

# [Public trust doctrine: indian contours](https://assignbuster.com/public-trust-doctrine-indian-contours/)

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Who owns the Earth and its resources? To what extent may the general public claim the pure water, clean air, rich soil, and the myriad services Earth provides to sustain human life? Across continents and pning centuries, a dynamic tension continues between those who would circumscribe the Earth’s bounty for private use and those who would carefully allot Earth’s riches to satisfy human needs. Private property—sequestering Earth’s resources for personal, exclusive use—has its zealous advocates, and in many locales its legal status is unimpeachable, and its ideology is unquestioned.

But a competing ideology, dating from antiquity[1], holds that some of Earth’s riches should never be sequestered for private use, must be left for the public’s enjoyment, and must be stewarded by those in power. Codified 1, 500 years ago during the Roman Empire, legal scholars labeled this the “ Public Trust Doctrine. ” The Public Trust Doctrine perseveres as a value system and an ethic as its expression in law mutates and evolves. More recently, scholars, activists, and lawyers have begun discussing the rights of people to access and enjoy various essential resources and services the Earth so generously yields.

The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes.

Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses. I begin this article by tracing the historical origins of the Public Trust Doctrine, charting its (r)evolutionary leaps across centuries, legal regimes, and environmental entities.

I then shift legal gears and analyze certain current environmental problems vis-à-vis this Doctrine. I explore how the judicial creativity complements and expands the Public Trust Doctrine’s legal connotations, which, for 1, 500 years, have constrained how Earth’s resources can be used and have guided who must bearresponsibilityfor stewarding resources for the public good. Evolution of the doctrine Roman Law: 1, 500 years ago, the Roman Emperor Justinian simplified the jumble of laws governing his Empire.

He commissioned dozens of the era’s leading jurists, whose wisdom became codified in the Corpus Juris Civilis. [2] In 529, Justinian’s code contained a Section as: “ By the law of nature these things are common to all mankind, the air, running water, the sea and consequently the shores of the sea. ”[3] The Public Trust Doctrine, as this notion came to be known, suggests that certain resources—usually water, but now much more—are common, shared property of all citizens, stewarded in perpetuity by the State. 4] Several hundred years after the fall of the Roman Empire, a copy of the Corpus Juris Civilis was rediscovered in Pisa, and scholars spent centuries analyzing the tome. [5]

In the peripatetic manner that has come to characterize it, the Public Trust Doctrine migrated with the Corpus Juris Civilis throughout Europe, to both civil law and common law regimes. [6] English Law: The Magna Carta codified Justinian’s words in England, and in 1225 King John was forced to revoke his cronies’ exclusive fishing and hunting rights, because this violated the public’s right to access these common resources. 7] Thus in England, while the King had vested ownership of public lands, he stewarded them in trust for the public. This notion of government ownership of resources held in trust as a commons is a shared precept in all places where the Public Trust Doctrine persists. [8] Evolution in India: India has the roots of this doctrine in ancient Vedas when every king was to protect the trees and natural resources. But somehow it bore mere moral and religious obligations and lacked legal recognition. The PTD has been recognized as a part of law of the land in 1997 in the case of M.

C. Mehta v. Kamal Nath. The evolution of the same has been discussed in the next Chapter. [9] An insight into Indian legal arena Article 21 of India’s constitution declares: “ No person shall be deprived of his life or personal liberty except according to procedure established by law. ”[10] Laws that conflict with or abridge fundamental rights named in the constitution are voided. [11] Citizens are allowed to challenge violations of these rights directly, and in fact citizen suits are the most rapid means to challenge actions that threaten fundamental rights. 12] In India, Judges have taken these substantive and procedural rights seriously and have buttressed them by establishing the Public Trust Doctrine to secure powerful protections for citizens’ EnvironmentalHuman Rights[13].

