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Saving Mabira Rainforest: Using Public Interest Litigation in Uganda to Save Mabira and Other Rainforests

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SAVING MABIRA RAINFOREST: USING PUBLIC INTEREST LITIGATION IN UGANDA TO SAVE MABIRA AND OTHER RAINFORESTS

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Abstract: In August 2011, President Yoweri Kaguta Museveni announced that he planned to give away part of Mabira rainforest to a sugar corporation to grow a sugarcane plantation and enhance sugar production in the country. The President had made a similar proposal in 2007 and only abandoned it after public and environmental groups received it with immense resistance. The Ugandan government has also given away other forest land to private investors, including parts of Bugala Island in Lake Victoria to a vegetable company to grow palm trees. This Note argues that the Ugandans opposed to the give-away of forest land to private companies can bring public interest litigation under Article 50 of the Uganda Constitution. The Note further proposes that to save private forests, Uganda should seek guidance from U.S. case law on applying the public trust doctrine to trust resources on private property.

Introduction

Deforestation and forest degradation is one of the leading causes of greenhouse gas emissions.[1] According to the United Nations (U.N.), deforestation produces almost twenty percent of global greenhouse gases, which is "more than the entire global transportation sector and second only to the energy sector."[2] Trees capture carbon from the atmosphere; therefore, destroying forests increases carbon dioxide, which contributes to global warming and climate change.[3]

Although Uganda has expressed a commitment to U.N. efforts to reduce greenhouse gases by fighting deforestation and forest degrada-

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[1] *About REDD+*, UN-REDD Programme, http://www.un-redd.org/AboutREDD/tabid/582/Default.aspx (last visited May 17, 2013).

[2] *Id.*

[3] *See* Gerald Tenywa, *Forests in Danger*, New Vision (Mar. 21, 2007), http://www.newvision.co.ug/D/8/12/555432.

tion,[4] the Ugandan government's actions perpetuate the destruction of its country's forests.[5] For example, on August 13, 2011, Ugandan President, Yoweri Kaguta Museveni, announced that he planned to give away part of Mabira forest to the Sugar Corporation of Uganda Limited ("SCOUL"), a Lugazi, Mukono company, to grow sugarcane.[6] The President explained that this was an attempt to reduce the shortage of sugar in the country by expanding production, thereby preventing the need to import sugar.[7] The President made a similar proposal in 2007, but intense public and environmental organizations resistance forced him to abandon it.[8] Similarly, the Ugandan government has given away other forest land to private investors, including forest land on Bugala Island in Lake Victoria to a vegetable company to grow palm trees.[9]

Concerned Ugandan citizens opposed to the government's giving away forest land to private investors can use public interest litigation to challenge such policies.[10] Although a maturing and evolving legal mechanism, public interest litigation has proved crucial to enforcing environmental rights and duties in Uganda.[11] Public interest litigants, therefore, obtain standing under the Constitution and environmental

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[4] *See About REDD+*, *supra* note 1; Kimbowa Richard et al, REDD+ and Other Sectors in East Africa: Opportunities for Cross-Sectoral Implementation 13 (2011), http://redd-net.org/files/Analytical%20paper%20final%20version%20for%20website.pdf. UN-REDD is a United Nations Programme that aims to reduce emissions from deforestation and forest degradation in developing countries by creating incentives for forest-dependent communities to preserve forests. *About REDD+*, *supra* note 1. The Programme partners with countries across Africa, Asia-Pacific and Latin America, and provides them direct support to design and implement their national REDD+ programmes, as well as "complementary support through common methodologies, tools, data, and best practices developed through UN-REDD Global Programme." *Id.*

[5] *See* Yasiin Mugerwa & Jude Luggya, *Government to Give Away Nine More Forests*, Monitor (Kampala) (Jan. 6, 2007), *available at* http://allafrica.com/stories/200701050807.html; Yoweri Museveni, *Why I Support Mabira Forest Give-away to Mehta Group*, New Vision (Apr. 19, 2007), http://www.newvision.co.ug/D/8/20/560792.

[6] Joseph Miti & Ephraim Kasozi, *Mabira Must Go, Museveni Tells District Officials*, Monitor (Kampala) (Aug. 14, 2011), http://mobile.monitor.co.ug/News/-/691252/1218362/-/format/xhtml/-/3e0i4m/-/index.html.

[7] *Id.*

[8] Miti & Kasozi, *supra* note 6; Museveni, *supra* note 5.

[9] Museveni, *supra* note 5; Gerald Tenywa, *BIDCO Encroaches on Ssesse Forest*, New Vision (Mar. 8, 2010), http://www.newvision.co.ug/PA/8/12/673967.

[10] *See infra* notes 198–275 and accompanying text.

[11] *See* Emmanuel Kasimbazi, *Public Interest Litigation as a Mechanism for Enforcing Environmental Rights and Duties in Uganda*, *in* Compliance and Enforcement in Environmental Law 579, 579 (LeRoy Paddock et al. eds., 2011).

laws, such as the National Environmental Act ("NEA"), to oppose the government's actions in court and protect Uganda's forests.[12]

Part I of this Note explains some of the main causes of deforestation in Uganda and focuses on two of the more controversial government give-aways of forest land.[13] Part II discusses specific laws that give public interest litigants in Uganda standing to bring an action.[14] Part III explores the public trust doctrine in the United States, and how it applies to private property,[15] and explains the potential role of the public trust doctrine in Ugandan law.[16] Part IV first argues that public interest litigants seeking to oppose the government give-away of Mabira and Bugala forest land should file public interest litigation under Article 50 of the Constitution.[17] Secondly, Part IV proposes that to save private forests, Uganda should seek guidance from U.S. case law on applying the public trust doctrine to trust resources on private property.[18]

I. Deforestation in Uganda

At a rate of approximately 2.2 percent annually, Uganda has one of the highest deforestation rates in the world.[19] According to the 2007 report released by the National Environment Management Authority ("NEMA"),[20] Uganda saw its forest cover shrink from 12.3 million acres of forest in 1990 to 9.1 million in 2005.[21] Following the release of a similarly grim report in 2008, NEMA officials forecasted that Uganda would have no forests left by 2050 if the level of deforestation persists at

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[12] Envtl. Action Network v. Attorney Gen., H.C. Misc. App. No. 39 of 2001 (High Ct. Aug. 28, 2001), *reprinted in* 1 Guide to Environmental Law in Uganda: A Casebook *17, *21 (United Nations Env't Programme 2004), *available at* http://www.nema-ug.org/padelia_meas_Project/UGANDA%20CASE%20BOOK%2020.09.05.pdf; Nat'l Ass'n of Prof'l Environmentalists v. AES Nile Power, H.C. Misc. Cause No. 268 of 1999 (High Ct. Apr. 19, 1999), *reprinted in* 1 Guide to Environmental Law in Uganda, *supra*, at *45, *48.

[13] *See infra* notes 19–68 and accompanying text.

[14] *See infra* notes 69–125 and accompanying text.

[15] *See infra* notes 128–165 and accompanying text.

[16] *See infra* notes 166–196 and accompanying text.

[17] *See infra* notes 206–250 and accompanying text.

[18] *See infra* notes 251–275 and accompanying text.

[19] Mubatsi Asinja Habati, *COP 17 - Uganda Calls for Global Agreement to End Deforestation*, Independent (Kampala) (Dec. 8, 2011), *available at* http://allafrica.com/stories/201112081397.html; Tenywa, *supra* note 3.

[20] NEMA is the agency charged with overseeing all environmental activity in Uganda. National Environmental Act, ch. 153, § 5 (Uganda 1995).

[21] Nat'l Env't Mgmt. Auth., State of the Env't Report for Uganda, at v (2008), *available at* http://www.nema-ug.org/reports/n_s_o_e_r_2008.pdf.

the present rate.[22] The alarming rate of deforestation is the result of a number of factors including population explosion and government give-away of forest land to promote private investment.[23]

A. *Population Growth*

Uganda's exploding population is one of the main contributors to the country's deforestation.[24] Uganda has a population growth rate of approximately 3.2% per year, which is 2.0% higher than the world average of 1.2%.[25] It is expected to have the highest population growth rate in the world within the next few decades.[26] A study by the Washington, D.C. research group, Population Reference Bureau, forecasts Uganda's population to explode from 27.7 million to 130 million by 2050.[27]

The astronomical increase in the country's population creates need for more housing, energy, and jobs.[28] For example, because 97% of Ugandans rely on charcoal and firewood for cooking, demand for these products has increased with the growth in population, thereby exceeding the supply legally available.[29] As a result, Uganda has experienced an increase in illegal timber logging,[30] sometimes with the participation of the authorities charged with forest management.[31] Even

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[22] Annie Kelly, *Uganda "At Risk" of Losing All Its Forests*, Guardian (London): Katine Chronicles Blog (June 25, 2009, 11:44 AM), http://www.guardian.co.uk/society/katine blog/2009/jun/25/uganda-deforestation.

[23] Museveni, *supra* note 5; Tenywa, *supra* note 3.

[24] Tenywa, *supra* note 3; Kelly, *supra* note 22.

