The Public Trust Doctrine – A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources

Susan D. Baer

Follow this and additional works at: http://lawdigitalcommons.bc.edu/ealr

Part of the Administrative Law Commons, Environmental Law Commons, Land Use Law Commons, and the Natural Resources Law Commons

Recommended Citation
THE PUBLIC TRUST DOCTRINE—A TOOL TO MAKE FEDERAL ADMINISTRATIVE AGENCIES INCREASE PROTECTION OF PUBLIC LAND AND ITS RESOURCES

Susan D. Baer*

I. INTRODUCTION

There are approximately 727,000,000 acres of federal public land in the United States.¹ Upon this land there are almost 86,000 miles of streams containing trout, salmon and other fish, thousands of recreational areas, wild animals including burros, horses, caribou, bear, deer, antelope, and an immense variety of other natural resources.²

Several federal agencies are responsible for administrating public land and its diverse resources. Within the Department of the Interior these include, among others, the Bureau of Land Management (BLM), the National Park Service, and the Fish and Wildlife Service.³ Additionally, the Forest Service is within the Department of Agriculture.⁴ Concerned citizen and environmental groups have attacked decisions by each of these agencies regarding use of natural resources.⁵ One area of continuing controversy stems from the agen-

---

¹ U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1987 183 (1986). About one half of the federal public land is located in Alaska. The federal government owns approximately 95% of Alaska because, due to its remoteness, it has been subject to very little development. More than 90% of federally-owned land outside of Alaska is located in eleven western states. A. REITZE, ENVIRONMENTAL PLANNING: LAW OF LAND AND RESOURCES, ch. 5 at 8 (1974).
³ A. REITZE, supra note 1, ch. 5 at 11–12.
⁴ Id. at 5–12.
⁵ See generally Wilkinson, The Public Trust Doctrine in Public Land Law, 14 U.C. DAVIS

385
cies’ classification decisions regarding the federal public lands that they administer. For example, the Multiple-Use Sustained-Yield Act directs the Forest Service to administer national forests for as many uses as will achieve maximum public benefit. Although the Act specifically states that the greatest revenue producing use is not necessarily the most beneficial use, the Forest Service frequently favors high revenue use over other uses due to political pressures.

In spite of the many federal statutes governing public land resources that the public may seek to enforce, courts generally defer to administrative agency expertise in deciding public land controversies. Most courts intervene only in the most egregious cases. Therefore, the public’s interest in public lands is subsumed into federal agency action.

Given the Reagan Administration’s environmental policies and the uncertainty of its successor’s policies, it appears that now, more than ever, new legal tools are necessary to protect public land against politically motivated federal agencies. The public trust doctrine, if clarified and strengthened, may be of future use against federal agency actions.

The public trust doctrine governs the use and disposition of lands by both private parties and the government. Its basic premise is

L. REV. 269 (1980). The concerned citizen and environmental groups include, among others, the Sierra Club, the Friends of Yosemite, and the Audubon Society.

6 Id. at 272.
10 Montgomery, supra note 8, at 138-39.
11 See infra notes 222-39 and accompanying text.
12 The Reagan Administration has not been inclined toward environmental protection. See, e.g., Strock, The Congress and the President: From Confrontation to Creative Tension, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,006, 10,008 (Jan. 1987) (“The [Reagan] Administration has too often appeared to view environmental issues under economists’ eyeshades, and more from the vantage point of regulation affecting commerce than health and safety.”); Oakes, Reagan’s Record on the Environment Fails to Match His Claims, L.A. Daily J., Oct. 29, 1984, at 4, col. 3 (“Ronald Reagan is in fact the only openly anti-environmental president in our history.”) (In support of this statement, Oakes cites President Reagan’s efforts to stop acquisition of much-needed parkland, to destroy wilderness areas through mineral development and reckless road-building, to sell the nation’s timber at below-market rates, and his support of former Secretary of the Interior Watt and former Environmental Protection Agency Administrator Burford in their efforts to undermine the protection of the nation’s environment.); Udall, Introduction to Volume 10 (Critique of President Reagan’s Environmental Policies), 10 ECOLOGY L.Q. 1 (1982)(Congressman Udall discusses the Reagan Administration’s assault on environmental protection and cites, for example, the Administration’s depriving programs of much-needed funds and interpreting a 20-year period of discretionary mineral leasing as being mandatory.).
that certain natural resources are impressed with a trust for the public's benefit. Furthermore, the government has an affirmative duty to act as trustee in regard to these resources, and courts have an obligation to ensure that the government and its agencies fulfill this duty. Under the classic public trust doctrine, the sovereign holds the lands under navigable waters and tidelands in trust for the benefit of its citizens. As trustee, the sovereign has an affirmative duty to protect the trust property and the beneficiaries of the trust, the citizens, have the power to compel the trustee to honor its trust obligations.

This Comment focuses on the public trust doctrine's potential as a tool to force federal administrative agencies to protect natural resources. Section II overviews the public trust doctrine's origins and its development as part of American common law. Section III examines numerous federal statutes through which Congress has implicitly delegated its public trust responsibilities to federal administrative agencies. Section IV explores public trust beneficiaries' rights against these federal administrative agencies to enforce the public trust. Section V posits reasons why these rights, and therefore natural resources themselves, are protected inadequately. Finally, Section VI suggests means to strengthen the public trust doctrine and ways to implement a newly-strengthened doctrine. This Comment concludes that, although the public trust doctrine is not currently an effective tool in forcing federal agency protection of natural resources, it has the potential to be one upon some initiative by the judiciary and future plaintiffs.

II. ORIGINS AND DEVELOPMENT OF THE PUBLIC TRUST DOCTRINE

An examination of the public trust doctrine's historical development is useful as a foundation for understanding the doctrine's present and future role in protecting public resources. On the state level,
the public trust doctrine developed as a source of state power and as a set of affirmative duties owed to, and enforced by, the citizens of each state. On the federal level, the public trust doctrine developed primarily as a source of federal power. Through a series of statutes, Congress has delegated this power, along with its reciprocal obligations, to certain federal agencies. These agencies have then used the statutory delegations to exercise control over public land and resources.

A. Roman and English Law Roots

The roots of the public trust doctrine begin in Roman law. As noted in the work of the Roman jurist, Justinian:

Things common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea . . . .

The use of the sea-shore . . . is also [governed] by the law of nations . . . and all persons are at equal liberty to land their vessels, unload them, and to fasten ropes to the trees upon the banks as to navigate upon the river itself . . . for the shores are not understood to be property in any man, but are compared to the sea itself, and to the sand or ground which is under the sea.17

Several commentators argue that Justinian's book was an idealization of Roman public rights. They state that, in practice, the Roman government frequently conveyed private rights in coastal resources for commercial purposes. Therefore, Roman law may be more useful as a source of theory than as an example of the public trust doctrine in actual use.

Centuries later the public trust doctrine spread to England through the work of Bracton, who incorporated whole passages of the Institutes into his writings in the mid-thirteenth century.19 In England, the doctrine developed into the concepts of *jus privatum*, the right to private ownership, and *jus publicum*, the right vested in the King to hold such property as the sea, rivers, and land below

---

16 See infra notes 53–104 and accompanying text.
the high water mark for the benefit of the public.\textsuperscript{20} Again, commentators have criticized the public trust doctrine as being more of an idealization than a reflection of English law then in force.\textsuperscript{21} One commentator asserts that the government formally recognized public rights in coastal resources only as a means to establish the Crown's ownership of these resources to increase the Crown's wealth.\textsuperscript{22}

\textbf{B. American Common Law Development}

Jurists incorporated the public trust doctrine into American common law through a series of nineteenth century cases.\textsuperscript{23} These cases adopted the division of possible interests in navigable waters found in Lord Chief Justice Hale's 1667 treatise, \textit{De Jure Maris et Brachiorum ejusdem} (Concerning the Law of the Sea and its Arms).\textsuperscript{24} These interests were: 1) \textit{jus publicum}: the right of the general public; 2) \textit{jus regium}: the royal right to manage the kingdom's resources for public safety and welfare, that is, essentially police power; and 3) \textit{jus privatum}: the private right of title.\textsuperscript{25} \textit{Jus publicum} was divided among the federal and states' sovereign interests.\textsuperscript{26}

1. Development at the State Level

Title to American tidewaters and tidelands passed from the English Crown to the Colonies after the American Revolution and then vested in the States in trust for public use.\textsuperscript{27} Although the commerce

\textsuperscript{20} Shively v. Bowlby, 152 U.S. 1, 11 (1894).
\textsuperscript{21} See Deveney, supra note 18, at 36 and Lazarus, supra note 18, at 635.
\textsuperscript{22} Lazarus, supra note 18 at 635. \textit{But see} Lord Mansfield, Rex. v. Eyres, 4 Burr. Part IV 21,190 (1766) ("[T]he King has no interest in this money, he is only Royal trustee for the party."). The Magna Carta is often cited as a pre-Bracton source of public trust rights in coastal areas. This is because it contains the principle that, in some ways, the King was subject to the people and that there were specific limitations imposed on the king's powers. \textit{See Note, supra note 17, at 765. See also} Deveney, supra note 18, at 39.
\textsuperscript{24} Lazarus, supra note 18, at 636; Deveney, supra note 18, at 53.
\textsuperscript{25} Lazarus, supra note 18, at 636; Deveney, supra note 18, at 45.
\textsuperscript{26} There is some question as to whether \textit{jus publicum} vested in the sovereign or whether it vested in the public and was held in trust by the sovereign for the public's benefit. Deveney, supra note 18, at 58.
\textsuperscript{27} Shively, 152 U.S. at 48–49 (citing Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 409–411 (1842)).
clause of the Constitution gave the federal government the right to regulate interstate commerce, the states continued to reserve title to lands under navigable waters.

Nineteenth century case-law established that each state has special powers over water resources that it holds in trust. Additionally, these cases established that each state also owes the public certain enforceable duties. In one of the earliest cases to refer to the public trust concept, *Arnold v. Mundy*, the New Jersey Supreme Court held that the state legislature could not alienate public access and use rights in water resources. Toward the end of the nineteenth century, in the landmark case of *Illinois Central Railroad v. Illinois*, the United States Supreme Court held that the Illinois legislature's grant of submerged lands along the Chicago waterfront impaired the state's *jus regium* and was therefore void. In making this decision, the *Illinois Central* Court stated:

*[The title of Illinois to the lands below the navigable waters of Lake Michigan] is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties . . . . The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. 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.*

The Supreme Court therefore explicitly recognized the public's rights and interests in the free use of navigable waters. Courts
referred to the *Illinois Central* decision throughout the nineteenth and twentieth centuries to support judicial control of state legislatures' excessive grants of public lands to private parties.  

2. Development at the Federal Level

Although the public trust doctrine developed primarily as a matter of state law, there is also judicial precedent for its application to the federal government. For example, in *Pollard's Lessee v. Hagan*, the Supreme Court ruled that the United States held territorial lands under navigable waters as temporary trustee until it transferred the lands to newly-formed states. The Court further stated that the federal government held public lands in trust in order to be able to sell off the lands for "the payment of debt, and to erect new states over the territory thus ceded." Until the mid-nineteenth century, courts considered the federal government to be only a temporary trustee. In the late nineteenth and early twentieth centuries, however, the federal government formally asserted its permanent public trust powers as justification for its protection of federal public lands.

This change in the federal government's role was due, in part, to a developing consensus that public lands should be protected for future generations. For example, in the 1891 case *Knight v. United States Land Ass'n*, the Supreme Court held that the Secretary of the Interior is "the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it." Moreover,
in the 1911 case *Light v. United States*, the Supreme Court upheld Forest Service regulations regarding grazing in national forests, on the grounds that "the public lands . . . are held in trust for the people of the whole country," and "the [g]overnment is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation." Thus the Supreme Court explicitly recognized the federal public trusteeship.

Federal cases in the late nineteenth and early twentieth centuries and their progeny uniformly upheld the federal government's power to take control of public lands. Because federal agencies have become today's federal trustees, it is significant that Congress, even at this early stage in the doctrine's development, considered federal administrative agencies, such as the Forest Service and the Department of the Interior, as the proper implementing agents for federal public trust duties.

