficiaries, and require the trustee to protect and maintain the trust corpus in perpetuity. While some aspects of private trust law can be useful in defining public trustee duties and limits, the wealth or income maximization aspects of private trust law can easily undermine or distort public trusts for natural resources.

This Article's four-part methodology for determining whether and how to use specific trust law principles to help interpret the meaning of public trusts for natural resources is intended to assist lawyers and judges in analyzing this issue in a way that honors the language and purposes of any particular public trust for natural resources. Traditional trust law helped create public trusts for natural resources, and traditional trust law, properly applied, can make them stronger.