[25] *Uganda on Track to Have the World's Highest Population Growth*, World Watch Inst. (Apr. 2, 2012), http://www.worldwatch.org/node/4525; *see* Jason Bremner & Eric Zuehlke, Population Reference Bureau, Integrating Population, Health, and Environment in Uganda 2 (June 2009), http://www.prb.org/pdf09/phe-uganda.pdf.

[26] *Uganda on Track to Have the World's Highest Population Growth*, *supra* note 25; *see* Bremner & Zuehlke, *supra* note 25.

[27] Population Reference Bureau, 2006 World Population Data Sheet 6 (2006), http://www.prb.org/pdf06/06WorldDataSheet.pdf.

[28] Tenywa, *supra* note 3.

[29] *See id.*; Kelly, *supra* note 22.

[30] Illegal timber logging refers to the violation of laws governing "cutting, processing and transporting timber or wood products." *Glossary of Terms*, Illegal-Logging.Info, http://www.illegal-logging.info/approach.php?a_id=200 (last updated July 13, 2006). In contrast, legal logging involves those loggers that have legal rights to access the timber, adhere to the quota constraints, pay required duties and taxes on the product, and are certified to haul or process logs. *Id.*

[31] Tenywa, *supra* note 3; *Uganda*, Illegal-Logging.Info, http://www.illegal-logging.info/approach.php?a_id=112 (last updated May 17, 2013).

worse, efforts by the National Forestry Authority ("NFA")[32] to enforce logging laws do not sufficient prevent deforestation because the agency only has power over public forest reserves, which constitute only 15% of the country's forest area, leaving the other 70% in private hands and unregulated.[33]

Population growth also contributes to forest degradation by fostering encroachment on forest reserves.[34] The NFA defines encroachment as the practice of people either "deliberate[ly] or unknowingly" settling on a protected forest reserve or using it for activities such as farming, grazing cattle, or construction.[35] Forest reserves are an easy target for swelling populations looking to settle on "cheap" land.[36] Moreover, the NFA's efforts to evict illegal encroachers from these reserves have been met with resistance from politicians afraid to antagonize voters.[37] For example, in 2009 President Museveni issued a directive stopping the NFA from evicting the over 180,000 encroachers countrywide.[38] Following the President's Directive, the number of encroachers increased to approximately 360,000.[39]

B. *Government Give-Away of Public Forest Land to Private Companies*

The government give-away of forests to commercial agriculturalists and other investors also contributes to deforestation.[40] The government views the grant of cheap land, in addition to other incentives like tax breaks, as part of a broader strategy to attract companies and pro-

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[32] The NFA is the agency charged with managing forest reserves in Uganda. *Vision, Mission, and Core Values*, Nat'l Forestry Authority, http://www.nfa.org.ug/content.php?submenu_id=9.

[33] *Uganda*, *supra* note 31. The Uganda Wildlife Authority manages the other fifteen percent. Gerald Tenywa, *Politics, Corruption Fuelling Destruction of Forest Reserves*, New Vision (Nov. 2, 2008), http://www.newvision.co.ug/D/9/36/657598.

[34] *See* Tenywa, *supra* note 3.

[35] Nat'l Forestry Authority, The Current Situation of Encroachment in Central Forest Reserves & the Way Forward 1, http://www.nfa.org.ug/docs/encroachment.pdf (last visited May 17, 2013).

[36] Nat'l Forestry Authority, *supra* note 35; *see* Tenywa, *supra* note 3.

[37] Gerald Bareebe, *300,000 Base on President's Directive to Encroach on Forests*, Monitor (Kampala) (July 8, 2009), *available at* http://allafrica.com/stories/200907081074.html; Tenywa, *supra* note 33.

[38] Bareebe, *supra* note 37; Tenywa, *supra* note 33.

[39] Bareebe, *supra* note 37; In Kiboga District, illegal encroachers started an organization known as Kiboga Encroachers Association, and are actively cutting down forests. Tenywa, *supra* note 33.

[40] *See Forests Fight Back: The Battle for Mabira and Bugala*, Int'l Inst. for Env't & Dev., http://www.iied.org/natural-resources/key-issues/forestry/justice-forests-uganda (click on video hyperlink) (last visited May 17, 2013).

mote industrialization.[41] Consequently, the government has increasingly turned to forest reserves as a source of land for investors.[42] Two of the more controversial and highly contested attempts by the government to give away forest reserve land involved Bugala Island forest reserves in Kalangala District and Mabira forest reserves in Buikwe District.[43]

1. The Bugala Island Give-Away

In 1998, the Ugandan government promised to give 24,710 acres of forest land on Bugala Island, Lake Victoria, to Bidco—a company that manufactures food products from palm oil[44]—to grow palm oil trees.[45] The government delivered 16,061 acres of this land to Bidco Uganda Limited, which cleared the forests to make way for palm oil trees.[46] When the government attempted to deliver the remaining acres of forest, however, environmental organizations, civic groups, and some members of the Ugandan Parliament protested the action and argued that the Bugala forests were public forests governed by the NFA and NEMA.[47] By granting these forest lands to Bidco, the government acted illegally because it had neither parliamentary approval nor public consent.[48] Ultimately, the government abandoned its efforts to give away additional public forest land on Bugala Island.[49]

Nonetheless, because the public does not own all land in Bugala Island, the government resorted to buying forested land from private parties, some of whom were willing to sell well below market value.[50] The government then gave this land to Bidco, which cleared the forest

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[41] *See* Museveni, *supra* note 5 (stating in an op-ed, that President Museveni supported the give-away of forest land to manufacturers because of the "urgent need for industriali[zation]" in Uganda); *Uganda's President Revives Plan to Axe Rainforest*, REUTERS (Dec. 21, 2007, 5:16 AM), http://www.reuters.com/article/2007/12/24/environment-uganda-environment-dc-idUSL2160288120071224.

[42] Museveni, *supra* note 5.

[43] *See* Yasiin Mugerwa & Agnes Nandutu, *MPs to Sue Government Over Bugala Forest Give-away*, MONITOR (Kampala) Dec. 30, 2006), *available at* http://allafrica.com/stories/200612290891.html; *Forests Fight Back*, *supra* note 40.

[44] *Forests Fight Back*, *supra* note 40.

[45] Mugerwa & Nandutu, *supra* note 43; Tenywa, *supra* note 9. Bugala Island has the following rainforests: Namatembe, Banga, Kubanda Towa, and Gala Forests. Mugerwa & Nandutu, *supra* note 43.

[46] Mugerwa & Nandutu, *supra* note 43; *Forests Fight Back*, *supra* note 40.

[47] Mugerwa & Nandutu, *supra* note 43; *Forests Fight Back*, *supra* note 40.

[48] Mugerwa & Nandutu, *supra* note 43; *Forests Fight Back*, *supra* note 40.

[49] *Forests Fight Back*, *supra* note 40.

[50] *Id.*

cover to make way for more palm oil trees.[51] Residents of the Island already experience some of the effects of Bidco's deforestation activities, including increased run-off into Lake Victoria because of exposure of bare land to weather effects; a growing threat to life and property from winds as there are no trees to act as windbreakers; increasing scarcity of wood products for local fishermen to construct houses and boats; worry from local fishermen about the potential hazardous effects from chemicals sprayed in the palm tree plantation; and a general threat to the Island's ecosystem.[52]

2. The Threat to Mabira Forest

Additionally, President Museveni has twice proposed to give away part of Mabira forest to SCOUL, owned by the Mehta Group of Companies.[53] The first attempt was in December 2006 when the President revealed the proposal to give 17,544 acres, approximately one quarter of Mabira forest, to the sugar corporation to grow sugarcane.[54] The President argued that this move was economically beneficial because the company would increase domestic sugar production two-fold to 220,462,262 tons annually, bring in over 3500 jobs, and pay an additional 11.5 billion Uganda shillings (equivalent to 4 million dollars) in taxes each year.[55]

Nonetheless, civil society groups and local residents around Mabira vigorously opposed the plan and argued that the economic benefits of the forest far outweighed the potential economic gains from replacing it with a sugarcane plantation.[56] In addition, residents argued that they rely on forest resources for their livelihoods.[57] Residents explained that they use forest products such as rattan canes to make stools, and palm leaves to make mats and baskets.[58] They further rea-

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[51] *See id.*

[52] *Id.*

[53] Miti & Kasozi, *supra* note 6; *Uganda's President Revives Plan to Axe Rainforest*, *supra* note 41.

[54] Miti & Kasozi, *supra* note 6; *Forests Fight Back*, *supra* note 40; *Uganda's President Revives Plan to Axe Rainforest*, *supra* note 41.

[55] Richard M. Kavuma, *Plan to Sacrifice Forest for Sugar Puts Economy Before Ecosphere in Uganda*, GUARDIAN (London): POVERTYMATTERS BLOG (Aug. 22, 2011 8:23 AM) http://www.guardian.co.uk/global-development/poverty-matters/2011/aug/22/trading-forest-sugar-museveni-uganda.

[56] *Forests Fight Back*, *supra* note 40.