### III. STATUTORY DELEGATION OF PUBLIC TRUST POWERS AND DUTIES TO FEDERAL ADMINISTRATIVE AGENCIES

The public trust doctrine languished somewhat in the early twentieth century. It was not until Professor Joseph Sax's seminal and oft-quoted 1970 article that the doctrine was actively incorporated into modern jurisprudence. As a result of Sax's article, a number of scholars have written articles about the public trust doctrine and arguments based upon trust imposed duties have appeared in both state and federal courts.

One issue involved the Secretary of the Interior's power to order a new survey of the land. The Court concluded that the Secretary of the Interior, by virtue of his power over lands in the public domain, had ample power to order a new survey of the land at issue. *Id.* at 176–82.

---

45 *220 U.S. 523 (1911).*

46 *Id.* at 537 (quoting, United States v. Trinidad Coal & Coking Co., 137 U.S. 160 (1890)).

47 *Id.* at 536 (quoting, United States v. Beebe, 127 U.S. 338 (1887)). For further examples of judicial recognition of the federal government's trust duties and powers, see also Utah Power & Light Co. v. United States, 243 U.S. 389 (1917)(injunction proper when issued to prevent unauthorized use of public lands); Camfield v. United States, 167 U.S. 518 (1897)(Congress has authority to prohibit the erection of fences on private land which effectively enclosed public land).

48 *Light, 220 U.S. at 536–37.*

49 As of 1980 there had been eighteen public land cases using trust language to support the federal government's power to protect public lands. *See Wilkinson, supra note 5, at 281.*

50 *Id.*


52 *See, e.g., Lazarus, supra note 18; Deveney, supra note 18; Wilkinson, supra note 5;
In addition to Professor Sax’s resurrection of the public trust doctrine, beginning in the 1970s Congress enacted a series of statutes that implicitly delegated to various federal administrative agencies the power to protect public trust property. These include, among others, the Wild Free-Roaming Horses and Burros Act,\textsuperscript{54} the Federal Land Policy and Management Act (FLPMA),\textsuperscript{55} the National Park Service Act,\textsuperscript{56} and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).\textsuperscript{57}

Congress enacted the Wild Free-Roaming Horses and Burros Act in 1971 to protect “all unbranded and unclaimed horses and burros on public lands of the United States.”\textsuperscript{58} Under the Act, the Secretary of the Interior is “authorized and directed to protect and manage wild free-roaming horses and burros as components of the public lands.”\textsuperscript{59} In \textit{Kleppe v. New Mexico},\textsuperscript{60} the Supreme Court upheld the Act’s constitutionality as a valid exercise of congressional power


\textsuperscript{53} For a brief study of the evolution of federal public land policy up until this period, see Wilkinson, \textit{supra} note 5, at 294–98.


\textsuperscript{58} 16 U.S.C. §§ 1331, 1332 (1982).

\textsuperscript{59} Id. § 1333.

\textsuperscript{60} 426 U.S. 529, \textit{reh'g denied}, 429 U.S. 873 (1976). New Mexico, its Livestock Board and the purchaser of three unbranded burros sought a declaratory judgment that the Wild Free-Roaming Horses and Burros Act was unconstitutional and also sought an injunction against enforcement of the Act. The Board rounded up nineteen unbranded burros pursuant to New Mexico’s Estray Law and sold them at public auction. Pursuant to the Wild Free-Roaming Horses and Burros Act, the Secretary of the Interior demanded that the Board recover the animals and return them to public lands. The Supreme Court held that Congress’ power over public lands under the Property Clause included the power to protect the wildlife living upon such lands. 426 U.S. at 533–35.
under the Property Clause. The Court also discussed the "broad trustee and police powers over wild animals" which states possess but which are subordinate to the paramount power of the federal government. Although originally invoked to protect the public's rights to conduct commerce, navigate and fish in navigable waters, the public trust rationale has been used, at the federal level, to include protection of public lands and wildlife. The Wild Free-Roaming Horses and Burros Act merely codifies the public trust doctrine with regard to wild horses and burros by statutorily empowering and requiring the Secretary of the Interior to protect these animals for the benefit of present and future generations of Americans, the trust beneficiaries.

Congress again delegated power over public trust property to a federal agency in the Federal Land Policy and Management Act of 1976 (FLPMA). This Act directs that:

the public lands be managed [by the Bureau of Land Management] in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

FLPMA, therefore, codifies the public trust doctrine's basic tenets of protection and preservation of natural resources for present and

---

61 426 U.S. at 536-41. See U.S. CONST. art. IV, § 3, cl. 2. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory as other Property belonging to the United States . . . ." U.S. CONST. art. IV, § 3, cl. 2. The Property Clause has been cited both in case-law and in law review articles as a possible source of the federal government's power to enforce its public trust duties. See infra notes 292-306 and accompanying text.

62 426 U.S. at 545.


66 43 U.S.C. § 1701(a)(8) (1982). Per Title III of the Act, the Secretary of the Interior must maintain an inventory of public lands and manage them according to FLPMA regulations. Id. §§ 1733, 1740. Per Title IV, the Secretary may issue permits and leases regarding grazing on public lands. Id. §§ 1751-1753. Per Titles V and VI, the Secretary may grant rights-of-way over public lands and designate certain land as wilderness. Id. §§ 1761-1771, 1782. For discussion of problems of FLPMA implementation, see Gregg, Federal Land Transfers in the West Under the Federal Land Policy and Management Act, 1982 UTAH L. REV. 499.
future generations. The Act further requires the Department of the Interior's Bureau of Land Management (BLM) to manage the public lands on the basis of multiple-use and sustained-yield.\textsuperscript{67} This means that the public lands are to be administered for as many uses as will achieve maximum public benefit.\textsuperscript{68} Due to political pressures, however, the BLM consistently favors economic uses over non-economic uses.\textsuperscript{69} As a result, the Act has lost some of its original force.

The theory and values espoused in the public trust doctrine also appear in other congressional delegations of power to federal agencies. For example, the National Park Service Organic Act\textsuperscript{70} established the national park system and authorized the Secretary of the Interior to administer that system.\textsuperscript{71} The purpose of the Act is to "conserve the scenery and the national and historic objects and the wildlife [in national parks, monuments, and reservations]... and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."\textsuperscript{72} A 1978 amendment to the Act, intended to clarify regulatory authority, further mandates that "the protection, management, and administration of these areas... be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established..."\textsuperscript{73} Therefore, the National Park Service Organic Act imposes


\textsuperscript{68} Montgomery, supra note 8, at 137. For a more in-depth discussion of the multiple-use sustained-yield policy, see infra notes 244-59 and accompanying text.

\textsuperscript{69} Montgomery, supra note 8, at 139. Examples of economic and non-economic uses are: oil development versus preservation as a wildlife refuge; lumber operations versus preservation as a national forest; and dam construction versus protection of endangered species.

\textsuperscript{70} 16 U.S.C. §§ 1-460 (1982 & Supp. IV 1986). Although this Act was originally promulgated in 1916, it is included with the analysis of post-1970 statutes because of its substantive 1978 amendment.


a duty on the Secretary of the Interior to act as trustee of national parks and to protect them for enjoyment by present and future beneficiaries of the trust.

The most recent delegation of Congress' public trusteeship powers is through the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). In enacting CERCLA in 1980, Congress authorized federal and state governments, as trustees, to recover from responsible parties for damages to natural resources caused by releases of hazardous substances. Section 101(16) defines natural resources as: "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . ., and State or local government . . . ." Section 107(f) provides:

The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for . . . damages. Sums recovered by the United States government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources.

Section 107(f) further requires the President to designate those federal officials who will act as natural resources trustees.

---

78 Pub. L. No. 99-499, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1629. The National Contingency Plan, as codified at 40 C.F.R. § 300.72, designates four classes of federal trustees: (1) “the head of . . . [a] Federal land managing agency” is trustee for “damage to resources of any kind located on, over, or under land subject to the management or protection
Unlike the federal statutes discussed previously, CERCLA does not require the executive branch to affirmatively protect natural resources. It does, however, empower the executive branch to seek retribution for damages to natural resources once such damages have already occurred. Arguably, the deterrent effect of CERCLA will result in indirect protection of natural resources by discouraging responsible parties from permitting injurious releases of hazardous substances. To date, however, the federal government has been slow to exercise its powers under CERCLA's natural resource provisions. Also, few citizen groups have attempted to use CERCLA's citizen suits provision to force any federal agency to honor its trusteeship duties. Because the delegation of public trust powers encompassed in CERCLA is relatively undiscovered both by agencies and by citizen groups, its effectiveness in providing even after-the-fact protection of natural resources remains to be seen.

Although pre-1970s acts are not to be attributed to Professor Sax's reintroduction of the public trust doctrine into American jurisprudence, some of these acts contain delegations of congressional authority regarding public trust property and have been invoked to impose trust duties. These delegating acts include, among others:

of . . . [that agency];" (2) "the head of . . . [a] Federal [resource] agency" is trustee for "damage to fixed or non-fixed resources subject to the management or protection of . . . [that] agency;" (3) the Secretary of Commerce; and (4) the Secretary of the Department of the Interior. 40 C.F.R. §§ 300.72(a)(1)-300.72(d)(2) (1987). 


[A]ny person may commence a civil action on his own behalf—(1) against any person (including the United States and any other governmental instrumentality or agency . . .) who is alleged to be in violation of any standard, regulation, condition, requirement or order which has become effective pursuant to this Act . . .; or (2) against the President or any officer of the United States (including the Administrator of the Environmental Protection Agency . . .) where there is alleged a failure of the President or of such other officer to perform any act or duty under this Act which is not discretionary . . . .

Id.

the Wilderness Act;\textsuperscript{83} the Rivers and Harbors Appropriation Act;\textsuperscript{84} and the National Environmental Policy Act of 1969 (NEPA).\textsuperscript{85}

The Wilderness Act\textsuperscript{86} established the National Wilderness Preservation System, which is comprised of federal lands that are designated as wilderness areas.\textsuperscript{87} The Act’s policy is to “secure for the American people of \textit{present and future generations} the benefits of an enduring resource of wilderness.”\textsuperscript{88} Additionally, wilderness areas are to be “administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the \textit{protection} of these areas [and] the \textit{preservation} of their wilderness character . . . .”\textsuperscript{89}

The Rivers and Harbors Appropriation Act,\textsuperscript{90} another statutory delegation of public trust duties, protects navigable waters and thus embodies the original thrust of the public trust doctrine. This Act prohibits the construction of a “bridge, causeway, dam or dike” across or in any navigable water of the United States except by congressional consent.\textsuperscript{91} The Act also prohibits deposits of refuse in navigable waters.\textsuperscript{92} The Corps of Engineers is responsible for implementing the public trust duties imposed by this Act.\textsuperscript{93}

Finally, NEPA\textsuperscript{94} embodies an all-encompassing statutory delegation of public trust duties. Its purpose is to “declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or

\textsuperscript{87} 16 U.S.C. § 1131(a)(1982). Examples of designated wilderness areas are: Eagles Nest Wilderness of Colorado; Petrified Forest National Wilderness of Arizona; Allegheny Islands Wilderness of Pennsylvania; River of No Return Wilderness in Idaho; and Ansel Adams Wilderness of California. 16 U.S.C. § 1132(e) (1982).
\textsuperscript{91} 33 U.S.C. § 401 (1982).
\textsuperscript{93} 33 C.F.R. § 322, app. B (1982).
eliminate damage to the health and welfare of man; to enrich the understanding of the ecological system and natural resources important to the Nation; and to establish a Council on Environmental Quality.” NEPA’s express goals are to:

fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assure . . . safe, healthful, productive and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without . . . unintended consequences; (4) preserve . . . our national heritage, and maintain . . . an environment which supports diversity and variety of individual choice; (5) achieve a balance between population and resource use . . . ; and (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depleted resources.

