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Private Action Under the Public Trust: An Environmental Bill of Rights for California

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Comments

Private Action Under The Public Trust: An Environmental Bill Of Rights For California

Today when rhetoric abounds from almost every available forum espousing condemnation of the elusive actor credited with deterioration of man's environment, the populace still moves lethargically toward a state of alarm. Each person looks toward his neighbor, beckoning him to take up the quixotic challenge to save our world from our hypocritical self. Yet, as this comment points out, even those pilgrims so naive they accept the Don's armor and sword abruptly discover their plan of attack (legal action based on a private remedy) is inadequate for their purpose and they are foreclosed from taking the battlefield to confront the "windmill" polluter. The writer suggests the solution to the dilemma of foreclosure of individual action might be derived from the concept of the "public trust" discussed in detail below. A review and analysis of the Michigan Environment Protection Act of 1970, the first legislative enactment of the public trust theory for environmental protection, provides some insight concerning the practicability of this theory, and how it might be applied by individuals as a basis for a private action to protect California's environment.

> As we have become more populated and more technologically sophisticated we realize that nature cannot repair all of its man-caused wounds by itself. As man demands more, he must give more.[1]

While the preservation of environmental quality has become a problem of nationwide concern, most of the development of environmental law has taken place outside the courtroom. The slow development of

1. Statement by former Chief Deputy Attorney General Charles A. O'Brien before California State Assembly Committee on Water, Sacramento, California, Monday, April 7, 1969.

case law in this area has been attributed to procedural difficulties such as a failure of the courts to grant private groups either standing to sue or the right to initiate a class action; problems of evidence; historic limitations on the concept of tort liability; as well as a feeling by the judiciary that legislative policy must precede specific case decisions.[2] Specifically, many modern pollutants such as photo-chemical smog have had gradual unforseen effects upon man and environment—effects which, while threatening man's existence, have not often fit within traditional tort concepts and have subsequently escaped private litigation.[3] Coupled with the additional fact that both federal and state pollution control agencies have not been completely successful,[4] the private citizen appears to be without an effective means of protecting his environment either in the courts or by following administrative procedures.

In view of the inadequacy of traditional bases of private action in dealing with pollution problems and in recognition of the valuable safeguard to effective agency control private litigation can provide,[5] it is the purpose of this comment to propose that California enact legislation granting individual citizens an effective environmental cause of action. As will be shown, such legislation is not without at least conceptual support in public trust laws and decisions; nor is such legislation without precedent in other states. Michigan has recently granted private citizens standing to bring suits against environmental waste without the necessity of proving special injury.[6]

The following discussion will first demonstrate the need for such legislation by briefly reviewing the inadequacies of the existing private remedies available against polluters; secondly, discuss the public trust concept as the conceptual basis for such legislation and finally examine the strengths and weaknesses of the Michigan Act in terms of its effect on the private pollution suit and as supplying guidelines for similar legislation in California.

Present Role of Private Litigation in Pollution Control

As indicated previously the most fundamental problem for the environmental lawyer is finding a substantive theory upon which to base

2. Jackson, *Foreword: Environmental Quality, the Courts, and the Congress,* 68 Mich. L. Rev. 1073, 1075-76 (1970).
3. Continuing Education of the Bar, Environmental Law Handbook § 6.19 (1970).
4. Comment, *Equity and the Eco-System: Can Injunctions Clear the Air?* 68 Mich. L. Rev. 1254, 1259-60 (1970).
5. Note, *Private Remedies for Water Pollution,* 70 Colum. L. Rev. 734, 755 (1970).
6. Environmental Protection Act of 1970, Public Act No. 127, M.C.L.A. §§ 691.1201-691.1207 (1970).

litigation. In California, and most other states for that matter, private citizens seeking redress against polluters are limited to actions based on traditional tort theories.[7] Perhaps the most commonly used cause of action in the area of pollution is that of nuisance. Air pollution was labeled a nuisance as early as 1611.[8] In California nuisance is defined as

> anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life and property . . .[9]