[57] *Id.*

[58] *Id.*

soned that the income raised from these activities was much greater than the meager salaries they would earn working for SCOUL.[59]

Environmentalists and other civil society organizations also pointed to further services provided by the forest.[60] They argued that Mabira acts as a water catchment area for Lake Victoria, Lake Kyoga, and the Nile River.[61] In addition, the forest absorbs carbon and is a major tourist attraction, bringing in extra revenue for the country.[62] Mabira has also been designated as an Important Bird Area by BirdLife International and is home to three hundred bird species, one of which is the endangered Nahan's Francolin.[63] Consequently, critics argued that destroying any part of the forest would threaten Uganda's biodiversity.[64]

Although the government shelved its plan to give away Mabira in 2007 after organized opposition and violent demonstrations that resulted in three deaths, the government revived the plan in 2011.[65] The President claimed that by giving the forest land to the Mehta Group of Companies to expand sugar production, Uganda would not have to import sugar.[66] The President will need Parliament to vote in favor of his proposal before he can give part of Mabira to SCOUL.[67] Nonetheless, concerned citizens looking to challenge the government's purchase of private forest land on Bugala Island for a private company, and the threatened give-away of Mabira forest, can seek judicial intervention through public interest litigation.[68]

II. Standing to Pursue Public Interest Litigation in Uganda

Ugandan laws such as the 1995 Constitution and National Environment Act ("NEA") provide potential litigants with standing to bring actions on behalf of the public.[69] In Uganda, public interest litigation is

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[59] *Id.*

[60] *Campaign to Save Mabira Forest in Uganda from Sugarcane Plantation for Biofuels*, BirdLife Int'l, http://www.birdlife.org/datazone/sowb/casestudy/231 (last visited May 17, 2013).

[61] *Id.*

[62] *Id.*

[63] *Id.*; NatureUganda, *Fears in Uganda as Sugar Company Renews Its Demands*, Birdlife Int'l (Oct. 21, 2011), http://www.birdlife.org/community/2011/10/fears-in-uganda-for-mabira-as-sugar-company-renews-its-demands.

[64] NatureUganda, *supra* note 63; *see* Kavuma, *supra* note 55.

[65] *See* Miti & Kasozi, *supra* note 6; Kavuma, *supra* note 55.

[66] Kavuma, *supra* note 55; *see* Miti & Kasozi, *supra* note 6.

[67] *See* Kavuma, *supra* note 55.

[68] *See* Kasimbazi, *supra* note 11.

[69] Envtl. Action Network, Ltd. v. Attorney Gen., H.C. Misc. App. No. 39 of 2001 (High Ct. Aug. 28, 2001), *reprinted in* 1 Guide to Environmental Law in Uganda, *supra* note 12, at *17, *21; Nat'l Ass'n of Prof'l Environmentalists v. AES Nile Power, H.C. Misc. Cause No. 268

brought on behalf of the public or on behalf of a significant part of the public in an effort to defend their rights.[70] Accordingly, any concerned person, group of people, or organization can bring a public interest action to enforce or defend the rights of a group of people.[71]

A. *The 1995 Uganda Constitution*

Article 50 of the 1995 Constitution of Uganda gives public interest litigants standing.[72] Article 50 Clause 1 states, "[a]ny person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation."[73] The Article, thus, applies to *any* individual whose rights have been violated.[74] Article 50 Clause 2 further allows "any person or organization" to petition the court to enforce "another person's or group's human rights."[75]

The High Court interprets Article 50 Clause 2 to allow any person or organization to enforce the rights of others, regardless of whether such person's or organization's rights were violated.[76] In 2001, in *Environmental Action Network v. Attorney General*, the High Court discussed Article 50 Clause 2 of the Constitution of Uganda.[77] In that case, the

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of 1999 (High Ct. Apr. 19, 1999), *reprinted in* 1 GUIDE TO ENVIRONMENTAL LAW IN UGANDA, *supra* note 12, at *45, *48.

[70] Kasimbazi, *supra* note 11, at 579.

[71] *Id.* Under the court structure in Uganda, the Supreme Court is the highest Court and is composed of seven justices including the Chief Justice of Uganda. *Courts of Law in Uganda*, CHR. MICHELSEN INST., http://www.cmi.no/pdf/?file=/uganda/doc/court-administration-uganda-october-05.pdf (last visited May 20, 2013). The Supreme Court only hears cases on appeal from lower courts, but has original jurisdiction in presidential election petitions. *Id.* The Appeals Court is the second highest in hierarchy and hears cases on appeal from the High Court. *Id.* The Appeals Court only has original jurisdiction when it hears cases affecting the interpretation of the Constitution, in which case it seats as the Constitutional Court. *Id.* The High Court is the third in hierarchy, and is divided into five divisions namely: Civil, Criminal, Family, Land, and Commercial Division. *Id.* The different divisions of the High Court hear cases on appeal from the Magistrate Courts. *Id.* Fourth in hierarchy are the Magistrate Courts which handle the bulk of the civil and criminal matters in Uganda, and whose decisions are reviewable by the High Court. *Id.* At the bottom of the hierarchy are the Local Council Courts, which hear controversies arising out of violation of local laws and bylaws at the sub-county, parish and village level. *Id.*

[72] UGANDA CONST. art. 50; *Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *21.

[73] UGANDA CONST., art. 50, cl. 1.

[74] *See* Kasimbazi, *supra* note 11, at 580.

[75] UGANDA CONST. art. 50, cl. 2.

[76] *Id.*; British Am. Tobacco Ltd. v. Envtl. Action Network Ltd. H.C. Civil Case 27 of 2003 (High Ct. Apr. 16, 2003), *reprinted in* GUIDE TO ENVIRONMENTAL LAW IN UGANDA, *supra* note 12, at *9, *11; *Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *21.

[77] UGANDA CONST. art. 50, cl. 2; H.C. Misc. App. No. 39 of 2001, at 21.

Environmental Action Network ("EAN") filed an action on its own behalf and on behalf of non-smoking Ugandans under Article 50 Clause 2 seeking a declaration that unregulated public smoking violates the right of non-smokers to a clean and healthy environment guaranteed under Article 39 of the Constitution.[78] EAN wanted the court to require the government to regulate public smoking, and thereby promote a healthy environment.[79] Respondents argued that petitioner could not bring a case on behalf of the non-smoking public due to a lack of individual interest in the right infringed.[80] The court held that under Article 50 Clause 2 "an organization can bring a public interest action on behalf of groups or individual members of the public even though the applying organization has no direct individual interest."[81]

Two years later in *British American Tobacco v. Environmental Action Network*, the High Court reached a similar decision.[82] The case involved a public interest action brought by the EAN under Article 50, Clause 2 requesting a declaration that respondent had not fully informed both actual and potential consumers of the dangers associated with cigarette smoking.[83] Plaintiffs requested that the court require respondents to include adequate information on cigarette packaging and in advertisements to fully inform customers of these risks.[84]

In an answering application, respondent contrasted Article 50, Clause 2 of the Ugandan Constitution with Section 38 of the South African Constitution, which lists the categories of people that may approach a court seeking redress for a violation of the Bill of Rights:[85]

> a. anyone acting in their own interest; b. anyone acting on behalf of another person who cannot act in their own name; c. anyone acting as a member of, or in the interest of, a group or class of persons; d. anyone acting in the public interest; and e. an association acting in the interest of its members.[86]

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[78] Uganda Const. arts. 39, 50; *Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *17, *19.

[79] *Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *19.

[80] *Id.* at *21.

[81] *Id.*; *see* Uganda Const. art. 50, cl. 2.

[82] H.C. Civil Case No. 27 of 2003, at *11.

[83] Uganda Const. art. 50, cl. 2; *British Am. Tobacco*, H.C. Civil Case No. 27 of 2003, at *10.

[84] *British Am. Tobacco*, H.C. Civil Case No. 27 of 2003, at *10.

[85] *Id.* at *11.

[86] S. Afr. Const., § 38.

Respondent argued that although Section 38 of the South African Constitution included interest group litigation with the statement "anyone acting in the public interest," the Ugandan Constitution did not have any such provision.[87] Consequently, respondent questioned whether Article 50, Clause 2 created a right for private parties to file actions in the public interest.[88] The High Court rejected respondent's argument and held that Article 50, Clause 2 can be interpreted to include organizations, people, and groups of people as well as litigants listed in Section 38 subsections a through e of the South African Constitution.[89] The court further noted that it would be demeaning to interpret the Ugandan Constitution in a way that ignored the reality of disadvantaged persons and did not allow public interest suits on their behalf.[90]

In 2001, in *Environmental Action Network v. Attorney General*, the High Court expressed similar concern for those without access to justice.[91] The court observed that most people are either illiterate, apathetic, or simply too poor to challenge violations of their rights.[92] Consequently, the court stated "that the interest of public rights and freedoms transcend technicalities" and when approached by litigants in the public interest, the court should grant standing.[93]

In addition to Article 50, public interest litigants can approach Ugandan courts for enforcement of environmental rights under Article 137, Clause 3 of the Constitution.[94] The Clause states:

> A person who alleges that—(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or (b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.[95]

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[87] S. Afr. Const., § 38; *British Am. Tobacco*, H.C. Civil Case No. 27 of 2003, at *11.

