THE PUBLIC TRUST DOCTRINE: WHO HAS THE BURDEN OF PROOF

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[T]he public trust is . . . an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands, and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the [public] trust.

The California Supreme Court's decision in National Audubon Society v. Super. Ct. of Alpine County, 33 Cal.3d 419, 441; 189 Cal.Rptr. 346, 360; 658 P.2d 709, 724 (1983),

Questions involving the environment are particularly prone to uncertainty. ... [R]egulators entrusted with the enforcement of [environment-related] laws have not ... been endowed with a prescience that removes all doubt from their decision-making. Rather, speculation, conflicts in evidence, and theoretical extrapolation typify their every action. ... Sometimes, of course, relatively certain proof of danger or harm from [requested] modifications [in the natural resource] can be readily found. But, more commonly, "reasonable ... concerns" and theory long precede certainty. Yet, the statutes -- and common sense -- demand regulatory action to prevent harm, even if the regulator is less than certain that the harm is otherwise inevitable.

The Federal Circuit Court of Appeals' decision in Ethyl Corp. v. EPA, 541 F.2d 1, 24-25 (D.C. Cir. 1976) cert. denied, 426 U.S. 941 (1976).

[Those who wish to maintain natural instream flows and to stop diversion of water from one watershed into another must show] with clear and convincing evidence [that harm will be caused by the diversion]. We believe it would be unreasonable [for the regulators to refuse the diversion request] on anything less than compelling evidence [of such harm]. ..." (Emphasis added.)

The lead attorney representing businesses that seek to divert mountain streams supporting traditional agriculture and a large estuary for new agricultural uses on the Central Oahu, Hawaii plains.

I. INTRODUCTION

Who has the burden of proof to demonstrate that a natural resource subject to the public trust should or should not be used or altered? Is it upon the party seeking to use or alter the resource? Or, as the Hawaii attorney quoted above suggests, is it upon those who oppose it? Or, is it ultimately upon the state and its agencies?

The public trust doctrine, once thought to be limited to the government's obligation to protect public rights in commerce, navigation and fishing in coastal tidal and submerged lands, has expanded dramatically in recent years to embrace recreational and ecological preservation in inland as well as coastal waters.

The job of the governmental regulator entrusted with the management of resources within the public trust is not envied by many, nor pleasant. Too often parties on various sides of an important, frequently controversial, issue offer largely generalities to support their particular viewpoint. The parties thereby leave it to the decision-maker to enunciate proper standards and reasonable certainty in pursuing

a narrow channel [of responsible planning], mindful of submerged hazards caused by takings decisions [by the courts], but propelled by statutory and common law obligations and the increasing realization that haphazard growth has led to pollution, proliferation of conflicting uses, shoreline erosion, and a denial to the people of their historic ... heritage.1

Again, who has the burden of proving that the government should permit the use and alteration of a public trust resource? For example, when the impact on the aquatic and plant wildlife of a proposed diversion of a stream which flows into an important estuary cannot be predicted with a high degree of certainty (in part because there is insufficient data and, even if the data existed, science cannot provide sufficient assurances), who has the burden of proving that the diversion should, or should not, be permitted?

As the argument of one lawyer quoted at the outset of this paper demonstrates, those who seek to use a natural resource for private gain frequently urge that the burden should be on those who oppose or would deny the request (usually those who can least afford to carry that burden), and that the burden should be "clear and convincing evidence" or nothing less than "compelling evidence" that the requested use and alteration of the resource would be harmful or improper. If that is the law, the consequences are dramatic and far-reaching.

This paper suggests that one powerful tool to assist decision-makers in resolving such issues is the burden of proof, and that the burden of proof should be squarely placed upon those who would use or alter the public trust resource, and that the burden should be a high one, requiring that there be a "clear and convincing" demonstration that there will be no significant detrimental effect on the resource. Doubts should be resolved against the request to use the resource.

The law is not settled on this question. Placing the burden on those parties seeking to use or alter the public resource is preferable for several reasons:

1. Traditional notions in Anglo-American jurisprudence that the party asking for something has the burden of demonstrating why he or she is entitled to it;

2. The precautionary principle;

3. Fiduciary duties of trustees to preserve and protect the principal of their trust: the public resources; and

4. Sound public policy arguments.

II.

WHAT IS THE "PUBLIC TRUST"?

In our opinion, the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. This authority applies to the waters tributary to Mono Lake and bars [the City of Los Angeles] or any other party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust.

