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## PENNSYLVANIA SUPREME COURT REAFFIRMS AND EXTENDS LANDMARK 2017 PUBLIC TRUST DECISION

Posted on August 16, 2021 by John Dernbach

In May 1971, at the beginning of the modern environmental movement, Pennsylvania voters approved an Environmental Rights Amendment (ERA) to the state's constitution. Article I, Section 27 provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

As discussed in an [earlier blog](#), it was not until 2017 that the Pennsylvania Supreme Court used Section 27 to hold a statute unconstitutional. On July 21, 2021, the state's Supreme Court reaffirmed and extended its 2017 holding. The new decision has important implications for both intergenerational equity and the use of traditional trust law in interpreting public trusts for natural resources.

In the landmark [2017 decision](#), Pennsylvania Environmental Defense Foundation (PEDF) challenged the state's expenditure of hundreds of million dollars of funds from gas leasing on state forest land. PEDF argued that both state forests and the gas under them constituted "public natural resources" under Section 27, and that royalties and other money received from leasing must be spent to "conserve and maintain" those resources, and not used (as the legislature had directed) to balance the state's budget. A majority of the Supreme Court agreed, but only with respect to royalties from leasing. It remanded to the Commonwealth Court the issue of how the state could spend bonus, rental, and penalty money from gas leasing on state land.

On remand, the Commonwealth Court used a 1947 trust law statute to decide that the state must spend two-thirds of this money to conserve and maintain public natural resources, but that the state could spend one-third of this money free and clear of the trust. It reasoned that the present generation is like a life estate beneficiary under the kind of trusts governed by that statute, and that future generations are like remaindermen or successor beneficiaries.

In its [recent decision](#), the Pennsylvania Supreme Court reversed, holding that the state must spend all of the money from bonus, rental, and penalty payments to conserve and maintain public natural resources. Although the Supreme Court employed essentially the same analysis as it did in the earlier case, it was much more explicit about the cross-generational aspect of Section 27.

The Supreme Court decided that the text of Section 27 does not allow diversion of any money received from gas leases to non-public trust purposes; it contains no express language allowing this result. The Supreme Court also held that the “cross generational” nature of the beneficiaries of the trust, both present and future generations—forbade the expenditure of trust money for the present generation only. Future generations are not successor beneficiaries to the present generation, the court explained; they are simultaneous beneficiaries with the present generation. “Far from setting up any kind of conflict between these beneficiaries regarding profiting from trust assets,” the court said, “the express inclusion of generations yet to come in ‘all of the people’ establishes that current and future Pennsylvanians stand on equal footing and have identical interests in the environmental values broadly protected by the ERA.” It added: “The language unmistakably conveys to the Commonwealth that when it acts as a trustee it must consider an incredibly long timeline and cannot prioritize the needs of the living over those yet to be born.”

The case also continued the Pennsylvania Supreme Court’s use of traditional trust law—which it described as private trust law to differentiate it from public trust law—in interpreting Section 27. The opinion is replete with reference to trust cases, the state’s trust statute, and the Restatement of Trusts. Traditional trust law is a two-edged sword for natural resources public trusts. On one hand, the public trustee’s fiduciary responsibility for natural resources should strengthen the protection of these resources. On the other hand, the improper use of traditional trust law could undermine protection by encouraging trustees to maximize income generation from natural resources. But here the Supreme Court used that law to decide that the terms of Section 27, not the 1947 trust statute, must be used to determine how non-royalty money received from gas leasing is spent.

(Disclosure: In response to the Commonwealth Court’s opinion, I wrote an [article](#) based on public trust cases from Pennsylvania and other states explaining how courts should use (or in some cases refuse to use) traditional trust law in order to strengthen public trusts for natural resources, and explaining why the Commonwealth Court decision should be reversed. A dissenting opinion in this recent case criticized that article.)

Pennsylvania’s revival of Section 27 has spurred interest in environmental constitutional amendments in other states and at the federal level. New York State voters, for instance, will decide the fate of another [proposed environmental amendment](#) in November. In a [recent book](#), Franklin Kury, who authored and advocated Pennsylvania’s ERA as a state legislator, argues that there should be national ERA to help address climate change. A once-obscure area of environmental law is gaining in importance.

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