[88] *British Am. Tobacco*, H.C. Civil Case No. 27 of 2003, at *12, *see* Uganda Const. art. 50, cl. 2.

[89] *British Am. Tobacco*, H.C. Civil Case No. 27 of 2003, at *11, *see* S. Afr. Const., § 38; Uganda Const. art. 50, cl. 2.

[90] *British Am. Tobacco*, H.C. Civil Case No. 27 of 2003, at *11.

[91] H.C. Misc. App. No. 39 of 2001 at *21.

[92] *Id.*

[93] *Id.*

[94] Kasimbazi, *supra* note 11, at 581; *see* Uganda Const. art. 137, cl. 3.

[95] Uganda Const. art. 137, cl. 3.

By referring to "'[a] person who alleges'" Article 137, Clause 3 includes those litigants who may not be directly injured by the violation, and therefore, covers standing to public interest litigants.[96]

B. *The National Environment Act*

Section 4 of the NEA establishes the National Environment Management Authority ("NEMA"), the primary agency in Uganda charged with overseeing all activities with an impact on the environment.[97] One of NEMA's functions is to work with various government departments and agencies to ensure the government considers environmental concerns in general national planning.[98] NEMA also monitors and regulates private and non-governmental entities on environmental issues, and requires environmental impact assessments from any entity whose proposed activities are "likely to have a significant impact on the environment."[99]

NEA decentralizes power by giving NEMA the authority to promulgate guidelines for creating a committee on the environment in each district.[100] The district environment committee, headed by a district environment officer, performs supervisory and management functions similar to those of the national organization, but aimed at promoting environmental quality at the district level.[101] NEA further decentralizes power by giving the district environment committee power to advise local government systems on the appointment of local environment committees.[102] Such local environment committees monitor activities at the local level, and inform the district environment officer of any activities that are likely to have substantial effects on the environment.[103]

1. Standing Under NEA to Bring Public Interest Litigation

Section 3 of NEA provides every person with the right to a healthy environment.[104] The section also provides that "[e]very person has a duty to maintain and enhance the environment, including the duty to inform the authority [NEMA] or the local environment committee of

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[96] Kasimbazi, *supra* note 11, at 581 (quoting Uganda Const. art. 137, cl. 3).
[97] National Environment Act, ch. 153, §§ 4, 5 (Uganda 1995).
[98] *Id.* § 6(1).
[99] *Id.* §§ 6, 19, 20.
[100] *See id.* § 15.
[101] *See id.* §§ 6, 14–15.
[102] *Id.* § 16.
[103] National Environment Act, ch. 153, § 16 (Uganda 1995).
[104] *Id.* § 3.

all activities and phenomena that may affect the environment significantly."[105] To ensure enforcement of these rights and duties, NEA gives NEMA and the local environment committee authority to initiate action against individuals whose activities pose a threat to the environment.[106] The action could be aimed at halting the activity or requiring that the activity undergo an environmental audit or monitoring.[107] Section 3, subsection 4 also allows NEMA or the local environment committee to initiate an action regardless of whether or not the complainant can demonstrate likelihood of personal loss or injury from the defendant's activity.[108]

The High Court interprets NEA section 3 as simply allowing an individual to complain to the local environment committee or NEMA about an environmental violation, but not allowing such person to proceed to court for redress.[109] In 2000, in *Byabazaire v. Mukwano Industries,* the plaintiff—an individual—brought an action under section 3 of NEA complaining that the defendant's factory emitted smoke that was "obnoxious, poisonous, repelling, and a health hazard to the community."[110] The plaintiff alleged that he suffered harm to his health as a result of the defendant's activities.[111] The High Court held that the plaintiff failed to establish a cause of action since the plaintiff had no right to sue under the statute.[112] The court explained that only NEMA and the local environment committees have the right to bring an action under NEA.[113] Consequently, any individual seeking to enforce a right under the statute would have to inform NEMA or the local environment committee, which could bring the action on the person's behalf.[114]

The portion of the *Byabazaire* opinion denying individuals the right to sue under NEA section 3, however, has been upended by other deci-

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[105] *Id.*

[106] *Id.*; Byabazaire v. Mukwano Indus., H.C. Misc. App. No. 909 of 2000 (High Ct. Jan. 24, 2001), *reprinted in* 1 Guide to Environmental Law in Uganda, *supra* note 12, at *39, *43.

[107] National Environment Act, ch. 153, § 3.

[108] *Id.* §3(4).

[109] *Byabazaire*, H.C. Misc. App. No. 909 of 2000, at *43.

[110] *Id.* at *40; *see* National Environment Act, ch. 153, § 3 (Uganda 1995).

[111] *Byabazaire*, H.C. Misc. App. No. 909 of 2000, at *40.

[112] *Id.* at *43.

[113] *Id.*

[114] *Id.*

sions.[115] These decisions rely on section 71 of NEA, which provides that "the court may, in any proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment."[116] Subsection (2) of section 71 also makes it unnecessary "for a plaintiff… to show that he or she has a right of, or interest in, the property, in the environment or land alleged to have been harmed or in the environment or land contiguous to such environment or land."[117]

In 1995, the High Court in *National Association of Professional Environmentalists v. AES Nile Power* discussed section 71.[118] In this case, the plaintiffs filed an application under section 71 of NEA, seeking a temporary injunction to prevent the company from finalizing a power purchase agreement with the Ugandan government until NEMA had approved an Environmental Impact Assessment ("EIA") on the project.[119] The court held that section 71 gives a person "the parallel avenue" to petition the "[c]ourt notwithstanding any action by the NEMA authority for an environmental restoration order against a person" whose activity is deleterious to the environment.[120] The court further explained that the section favors class actions and suits in the public interest because it makes it easier to establish standing to bring an action by making it unnecessary for the plaintiff to demonstrate a right or an interest in the action.[121]

Another case where a Ugandan court discussed section 71 of NEA is *Greenwatch v. Golf Course Holdings Ltd.*[122] The case concerned an application brought by Greenwatch, a non-governmental organization dedicated to environmental rights advocacy, under section 71 of NEA seeking a temporary injunction to stop respondents from building a hotel on a wetland.[123] Although the court declined to grant the injunction, it nonetheless acknowledged that the plaintiffs' interest was of a

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[115] *See* Greenwatch v. Golf Course Holdings, Ltd., H.C. Misc. App. No. 390 of 2001, (High Ct. Oct. 20, 2001), *reprinted in* 1 GUIDE TO ENVIRONMENTAL LAW IN UGANDA, *supra* note 12, at *36, *38; *Nat'l Ass'n of Prof'l Environmentalists*, H.C. Misc. Cause No. 268 of 1999, at *48.

[116] *See* National Environment Act, ch. 153, § 71(1) (Uganda 1995).

[117] *Id.* § 71(2).

[118] H.C. Misc. Cause No. 268 of 1999, at 48; *see* National Environment Act, ch. 153, § 71(1). The Parliament amended NEMA and section 72 became section 71. Kasimbazi, *supra* note 11, at 584.

[119] *Nat'l Ass'n of Prof'l Environmentalists*, H.C. Misc. Cause No. 268 of 1999, at *45.

[120] *Id.* at *48; *see* National Environment Act, ch. 153, § 71(1).

[121] *Nat'l Ass'n of Prof'l Environmentalists*, H.C. Misc. Cause No. 268 of 1999, at *48.

[122] H.C. Misc. Applic. No. 390 of 2001, at *38.

[123] *Greenwatch*, H.C. Misc. Appc. No. 390 of 2001, at *36–*37; Kasimbazi, *supra* note 11, at 584.

public nature and they had a right to sue under the statute.[124] Consequently, litigants can get standing under section 71 of NEA to bring public interest litigation.[125]

III. The Public Trust Doctrine

The public trust doctrine has its origins in Roman law, when the Institutes of Justinian declared "[b]y the law of nature these things are common to mankind–the air, running water, the sea and consequently the shores of the sea."[126] From this development, the English common law ultimately accepted the notion of the public trust, where the sovereign holds all navigable waterways, along with the land underneath these waterways as a trustee and the people as the beneficiaries.[127]

A. *Evolution of the Public Trust Doctrine in the United States*

An American court first acknowledged the public trust doctrine in 1821 in *Arnold v. Mundy*.[128] The case involved an action for trespass by the plaintiff, who alleged that defendant had no right to take the oysters that the plaintiff planted in a tidal bed of the Raritan River adjacent to the plaintiff's land.[129] The New Jersey Supreme Court held that under the common law, the King of England, as the sovereign of America, owned all the navigable waters and the land under the waters for use by the general public.[130] Following the American Revolution, title to these waters and lands passed from the King of England to the people of New Jersey as the new sovereign.[131] The court concluded that because the New Jersey legislature did not give the plaintiff absolute

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[124] *Greenwatch*, H.C. Misc. App. No. 390 of 2001, at *38; Kasimbazi, *supra* note 11, at 584.

[125] *See Greenwatch*, H.C. Misc. App. No. 390 of 2001, at *38; Kasimbazi, *supra* note 11, at 584.