The California Supreme Court in the Mono Lake case.2

The public trust doctrine offers a principled way for regulators and the courts to draw limits on the use and alteration of public resources. The doctrine is an entirely independent basis for decision-makers to decide specific cases. It is, at its best, a construct that presents neutral, reasoned criteria for making such tough decisions. The doctrine complements state constitutions, and state and federal statutes. It is potentially powerful. It can override statutes when they conflict with public trust purposes. The doctrine can provide relief for the decision-maker; it has been crafted by decision-makers. It changes the regulators' job from (a) deciding when should we alter and in many cases destroy natural resources--perhaps gradually but inevitably and with certainty--into (b) drawing a fairly firm line as to which resources we must protect. That is at the heart of the doctrine: identifying what resources should be protected over a period of time that spans generations.

The Courts of every state in the United States recognize that certain natural resources are held by the state and preserved for the public and future generations by the "Public Trust." These resources include all waters and submerged lands from three nautical miles offshore to at least the mean high-tide line, and navigable rivers, streams, ponds, and lakes, at least to their respective ordinary high-water marks. In recent years the reach of the doctrine has extended to the regulation of activities outside the above list of waters to include areas that may affect these resources (for example, non-navigable waterways such as seasonal streams the diversion of which adversely affects a lake), and by requiring access across privately owned lands to access public trust lands.

Hawaii has gone well beyond this and declared that all public natural resources are held in trust for the benefit of the people, including all waters of the state.

The body of law regarding the public trust, often referred to as the "public trust doctrine", is commonly recognized to have evolved from its ancient Roman origins, through the courts of England, and into the law of many countries. In the United States the law regarding the public trust doctrine has evolved primarily through the state legislatures and courts, as it is the states which are described as owning the public trust resources for the benefit of all their citizens. A state-by-state analysis is required to know what the law is with regard to a specific public resource.

The flash point of the evolution of that doctrine is the adversarial processes of government, when a private interest or a government agency seeks a controversial use and alteration of a natural resource which is subject to the public trust. Regulatory bodies initially decide the dispute and how the doctrine applies to the particular case, and then, when those governmental decisions are challenged, the courts test the regulatory decisions against the established law in this area. Sometimes new law is created.

Who has the burden of proof, and whether that burden has been met, can often determine the outcome of such contested proceedings.

III. WHAT IS THE "BURDEN OF PROOF"?

The burden of proof in a disputed case is "[t]he obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind" of the decision-maker in order for that party to prevail that fact. Black's Law Dictionary. The failure of a party to succeed in meeting this burden ordinarily means the party will lose on the issue or issues on which it has the burden.

The "burden of proof" is often used to mean two sometimes very different concepts: either (1) the necessity of establishing a fact, in other words, the burden of persuasion, or (2) the necessity of making a prima facie showing, in other words, the burden of going forward. In this paper, unless otherwise noted the burden of proof refers to the former definition: the burden of producing sufficient evidence in

order to persuade the decision-maker that that party is entitled to win on an issue.

In civil (non-criminal) matters, there are two basic standards of proof, or measures of the burden: "a preponderance of the evidence", and the much higher standard of "clear and convincing evidence".

Preponderance of the evidence, traditionally applied in civil cases generally, is defined as "more than 50%", or "more likely than not", or "proof which leads the decision-maker to find that the existence of a contested fact is more probable than its nonexistence."

On more important matters, clear and convincing evidence is required, which is described as evidence which produces in the decision-maker a firm belief or conviction as to the facts sought to be established. Placing the higher burden, and standard of proof of clear and convincing evidence, on those seeking to use or alter public resources is preferable for several reasons discussed throughout this paper.

The risk of loss inherent in the burden of proof makes its allocation of paramount importance. Statutes sometimes dictate which party must carry the burden of proof in a particular action. However, the legislature is often silent as to which party must bear the burden of proof. In these instances, the decision-maker must decide how to allocate the burden.

IV. TRADITIONAL NOTIONS IN ANGLO-AMERICAN JURISPRUDENCE THAT THE PARTY SEEKING SOMETHING HAS THE BURDEN OF,br> DEMONSTRATING WHY HE OR SHE IS ENTITLED TO IT

American courts always place the burden of proof on an issue on a specific party to a dispute. Usually, that burden is placed upon the party seeking to better his or her position. Sometimes deciding which party should have the burden on specific issues requires a more complex analysis. In determining where to allocate the burden of proof, when the answer is not apparent, courts consider factors such as (a) which party seeks to change the status quo, (b) the parties' relative ease of access to pertinent information, and (c) whether a certain allocation will effectuate the policy of underlying law.3 A court may require the party who possesses superior "access to knowledge" of the contended fact to bear the burden of proof.4 Courts may also allocate the burden of proof to the party which is alleging the most improbable or the least likely scenario.5 In addition, courts often consider public policy goals in determining where to allocate the burden of proof.6

