



## **In a Constitutional Green Amendment, Designating the State as “Trustee” Brings a Robust Body of Understanding Not Available with the Term “Steward”**

*“As a trustee, the [state] must deal “with its citizens as a fiduciary, measuring its successes by the benefits it bestows upon all its citizens in their utilization of natural resources under law.”<sup>1</sup>*

**The terms ‘trust’, ‘trustee’, ‘beneficiary’ are terms that carry with them well understood legal obligations and implications. To the extent legislators and the people of New Mexico are seeking terms that are well understood and defined, using trust law and terminology well meets that goal.**

Use of trust language in the context of Green Amendments establishes a trust in which the government is the trustee, the public are the beneficiaries, and the assets are the environment.

The use of trust language with the state serving as trustee of the natural resources of the state for the benefit of present and future generations of New Mexicans brings clearly identified responsibilities and duties that can help legislators, regulators and the courts understand the steps they must undertake to fulfill their constitutional obligations.

While beneficial to all New Mexicans, the use of trust law offers important protections and clarity that will strengthen environmental justice in the state.

Under trust law, trustees have clearly identified and understood fiduciary duties that guide their authority and discretion in order to protect beneficiaries’ interests and ensure that the trustee abides by the terms of the trust. Trustees must fulfill the fiduciary duties of prudence, loyalty, and impartiality in managing the trust and serving the beneficiaries.

⇒ *Duty of Prudence mandates that the trustee exercise ordinary skill, caution, prudence, and act in an informed and cautious way in managing the corpus of the trust.<sup>1</sup>*

The duty of prudence will require that government engages in informed decision-making and uses reasonable care and caution when natural resources and environmental rights are implicated – in the environmental context this means considering existing local conditions, applicable science and data, and considering the near term and cumulative impacts of the proposed action as part of the decision-making process.

⇒ *Duty of Loyalty<sup>2</sup> requires the trustee administer the trust solely in the interest of the beneficiaries.*

The duty of loyalty ensures the state’s natural resources – the trust resources – are managed for the benefit of the people/beneficiaries versus alternative goals of the trustee (government) or others. It also ensures a loyalty to, and consideration of, all the beneficiaries regardless of race, ethnicity or generation.

⇒ *Duty of Impartiality mandates that the trustee treat all beneficiaries equitably.<sup>3</sup>*

The obligation to treat beneficiaries “equitably” is concerned with being fair and just. This is different from treating people “equally,” which means treating each person the same, regardless of circumstance.

<sup>1</sup> *Leyba v. Whitley*, 120 N.M. 768, 907.P.2d 172 (1995)

<sup>2</sup> *Miller v. Bank of America*, 2015-NMSC-022, 352 P.3d 1162.

<sup>3</sup> *Khalsa v. Puri*, 2015-NMCA-027, 344 P.3d 1036.

*Equitable* treatment may require different methods and courses of action in different communities; but in the final analysis, to be equitable, environmental protection must be balanced fairly and justly, across all communities, and with other rights enshrined in the Constitution. The duty of impartiality will ensure equitable treatment of all beneficiaries regardless of race, ethnicity, socioeconomic status, or generation.

Creating a trustee/beneficiary relationship between New Mexico government and its people ensures the obligation to “conserve, protect and maintain” the state’s natural resources are part of the fiduciary obligations of the state as trustee rather than serving merely as guidance. It also ensures that all parties understand that government has a clear duty to operate in good faith to ensure the state’s natural resources are managed consistent with these fiduciary obligations.

As explained by one Pennsylvania Supreme Court Chief justice regarding a similar Bill of Rights provision<sup>4</sup>:

*“As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary’s conduct. The explicit terms of the trust require the government to “conserve and maintain” the corpus of the trust. See PA. CONST. art. I, § 27. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust -- the public natural resources -- with prudence, loyalty, and impartiality.”<sup>5</sup>*

The creation of the trustee/beneficiary relationship with the natural resources as the corpus of the trust ensures that government does not manage the natural resources of New Mexico (the trust resources) in a way that is clearly antithetical to natural resource protection and environmental rights – as these are the purposes of the trust.

**Use of the term “steward” in lieu of “trustee” is a serious undermining of the environmental and justice goals the people are seeking with this amendment, and lacks the clarity of purpose and obligation that the Trust Law approach provides.**

The term steward does not bring with it the same rich body or quality of law, clarity or protections. While a legal dictionary and case law search for “trust”, “trustee” and/or “beneficiary” provides a rich body of definition and legal guidance as to the duties of the trustee, the obligations owed to beneficiaries, and to guide the management of the corpus of the trust, the same research into the duties of a “steward” does not yield a similar well rounded and understood body of legal definition or guidance.

While the Office of the State Engineer (OSE), has been described as the steward of New Mexico’s obligations under the Rio Grande Compact, and as such “must ensure that it approves only those applications that are not contrary to the conservation of water within the state and not detrimental to the public welfare of the state”<sup>6</sup> there does not exist a robust body of law or cases explaining the duties and obligations of the term “steward” in this water context that could be extrapolated to the environmental rights context.

Use of “steward” in other contexts, environmental or otherwise, fails to return a body of law or understanding anywhere near as clear, understandable or robust as the trustee terminology proposed.

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<sup>4</sup> PA Constitution, Article I, Declaration of Rights § 27, Natural Resources and The Public Estate. 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

<sup>5</sup> *Robinson Twp., Delaware Riverkeeper Network, et al. v. Commonwealth*, 83 A.3d 901 (Pa. 2013)

<sup>6</sup> *Carangelo v. Albuquerque-Bernalillo County Water Util. Auth.*, 2014-NMCA-032, 320 P.3d 492.