

A

M.C. MEHTA

v.

KAMAL NATH AND ORS.

DECEMBER 13, 1996

B

[KULDIP SINGH AND S. SAGHIR AHMAD, JJ.]

Environmental Law :

Constitution of India, 1950 : Article 32.

C

Public Interest Litigation—Ecology—Environmental Pollution—River Beas—Public Trust Doctrine—Grant of lease—Of riparian forest land for commercial purpose to private company which operated a Motel located at bank of River, by State Government—Motel management interfered with natural flow of river—Held, Public Trust Doctrine was part of Indian Law—It extended to natural resources such as rivers, forests, seashores, air etc. for purposes of protecting ecosystem—State Government committed breach of public trust—Prior sanction granted by Ministry of Environment and Forest and lease granted in favour of Motel quashed—Polluter Pays Principle applicable—Hence polluter company liable to pay compensation in terms of cost for restitution of environment and ecology of the area—Other directions issued.

D

E

A news item appeared in the "Indian Express" which stated that a private Motel in which the respondent's family had direct link, had floated a club at the bank of River Beas by encroaching land including substantial forest land which was later regularised and leased out to the company when the respondent was a Minister in the Central Government. It was stated that the Motel used bulldozers and earth-movers to turn the course of the river. The bulldozers created a new channel by diverting the flow of the river. According to the news item three private companies were engaged to reclaim vast tracts of land around the Motel. The course of the river was being diverted to save the Motel from future floods.

F

G

This Court took notice of the news item because the facts disclosed therein, if true, would be a serious act of environmental degradation on the part of the Motel.

H

Disposing of the petition, this Court

HELD : 1.1. 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. The ancient Roman Empire developed legal Theory known as the "Doctrine of the Public Trust". The Public Trust Doctrine primarily rests on the principle that certain resources like air, seas, 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, they 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 purposes. It is no doubt correct that the public trust doctrine under the English Common Law extended only to certain traditional uses such as navigation, commerce and fishing. But the American Courts in recent cases have expanded the concept of the public trust doctrine. The observations of the Supreme Court of California in *Mono Lake case* clearly show the judicial concern in protecting all ecologically important lands, for example fresh water, wetlands or riparian forests. The observations of the Court in *Mono Lake case* to the effect that the protection of ecological values is among the purposes of public trust, may give rise to an argument that the ecology and the environmental protection is a relevant factor to determine which lands, waters or airs are protected by the public trust doctrine, the Courts in United States are finally beginning to adopt this reasoning and are expanding the public trust to encompass new types of lands and waters. There is no reason why the public trust doctrine should not be expanded to include all eco-systems operating in our natural resources. [35-H; 37-F; 38-E-F; 44-D-H]

1.2. 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. Thus Public Trust Doctrine is a part of the law of the land. [45-A-B]

Illinois Central R.R. Company v. Illinois, 146 US 387; *Gould v. Greylock Reservation Commission*, 350 Mass 410 (1966); *Sacco v. Develop-*

- A *ment of Public Works*, 532 Mass 670; *Robins v. Department of Public Works*, 255 NE 2d 577; *National Audubon Society v. Superior Court of Alpina County*, 33 CAL. 3d 419; *Prieweys, Wisconsin State Land and Improvement Company* 93 Wis 534 (1896); *Crawford County Lever and Drainage Distt. No. 1*, 182 Wis 404 and *City of Milwaukee v. State*, 193 Wis 423 and *State v. Public Services Commission*, 275 Wis 112, referred to.

- B Prof. Sax : *Public Trust Doctrine in Natural Resources Law : Effective Judicial Intervention*", Michigan Law Review, Vol. 68, part 1, p 473 and David B. Hunter : *"An Ecological Perspective on Property : A call for Judicial Protection of the Public's interest in Environmentally Critical Resources"*, Harvard Environmental Law Review, Vol. 12 1988 p 311, referred to.

C *Marks v. Whitney*, 6 Cal 3d 251 and *United Plainsmen v. N.D. State Water Cons. Comm'n*, 247 NW 2d 457 (N.D. 1976), cited.

- 2.1. The issues presented in this case illustrate 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 increasing complex society, find it necessary to encroach to some extent open lands heretofore considered in-violate to change. The resolution of this conflict in any given case is for the legislature and not the courts. If there is a law made by Parliament or the State Legislatures the courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership or for commercial use. The esthetic use and the prestine 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 good and in public interest to encroach upon the said resources. [45-C-E]

- G 2.2. In the present case, large area of the banks of river Beas which is part of protected forest has been given on a lease purely for commercial purposes to the Motels. The area being ecologically fragile and full of scenic beauty should not have been permitted to be converted into private ownership and for commercial gains. The State Government committed H patent breach of public trust by leasing the ecologically fragile land to the

Motel management. The lease transactions are in patent breach of the trust held by the State Government. [45-F-G] A

2.3. The admissions by the Motel-management in various letters written to the Government officers and the report placed on record by the Central Pollution Control Board clearly show that the Motel-management has by their illegal constructions and callous interference with the natural flow of river Beas has degraded the environment. The Motel interfered with the natural flow of the river by trying to block the natural relief/spill channel of the river. It is settled by this Court that one who pollutes the environment must pay to reverse the damage caused by his acts. [35-C-D] B

Vellore Citizens Welfare Forum v. Union of India & Ors., JT (1996) 7 SC 375, relied on. C

Indian Council for Enviro-Legal Action v. Union of India, JT (1996) 2 SC 196, cited. D

3. The Motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The pollution caused by various constructions made by the Motel in the river bed and the banks of the river Beas has to be removed and reversed. NEERI is directed through its Director to inspect the area, if necessary, and give an assessment of the cost which is likely to be incurred for reversing the damage caused by the Motel to the environment and ecology of the area. NEERI may take into consideration the report by the Board in this respect. The Motel through its management shall show cause why pollution fine in addition be not imposed on the Motel. The Motel shall construct a boundary wall at a distance of not more than 4 meters from the cluster of rooms (main building of the Motel) towards the river basin. The boundary wall shall be on the area of the Motel which is covered by the lease. The Motel shall not encroach/cover/utilise any part of the river basin. The boundary wall shall separate the Motel building from the river basin. The river bank and the river basin shall be left open for the public use. The Motel shall not discharge untreated effluents into the river. The State Pollution Control Board is directed to inspect the pollution control devices/treatment plants set up by the Motel. If the effluent/waste discharged by the Motel is not conforming to the prescribed standards, action in accordance with law be taken against the Motel. The State Pollution Control Board shall not permit the discharge of untreated effluent into E F G H

A river Beas. The Board shall inspect all the hotels/institutions/factories in Kullu-Manali area and in case any of them are discharging untreated effluent/waste into the river, the Board shall take action in accordance with law. The Motel shall show cause why Pollution-fine and damages be not imposed as directed by this Court. [47-F-H; 48-A-E]

B CIVIL ORIGINAL JURISDICTION : Writ Petition (C) No. 182 of 1996.

(Under Article 32 of the Constitution of India.)

C In-person for Petitioner.

