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A CONSTITUTIONAL RIGHT TO AN ENVIRONMENTAL PUBLIC TRUST Protections Offered by Incorporating Trust Language in a State's Green Amendment

The incorporation of trust language in a Green Amendment will create a different dynamic when it comes to all actions concerning the environment by mandating the government work proactively to prohibit degradation and ensure that all residents have equitable access to a healthy environment.

The incorporation of trust language in a Green Amendment is not the same thing as simply incorporating the public trust doctrine. As defined, the Public Trust Doctrine embodies “the principle that certain natural and cultural resources are preserved for public use, and that the government owns and must protect and maintain these resources for the public’s use.”¹ But, for the most part, the public trust doctrine has been legally interpreted and applied as being more limited in scope, e.g. as applying to tidal and submerged lands, and/or navigable waterways. By directly using trust language, rather than simply referencing the public trust doctrine, Green Amendments more explicitly confirm an obligation to protect and maintain all public natural resources (not just submerged lands and identified water resources) for the benefit of all the people, and brings with it well understood legal mandates and guidelines regarding the obligations of the trustee (i.e. government officials) as pertains to the beneficiaries of the trust (i.e. every member of the public.) Establishing all residents of a state as beneficiaries implicitly includes future generations because trustees are under certain legal obligations to prevent waste as to the trust corpus. However, the express inclusion of future generations is advisable to ensure cross-generational protections.

A TRUST FOR PUBLIC NATURAL RESOURCES

In law, a trust is a collection of assets (also called a corpus or body of the trust) entrusted to an individual or group to manage for the benefit of others. The individual who is charged with watching over the assets is a trustee and those who enjoy the benefit are known as beneficiaries. In taking care of the assets, a trustee’s duty is to ensure that, through proper management of the assets, beneficiaries receive the most benefit from those assets, in both the short and long term. Under trust law, trustees have fiduciary duties that limit their authority and discretion in order to protect the beneficiaries’ interests and ensure that the trustee abides by the terms of the trust. Examples of fiduciary duties include that a trustee must act with prudence, loyalty, and impartiality in making decisions concerned with the trust.

- Prudence mandates that the trustee act in an informed and cautious way.
- Loyalty requires that the trustee administer the trust solely in the interest of the beneficiaries.
- Impartiality mandates that the trustee treat all beneficiaries equitably.

Use of trust language in the context of Green Amendments establishes a trust in which the government is the trustee, the public are the beneficiaries, and the assets are the environment. By using trust language, governmental entities, as trustee, must abide by the fiduciary duties of prudence, loyalty, and impartiality, when carrying out their obligation to conserve and maintain public natural resources for the benefit of current and future generations.

¹ https://www.law.cornell.edu/wex/public_trust_doctrine

A GREEN AMENDMENT INCORPORATING TRUST RIGHTS

Placing trust language in a Green Amendment will make trust obligations a constitutional duty of governmental actors that cannot simply be brushed aside in decision-making. Such obligations will require that governmental entities prohibit and remedy degradation, whether it is perpetrated through the government or a private actor, and act affirmatively to protect the environment from further degradation through legislative or other action. The trust language will mandate that government ensure that it acts for the benefit of current and future generations, which helps guarantee that all residents have equitable access to a healthy environment. These obligations will not be vested in any single branch of government, but rather, command all branches of government at all levels, including local government, to conserve and maintain public natural resources.

Implications of public trust obligations are many. Two examples include implications flowing from the fiduciary duties of prudence and impartiality.

- First, both of these duties require a scientific, data-driven pre-action analysis to determine a proposed action's impact on the local environment. This pre-action analysis requires that decisions occur only after governmental entities have determined (among other factors) the current environmental conditions of a locality, and effects a proposed action will have on residents. This pre-action analysis must account for all current local environmental impacts to understand how and to what extent the proposed project/action will increase existing pollution/degradation and thus harm to the air, water, and other public natural resources. This pre-action analysis ensures that individual environmental impacts will not amount to unknown or unaccounted for environmental degradation in the aggregate.

A defensible pre-action analysis must ensure that short-term and long-term cumulative impacts are analyzed in order to understand whether an action may disproportionately impact overburdened communities now and/or in the future. Such an analysis will ensure the compounding effects of projects will not lead to unaccounted-for pollution and/or more detrimental effects for current and/or future generations.

- Second, these obligations will ensure decisions on whether to allow a proposed action are equitable and based on facts. As a result, in making decisions, no longer can a lack of evidence be used to say that something is safe, and no longer can future impacts simply be ignored in favor of short-term benefits. In addition, government cannot ignore unfavorable information in an effort to allow an action or decision to advance regardless of the impacts. Furthermore, additional pollution or degradation in a community cannot be excused by that community's history of environmental degradation or for economic reasons. This is because each resident has a right to a clean environment, and the trustee must treat all beneficiaries equitably.

These obligations thus require that government officials understand the impacts of proposed actions or activities, and provides a means to hold government accountable for continuing to burden certain communities with environmental harm.

Other obligations flowing from the public trust involve protections on the usage of funds gained from any exploitation or activity utilizing state natural resources. Often, public natural resources are seen as an easy way to address budgetary shortfalls. However, a Green Amendment with public trust language prevents such diversions, and requires that funds gained from the exploitation of public natural resources are put towards protection and conservation of those resources. Such a mandate ensures that government priorities are to protect the rights of the public to a clean and healthy environment, rather than merely prioritizing the plans of private and public actors to exploit these resources for their own gain and/or to pad the government budget.

Therefore, adding trust language to a Green Amendment will make real the right to a clean and healthy environment for all people in all parts of the government's jurisdiction, no matter their economic status, the environmental history of where they live, their skin color, their mental or physical capabilities, or their education level. It will mandate that government work proactively to prohibit and remedy degradation and ensure that all residents have equitable access to a healthy local environment.