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The Public Trust Doctrine: Protector of Pennsylvania's Public Natural Resources?

I. Introduction

The Big Spring Creek, located in Newville, Pennsylvania, was once known to trout fisherman as one of the best fisheries in the nation.¹ Throughout the majority of the twentieth century, the Big Spring Creek boasted trophy brook trout in abundant numbers.² Then effluent discharges of organic wastes and nutrients destroyed the ecology within the creek, chasing away the once great trout fishing.³ The Big Spring Creek has declined in quality and is now listed by the Federation of Fly Fishers as one of the five most endangered fisheries in the nation.⁴ Many fishermen blame the Pennsylvania Fish and Boat Commission (Fish Commission) for this decline in quality because of the fish hatchery that the Commission owns and operates at the head of the stream.⁵

The Public Trust Doctrine is found in the Pennsylvania Constitution Article I, Section 27.⁶ This Doctrine states that the

1. See Bill Porter, *Federation Critiques Fisheries*, THE CARLISLE SENTINEL, Sept. 5, 1999, at C6.

2. See Conrad Grove, *State Will Not Close Hatchery That Polluted a Trout Stream*, THE PHILADELPHIA INQUIRER, Nov. 22, 1998, at E9. Brook trout are the most fragile species of trout and are the only species native to the eastern United States. See *id.*

3. See JOHN J. BLACK, AN ECOLOGICAL SURVEY OF BIG SPRING CREEK WITH EMPHASIS ON THE EFFECTS OF FISH HATCHERY EFFLUENT (1998) at ii-1.

4. See Bill Porter, *Federation Critiques Fisheries*, THE CARLISLE SENTINEL, Sept. 5, 1999, at C6. The Big Spring was actually listed as third on the Federation of Fly Fishers' rating order, with the Wolf River, Wisconsin as first, the Crooked Creek, Arkansas second, the Snake River, Idaho fourth, and the San Juan River, California fifth. See *id.*

5. See *id.*

6. See PA. CONST. art. I, § 27 ("The people have a right to clear 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").

people of the state have a right to “pure water, and to the preservation of the natural, scenic, historic and esthetic value of the environment.”⁷ While Plaintiffs have not been successful in using the Public Trust Doctrine, the Pennsylvania Supreme Court has not had a good opportunity to apply the doctrine to a situation where a State agency has been the determining factor in an environmental disaster.

This comment will explore what made the creek such a great fishery, examine what ruined this great fishery, analyze the current law, and hypothesize the result of legal action brought against the Pennsylvania Fish and Boat Commission based on the Public Trust Doctrine as established in the Pennsylvania Constitution, Article I, Section 27.

II. The History of the Big Spring Creek

The Big Spring Creek originates from a large limestone spring that flows out of the ground, forming a moderately sized stream.⁸ Limestone streams are different from most streams because of their unique composition and structure.⁹ Because it is difficult to compare limestone streams with other streams, the task of determining the causes of the stream’s downfall is much more difficult.¹⁰

The relevant history of the Big Spring Creek dates back to the early days of the United States. During the Nineteenth Century, grist mills were scattered along the Big Spring Creek.¹¹ These mills used dams to provide the necessary power, causing the current to slow and the water to deepen.¹² Because of the slower current, vegetation began to grow on the bottom, covering the pebbled creek floor.¹³ In an effort to keep the stream clear, the mills would periodically flush the stream by releasing the head of water above each dam.¹⁴ By timing the release correctly, all the mills together

7. *See id.*

8. *See* WILLIAM F. BOTTS, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, AQUATIC BIOLOGICAL INVESTIGATION, BIG SPRING CREEK (1999) at 1.

9. *See id.*

10. *See id.* The unique composition and structure of the Big Spring Creek makes it difficult to find a reference condition or threshold for pollution detection to compare to the creek.

11. Telephone Interview with Bill Porter, Columnist, CARLISLE SENTINEL (Sept. 7, 1999).

12. *Id.*

13. *Id.*

14. *Id.*

could clear the stream because of the force of the water, maintaining a pebble creek bottom.¹⁵

The mills began to die out during the early twentieth century, and with the mills went the dams.¹⁶ Once again, the stream flowed unobstructed. During the late 1940's to 1950's, the trout population was so abundant that surface feeding trout were nearly always visible.¹⁷ The brook trout flourished on a wide variety of aquatic and terrestrial insects. In addition to the insects, sculpin, small bottom-dwelling fish, were scattered throughout the stream.¹⁸

Overall, the excellent water quality was the reason for the stream's great ecosystem.¹⁹ This characteristic of the stream made it known across the United States as one of the top fisheries in the nation.

III. The Decline of Big Spring Creek

In 1953, the Colin Thomas fish hatchery began operations.²⁰ The hatchery gradually increased its production to about 300,000 to 400,000 trout in 1956.²¹ During this same time, the brook trout population and the mayfly hatch downstream from the hatchery began to decline, while the trout population above the hatchery continued to flourish.²² A 1958 electrofishing survey showed that the trout population above the hatchery was 641 trout per acre, and only 31 trout per acre below the hatchery.²³ This dichotomy continued to exist until the Pennsylvania Fish and Boat Commission (Fish Commission) developed the Big Spring Fish Culture Station, which was located at the head of the creek.²⁴ By

15. *Id.*

16. Telephone Interview with Bill Porter, Columnist, CARLISLE SENTINEL (Sept. 7, 1999).

17. *See* BLACK, *supra* note 3, at I-1. During the late 1940's and early 1950's, brook trout were so abundant and fed on the surface so frequently, that even while just driving along the stream, the rise forms made by hundreds of surface feeding trout were almost always visible from the road adjacent to the Big Spring Creek. This was an everyday occurrence prior to the development of the fish hatcheries on the creek.