While the constitution does not explicitly provide for Environmental Human Rights, Indian courts have gone further than almost any in naming environmental rights that serve the fundamental right to life. [14] The claims that impinge on Article 21’s fundamental right to life include various challenges where ecosystems have been impaired. 15] India’s Supreme Court stopped unauthorized mining causing environmental damage, holding that this “ is a price that has to be paid for protecting and safeguarding the right of the people to live in a healthyenvironmentwith minimal disturbance of ecological balance. ”[16] When a government agency action threatened a local fresh water source, the High Court of Kerala held that government “ cannot be permitted to function in such a manner as to make inroads into the fundamental right under Art. 1. . . . The right to sweet water and the right to free air are attributes of the right to life, for these are the basic elements which sustain life itself. ”[17] In a case upholding a statute that allows India to pursue justice following the Bhopal gas leak disaster, the Supreme Court further consolidated the link between Article 21’s right to life and the right to a clean environment. [18] In 1997, the landmark case of M.

C. Mehta v. Kamal Nath[19] conjured up the Public Trust Doctrine in India. In that case, the Minister of the Environment (respondent) impermissibly allowed a motel to be built at the mouth of a river, and impermissibly allowed the motel to change the course of the river (which created subsequent flooding in nearby villages) in violation of the Public Trust Doctrine—which hadn’t explicitly existed before this case. 20]

Before invoking the Public Trust Doctrine, the court alludes to: the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change. 21] In this case, the court summons up the Public Trust Doctrine by first saying “ The notion that the public has a right to expect certain lands and natural areas to retain their natural characteristic is finding its way into the law of the land. ”[22] To justify this notion, the court cites excerpts from aHarvardEnvironmental Law Review article: “ Human activity finds in the natural world its external limits.

In short, the environment imposes constraints on our freedom; these constraints are not the product of value choices but of the scientific imperative of the environment’s limitations”[23] , promoting a new kind of natural law exigency for protecting environmental resources in the name of protecting fundamental human rights. [24] The court then revisited Justinian’s notion of the Public Trust Doctrine, including the exegesis of more than a half dozen seminal cases[25] of United States law that invoked and reinvigorated the Public Trust Doctrine. 26] The court concluded: “ Our legal system—based on English common law —includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment.

Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership. 27] And thus the “ aesthetic use and the pristine glory of the natural resources, the environment and the eco-systems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public goods and in public interest to encroach upon the said resources. ”[28] The Supreme court for the first time recognized and declared, “ the Public Trust Doctrine as discussed in this judgment is a part of the law of the land. ”[29] In M. I. Builders Pvt. Ltd. v.

Radhey Shyam Sahu[30], the Indian Supreme Court subsequently hitched the Public Trust Doctrine to the constitutionally guaranteed right to life. [31] The court held that a public park and market are public trust resources that may not be replaced with a shopping complex. [32] Citing the precedent of M. C Mehta, the court reasserted that the Public Trust Doctrine is part of Indian law,[33] and thus ordered the appellant to restore the park that it had destroyed when it (and the government agency that permitted its actions) improperly violated the public trust. 34] The park in a crowded area is of “ historical importance and environmental necessity. ”[35] To allow the construction would mean that citizens “ would be deprived of the quality of life to which they are entitled under the law. ”[36]

Because the government’s Development Authority was the trustee of the park, it had violated “ the doctrine of public trust, which [is] applicable in India. ”[37] The government authority was obliged to manage this park for the public good, and it “ has deprived itself of its obligatory duties which cannot be permitted. [38] The court noted that “ this public trust doctrine in our country, it would appear, has grown from Article 21 of the Constitution. ”[39] The Public Trust Doctrine was invoked anew specifically to protect the fundamental human rights enshrined in the Constitution. Here, then, the Indian Supreme Court avers that the actions of the government and the private party appellant violated the right to life guaranteed in Article 21 of the Indian Constitution, and the government agency has committed these violations by violating PTD.

Drawing on the Illinois Central[40] decision to explain Sax’s central tenet of the PTD[41], the court recited that “ when a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate the resource to more restricted uses or to subject public uses to the self-interest of private parties. ”[42] Subsequent litigation has affirmed the PTD’s relevance in Indian law.