Despite these considerations, authorities conclude that there is no overriding principle governing the apportionment of the burden of proof in every case because the ultimate allocation depends on considerations of fairness, convenience, and policy.7 As the U. S. Supreme Court has stated: "there are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, is merely a question of policy and fairness based on experience in the different situations."8

The sum of the various considerations concerning the allocation of the burden of proof has resulted in the burden of proof mechanism regularly operating to preserve the status quo or prior existing relationships. The burden thus often rests on the plaintiff as the party that is generally initiating the action or proceeding and seeking to change the status quo. In some instances, however, the party seeking relief through modification of the status quo is the defendant. Whether plaintiff or defendant, traditional notions of the burden of proof dictate that the party seeking to change the status quo should bear the burden of proof.9

In cases concerning public trust resources, the status quo is the natural state of the public resource: the state before alteration by human activity.10 Application of the burden of proof in public trust resource

cases in order to maintain the status quo requires that the burden of proof be placed on those who seek to alter or use the property protected under the trust. The burden is to prove that the requested relief will not impair or destroy the public resource.11

"Clear and convincing" is the appropriate standard by which to measure proof in most public resource cases. As discussed earlier, this standard is typically used in cases where the court endeavors to protect particularly important interests. The protection of the public resources for the benefit of the public good is unquestionably a "particularly important" interest. Under the clear and convincing standard, the decision-maker must have a firm belief or conviction that the activity will not damage the public resources. Thus unless clear and convincing evidence is presented proving that the proposed conduct will not result in damage,12 the party should not be permitted to use the resources. The clear and convincing standard, and the corresponding allocation of the burden of proof, helps ensure that the public resources will not be subject to unwarranted harm.

Placing the burden of proof on the party who is at risk of damaging the public resource also serves the traditional goals of the burden of proof doctrine. This party is seeking to change the status quo of public resources in their natural state. In addition, this party usually, if not always, possesses superior access to information.13 Furthermore, this party is virtually always alleging the improbable or the least likely scenario - that its actions will not damage or destroy the public resources. This result also furthers notions of fairness, as those engaged in conduct which alters public trust resources usually possess more money, control, and information, and are seeking to use the public resources for economic gain. These entities thus control the information and economic resources upon which to base any conclusion of the effect of their actions. At the same time, those seeking to protect the public resource generally have scant resources to bring a case and prove it.

If the burden of proof is not placed on the party seeking to alter or use the public resource, the party who is altering the environment is often permitted to do so until "proven wrong." As a result, the burden of proof mechanism, rather than protecting the environmental status quo, actually tends to protect the human activity impairing the public resources and therefore institutionalizes the environmentally damaging conduct as the status quo.

Thus, the allocation of the burden of proof to the party seeking to alter public trust resources will help ensure that the environment is protected unless those who seek to modify the status quo can prove, with a requisite degree of scientific and legal certainty, that their actions will not cause damage. By using the burden of proof consistent with its traditional purpose of maintaining the status quo, decision-makers can use the legal process and existing doctrine to more systematicallcourts fy preserve and protect the public trust resources.

V. THE PRECAUTIONARY PRINCIPLE

The precautionary principle comes to the law from science. That scientific principle of caution when faced with potentially grave consequences has found its way into international treaties and agreements, and into case law in the United States, particularly in the last 20 years.

For example, the Rio Declaration on Environment and Development provides that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing effective measures to prevent environmental degradation."14

Elsewhere, the principle has been described as follows: "a potential actor must prove that a possibly deleterious activity will not cause harm before permission for it will be granted,"15 and "activities that

may be harmful to the environment should be [prevented or] regulated even if conclusive scientific evidence of their harmfulness is not as yet available."16 In short, the principle mandates prudence in the face of scientific uncertainty about the consequences of a proposed action when there is reason to believe those consequences may be significant or severe. In matters involving the environment, the impact of an action on the natural resources is usually difficult to predict with specificity and certainty. Given this reality, the precautionary principle demands that protective measures be taken to prevent possible environmental degradation, even when the threatened harm cannot be proven with scientific certainty. The principle asserts that "regulators and decision-makers should act in anticipation of environmental harm, without regard to the certainty of scientific information pertaining to the risk of harm."17 When the environmental effects of a proposed activity are unknown or uncertain, the precautionary principle instructs regulators to err on the side of preventing environmental harm. The precautionary principle thus gives regulators wide latitude to take precautionary measures to protect natural resources and also the public health (which is invariably impacted by environmental damage). The legal ramification of this authority is an implicit allocation of the burden of proof to the party wishing to use the resources to establish that its activities will not damage the environment. This distribution of the burden of proof is evident in courts' decisions to uphold environmental regulators' actions to protect a natural resource and the public health in the face of unpredictable and uncertain harm.