18. *See id.* at I-2. Sculpin was a significant part of the food chain within Big Spring Creek.

19. *See id.*

20. *See id.* The Colin Thomas fish hatchery was located approximately 0.6 miles below the source of the Big Spring. *See id.* at ii-1.

21. *See id.*

22. *See* BLACK, *supra* note 3, at I-1.

23. *See id.* This decline amounted to a 95% reduction.

24. *See id.* at I-4. The headwaters population living between the spring source and the intake dam for the Colin Thomas hatchery continued to do well during the period of 1958 to 1972.

1973, the trout population had declined throughout the entire stream to a point where fly-fishing became entirely non-productive.²⁵

The decline of the stream did not go unnoticed by the Fish Commission. A 1970 news release from the Fish Commission acknowledged that the high quality water in the stream had "suffered over the years through siltation, pollution from commercial fish hatcheries, and other man-made problems."²⁶ In the same press release, the Commission announced a long-range objective to correct the problems and restore the stream to once again become one of Pennsylvania's finest trout waters.²⁷

Initially, it appeared that the Commission would take control of the worsening trout situation. This hope never came to fruition. In a 1989 internal memo written by R. T. Greene and M. T. Marcinko, the Commission acknowledged that it had ignored the stream.²⁸ While the Commission denied that it was at fault for the decline in the trout population, it did recognize that the current condition of the habitat could be an embarrassment to the Commission.²⁹ More importantly, the Commission realized that since it was the owner of the stream, it was partly responsible for the decline.³⁰ Even more disturbing, the Commission memo noted that it had come "under fire" from anglers in the 1970s, but had worked through the problems because of good data, a good plan, and a good habitat.³¹ The memo then noted that if the same critics

25. *See id.* After the Big Spring hatchery's first crop of trout in 1973, the brook trout population downstream of Spring Road Bridge declined to the point that by 1975 flyfishing in any part of the stream below that point became non-productive.

26. Pennsylvania Fish and Boat Commission News Release acknowledging problem on the Big Spring Creek (Release No. 70-25) (Sept. 22, 1970) at 1.

27. *See id.* "The Commission's long-range objective in the current project is to correct these problems and restore Big Spring to its full potential as one of Pennsylvania's finest trout waters." *Id.*

28. Memorandum from R.T. Greene and M.T. Marcinko to the Bureau Director of the Pennsylvania Fish and Boat Commission acknowledging that the Fish Commission has ignored the Big Spring Creek (June 6, 1989) at 3. "It is also somewhat ironic that for one of the most fitting stream habitats where many of the proven improvement techniques can make a difference, Big Spring Creek is virtually ignored by the very agency heading up a relatively large habitat improvement program, albeit it volunteer oriented." *Id.* at 3.

29. *See id.* at 2 ("Big Spring Creek in light of habitat deterioration could be viewed as an embarrassment to the Pennsylvania Fish Commission").

30. *See id.* "However, for a stream of national prominence to literally 'fall apart' except for a couple of hundred feet of the special reg area, this agency, as the owner, bears responsibility especially in light of the 'Resource First' theme." *Id.* at 2.

31. *See id.* at 3.

came along at the current time, the agency would not “have a leg to stand on,” recognizing the lack of attention the Commission had given to the Big Spring Creek.³²

In 1990, it appeared that the Big Spring Creek would receive some needed restoration. The Pennsylvania Environmental Defense Foundation (PEDF) sued the Fish Commission for violating the Federal Clean Water Act through four of the Commission owned hatcheries, including the Big Spring Fish Culture Station.³³ The basis of the claim was that certain months’ effluent readings exceeded the limitations amount in the Federal Clean Water Act.³⁴ The Commission and the PEDF settled the lawsuit, with the Commission denying that it was liable under the Federal Clean Water Act.³⁵ As part of the settlement, the Commission was to undertake a Hatchery Improvement Program that was to upgrade its fish culture station facilities so as to reduce the amount of effluent discharges.³⁶ The expected date of completion for the Big Spring Fish Culture Station was 1994.³⁷ Unfortunately, the improvement program is not yet complete.³⁸

An ecological study done by John J. Black, Ph.D. and Gene Macri, M.S., showed that the decline of the stream was caused by the hatcheries.³⁹ The study recommended that the most cost-

32. *See id.* “If those same critics came around today, this agency doesn’t have a leg to stand on. Except for the annual removal operation, (electro fishing) and efforts to improve the quality of the hatchery effluent, we are not paying much attention to the stream.” *Id.* at 3.

33. *See* Settlement Agreement By and Between The Commonwealth of Pennsylvania Pennsylvania Fish and Boat Commission and The Pennsylvania Environmental Defense Foundation, (Nov. 15, 1990) (on file with author) at 1. Federal Clean Water Act Sixty (60) Day Notices of Intent to Sue were sent to the Fish Commission on December 8, 1988. The notices listed violations at Benner Spring, Bellefonte, Pleasant Gap, and Big Spring.

34. *See id.*

35. *See id.* at 2. The Fish Commission denied that effluent discharge from its fish culture stations subjected it to liability under the Federal Clean Water Act. Accordingly, the Fish Commission and the PEDF settled all Clean Water Act claims arising out of the operation of the Fish Commission’s fish culture stations by means of the settlement agreement.

36. *See id.* The Fish Commission agreed to undertake a Hatchery Improvement Program designed to make improvements to wastewater treatment and effluent discharges. The Hatchery Improvement Program was to include work designed to ensure compliance with applicable environmental standards and work designed to upgrade and improve hatchery operations.