For example, the High Court of Jammu & Kashmir[43] allowed a manufacturing plant to be constructed, but only if the regional government observed its PTD duties to ensure that all possiblepollutionsafeguards were implemented. A plant for filling cylinders with LPG was started after complying with the statutory requirements and clearance from PCB. When the residents objected the plant to continue and filed a writ of mandamus, the court after referring to Article 21, 47[44], 48-A[45], 51(A)(g)[46] and the post independence legislations invoked the doctrine of public trust and held that natural resources belong to people.

The decision once again said that Article 21 of the constitution required that the government observe its public trust duties, for the “ public has a right to expect certain lands and natural areas to retain their natural characteristics. ”[47] The judgment also extended the scope of the Public Trust Doctrine, as “ there can be no dispute that the State is under an obligation to see that forests, lakes and wildlife and environment are duly protected. [48] The Fomento Resorts Case (2009)[49]: Here, Fomento Resorts and Hotels Ltd had extended the construction of its hotel resort encroaching upon a public road and parking place which was a natural access to people visiting the Vainguinim beach. On a writ petition filed by a local residents, the Bombay High Court ordered demolition of the unauthorized structures following which the resort company preferred an appeal in the apex court.

The apex court concurred with the view of the local residents that the unauthorized construction had put hindrances in their access tothe beach. ‘ Natural resources like beaches, forests, rivers and other water bodies are for uninterrupted and unhindered use of the general public and even the State cannot deprive them of their natural rights’, the Supreme Court held. Such rights are governed by the " public trust doctrine" and people can move the courts for enforcing the rights and directed Fomento resorts Goa to emolish its unauthorised construction on Vainguinim Beach, which had been overlooked by the state government. “ The State cannot transfer public trust properties to a private party, if such a transfer interferes with the right of the public the court can invoke the public trust doctrine and take affirmative action for protecting the rights of the people to have access to light, air and water and also for protecting rivers, sea, tanks, trees forest and associated natural eco-system.

The doctrine puts an implicit embargo on the right of the State to transfer public properties to private party if such transfer affects public interest, mandates affirmative State action for effective management of natural resources and empowers the citizen to question ineffective management thereof," the apex court ruled. AN ANALYSIS OF THE JUDICIAL TRENDS The aforementioned decisions, however a major breakthrough, do not reveal whether the judges are saying this Doctrine has always been a part of Indian law, or whether it is a new provision.

Mostly they seem to reiterate that United States law has always found the Doctrine to be part of its common law heritage as a British colony, and so should be done here as well. What is distinctively clear, however, is that the court felt the Public Trust Doctrine was necessary to bolster its demands on the government to advance constitutionally protected rights. It also appears that putting the Public Trust Doctrine in service of constitutionally guaranteed environmental rights puts not only new strictures on government, but also places new constraints on private property rights in India.

Those constraints could be cast as a sextuple threat to Indian private property rights. First, the Indian Constitution mandates a fundamental right to life. Second, two decades and dozens of court cases interpret this constitutionally provided right to mean that environmental harms themselves are proscribed in order to serve the fundamental right to life. Third, to prohibit private acts that threaten environmental resources essential to safeguard the right to life, the Indian Supreme Court has repeatedly cited the “ polluter pays principle and the precautionary principle” as emerging norms of international environmental law. 50] Fourth, the Public Trust Doctrine is asserted to buttress the government’s ineluctable responsibility to protect the right to life and the ancillary rights that serve the fundamental right.

Fifth, private rights of action against private or government parties are permitted to vindicate the fundamental and corollary rights. Finally, the Indian Constitution requires an affirmative “ fundamental duty” of every citizen of India “ to protect and improve the natural environment including forests, lakes, rivers, wild life, and to have compassion for living creatures. [51] While a thorough examination of Indian private property rights is beyond the scope of this project, the combination of court-enshrined corollary environmental rights in service of fundamental right to life when accompanied with a decade-old reinvention of the Public Trust Doctrine means that whatever rights private property owners had before in India are now cast in a new, circumscribed way[52]. Contemporary Twists in the tale:

Multi faceted Application of the doctrine National parks and national monuments harbor some of the most scenic areas in India. Each summer, motorists and tourist lineup to see the majesty of places like Kanha National Park , the holy shrines of Haridwar, Mankadevi, Rishikesh, Gangotri and Yamnotri and numerous Beaches and backwaters, gawking at wildlife and snapping photos to share. These public lands are also rich in natural resources like coal, oil, gas and timber.