Although NEPA does not specify congressional intent regarding enforcement, courts have interpreted the Act to establish judicially-enforceable obligations. In imposing a duty to preserve the “environment” for future generations, NEPA is a direct and complete codification of the public trust doctrine. The statutes discussed thus far have encompassed the public trust doctrine as it applies to specific trust property, such as: wild free-roaming horses and burros; public lands; parks; wilderness areas; and navigable waters. In contrast, NEPA, in a sense a catch-all statute, mandates that all public trust property be protected and preserved for present and future generations.

These public land and natural resource statutes suggest that Congress is aware of its public trust obligations. In fact, some of the language in these acts indicates that Congress does indeed take its obligations seriously, and wishes to ensure that the public trust

97 See, e.g., Calvert Cliffs’ Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). In Calvert Cliffs’, Judge Skelly Wright concluded that NEPA “mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties.” Id. at 1115. For a more in-depth discussion of NEPA, see Murchison, Does NEPA Matter?—An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act, 18 U. RICH. L. REV. 557 (1984).
corpus is protected adequately for present and future generations. Moreover, as discussed above, several federal administrative agencies already have statutory duties to protect what, under the public trust doctrine, is public trust property. This Comment, however, posits that it is the public trust beneficiaries' powers to enforce these obligations that will make the public trust doctrine an effective tool in protecting our nation's natural resources.

IV. PUBLIC TRUST BENEFICIARIES' RIGHTS AGAINST FEDERAL ADMINISTRATIVE AGENCIES

According to Professor Sax, to be viable, the public trust doctrine must encompass a legal right that is: (1) vested in the public; (2) enforceable against the government; and (3) harmonious with environmental concerns. At the federal level, the public trust doctrine has developed primarily as a source of governmental power to control public resources. Congress, however, has delegated implicitly both the power and the obligation to protect public resources to federal administrative agencies via several different statutes. The public trust doctrine has thus developed to the point where there is at least an implicit legal right vested in the public. Therefore, the first of Professor Sax's mandates has been met. The question remains, however, whether the public trust doctrine leads to enforceable rights against the federal government. Environmental groups have sought to compel federal administrative agencies to honor trust obligations imposed by these statutes. In addition, courts have held in a few cases that the federal government and its agencies have separate non-statutory public trust obligations.

A. Enforceability of Trustee Duties Against Federal Agencies By, or In Conjunction with, Federal Statutes

Non-profit environmental groups, among others, have sought to compel federal agencies to honor their public trust duties through, or in conjunction with, federal statutes. These groups typically argue

---

103 See supra notes 66, 72, 76, and 96 and accompanying text.
104 See supra notes 53-103 and accompanying text.
105 See Sax, supra note 51, at 474. For the purposes of this Comment, only Sax's first and second mandates will be discussed.
106 See supra notes 38-50 and accompanying text.
107 See supra notes 51-103 and accompanying text.
108 See infra notes 110-78 and accompanying text.
109 See infra notes 179-211 and accompanying text.
either that a federal statute itself imposes public trust duties, or that public trust duties exist as a supplement to statutory duties. In general, courts have been more receptive to the former argument.

1. The National Park Service Act

Prior to 1978, the leading case for imposing public trust duties on federal agencies in conjunction with the National Park Service Act was *Sierra Club v. Department of the Interior*. In that case, the Sierra Club, a non-profit environmental group, sued the Department of the Interior in 1974 to compel it to exercise its protective powers over Redwood National Park. Despite the federal establishment of Redwood National Park in 1968, continued logging from adjoining private lands within the Redwood Creek watershed threatened to destroy parkland redwoods. In *Sierra Club I*, District Judge Sweigert found that the Redwood National Park Act, the National Park Service Act, and the public trust doctrine imposed legal duties upon the Secretary of the Interior:

> to utilize the specific powers given him whenever reasonably necessary for the protection of the park and that any discretion vested in the Secretary concerning time, place and specifics of the exercise . . . [was] subordinate to his paramount legal duty imposed, not only under his trust obligation but by the statute itself, to protect the park.

The court further found that the complaint was sufficient and therefore denied the Secretary's motion to dismiss.

After *Sierra Club I*, the Department of the Interior conducted further studies of Redwood National Park and attempted to negotiate cooperative agreements with the logging companies whose op-

---

110 376 F. Supp. 90 (N.D. Cal. 1974) [hereinafter *Sierra Club I*].
111 Id. at 92–93.
112 Id.
115 In describing the Secretary of the Interior's fiduciary obligations, the court stated: "The Secretary is the guardian of the people of the United States over the public lands." 376 F. Supp. at 93 (quoting Knight v. United States Land Ass'n, 142 U.S. 161, 181 (1891)). For a discussion of *Knight*, see * supra* note 43 and accompanying text.
117 Id. at 96.
erations were damaging the parkland redwoods. The court maintained continuing jurisdiction over this matter and issued two additional opinions. In *Sierra Club II*, Judge Sweigert held that the Secretary had acted unreasonably, arbitrarily, and in abuse of his discretion by not taking further steps to protect the Park as required by his statutory and public trust duties. The court ordered the Secretary to take reasonable steps within a reasonable time to protect the Park. Those steps included: buying land on the periphery of the Park; modifying Park boundaries; and resorting to Congress to seek appropriation of funds to implement the foregoing steps.

In response to this court order, the Department of the Interior submitted to Congress a report setting forth five alternatives for protecting the Park. The Department also requested, and was denied, Office of Management and Budget funds for implementing these alternatives. Finally, the Department suggested that the Justice Department commence litigation against certain companies to restrain their logging practices that were endangering the Park.

In *Sierra Club III*, the court held that the Department of the Interior had, in good faith, attempted to perform its duties within the limits of the funds provided by Congress and that "primary responsibility for the protection of the Park rest[ed], no longer upon Interior, but squarely upon Congress . . . ." The *Sierra Club II* court specifically recognized affirmative public trust duties imposed

---

118 Sierra Club v. Department of the Interior, 398 F. Supp. 284, 287–91 (N.D. Cal. 1975) [hereinafter *Sierra Club II*]. Beginning in April 1969, the Secretary of the Interior conducted five consecutive studies of the damage to the Park caused by logging operations. These included: the Stone Report of 1969, which recommended that buffers be established around the perimeters of the Park; the Preliminary Draft Master Plan of 1971, which again stated the need for a buffer zone; the National Park Service Proposal of November 1971, which recommended special forest management practices, and acquisition of a buffer zone and lands along tributary streams; the Earth Satellite Report of 1972, which included aerial documentation of damage to the Redwoods and a list of logging practices which accelerated the erosion process; and the Curry Task Force Report of 1975, which recommended cooperative agreements with logging companies, acquisition of a buffer zone, and a stream monitoring system.

119 *Id.* at 293.

120 *Id.* at 294.

121 *Id.*

122 *See* Sierra Club v. Department of the Interior, 424 F. Supp. 172, 173–74 (N.D. Cal. 1976) [hereinafter *Sierra Club III*]. The five proposed alternatives were: "(1) reliance on state regulation; (2) cooperative agreements . . . ; (3) acquisition of land through leasing and less-than-fee interests . . . ; (4) acquisition of fee interest of land [to enlarge present boundaries] . . . ; and (5) long-range land use planning . . . ." *Id.* at 173.

123 *Id.* at 173–74.

124 *Id.* at 174.

125 *Id.* at 175.
in conjunction with federal statutes and ordered the Secretary of the Interior to honor these duties. The Sierra Club III court, however, was only willing to require fulfillment of such duties to the extent allowed by financial considerations.

In September 1976, three months after the Sierra Club III decision, plaintiffs in Friends of Yosemite v. Frizzell sought declaratory and injunctive relief, as well as compensatory and punitive damages, with regard to: construction of certain sanitation and housing facilities in Yosemite National Park; the firing of three of the plaintiffs from employment in Yosemite; and an alleged publicity campaign to promote the use of the Park for business conventions. The Friends of Yosemite claimed that the Secretary of the Interior's actions violated the public trust duties imposed upon him under the National Park Service Act. They also relied upon both Sierra Club I and Sierra Club II to support their contention that a breach of this fiduciary duty gives rise to a private cause of action.

In Friends of Yosemite, a California federal district court held that, because the National Park Service Act specifically authorized construction of sanitation facilities and tourist promotion, it was unnecessary "to decide whether a private right of action [would] exist for a breach of trust under the facts of this case because there is no evidence that . . . either the Department of the Interior or the National Park Service violated any legal duty." Additionally, the court stated that plaintiffs failed to allege any facts indicating the Secretary acted "unreasonably, arbitrarily [or] in abuse of discretion." The court further suggested that, even if the federal defendants erred in their decision not to issue an environmental impact statement, this error would constitute a violation of NEPA, not a breach of trust.

Once the Friends of Yosemite court found that agency actions were specifically authorized by a federal statute, it saw no need to
consider common law duties preempted by that statute. The court indicated, therefore, that it would not recognize "fiduciary duties" per se, only specific statutory duties. Part of the problem may be that the Sierra Club plaintiffs argued, and the court agreed, that the Secretary's actions violated both statutory duties and public trust duties. The Friends of Yosemite plaintiffs failed to argue breach of non-statutory trust duties. Accordingly, once the court found that the Secretary's actions were specifically statutorily authorized, it had no alternative but to find for the defendants. Moreover, on the facts, the Friends of Yosemite plaintiffs had a weaker case than the Sierra Club plaintiffs.

In 1978, Congress, perhaps in response to Sierra Club III's message, amended the Redwood National Park Act to authorize large additions of adjoining timberland to the Park. The legislative history of this amendment indicates a congressional intent to abrogate any distinction between statutory and non-statutory public trust duties:

This restatement of these highest principles of management is also intended to serve as the basis for any judicial resolution of competing private and public values and interest in the areas surrounding Redwood National Park and other areas of the National Park System . . . . The committee [on Energy and Natural Resources] has been concerned that litigation with regard to Redwood National Park and other areas of the system may have blurred the responsibilities articulated by the 1916 Act creating the National Park Service . . . . [T]he primary purpose of Subsection 1(b) which amends the Act of 1970 . . . is to refocus and insure that the basis for decision-making concerning the National Park system continues to be the criteria provided by 16 U.S.C. § 1 [the National Park Service Act] . . . .

Such language as "the criteria" and "the basis" seems to preclude imposition of non-statutory public trust duties with regard to the National Park System.

136 398 F. Supp. at 293.
137 420 F. Supp. at 393.
138 The Sierra Club III court held that the Secretary of the Interior's limited actions to remediate his breach of trust duties were sufficient given the financial constraints imposed by Congress. 424 F. Supp. at 175.
140 Id. at 260; S. REP. No. 528, 95th Cong., 1st Sess. 9 (1977). See also H. REP. No. 581, 95th Cong., 1st Sess. 21 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 463-95. For a detailed discussion of the legislative history of the amendment, see Hudson, supra note 114, at 847-56; see also Keiter, supra note 73, at 371-75.
141 S. REP. No. 528, 95th Cong., 1st Sess. 8, 13-14 (1977)(emphasis added).
In Sierra Club v. Andrus, the court interpreted the legislative history of the 1978 amendment to the Redwood National Park Act to limit the public trust doctrine such that the federal defendants' only responsibilities with regard to the National Park System were statutorily-imposed ones. In Andrus, the Sierra Club sued the Secretary of the Interior, various officials of the National Park Service, and the Bureau of Land Management to require them to assert and to protect federally-reserved water rights in certain water courses located within the National Park System. Plaintiff also sought a declaration that such water rights existed. It argued that the defendants had failed to fulfill statutory obligations imposed under the National Park Service Act, the Federal Lands Policy and Management Act of 1976, and other laws. The Sierra Club further alleged that the defendants had failed to fulfill public trust obligations imposed by these enumerated statutes.