H.N. Salve, Sr. Adv., M.S. Vashisht, Rajiv Dutta, Shiv Pujan Singh, J.S. Atri and L.R. Rath, Advs. for the Respondents.

The Judgment of the Court was delivered by

D **KULDIP SINGH, J.** This Court took notice of the News item appearing in the "Indian Express" dated February 25, 1996 under the caption - "Kamal Nath dares the mighty Beas to keep his dreams afloat". The relevant part of the news item is as under :

E "Kamal Nath's family has direct links with a private company, Span Motels Private Limited, which owns a resort - Span Resorts - for tourists in the Kullu-Manali valley. The problem is with another ambitious venture floated by the same company - Span Club.

F The club represents Kamal Nath's dream of having a house on the bank of the Beas in the shadow of the snow-capped Zaskar ranges. The club was built after encroaching upon 27.12 bighas of land, including substantial forest land, in 1990. The land was later regularised and leased out to the company on April 11, 1994. The regularisation was done when Mr. Kamal Nath was Minister of Environment and Forests.The swollen Beas changed its course and engulfed the Span Club and the adjoining lawns, washing it away.

G

For almost five months now, the Span Resorts management has been moving bulldozers and earth movers to turn the course of the Beas for a second time.

H

The heavy earth mover has been used to block the flow of the river just 500 metres upstream. The bulldozers are creating a new channel to divert the river to at least one kilometer downstream. The tractor trolleys move earth and boulders to shore up the embankment surrounding Span Resort for laying a lawn. According to the Span Resorts management, the entire reclaiming operation should be over by March 31, and is likely to cost over a crore of rupees.

Three private companies - one each from Chandigarh, Mandi and Kullu - have moved in one heavy earth mover (hired at the rate of Rs. 2000 per hour), four earth movers and four bulldozers (rates varying from Rs. 650 to Rs. 850 each per hour) and 35 tractor trolleys. A security ring has been thrown all around.Another worrying thought is that of the river eating into the mountains, leading to landslides which are an occasional occurrence in this area. Last September, these caused floods in the Beas and property estimated to be worth Rs. 105 crore was destroyed.Once they succeed in diverting the river, the Span management plans to go in for landscaping the reclaimed land. But as of today, they are not so sure. Even they confess the river may just return.

"Mr Kamal Nath was here for a short while two-three months ago. He came, saw what was going on and left. I suppose he knows what he is doing", says another executive.

The district administration pleads helplessness. Rivers and forest land, officials point out, are not under their jurisdiction. Only the Kullu conservation of forests or the district forest officer can intervene in this case.

But who is going to bel, the country's former Environment and Forests Minister.

Interestingly, a query faxed to Kamal Nath for his views on these developments fetched a reply from Mr. S. Mukerji, President of the Span Motels Private Limited.

Admitting that the Nath family had "business interests" in the company since 1981, he said, "the company is managed by a team

A of professional managers and Mr. Kamal Nath is not involved in the management of activity of the company."

B "The Board comprises professionals, some of whom are friends and relatives of the Nath family", Mr. Mukerji said, he expressed surprise that a reference had been made to Rangri and Chakki villagers "since these villagers are at least 2/3 kilometers away and not even on the river side."

C He said the Span Club was "not for the exclusive use of any one individual." "We would like to emphasize that we are only 'restoring the river' to its original and natural course and are restoring our land and or those or neighbouring villagers similarly affected by the flood."

D He maintained that "Mr Kamal Nath has definitely not been to Span Resorts in the last two months and in fact, to the best of my knowledge, has not travelled to the Kullu Valley for quite some time now.In any case, we had never 'blocked' any channel in the vicinity of Span."

Mr. Kamal Nath filed one-page counter affidavit dated June 8, 1996. Paras 1 and 3 of the counter are as under :-

E "I say that I have been wrongly arrayed as a respondent in the above petition in-as-much as I have no right, title or interest in the property known as 'Span Resorts' owned by 'Span Motels Private Limited'.

F I further say that the allegations made in the press reports based on which this Hon'ble Court was pleased to issue notice are highly exaggerated, erroneous, *mala fide*, mischievous and have been published only to harm and walign the reputation of this respondent."

G On behalf of Span Motel Private Limited (the Motel), Mr. Banwari Lal Mathur, its Executive Director filed counter affidavit. Paras 2 and 3 of the Counter are as under :-

H "I say that Mr. Kamal Nath who has been arrayed as respondent No. 1 in the above writ petition has no right, title or interest in the

property known as SPAN RESORTS owned by Span Motels Pvt. Ltd. or in the lands leased out to the said company by the State of Himachal Pradesh. A

I say that the shareholding of SPAN MOTELS PVT. LTD. is as under :

	<i>No. of Shares Held</i>	<i>% Share holding</i>
Mrs. Leela Nath	32,560	42
EMC Projects Pvt. Ltd.	14,700	19
SHAKA Properties Pvt. Ltd.	15,000	19
SHAKA Estate & Finance Pvt. Ltd.	15,000	19
Capt. Alok Chandola	250	01
	77,510	100

It was not disputed before us by Mr. Harish Salve, learned counsel appearing for Mr. Kamal Nath that almost all the shares in the Motel are owned by the family of Mr. Kamal Nath. We do not wish to comment on the averment made on oath by Mr. Kamal Nath that he has "no right, title or interest in the property known as Span Resorts owned by Span Motels Private Limited". E

Mr. B.L. Mathur filed an additional counter affidavit dated July 30, 1996 on behalf of the Motel. The counter affidavit mentioned above states that Government land measuring 40 bighas 3 biswas situated along side Kullu-Manali Road on the bank of river Beas was granted on lease to the Motel for a period of 99 years with effect from October 1, 1972 to October 1, 2071. The lessee was granted permission to enter and occupy the said area for purpose of putting up a motel and for installing ancillaries in due course as may be subsequently approved by the lessor. We may refer to paras 6 and 7 of the lease deed dated September 29, 1972 which are as under : F G

"The Lessee shall not dig deep pits of trenches in the said land, which may lead to the danger or erosion and shall make good the H

A Lessor/defects caused by their acts or defaults within one month of notice by the Lessor.

B In the event of said land being required by Lessor for any other purpose, whatsoever the Lessor will be entitled to terminate this lease at any time by giving six months notice in writing to the lessee and the lessee shall not be entitled to any compensation whatsoever on account of such termination."

C The current management (Shri Kamal Nath's family) took over the Motel in the year 1961. Fresh lease was signed on September 29, 1981. The new lease was for the same period from 1972 to 2071. Paras 4 and 5 of the additional affidavit are as under :-

D " I say that the Motel commenced operations in 1975. There are over 800 trees in this area of 40 bighas. the motel has two clusters with 8 dwelling units of 3 rooms each. The rooms are nowhere near the river - the distance between the cluster of rooms and the beginning of the river basin is about 10 meters-actually the river is another 30 meters therefrom. Thus, the effective distance between the edge of the river and the cluster of rooms is 40 meters.

E I say that in the peak of the flood, the river did not come closer than 10 meters to the rooms and did not, therefore, pose any danger to the rooms, particularly there is no problems qua rooms as the rooms are on a higher level - at least 5-7 meters at their closest point."