It is generally expected that Nation’sleadershipwould put these “ public lands” wisely to use. Today, the conflict between protection of natural resources upholding the doctrine of public trust and the responsibility of state to manage national interests of industrialization and preservation of natural resources. Sometimes these conflicts are subtle, and sometimes the interests they represent are in direct opposition. This section discusses two case studies as a way to raise the issues.

The first case the conflict is between traditional Native religious practitioners and commercial mountain climbing interests. The conflicts may seem more subtle as the policy makers see the mountain climbing “ recreational” use that ought to be consistent with traditional native use since both depend, to some extent, upon the preservation of the mountain and its aesthetic qualities. However it is far too simplistic to assume that recreational use of public lands is consistent with “ preservation” uses.

While environmentalists frequently deplore the idea that natural resources exploitation can achieve a friendly coexistence with “ preservation” of these spectacular places, the current political and economic climate reflects the emphatic commitment to commercial exploitation of public lands. Native peoples’ longstanding interests in these public lands are frequently reduced to a religious attachment or, in policy terms, an interest in “ sacred sites protection. All the policymakers overlook in the process that the native people have a unique relationship with their ancestral homelands, which are time and again encroached upon. Natives have legal, moral, political and cultural interests in their ancestral homelands, and these multiple and complex interests should not be described as purely religious in nature.

The followingcase studyaddresses a compelling issue for contemporary policymakers: how do we protect the inherent rights of the people to the natural resources which are time and again endangered by industrial and commercial exploiters? 53] The story revolves around the tribes people of Kalahandi who oppose Vedanta[54]’s takeover of a region they hold in reverence. For the last one year, the Niyamgiri hills in Kalahandi district of southwestern Orissa have been reverberating with protests and demonstrations. The tribals of the area[55], who worship the hills as living gods—are taking on Vedanta, a UK-based mining major that has acquired a license from the government to exploit the abundant bauxite reserves in the pristine region.

Conflicts between tribals and the state are nothing new—especially when they are portrayed as a struggle between the modern (read: progressive governments and corporates) and the primitive (read: tribals). Vedanta, in partnership with the state-owned Orissa Mining Corporation, promises to put India on the global map as undisputed leader in production of iron ore, aluminium and zinc. But the tribals are asking if this should be at the cost of destroying their habitat, with which, in their animist traditions, they engage in a sacred covenant.

And environment activists ask if there can ever be another Niyamgiri once the mining starts. A visit there is a trip to paradise—lush greenery, scores of streams crisscrossing the mountains, rich soil, an abundance of wildlife. In fact much of the region is protected under Section 18 of the Indian Wildlife Act, and the Orissa government had declared it an elephant reserve as recently as 2004. But once the mining begins, the ecosystem will be lost. The pollution and degradagion and degeneration has begun. The earlier warnings were all ignored.

The first had come from the central empowered committee in 2002, constituted under the EPA[56]. The committee observed: “ Had a proper study been conducted before embarking on a project of this nature and magnitude involving massive investment, the objections to the project from the environmental/ecological/forest angle would have become known in the beginning itself and in all probability the project would have been abandoned. ” The second came from WII in 2006. Its status report said, “ Mining could trigger irreversible changes in the ecological characteristics of the area.