The Andrus court found that: “The legislative history of the 1978 amendment . . . makes clear that any distinction between ‘trust’ and ‘statutory’ responsibilities in the management of the National Park System is unfounded.” The court, therefore, dismissed the plaintiff's breach of trust claims for failure to state a claim for which relief can be granted. As to the statutorily-imposed duties, the court stated that, because a task force was implementing the very action plaintiff sought to compel, the Secretary's decision to refrain from litigation over these particular federally-reserved water rights had a rational basis. In sum, the court held that the Secretary's decision was not arbitrary or capricious, he had not violated any

---

143 Id. at 449.
144 Id. at 445. The water courses are the Escalante River, the Paria River, Kanab Creek, and Johnson Wash. Id. Plaintiffs allege that the federal reserved water rights arose by virtue of the waters' locations in the Grand Canyon National Park, Glen Canyon National Recreation Area, and Bureau of Land Management lands. Id.
145 Id.
147 487 F. Supp. at 449.
148 Id.
149 Id. at 452.
150 Id.
statutory duties, and he was not subject to any "trust" duties because such duties were indistinguishable from his statutorily-imposed duties.\textsuperscript{151}

In sum, prior to Congress' 1978 amendment to the Redwood National Park Act, the \textit{Sierra Club} court was willing to recognize, and impose, public trust duties in conjunction with duties imposed by the National Park Service Act.\textsuperscript{152} In \textit{Friends of Yosemite}, the same court found no need to determine whether plaintiffs had a separate cause of action under the public trust doctrine because the defendants' actions were sanctioned specifically by statute.\textsuperscript{153} After Congress' 1978 amendment to the Redwood National Park Service Act, however, in \textit{Sierra Club v. Andrus}, the Federal Court of Appeals for the District of Columbia refused to recognize public trust duties imposed in conjunction with the National Park Service Act because it found the legislative history of the 1978 amendment clearly indicated congressional intent to abrogate, at least with regard to the National Park System, any distinction between statutory and non-statutory public trust duties.\textsuperscript{154}

2. The Rivers and Harbors Appropriation Act

The Rivers and Harbors Appropriation Act\textsuperscript{155} is another federal statute through which plaintiffs may seek to establish affirmative

\textsuperscript{151} 487 F. Supp. at 452. The Sierra Club took a narrow appeal from the district court's judgment, appealing only that portion of the decision where the court declined to decide whether FLPMA conferred by implication federally-reserved water rights in waters adjacent to lands managed by the BLM. \textit{See Sierra Club v. Watt}, 659 F.2d 203 (D.C. Cir. 1981)(The Court of Appeals held that FLPMA's mere passage did not result in reserved water rights.). \textit{See also} Conservation Law Foundation v. Clark, 590 F. Supp. 1467 (D. Mass. 1984). In \textit{Clark}, the Conservation Law Foundation (CLF) challenged the National Park Service's plan regulating use of off-road vehicles on the Cape Cod National Sea Shore. \textit{Id.} at 1470–71. CLF argued that the Secretary of the Interior's adoption of the plan violated, \textit{inter alia}, the National Park Service Act and the public trust doctrine. \textit{Id}. In response to plaintiffs' public trust claim, the court stated, in a footnote, that it "recognize[d] the duty of the Secretary of the Interior to see that 'none of the public domain is wasted or is disposed of to a party not entitled to it.'" \textit{Id.} at 1480 n.8 (quoting Knight v. United States Land Ass'n, 142 U.S. 161, 181 (1891)). However, the court then stated that, in light of the specific statutory mandates to protect the seashore, "any further consideration of such general implied public trust duties would be inconsequential to the court's ultimate decision." \textit{Id.} at 1480 n.8. The \textit{Clark} court, therefore, like the \textit{Andrus} court, refused to impose non-statutory public trust duties when there existed specific statutory duties.

\textsuperscript{152} 376 F. Supp. at 95–96; 398 F. Supp. at 293.

\textsuperscript{153} 420 F. Supp. at 393.

\textsuperscript{154} 487 F. Supp. at 449.

federal public trust duties. The Act protects navigable waters and, inter alia, prohibits deposits of refuse in navigable waters.156

District of Columbia v. Air Florida, Inc.157 is an example of a case where the plaintiff could have been more successful if it had sought to establish public trust duties through the Rivers and Harbors Appropriation Act. In 1983, the District of Columbia brought an action against Air Florida to recover the costs of emergency services and cleanup that resulted from the crash of an Air Florida jet into the Rochambeau Memorial Bridge and the Potomac River.158 The District of Columbia, in its appeal from the district court’s dismissal for failure to state a claim, contended that it had alleged facts sufficient to recover under two legal theories: first, a municipality may recover from negligent tortfeasors the costs of “extraordinary” emergency services; and second, Air Florida had a duty not to interfere with the federal public trust responsibilities for the Potomac River that Congress had delegated implicitly to the District of Columbia.159

Under its second legal theory, the District contended that, even though the United States holds title to that section of the Potomac River and is therefore sovereign trustee, Congress’ implicit delegation of its public trust responsibilities to the District, by conferring to the District significant control over the river, made the District “surrogate trustee.”160 Rather than arguing that the federal government’s public trust duties to protect navigable waters devolved from the Rivers and Harbors Appropriation Act, the District argued that these reponsibilities stemmed from the common law public trust doctrine.161 The court of appeals held that the District of Columbia’s failure to raise this novel public trust theory in the district court, and to allege facts that would have alerted the district court to the relevance of the public trust doctrine, justified the appellate court’s refusal to exercise its discretion to entertain new theories on appeal.162

156 For a brief discussion of the Act, see supra notes 90–93 and accompanying text.
157 750 F.2d 1077 (D.C. Cir. 1984).
159 District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1081 (D.C. Cir. 1984). To support its proposition that it was the recipient of Congress’ public trust responsibilities for the Potomac River, the District of Columbia cited D.C. CODE ANN. §§ 22-1701–22-1703(a) (1981 & Supp. 1986), which empowered the District to promulgate and enforce harbor regulations. Id. at 1081 n.11.
160 750 F.2d at 1081.
161 Id.
162 Id. at 1078–79.
Although the appellate court affirmed the dismissal, it took the opportunity to make a thorough analysis of the public trust doctrine's history. After making this analysis, the court stated two additional bases to reinforce its decision not to consider the District's public trust claim. First, the court noted that the United States was not a party to the action, and stated that resolution of these issues should be left to a case where the District of Columbia has an opportunity to join the United States. Second, the court stated that Congress had already legislated extensively regarding many public trust interests and such legislation included, \textit{inter alia}, the Rivers and Harbors Appropriation Act. The court expressed concern that this legislation may preempt all, or part, of the alleged federal common law duties. Although the \textit{Air Florida} court was obviously intrigued by the concept of a federal common law public trust doctrine, its decision seems to follow the \textit{Sierra Club v. Andrus} rationale. That is, if there are public trust duties, they are indistinguishable from, and may only be imposed through, related statutory duties.

3. The Wilderness Act

The most recent attempt to impose public trust obligations upon federal administrative agencies in conjunction with a federal statute is \textit{Sierra Club v. Block}. In \textit{Block}, the Sierra Club asserted that federal defendants failed to claim and protect federally-reserved water rights in designated wilderness areas in violation of their duties under the Wilderness Act to protect and preserve wilderness areas for the benefit of present and future Americans, and their additional duties under the public trust doctrine “to protect and preserve [public] lands for the public’s common heritage.” The federal district court found that a common law public trust duty did
1988] PROTECTING FEDERAL LAND 409

exist. The court stated that: "Consistent with the right to use the lands for public purposes, the government has a duty under this doctrine to protect and preserve the lands for the public's common heritage." The Block court went on to state, however, that it was not for the courts, but for Congress, to say how the trust should be administered. The court cited Sierra Club v. Andrus in support of its determination that congressional statutory directives comprised all the federal agency defendants' public trust responsibilities. The court further stated that, because the Wilderness Act itself imposed public trust duties, it was unnecessary to resort to a common law public trust doctrine to assert protection of these public trust resources.

The line of cases examined thus far indicates that courts have been unwilling to impose public trust duties except in conjunction with a federal statute or as required by a statute itself. As discussed in the next section, however, there remains the possibility that public trust beneficiaries could enforce public trust duties against the federal government without reference to a federal statute.

B. Enforceability of Federal Agencies' Trustee Duties Without Reference to Federal Statutes

Although courts, in general, have been unwilling to impose non-statutory public trust duties against the federal government, three recent cases indicate that courts may be more willing to impose such duties.

174 Id.
175 Id.
177 622 F. Supp. at 866.
178 Id. at 1501-1502.
In *In re Steuart Transportation Co.*, the federal government and Virginia sued the owner of a tank barge for compensatory damages for damage to migratory fowl, statutory penalties, and cleanup costs resulting from an oil spill in Chesapeake Bay. The defendant, Steuart Transportation Co., moved for summary judgment, claiming that neither the federal nor the state government could maintain the action because neither owned the birds. The federal district court agreed that neither owned the birds, but ruled that: "Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public’s interest in national wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people." The opinion does not, however, offer any analysis as to why the common law public trust doctrine creates a right in, and imposes a duty upon, the federal government. Its value in clarifying the federal public trust doctrine, therefore, is limited.

The second recent decision that suggests a willingness upon the part of the judiciary to recognize non-statutory federal public trust duties is *United States v. 1.58 Acres of Land.* In that case, the United States sought to condemn and take certain waterfront property in fee simple for use in redeveloping a Coast Guard Support Center and “for such other uses as may be authorized by Executive Order.” The Commonwealth of Massachusetts objected. The state contended that the language “for such other uses” could allow the United States to convey fee simple to the submerged lands to private individuals and this would “vitiate the perpetual public trust that is impressed upon land below the low water mark and which is administered by the Commonwealth.”

After a thorough analysis of the development of the public trust doctrine, the *1.58 Acres of Land* court held that the United States could take the property in fee simple, but subject to certain restrictions. The court stated that, even though the “state’s administra-

---

181 Id. at 39.
182 Id.
183 Id. at 40 (emphasis added).
184 In *District of Columbia v. Air Florida, Inc.*, discussed supra at notes 157–69 and accompanying text, the District of Columbia Court of Appeals criticized *In re Steuart Transportation Co.* for its lack of analysis. 750 F. 2d at 1083.
186 Id. at 121.
187 Id.
188 Id.
189 Id. at 124–25.
tion of the trust is subject to paramount rights of the federal government to administer its trust . . .,”190 neither the state’s nor the federal government’s public trust responsibilities were destroyed by the taking.191 Each sovereign was restricted, therefore, in its ability to abdicate its jus publicum in the submerged lands.192 U.S. v. 1.58 Acres of Land stands for the proposition that, even in the absence of a statutory mandate, both federal and state governments are charged with public trust duties with respect to submerged lands.193

In a third recent case, City of Alameda v. Todd Shipyards Corp.,194 a court not only recognized the federal government’s non-statutory trust duties but also affirmatively imposed such duties on the federal government.195 The case involved a title dispute over 4.9 acres of land bordering an army base on an estuary in Alameda, California.196 When California became a state in 1850, it succeeded the federal government as public trustee of the land located between the high and low water mark.197 United States engineers filled a large portion of the land between 1870 and 1913.198 In 1913, California, by statute, transferred title to the land to Alameda which, by city ordinance, granted the land back to the United States in 1931.199 In 1943, the United States condemned the remaining portion of the land at issue that Alameda had neglected to convey in 1931.200 Then, in 1970, the United States purportedly sold the land to Todd Shipyards, a private corporation.201

Alameda argued that, because the land was subject to the public trust, the conveyance to Todd Shipyards was void and that the land should revert to the City.202 The court held that, because the public trust doctrine bars alienation of trust land to private parties without legislative permission, the United States lacked the authority to convey the land to Todd Shipyards and the conveyance was void.203

190 Id. at 124.
191 Id. at 124–25.
192 Id. See supra notes 25–26 and accompanying text for a definition of jus publicum.
193 Id. at 124–25.
194 632 F. Supp. 333 (N.D. Cal. 1986). The court resolved certain issues in this opinion, resolved other issues in a subsequent opinion, 635 F. Supp. 1447 (N.D. Cal. 1986), and will address the remaining issues in an opinion yet to be written.
195 632 F. Supp. at 341.
196 Id. at 335.
197 Id.
198 Id.
199 Id.
200 Id. at 336.
201 Id. at 335.
202 Id.
203 Id. at 335–37.
As a result, legal title reverted to the United States.\textsuperscript{204} Further, even with regard to the filled land, the United States "was obligated to hold the land in trust for navigation and public use."\textsuperscript{205} As to the portion of the land acquired by condemnation, the court, in a second opinion, directed the parties to submit affidavits showing whether that land was "subject to the action of the tides"\textsuperscript{206} at the time of condemnation.\textsuperscript{207} The court cited United States v. 1.58 Acres of Land\textsuperscript{208} for the proposition that, if the land was tideland at the time of condemnation, then "[t]he United States may not abdicate the role of trustee for the public . . . ."\textsuperscript{209} The City of Alameda court, therefore, not only recognized the federal government's non-statutory public trust duties, by requiring the government to hold the land for a public use, but it also affirmatively imposed trust duties by voiding the government's attempt to breach its trust duties.\textsuperscript{210}