37. *See id.*

38. Telephone Interview with Terry Farner, Manager of the Big Spring Fish Culture Station (January 11, 2000). The Hatchery Improvement Program is scheduled to be completed at the Big Spring Fish Culture Station by November 2001.

39. *See* BLACK, *supra* note 3, at ii-1. The effluent from the Big Spring hatchery

effective option was to close the hatchery.⁴⁰ Closing the hatchery would allow the stream to recover and to become a great fishery once again.⁴¹ The study further estimated that a resurrected fishery could draw fishermen to the creek, generating about a \$237,000 to \$474,000 increase in local annual revenue.⁴²

On the heels of the study performed by Black and Macri, the Pennsylvania Department of Environmental Protection (DEP) performed its own study of the effects of the hatchery on the Big Spring Creek.⁴³ The DEP concluded in its study that the effluent from the Big Spring Fish Culture Station had severely impacted the stream for a distance of 1.5 to 2.5 miles.⁴⁴ The DEP further noted that although the hatchery had complied with its National Pollutant Discharge Elimination System (NPDES) permit, the permit was not adequate to protect the fragile environment of the Big Spring Creek.⁴⁵

The Big Spring Creek continued to suffer from the effluent problem throughout the 1990s. Then in 1998, the Fish Commission published a three-level action plan for the Big Spring Fish Culture Station.⁴⁶ The goal of phase one was to reduce the amount of suspended solids and nutrients through alterations in system components and feed management.⁴⁷ The second phase looked to

discharged organic wastes and nutrients that resulted in nutrient enrichment, siltation, and oxygen depletion. Consequently, the oxygen depletion was the major factor that caused the collapse of the Big Spring Creek's wild trout population. *Id.*

40. *See id.* at VII-1. "Although a number of options could be employed to deal with the Big Spring hatchery, probably the most cost-effective would be to simply close the hatchery." *Id.*

41. By closing the hatchery, organic wastes and nutrients would not be discharged into the creek, causing oxygen depletion. By eliminating the major factor that caused the collapse of the wild trout population, the creek should be able to begin rebuilding the ecosystem that sustained the prior wild brook trout population. "Under catch and release regulations it is likely that brook trout exceeding 12 inches would be common and some brook trout exceeding 18 inches would be present throughout the stream." *See id.* at VII-1.

42. *See id.* at VII-2. This figure is based on a conservative daily expenditure of \$30 per angler and 7,900 to 15,000 angler-days.

43. BOTTIS, *supra* note 8, at 1.

44. *See id.* at 5. The Rapid Bioassessment Protocol (RBP) biological samples taken by the DEP indicated the Big Spring Hatchery discharge severely impacted Big Spring Creek for 1.5 miles, and that the impact probably extends approximately another 1.0 mile.

45. *See id.* at 6.

46. *See* Big Spring Fish Culture Station: Conclusions and Recommendations of the RFP Evaluation Team (Oct. 7, 1998) (draft action plan).

47. *See id.* at 2. The estimated time of completion for phase one was 12 months.

reducing the total suspended solids and nutrients through modernizing the waste water treatment system.⁴⁸ The goal of the final phase was to eliminate the total dissolved solids.⁴⁹ Currently, the plan is in phase two.⁵⁰

IV. The Current Law in Pennsylvania

The Pennsylvania Public Trust Doctrine is found in Article 1, Section 27 of the Pennsylvania Constitution and reads:

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.⁵¹

Two landmark cases best interpret and apply the Public Trust Doctrine: *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*⁵² and *Payne v. Kassab*.⁵³

A. Self-executing

In *National Gettysburg Tower*, the Commonwealth of Pennsylvania sought to enjoin the construction of a 307-foot tower near the Gettysburg National Park.⁵⁴ The State claimed that the tower would spoil the natural and historic environment of the battlefield.⁵⁵ A sharply divided Pennsylvania Supreme Court never applied the Public Trust Doctrine, but merely focused on whether

48. *See id.* at 3. The estimated time of completion for phase two was 18 months for design and 6 months for construction. As part of phase two, the fish commission installed an oxygen supplementation program which will reduce the amount of water taken from the spring. Liquid oxygen will be pumped into the water, to supplement the reduced amount of water, in order to deliver the necessary amount of oxygen to the fish in the hatchery.

49. *See id.* at 4. No estimated time of completion given for phase three.

50. Telephone Interview with Terry Farner, Manager of the Big Spring Fish Culture Station (January 11, 2000).

51. PA. CONST. art. I, § 27.

52. 311 A.2d 588 (Pa. 1973).

53. 361 A.2d 263 (Pa. 1976).

54. *See National Gettysburg Battlefield Tower*, 311 A.2d at 589. Ironically, the tower at issue in *National Gettysburg Tower* was demolished on July 3, 2000.

55. *See id.* at 590. The Commonwealth alleged that the tower would be "despoilation of the natural and historic environment" because it would disrupt the skyline, dominate the setting from many angles, and erode the natural beauty and setting of the area.

the Doctrine was self-executing.⁵⁶ In a plurality opinion, Justice O'Brien determined that Section 27 was not self-executing.⁵⁷ Justice O'Brien reasoned that the Commonwealth had always had a police power to regulate the use of land and thus could establish standards for clean air and clean water.⁵⁸ Therefore, Section 27 was merely a reaffirmation of past law.⁵⁹ O'Brien did note, however, that the aesthetic and historical considerations were now included in the Commonwealth's police power.⁶⁰

The next step in the majority's reasoning was that Section 27 did not give powers of trustee to any one state entity but to the Commonwealth in general.⁶¹ When power is given to the Commonwealth in general, the power is to be shared equally by all three branches of the government.⁶² Thus, the Governor could not decide alone how or when he would exercise the state's police power as a trustee.⁶³

Further, the Court stated that the terms "clean air," "pure water" and "the natural, scenic, historic and esthetic values of the environment" had not been defined.⁶⁴ With no definitions for guidance, the Court warned that the State could single out private landowners with no advance warning, leaving all landowners ignorant of what the State could do with the landowners' property.⁶⁵

Lastly, the majority looked to other states with Public Trust Doctrines and noted that these states had recognized that

56. *See id.*

57. *See id.* at 591. Justice O'Brien noted that the Commonwealth made two arguments in support of the proposition that § 27 of Article 1 was self-executing but found neither argument persuasive.