The cost-benefit value should not only take into account the material benefits of bauxite mining... (but also) the perpetuity of the resources and ecosystem services that would be provided by these forests in the future. Compromising long-term economic returns, therefore, cannot be an alternative for short-term gains. ” The apex court, however, ruled in 2008 that the company was free to mine after it complies with the due process of law. Today the public trust doctrine serves an important role in adjudicating tribal rights and state responsibilities. 57] Modern case laws have defined contours of State responsibility and highlighted it’s application towards protection of the interests of “ We, the People. ”

Skeptics may say the process could allow Vedanta scope for intervention, but the tribal activists are steadfast in their resolve. “ We’re not against development,” they say, “ But the state must recognize the rights of tribal communities that have lived here for ages. ” Critical analysis Is the public trust doctrine a threat to private property? Is it a vital, evolving common law doctrine? Or a metastasizing source of governmental uthority over private land? These are certain inevitable questions to be raised by the critics of the said Doctrine. Analysing the Doctrine, it can be said that it serves two purposes: it mandates affirmative state action for effective management of resources and empowers citizens to question ineffective management of natural resources. The Public Trust Doctrine can be used as leverage during policy deliberations and public scoping sessions and hearings. This forces agencies to prove that their actions are not environmentally harmful to the extent that they will destroy a public resource.

If the agencies fail to provide a more environmentally benign alternative, then you can bring up a Public Trust lawsuit. Although the court process may be long and arduous, many important precedents have been established. It is interesting to note that in the Kamal Nath case[58] the Supreme Court held that even if there is a separate and a specific law to deal with the issue before the Court, it may still apply public trust doctrine. If there is no suitable legislation to preserve the natural resources, the public authorities should take advantage of this doctrine in addition to the fact that there was a branch of municipal law.

Secondly the Supreme Court in M. I. builders[59], however, stated that public trust doctrine has grown from Article 21 of the constitution. By attaching this doctrine to the fundamental right to life, the Supreme Court appears to be willing to diversify the application of this doctrine. It seems likely that the court would give precedence to right to life when the public trust doctrine, as a part of right to a safe and healthy environment, is challenged by any other fundamental rights.

Thirdly by ordering the Mahapalika to restore the park to its original beauty, the Supreme Court redefined the duties of a trustee to its beneficiaries the users of the park. In effect, it aligned the local authorities duty as a trustee with the concept of intra-generational and inter-generational equity. Fourthly, the case came before the court as a judicial review and not as challenge against the decision of the government from a beneficiary. As this doctrine acts as a check upon administrative action by providing a mechanism for judicial or resource allocation decisions.

Therefore, public trust doctrine could serve as an additional tool for environmental protection particularly where administrative discretion has been abused. IMPORTANCE OF PUBLIC PARTICIPATION FOR PROPER IMPLEMENTATION OF PTD Public participation is a necessary component of vibrant, dynamic, functioning and participatory democracy. It has potential to make all governmental decision making transparent, rational just, fair and responsive as a good governance practice which entails effective participation in public policy making provisions of the rule of law.

Public participation also serves as a useful device to make government and its agencies accountable and at the conceptual level public participation is inextricably linked with democracy, decentralization, self-administration, self-management andrespectfor human rights and fundamental freedoms. The idea of public participation has also entered the arena of environmental protection and its recognition as an important part of environmental decision making is discernible at all levels of government. 60]

The contribution of public participation in environmental decision-making to the substantive quality of decisions was given a significant boost with the entry into force of the Aarhus Convention[61] adopted through the United Nations Economic Commission for Europe. The Convention stresses that public participation in environmental decision-making contributes to “ the protection of the right of every person of present and future generations to live in an environment adequate to his or herhealthand well-being. ” NEED FOR PROPER FRAMEWORKOF LAWS IMPLEMENTING THE DOCTINE

The public trust doctrine could provide a practical legal framework for restructuring the way the oceans are regulated and managed. It would support ocean-based commerce while protecting marine species and habitats. The public trust doctrine is " a simple but powerful legal concept," that obliges governments to manage certain natural resources in the best interests of their citizens, without sacrificing the needs of future generations. Extending the public trust doctrine to ocean waters would help State agencies better manage conflicting demands such as conservation, offshore energy development, fisheries and shipping in the 3. million nautical square miles of water included in the nation's territorial sea and EEZ.