In the foregoing three recent cases, courts have suggested that the federal government may be subject to non-statutory trust duties.\textsuperscript{211} These cases may indicate that the judiciary will impose separate public trust duties on federal agencies, at least where there are no statutory duties to protect the trust resources at issue. At the state case-law level, beneficiaries of the public trust have successfully forced both state governments and their agencies to honor non-statutorily-imposed public trust duties.\textsuperscript{212} At the federal level, however, as discussed previously,\textsuperscript{213} federal courts generally will not impose non-statutory public trust duties.\textsuperscript{214} Yet, they will, on occasion, compel federal agencies to fulfill their statutory trust duties.\textsuperscript{215}

\textsuperscript{204}Id. at 337.
\textsuperscript{205}Id. at 341. The court held that "[m]ere filling does not remove the public trust obligations [of the United States] . . . ." Id.
\textsuperscript{206}635 F. Supp. at 1451.
\textsuperscript{207}Id.
\textsuperscript{209}Id. at 1450.
\textsuperscript{210}632 F. Supp. at 336–37, 341; 635 F. Supp. at 1450.
\textsuperscript{212}See, e.g., Robbins v. Department of Public Works, 355 Mass. 328, 244 N.E.2d 577 (1969)(Department of Public Works enjoined under public trust doctrine from building highway across meadow); City of Zumbrota v. Strafford Western Emigration Co., 290 N.W.2d 621 (Minn. 1980)(city enjoined under public trust doctrine from selling public square to developer); Stephenson v. County of Monroe, 43 A.D.2d 897, 351 N.Y.S.2d 232 (1974)(county enjoined under public trust doctrine from using park as sanitary landfill).
\textsuperscript{213}See supra notes 110–78 and accompanying text.
\textsuperscript{214}See supra notes 128–78 and accompanying text.
\textsuperscript{215}Id.
Unless the public trust doctrine, whether statutory or non-statutory, is strengthened, however, given the problems that are analyzed in the next section of enforcing even statutorily-imposed public trust duties, there is little likelihood of the public trust doctrine becoming a potent tool to make federal agencies protect trust resources.

V. PROBLEMS WITH JUDICIAL REVIEW OF FEDERAL AGENCIES’ PUBLIC TRUST RESOURCE DECISIONS

Congress delegated its public trust powers and duties to federal administrative agencies through numerous statutes. Various beneficiaries of this public trust have attempted to compel federal administrative agencies to fulfill their trust obligations through legal actions. Each of these plaintiffs has encountered procedural and substantive hurdles to achieving their goals of governmental accountability for environmental decision-making. These hurdles stem from judicial review of agency decisions regarding the use of public trust resources. The problems plaintiffs have encountered include: judicial deference to agency expertise; the public trust doctrine’s lack of clear definition, thus the difficulty of implementing its standards; and, the judiciary’s blind deference to federal agencies’ misuse of the federal multiple-use sustained-yield acts.

A. Judicial Deference to Agency Expertise

The Administrative Procedure Act and the Mandamus Act give federal district courts jurisdiction to compel a federal employee, officer or agency to perform a duty owed to plaintiffs. The two exceptions to this jurisdiction are: (1) where there exists clear and convincing evidence that Congress intended to preclude judicial review; and, (2) where agency action is committed to agency discretion. In Citizens to Preserve Overton Park, Inc. v. Volpe, the

216 For a discussion of potential means to strengthen the public trust doctrine, see infra notes 260–356 and accompanying text.
217 See supra notes 51–103 and accompanying text.
218 See supra notes 110–78 and accompanying text.
219 See infra notes 222–39 and accompanying text.
220 See infra notes 240–43 and accompanying text.
221 See infra notes 244–59 and accompanying text.
Supreme Court emphasized that the second of these exceptions is very narrow.\textsuperscript{226} The Court stated that there is a basic presumption in favor of judicial review, and that the exception is applicable only in "rare instances."\textsuperscript{227}

Once a court determines that an action is reviewable, it must then apply a standard of review. Agency actions must be supported by substantial evidence\textsuperscript{228} and, \textit{inter alia}, must not be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."\textsuperscript{229} However, it is very difficult to establish that agency action has met these conditions. Once a court has determined that there is some rational basis for an agency's decision, the court very often defers to the agency's expertise.\textsuperscript{230} Courts generally have been hesitant to override administrative agencies' decisions for fear of substituting their own judgments for the agencies.\textsuperscript{231}

It is also a well-established principle that an agency's interpretation of its enabling statute and its regulations is entitled to great deference.\textsuperscript{232} The Secretary of the Interior's interpretation of the National Park Service Act, for example, would be accorded great deference. Courts have also deferred to agency decisions because the government, as proprietor of the public lands, is supposedly in the best position to decide the lands' most beneficial use.\textsuperscript{233} For example, in \textit{Sierra Club v. Andrus},\textsuperscript{234} a federal district court stated: "The standard of review is a highly deferential standard which presumes agency action to be valid, forbids a court's substituting its

\begin{itemize}
\item \textsuperscript{226} 401 U.S. at 410 (citations omitted).
\item \textsuperscript{227} Id.
\item \textsuperscript{228} 5 U.S.C. § 706(2)(E) (1982).
\item \textsuperscript{230} \textit{See, e.g.}, Sierra Club v. Clark, 774 F.2d 1406, 1408 (9th Cir. 1985) ("Traditionally, an agency's interpretation of its own regulations is entitled to a high degree of deference."); Hawaiian Electric Co. v. United States EPA, 723 F.2d 1440 (9th Cir. 1984); Cities of Batavia v. Fed. Energy Regulatory Comm'n, 672 F.2d 64 (D.C. Cir. 1982) (Where an agency has been assigned principal policy development responsibility, a healthy dose of deference is in order.). \textit{See generally} 5 K. DAVIS, \textit{ADMINISTRATIVE LAW TREATISE} § 29:16 (1984).
\item \textsuperscript{231} \textit{See, e.g.}, Harley-Davison Motor Co. v. EPA, 598 F.2d 228 (D.C. Cir. 1979) (where an agency has demonstrated a rational basis for action, a court may not substitute its judgment for that of the agency); Ashwood Manor Civic Ass'n v. Dole, 619 F. Supp. 52 (E.D. Pa. 1985), \textit{aff'd}, 779 F.2d 41 (3d Cir. 1985), \textit{cert. denied}, 475 U.S. 1082 (1986).
\item \textsuperscript{233} \textit{See Montgomery}, \textit{supra} note 8, at 146.
\end{itemize}
judgment for that of the agency, and requires affirmance if a rational basis exists for the agency’s decision. In keeping with this standard, the Andrus court upheld the Secretary of the Interior’s decision not to sue to protect federally-reserved water rights. Also, in Lara v. Secretary of the Interior, a mining claim case, the Ninth Circuit Court of Appeals deferred to the Secretary’s expertise in determining what constitutes a “mineral discovery.” Specifically with regard to the public trust doctrine, courts have held that it is not for the courts to say how the trust will be administered. In practice, therefore, judicial deference to agency expertise impedes judicial imposition of public trust duties.

B. The Public Trust Doctrine’s Lack of Definition

Still another obstacle to a court’s imposition of public trust duties is the duties’ lack of clear definition. Courts have historically used the public trust doctrine to impose the public trust duties of protection and preservation of natural resources for future generations where they saw such a need. Although a certain degree of judicial flexibility may broaden the doctrine’s applicability, it also hinders its imposition. “Protection” and “preservation” of trust property are broad terms. It is often easier to apply the Administrative Procedure Act’s standard of requiring agency decisions to have some, if little, rational basis and to look to a statute’s legislative history for an appropriate standard of review. Moreover, given that federal environmental law is rife with statutes that ostensibly already protect the same public trust resources that the public trust doctrine protects, it is difficult to justify the need for imposing additional non-statutory duties via judicial review.

235 487 F. Supp. at 450.
236 Id. at 452.
237 820 F.2d 1535 (9th Cir. 1987).
238 Id. at 1542.
240 Historically, the public trust doctrine applied to submerged lands between the high and low water mark and to navigable waters. The public trust doctrine has been used, however, to protect a wide assortment of public land resources. See, e.g., Geer v. Connecticut, 161 U.S. 519 (1896)(wildlife); Robbins v. Department of Public Works, 355 Mass. 328, 244 N.E.2d 577 (1969)(meadow); Gould v. Greylock Reservation Comm’n, 350 Mass. 410, 215 N.E.2d 114 (1966)(parklands); City of Zumbrota v. Strafford Western Emigration Co., 290 N.W.2d 621 (Minn. 1980)(public square).
Under the Reagan Administration, however, trust resources are not as well protected as they would be if the agencies’ decisions were attacked under a more potent public trust doctrine.\textsuperscript{242} This is due to courts’ tendency to defer to agency expertise.\textsuperscript{243} This is also due to the fact that the public trust doctrine encompasses values not necessarily included in federal statutes or considered a necessary component of federal agency decisions. These public trust values include preservation for future generations, preference for non-economic uses, consideration of long-term, as opposed to short-term, goals and aesthetics.

C. Judicial Deference to Federal Agencies’ Misuse of the Federal Multiple-Use Sustained-Yield Acts

Furthermore, the current scheme of federal statutes is insufficient to protect adequately trust resources due to the judiciary’s blind deference to federal agencies’ misuse of the multiple-use sustained-yield policy of federal land use designation. This policy is embodied in the Multiple-Use Sustained-Yield Act of 1960 (MUSY) and in the Federal Land Policy and Management Act of 1976 (FLPMA).\textsuperscript{244} MUSY directs the Secretary of Agriculture, through the Forest Service, to “develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom.”\textsuperscript{246} This means, for example, that the Forest Service must decide what percentage of forestland will be used as parkland and what percentage will be used for lumber. The Act conveys broad discretion to the Forest Service to decide the “proper mix of uses.”\textsuperscript{246} The Act requires the Forest Service to give due consideration to the various competing uses.\textsuperscript{247} Once a court is satisfied that the Forest Service had consid-

\textsuperscript{242} See supra note 12.

\textsuperscript{243} See supra notes 222–39 and accompanying text.


\textsuperscript{245} 16 U.S.C. § 529 (1982).