In Ethyl Corp. v. EPA18 (quoted at the outset of this paper), the United States Court of Appeals for the District of Columbia Circuit emphasized the need for precaution in a case involving, in part, a challenge to the Environmental Protection Agency ("EPA") Administrator's discretionary authority to act to prevent harm that was not proven with scientific certainty. The court also addressed the uncertainty associated with environmental effects as follows:

[C]ertainty in the complexities [of environmental matters] may be achievable only after the fact, when scientists have the opportunity for leisurely and isolated scrutiny of an entire mechanism.

Awaiting certainty will often allow for only reactive, not preventative, regulation.19

The court implied that unless the manufacturers and refiners could show that their actions would not harm the environment, the EPA was permitted to prohibit those actions. Thus, in burden of proof terms, the burden was on the lead producers to prove that their conduct would not harm the environment. Absent a showing of such proof, the manufacturers and refiners were required to conform to the EPA order by ceasing the activities deemed to have the potential to harm the environment and human health.

The need for precaution in activities that may impact natural resources -- and the translation of that need into an allocation of burden of proof -- was similarly seen in Lead Industries Ass'n v. EPA.20 The court recognized that "man's ability to alter the environment often far outstrips his ability to foresee with any degree of certainty what untoward effects these changes may bring."21 The court found that waiting until the adverse environmental effects of an action could be conclusively determined before prohibiting the action was inconsistent with the precautionary and preventative orientation necessary to protect the environment.22 In choosing between protection and development, the court held that the EPA was to "err on the side of caution."

23 In Lead Industries Ass'n, given the known dangers of the "activity" in question, lead emissions, the court implicitly placed the burden of proof on the lead industry association to demonstrate that its conduct would not harm the environment and the public health. Absent such proof, the EPA was permitted, and in fact compelled, to prohibit actions that could potentially damage the environment and the public health.24

In deciding to err on the side of protecting the environment, the Ethyl Corp. and Lead Industries Ass'n opinions clearly invoked the tenets of the precautionary principle. The same rationales are applicable to public trust resources in order to provide a framework to safeguard them from further environmental destruction.

Given the potentially devastating and irreversible nature of public trust resource exploitation, and the scientific uncertainty that invariably accompanies any attempt to predict the effects of a proposed public resource use, the burden of proof in public trust cases must rest with the party whose actions threaten the trust resources. This party must demonstrate with a high degree of scientific certainty that its proposed action will not jeopardize the public resources, before that action is taken. The legal standard of proof corresponding with "scientific certainty" is clear and convincing proof. Thus to prove its case with legal certainty, a party must produce evidence which produces in the decision-maker a firm belief or conviction the actions will not harm the public resources. This approach clearly favors protecting the public resources because no action would be allowed unless it can be shown with scientific and legal certainty that it would not endanger the resources.

The alternative approach, placing the burden of proof on the party opposing the exploitation of the public resource, logically would inevitably result in the irreparable destruction of the public trust resources in almost every instance. It is this party which typically lacks the funds necessary to perform the necessary studies to demonstrate with requisite certainty that the public trust resources would be damaged by the opposing party's actions. Scientific "certainty" is rare in predicting environmental damage. Thus the party opposing the use or alteration of the public resource would rarely prove its case, resulting in continued and unhampered use of the public trust resources until harm actually occurs. At that point, even if the party can prove with scientific certainty the damage and its cause, the party would still need to demonstrate future harm. Thus, placing the burden of proof on the party seeking to safeguard the public resources would in effect mean that resources can only be protected after harm has already occurred. At that point, the damage may be irreversible. The difficulty, at times the impossibility, of demonstrating that a particular use or alteration will harm the public trust resources means that the allocation of the burden of proof alone may be dispositive of the result. The precautionary principle instructs that the burden of proof should favor protecting those resources. Applying the precautionary principle to evaluate any activities that may impact the public trust resources builds in caution and prudence.

VI. FIDUCIARY DUTIES OF TRUSTEES TO PRESERVE AND PROTECT THE PRINCIPAL OF THEIR TRUST: THE PUBLIC RESOURCES

A. Classic Trust Law Principles

In determining specific duties that the state as trustee owes with respect to the public resources, many courts have looked to the analogous classic trust law - that for private and charitable trusts25 - to determine the obligations and responsibilities of the state as trustee in protecting and using the public trust property.26 Application of classic trust law standards to the public trust doctrine also provides general guidance in resolving public trust issues and serves to strengthen the public trust doctrine's viability as a tool to ensure government accountability for public lands.