Currently dozens of laws, regulate species and activities in these waters, without any mandated, systematic effort to coordinate their actions for the public good. Though the public trust doctrine is well suited to serve as a critical legal foundation for a coordinated, ecosystem-based ocean policy, it has not yet been formally articulated by the executive branch, nor has it been recognized by courts or expressly established in statutory law.

As we contemplate managing our ocean resources, not only for today but for future generations, we need to ask ourselves two critical questions: For whom should the country's oceans be managed? And for what purpose? The public trust doctrine answers both of these questions. International Scenario It is a common law concept, defined and addressed by academics in the United States and the United Kingdom. Various common properties; including rivers, the seashore, and the air, are held by the government in trusteeship for the uninterrupted use of the public.

The sovereign could not, therefore, transfer public trust properties to a private party if the grant would interfere with the public interest. The public trust has been widely used and scrutinized in the United States (The Mono Lake case being the breakthrough)[62], but its scope is still uncertain. Various have been made to apply this doctrine to protect navigable and non-navigable waters, public land sand parks, and to apply it to both public and private lands and ecological resources.

The Supreme Court of California has broadened the definition of public trust by including ecological and aesthetic considerations. Although the public trusts doctrine is not without its fair share of criticism it is being increasingly related to sustainable development, the precautionary principle and bio-diversity protection. The doctrine combines the guarantee of public access to public trust resources with a requirement of publicaccountabilityin respect of decision-making regarding such resources.

Moreover, not only can it be used to protect the public from poor application of planning law or environmental impact assessment, it also has an intergenerational dimension. The Stockholm Declaration of United Nations on Human Environment evidences this seminal proposition: " The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural system, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate... Conclusion Om vanaspataye Shanti Bhavantu[63] The Rishis of Aryavrata, the great thinkers of the ancient period pronounced above in the Vedas in no uncertain terms. However, we have sadly forgotten this precept except uttering the words occasionally while conducting havan to propitiate Gods and Nature without understanding the implication of this Mantra.

In recent years these life supporting systems are gradually declining through the capricious exploitation of earth’s resources by the ever expanding human population in order to meet its growing material needs in the name of modernization and development and so does our relationship with natural resources continues to deteriorate till nature’s resources are exploited and utilized in a more rational & economical way to maintain a sustainable development. Environment is common heritage for all.

Obviously, conservation and development can and must go hand in hand unrevealing and understanding the complexities of various eco-systems with a changing attitude of “ touch-me-not” to “ use me wisely”. It is evident that the state is not the owner of the natural resources in the country but a trustee who holds fiduciary relationship with the people. By accepting this task the government is expected to be loyal to the interests of its citizens and to discharge its duty with the interest of the citizens at heart and involve them in decision-making process concerning the management of natural resources in the country.

The Public Trust Doctrine may provide the means for increasing the effectiveness of environmental impact assessment laws. The Public Trust Doctrine stands for the proposition that some of nature’s gifts inherently belong to all people, and the government must steward these to prevent both private arrogation of public resources and the “ tragedy of the commons” from unfettered public access to these shared resources. [64] Environmental Human Rights represent a growing movement to codify this belief, to make positive law that firms up thephilosophypromulgated for 1, 500 or so years in the name of the Public Trust Doctrine.

In addition, the Public Trust Doctrine has expanded its reach to cover more of the Earth as the interrelatedness of ecosystem processes becomes more defined, and the success of the strategy in protecting those processes becomes more apparent. The Public Trust Doctrine encourages government officials to fulfill their stewardship duties. Judicial vigilance creates obligations erga omnes, i. e. , duties that must be performed. The Public Trust Doctrine urges judges to take a hard, skeptical look when government action appears to allow private interest to impede public trust environmental resources.

The Public Trust Doctrine naturally shrinks what constitutes private property rights (and moves us to reconsider them as “ private” “ property” “ rights”), either because certain resources never actually were subject to private usurpation, or never should have been. The Public Trust Doctrine has always reflected a value preference for public over private access to environmental assets. Invoking environmental rights as human rights amplifies the public’s right, now and in the future, to share in ecological gifts fundamental to human health and wellbeing.