F Along with the additional affidavit the correspondence between the Motel and Government has been annexed. In a letter dated October 19, 1988 addressed to the Chief Minister Himachal Pradesh. The Motel gave details of the flood-damage during the year 1988 and finally requested the Government for the following steps :-

G "Further it is imperative that the Government take immediate steps to stop erosion of the land under lease to us. It would appear that strong concrete blackened retaining walls will be necessary to be placed at appropriate points to protect the land mass around us."

H The Motel addressed letter dated August 30, 1989 to the Divisional Forest Officer, Kullu. The relevant part of the letter is as under :-

When we acquired our land on lease, there were no clear demarcations of the surrounding areas and boundaries. There has existed a stretch of waste and 'banjar' (Class III) forest land in a longitudinal strip along the River bank admeasuring about 22.2 bighas, contiguous and adjacent to our leased land. Over the years, and especially after the *severe flood erosion* last year, we have built extensive stone, cemented and wire-mesh crated embankments all along the river banks at considerable expense and cost. We have also gradually and painstakingly developed this entire waste a 'banjar' area, beautified and landscaped it, planted ornamental, fruiting and varied forest trees extensively such that it blends with our estate and with the surrounding flora and environment in a harmonious manner. A Revenue map along with all revenue department records covering this entire area, is forwarded enclosed herewith for your reference and perusal.

We are aware that in accordance with the forest Conservation Act of 1980, the use of Forest land by Private Agency even for natural development and afforestation scheme, requires alternative matching compensatory afforestation land areas to be surrendered by the concerned party, after due approval of the Government. In view of this statutory pre-condition, we wish to submit that we can immediately surrender to the Government nearly 28 bighas & 13 biswas of private agricultural cultivated land located at Village MAJHACH, (Burua), MANALI, in exchange for the above mentioned 22.2. bighas of Class III banjar forest land adjoining our land in Village Baragran Bihal, which we request for transfer to our company in lieu of the land we are willing to surrender. The specific Revenue maps and records concerning this area of land at Village Majhach, are also enclosed herewith for your kind perusal."

It is obvious from the contents of the letter quoted above that the motel had encroached upon an additional area of 22.2 bighas adjoining to the lease-hold area. Apart from that the Motel had built extensive stone, cemented and wire mesh created embankments all along the river banks. The Motel was keen to have the encroached land by way of exchange/lease. A request to that effect was repeated in the letter dated September 12, 1989 addressed to the Divisional Forest Officer, Kullu. The Motel again

A repeated its request for lease of the additional land by the letter dated July 9, 1991. The said letter further stated as under :-

B "We would also like to mention that the Banjar land adjoining our hotel, referred to in para 1 above, lies along the bank of river Beas which erodes it every year. About ten years ago almost 4 bighas of this land were lashed away and the on flowing water had posed a serious threat to our motel buildings and adjoining area. To protect our property we were compelled to erect deep protection embankments along the banjar land in question at huge cost the details of which will be sent to you shortly. If our proposal is accepted for the exchange of land it will become possible for us to take further steps to protect this land".

C The Divisional Forest Officer, Kullu sent reply dated January 12, 1993 which stated as under :

D "In this connection it is intimated that at present we are not having funds to put crates and spurs along the river side near your hotel to check the soil erosion, as indicated in your letter referred to above. In order to protect your property from the damage, you can carry out such works at your level, subject to the condition that the ownership of the land would vest with Forest Department and the Department would not be liable to pay any amount incurred for the purpose by you at a later stage and you would not claim any right on government property."

E The above quoted letter can be of no consequence because much before the said letter the Motel had built extensive stone, cemented and wire mesh crated embankments all along the river banks. This is obvious from the contents of the letter dated August 30, 1989 (quoted above).

F The Motel addressed a letter dated June 21, 1993 to the Chief Secretary, Himachal Pradesh wherein it is clearly stated that the adjoining land measuring 22 bighas and 3 bishwas had been reclaimed by the Motel. The relevant part of the letter is as under :-

G "Adjoining our Resort and Contiguous to our leased land is a stretch of class III - Banjar forest land in a longitudinal strip along the river bank admeasuring 22 Bighas and 3 Biswas. This was a

H

stony piece of land and used to get flooded every year during monsoons and often got washed away and reduced in size by river erosion year by year. This land was reclaimed by us and protected by an embankment and filling from the river side.

The said letter further states as under :-

"Similarly on the river side part of our leased land there used to be floods and erosion every year. If we would have let this continue, the leased land would have also got reduced every year. In order to protect our leased land and to save damage to our hotel property, we at our own considerable expense and cost built stone and wire mesh crated embankment all along the river bank. This not only protected our hotel land but also the forest land....

In 1988 there were severe floods when every a portion of leased land got washed away. It became imperative for us at considerable expense to build an embankment on the river front along the leased property. In order to build an embankment on the river front along the leased property the washed away area and part of the river bank had to be filled at huge cost. Once the river bed and the washed away area was filled, the choice before us was either to put soil on it and grow grass and trees to secure it or let it remain unsecured and aesthetically displeasing. We chose the former. As a result of land filling and embankment our leased area when measured will obviously show an increase. This increase is not an encroachment but reclamation with the objective of protecting the leased property."

In the letter dated August 7, 1993 addressed to the Divisional Forest Officer, the Motel again asked to lease of adjoining area. The relevant part of the letter is as under :-

"We had explained in our previous letters dated 21.6.93 and 23.7.93 (copies of which have been sent to you with our letter dated 5.8.93) the circumstances under which we had to spend enormous sum of money in protecting and reclaiming the forest land adjoining our Resort. It had become necessary for us to undertake this reclamation and protection work by filling the land from the river bed, constructing embankments, retaining walls and crating etc. in order

A to protect the land leased by the Government to our Span Resort and property thereon but we were unable to complete the entire work as we were restrained from carrying on with the work under undue allegations of encroachment on the forest land.....

B In order to expedite the process of commencing protection work on an urgent basis on the forest land, we propose that the forest land be given to us on long lease co-terminus with the lease of the land granted by the government for our Span Resorts. This could be done by a supplementary lease as it is imperative to save the land under the original lease.

C All we have done is to reclaim and protect the land from erosion by constructing crates, retaining walls and embankments along the river Beas by investing huge amounts which unfortunately have all been washed away due to floods and now requires reconstruction to save the forest land and our adjoining property from total destruction."

D The Government of India, Ministry of Environment and Forests by the letter dated November 24, 1993, addressed to the Secretary, Forest, Government of Himachal Pradesh, Shimla conveyed its prior approval in terms of Section 2 of the Forest (Conservation) Act, 1980 for leasing to the Motel 27 bighas and 12 biswas of forest land adjoining to the land already on lease with the Motel. A lease deed dated April 11, 1994 regarding the said land was executed between the Himachal Government and the Motel. The additional affidavit filed by the Motel refers to the prior approval granted by the Government of India as under :

F "In the Ministry of Environment and Forests, the proposal was cleared by the Secretary and Forwarded to the Forest Advisory Committee by passing the Minister concerned. The Forest Advisory Committee cleared the proposal subject to severe restrictions - and also certain restrictions which are not normally imposed in such cases. The proposal was then cleared at the level of the Prime Minister and a letter of 24th November, 1993, approval was communicated to the State Government and SMPL."