A trust is defined is a fiduciary relationship with respect to property, by which a trustee is empowered to deal with the property for the benefit of another person or persons (the beneficiaries).27 The trustee, as a fiduciary, is held to "an unusually high standard of ethical or moral conduct."28 The most fundamental duty that a trustee has is the duty of loyalty - the obligation to act solely in the interest of the beneficiaries.29 The trustee also has a duty to use care and skill to preserve the trust property (including

the duty to protect against "invasion" of the trust).30 In addition, the trustee has a duty to furnish information to the beneficiaries, a duty to make the trust productive, and a duty to deal impartially with beneficiaries.31 In meeting its duties, the trustee must act prudently, diligently, and in good faith.32

If the trustee breaches any of its fiduciary duties, beneficiaries may seek, among other remedies, to enjoin the trustee's actions.33 In addition, if the trustee acts for its own benefit without informing the beneficiaries and receiving their consent, the action is voidable even if it was taken in good faith and was otherwise fair and reasonable.34

Trust law favors the preservation of the trust property, to hold its value for current and future beneficiaries.35 As a result, in actions involving breach of trust claims, the burden of proof is on the trust "despoilers" to show the necessity of invading the trust corpus.36B. Applied to Public Trust Doctrine

Applying the principles from classic trust law to the public trust doctrine, the state as trustee holds legal title to public trust land and resources - the trust "property" or "corpus" - for the interest of the public as beneficiaries.37 As in private and charitable trust law, the state as trustee owes a high fiduciary duty to the beneficiaries. The state thus has a duty of loyalty to "exercise its rights and authorities over public land for the benefit of the beneficiaries."38 Accordingly, absent express constitutional or statutory directive to the contrary, the state is prohibited from exercising its authority over public land and resources to benefit the state itself (such as selling trust lands simply to raise revenues) or to benefit any one individual or group of individuals.39

The duty to preserve the trust applied to the public trust doctrine results in an obligation by the state to ensure that the public land and resources are conserved. In classic trust law, the duty to preserve the trust where trust property consists of financial assets is the duty to preserve the principal. Where the trust property is real property, the duty is to upkeep and maintain the property. The analogous duty in public trust law is the duty to preserve the value of the trust property ("the principal") - the public lands and resources.40 In this regard, the state's obligation may extend to an affirmative responsibility to adopt and enforce measures to provide environmental protection for trust resources: "Where public trust lands are threatened by environmental degradation, pollution, or misuse, the trustee may have a duty to take action to protect and preserve those lands and resources."41

The duty to preserve the trust is related to the duty to deal impartially with beneficiaries. Because "beneficiaries" encompasses both current and future beneficiaries, applying the duty to deal impartially with beneficiaries to the public trust doctrine presents a challenge for state trustees. In any trust situation, there is often a conflict between current and future beneficiaries' interests. In the public trust context, the state's challenge is to balance uses by current beneficiaries with the "goal of preservation of trust resources for continued use by future generations."42

In California, courts have held that preservation of the public trust resources is a protected "public use."43 Following this precedent and using the classic trust analogy, states can preserve public trust resources for use by future generations, even if preservation is challenged by current beneficiaries propounding what would otherwise be an appropriate public trust use.44

The classic trust law preference for continuation of the trust and the prohibition against invasion of the trust places the burden of proof on those who wish to "despoil" the trust. Similarly, in the public trust context, the despoilers should be required to show that their actions promote the public benefit and are consistent with the public trust.45 This burden applies whether the despoiler is the government trustee or a private interest.

As in classic trust law, the trust corpus - public land and resources - is presumed to have significant value,46 and any activity that will alter the public trust resource necessarily impairs the value of the trust.47 Accordingly, a party who wishes to use the trust corpus in a way that may alter its value must show that it will not decrease or impair the value of the trust, the public resources. Application of classic trust law principles to the public trust doctrine thus places the burden of proof on those who wish to engage in activity that may alter the value of the public trust resources.

C. State of Hawaii

The Hawaii Supreme Court has held that the state holds the same fiduciary duties and obligations as trustee of the public lands trust as a private trustee,48 and that its conduct is measured by the same strict standards applicable to private trustees.49 The Court has also indicated that in a breach of public trust case, the burden of proof is on the government as trustee to show it met its duties under the trust: Ahuna v. Department of Hawaiian Home Lands. In this case, the court determined the extent of the Department of Hawaiian Home Lands' duties as trustee of Hawaiian home lands.50 The court also addressed the standards by which the government's conduct as trustee will be evaluated, and placed the burden of proof on the trustee to show that its actions were consistent with those standards.