To recover under nuisance plaintiff must prove that there is or will be a substantial interference, that defendant's conduct is unreasonable and that such conduct is the proximate cause of such interference.[10] If the nuisance causes inconvenience or damage to the public in the exercise of its common rights it is a public nuisance.[11] For the private person to recover under public nuisance he must prove special damages, *i.e.*, damages other than those sustained as a member of the general public.[12] This requirement of showing special damages has for the most part rendered nuisance actions ineffective against the major polluting activities of community-wide proportion, wherein damage to the individual apart from that shared by the general public is difficult to show.[13] Additionally, an action for nuisance is subject to several defenses: the action will not lie if defendant has acquired a prescriptive right;[14] nor if the plaintiff can be said to have voluntarily chosen his place to live, *i.e.*,

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7. With the exception of Michigan (*see* text accompanying note 6 *supra*), no state has granted its citizens standing to directly enjoin alleged polluting activities. The Porter-Cologne Water Quality Control Act of 1969 (CAL. WATER CODE § 13000 *et seq.*) allows "aggrieved persons" to appeal discharge requirements to the State Board or the courts if necessary (§§ 13320, 13330), however all civil actions to enforce the provisions of the act are brought by the Attorney General (§ 13361). Additionally, the California Legislature has removed the requirement that plaintiff show a lack of adequate remedy at law and irreparable damage in civil actions brought to enjoin violations of Air Pollution Control Board standards (A.B. 90, CAL. STATS. 1970, c.73, p. 86). Yet this amendment applies only to actions brought in the name of the people by the pollution control districts.

Currently pending before the California legislature are two measures, A.B. 838 (Hayes) introduced on March 8, 1971, and A.B. 985 (Z'berg) introduced on March 16, 1971, which are intended to greatly increase the effectiveness of private pollution suits. A.B. 985 contains provisions identical to those contained in the Michigan Environmental Protection Act, while A.B. 838 would limit private actions to situations not involving conduct expressly authorized by (a) state statute, (b) state agency rule, regulation or order, or (c) a public entity.

8. William Alfred's Case, 77 Eng. Rep. 816 (K.B. 1611).

9. CAL. CIV. CODE § 3479.

10. PROSSER, LAW OF TORTS, *Nuisance*, § 88 (3d ed. 1964).

11. *Id.* § 89.

12. *Id.*

13. *See* Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126, 1135 (1967); the same appears to be true in private actions against water pollution, *see* Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality*, 52 IOWA L. REV. 186, 197-198 (1966).

14. Hulbert v. California Portland Cement Company, 161 Cal. 239, 244 (1911).

"came to the nuisance",[15] nor if defendant's action is authorized by statute.[16]

By far the most common goal of private pollution suits is injunctive relief.[17] Since damages are often uncertain or difficult to show to a certainty and there is frequently a possibility of a multiplicity of actions, an injunction is not likely to be denied on the grounds of the existence of an adequate remedy at law. Yet, gaining an injunction against polluters is by no means an easy matter as the decision requires the court to "balance the equities."[18] This generally means that the court will weigh the gravity of harm to the plaintiff against the social utility of defendant's conduct and the feasibility and cost of remedying the complained of nuisance. In *Hulbert v. California Portland Cement Co.*,[19] the court rejected the balancing test and granted injunctive relief, however this case has not been consistently followed.[20] The balancing doctrine is particularly important in the area of pollution because the ultimate resolution depends upon what factors and policy decisions the judge wishes to "put on the scale".[21] Generally "balancing the equities" has meant balancing the equities of the complainants and even courts who employ the concept of the "greatest good to the greatest number of people", have failed to consider the possible harm from pollution to thousands or even millions of people not party to the action; in a real sense then there is not a true balancing of the equities.[22] Additionally in California, the plaintiff must contend with Code of Civil Procedure section 731a which prohibits private citizens from enjoining an activity which is reasonable and necessary to the express zoning use to which property is devoted.[23]

15. East St. Johns Shingle Co. v. City of Portland, 195 Ore. 505, 246 P.2d 554 (1952); Powell v. Superior Portland Cement, 15 Wash. 2d 14, 129 P.2d 536 (1942). However, Prosser suggests that a more accurate statement would be that "coming to the nuisance" is merely one factor to be considered in determining the reasonableness of the use rather than a total bar to the bringing of the action. PROSSER, *supra* note 10, § 92. *See also Juergensmeyer, supra* note 13, at 1136.