\textsuperscript{246} 16 U.S.C. §§ 529, 531 (1982). See also Sierra Club v. Hardin, 325 F. Supp. 99, 123 (D. Alaska 1971). The case involved an action by the Sierra Club to enjoin the sale of timber from the Tongass National Forest and the issuance of a patent of the land for timber harvesting. Plaintiffs argued, \textit{inter alia}, that the Secretary of the Department of Agriculture and the other federal defendants failed to consider and to balance non-economic uses of the land, such as “outdoor recreation, watershed, wildlife and fish uses . . . .” Id. at 106. In \textit{dicta}, the district court stated that the Forest Service had wide discretion to decide the proper mix of uses under MUSY. \textit{Id.} at 123. The court held, \textit{inter alia}, that laches barred plaintiffs' claims. \textit{Id.} at 123–24.

ered all competing uses, MUSY forbids the court to take any further action and thus substitute the court's decision for the Secretary's determination of the best use for the land.\textsuperscript{248} For example, in \textit{National Wildlife Federation v. United States Forest Service},\textsuperscript{249} a federal district court held that the Forest Service's decision to approve timber harvesting in the Siuslaw National Forest, despite damaged soil, watershed and fish habitats from prior timber harvests, had not violated, and was in keeping with, the Multiple-Use Sustained-Yield Act of 1960.\textsuperscript{250}

The Federal Land Policy and Management Act of 1976 (FLPMA) directs the Secretary of the Interior to "manage the public lands under principles of multiple use and sustained yield."\textsuperscript{251} This means that the Secretary must decide which combination of uses of public lands will "best meet the present and future needs of the American people . . . ."\textsuperscript{252} Therefore, the Secretary must balance revenue-producing uses against non-revenue-producing uses.\textsuperscript{253}

Although the two multiple-use acts\textsuperscript{254} specifically state that federal agencies are not to give preference to economic uses over non-economic uses,\textsuperscript{255} in reality this is exactly what is happening.\textsuperscript{256} Much

\textsuperscript{248} Id.
\textsuperscript{249} 592 F. Supp. 931 (D. Or. 1984).
\textsuperscript{250} 592 F. Supp. at 938–39. The court held, however, that the federal defendants' decision not to prepare an environmental impact statement was unreasonable and issued an injunction enjoining the sale of timber until the defendants prepared such a statement. Id. at 944–45.
\textsuperscript{251} 43 U.S.C. § 1732(a) (1982).
\textsuperscript{252} 43 U.S.C. § 1702(c) (1982).
\textsuperscript{253} Id.
\textsuperscript{255} 16 U.S.C. § 531 (1982); 43 U.S.C. § 1702(c). "[C]onsideration [must be] given to the relative values of the various resources and not necessarily the combination of uses that will give the greatest dollar return." 16 U.S.C. § 531(A).
\textsuperscript{256} For example, in a recent Interior Board of Appeals case, \textit{Sierra Club Legal Defense Fund, Inc.}, 92 Interior Dec. 37, 84 I.B.L.A. 311 (Jan. 7, 1985), an administrative judge affirmed the BLM's decision to deny the Sierra Club's protest against the issuance of 118 oil and gas leases in areas of critical concern in the California Desert Conservation Area. 92 Interior Dec. at 38, 46. See also Oakes, \textit{Hodel Blunders as He Squanders the Nation's Resources}, L.A. Daily J., May 20, 1987, at 4, col. 3 ("Hodel's two most recent violations of the trust are separate but related. The first was to throw open to oil extractions the entire coastal plain of the Artic National Wildlife Refuge in northeastern Alaska, the only place in North America where the complete range of Artic ecosystems is still intact. The second, a week later, was Hodel's decision to open for oil and gas leasing millions of acres of the most environmentally sensitive offshore areas along the Atlantic, Pacific and Alaska coasts."); \textit{FRIENDS OF THE EARTH, RONALD REAGAN & THE AMERICAN ENVIRONMENT} 6 (1982) ("The Reagan Administration has made a mockery of the multiple-use/sustained-yield concept that governs public lands. It has put huge amounts of the nation's coal, oil and lumber up for sale
of this imbalance may be the result of political pressure exerted on the Forest Service and the Secretary of the Interior. This pressure is created by a statutory mechanism that causes revenues produced by natural resources to be funneled back to the local government where the federal land is located. Therefore, rather than protect and preserve public land and its natural resources, the Forest Service and the Secretary of the Interior, under the guise of the multiple-use statutes, favor economic exploitation of this land and its resources.

In sum, although public trust duties are incorporated into a network of federal environmental statutes, the practice of judicial deference to agencies, the public trust doctrine's lack of clear definition, and the agencies' current multiple-use policy undermine much of the efficacy of these statutes. These problems may be overcome by strengthening and clarifying the public trust doctrine into a viable tool against federal administrative agencies' failure to protect and preserve public trust resources. This newly-strengthened tool could be useful in enforcing both statutory and non-statutory public trust duties.

VI. POTENTIAL MEANS TO STRENGTHEN AND IMPLEMENT THE PUBLIC TRUST DOCTRINE

This section first addresses the various ways in which the public trust doctrine may be strengthened to increase its effectiveness. It will then suggest ways in which plaintiffs can use a more powerful doctrine to ensure protection of natural resources under the control of federal administrative agencies.

at bargain basement prices, without considering the long-term consequences, or showing the need for this massive transfer of public resources to private hands.

See Montgomery, supra note 8, at 139.

Id. at 139. The Forest Service Organic Act of 1891 states that: twenty-five per centum of all moneys received during any fiscal year from each national forest [from e.g. sales of, e.g., logs, ties, poles, posts, cordwood, pulpwood, and other forest products] shall be paid, at the end of each year, by the Secretary of the Treasury to the State . . . in which such national forest is situated, to be expended as the State . . . legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated . . . .

16 U.S.C. § 500 (1982). For additional discussion of the problems caused by the multiple-use philosophy, see A. Reitze, supra note 1, ch. 5 at 18-19 and ch. 6 at 4-5.

See supra note 256.
A. Methods for Strengthening the Public Trust Doctrine

1. Analogize to Classic and Charitable Trust Law

Part of the difficulty that courts have in applying the public trust doctrine is its lack of clearly definable terms. If plaintiffs seeking to preserve trust resources clearly delineate public trustees' fiduciary duties, then they will have a better chance of persuading a court to enforce such duties. Clarification would facilitate the enforcement of both statutory and non-statutory public trust duties.

To clarify, and thereby strengthen public trust law, plaintiffs could rely on definitions and standards from classic trust law. The RESTATEMENT (SECOND) OF TRUSTS defines a trust as a "fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person . . . ." The law of trusts demands of the trustee, as a fiduciary, "an unusually high standard of ethical or moral conduct . . . ." Trustees have a duty to protect trust property and to "do all acts necessary for the preservation of the trust res which would be performed by a reasonably prudent man." In preserving the trust property, trustees must act in good faith, prudently, diligently and loyally, and must defend actions against the trust. If trustees are given the express power to sell the trust property, or if they gain judicial approval, they have .

260 Berlin, Roisman & Kessler, Law in Action: The Trust Doctrine in LAW AND THE ENVIRONMENT 166, 171 (M. Baldwin & J. Page, Jr. eds. 1970) [hereinafter Berlin]. "With specifically defined trust duties and an identifiable trustee, those who seek to protect the property will have a much firmer basis for arguing that a governmental agency has specific duties with respect to the property and has an affirmative duty to preserve the trust property and to avoid a wasting of its assets." Id. at 171.


265 Id. § 544.

266 Id. § 612.

267 Id. § 541.

268 Id. § 543.

269 Id. § 581.
a duty to exercise reasonable care and prudence in the sale of the trust property. To decide whether to exercise a power to sell, trustees must consider both the effect of the sale on the trust's beneficiaries and whether it is in the beneficiaries' best interests. If trustees breach any of their fiduciary duties, beneficiaries may seek, among other remedies, to enjoin trustees' actions. Once trust law preferences for preservation of the trust and prohibition of invading the trust are established in court, the burden of proof shifts to the "despoilers" to prove the necessity of despoiling the trust corpus. These classic trust law definitions and standards clearly set forth the respective roles of trustee and beneficiary that the public trust doctrine lacks. Reliance on the classic trust model can thus strengthen the vague and amorphous rights and duties of the public trust doctrine.

To further clarify the public trust doctrine, plaintiffs could also analogize public trust law to charitable trust law. A charitable trust is a trust established for a charitable purpose and for the benefit of the community. A purpose is "charitable" if "its accomplishment is of such social interest to the community as to justify permitting property to be devoted to the purpose in perpetuity." Whenever it is possible to continue the original charitable purpose of the trust, the legislature may not modify it. The United States has the capacity to hold property as trustee in a charitable trust. Persons with special interest have standing to sue to enforce charitable trusts.

---

270 Id. § 744.
271 Id.
275 Cohen, supra note 261, at 392.
276 Id.
278 4 A. SCOTT, LAW OF TRUSTS §§ 348, 368 (2d ed. 1956).
279 Id. § 364.
280 Id. § 368. Also, a charitable trust may continue to exist beyond the period of the rule of perpetuities. Id. § 365.
281 Id. § 367.3.
282 Id. § 378.
Because federal agencies are *de facto* trustees of federal public land and its resources, courts should be receptive to the premise that federal agencies, as public trust trustees, are subject to the same fiduciary standard as other trustees. According to one commentator's view of the public trust doctrine, the trust *corpus* should be natural resources, as defined by conservation groups and ecologists, the trustee should be the government department with the clearest responsibility for taking the desired action, and the beneficiary should be any citizen or group that believes its trust interests are not being protected adequately.\(^{284}\) Classic and charitable trust law thoroughly delineate the duties a fiduciary owes to beneficiaries. If plaintiffs are able to point to specific breaches of the public trust doctrine by using classic and charitable trust language, courts may be more willing to impose public trust obligations on federal agencies than they have evinced to date. Moreover, judicial imposition of a fiduciary standard of duty may subject agencies to a stricter scrutiny than they would receive under the Administrative Procedure Act.\(^{285}\) Therefore, analogy to classic and charitable trust law may clarify the duties owed by federal agencies, provide the courts with a clearly defined standard, and ultimately, strengthen the public trust doctrine's viability as a tool to ensure agency accountability for public lands.

2. Determine the Public Trust Doctrine's Position in Modern Jurisprudence

Another method of strengthening the public trust doctrine, and increasing its applicability, would be to determine the doctrine's position in modern jurisprudence; that is, to decide whether it is federal common law, statutory law, or whether it is constitutionally-based. As discussed previously,\(^{286}\) the public trust doctrine developed at the federal common law level as a justification for federal agencies' control over federal public lands and their resources.\(^{287}\)

In recent cases, environmental groups have attempted to use the public trust doctrine, along with federal statutes incorporating public trust ideals, as a source of enforceable fiduciary duties.\(^{288}\) In *Illinois*

\(^{284}\) See Berlin, *supra* note 260, at 178.

\(^{285}\) For a brief discussion of the Administrative Procedure Act, see *supra* notes 222–39 and accompanying text.

\(^{286}\) See *supra* notes 38–50 and accompanying text.

\(^{287}\) See *supra* notes 38–50 and accompanying text.

\(^{288}\) See *supra* notes 110–78 and accompanying text.
Central, the Supreme Court held that, under the public trust doctrine, the Illinois legislature could not abdicate its trustee powers over submerged lands "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 . . . ."290 Under the Illinois Central rationale, in certain circumstances, the public trust doctrine supersedes state statutes. If plaintiffs could establish that the Illinois Central principle applies to federal statutes then the public trust doctrine would become a powerful tool for restraining Congress from abusing public lands. With this issue in mind, several commentators have questioned whether the public trust doctrine has any constitutional basis.291 If constitutionally-grounded, the public trust doctrine could supersedec federal statutes and thus become a potent plaintiffs' weapon.

The Property Clause of the Constitution states that "[t]he Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."292 Courts throughout American jurisprudence have cited the Property Clause as the federal government's source of power over federal lands. For example, in Utah Power & Light Co. v. United States,293 the Supreme Court, citing the United State's power to control its lands under the Property Clause, ordered Utah Power & Light Co. to compensate the United States for its use of certain forest reservations in Utah to generate electric power.294 Also, in Kleppe v. New Mexico,295 the Court stated: "Although the Property Clause does not authorize 'an exercise of general control over public policy in a State,' it does permit 'an exercise of the complete power over particular public property entrusted to it.'"296 The Court held that the Property Clause gives Congress the

289 146 U.S. 387 (1892).
290 Id. at 453.
292 U.S. CONST. art. IV, § 3, cl.2.
293 243 U.S. 389 (1917).
294 Id. at 411.
296 Id. at 540 (citing United States v. City of San Francisco, 310 U.S. 16, 30 (1940), reh'g denied, 310 U.S. 657 (1940)).
power to protect wildlife on public lands.297 In a recent case, United States v. Ruby Co.,298 the Ninth Circuit Court of Appeals adopted the concept that the public trust doctrine is constitutionally-based in the Property Clause.299 The Ruby Co. opinion cites the Property Clause to support its statement that “public lands are held in trust by the federal government for all the people.”300 Unfortunately, in a subsequent opinion, State of Nevada v. United States,301 the Ninth Circuit affirmed, but did not specifically address, a lower court’s opinion that “[t]he responsibility of Congress to utilize the country’s assets in a way that it decides is best for the future of the nation is a sort of trust, but not in the sense that a private trustee holds for the benefit of a trust’s beneficiaries.”302 The federal district court held that, under FLPMA and the Property Clause, the Secretary of the Interior has the power to impose a moratorium on the disposal of federal lands in Nevada.303 The Court of Appeals held that because the Secretary rescinded the moratorium, the action was moot and affirmed the district court’s dismissal.304

Therefore, although courts have invoked the Property Clause as the source of the federal government’s power over federal public land, courts do not yet use the Property Clause as a source of trust beneficiaries’ power to impose public trust duties and thus to base the doctrine in the Constitution. Additionally, there is no indication

297 426 U.S. at 546. See also United States v. California, 332 U.S. 19, 27, 41, reh’g denied, 332 U.S. 787, supp. opinion, 332 U.S. 804 (1947) (Under the Property Clause, the federal government has paramount rights to submerged land off the coast of California); United States v. City of San Francisco, 310 U.S. 16, 31–32, reh’g denied, 310 U.S. 657 (1940) (Court upheld the United States’ power over public lands under the Property Clause and enjoined San Francisco from allowing a private utility to use water from a national park to generate electricity); U.S. v. Gratiot, 39 U.S. (14 Pet.) 526, 537–38 (1840) (Court cited the Property Clause as source of President’s power to lease public land).