The court in Ahuna determined that the department must adhere to the "high fiduciary duties normally owed by a trustee to its beneficiaries."51 Specifically, the Department of Hawaiian Home Lands as trustee was found to have a duty to administer the trust solely in the interest of Native Hawaiian beneficiaries.52

In evaluating whether there has been a breach of the trustee duties, the court held that the government shall be judged by "the most exacting fiduciary standards."53 The trustee's actions were thus be "strictly scrutinized" to ensure that they were in compliance with the significant duties imposed by the trust.54

In strictly scrutinizing the government's conduct, the court in Ahuna implied that the burden of proof was on the trustee to show that it exercised the high duty of care owed to the trust beneficiaries. For instance, the court held that the trustees "failed to demonstrate that they considered the interests of all beneficiaries" and therefore they breached their fiduciary duties.55 The court thus placed the onus on the trustees to prove that they considered the interests of all beneficiaries. Put another way, the burden of proof was placed on the government to show that it met the standard of duty owed to beneficiaries. Similarly, the court found that the trustees "failed to show good cause why the beneficiary should not receive trust benefits."56 The court placed the burden of proof on the trustees to demonstrate good cause for their conduct.

Application of the classic trust law preference for the preservation of the trust, and accordingly placing the burden of proof on the party whose actions threaten the preservation of the trust. Again, this helps to ensure that the public trust resources are protected and preserved.

VII. SOUND PUBLIC POLICY ARGUMENTS

Courts often consider public policy goals in determining where to allocate the burden of proof.57 Protection of the public resources and public health clearly serves public policy.58 This interest and other significant public policy concerns are served by placing the burden of proof on the party seeking to use or alter the public trust resources.

The placement of the burden of proof on the party seeking to use or alter the public trust resources will most likely ensure that the resources will not be damaged. The party seeking to use the public reserve is

normally either the government, or a private party seeking private gain. No activity will be permitted unless it is demonstrated with clear and convincing proof that it will not impair or destroy the resources. The legal tool of the burden of proof is thus used to favor the protection of the public resources.

This result furthers principles of fairness, as those engaged in conduct which alters public trust resources typically possess money, control, and information, and are seeking to use the public resources for economic gain. These entities thus control the information, financial resources, and economic incentive upon which to base any determination of the effect of their actions.

On the other hand, placing the burden of proof on citizens or citizens organizations who seek to preserve the natural environment, who generally have scant resources, tips the likely outcome in favor of those who seek to use or alter the public resources. Why should the burden of proof be placed on those who usually can least afford it and who normally are least likely to be able to meet that burden?

The inequities between the parties in an environmental case are particularly significant given the scientific uncertainty associated with environmental cases. To prove the effects of an action on the environment requires substantial funds and information. Environmental parties cannot afford the tens of thousands of dollars necessary to prove a scientifically uncertain chain of events. If the burden of proof is placed on this party, the one with little money, expertise, or information, destruction of public resources would conceivably continue unhampered until the resources are completely destroyed. To protect the public trust resources, the burden of proof must thus be placed on those wishing to use or alter the resources, the party which usually has control, money, and knowledge of the situation.

Perhaps most importantly, who should be most negatively impacted by the scientific uncertainty surrounding many environmental issues? The party seeking to use or alter the public issues, or the public resource itself?

The designation of the burden of proof in public trust resources cases is often outcome-determinative. Its allocation is thus of fundamental importance. Administrative decision- makers should use the burden of proof to address the threats to public resources and stop the unpredictable consequences and often devastating damage that occurs when those irreplaceable resources are exploited.

ENDNOTES

1 Jan Stevens, Deputy Attorney General, State of California, from his "foreword" to The Public Trust Doctrine and the Management of America's Coasts, University of Massachusetts Press (1994).

2 Nat'l Audubon Society v. Superior Court of Alpine County, 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709, 712, cert. denied, 464 U.S. 977 (1983) (popularly known as the Mono Lake case).

3 McCormick on Evidence, § 336-340 (Edward W. Cleary ed., 3d ed. 1984); 9 Wigmore, Evidence § 2486 (Chadbourn rev. ed. 1981); see also Michigan Tool Co. v. Employment Security Comm., 346 Mich. 673, 78 N.W.2d 571 (1956).