58. *See id.* "Insofar as the Commonwealth always had recognized police power to regulate the use of land, and thus could establish standards for clean air and clean water consistent with the requirements of public health, § 27 is merely a general reaffirmation of past law." *See id.*

59. *See Nat'l Gettysburg Battlefield Tower*, 311 A.2d at 592.

60. *See id.* Justice O'Brien recognized that aesthetic or historical considerations, by themselves, had not previously been considered sufficient to constitute a basis for the Commonwealth's exercise of its police power.

61. *See id.* at 593. Other specific executive powers are enunciated in sections 7, 8, 9, 10, 11, 12, 15, and 16 of Article I, but the Pennsylvania Constitution does not state how the Governor is to act whenever the Commonwealth is given the powers of trustee.

62. *See id.*

63. *See id.*

64. *See Nat'l Gettysburg Battlefield Tower*, 311 A.2d at 593.

65. *Id.* The Court reasoned that if it held that the Governor needed no legislative authority to exercise the undefined powers of a trustee, the Executive branch of the State could single out individuals with no advance warning for interference with the State, claiming the awesome power of the state as justification for its actions.

legislative implementation was necessary before such power could be exercised.⁶⁶ The Court determined that the Commonwealth had not implemented any legislation enabling the state to exercise such power.⁶⁷ Therefore, supplemental legislation was required before Section 27 could be effective.⁶⁸

Justice Roberts concurred in *National Gettysburg Tower*, using an entirely different reasoning than the majority.⁶⁹ Roberts claimed that the State could not proceed on its claim because it had not shown by clear and convincing proof that the natural, historic, scenic, and aesthetic values would be irreparably harmed.⁷⁰

The dissent, led by Chief Justice Jones, concluded that the Public Trust Doctrine was self-executing.⁷¹ Jones stated that Section 27 conferred certain enumerated rights upon the people of the Commonwealth, and imposed a fiduciary obligation on the executive branch to enforce these rights.⁷² Section 27 appointed the people as the trust beneficiaries and the executive branch as the trustee.⁷³

Upon analyzing the impact of *National Gettysburg Tower*, it is clear that no controlling precedent emerged because only a plurality held that the Public Trust Doctrine was not self-executing. Therefore, the next landmark case addressing the Public Trust Doctrine must also be examined.

66. *See id.* at 594. "However, we find it more significant that all of these other states, which expanded the powers of their governments over the natural environment in the same way as Article 1, § 27 expanded the powers of the Commonwealth, recognized that legislative implementation was necessary before such new power could be exercised." *Id.* According to this reasoning, Article 1, Section 27 would not be enough, by itself, to impose a duty on the state.

67. *See id.*

68. *Id.* at 595. Supplemental legislation would define the values that section 27 seeks to protect and establish procedures by which the use of private property could be fairly regulated to protect those values. Requiring further legislation would force the legislature to define the extent of the doctrine, preventing an over imposing constitutional amendment.

69. *See id.*

70. *See Nat'l Gettysburg Battlefield Tower*, 311 A.2d at 596 (Roberts, J., concurring). "However, in my view, the Commonwealth, on this record, has failed to establish its entitlement to the equitable relief it seeks, either on common-law or constitutional (prior or subsequent to Section 27) theories." *Id.* This concurrence is critical because Justice Roberts does not agree with the majority that the doctrine is self-executing. As a result, there is no majority ruling that the doctrine is not self-executing.

71. *See generally id.* at 596 (Jones, J., dissenting).

72. *Id.*

73. *Id.*

Two years after *National Gettysburg Tower*, the Pennsylvania Supreme Court again looked at the Public Trust Doctrine.⁷⁴ In *Payne v. Kassab*, several citizens of the city of Wilkes-Barre sought to halt a street widening project by the Pennsylvania Department of Transportation.⁷⁵ The Plaintiffs claimed the project would have a negative impact on the historical, scenic, recreational and environmental values of the area in Wilkes-Barre known as the River Common.⁷⁶ The Plaintiffs argued as one of their three main arguments that the street widening project violated the Public Trust Doctrine.⁷⁷ Both the Plaintiffs and the State agreed that Article I, Section 27 of the PA Constitution was self-executing in this situation.⁷⁸ The Court agreed with the Plaintiffs and the State, noting that the Public Trust Doctrine was self-executing in this case because the doctrine was being enforced against the State, which was a role reversal from *National Gettysburg Tower*.⁷⁹ The Court stated that there could be “no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them.”⁸⁰ Further, the Court noted that no implementing legislation was required to establish these relationships.⁸¹

The Supreme Court then moved on from the issue of self-execution to the merits of the case. Here, the Court emphasized that although one may have rights to a protected value under the trusteeship of the State, there is no automatic right to relief.⁸² One

74. See *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976).

75. See *id.* at 264.

76. See *id.* The River Common was a tract of land approximately thirty-two acres in size. Twenty-one acres of the Common was a tree lined park used for recreational and leisure activities. Also in the Common area were several historical markers and monuments.