298 588 F.2d 697 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979).

299 Id. at 704.

300 Id. The Ruby Co. case involved a title dispute between the United States and a patentee’s successors in interests. An 1877 survey of certain lands along the Snake River in Idaho that established grossly erroneous meander lines resulted in the the omission of fourteen to sixteen thousand acres of land from the original survey. The federal government sued to quiet title in these omitted lands. The circuit court held that this land “belongs to all the people of the United States” and is held in trust for them by the federal government. Id. at 705. The court held, therefore, in favor of the government. Id.


302 512 F. Supp. at 172. See also 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. The responsibility of Congress is to utilize the assets that come into its hands as sovereign in the way that it decides is best for the future of the Nation. That is what it has done here.” Id. at 277.

303 Id.

that the framers of the Constitution intended the Property Clause to incorporate explicitly the public trust doctrine\textsuperscript{305} and some commentators are skeptical that this concept will ever be well-received.\textsuperscript{306}

Alternatively, several commentators\textsuperscript{307} have argued that the public trust doctrine should be included within the penumbra of unenumerated rights of the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."\textsuperscript{308} They argue that the public trust doctrine encompasses the unenumerated, but fundamental, right to a clean environment and the preservation of natural resources and that breach of the trust amounts to a violation of the Constitution.\textsuperscript{309} Arguably, if the Supreme Court can discern a right of privacy from the Ninth Amendment's penumbra,\textsuperscript{310} the Court can recognize the right to an unpolluted and protected environment.\textsuperscript{311}

\textsuperscript{305}See Wilkinson, supra note 5, at 307 (citing 2 RECORDS OF THE FEDERAL CONVENTION 466 (rev. ed. 1937)).

\textsuperscript{306}See, e.g., Wilkinson, supra note 5, at 307; Proprietary Duties, supra note 52, at 592.


\textsuperscript{308}U.S. CONST. amend. IX.

\textsuperscript{309}Cohen, supra note 261, at 392-93; M. SELVIN, supra note 23, at 419-20. See also Van Loan, Natural Rights and the Ninth Amendment, 48 B.U.L. REV. 1 (1968).

As the Court struggles in the future with the problems created by the impact of an increasingly complex and populous society upon the individual, it may discover that some substantial interests are inadequately protected by the Constitution from governmental encroachment. If so, the Griswold opinion may provide a precedent for reliance upon the ninth amendment as a textual basis for the establishment of new constitutional rights.

\textsuperscript{310}For a more detailed discussion of the penumbra rationale and the Ninth Amendment, see Kauper, Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case, 64 MICH. L. REV. 235 (1965).

\textsuperscript{311}Griswold, 381 U.S. 479, 490 (Goldberg, J., concurring) ("These statements of Madison and Story [regarding the Ninth Amendment] make clear that the Framers did not intend that
It may be that the right to the government's protection of natural resources, as encompassed in the public trust doctrine, is part of America's heritage of Roman-Anglo law and, as such, is so fundamental a right that any breach of the trust must constitute a violation of the Constitution.

In sum, the public trust doctrine's position in federal law remains transitory. Although rooted in early-nineteenth century common law as a source of federal agency power, since the 1970's, the doctrine has been incorporated into several important federal statutes. In the future, if it is to reach its full potential in mandating protection of public lands, the public trust doctrine's right to a clean and protected environment arguably should be given constitutional status through the penumbra of the Ninth Amendment.

3. Analogize to State Law

The public trust doctrine developed much more extensively and as a more powerful tool at the state level than at the federal level. The doctrine itself is the same public trust doctrine that America inherited from the Romans and the English—it simply assumed different roles at the federal and state levels. Although state law is not binding on federal courts reviewing federal administrative agency decision-making, analogy to development of the doctrine at the state level is useful to demonstrate the doctrine's potential at the federal level and to strengthen the doctrine's viability as a tool against federal administrative agencies.

For example, some state courts require that defendants show evidence of clear legislative intent to allow a specific diversion of public trust lands.312 In this way the public trust doctrine acts as a

312 These states include, among others, Massachusetts, New York, and California. See infra notes 314–20 and accompanying text. These courts have essentially adopted Professor Sax's theory of "limited review" regarding the public trust. Under this theory, courts should overturn any agency action that breaches the public trust unless these is a statute that specifically sanctions the agency's action. Sax, supra note 51, at 558–59.
powerful limitation on agency discretion.\textsuperscript{313} In \textit{Gould v. Greylock Reservation Comm'n},\textsuperscript{314} for example, the Massachusetts Supreme Judicial Court held that a statute giving the defendant Commission power to lease a part of Mount Greylock reservation was not sufficiently explicit to permit the construction of a tramway and ski resort.\textsuperscript{315} The court therefore ordered the Commission to cancel its plan.\textsuperscript{316} Similarly, in \textit{Robbins v. Department of Public Works},\textsuperscript{317} the same court further restricted trust land diversion by holding that a statute authorizing the Department to relocate highways did not authorize the diversion because the statute did not identify specifically the meadow in question.\textsuperscript{318} Furthermore, the court held that the statute did not show legislative awareness of the meadow's pre-existing use.\textsuperscript{319} The \textit{Robbins} court stated that "the legislature should express not merely the public will for the new use but its willingness to surrender or forgo the existing use."\textsuperscript{320}

Requiring specific legislative sanction of an agency's decisions regarding federal trust resources curtails agency discretion. Under this approach, the power to control trust resources rests with elected officials, not agency bureaucrats. Arguably, as representatives of the electorate who are the public trust beneficiaries, Congress could be more imbued with a sense of responsibility toward the trust resources than are administrative agencies. Therefore, this approach could result in more protection of federal trust resources. One disadvantage to requiring specific legislation, however, is that it would have a crippling effect upon agency action. Decisions regarding natural resources would be subject to Congress' ability to enact tailor-made statutes. Potential solutions to this dilemma could include requiring specific legislation only in federal land use decisions of a certain magnitude or for the legislature to amend the agency's enabling act so as to limit the agency's discretion.

\textsuperscript{313} See Wilkinson, \textit{supra} note 5, at 310–11.
\textsuperscript{315} \textit{Id.} at 422–23, 215 N.E.2d at 123–24.
\textsuperscript{316} \textit{Id.} at 427, 215 N.E.2d at 126.
\textsuperscript{317} 355 Mass. 328, 244 N.E.2d 577 (1969).
\textsuperscript{318} \textit{Id.} at 331–32, 244 N.E.2d at 580.
\textsuperscript{319} \textit{Id.}
\textsuperscript{320} \textit{Id.} at 331, 244 N.E.2d at 580. \textit{See also} Stephenson v. County of Monroe, 43 A.D.2d 897, 351 N.Y.S.2d 232 (1974) (use of park as sanitary landfill inconsistent with park purpose and must be specifically approved by the legislature); Big Sur Properties v. Mott, 62 Cal. App. 3d 99, 132 Cal. Rptr. 835 (1976) (right-of-way across state park held inconsistent with park's use and may not be granted except by legislative enactment, even though there was no alternative access to private land).
Other state developments that could help strengthen the public trust doctrine at the federal level include, *inter alia,*: (1) application of the public trust doctrine to non-tideland resources, such as meadows,321 sport-caught fish,322 and parkland;323 (2) extending the traditionally protected uses of trust resources (navigation, commerce, and fishing) to include recreational uses and ecological preservation;324 (3) imposing an "affirmative duty to take the public trust into account in the planning and allocation of . . . [natural] resources, and to protect public trust uses whenever feasible;"325 and (4) explicitly incorporating the public trust doctrine into the Constitution.326

Therefore, environmental plaintiffs could have more success in arguing that the public trust doctrine requires protection of federal public resources if such plaintiffs demonstrate that, at the state level, the same public trust doctrine already requires protection of state public resources.327

326 See, e.g., CAL. CONST. art. X, § 3 (tidelands trust), § 4 (right to access to navigable waters); HAW. CONST. art. XI, § 9 (right to protection of natural resources), art. XII, § 4 (state holds public lands in trust for the people of Hawaii); LA. CONST. art. IX, § 1 (right to protection and preservation of natural resources); MASS. CONST. amend. XCVII (right to protection of natural resources); MONT. CONST. art. IX, § 1 (state must maintain clean environment "for present and future generations"), art. X, § 11 (state public lands "shall be held in trust for the people"); PA. CONST. art. I, § 27 (state, as trustee, must conserve natural resources for present and future generations); R.I. CONST. art. I, § 17 (right to use the shore) (duty of the general assembly to provide for preservation of natural resources); TEX. CONST. art. XVI, § 59 (right to conservation of natural resources). See also Pollock, State Constitutions, Land Use and Public Resources: The Gift Outright, 1984 ANN. SURVEY OF AM. LAW 13, 27–30 (1985).
4. Analogize To Indian Trust Law

Another way for environmental advocates to strengthen the federal public trust doctrine in order to require protection of public resources is to analogize to Indian trust law.328 The federal Indian trust doctrine, like the public trust doctrine, evolved from common law.329 Chief Justice Marshall first articulated the doctrine in *Cherokee Nation v. Georgia*:330 "[Indian tribes'] relation to the United States resembles that of a ward to his guardian." In spite of its common law origins, the Indian trust doctrine is "one of the primary cornerstones of Indian law."332

Under the Indian trust doctrine, officials administering Indian property and affairs have been held to high fiduciary standards.333 For example, in *Seminole Nation v. United States*,334 the Supreme Court stated:

In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party.

Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of

---


328 See, e.g., Sax, *Helpless Giants: The National Parks and The Regulation of Private Lands*, 75 MICH. L. REV. 239, 260–62 (1976) (Professor Sax discusses an Indian trust case as a good example for Congress to follow with regard to the national parks problem). See also Wilkinson, supra note 5, at 274–76. Indian trust cases may only be used in analogy to public trust cases, and not in direct support thereof, because there are substantial differences between the two. For example, many Indian trust obligations date back to bilateral treaties entered into in the early part of American history. Also, Indian lands are not public lands. *Id.*


331 *Id.* at 181. *Cherokee Nation* involved an action by the Cherokee tribe to enjoin enforcement of state statutes on lands guaranteed to the tribe by treaties. *Id.* at 179. The Court held that it lacked original jurisdiction because the tribe was not a "state." *Id.* at 183–84. See also United States v. Kagama, 118 U.S. 375, 383–84 (1886) ("These Indian tribes are the wards of the nation. . . . From their very weakness and helplessness so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

332 F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 221 (1982 ed.).

333 *Id.* at 226.