16. CAL. CIV. CODE § 3482 provides "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

17. *See* Note, *Private Remedies for Water Pollution,* 70 COLUM. L. REV. 734, 747 (1970).

18. *See* Peterson v. Santa Rosa, 119 Cal. 387 (1897); Williams v. Los Angeles Railroad, 150 Cal. 592 (1907); Parker v. P. G. & E. Co., 50 Cal. App. 264 (1920); Wright v. Best, 19 Cal. 2d 368 (1942); Christensen v. Tucker, 114 Cal. App. 2d 554 (1952); Oertel v. Copley, 152 Cal. App. 2d 287 (1957); Family Record Plan Inc. v. Mitchell, 172 Cal. App. 2d 235 (1959); Frabotta v. Alencastre, 182 Cal. App. 2d 679 (1960); Scheble v. Nell, 200 Cal. App. 2d 435 (1962).

19. 161 Cal. 239 (1911).

20. *See* cases cited *supra* note 18.

21. *Juergensmeyer, supra* note 13, at 1134.

22. *Juergensmeyer, supra* note 13, at 1134.

23. CAL. CODE OF CIV. PROC. § 731a provides:

Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial or airport uses are expressly permitted, except in an action to abate a public nuisance brought in the name of the people of the State of California, no

The private citizen who cannot satisfy the above-mentioned requisites for a successful nuisance action in many instances might find a suitable alternative in an action for trespass. Mere wrongful entry upon the land is sufficient to maintain an action for trespass[24] and this is often easier to show than a substantial interference which is required for nuisance. A trespass theory has been successfully used in an action to recover for damage caused by escaping pollutants from an aluminum plant.[25] However, some courts have denied recovery either by holding that air pollutants are not substantial enough to constitute physical entry or that entry was not direct since wind had intervened to carry pollutants onto the plaintiff's land.[26]

A third possible basis for private action against pollution is provided by an action for damages based on negligence. Negligence actions in this field have been often hampered by the difficulty in establishing a causal relationship between defendant's conduct and plaintiff's injury.[27] In *Hagy v. Allied Chem Dye Corp.*,[28] plaintiff successfully sued for damage to her larynx when she drove through smog allegedly containing sulphuric acid compounds negligently emitted from defendant's plant.[29] The value of *Hagy* as a precedent seems to be lessened by the fact that defendant apparently admitted negligence.[30] Unlike *Hagy*, in most cases negligence is not admitted, which raises the additional problem of determining the standard of care to use for polluters. Has the polluter met the standard of care required if he shows that he puts out fewer pollutants than any other operation of his type or that he uses all available control devices? Or that the cost of additional control devices would be substantial? In the final analysis the standard to which the courts will hold the producer of pollutants depends upon the judge's or jury's view of the social utility of pollution control.[31]

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person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone or airport of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation. . . .

For discussion of the effect of § 731a see Steinberg, *Rights Under California Law of the Individual Injured by Air Pollution*, 27 So. CAL. L. REV. 405 (1954).

24. Triscony v. Brandenstein, 66 Cal. 514 (1885); Macleod v. Fox West Coast Theatres Corp., 10 Cal. 2d 383 (1937). *See* PROSSER, LAW OF TORTS, *Intentional Interference with Property*, § 13 (3d ed. 1964).

25. Martin v. Reynolds Metal Company, 221 Ore. 86, 342 P.2d 790 (1959), *cert. denied*, 362 U.S. 918 (1960).

26. *See* Thackery v. Union Portland Cement Co., 64 Utah 437, 231 P. 813 (1924) (industrial dust); Arvidson v. Reynolds Metal Co., 125 F. Supp. 481 (W.D. Wash. 1954), *cert. denied*, 352 U.S. 968 (1957) (noxious fumes).