4 Fleming James, Jr. and Geoffrey C. Hazard, Jr., Civil Procedure § 7.8 (3d. ed. 1985); Wigmore, supra, § 2486; see also Welsh v. U.S., 844 F.2d 1239 (6th Cir. 1988) (burden placed on defendant because it had easier access to evidence than plaintiff); Jackson v. Green, 700 S.W.2d 620, 621 (Tex. App. 1985) (burden of proof on defendant as party with access to knowledge).

5 McCormick, supra, § 336-340; Wigmore, supra, § 2486. 6 See Price Waterhouse v. Hopkins, 490 U.S.

228 (1989)(O'Connor, J., concurring); McCormick, supra, § 337; Gene R. Shreve & Peter Raven-Hansen, Understanding Civil Procedure § 346 (1989).

7 James & Hazard, supra, § 7.6, at 322; McCormick, supra, § 7.6, at 322; McCormick, supra, § 336; Wigmore, supra, § 2485; E. Morgan, Basic Problems of Evidence § 28 (1962).

8 Keyes v. School Dist. No. 1, 413 U.S. 189, 209 (1973), quoting 9 Wigmore, A Treatise in the Anglo-American System of Evidence in Trials at Common Law 2486, at 275 (3d. ed. 1940).

9 G. Lilly, The Law of Evidence 41 (1978). 10 Attorney General v. Thomas Solvent Co., 146 Mich. App. 55, 380 N.W.2d 53 (1985) (holding that the status quo ante is an unpolluted environment and that the burden of proof was on defendant as party seeking to pollute).

11 Dep't of Envtl. Resources v. Pennsylvania Public Utility Comm., 18 Pa. Commw. 558 567, 335 A.2d 860, 865 (1975)(holding that once a party alleges damage to the state public trust resources, burden on party seeking to use resources to prove that the proposed use will not impair the public resources); see also Shokal v. Dunn, 109 Idaho 330, 770 P.2d 441 (1985)(holding that the burden of proof is on the party requesting to use public resource, not on the party objecting to the proposed use, to show that the proposed use is in the public interest).

12 See, e.g., Marcon v. Dep't of Envtl. Resources, 76 Pa. Commw. 56, 60, 462 A.2d 969, 971 (1983) (holding that protecting the quality of public trust waters demands that once any likelihood of environmental harm is shown, the burden of proof is on party wishing to use the waters to demonstrate the resources will not be impaired). 13 See, e.g., Superior Public Rights, Inc. v. Dep't. of Natural Resources, 80 Mich. App. 72, 79, 263 N.W.2d 290, 293 (1977) (burden on defendant requesting to use public trust waters for private commercial gain as party having superior access to relevant information).

14 Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF. 151/5/Rev.1 (1992).

15 Harald Hohmann, Precautionary Legal Duties and Principles of Modern International Environmental Law 334 (1994).

16 Cameron & Werksman, Centre for International Environmental Law (London), The Precautionary Principle: A Policy for Action in the Face of Uncertainty (1991). 17 Gregory D. Fullem, Comment, The Precautionary Principle: Environmental Protection in the Face of Scientific Uncertainty, 31 Willamette L. Rev. 495, 497-98 (1995).

18 Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976), cert. denied, 426 U.S. 941. 19 Id.; see also National Resources Defense Council v. Administrator, 902 F.2d 962, 994 (D.C. Cir. 1990)(the "EPA need not wait for scientific certainty to effect air quality standards").

20 Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C.Cir. 1980); see also Reserve Mining Co. v. United States, 514 F.2d 492, 528 (8th Cir. 1975)(holding that taconite company's discharges into the air and water called for preventative and cautionary steps even though the harm was potential not actual and the danger to public health was not imminent).

21 Id. at 1135.

22 Id. at 1155.

23 Id.; see also Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980)(in setting workplace standards for benzene emissions, the Occupational Safety and Health Act (OSHA) agency did not need scientific certainty or proof of actual worker harm and could err on the side of overprotection); Industrial Union Dep't v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974) (where reliable data concerning the health effects of various levels of asbestos dust was unavailable, decision to err on the side of overprotection was sound).

24 Clean Air Act, as amended, 42 U.S.C. § 7401 et seq.; see also Sierra Club v. EPA, 719 F.2d 436, 470 (D.C. Cir. 1983) (requiring EPA to fulfill its obligations to set quality air standards under the Clean Air Act).

25 Private trusts and charitable trusts are governed by essentially the same legal standards. However, private trusts generally have one or few beneficiaries, where charitable trusts have a community of people or the general public as beneficiaries. In addition, private trusts must be limited in duration, whereas charitable trusts may be unlimited.