[126] Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty. ("*Mono Lake*"), 658 P.2d 709, 718 (Cal. 1983) (quoting J. Inst. 2.1.1).; Mackenzie S. Keith, *Judicial Protection for Beaches and Parks: The Public Trust Doctrine Above the High Water Mark*, 16 Hastings W.-Nw. J. Envtl. L. & Pol'y, 165, 169 (2010).

[127] *Mono Lake*, 658 P.2d at 718; Zachary C. Kleinsasser, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. Envtl. Aff. L. Rev. 421, 423–24 (2005).

[128] Arnold v. Mundy, 6 N.J.L. 1, 1–3 (1821); Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 Pace Envtl. L. Rev. 649, 655 (2010).

[129] Arnold, 6 N.J.L. at 1–3.

[130] *Id.* at 12–13.

[131] *Id.* at 13.

right or title to the riverbed, the plaintiff could not maintain a trespass action against the defendant for taking oysters from the riverbed.[132]

The Supreme Court's decision in *Illinois Central R.R. Co. v. Illinois* significantly shaped the public trust doctrine as applied by the states.[133] In that case, the Illinois legislature passed an act granting the Illinois Central Railroad Company possession of the submerged lands in the harbor of Chicago and subsequent control of its waters.[134] The legislature later repealed the act, but the company asserted its right of ownership to the submerged lands and harbor, and the right to erect docks, piers, wharves, and other developments necessary for the company's interests.[135]

The issue before the Court was whether the Illinois Legislature had the power to transfer state ownership of the submerged lands to the railroad company.[136] The Court held that the legislature did not have this power, and therefore, a grant transferring ownership of the submerged lands was either void on its face or revocable.[137] The Court compared the state's power over property enjoyed by the general public to the state's police powers and reasoned that just as the state could not relinquish these police powers, neither could it give authority over public trust property to private entities.[138] With this statement, the Court conveyed a rule that is at the heart of public trust cases: when a state controls a public resource, courts are reluctant to sanction any government action that either inhibits the use of the resource or promotes private party interests in the resource over those of the public.[139]

B. *Reconciling the American Public Trust Doctrine with Private Property*

The 1971 California Supreme Court decision *Marks v. Whitney* marks a significant development in understanding the public trust doctrine.[140] The decision is important for two reasons: (1) it expanded the scope of the public trust to encompass private property; and (2) acknowledged that the scope of the public trust expands with evolving

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[132] *See id* at 13–14.

[133] Keith, *supra* note 126, at 170; *see* 146 U.S. 387, 453 (1892).

[134] *Ill. Cent. R.R. Co.*, 146 U.S. at 439–43.

[135] *Id.*

[136] *Id.* at 452.

[137] *Id.* at 453.

[138] *Id.* at 453–54.

[139] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 490 (1970).

[140] 491 P.2d 374, 378–80 (Cal. 1971); Arthur L. Littleworth, *The Public Trust vs. The Public Interest*, 19 PAC. L.J. 1201, 1214–15 (July 1988).

uses of the trust resource.[141] The case involved an action for quiet title where the defendant owned a narrow piece of the tidelands, which attached to a long portion of the plaintiff's property.[142] Claiming absolute ownership of the tidelands, the defendant argued that he could develop and fill them.[143] The plaintiff, however, contested the defendant's proposed development plan arguing that this would take away his littoral rights[144] as an owner of property and his rights as a member of the public in the navigable waters and tidelands.[145] The plaintiff, therefore, asked the court to find the defendant's title encumbered by a public trust easement.[146]

Expanding the reach of the doctrine to cover private property, the California court held that a public trust burdened the defendant's title to the tidelands.[147] The court's decision split the plaintiff's property into two distinctive estates.[148] The first estate, inherent in the defendant's title, was an acknowledgement of the property owner's rights of "possession and alienation."[149] The second estate, however, was implicit in the public's rights in the estate, which limited "private development that was inconsistent with public rights."[150]

The court also signaled a potential for the expansion of the public trust doctrine to include the ever-changing needs of the public in the trust resource.[151] As an example, the court explained that courts conventionally limit public trust easements to the public's right to use navigable waters and tidelands to "fish, hunt, bathe, [and] swim."[152] Nonetheless, the court noted that this "outmoded classification" of public uses did not restrict the public interest in tidelands, and could change with evolving public needs.[153] The court then referenced increased public appreciation for the preservation of tidelands in their natural state so that they could provide ecological services, act as a habitat and

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[141] *Marks*, 491 P.2d at 378, 380; Littleworth, *supra* note 140, at 1214.

[142] *Marks*, 491 P.2d at 377.

[143] *Id.*

[144] "A littoral owner has a right in the foreshore adjacent to his property separate and distinct from that of the general public." *Id.* at 382. The court cautioned that although this right is subject to the rights of the general public, it cannot be randomly terminated. *Id.*

[145] *Id.* at 377.

[146] *Id.*

[147] *Id.* at 378.

[148] *Marks*, 491 P.2d at 379–80; Blumm, *supra* note 128, at 658.

[149] Blumm, *supra* note 128, at 659; *see Marks*, 491 P.2d at 378.

[150] Blumm, *supra* note 128, at 659; *Marks*, 491 P.2d at 379.

[151] *Marks*, 491 P.2d at 380; Littleworth, *supra* note 140, at 1214.

[152] *Marks*, 491 P.2d at 380; Littleworth, *supra* note 140, at 1214.

[153] *Marks*, 491 P.2d at 380.

source of food for animals, and positively affect the climate and surroundings.[154] The court recognized that such uses were well within the public trust.[155]

In 1983, in *National Audubon Society v. Department of Water & Power of Los Angeles* ("*Mono Lake*"), the California Supreme Court broke several new grounds for the doctrine.[156] The case involved an action to enjoin California's Department of Water from diverting streams flowing into Mono Lake because the diversion affected the "scenic beauty and ecological values" of the lake.[157] The court held that the public trust doctrine considerations apply to California's water rights system.[158] The *Mono Lake* decision made four major contributions to the public trust doctrine.[159] First, the court increased the scope of the public trust to protect not only navigable waters, but also "nonnavigable tributaries" affecting navigable waters.[160] Second, the court reiterated the holding in *Marks* that development by private landowners on trust property is subject to the public's interest in the trust resource.[161] Third, the court held that the public trust requires some accommodation between private rights and the public's interest in the trust resource.[162] Consequently, the public's interest in the trust has to be protected "whenever feasible."[163] Lastly, the court held that even after authorizing use of a trust resource, the state has "a duty of continuing supervision" over how interested parties utilize that resource.[164] The state, therefore, is not bound by past authorizations and is free to reconsider judicial determinations on receipt of new information.[165]

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[154] *Id.*; Littleworth, *supra* note 140, at 1214.

[155] *See Marks*, 491 P.2d at 380; Littleworth, *supra* note 140, at 1214.

[156] Michael C. Blumm & R.D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 44 U.C. Davis L. Rev. 741, 757–59 (2012).

[157] *Mono Lake*, 658 P.2d at 711.

[158] *Id.* at 726.

[159] Blumm & Guthrie, *supra* note 156; *see* Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 Ariz. L. Rev. 701, 708 (1995).

[160] *Mono Lake*, 658 P.2d at 721; Blumm & Guthrie, *supra* note 156, at 757.

[161] *Mono Lake*, 658 P.2d at 723; Blumm & Guthrie, *supra* note 156, at 757; *see Marks*, 491 P.2d at 379.

[162] *Mono Lake*, 658 P.2d at 727; Blumm & Guthrie, *supra* note 156, at 758.

[163] *Mono Lake*, 658 P.2d at 728; Blumm & Guthrie, *supra* note 156, at 758.

[164] *Mono Lake*, 658 P.2d at 728; Blumm & Guthrie, supra note 156, at 711.

[165] *Mono Lake*, 658 P.2d at 728; *see* Blumm & Guthrie, *supra* note 156, at 758–59.

C. *The Public Trust Doctrine in Uganda*

Use of the public trust doctrine in Uganda is a recent development, which in 2004, the High Court of Uganda, Kampala adopted in *Advocates Coalition for Development and Environment v. Attorney General.*[166] The case concerned a thirty-two year old lease held by Kakira Sugar Works ("KSW") to collect firewood from Butamira Forest for use at its factory.[167] KSW tried to change the permit so it could grow sugarcane on the forest land but was unsuccessful.[168] In 1997, KSW finally succeeded when the Forestry Department granted the company a fifty-year permit to use the forest for sugarcane.[169] Without doing an Environmental Impact Assessment, as mandated under Uganda's National Environmental Act ("NEA"), KSW set out to replace the forest with sugar cane plantations.[170] When the surrounding community protested the developments, the Inspector General of Uganda and later the Parliamentary Committee on Natural Resources conducted an inquiry into KSW's permit.[171] The Committee, on finding fraud, proposed that the permit be withdrawn.[172] Parliament, however, passed a motion in favor of KSW's continuing to grow sugar on the reserve.[173] Consequently, the plaintiff filed an application opposing the permit.[174]

The court recognized that the environmental group—Advocates Coalition for Development and Environment—had standing under Article 50 Clauses 1 and 2 of the Ugandan Constitution to file an action on behalf of the people of Butamira and the Ugandan public.[175] The court held that the Butamira Forest Reserve was "land which the government of Uganda holds in trust for the people of Uganda."[176] As a result, the government lacked the power to lease the land or alienate

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[166] Misc. Cause No. 0100 of 2004 (High Ct. Nov. 7, 2005), *reprinted in* 1 Environmental Law Case Book for Practitioners and Judicial Officers *1, *8 (Greenwatch, Environmental Law Institute, National Environment Management Authority ed., 2005), *available at* http://www.greenwatch.or.ug/files/downloads/Casebook%20on%20Environmental %20law.pdf.