27. *Juergensmeyer, supra* note 13, at 1143.

28. 122 Cal. App. 2d 361 (1953).

29. *Id.* at 363.

30. "Appellants do not contend that there is insufficient evidence of negligence in the operation of their plant." *Id.* at 364.

31. For an example of a commendable approach to the problem see Renken v.

The doctrine of strict liability without fault may apply to polluters if the defendant's conduct can be considered ultra-hazardous,[32] or within the limits of absolute nuisance.[33] Such theories have been used only infrequently in pollution control.[34] The doctrine of products liability under which a seller of a product is strictly liable for injuries caused by dangerous defects in design or manufacture has been mentioned in connection with air pollution suits, but its applicability is questionable.[35] If plaintiff's property has been damaged by pollutants from governmental activities or by private companies having the power of eminent domain,[36] he may be able to bring an action for inverse condemnation.[37]

Another potential basis for action against pollution which is available in federal courts should be mentioned here. A number of private groups have filed actions under the Sherman Anti-Trust Act against the major automobile manufacturers alleging that they have agreed to delay research development, manufacture and installation of motor vehicle pollution control equipment.[38] These cases are now pending in the District Court for the Central District of California.

As the foregoing illustrates, pollution problems are not readily amenable to actions by individual citizens within the existing theories of private action. Generally, the obstacles facing the private litigant can be summarized thusly: If the plaintiff suffers no direct personal or economic harm from the alleged polluting activity he lacks standing to sue;[39] those seeking environmental quality are almost invariably the plaintiffs and hence must prove the basic issues; for this reason it has been said that even if the law favors environmental quality, present procedure favors polluters.[40] In the equitable determination of whether an

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Harvey Aluminum, Inc., 226 F. Supp. 169 (D. Ore. 1963), in which the court stated at 172:

> While we are not dealing with the public as such, we must recognize that air pollution is one of the great problems now facing the American public. If necessary the cost of installing adequate controls must be passed on to the ultimate consumer. The heavy cost of corrective devices is no reason why the plaintiffs should stand by and suffer substantial damage.

32. Green v. General Petroleum Corp., 205 Cal. 328 (1928); Luthringer v. Moore, 31 Cal. 2d 489 (1948).

33. *See* PROSSER, LAW OF TORTS, *Strict Liability* § 77 (3d ed., 1964).

34. *See Juergensmeyer, supra* note 13, at 1151.

35. *See* ENVIRONMENTAL LAW HANDBOOK, *supra* note 3, at § 6.25; Katz, *The Function of Tort Liability in Technology Assessment,* 38 U. CIN. L. REV. 587, 623 (1969).

36. CAL. CIV. CODE § 1001.

37. *See* Tyler v. Tehama County, 109 Cal. 618 (1895); Hillside Water Co. v. Los Angeles, 10 Cal. 2d 677 (1938).

38. *In re* Motor Vehicle Air Pollution Control Equipment, 311 F. Supp. 1349 (1970).

39. *See* Jaffe, *Standing to Secure Judicial Review: Public Actions,* 74 HARV. L. REV. 1265 (1961); Jaffe, *Standing to Secure Judicial Reiview: Private Actions,* 75 HARV. L. REV. 255 (1962).

40. Krier, Environment, Litigation and the Burden of Proof (unpublished work cited in ENVIRONMENTAL LAW HANDBOOK, *supra* note 3, at § 4.22). For a discussion

injunction will issue, success for the individual depends on how much importance those interpreting the law place on pollution control.[41] The most important consequence of these obstacles restricting environmental litigation is that even when successful, existing litigation is necessarily limited to only a small part of the entire pollution problem. Private action is only feasible where there is a single point source of pollution, *i.e.*, an identifiable polluter. When pollution reaches community-wide proportions, where many pollutants have commingled, private action is rarely appropriate due to the difficulty in establishing causation or in identifying the tortfeasor.[42]

THE PUBLIC TRUST CONCEPT: THE RIGHT TO A CLEAN ENVIRONMENT?