G It may be mentioned that Mr. Kamal Nath was the Minister in charge, H Department of Environment and forests at the relevant time. What is

sought to be conveyed by the above quoted paragraph is that Mr. Kamal Nath did not deal with the file. The correspondence between the Motel and the Himachal Government referred to and quoted by us shows that from 1988 the Motel had been writing to the Government for the exchange/lease of the additional Forest land. It is only in November 1993 when Mr. Kamal Nath was the Minister, incharge of the Department that the clearance was given by the Government of India and the lease was granted. Surely it cannot be coincidence.

This Court took notice of the news item - quoted above - because the facts disclosed therein, if true, would be a serious act of environment-degradation on the part of the motel. It is not disputed that in September 1995 the swollen beas engulfed some part of the land in possession of the motel. The news item stated that the motel used earth-movers and bulldozers to turn the course of the river. The effort on the part of the motel was to create a new channel by diverting the river-flow. According to the news item three private companies were engaged to re-claim huge tracts of land around the motel. The main allegations in the news item was that the course of the river was being diverted to save the motel from future floods. In the counter affidavit filed by the motel, the allegations in the news item have been dealt with in the following manner :

"(1) If the works were not conducted by the Company, it would in future eventually cause damage to both banks of the river, under natural flow conditions.

(m) By dredging the river, depth has been provided to the river channel thus enhancing its capacity to cope with large volume of water.

(n) The wire crates have been put on both banks of the river. This has been done to strengthen and protect the banks from erosion and NOT as any form of river diversion. It is not necessary to divert the river because simply providing greater depth and removing debris deposits enhances the capacity of the river to accommodate greater water flow.

(o) I further state that the nearly 200 metres of wire crates which have been put on the left bank of the river (the river bank on the opposite side of SPAN) is in the interest of the community and

A nearby residents/villages. This left Bank crating protects the hillside where RANGRI, CHAKKI and NAGGAR are located.

B (s) After the floods, it was observed, that the boulders and rubble deposits were obstructing and hindering the flow of the river and thus, it was the common concern of the Company as well as of the Panchayat of the Village BARAGRAN BIHAL to carry out dredging measures to provide free flow of the river water.

(t) Accordingly alleviation measures conducted by the company and the villagers of BARAGRAN BIHAL were as under :

C (i) *Dredging of Debris deposit* : Debris deposits in river basin which had collected due to the floods were removed by dredging. This deepens the channel and thus allows larger flow of water.

D (ii) *Strengthening of both banks with wire crates* : Wire crates are the common method of protection of bank erosion. Accordingly wire crates were put along the opposite side (left bank) to protect the landslide of the hillside wire on which village RANGRI is perched. Wire crating was also put on the Resort side of the River (Right Bank) to strengthen & protect the bank against erosion. All the wire crating runs along the river flow and not as an obstruction or for, any diversion.

E (w) It is further submitted that whereas the report mischievously refers to villagers of Rangri, Chakki and Naggar nowhere does it take in to account the very real problems of villagers of Baragran Bihal which is located immediately on the Right Bank near the SPAN Resort who were seriously affected by the floods. Chakki, Rangri and Naggar Villages have not at all been affected by the floods and there is no remote possibility of these villages being affected due to the flood protection works conducted by the Company."

G In the additional affidavit filed by the motel the facts pleaded are as under :

H "(ii) It had become necessary for them to undertake this reclamation and protection work by filling the land from river bed, constructing embankment, retaining walls and crates, etc. in order to

protect the land leased by the Government to the Resort and the property thereon. A

(vii) The forest land which is susceptible to heavy river erosion by floods involves high cost for its protection from getting washed away every year would be protected by construction of embankments and filling from the river side by the Company....local community or Kullu Manali and surrounding villages will benefit." B

Mr. G.D. Khachi, Under Secretary (Revenue) Government of Himachal Pradesh in the counter affidavit filed in this Court stated as under :

"(iii) That subsequently, a piece of land measuring 21- 09 bighas was encroached by M/s. Span Motels. On coming to the notice of the Government of such encroachment, the Govt. of Himachal Pradesh in Revenue Department took action and reportedly got the encroached land vacated, and the possession of which has been taken over by the Forest Department, C D

that on 21-22 July, 1992, the then Chief Secretary to the Government of Himachal Pradesh visited the site who drew the inference that M/s. Span Motel Ltd. were still using the encroached land. The copy of note on inspection of the then Chief Secretary is annexed as R-1, E

that immediately on receipt of the recommendations of the then Chief Secretary (Annexure R-I), the Department of Forest started working at the site but in the mean time, it was decided to lease out a piece of land measuring 27-12 bighas which includes the said encroached land measuring 21-09 bighas. the lease granted by the Government of Himachal Pradesh in Revenue Department vide letter No. Rev.O(G)6-53/93, dated 6.4.1994 is annexed as Annexure R-II after obtaining the approval of Government of India, Ministry of Environment & Forest, New Delhi vide letter No. 9-115/93-ROC, dated 24.11.93 (copy annexed as Annexure R-III) for the purpose of protecting earlier leased land, F G

that the developmental activities which was being undertaken by M/s. Span Motels Ltd. came to the knowledge of the Government from the News Item which appeared in the Press and field officers H

- A of all the concerned departments took an exercise to carry out the inspection and reported the matter to the Government".

C.P. Sujaya, Financial Commissioner-cum-Secretary (Irrigation and Public Health) Government of Himachal Pradesh in her counter affidavit filed in this Court, *inter alia*, stated as under :

- B "Admitted to the extent that the Span Resorts management had deployed heavy earth moving machinery to reclaim their land and to divert/channelise the course of river to its course which it was following prior to 1995 floods: by dredging and raising of earthen and wire crated embankments.

- C The flow of river has been changed/diverted by dredging/raised of wire crated embankments and creating channel from a point u/s of Span Resorts to D/s of Span Resorts. The approximate length of channel is about 1000 mtrs.

- D Admitted to the Extent that village Ranghri and Chakki are located on left bank of river Beas. However, channelization of river has been done slightly away from the toe or foot hills except for the last about 500 metres where it is running along the foot hills.

- E The hill on which village Rangri and Chakki are situated consists of small boulders embedded in Sandy Strata and is quite fragile/unstable in nature. Therefore, this reach of river is prone to land slides in the normal course also. However, it is feared that flow of river along the foot hills may hasten/aggravate the process of land slides. The Span management has provided wire crated embankment in a reach of about 30 metres on left bank and about 270 metres on right bank to channelise the flow and also to reclaim part of land on right bank of river Beas.

- F Admitted to the extent that the diversion/channelization of river has been done to restore it to its course of pre-1995 floods and in doing so, by raising the earthen and wire crated embankments, some land of villagers situated on right bank of river Beas has also been reclaimed along with land of Span Resort."