[167] *Id.* at *3.

[168] *Id.*

[169] *Id.* at *4.

[170] *Id.*

[171] *Id.*

[172] *Advocates Coal. for Dev. & Env't*, Misc. Cause No. 0100 of 2004, at *4.

[173] *Id.*

[174] *Id.* at *6.

[175] Uganda Const. art. 50, cls. 1, 2; *Advocates Coal. for Dev. & Env't*, Misc. Cause No. 0100 of 2004, at *6.

[176] *Advocates Coal. for Dev. & Env't*, Misc. Cause No. 0100 of 2004, at *8.

it.[177] The court noted that the "government may grant concessions or licenses or permits in respect of land held under trust."[178] Nonetheless, the court emphasized that such rights were to be given with permission from Parliament and consent from members of the public.[179] Because there were several complaints[180] from the surrounding community members about the permit in this instance, the court held that granting the permit violated the public trust.[181]

In reaching its decision, the court relied on the public trust doctrine as codified in the 1995 Constitution and the NEA.[182] With regard to the Constitution, the court looked to the Preamble, the National Objectives and Directive Principles of State Policy, that declares "'[t]he State shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda.'"[183] Article 237, Clause 2, Section b of the Constitution restates this public trust principle and explains that the government shall hold all land including rivers, wetlands, lakes, and other lands set aside for ecological and recreational purposes in trust for the people.[184]

The court also looked to the NEA for its language invoking the public trust doctrine.[185] Section 2 of NEA declares that one of the principles of environmental management is to use resources efficiently and conserve them "for the benefit of both present and future generations."[186] The section's reference to the preservation of resources for future generations calls to mind principles underlying the public trust doctrine.[187] In *Advocates Coalition for Development & Environment*, the

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[177] *Id.* Alienation refers to the "[c]onveyance or transfer of property to another." BLACK'S LAW DICTIONARY 84 (9th ed. 2010).

[178] *Advocates Coal. for Dev. & Env't*, Misc. Cause No. 0100 of 2004, at *8.

[179] *Id.*

[180] The court noted that over 1500 people from the local community had formed an activist group to protest the conversion of the forest to a plantation. These people used the forest as a source of food, water and other types of nourishment. *Id.*

[181] *Id.*

[182] *Id.* at *7, *10–*11; *see* UGANDA CONST. pmbl.; National Environment Act, ch. 153, § 2 (Uganda 1995). The court also relied on section 44 of the 1998 Land Act. The only difference between the Constitutional provision and the provision in the Land Act is that the Land Act includes "ground water, natural ponds, [and] natural streams" among those resources held in trust for the public. *Advocates Coal. for Dev. & Env't*, Misc. Cause No. 0100 of 2004, at *7–*8.

[183] *Id.* at *7 (quoting UGANDA CONST. pmbl.).

[184] UGANDA CONST. art. 237, cl. 2, § b.

[185] National Environment Act, ch. 153, § 2; *Advocates Coal. for Dev. and Env't*, Misc. Cause No. 0100 of 2004, at *8–*9; Blumm & Guthrie, *supra* note 156, at 778–79.

[186] National Environment Act, ch. 153, § 2.

[187] *See* Blumm & Guthrie, *supra* note 156, at 779.

High Court referenced this language and held that NEMA failed in its statutory statutory duties because it did not require KSW to prepare an environmental impact assessment as required by the statute.[188] Consequently, NEMA could not effectively assure the preservation of the resource for the next generation.[189]

The scope of the public trust doctrine in Uganda includes more than just navigable waters.[190] Furthermore, Uganda's public trust doctrine goes beyond the traditional function of protecting the public's interest in "navigation, fishing, and commerce."[191] The doctrine as pronounced in the Constitution encompasses water resources including lakes, rivers, and public lands such as forest reserves, and national parks.[192] The purpose of the doctrine includes the protection of non-traditional public interests in trust resources including "ecological and touristic purposes."[193]

The court in *Advocates Coalition for Development and Environment*, recognized these non-traditional interests when it declared that the right to health extends beyond physical wellbeing to include "intellectual, moral, cultural, spiritual, political and social wellbeing."[194] Consequently, the court held that the community around Butamira forest reserve had a "cultural economic and spiritual attachment to Butamira Forest Reserve as a source of sports, worship, herbal medicine, [and] economy," among others.[195] KSW's private interest of growing a plantation would cut off these interests, thereby violating the public trust.[196]

IV. Using Public Interest Litigation to Save Bugala Island and Mabira Forest

Government give-aways of forest land to agricultural investors contributes to the high rate of deforestation in Uganda.[197] As previously mentioned, two of the more highly protested land grants are the proposed grant of Mabira Forest and the give-away of some forest land on

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[188] National Environment Act, ch. 153, § 2 (Uganda 1995); Misc. Cause No. 0100 of 2004, at *11.

[189] *See Advocates Coal. for Dev. & Env't*, Misc. Cause No. 0100 of 2004, at *11.

[190] Blumm & Guthrie, *supra* note 156, at 779.

[191] *Id.*

[192] Uganda Const. art. 237, cl. 2, § b.

[193] *Id.*; Blumm & Guthrie, *supra* note 156, at 779.

[194] Misc. Cause No. 0100 of 2004, at *11.

[195] *Id.*

[196] *Id.* at *8.

[197] *See Forests Fight Back*, *supra* note 40.

Bugala Island.[198] Public interest litigants looking to oppose these grants should take advantage of Uganda's liberal standing requirements under Article 50 of the Constitution and file a public interest suit.[199] The action could be for violation of the right to a clean and healthy environment guaranteed under the Constitution, or a violation of the public trust doctrine.[200]

Litigants should consider that public forest reserves constitute only 15% of Uganda's forest area, 70% of which is privately owned.[201] Private forests are, therefore, vulnerable to degradation.[202] A clear illustration is the Bugala Island give-away where stiff opposition stopped the government from giving away more public forest land to Bidco.[203] Nonetheless, the government started buying forest land from private parties to give to the company.[204] Litigants could argue that forests on private land are a public trust resource, and courts should look to American law for guidance on applying the public trust doctrine to trust resources on private property.[205]

A. *Potential Litigants Should Bring Public Interest Actions Under Article 50, Clauses 1 and 2 of the Ugandan Constitution*

Although public interest litigants can obtain standing under Articles 50 and 137 of the Constitution, and section 71 of the National Environment Act ("NEA"), an individual seeking to halt a government give-away of forest land in Mabira and Bugala should file an action in the public interest under Article 50, Clauses 1 and 2 of the Constitution.[206] Article 50, Clauses 1 and 2 are superior because litigants can most easily

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[198] *See* Miti & Kasozi, *supra* note 6; *Forests Fight Back*, *supra* note 40; Kavuma, *supra* note 55.

[199] *See* Uganda Const. art. 50, cls. 1–2; Envtl. Action Network, Ltd. v. Attorney Gen., H.C. Misc. App. No. 39 of 2001 (High Ct. Aug. 28, 2001), *reprinted in* 1 Guide to Environmental Law in Uganda, *supra* note 12, at *17, *21.

[200] Uganda Const. art. 39; Advocates Coal. for Dev. & Env't v. Attorney Gen., Misc. Cause No. 0100 of 2004 (High Ct. Nov. 7, 2005), *reprinted in* 1 Environmental Law Case Book for Practitioners and Judicial Officers, *supra* note 167, at *1, *8.

[201] *See* Tenywa, *supra* note 33.

[202] *See id.*

[203] *See Forests Fight Back*, *supra* note 40.

[204] *Id.*

[205] *See infra* notes 251–275 and accompanying text.

[206] *See Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *21; Nat'l Ass'n of Prof'l Environmentalists v. AES Nile Power, H.C. Misc. Cause No. 268 of 1999 (High Ct. Apr. 19, 1999), *reprinted in* 1 Guide to Environmental Law in Uganda, *supra* note 12, at *45, *48.

establish standing, and avoid the restrictive standing requirements of the other laws.[207]

Under Article 50, Clauses 1 and 2, concerned parties can file an action against the Ugandan government for violating their right to a clean and healthy environment guaranteed under Article 39 of the Constitution.[208] Article 50, Clause 1 confers standing if the litigant alleges that his or her right under the Constitution has been violated.[209] Take the example of the residents of Bugala Island who are experiencing the effects of Bidco's forest-clearing activities.[210] These residents can claim that the government violated their right to a clean and healthy environment when it gave away forest land to Bidco, and the company subsequently cleared the forest to make way for a palm tree plantation.[211] Since this action directly injured the residents, they have standing under Article 50, Clause 1 to approach the court for redress, and could halt the government's purchase of private forested land in the area.[212]

Furthermore, other potential litigants such as environmental organizations or civil society groups can get standing under Article 50, Clause 2 of the Constitution to challenge these actions.[213] These parties would argue the government's grant of forest lands to private companies for development is a violation of the right of the residents living in these areas to a clean and healthy environment.[214] Article 50, Clause 2 does not require that plaintiffs allege a direct injury from the right infringed, therefore, the courts would likely grant standing to an interested, but not directly affected, party.[215] As articulated in *The Environment Action Network v. Attorney General*, most people are either apathetic or ignorant of their rights, or they are simply too poor to pursue ex-

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[207] *See infra* notes 208–248 and accompanying text.