77. See generally *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976). The Plaintiffs brought three claims against the state. First, the proposed widening of River Street violated the language of the statutory dedications of the land in question as a public Common. Second, Plaintiffs claimed that Penn DOT abused its discretion and violated the obligations imposed on it by 71 P.S. § 512. Thirdly, the Plaintiffs claimed that Penn DOT violated the Public Trust Doctrine.

78. See *id.* at 272.

79. See *id.* In *National Gettysburg Tower*, the doctrine was being enforced against a private individual, whereas in *Payne*, the doctrine was being enforced against the State.

80. *Id.*

81. *Id.*

82. See *Payne*, 361 A.2d at 273. Under this reasoning, a citizen must prove an injury in fact and not just claim a general right that is owned by all citizens.

must balance the many interests of the State before acting on one provision of law.⁸³ The Court then concluded that the Commonwealth had not failed in its duties as trustee because it had carefully considered other interests, such as the need for public transportation.⁸⁴

Although *Payne v. Kassab* was reviewed by the Pennsylvania Supreme Court, the Commonwealth Court established a three-part test that has been used in almost every subsequent Article I, Section 27 case. When examining an Article I, Section 27 case, the critical test asks: 1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?⁸⁵ 2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?⁸⁶ 3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?⁸⁷ Finding no violation of the three-part test in *Payne*, the Commonwealth Court ruled in favor of the State, allowing the road expansion to continue.⁸⁸

B. Standing

Another critical issue when examining a state agency's liability is determining who is entitled to bring an action against the state. To have standing "a party must show that it 1) has a substantial interest in the subject matter of the particular litigation, 2) the asserted interest must be direct, and 3) the interest must be immediate and not a remote consequence."⁸⁹ To satisfy the first requirement, a party must have a substantial interest which is greater than the common interest of all citizens who are concerned with the law.⁹⁰ Secondly, a party has a direct interest in the dispute if he or she was harmed in some way by the action.⁹¹ Lastly, a party

83. *See id.*

84. *See id.*

85. *See Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973).

86. *Id.* at 94.

87. *Id.*

88. *Id.* at 97. The Court determined that Section 27 did not preclude the Pennsylvania Department of Transportation and the City of Wilkes-Barre from utilizing or taking any portion of the River-Common for the purposes of highway or road construction or widening.

89. *Empire Coal Mining & Dev., Inc. v. Department of Env'tl. Resources*, 623 A.2d 897 (Pa. Commw. Ct. 1993).

90. *Id.* at 899.

91. *Id.*

has an immediate interest if there is a causal connection between the action complained of and the injury asserted by the party claiming the injury.⁹²

Most actions against an administrative agency in the context of the Public Trust Doctrine generate through an appeal of an agency granting some type of permit. In applying the three-part standing test, the Commonwealth Court has stated that a party's standing to challenge the granting of a permit may have a more broad standard than standing in an original action brought against an agency.⁹³ It is unclear how well courts consider the three parts of the test when an original action is brought against an agency.⁹⁴ However, *William Penn Parking Garage, Inc. v. City of Pittsburgh* is recognized as the principal case in Pennsylvania in explaining the issue of standing.⁹⁵

In *William Penn*, the Pennsylvania Supreme Court stressed that for a plaintiff to have standing, the plaintiff must be aggrieved.⁹⁶ This requirement is based on two key issues: a direct and substantial interest, and an "immediate" injury.⁹⁷ The Court explained that to be aggrieved, a party must have been adversely affected in some way.⁹⁸ Further, it is not sufficient for a party

92. *Id.*

93. *Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Commw. Ct. 1975). This case was an appeal by Defendant to challenge the grant of a sewage permit to Central Delaware County Authority. Regarding the issue of standing, the Court stated: "in any administrative appeal, a party must still be a 'person aggrieved' by the adjudication in order to appeal from it. We do not rule that a more broad standard might not apply to standing in an *original action* as a direct challenge to an administrative agency for a violation of its duties as trustee of public natural resources." *Id.* at 474 (emphasis added).

94. *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). "In summary then, one who seeks to challenge governmental action must show a direct and substantial interest . . . In addition, he must show a sufficiently close causal connection between the challenged action and the asserted injury to qualify the interest as 'immediate' rather than 'remote.' The requirement of a 'legal interest' tends to conceal the necessary construction of the legal rules relied upon by the challenger and therefore is not a useful guide to the determination of standing questions." *Id.* at 286.

95. *Great Lakes Rehabilitation Hosp. v. Comm. Dep't of Health*, 592 A.2d 769 (Pa. Comm. Ct. 1991). *Great Lakes* noted that *William Penn* is the seminal case pertaining to standing, and requires that the person bringing an action be aggrieved.

96. *See generally*, *Wm. Penn Parking Garage, Inc.*, 346 A.2d at 275. In *William Penn*, the city of Pittsburgh adopted an ordinance imposing a tax on all patrons of non-residential parking places in the amount 20% of the consideration paid for storage of any vehicle. Various parties appealed the adoption of the ordinance. Among the parties were private citizens and parking garage owners.

97. *See supra* note 94.

98. *Id.* at 280. According to the Court, the core concept was whether the person was adversely affected in any way. If the person was not adversely

claiming standing to assert the common interest of all citizens in general.⁹⁹ In addressing the issue of “substantial” injury, the Court significantly weakened the idea that an injury must be pecuniary,¹⁰⁰ citing *United States v. Students Challenging Regulatory Agency Procedures* as support to allow standing in an issue related to the use of wild resources.¹⁰¹ The Court summarized the idea of a substantial interest by stating that the party’s interest must have some discernible adverse effect other than the abstract interest of all citizens.¹⁰² The Court then quickly explained the concept of “direct” as meaning that a party must show causation of the injury to the action complained of.¹⁰³ In explaining the concept of “immediate” injury, the Court stated that there must be a causal connection between the injury and the action.¹⁰⁴

Before disposing of the issue of standing in *William Penn*, the Court noted that some cases require the party to prove that a “legal right” has been violated.¹⁰⁵ Under this requirement, a party’s interest must merely be protected by the legal provisions relied on.¹⁰⁶

V. Resolution

After examining both the specific facts and the current law, the question thus arises whether the Public Trust Doctrine applies to

affected, he was not ‘aggrieved’ and has no standing to obtain a judicial resolution of his challenge.