In its most simple form the public trust concept means that certain resources are held by the state in trust for all the people and such resources cannot or at least should not be dissipated.[43] The influence of the public trust concept upon American law can be best understood by briefly reviewing its early developments in Roman and English law. The concept appears to have its earliest roots in the Roman and English concepts concerning the nature of property rights in rivers, the sea and the seashore.[44] Certain interests such as navigation and fishing were sought to be preserved for the benefit of the public; accordingly property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. While it was understood that perpetual use in certain common properties (such as the seashore, highways and running water), was granted to the public, it has never been clear whether the public had an enforceable right to prevent the infringement of those interests.[45] As conceptual support for the public trust doctrine in the United States, Joseph Sax identifies three principles that have historically been part of American law: first, that certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than serfs. The historic public rights of fishing and navigation reflect this feeling.[46] Secondly, that certain interests are

of the problems of proving causation in water pollution litigation see *Hines, supra* note 13, at 198.

41. *Juergensmeyer, supra* note 13, at 1154.

42. Miller & Borchers, *Private Lawsuits and Air Pollution Control*, 56 A.B.A.J. 465, 466 (1970). *See also* CONTINUING EDUCATION OF THE BAR, ENVIRONMENTAL LAW HANDBOOK § 6.19 (1970).

43. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

44. *Id.* at 475.

45. *Id.*

46. *Id.* at 484.

so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace. This principle led to the creation of national parks and monuments.[47] Finally, that certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate, *i.e.*, the rule of water law that one does not own a property right in water the same way he owns his watch or shoes, but that he owns only a *usufruct*, an interest that incorporates the needs of others.[48] It is thus thought to be incumbent upon the government to regulate water uses for the general benefit of the community and to take into account the public nature which the physical nature of the resource implies.[49]

The most celebrated public trust case in American law is the decision of the U. S. Supreme Court in *Illinois Central Railroad Co. v. Illinois*.[50] In 1869 the Illinois Legislature made an extensive grant of submerged lands, in fee, to the Illinois Railway. The grant included all the land underlying Lake Michigan, for one mile out from the shoreline and extending one mile in length along the central business district of Chicago (more than one thousand acres, comprising virtually the whole commercial waterfront of the city).[51] In 1873 the legislature repealed the 1869 grant[52] and brought an action to invalidate the grant. The Supreme Court upheld the state's claim and said that this conveyance of trust lands was beyond the power of the legislature.[53] The court did not actually prohibit the disposition of trust lands to private parties in all instances[54] but rather said the

> state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them . . . than it can abdicate its police powers in the administration of government . . .[55]

While the *Illinois Central* facts are highly unusual the case remains an important precedent. Sax points out that the court articulated a principle that has become the central substantive thought in public trust litigation:

> [w]hen a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism

47. *Id.* at 484-485.
48. *Id.* at 485.
49. *Id.*
50. 146 U.S. 387 (1892).
51. *Id.* at 405.
52. *Id.* at 410-411.
53. *Id.* at 453.
54. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and water remaining.
Id. at 453.
55. *Id.* at 453.

> upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.[56]

Even though this thought has not met with uniform approval, the public trust rationale is not without support in California. Early California decisions either invalidated grants of tidelands to private parties or read into such grants a trust obligation upon the private owner not to change the waterfront or obstruct navigation.[57] Later cases modified the early principle and upheld grants of trust lands to private individuals, but found that such lands were impressed with the public trust which required the owners to use their lands in a manner consistent with the right of the public.[58] As the court stated in *People v. California Fish Company*,[59] the grantee of such lands does not take absolute ownership but rather takes "the title to the soil subject to the public right of navigation."[60]

In addition to case law, several California statutory enactments also lend support to the public trust concept. Perhaps the most important of these is the McAteer-Petris Act[61] which created the Bay Conservation Development Commission to develop a plan for conservation of the water of the bay and the development of its shoreline.[62] Additionally in the granting of tidelands to municipalities, California has indicated that such lands should be "used for purposes in which there is a general statewide interest."[63]

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56. *Sax, supra* note 43, at 490.