- G This Court by the order dated May 6, 1996 directed the Central Pollution Control Board (the Board) through its Member Secretary to inspect the

environments around the area in possession of the motel and file a report. A
This Court further ordered as under :

"Meanwhile we direct that no construction of any type or no interference in any manner with the flow of the river or with the embankment of the river shall be made by the Span Management." B

Pursuant to this Court's order dated May 6, 1996 the Board filed its report along with the affidavit of Dr. S.P. Chakrabarti, Member-Secretary of the Board. It is stated in the affidavit that a team comprise Dr. Bharat Singh, Former Vice Chancellor and Professor Emeritus, University of Roorkee, Dr. S.K. Ghosh, Senior Scientist and former Head, Division of Plant Pathology (NF), Kerala Forest Research Institute, Peechi, Trichur and Dr. S.P. Chakrabarti, Member-Secretary, Board was constituted. The team inspected the area and prepared the report. Para 4.2 of the report gives details of the construction done by the motel prior to 1995 floods. The relevant part of the paragraph is as under : C

"To protect the newly acquired land, SMPL took a number of measures which include construction of the following as shown in Fig. 2: D

(a) 8 nos. studs of concrete blocks 8m long and 20m apart on the eastern face of the club island on the upstream side, E

(b) 150m long stepped wall also on the eastern face of club island on the downstream side,

(c) A 2m high bar of concrete blocks at the entry at the spill channel, and F

(d) Additional 8 nos. studs also 8m long and 20m apart on the right bank of the river Beas in front of the restaurant of the SMPL.

While (a) & (b) were aimed at protecting the club island from the main current, (c) was to discourage larger inflow into the spill channel. Item (d) was meant to protect the main resort land or SMPL if heavy flow comes into the spill channel. G

The works executed in 1993 were bank protection, works, and were not of a nature so as to change the regime or the course of river. H

A A medium flood again occurred in 1994. Partly due to the protection works, no appreciable damage occurred during this flood. The main current still continues on the left bank."

The happening of events in the vicinity of motel during the 1995 flood and the steps taken by the motel have been stated in the report as under :

B "A big slip occurred on the hill side on the left bank, at a distance about 200m upstream from the point where division into main and spill channels was occurring on the afternoon of September 4, 1995. This partially blocked the main left side channel which was relatively narrow at this location. This presumably triggered the major change of course in the river diverting the major portion of the flow into spill channel towards the right and almost over the entire land area of the club island. The entire club building and the plantation as well as the protection works build in 1993 were washed away. Heavy debris was deposited on this land. Damage occurred on the right bank also but the buildings of the main SMPL resort remained more or less unaffected. A large hotel and many buildings on the right bank, almost adjacent to SMPL in the downstream were also washed away. The bar of blocks at the upstream end of the spill channel as well as most of the studs on this channel were also washed away. Some remnants of five downstream studs could be seen at the time of the visit. After the passage of 1995 flood, SMPL have taken further steps to protect their property as shown in Fig. 3. These are as follows :

E 1. The left side channel (the main channel), which had become less active, has been dredged to increase its capacity. Wire crate revetments (A, B & C) on both banks of this channel have been made to direct the flow through this channel. These revetments and restoration earth work done would curtail the entry of water into the right side relief/spill channel which had developed into the main channel during the flood. A relatively small channel (the relief/spill channel) still exists and carries very little flow. Bulk of the flow is now going into the left bank channel.

G On the left bank, there are steep unstable slopes at higher elevations left after the slides during the flood. These are likely to slip in any case, and if so happens, may block the left channel again.

H

This land belongs to some villagers from Rangri. The left bank channel is again sub-dividing into two streams (D) and the small stream is flowing close to the toe of the hills for a distance of about 500 to 600 m before it turns towards midstream. Some of the dredged material is piled on the right bank and some on the divide between the main channel and the subsidiary channel on the left. Strips can be seen in this reach of 500-600 m even now, and erosion at toe may aggravate sliding tendency. SMPL has also put 190m wire crates (C) as protection against erosion of this bank, which may be helpful upto moderate flood conditions.

The dredging and channelisation of the left bank channel, though aimed at protecting SMPL land, should normally keep high intensity of flow away from both banks in moderate floods. This should thus not be a cause of concern. In high floods, the water would spill or spread beyond this channel. Due to restriction of entry in the right relief/spill channel, though the works may not withstand a high flood, there may be a tendency for more flow towards the left bank. However, the river is presently in a highly unstable regime after the 1995 extra-ordinary floods, and it is difficult to predict its behaviour if another high flood occurs in the near future.

The conclusions given by the inspecting team in the report are as under :

"6.4. M/s. Span Motels Private Limited has taken some flood control measures at the immediate upstream by construction of wire crates (Fig. 3) on both sides (A, B & C) and also dredged the main channel of the river by blasting the big boulders and removing the debris, the flood control measures, taken by them on the right bank of the main channel and at the mouth of relief channel after the 1993 flood, were also washed off. There is no sign of any boundary of the premises of the newly acquired land.

6.5. The mouth of the natural relief/spill channel has been blocked by construction of wire crate and dumping of boulders (A & B). The area has almost been levelled. Although a little discharge was observed due to seepage through boulders and flowing through the remnants of the relief channel to the downstream, the channel is blocked by a stonewall across the channel (F) at the downstream of M/s SMPL by a private property owner who has even con-

A structed two wells (E) on the bed of the channel. This indicates the intention of the occupiers of the right bank properties in the concerned stretch in favour of filling up of the natural spill/relief channel.

B 6.6. M/s. Span Motels has not consulted any Flood Control Expert as it appeared from the way of construction of the wire crate. In proper revetment was done white crating. As such, these cratings may not last long.

C 6.7. In the process of channelising the main course, the main stream has been divided into two, one of which goes very near to the left bank (G) because of which fresh land slip in future is not ruled out.

D 6.8. The relief channel is supposed to be the government land. Construction of any sort to block the natural flow of water is illegal and no permission has been taken from the concerned department.

E 6.9. The lease agreement of 1994 had the clause for protection of the land but it should have been done not by blocking the flood spill/relief channel.

F 6.10. Relief channel is the shortest path between the two bends. Any future slip on left bank due to training of discharge at its foot may cause flood on the right bank where the leasehold land (1994) exists.

G 6.11. No new construction should be allowed in this flood prone area except flood protection measures. No economic activity should be undertaken in the aforementioned stretch.

H 6.12. Since newly acquired land of M/s SMPL is located on the flood plain, sandwiched between the main channel and the relief/spill channel, the land may be deleased and the Forest Department take care of plantation in the area after adequate flood control measures are taken by the Irrigation Department. This is necessitated in view of the fact that the left bank opposite SMPL is very steep (almost vertical) and is subjected to potential threat of land slip to block the channel and cause change of course of the river flow again.