[208] *See Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *21. *Compare* UGANDA CONST. art. 39 (providing every Ugandan with a right to a clean and healthy environment), *with id.* art. 50, cls. 1–2 (giving any person or organization the right to apply to a competent court for redress for violation of rights guaranteed under the Constitution).

[209] UGANDA CONST. art. 50, cl. 1.; Kasimbazi, *supra* note 11, at 580.

[210] *See Forests Fight Back*, *supra* note 40.

[211] *See* UGANDA CONST. art. 39; *id.* art. 50, cls. 1–2.

[212] *See id.* art. 50, cl. 1; Kasimbazi, *supra* note 11, at 580.

[213] *See* UGANDA CONST. art. 50, cl. 2; British Am. Tobacco Ltd. v. Envtl. Action Network Ltd., H.C. Civil Case 27 of 2003 (High Ct. Apr. 16, 2003), *reprinted in* 1 GUIDE TO ENVIRONMENTAL LAW IN UGANDA, *supra* note 12, at *9, *11; *Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001 at 21.

[214] *See* UGANDA CONST. art. 39; *Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *21.

[215] *See British Am. Tobacco*, H.C. Civil Case No. 27 of 2003, at *12; *Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *21.

pensive litigation to enforce them.[216] As a result, the High Court interprets Article 50, Clause 2 to give standing to any organization or group seeking to enforce the rights of the general public or an affected portion of the public.[217] Litigants should bring public interest actions under Article 50, Clauses 1 and 2 of the Constitution because standing under Article 137 of the Constitution is more restrictive, private parties cannot control litigation under NEA section 3, and Article 50 is broad enough to include public trust claims.

1. Article 50 Is Better Than Article 137, Clause 3 for Standing

It is easier for public interest litigants to establish standing under Article 50, Clauses 1 and 2 than under Article 137, Clause 3 of the Uganda Constitution because the latter requires that the plaintiff frame the action to raise a Constitutional question.[218] Although Article 137, Clause 3 allows any person alleging a violation of the rights guaranteed in the Constitution to petition the Constitutional Court for a remedy, it also specifically provides for resolving constitutional questions.[219] Article 137, Clause 3 gives the Court of Appeals power to interpret the Constitution only when it is "sitting as the Constitutional Court."[220] Furthermore, under Article 137, the Constitutional Court is limited to interpreting the Constitution.[221] Consequently, citizens concerned about government granting forest land to private individuals would have to frame the action to raise a constitutional question in order to get standing under Article 137, Clause 3.[222] Public interest litigants who wish to avoid this burden should bring the action in the High Court under Article 50 of the Constitution.[223]

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[216] *Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *21.

[217] *British Am. Tobacco*, H.C. Civil Case No. 27 of 2003, at *11–*12; *Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *21.

[218] *See* Kasimbazi, *supra* note 11, at 582. *Compare, e.g.*, Uganda Const. art. 50, cl. 1 (giving any person or organization the right to apply to a *competent court* for redress for violation of rights guaranteed under the Constitution), *with id.* art. 137, cl. 3 (giving any person the right to petition the *Constitutional Court* for redress for violation of rights guaranteed under the Constitution).

[219] Uganda Const. art. 137, cl. 1.

[220] *Id.*

[221] Kasimbazi *supra* note 11, at 582; *see* Uganda Const. art. 137, cl. 1.

[222] *See* Uganda Const. art. 137, cl. 1; Kasimbazi *supra* note 11, at 582.

[223] *See* Uganda Const. art. 137, cls. 1, 2; Kasimbazi *supra* note 11, at 582.

2. Public Interest Litigants Control the Lawsuit Under Article 50, Which Is Better Than NEA Section 3 Actions

By filing the action under Article 50, Clauses 1 and 2 of the Ugandan Constitution, public interest litigants can also avoid ceding the suit to the National Environment Management Authority ("NEMA").[224] In contrast, the *Byabazaire v. Mukwano Industries* decision, criticized among environmentalists, requires citizens alleging that an entity is violating NEA, to bring such violations to the attention of NEMA.[225] Consequently, citizens concerned that the government violates NEA by granting forest land to private parties can only report the violation to a government agency—NEMA or the local environment committee—that then could bring an action on their behalf.[226]

Requiring litigants to report violations denies them the right to determine what remedies should be sought under the suit.[227] For example, residents of Bugala Island might want to seek an injunction stopping the government from buying private forest land and giving it to private parties, while NEMA might simply demand that the government file an Environmental Impact Assessment ("EIA").[228] Since the *Byabazaire* decision effectively denies Bugala Island residents standing to bring a public interest action under NEA section 3, they would have to accept the remedy demanded by NEMA.[229]

Additionally, critics argue that although the High Court may have properly held that only NEMA has the right to seek relief for violations of the section 3 of the statute, the court was wrong in asserting that only NEMA has the "power and duty to sue for violations committed under the [entire] Statute."[230] The critics point to other decisions such as *National Ass'n Professional Environmentalists v. AES Nile Power* and *Advocates Coalition for Development & Environment v. Attorney General* to show that a

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[224] *See* Byabazaire v. Mukwano Indus., H.C. Misc App. No. 909 of 2000 (High Ct. Jan. 24, 2001), *reprinted in* 1 GUIDE TO ENVIRONMENTAL LAW IN UGANDA, *supra* note 12, at *39, *43.

[225] *Id.* at *43; Kasimbazi, *supra* note 11, at 583.

[226] Kasimbazi, *supra* note 11, at 583; *see Byabazaire*, H.C. Misc. Appl. No. 909 of 2000, at *43.

[227] *See Byabazaire*, H.C. Misc. App. No. 909 of 2000, at *43; Kasimbazi, *supra* note 11, at 583.

[228] *See* National Environment Act, ch. 153, § 20(3) (Uganda 1995); *Byabazaire*, H.C. Misc. App. No. 909 of 2000, at *43; Kasimbazi, *supra* note 11, at 583.

[229] *See Byabazaire*, H.C. Misc. App. No. 909 of 2000, at *43; Kasimbazi, *supra* note 11, at 583.

[230] Kasimbazi, *supra* note 11, at 584; *see Byabazaire*, H.C. Misc. App. No. 909 of 2000, at *43.

public interest litigant can seek redress from the courts for a violation of NEA under section 71 of the statute.[231] Individuals or organizations who want to retain control of the suit can challenge the government's decisions regarding Bugala and Mabira Forests as a violation of NEA under section 71 of the statute.[232] Nonetheless, potential litigants should be aware that some courts only grudgingly recognize the right of public interest litigants to bring actions under section 71 of the statute.[233] Consequently, litigants can avoid the ambivalence of courts to grant standing under NEA by filing the action under Article 50, Clauses 1 and 2 of the Constitution.[234]

3. Article 50 Confers Standing To Bring a Public Trust Doctrine Case

Lastly, Article 50, Clauses 1 and 2 also give potential public interest litigants standing to file an action for breach of the public trust under the public trust doctrine.[235] Public interest litigants could use the Ugandan Constitution to sue the government on behalf of all Ugandans and on behalf of the local residents whose livelihood depends on the forests.[236] Litigants could seek a declaration that the government would violate the public trust doctrine if it executes its proposal to give away one quarter of Mabira forest to the Sugar Corporation of Uganda Limited ("SCOUL").[237]

An action under the public trust doctrine to stop the government from granting public forest land to a private company to grow sugarcane would be similar in form and argument to *Advocates Coalition for Development & Environment v. Attorney General*.[238] Litigants could argue

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[231] *See* Greenwatch v. Golf Course Holdings, Ltd., H.C. Misc. App. No. 390 of 2001, (High Ct. Oct. 20, 2001), *reprinted in* 1 GUIDE TO ENVIRONMENTAL LAW IN UGANDA, *supra* note 12, at *36, *38; *Nat'l Ass'n of Prof'l Environmentalists*, H.C. Misc. Cause No. 268 of 1999, at *48; Kasimbazi, *supra* note 11, at 583–84.

[232] National Environment Act, ch. 153, § 71 (1); *see Greenwatch*, H.C. Misc. App. No. 390 of 2001, at *38; *Nat'l Ass'n of Prof'l Environmentalists*, H.C. Misc. Cause No. 268 of 1999, at *48.

[233] *See Greenwatch*, H.C. Misc. App. No. 390 of 2001, at *38 (stating that "I am aware that the NEMA statute gives them the right to sue but in my view this does not diminish the fact that the suit property belongs to the respondents").