57. Taylor v. Underhill, 40 Cal. 471 (1871). *See also* Ward v. Mulford, 32 Cal. 365 (1867); Shirley v. Benicia, 118 Cal. 344 (1897); City of Oakland v. Oakland Waterfront Co., 118 Cal. 160 (1897). These cases drew a distinction between grants outside the scope of any legislative program and grants made as part of a public program, such as the improvement of a harbor. The former were held invalid to the extent they involved land subject to the public trust use, and valid to the extent they covered worthless lands. But when the grant was part of a legislative program for public purposes, historic or potential uses, it could be validly subordinated to such public schemes. *Sax, supra* note 43, at 527-528.

58. *See* Forestier v. Johnson, 164 Cal. 24 (1912). (Owner of tideland grant cannot exclude public).

59. 166 Cal. 576 (1913).

60. *Id.* at 588.

61. CAL. GOV'T CODE § 66600 *et seq.*; CAL. STATS. 1965, c. 1162, § 1, p. 2940.

62. CAL. GOV'T CODE § 66603. The introductory language of the act clearly indicates a recognition of the public interest therein:

> The legislature hereby finds and declares that the public interest in the San Francisco Bay is in its beneficial use for a variety of purposes; that the public has an interest in the bay as the most valuable single natural resource of an entire region, a resource that gives special character to the bay area; that the bay is a single body of water than can be used for many purposes, from conservation to planned development; and that the bay operates as a delicate physical mechanism in which changes that affect one part of the bay may also affect all other parts. It is therefore declared to be in the public interest to create a politically responsible, democratic process by which the San Francisco Bay and its shoreline can be analyzed, planned and regulated as a unit. . . . CAL. GOV'T CODE § 66600.

63. CAL. STATS. 1961, c. 1763, p. 3767 (grant of tidelands to City of Albany);

While several cases evidence a rather expansive view as to what constitute "public activities",[64] it appears that California has utilized the public trust concept to constrain activities which significantly shift public values into private uses or into uses which benefit a private group.[65]

The cases indicate that many courts have either consciously or unconsciously employed public trust thinking in dealing with governmental regulation of natural resources. Historically, the concept of the public trust has been limited to situations involving tidelands, parks and high and low water marks on seas and lakes.[66] However, the word "public trust" has not been used with exacting precision, and, as with any judicially applied doctrine expanded on a case by case basis, its limits are not easily determined. Important questions remain concerning not only what are the resources encompassed by the public trust but also whether the individual has enforceable rights thereunder. Sax has concluded the public trust problems are found wherever governmental regulation comes into question and that

> the protections which the Courts have applied in conventional public trust cases would be equally applicable and equally appropriate in controversies involving air pollution, dissemination of pesticides, location of rights-of-ways for utilities, for strip mining, etc.[67]

Whether the public trust concept can be an effective means of combating air pollution and the other problems as Sax suggests will primarily depend upon the willingness of the courts to view the air we breathe as belonging within the province of the public trust. It would at least appear that of all natural or so-called "public resources" the air is most easily characterizable as "so particularly the gift of nature's bounty that it ought to be reserved for the whole of the populace"[68] and hence should belong within the public trust. Even if the courts are willing to view air quality as a public trust problem several additional questions must be answered before this concept can supply an effective pollution remedy: To what extent does the private citizen have enforceable rights under the public trust? What are the government's duties and liabilities as trustee of the public trust? If analogy to private trust litigation is appropriate, answers to these questions can be supplied. In its basic form

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CAL. STATS. 1959, c. 921, p. 2952 (grant of tidelands and submerged lands to Emeryville).

64. *See* San Pedro, etc., Railroad v. Hamilton, 161 Cal. 610 (1911); Martin v. Smith, 184 Cal. App. 2d 571 (1960).

65. *See* City of Coronado v. San Diego Unified Port District, 227 Cal. App. 2d 455 (1964); Higgins v. Santa Monica, 62 Cal. 2d 24 (1964).

66. *See* text accompanying notes 44-49 *supra.*

67. *Sax, supra* note 43, at 556-57.