6.13. Even if land slips occur, the impact will be local limited only to the stretch of the Beas river near SMPL. A

6.14. The river is presently in a highly unstable regime after 1995 extra-ordinary floods, and it is difficult to predict its behaviour if another high flood occur in the near future. A long-term planning for flood control in the Kullu Valley needs to be taken up immediately with the advice of an organisation having expertise in the field, and permanent measures shall be taken to protect the area so that recurrence of such a heavy flood is mitigated permanently". B

On a careful examination of the counter-affidavits filed by the parties, the report placed on record by the Board and other material placed on record, the following facts are established : C

1. The lease hold area in possession of the motel is a part of the protected forest land owned by the State Government. D

2. The forest land measuring 27 bighas and 12 biswas leased to the motel by the lease-deed dated April 11, 1994 is situated on the right back of the river and is separated from the motel by a natural relief/spill channel of the river. E

3. A wooden bridge on the spill channel connects the main motel land and the land acquired under the 1994 lease-deed. F

4. 22.2 bighas out of the land leased to the motel on 1994 was encroached upon by the motel in the year 1988/89. G

5. Prior to the 1995 floods the motel constructed 8 studs of concrete blocks 8m long and 20m apart on the upstream bank of the river, 150m long stepped wall on the downstream side of the river and 2m high bar of concrete blocks at the entry at the spill channel and additional 8 studs 8m long and 20m apart on the right bank of the river Beas in front of the restaurant of the Motel. H

6. After the 1995 floods the motel has dragged the left side channel (the main channel) of the river to increase its capacity. Wire crate revetments on both banks of the main channel of river have been made to direct the flow through the said channel. This has been done with a view to curtail the entry of water into the right side relief/spill channel. H

A 7. The motel has constructed 190m wire crates on the bank of the river (upstream). The dredged material is piled up on the banks of the river. The dredging and channelising of the left bank has been done on a large scale with a view to keep high intensity of flow away from the motel.

B 8. The dredging of the main channel of river was done by blasting the big boulders and removing the debris.

9. The mouth of the natural relief/spill channel has been blocked by wire crates and dumping of boulders.

C 10. The construction work was not done under expert advice.

11. The construction work undertaken by the motel for channelising the main course has divided the main stream into two, one of which goes very near to the left bank because of which, according to the report, fresh land slip in future cannot be ruled out.

D The report further indicates that the relief channel being part of the natural flow of the river no construction of any sort could be made to block the said flow. According to the report no permission whatsoever was sought for the construction done by the motel. The Board in its report has further opined that the clause in the lease agreement for protection of land did not permit the motel to block the flood spill/relief channel of the river. The report categorically states that no new construction should be allowed in this flood prone area and no economic activities should be permitted in the said stretch. It has been finally recommended by the inspection team that the land acquired by the motel under the 1994 lease-deed is located on the flood plain, sandwiched between the main channel and the relief/spill channel and as such it should be released so that the Forest Department may take care of the plantation in the area and also preserve the ecologically fragile area of river Beas.

G Mr. Harish Salve vehemently contended that whatever construction - activity was done by the motel on the land under its possession and on the area around, if any, was done with a view to protect the lease-hold land from floods. According to him the Divisional Forest Officer by the letter dated January 12, 1993 - quoted above - permitted the motel to carry out the necessary works subject to the conditions that the department would not be liable to pay any amount incurred for the said purpose by the motel.

H

We do not agree. It is obvious from the correspondence between the Motel and the Government, referred to by us, that much before the letter of the Divisional Forest Officer dated January 12, 1993, the Motel had made various constructions on the surrounding area and on the banks of the river. In the letter dated August 30, 1989 addressed to the Divisional Forest Officer Kullu - quoted above - the Motel management admitted that "over the years, and especially after the sever flood erosion last year, we have built extensive stones cemented and wire-mesh crated embankments all along with the river banks at considerable expense and cost. We have also gradually and painstakingly developed this entire waste and banjar area". The "banjar area" referred to in the letter was the adjoining area admeasuring 22.2 bighas which was not on lease with the Motel at that time. The admissions by the Motel-management in various letters written to the Government the counter affidavits filed by the various Government officers and the report placed on record by the board clearly show that the Motel-management has by their illegal constructions and callous interference with the natural flow of river Beas has degraded the environment. We have no hesitation in holding that the motel interfered with the natural flow of the river by laying to block the natural relief/spill channel of the river.

The forest lands which have been given on lease to the Motel by the State Governments are situated at the bank of the river Beas. Beas is a young and dynamic river. It runs through Kullu valley between the mountain ranges of the Dhauladhar in the right bank and the Chandrakheni in the left. The river is fast - flowing, carrying large boulders, at the time of flood. When water velocity is not sufficient to carry the boulders, those are deposited in the channel often blocking the flow of water. Under such circumstances the river stream changes its course, remaining within the valley but swinging from one bank to the other. The right bank of the river Beas where motel is located mostly comes under forest, the left bank consists of plateaus, having steep - bank facing the river, where fruit orchards and cereal cultivation are predominant. The area being ecologically fragile and full of scenic-beauty should not have been permitted to be converted into private ownership and for commercial gains.

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. The need to protect the environment and ecology.

A has been summed up by David B. Hunter (University of Michigan) in an article titled *an ecological perspective on property : A call for judicial protection of the public's interest in environmentally critical resources* published in Harvard Environmental Law Review Vol. 12, 1988 page 311 in the following words :

B "Another major ecological tenet is that the world is finite. The
C earth can support only so many people and only so much human
D activity before limits are reached. This lesson was driven home by
E the oil crisis of the 1970's as well as the pesticide scare of the
1960's. The current deterioration of the ozone layer is another vivid
example of the complex, unpredictable and potentially catastrophic
effects posed by our disregard of the environmental limits to
economic growth. The absolute finiteness of the environment,
when coupled with human dependency on the environment, leads
to the unquestionable result that human activities will at some point
be constrained. "[H]uman 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.
Reliance on improving technology can delay temporarily, but not
forever, the inevitable constraints. "There is a limit to the capacity
of the environment to service...growth, both in providing raw
materials and in assimilating by-product wastes due to consump-
tion. The largesse of technology can only postpone or disguise the
inevitable."

F Professor Barbara Ward has, written of this ecological impera-
tive in particularly vivid language :

G We can forget moral imperatives. But today the morals of
respect and care and modesty come to us in a form we cannot
evade. We cannot cheat on DNA. We cannot get round
photosynthesis. We cannot say I am not going to give a damn
about phytoplankton. All these tiny mechanisms provide the
preconditions of our planetary life. To say we do not care is
to say in the most literal sense that "we choose death."

H There is a commonly-recognized link between laws and social
values, but to ecologists a balance between laws and values is not

alone sufficient to ensure a stable relationship between humans and their environment. Laws and values must also contend with the constraints imposed by the outside environment. Unfortunately, current legal doctrine rarely accounts for such constraints, and thus environmental stability is threatened.

Historically, we have changed the environment to fit our conceptions of property. We have fenced, plowed and paved. The environment has proven malleable and to a large extent still is. But there is a limit to this malleability, and certain types of ecologically important resources - for example, wetlands and riparian forests - can no longer be destroyed without enormous long-term effects on environmental and therefore social stability. To ecologists, the need for preserving sensitive resources does not reflect value choices but rather is the necessary result of objective observations of the laws of nature.