99. *Id.*

100. *See id.* at 193. A plaintiff will have standing in some instances even when his interest is neither pecuniary nor readily translatable into pecuniary terms.

101. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973). The Court considered the party aggrieved because they claimed an adverse effect upon their use of the “forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing and other recreational [and] aesthetic purposes.” *Id.* at 687, 688.

102. *See Wm. Penn Parking Garage, Inc.*, 346 A.2d at 282.

103. *Id.* at 282.

104. *Id.* at 283. The Court gave two guidelines for determining whether an injury was immediate:

- 1) the possibility that an interest will suffice to confer standing grows less as the causal connection grows more remote and 2) standing will be found more readily where protection of the type of interest asserted is among the policies underlying the legal rule relied upon by the person claiming to be ‘aggrieved’.

Id.

105. *Id.* at 285. This “legal right” requirement is usually used in an administrative law setting. The court would not allow a party to challenge governmental action unless he alleged an injury of the sort which would give rise to a cause of action against another individual outside an administrative law setting.

106. *Id.* at 286.

the Big Spring Creek. Various sources, including the Pennsylvania Department of Environmental Protection, have recognized that the Pennsylvania Fish and Boat Commission is responsible for the present state of the Big Spring Creek. With the issue of causal connection to the injury determined, the next issue to consider is whether the current law places a duty on the Fish and Boat Commission, and if so, what action should be taken.

A. *Self-Executing*

Most likely, *National Gettysburg Tower* does not apply because that case held that the Public Trust Doctrine is not self-executing when the state is bringing the action. However, *Payne* most likely does apply. In *Payne*, the Pennsylvania Supreme Court differentiated its decision from *National Gettysburg Tower* by noting that the State was the trustee and placed the duty on the State. Therefore, the issue whether the Public Trust Doctrine is self-executing should be settled in favor of the citizens of the State.

B. *Payne Analysis*

Once it is determined that the Public Trust Doctrine is self-executing, the merits of the case may be examined. According to the Public Trust Doctrine, the State is to conserve and maintain the natural resources of the Commonwealth for the benefit of the people.¹⁰⁷ The facts as discussed earlier, have shown that the State, through the Fish and Boat Commission, has not maintained the natural resources of the Big Spring Creek, but the State has actually destroyed these resources.¹⁰⁸

In order to examine the merits of the case, the three-part test established by the Commonwealth Court in *Payne v. Kassab* must be implemented.¹⁰⁹ The first question asks whether the state has complied with all applicable statutes relevant to the protection of the state's natural resources. Under this question, two statutes are relevant. The first statute is the Clean Stream Law.¹¹⁰ The policy

107. See PA. CONST. art. I, § 27. The Public Trust Doctrine states: "As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

108. See generally, BLACK, *supra* note 3, at ii-2, explaining that the Big Spring Fish Culture Station is the cause of why the Big Spring Creek's trout population continues to suffer.

109. See *Payne*, 312 A.2d at 94.

110. 35 P.S. § 691.4 (1999). This particular statute falls under the chapter pertaining to the protection of the public water supply.

reasons behind the Clean Stream Law are to keep clean and to restore every stream in the state of Pennsylvania for the present generation and for all generations to come.¹¹¹ At first glance, it may appear that the Fish Commission is in violation of the statute's policy because it has hurt the local tourist industry,¹¹² has impaired the stream as a recreational facility,¹¹³ has not cleaned up the polluted stream,¹¹⁴ arguably has not aided the economic future of the Commonwealth,¹¹⁵ and has not successfully managed and controlled the watershed.¹¹⁶

In rebuttal, the Fish Commission could make a strong argument that any negative effects on just one stream are offset by the multiple positive effects the hatchery has on all the streams that the hatchery supports. By raising over 900,000 trout per year,¹¹⁷ the hatchery draws hundreds, or thousands, of anglers to the streams that receive the hatchery trout. This draw increases tourism on a greater expanse of geographical area, increases the recreational facilities within the state, and has aided the economic future of the state as a whole.

Because the section of the Clean Stream Law cited is based on policy, the decision of any court would probably be close. Most

111. *Id.* This statute is made up of five separate declarations of policy: “(1) Clean, unpolluted streams are absolutely essential if Pennsylvania is to attract new manufacturing industries and to develop Pennsylvania’s full share of the tourist industry; (2) Clean, unpolluted water is absolutely essential if Pennsylvanians are to have adequate out of door recreational facilities in the decades ahead; (3) It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted; (4) The prevention and elimination of water pollution is recognized as being directly related to the economic future of the Commonwealth; and (5) The achievement of the objective herein set forth requires a comprehensive program of watershed management and control.” *Id.*

112. *See* Black, *supra* note 3, at I-1. The Big Spring used to draw not only fishermen but authors. Charles K. Fox and Theodore Gordon were among several who wrote about the stream, giving the Big Spring Creek even greater notoriety.

113. *See* Black, *supra* note 3, at VII-1. In his study, Black estimates that closing the culture station could produce 7,900 to 15,000 angler-days just in the upper 1.5 mile portion at the head of the creek. This would be a significant increase in the recreational facilities.

114. *See supra* note 32.

115. *See supra* note 42 and accompanying text.