68. *See* text accompanying note 47 *supra.*

a trust may be defined as a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another.[69] Generally it is the duty of the trustee of a private trust to prosecute or defend actions for the protection of the trust.[70] The beneficiary can bring an action against the trustee for breach of the trustee's duty but normally he cannot bring an action directly against a third party unless the trustee refuses to sue after demand.[71] A charitable trust can be defined as a "donation in trust for promoting the welfare of mankind at large or a community or of some class forming a part of it, indefinite as to numbers and individuals."[72] Supervision and enforcement of charitable trusts is done by the Attorney General in behalf of the people of the state,[73] and he is a necessary party in actions to modify the trust provisions.[74] Public trust operation does not appear to fit neatly within the concept of either a private or a charitable trust, but rather can be seen as containing elements of both. A public trust is properly for the benefit of all the people and in this sense it is akin to a charitable trust. Yet as each citizen is a beneficiary of resources held in the public trust, each should have an enforceable right against the trustee and third parties, when appropriate, as does the beneficiary of a private trust. As trustee of the public trust, the government has the primary duty of protection and enforcement, and would appear to always be a necessary party in litigation involving the trust. Admittedly no court has expressly adopted such a comparison between public and private trust litigation and, although individual rights in the public trust remain largely undefined, a recent federal decision may shed light on this area. In *Citizens Committee for the Hudson Valley v. Volpe*[75] environmental organizations and several other groups sought review of an Army Corps of Engineers decision to grant a permit for the construction of an expressway on filled land in the Hudson River under the Rivers and Harbors Act of 1889.[76] In holding that the plaintiffs were proper parties to bring the action the court said,

> the public interest in environmental resources . . . is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest.[77]

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69. BOGERT, TRUSTS, *Introduction and History*, § 1 (4th ed. 1963).
70. BOGERT, TRUSTS, *Duties of Trustee*, § 98 (4th ed. 1963).
71. BOGERT, TRUSTS, *Remedies of Beneficiary*, § 166 (4th ed. 1963).
72. People v. Cogswell, 113 Cal. 129, 138 (1896).
73. BOGERT, TRUSTS, *Remedies of Beneficiary*, § 156 (4th ed. 1963).
74. *Id.*
75. 425 F.2d 97 (1970).
76. *Id.* at 100.
77. *Id.* at 105.

It appears that this case is an important step forward in clarifying the scope of the individual's rights to bring actions in behalf of the public.

The Michigan Environment Protection Act of 1970

While public trust litigation appears to be gaining increasing acceptance in the courts, as *Volpe* would indicate, private rights under the public trust can be most effectively protected by statute. Michigan has become the first state to adopt such a measure in the form of the 1970 Michigan Environmental Protection Act[78] which provides the private citizen with a judicial remedy for air pollution under the concept of the public trust. The act provides that "any person, partnership, corporation, association, organization or other legal entity" may maintain an action under this statute against "the state or any political subdivision thereof, any person, partnership, corporation . . . or other legal entity" for the "protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."[79] This section expressly adopts the concept of the public trust as well as recognizes the right of a citizen to bring an action for breaches of that trust without the requirement of individual injury. The Michigan Act is also significant in that it relaxes the burden of proof in respect to the initial showing of pollution. Plaintiff must make only a "prima facie showing that the conduct of defendant has or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein . . . ."[80] Defendant then has the burden of putting forth an affirmative defense. The act also indicates that any individual can bring an action under these provisions prior to agency action; the court then will retain jurisdiction pending administrative procedure.[81] While the act itself is important in that it is the first legislative recognition of the rights of private citizens in the public trust, the precise wrong for which this statute intended to provide a remedy is not clear. The act does not define what is meant by "pollution, impairment or destruction." Not only are no pollution standards contained within the act, but one provision adds further to the confusion by raising doubts concerning the applicability of agency standards in actions brought under this act. This section provides that the court need not be bound by "standards for pollution or for an anti-pollution device or procedure, fixed by rule or otherwise, by instrumentality or agency of the state."[82] The