In sum, ecologists view the environmental sciences as providing us with certain laws of nature. These laws, just like our own laws, restrict our freedom of conduct and choice. Unlike our laws, the laws of nature cannot be changed by legislative fiat; they are imposed on us by the natural world. An understanding of the laws of nature must therefore inform all of our social institutions."

The ancient Roman Empire developed a legal theory known as the "Doctrine of the Public Trust". It was founded on the ideas that certain common properties such as rivers, sea-shore, forests and the air were held by Government in trusteeship for the free and unimpeded use of the general public. Our contemporary concern about "the environment" bear a very close conceptual relationship to this legal doctrine. Under the Roman Law these resources were either owned by no one (*Res Nullius*) or by every one in common (*Res Communis*). Under the English common law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation of fishing. Resources that were suitable for these uses were deemed to be held in trust by the Crown for the benefit of the public, Joseph L. Sax, Professor of Law, University of Michigan proponent of the Modern Public Trust Doctrine in an *erudite* article "*Public Trust Doctrine in natural resource*

A *law : effective judicial intervention*". Michigan Law Review Vol. 68 Part-I page 473 has given the historical background of the Public Trust Doctrine as under :

B "The source of modern public trust law is found in a concept that received much attention in Roman and English law - the nature of property rights in rivers, the sea, and the seashore. That history has been given considerable attention in the legal literature, need not be repeated in detail here. But two points should be emphasized. First, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public, accordingly, property used for the those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties - such as the seashore, highways, and running water - "perpetual use was dedicated to the public," it has never been clear whether the public had an enforceable right to prevent infringement of those interests. Although the state apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government."

E 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. They 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. According to Professor Sax the Public Trust Doctrine imposes the following restrictions on governmental authority.

G "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".

H The American law on the subject is primarily based on the decision

of the United States Supreme Court in *Illinois Central R.R. Company v. Illinois*, 146 US 537 (1892). In the year 1869 the Illinois legislature made a substantial grant of submerged lands - a mile strip along the shores of Lake Michigan extending one mile out from the shoreline - to the Illinois Central Railroad. In 1873, the legislature changed its mind and repealed the 1869 grant. The State of Illinois sued to *suit* title. The court while accepting the stand of the State of Illinois' held that the title of the State in the land in dispute was a title different in character, from that which the State held in lands intended for sale. It was different from the title which the United States held in public lands which were open to preemption and sale. It was a title held in trust - for the people of the State that they may enjoy the navigation of the water, carry on commerce over them, and have liberty of fishing therein free from obstruction or interference of private parties. The abdication of the general control of the State over lands in dispute was not consistent with the exercise of the trust which required the Government of the State to preserve such waters for the use of the public. According to the Professor Sax the court in *Illinois' Central* "articulated a principle that has become the central substantive thought in public trust litigation. 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 relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties".

In *Gould v. Greylock Reservation Commission*, 350 Mass 410 (1966), the Supreme Judicial Court of Massachusetts took the first major step in developing the doctrine applicable to changes in the use of lands dedicated to the public interest. In 1888 a group of citizens interested in preserving Mount Greylock as a unspoiled natural forest, promoted the creation of an association for the purpose of laying out a public park on it. The State ultimately acquired about 9000 acres, and the legislature enacted a statute creating the Greylock Reservation Commission. In the year 1953, the legislature enacted a statute creating an Authority to construct and operate on Mount Greylock an Aerial Tramway and certain other facilities and it authorised the commission to lease to the Authority any portion of the Mount Greylock Reservation. Before the project commenced, five citizens brought an action against both the Greylock Reservation Commission and the tramway Authority. The plaintiffs brought the suit as beneficiaries of the public trust. The court held both the lease and the management

A agreement invalid on the ground that they were in excess of the statutory grant of the authority. The crucial passage in the judgment of the Court is as under :-

B "The profit sharing feature and some aspects of the project itself strongly suggest a commercial enterprise. In addition to the absence of any clear or express statutory authorization of as broad a delegation of responsibility by the Authority as is given by the management agreement, we find no express grant to the Authority of power to permit use of public lands and of the Authority's borrowed funds for what seems, in part at least, a commercial
C venture for private profit."

Professor Sax's comments on the above quoted paragraph from Gould decision are as under :-

D "It hardly seems surprising, then that the court questioned why a state should subordinate a public park, serving a useful purpose as relatively undeveloped land, to the demands of private investors for building such a commercial facility. The court, faced with such a situation, could hardly have been expected to have treated the case as if it involved nothing but formal legal issues concerning the state's authority to change the use of a certain tract of land
E Gould, like Illinois Central, was concerned with the most overt sort of imposition on the public interest : commercial interests had obtained advantages which infringed directly on public uses and promoted private profits. But the Massachusetts court has also confronted a more pervasive, if more subtle, problem - that concerning projects which clearly have some public justification. Such
F cases arise when, for example, a highway department seeks to take a piece of parkland or to fill a wetland."

G In *Sacco v. Development of Public Works*, 532 MASS 670, The Massachusetts Court restrained the Department of Public Works from filling a great pond as part of its plan to realocate part of State Highway. The Department purported to act under the legislative authority. The court found the statutory power inadequate and held as under :-

H "the improvement of public lands contemplated by this section does not include the widening of a State highway. It seems rather that

the improvement of public lands which the legislature provided for is to preserve such lands so that they may be enjoyed by the people for recreational purposes."

In *Robbins v. Department of Public Works*, 255 N.E. 2d 577, the Supreme Judicial Court of Massachusetts restrained the Public Works Department from acquiring Fowl Meadows, "wet lands of considerable natural beauty ... often used for nature study and recreation" for highway use.

Professor Sax in the article (Michigan Law Review) refers to *Priewe v. Wisconsin State Land and Improvement Company*, 93 Wis 534 (1896), *Crawford Country Lever and Drainage district No. 1*, 182, Wis 404, *city of Milwaukee v. State*, 193 Wis 423 and *State v. Public Service Commission*, 275 Wis 112 and opines that the Supreme Court of Wisconsin has probably made a more conscientious effort to rise above rhetoric and to work out a reasonable meaning for the public trust doctrine than have the courts of any other state".

Professor Sax state the scope of the public trust doctrine in the following words :-

"If any of the analysis in this Article makes sense, it is clear that the judicial techniques developed in public trust cases need not be limited either to these few conventional interests or to questions of disposition of public properties. Public trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals. Thus, it seems that the delicate mixture or procedural and substantive protections which the courts have applied in conventional public trust cases would be equally applicable and equally appropriate in controversies involving air pollution, the dissemination of pesticides, the location of rights of way for utilities, and strip mining or wetland filling on private lands in a state where governmental permits are required."