116. *See generally* Black, *supra* note 3. Statistical graphs throughout the survey show that the trout population has not grown, and that the ecology of the creek has not improved since the time that the Fish Commission stated it would begin to correct the problem in the stream.

117. Black, *supra* note 3, at ii-2.

likely, a court would decide against the Fish Commission on this law, because it would appear from all of the evidence that the Fish Commission could still maintain the hatchery while minimizing the amount of effluent released into the stream. The court would most likely conclude that the Fish Commission could abide by the policies of the Clean Stream Law and still provide the same number of trout for the supported streams.

Another Pennsylvania statute factors into the *Payne* analysis as well. Part of the Fish Law¹¹⁸ looks to preventing the pollution of waters that support fish and fishing.¹¹⁹ A party violates the Fish Law if they allow any substance that is harmful to fish to be released into any water in the Commonwealth.¹²⁰ The facts above show that the effluent being released into the Big Spring Creek is damaging not only to the creek itself,¹²¹ but also to the reproduction of the trout.¹²² Although these facts show that the hatchery is damaging the creek, the Fish Commission has a strong argument because they are not violating their permit.¹²³ The Fish Commission could argue that it is not in violation of a generalized Fish Law when it complies with other specific national standards.

The next step in the *Payne* analysis is to examine whether the record demonstrates a reasonable effort to reduce the environmental incursion to a minimum.¹²⁴ The relevant facts show that the Fish Commission has not demonstrated reasonable efforts to

118. 30 Pa.C.S. § 2504 (1999).

119. *Id.* The general rule is that no person shall: "(1) Put or place in any waters within or on the boundaries of this Commonwealth any electricity, explosives or any poisonous substances except that, for the purposes of research and fish management, agents of or person authorized by the executive director may use any method or means to collect, eradicate or control fish.

(2) Allow any substance, deleterious, destructive or poisonous to fish, to be turned into or allowed to run, flow, wash or be emptied into any waters within or bordering on this Commonwealth."

120. *Id.*

121. Black, *supra* note 3, at II-2. "Comparison of 1990 DER data for the spring (BSC01) versus 'the ditch' (BSC02), shows that even after dilution, the hatchery effluent increases the streams content of nitrogen and phosphorus." *Id.* at II-2. This increase in nitrogen and phosphorus is the principal aid in the excessive aquatic plant growth within the stream.

122. *See* Black, *supra* note 3, at II-7. Black's report noted that although nutrients in the hatchery effluent might not directly harm free-swimming adult and juvenile salmonids per se, that after decay and nutrient cycling processes, nutrients from the Fish Commission's Big Spring hatchery are an important factor to the continuing trout reproduction failure.

123. *See* Draft Action Plan, *supra* note 46, at 1. The Fish Commission rigorously claims that the Big Spring effluent discharge meets NPDES standards and special conditions.

124. *See Payne*, 312 A.2d at 94.

reduce the environmental incursion upon the Big Spring Creek. As recognized by the Commission itself, they have ignored the stream and “would not have a leg to stand on” when faced by critics.¹²⁵ Of course, the Commission has entered into a settlement agreement with the Pennsylvania Environmental Defense Foundation whereby the Fish Commission is to upgrade the wastewater treatment.¹²⁶ To date, this upgrade is not on schedule. In fact, in late 1998, the Fish Commission issued a three-phase draft action plan after receiving recommendations from an evaluation team.¹²⁷ Currently, the plan is in phase two.¹²⁸ When presented with all of the evidence, it is likely that the fact finder would conclude that the Fish Commission has not demonstrated a reasonable effort to reduce the environmental incursion to a minimum. The Fish Commission has continually made promises and statements about cleaning up the stream, but nothing substantial has been done. The Big Spring Creek is in roughly the same condition today as it was in the late 1970’s.¹²⁹ Therefore, it appears that under the *Payne* analysis the Fish Commission would fail under step two: a reasonable effort to reduce the environmental incursion to a minimum.

Step three of the *Payne* analysis questions whether the environmental harm clearly outweighs the benefits from the

125. See Memo from R.T. Greene, *supra* note 32, at 3.

126. See Settlement Agreement by and between the Commonwealth of Pennsylvania Fish and Boat Commission and the Pennsylvania Environmental Defense Foundation, *supra* note 33, at 2. Term one of the settlement agreement reads: “The PFC will undertake a Hatchery Improvement Program designed to upgrade and improve its fish culture station facilities to make improvements to wastewater treatment and effluent discharges. The Hatchery Improvement Program shall include work designed to ensure compliance with applicable environmental standards and work designed to upgrade and improve hatchery operations. It is recognized and agreed that these two goals are interrelated. The PFC has established, and the PEDF has accepted, the goal that all environmental projects in the Hatchery Improvement Program shall be completed within 10 years after the due date of this agreement. As used in this settlement agreement, the term ‘environmental project’ includes projects to deal with wastewater discharges and sludge removal and disposal.” *Id.*

127. See Draft Action Plan from the Pennsylvania Fish and Boat Commission, *supra* note 45, at 1. The purpose of the evaluation team was to “evaluate and synthesize the best professional advice available to the agency” in regards to the effluent problem at the hatchery.

128. See Farner, *supra* note 50.

129. See generally, Black, *supra* note 3, at Section III. In this part of the ecological survey, Black gives statistical evidence showing that the trout population from 1977 through 1993 has remained fairly constant at an average range of 30 trout per acre, representing more than a 99% reduction in population density in 1962.

action.¹³⁰ This step in the *Payne* analysis is based mostly on public policy arguments more so than the previous two steps.¹³¹ Here, both sides could make a variety of arguments.