334 316 U.S. 286 (1942).
PROTECTING FEDERAL LAND

1988] 429

dthis Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.335

Additionally, courts have held executive officials to the same fiduciary obligations as those imposed on private trustees.336 Therefore, the officials, as trustees, must “do all acts necessary for the preservation of the trust res which would be performed by a reasonably prudent man.”337

As with agency actions regarding federal public lands, agency action regarding Indian lands and affairs are subject to judicial scrutiny under the Administrative Procedure Act.338 In Indian law cases, however, the level of judicial scrutiny is heightened due to the agencies' fiduciary obligations.339 In Morton v. Ruiz,340 for example, the Court imposed fiduciary standards on top of the standards of review required by the Administrative Procedure Act.341

335 Id. at 296–97 (citations omitted). See also Shoshone Tribe of Indians v. United States, 299 U.S. 476, 497–98 (1937); United States v. Creek Nation, 295 U.S. 103, 109–10, reh'g denied, 295 U.S. 769 (1935) (“The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute . . . . [It was subject to limitations inhering in such a guardianship . . . .”).


It may be that where only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States. But where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, . . . the analogy of a faithless private fiduciary can not be controlling for purposes of evaluating the authority of the United States to represent different interests.


341 Id. at 236. Ruiz involved a dispute over the Secretary of the Interior's denial of general assistance benefits to certain Indians because, as allegedly required by the Snyder Act, they did not live "on or near" a reservation. Id. at 204–205. Besides holding that the Secretary had failed to comply with the Administrative Procedure Act and with the Bureau of Indian Affairs' own regulations, the Court stated: "The denial of benefits to these respondents under such circumstances is inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" Id. at
As with the public trust doctrine, Congress has implicitly delegated by statute its responsibilities with regard to Indians to federal agencies.\textsuperscript{342} Thus, in a recent landmark decision, \textit{United States v. Mitchell},\textsuperscript{343} the Supreme Court held that, although certain federal statutes did not specifically mention a "trust" or a "fiduciary relationship," those statutes established a trust relationship between the United States and Indians and the Government was liable for money damages for breach of those fiduciary duties.\textsuperscript{344}

The \textit{Mitchell} case involved the Quinault Tribe's claim for damages due to the federal government's alleged mismanagement of reservation timber lands.\textsuperscript{345} The Tribe asserted that this mismanagement constituted a breach of trust duties that the General Allotment Act imposed upon the United States.\textsuperscript{346} In \textit{Mitchell I}, the Court held that the General Allotment Act did not impose such fiduciary duties on the federal government but remanded the case to the Court of Claims to determine whether other statutes imposed such duties.\textsuperscript{347} The Court of Claims ruled that various timber management statutes and other statutes,\textsuperscript{348} including regulations promulgated under these

\begin{enumerate}
\item failed to obtain fair market value for timber sold;
\item failed to manage timber on a sustained-yield basis . . .;
\item failed to obtain payment for some merchantable timber;
\item failed to develop a proper system of roads and easements for timber operation . . .;
\item failed to pay interest on certain funds . . .; and
\item exacted excessive administrative charges from allottees.
\end{enumerate}

\textit{Id.} at 537.

\textsuperscript{346} \textit{Id.} at 537.

\textsuperscript{347} \textit{Id.} at 542, 546.

\textsuperscript{348} The timber statutes included, \textit{inter alia}; 25 U.S.C. § 466 (1982)(Secretary of the Interior must manage Indian forest resources under the sustained-yield principle); 25 U.S.C. § 406(a)
statutes, imposed fiduciary duties upon the United States in its management of Indian lands.

In *Mitchell II*, the Supreme Court affirmed the Court of Claims opinion and held that, because these statutes "give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians, . . . [t]hey thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." The Court added: "Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States); a beneficiary (the Indian allotees); and a trust corpus (Indian timber, lands, and funds)." The Court held, therefore, that where the federal government exercises full responsibility over certain lands for the benefit of others, the existence of a trust relationship is presumed.

The analogy to the public trust doctrine is apparent. Various federal land statutes grant the Secretary of the Interior full responsibility to manage federal public lands for the benefit of the American people. "All of the necessary elements of a common-law trust are present:" a trustee (the United States/Secretary of the Interior);
a beneficiary (present and future Americans); and a trust corpus (federal public land and its resources). The existence of a trust relationship, therefore, is presumed. Under the Mitchell II rationale, those federal agencies that are responsible for managing federal public lands have fiduciary duties with regard to those lands and must answer to the American people for breach of such duties.

Indian trust law developed as a means to protect Indians who were collectively in a vulnerable position. It fulfilled a need that presented itself as a part of American history. Today, public trust resources are becoming increasingly vulnerable. Many resources, such as the giant redwoods, are irreplaceable. The public trust doctrine has the potential to develop as a means to protect those resources; to fulfill a need now presenting itself as a part of American history. This potential may be realized, in part, if the federal government is imbued with the same sense of heightened responsibility toward public trust resources it recognizes in its duties toward the Indian nations. In this way, analogy to Indian trust law may strengthen the efficacy of the public trust doctrine.

B. Potential Uses of a Strengthened Public Trust Doctrine In Actions Against Federal Administrative Agencies

The public trust doctrine has already developed as a source of federal power over public lands. Since the federal government uses the doctrine as a source of power, there is little justification for not using the doctrine as a means for imposing reciprocal duties on the federal government. The sword should cut both ways. Arguably, beneficiaries can already enforce the public trust through suing to force imposition of implied statutory duties. In the past, however, this remedy has been inadequate. If the public trust is injected with new vitality, then there are several possible uses of a newly strengthened doctrine.

356 See Mitchell II, 463 U.S. at 225.
357 See, e.g., Camfield v. United States, 167 U.S. 518 (1897)(Congress has authority to prohibit the erection of fences on private land which effectively enclosed public land.); United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277 (9th Cir. 1980)(The United States, as trustee, has the power to enjoin the owner of unpatented mine claims from restricting access to, and recreational use of, the land’s surface from the public.); Stewart v. Penny, 238 F. Supp. 821 (D. Nev. 1965)(The Secretary of Interior, as trustee, has broad discretion to grant land patents.).
358 See supra notes 12 and 110-78 and accompanying text.
359 See supra notes 260–356 and accompanying text.
1. Use as a Rule of Construction

One way to use a strengthened public trust doctrine would be for courts to construe public land statutes liberally and in favor of public trust beneficiaries.\textsuperscript{360} Again, analogy to Indian law supports this concept. It is a well-established principle of Indian law that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians."\textsuperscript{361} Under this concept, courts should presume that Congress intended statutes affecting public resources to be interpreted in a manner consistent with Congress' role as public trustee. Courts should presume, therefore, that such statutes favor protection and preservation of natural resources. Courts could justify such a presumption by recognizing Congress' implicit delegation to federal agencies of its trusteeship through various federal land statutes.\textsuperscript{362} This presumption then could be rebutted upon clear evidence of congressional intent to the contrary.\textsuperscript{363} As with agency actions regarding Indian lands and affairs,\textsuperscript{364} this rule of construction would act as an important limitation on agency discretion in managing the federal lands.

2. Use as Part of the “Hard Look” Doctrine

Another use of the public trust doctrine would be as part of the "hard look" doctrine. The Supreme Court developed this doctrine in \textit{Citizens to Preserve Overton Park, Inc. v. Volpe,}\textsuperscript{365} where it held that a court reviewing actions brought under the Administrative Procedure Act must consider "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."\textsuperscript{366} In deciding whether an agency has taken a "hard look" at the matter, courts should consider whether the federal agency, as assignee of Congress' public trusteeship, has

---

\textsuperscript{360} See Montgomery, \textit{supra} note 8, at 170; Wilkinson, \textit{supra} note 5, at 311–13.


\textsuperscript{362} See \textit{supra} notes 53–107 and accompanying text.

\textsuperscript{363} For discussion of the effect of this rule of construction on federal resource statutes, see Wilkinson, \textit{supra} note 5, at 312–13.

\textsuperscript{364} See F. COHEN, \textit{supra} note 332, at 221–26.

\textsuperscript{365} 401 U.S. 402 (1971).

\textsuperscript{366} Id. at 416.
considered its public trust duties and has met its fiduciary duty of "an unusually high standard of ethical or moral conduct . . . ." The incentive for a court to impose this higher trust standard on agency action is twofold. First, it is arguably mandated by statutory delegation of public trust duties and second, the standard gives the court a readily identifiable basis for judicial review. If the agency's action is not in keeping with its high fiduciary duties, then the court should find that such action is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Arguably, imposing a public trust standard of review makes the court's job easier and the agency's job more difficult. As a result, the agency would have to take more care in reaching public land and resource decisions; the agency would be forced to take into consideration its public trust duties.

3. Use as a General Principle of Environmental Law

The public trust doctrine rationale could also serve as a general principle of environmental law. One commentator characterized this general principle as a legal concept to which "courts can . . . refer when evaluating and resolving conflicts between [sic] environmental values and other values . . . ." It seems inequitable that "courts have at their disposal no legal theory to balance the rights of the government in public land against what many argue are equally legitimate, but as yet judicially unrecognized, rights of the public in the same property." Using the public trust doctrine as a general principle could be an effective mechanism for providing protective, preservational and environmental values that would counterbalance many agencies' politically-induced economic values. For example, courts could refer to public trust values in determining whether the Secretary of the Interior's actions have complied with the multiple-use sustained-yield mandate to consider both environmental and economic potential uses. Like the use of the public

---

367 G. Bogert, supra note 263, § 1.
369 See Montgomery, supra note 8, at 174-81.
370 Id. at 175.
371 Id. at 177 (citation omitted).
372 See supra notes 244-59 and accompanying text for discussion of the multiple-use sustained-yield policy.
trust doctrine as a rule of construction, this use proposes the doctrine as a supplement to the statutory guidelines.\textsuperscript{373} It goes one step further, however, and suggests a broader use of the doctrine as a “conceptual framework” in which to exercise judicial review.\textsuperscript{374}

Within this “conceptual framework,”\textsuperscript{375} courts should consider whether the agency has complied both with its public trust, as well as its statutory, duties. Since public trust duties require agencies to act as fiduciaries with regard to public land and resources, agencies’ actions with regard to such land must be moral and ethical.\textsuperscript{376} Therefore, judicial scrutiny of actions regarding public trust resources must involve moral and ethical scrutiny. According to H.L.A. Hart:

\begin{quote}
What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to moral scrutiny.\textsuperscript{377}
\end{quote}

Additionally, according to one commentator, “[i]t is inconceivable . . . that an ethical relation to land can exist without love, respect, and admiration for land and a high regard for its value.”\textsuperscript{378} If one accepts this premise, then the public trust doctrine not only imposes ethical duties but also helps to provide a conceptual framework for courts to determine if an agency has complied with such ethical duties through referring to the doctrine’s mandate of preservation and protection—that is, “a high regard for [the land’s] value.”\textsuperscript{379}

VII. CONCLUSION

The review of federal public trust law necessarily leaves the observer with a sense of ambivalence. Numerous federal statutes ostensibly serve to protect most of the public trust corpus. Like the

\begin{flushright}
373 Montgomery, supra note 8, at 178.  
374 Id.  
375 Id.  
376 The law of trusts demands of the trustee, as a fiduciary, “an unusually high standard of ethical and moral conduct . . . .” G. Bogert, supra note 263, § 1. See also J. Petulla, Environmental Protection in the United States 162 (1987).  
379 Leopold, supra note 378, at 7.
\end{flushright}
court in *Sierra Club v. Andrus*, most courts currently hold that resort to the public trust doctrine is unnecessary because the doctrine's duties are imposed statutorily. However, because of both the judicial tendency to defer to administrative agency expertise in natural resource matters, and the current multiple-use philosophy, many natural resources are, in reality, left unprotected. Therefore, there is a need for a strong, clearly defined public trust doctrine. One reason that courts may be reluctant to impose public trust duties is that the doctrine is hard to define, and thus hard to apply. Analogies to classic trust law, state law, Indian trust law, and determining the doctrine's position in modern jurisprudence should help clarify and strengthen the public trust doctrine. Once the doctrine has become a more effective environmental tool, it could be used as a rule of construction, as part of Overton's "hard look" doctrine, and as a general principle of environmental law. Such uses of a refined public trust doctrine could force federal administrative agencies to recognize their public trust obligations and to enhance the protection of valuable and irreplaceable natural resources.

---

381 See supra notes 244–59 and accompanying text.
382 See supra notes 365–68 and accompanying text.