78. M.C.L.A. §§ 691.1201-691.1207 (1970).
79. M.C.L.A. § 691.1202 (1970).
80. M.C.L.A. § 691.1203 (1970).
81. M.C.L.A. § 691.1204 (1970).
82. M.C.L.A. § 691.1202 (1970).

court is left free to determine the "validity, applicability and reasonableness of the standard" and to direct the adoption of a standard approved by the Court.[83] The apparent intent of this section was to avoid binding the court to apply an inadequate standard or to allow a polluter to defend on the basis that he has complied with agency standards. Yet the act contains no criteria by which the court is to determine the adequacy of applicability of a given agency standard. While it has been suggested that the withdrawal of the presumptions that agency standards are adequate or that a particular agency has adequately resolved all issues is the necessary first step for the courts to effectively aid pollution control,[84] there is the possibility that such a provision could prove more harmful than beneficial. The act does not specify whether the court must first find the agency standards inadequate before it can fix its own or whether the court can determine the agency standard to be unnecessarily restrictive and then order the establishment of a more lenient standard. With this apparent discretion, it would appear that the effectiveness of private actions under this act will depend, as do present tort actions, on the importance of pollution control to those who are interpreting the law.[85] Additionally, it is questionable whether the act could withstand a challenge on the basis that it is either too vague or overly broad to be enforceable.[86] As indicated above, the act contains no definition of, nor standards for, pollution. Apparently every citizen, corporation, etc., is subject to the act, but no specific types of activities are prohibited or exempted. Additionally, compliance with agency standards may not always be enough, but there is no indication of when such compliance will or will not be sufficient.

A Public Trust Law for California

In spite of the apparent problems of the Michigan Environmental Protection Act, the principle underlying such legislation is indeed sound: that the private citizen has rights under the public trust and that the legislature should insure the enforceability of such rights by the enactment of appropriate legislation. It has been the purpose of the foregoing analysis to demonstrate that California should also recognize the rights of private citizens under the public trust. That the remedies

83. M.C.L.A. § 691.1202 (1970).
84. *Sax, supra* note 43, at 561.
85. *See* text accompanying note 31 *supra.*
86. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.
Cramp v. Board of Public Instruction, 368 U.S. 275, 287 (1961).

available to individual citizens seeking environmental quality control need bolstering has already been indicated. Neither would a public trust statute incorporating air quality be all together novel as California decisional and statutory law has already utilized such a concept to protect tide and shorelands.[87]

With this in mind it is proposed that California enact legislation expressly recognizing the public trust doctrine. Such a statute should incorporate the following ideas:

1. A definition or explanation of which resources, activities, etc., are encompassed in the trust and held for the benefit of all the people.
2. A specification of what types of activities would be considered as impairing or polluting the trust.
3. A granting of standing to any citizen as beneficiary of the trust to bring suit to enjoin activities which are or will be in contravention of the public trust without the necessity of showing individual injury or loss.
4. A shift of the burden of proof from polluted to polluter requiring that those responsible for alleged polluting activity show by way of affirmative defense that their conduct or activity will not impair or destroy that which belongs to the public trust.
5. A retention of existing agency procedure and standards where appropriate and where such can be shown to be capable of effectively protecting the trust from abuse.

The adoption of such a statute would accomplish several goals. By removing the existing requirements of standing and shifting the burden of proof, it would allow the private citizen an effective remedy against pollution. By specifying which resources are protected as belonging within the public trust and retaining agency action where appropriate, it would overcome the potential vagueness and apparent overbreadth of the Michigan Environmental Protection Act.

Admittedly such a statute would not comprise a total solution to the problem of pollution control. Not all types of problems can be enumerated or even anticipated in a legislative enactment. Additionally, the effectiveness of any judicial remedy provided by statute will always in some degree depend upon the willingness of the bench to apply it. Yet, in spite of any potential shortcomings, the adoption of a public trust law would be an important recognition that the air, water and

87. *See* text accompanying notes 57-65 *supra.*

natural resources belong to all the people, and, moreover, that the means of protecting these resources should be entrusted to them.

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