First, advocates against the Fish Commission could argue that the low quality of the stream is hurting the local economy because less fisherman are visiting the stream than what could be possible.¹³² At the same time, the Fish Commission could argue that the large number of trout produced each year and stocked into streams throughout this region of the state encourages anglers to buy fishing licenses to fish for the stocked trout. Consequently, the benefits of the revenue created by the fishing licenses sold outweighs the damage done to one creek which still has fish in the creek, just not in the same numbers.¹³³ The advocates against the Fish Commission could then respond by arguing that the Commission can still operate its hatchery and have a clean Big Spring Creek by improving the waste management of the hatchery. The advocates' response would most likely prevail because the reviewing court would agree that the Fish Commission, by improving the waste management, could both operate the hatchery and prevent further harm to the ecology of the Big Spring Creek. The Court's conclusion that the Fish Commission could both operate the hatchery and prevent harm to the Big Spring Creek, would effectively determine that the environmental harm to the Creek outweighs the benefits of operating the hatchery in its current condition. Consequently, the Fish Commission's actions would fail under step three of the *Payne* analysis: whether the environmental harm clearly outweighs the benefits from the action.

C. *Standing*

Although the issue of standing would not be the key issue in this analysis, it would be an important factor. A complete analysis should not overlook this issue. The first step is to determine who

130. See *Payne*, 312 A.2d at 94.

131. See *Payne*, 312 A.2d at 94. Step three examines whether the harm outweighs the benefits. This type of balancing test looks to the results, and factors in the public policy arguments when determining if the harm outweighs the benefits.

132. See Black, *supra* note 3, at VII-1, 2. Restoring the upper 1.5 miles of the stream could produce up to \$237,000 to \$474,000 in revenue per year. Obviously, restoring even more of the stream could produce even more revenue to the local economy.

133. Because fishing licenses are valid throughout the entire state, and the Big Spring hatchery only stocks select streams, it is difficult to calculate the amount of revenue, from fishing licenses sold, that the Big Spring hatchery is responsible for.

would be interested parties. Interested parties could include both organizations and individual citizens.

Most organizations who would be interested in this issue would represent either environmental groups or fishing clubs, such as a local chapter of Trout Unlimited. Following the requirements set out in *William Penn*, an organization such as Trout Unlimited would have to show it is an aggrieved party. First, it must show a direct and substantial interest, and second, it must show an immediate injury.¹³⁴ The mission of an organization such as Trout Unlimited is to protect and restore trout fisheries within North America.¹³⁵ This mission is not an interest that is common to all citizens. Thus, there would be a substantial interest as defined by the *William Penn* court.¹³⁶ The organization could also show a direct and immediate injury by showing that the Fish Commission's actions damaged the quality of the Big Spring Creek, and that these actions conflict with the mission of Trout Unlimited.¹³⁷ After completing this analysis, a reviewing court would likely find that Trout Unlimited, as an organization, has standing.

A private citizen, such as a fisherman, could also initiate an action against the Fish Commission. A fisherman most likely could prove to have standing easier than an organization. A fisherman can show a substantial interest if he can show that he goes fishing in the stream and the quality of the stream is not as good as it could be because of the Fish Commission's actions with the hatchery.¹³⁸ This adverse effect caused by the Commission would certainly not be something that is common to all citizens. Further, a fisherman could prove a direct and immediate effect by showing that the Fish Commission's actions have diminished the fishing quality of the

134. See *William Penn Parking Garage, Inc.*, 346 A.2d at 286. The two key issues to standing is a direct interest and an immediate injury.

135. See Trout Unlimited, *Trout Unlimited Today* (visited November 27, 1999) <<http://tu.org/whatis/tutoday.html>>. Trout Unlimited's mission is "to conserve, protect and restore America's trout and salmon fisheries and their watersheds." According to Trout Unlimited's mission, this organization would likely be an interested party.

136. See *William Penn Parking Garage, Inc.*, 346 A.2d at 293. For a party to show a substantial interest, the party must only show that its interests have a discernable adverse effect other than the abstract interest of all citizens.

137. See *id.* at 283. A party shows a direct and immediate harm by showing causation of the injury and a causal connection between the injury and the action.

138. See *id.* at 269. By showing the lower quality of the stream, the fisherman proves that his interests in having a higher quality stream are not the same interests as all citizens.

stream.¹³⁹ Therefore, it appears that a reviewing court would be very likely to grant standing to a private citizen such as a fisherman.

A fisherman could also introduce policy reasons why the court should grant standing. If a fisherman could not sue the Fish Commission for causing the decline of the fishery, who could sue? The State must be held accountable for its actions, and allowing a fisherman to sue the Fish Commission appears to be one of the most effective ways.

VI. Conclusion

After reviewing the evidence and the relevant case law, it seems apparent that the State has a duty to return the Big Spring Creek back to its original, productive state at whatever cost this may bring to the Pennsylvania Fish and Boat Commission and to the Big Spring Fish Culture Station. Under the *Payne* analysis, it is likely that a reviewing court would hold the Fish Commission liable for the decline of the fishing quality in the Big Spring Creek. Proper damages would most likely include an injunction to halt or phase out operation of the Big Spring Fish Culture Station until the Fish Commission could reasonably prove to the Court that the Commission has cured the effluent problem. If the Fish Commission could not effectively show the Court that the effluent problem has been remedied, the hatchery will have to close operations and move elsewhere to support the high demand for stocked trout in the State's waters. It would be sad to see the hatchery permanently close operations, but it is also tragic to see a once-renowned trout fishery deteriorate because of one State agency's actions.

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139. *See id.* at 283. A party shows a direct and immediate harm by showing causation of the injury and a causal connection between the injury and the action. This standard would apply both for an organization or a private citizen.