[234] *See* UGANDA CONST. art. 50, cls. 1–2; *Greenwatch*, H.C. Misc. App. No. 390 of 2001, at *38; *Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *21.

[235] *See Advocates Coal. for Dev. & Env't.*, Misc. Cause No. 0100 of 2004, at *6.

[236] *See id.*

[237] *See id.* at *8.; Miti & Kasozi, *supra* note 6; Kavuma, *supra* note 55.

[238] *See* Misc. Cause No. 0100 of 2004, at *4–*5.

that because of the striking similarities between the two cases, the court should find in their favor.[239]

In *Advocates Coalition for Development & Environment*, litigants protested a government permit allowing a sugar works company to use a public forest for its sugar plantation.[240] The plaintiffs highlighted the fact that the government had not released an EIA for the proposed sugarcane plantation.[241] Consent was also critical to the court's decision, where the court noted that the government had the right to issue permits authorizing parties to use public trust land.[242] The court emphasized, however, that these permits had to be given with Parliamentary approval and the consent of the public.[243]

Potential litigants today would oppose the government's proposed give-away of Mabira Forest Reserve to SCOUL for economic purposes.[244] Similar to the Plaintiff's argument in *Advocates Coalition for Development & Environment*, litigants should highlight the fact that the government has not yet released an EIS on the Mabira give-away.[245] Consequently, the court should declare any government give-away of Mabira forest invalid.[246] Moreover, potential litigants should argue that the government lacks consent from members of the public to give land in the Mabira Forest to SCOUL.[247] Litigants can point to intense public opposition, including demonstrations that resulted in three deaths, following the government's announcement that it would give away Mabira forestland in 2007.[248] As a result, the government abandoned plans to give away the forest in 2007 and only revived them in 2011.[249] Potential litigants should argue because there is still opposition to these efforts, the government lacks consent from the public, and giving away the forest violates the public's rights in the trust resource.[250]

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[239] *See id.* at *4–*5, *8.
[240] *See id.* at *4–*5.
[241] *Id.* at *8.
[242] *See id.*
[243] *Id.*
[244] *See Advocates Coal. for Dev. & Env't*, Misc. Cause No. 0100 of 2004, at *8.
[245] *See id.*
[246] *See id.* at *11.
[247] *See Uganda's President Revives Plan to Axe Rainforest*, *supra* note 41.
[248] *See* Miti & Kasozi, *supra* note 6.
[249] *Id.*
[250] *See Advocates Coal. for Dev. & Env't*, Misc. Cause No. 0100 of 2004, at *8.

B. *Uganda Should Seek Guidance from U.S. Case Law on Applying the Public Trust Doctrine to Private Property*

Potential public interest litigants should ask Ugandan courts to look to American case law for guidance on applying the public trust doctrine to trust resources on private property.[251] Uganda's forests are especially vulnerable to degradation because over 70% of them are on private property and only 15% are public forest reserves.[252] Litigants could point to what happened on Bugala Island, and argue that expanding the public trust doctrine to cover forests on private property would prevent any party, including the government, from changing the use of private forest land without parliamentary approval or public consent.[253]

Litigants could highlight as a model the California Supreme Court decision in *Marks v. Whitney*, which held that the public trust legally burdened the defendant's title in the tidelands.[254] The California court essentially divided that plaintiff's property into two estates; the private owner's right of "possession and alienation," and the public's right which limits any development inconsistent with the public trust.[255] Litigants could ask the court similarly to declare that a public trust easements encumber forests on private land in Uganda.[256] A private owner of forest land would, therefore, have the right of possession and alienation.[257] The private property owner, however, would not have the right to use the forest land in ways inconsistent with the public trust.[258] Consequently, although the government could buy private forest land and give it to private companies, the companies could not pursue activities destroying forests given that such land would still be encumbered by the public trust.[259]

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[251] *See, e.g.*, *Envtl. Action Network*, H.C. Misc. App. No. 39 of 2001, at *21 (citing part of an opinion by a Justice in a High Court in Tanzania as support for giving litigants standing to pursue public interest litigation). Uganda, occasionally looks to other common law jurisdictions for guidance on handling certain legal questions. Johana Kalb, *Explaining Improbable Cases of Judicial Independence: The Example of Uganda*, I-CONNECT (Oct. 15, 2012) http://www.iconnectblog.com/2012/10/525/#_ftnref4 (stating that the Ugandan Judiciary regularly cites international and comparative law in its decision-making).

[252] *See Uganda*, *supra* note 31.

[253] *See Advocates Coal. for Dev. & Env't*, Misc. Cause No. 0100 of 2004, at *8; Marks v. Whitney, 491 P.2d 374, 378 (Cal. 1971).

[254] 491 P.2d at 378.

[255] *Id.* at 379; Blumm, *supra* note 128, at 658.

[256] *See Marks*, 491 P.2d at 378.

[257] *See id.* at 379; Blumm, *supra* note 128, at 658.

[258] *See Marks*, 491 P.2d at 379; Blumm, *supra* note 128, at 658.

[259] *See Marks*, 491 P.2d at 379; Blumm, *supra* note 128, at 658.

Moreover, litigants could also emphasize the California Supreme Court's acknowledgement in *Marks* that the public trust doctrine can expand to encompass the ever-changing needs of the public in the trust resource.[260] The court in *Marks* specifically noted the public's increased recognition of the value of preserving tidelands in their natural state because of benefits including ecological services, providing birds and animals with food and habitat, and also positively influencing climate and scenery.[261] Similarly, litigants could argue that by resisting the government give-away of forests, Ugandans have demonstrated belief in the benefits the forests provide in their natural state.[262] As a result of these new found benefits, the public trust doctrine in Uganda should expand to accommodate this use of forests as a trust resource.[263]

Nonetheless, litigants should anticipate the government's argument that expanding the public trust doctrine to cover forests on private property constitutes a threat to private landowners' property rights.[264] In response, litigants should highlight the California Supreme Court's decision in *National Audubon Society v. Superior Court of Alpine County* ("*Mono Lake*"), which held that the public trust requires accommodation between private rights and the public's interest in the trust resource.[265] The California court noted "that appropriation [of the trust resource] may be necessary for efficient use" of the resource "despite unavoidable harm to public trust values."[266] The public's interest in the trust resources, however, should be protected "whenever feasible."[267]

Consequently, litigants should argue that expanding the public trust doctrine in Uganda to cover forests on private land does not completely extinguish private property rights.[268] The doctrine simply ensures that when developing their property, private property owners protect the public's interest in forests "whenever feasible."[269] The Ugandan government would retain power, therefore, to buy and appropriate private forest land despite "foreseeable harm" to the forests if, and only if, it is absolutely necessary.[270] This, litigants can reason, would ensure that

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[260] *See* 491 P.2d at 380.
[261] *Id.*
[262] *See id.*
[263] *See id.*
[264] *See* Blumm, *supra* note 128, at 649–50.
[265] 658 P.2d 709, 727–28 (Cal. 1983).
[266] *Id.* at 728.
[267] *Id.* at 727–28; *see* Blumm, *supra* note 128, at 650.
[268] *See* Blumm, *supra* note 128, at 650–51.
[269] *Mono Lake*, 658 P.2d at 728.
[270] *See id.*

the Ugandan government observes "its duty as trustee to consider the effect of the taking on the public trust."[271]

Additionally, litigants could emphasize the court's decision in *Mono Lake*, which held that when the government makes an appropriation of a trust resource, "the public trust imposes a duty of continuing supervision" over the resource.[272] Consequently, incorrect past authorization do not hold the government hostage; instead, the government may reconsider the appropriation in light of new information.[273] In the case of the Bugala forest land, the government could reconsider its appropriation given current knowledge about the effects that Bidco's activities have on local residents.[274] Ultimately, litigants would be able to show that it is possible to preserve property rights in private forest land while ensuring that property owners and the government protect the public's interest in the forests.[275]

Conclusion

By giving away forest land to private investors, the Ugandan government perpetuates the high rate of deforestation and forest degradation in the country. The government has faced stiff resistance from the public in the form of protests for two of its more high profile give-aways of forest land: the proposed give-away of Mabira rainforest and the give-away of forest land on Bugala Island. Opponents can further challenge the government's actions by filing public interest litigation under Article 50 of the Constitution. An Article 50 action could be for violation of the right to a clean and healthy environment guaranteed under Article 39 of the Constitution, and for violation of the public trust doctrine. Because most of Uganda's forests are on private property, litigants should ask the courts to look to the American public trust doctrine and extend the public trust to cover trust resources on private property. Litigants will then be able to limit the destruction of forests on both pri-

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[271] *See id.*

[272] *See id.*

[273] *Id.*

[274] *See id.* Such effects include increased run-off into Lake Victoria because of exposure of bare land to weather effects; a growing threat to life and property from winds as there are no trees to act as windbreakers; scarcity of wood products to construct houses and boats; worry from local fishermen about the effects from chemicals sprayed in the palm tree plantation; and a general threat to the Island's ecosystem. *Forests Fight Back*, *supra* note 40.

[275] *See* Blumm, *supra* note 128, at 650–51.

vate and public forest land, and ultimately slow the rate of deforestation in Uganda.