26 Archer et. al., The Public Trust Doctrine and Management of America's Coasts, at 31 (1994).

27 Restatement (Second) of Trusts § 2 (1959).

28 G. Bogert, The Law of Trusts and Trustees § 1 (2d ed. 1965).

29 Id. §§ 541, 543, 581, 612, 744.

30 Id. § 544.

31 This description is not an exhaustive list of the obligations a trustee holds, but an overview to demonstrate classic trust law's applicability to the public trust doctrine. 32 G. Bogert, supra §§ 541, 543, 581, 612, 744.

33 Id. § 861.

34 Restatement (Second) of Trusts § 164, 169-169-85 (1959). 35 G. Bogert, supra § 582.

36 Id.; Cohen, The Constitution, The Public Trust Doctrine and the Environment, 1970 Utah L. Rev. 388, 392.

37 G. Bogert, Law of Trusts (5th ed. 1973).

38 Archer et. al., supra, at 36.

39 Id.; see also Illinois Central R.R. Co v. Illinois, 146 U.S. 387 (1892) (holding that the state, as administrator of the trust in navigable waters on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties); People ex. rel. Scott v. Chicago Park Dist., 66 Ill.2d 65, 360 N.E.2d 773 (1976)(applying the public trust doctrine to enjoin a sale of lands submerged under Lake Michigan to a private individual).

40 As early as 1892, this duty was recognized in Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892)(a state's conveyance of any piece of public trust property which impairs the public's interest in remaining public lands is void).

41 Archer et. al., supra, at 38-39; Nat'l Audubon Society v. Superior Court of Alpine County, 33 Cal.3d 419, 189 Cal. Rptr. 346, 658 P.2d 709, cert. denied, 464 U.S. 977 (1983) (holding that the public trust doctrine affirmatively protects environmental and recreational values); Marks v. Whitney, 6 Cal.3d 251, 98 Cal.Rptr. 327, 606 P.2d 362 (1971) (same).

42 Nat'l Audubon Society v. Superior Court of Alpine County, 33 Cal.3d 419, 189 Cal. Rptr. 346, 658 P.2d 709, cert. denied, 464 U.S. 977 (1983).

43 Id. at 429 (holding that public interest uses include "the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds); see also Marks, 6 Cal.3d at 259-260 (finding that "one of the most important public uses of the tidelands - a use encompassed within the tidelands trust - is the preservation of those lands in their natural state").

44 Archer et. al., supra, at 39; see also United States v. State Water Resources Control Bd., 182 Cal.App.3d 277, 227 Cal.Rptr. 161 (1986) (holding that the public trust doctrine was an appropriate foundation for the promulgation of water quality standards that would protect fish and wildlife).

45 Cohen, The Constitution, The Public Trust Doctrine and the Environment, 1970 Utah L. Rev. 388, 392 (1970).

46 Township of Grosse Isle v. Dunbar & Sullivan Dredging Co., 15 Mich. App. 556, 167 N.W.2d 311 (1969).

47 See Com. v. National Gettysburg Battlefield Tower, Inc., 8 Pa. Commw. Ct. 231, 249, 302 A.2d 886, 895 (1973), aff'd, 454 Pa. 193, 311 A.2d 588 (1973) ("[i]t is difficult to conceive of any human activity that does not in some degree impair the natural, scenic and esthetic values of any environment.").

48 Haw. Const. Art. XII, § 4; Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4, 6 (1959); see also Pele Defense Fund v. Paty, 73 Haw. 578, 585-586, 837 P.2d 1247 (1992).

49 Pele Defense Fund, 73 Haw. at 605. The Hawaii Supreme Court has also concluded that when the agency charged with the administration of a trust held for the benefit of members of the public purportedly violates trust duties, the courts must be available to the citizens to bring a breach of trust claim. Id.; Kapiolani Park Preservation Society v. City & County of Honolulu, 69 Haw. 569, 751 P.2d 1022 (1988). 50 Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982).

51 Id. at 338.

52 Id. at 340.

53 Id. at 339, citing Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). 54 Ahuna, 64 Haw. at 339.

55 Id. at 341.

56 Id. at 344.

57 See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (O'Connor, J., concurring); Keyes v. School Dist. No. 1, 413 U.S. 189, 209 (1973) (finding that the allocation of the burden of proof is "a question of policy and fairness").

58 The Hawaii State Constitution recognizes this policy: "Each person has the right to a clean and healthful environment, as defined by law relating to environmental quality, including control of pollution and conservation, protection, and enhancement of natural resources." Haw. Const. Art. II, § 9.