We may at this stage refer to the judgment of the Supreme Court of California in *National Audubon Society v. Superior Court of Alpine County*, 33 CAL. 3d 419, the case is popularly known as "the Mono lake case",

- A Mono lake is the second largest lake in California, the lake is saline. It contains no fish but Support a large population of brine shrimp which feed vast numbers of nesting and migrating birds. Islands in the lake protect a large breeding colony of California gails, and the lake itself serves as a haven on the migration route for thousands of birds. Towers and spires of tura on the north and south shores are matters of geological interest and a tourist attraction. In 1940, the Division of Water Resources granted the Department of Water and Power of the city of Los Angeles a permit to appropriate virtually the entire flow of 4 of the 5 streams flowing into the lake. As a result of these diversions, the level of the lake dropped, the surface area diminished, the gulls were adbondoning the lake and the scenic beauty and the ecological values of the Mono Lake were imperiled.
- B
- C The plaintiffs environmentalist - using the public trust doctrine - filed a law suit against Los Angeles Water Diversions. The case eventually came to the California Supreme Court, on a Federal Trial Judge's request for clarification on the States public trust doctrine. The Court explained the concept of public trust doctrine in the following words :
- J

"By the law of nature these things are common to mankind - the air, running water, the sea and consequently the shores of the sea." (Institutes of Justinian 2.1.1.) From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign own "all of its navigable waterways and the lands lying beneath them 'as trustee of' a public trust for the benefit of the people."

E

The Court explained the purpose of the public trust as under :-

F

"The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways. As we observed in *Marks v. Whitney*, supra, 6 Cal. 3d 251, "[public trust easements [were] traditionally defined in terms of navigations commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the State, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. We went on, however, to hold that the traditional triad of uses- navigation, commerce and fishing-did not limit the public interest in the trust res. In language of special importance to the present

G

H

setting, we stated that "[T]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of the tidelands-a use encompassed within the tidelands trust-is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area."

Mono Lake is a navigable waterway. It supports a small local industry which harvest brine shrimp for sale as fish food, which endeavor probably qualifies the lake as a "fishery" under the traditional public trust cases. The principal values plaintiffs seek to protect, however, are recreational and ecological - the scenic views of the lake and its shore, the purity of the air and the use of the lake for nesting and feeding by birds. Under *Marks v. Whitney*, supra, 6 Cal. 3d 251, it is clear that protection of these values is among the purposes of the public trust."

The court summed up the powers of the state as trustee in the following words :

"Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust..."

The Supreme Court of California, *inter alia*, reached the following conclusion :-

"The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it

- A demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. (See Johnson, 14 U.C. Davis L. Rev. 233. 258-257; Robie, some Reflections on Environmental Considerations in Water Rights Administration, 2 Ecology L.Q. 695, 710-711 (19/2); Comment, 33 Hastings L.J. 653, 654.) As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust (see *United Plainsmen v. N.D. State Water Cons. Comm'n*, 247 N.W 2d 457, 462-463 (N.D. 1976), and to preserve, so far as consistent with the public interest, the uses protected by the trust."
- B
- C

The Court finally came to the conclusion that the plaintiffs could rely on the public trust doctrine in seeking reconsideration of the allocation of the waters of the Mono basin.

D

- It is no doubt correct that the public trust doctrine under the English Common Law extended only to certain traditional uses such as navigation, commerce and fishing. But the American Courts in recent cases have expanded the concept of the public trust doctrine. The observations of the Supreme Court of California in *Mono Lake case* clearly show the judicial concern in protecting all ecologically important lands, for example fresh water, wetlands or riparian forests. The observations of the Court in *Mono Lake case* to the effect that the protection of ecological values is among the purposes of public trust, may give rise to an argument that the ecology and the environment protection is a relevant factor to determine which lands, waters or airs are protected by the public trust doctrine. The Courts in United States are finally beginning to adopt this reasoning and are expanding the public trust to encompass new types of lands and waters. In *Phillips Petroleum co. v. Mississippi*, 108 S.C.C. 791 [1988], the United States Supreme Court upheld Mississippi's extension of public trust doctrine to lands underlying nonnavigable tidal areas. The majority judgment adopted ecological concepts to determine which land can be considered tide lands. *Phillips Petroleum case* assumes importance because the Supreme Court expanded the public trust doctrine to identify the tide lands not on commercial considerations but on ecological concepts. We see no reason why the public trust doctrine should not be expanded to include all
- E
- F
- G
- H

eco-systems operating in our natural resources.

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 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.

We are fully aware that the issues presented in this case illustrate 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 increasing complex society, find it necessary to encroach to some extent open lands heretofore considered in-violate to change. The resolution of this conflict in any given case is for the legislature and not the courts. If there is a law made by Parliament or the State Legislature the courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership or for commercial use. The esthetic use and the prestime 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 good and in public interest to encroach upon the said resources.

Coming to the facts of the present case, large area of the bank of river Beas which is part of protected forest has been given on a lease purely for commercial purposes to the Motels. We have no hesitation in holding that the Himachal Pradesh Government committed patent breach of public trust by leasing the ecologically fragile land to the Motel management. Both the lease - transactions are in patent breach of the trust held by the State Government. The second lease granted in the year 1994 was virtually of the land which is a part of river-bed. Even the board in its report has recommended de-leasing of the said area.

This Court in *Vellore Citizens Welfare Forum v. Union of India & Ors.*,

A JT (1996) 7 S.C. 375, explained the "Precautionary Principle" and "Polluters Pays principle" as under :

B Some of the salient principles of "Sustainable Development", as culled out from Brundtland Report and other international documents, are inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter pays principle, Obligation to assist and cooperate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that "the Precautionary Principle" and "the Polluter Pays" principle are essential features of "Sustainable Development". The "precautionary Principle" - in the context of the municipal law - means :

C (i) Environment measures - by the State Government and the statutory authorities - must anticipate, prevent and attack the causes of environmental degradation.

D (ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

E (iii) The "Onus of proof" is on the actor or the developer/industrialist to show that his action is environmentally benign.

F "The Polluter Pays" principle has been held to be a sound principle by this Court in *Indian Council for Enviro-Legal Action v. Union of India*, JT (1996) 2 196. The Court observed, "We are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country". The Court ruled that "Once the activity carried on is hazardous or inherently dangerous, the persons carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on". Consequently the polluting industries are "absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the

underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas". The "Polluter Pays" principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

The precautionary principle and the polluter pays principle have been accepted as part of the law of the land.

It is thus settled by this Court that one who pollutes the environment must pay to reverse the damage caused by his acts.

We, therefore, order and direct as under :

1. The public trust doctrine, as discussed by us in this judgment is a part of the law of the land.

2. The prior approval granted by the Government of India, Ministry of Environment and Forest by the letter dated November 24, 1993 and the lease-deed dated April 11, 1994 in favour of the Motel are quashed. The lease granted to the Motel by the said lease-deed in respect of 27 bighas and 12 biswas of area, is cancelled and set aside. The Himachal Pradesh Government shall take over the area and restore it to its original-natural conditions.

3. The Motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The pollution caused by various constitutions made by the Motel in the river bed and the banks on the river Beas has to be removed and reversed. We direct NEERI through its Director to inspect the area if necessary, and give an assessment of the cost which is likely to be incurred for reversing the damage caused by the Motel to the environment and ecology of the area. NEERI may take into consideration the report by the Board in this respect.

4. The Motel through its management shall show cause why pollution fine in addition be not imposed on the Motel.

- A 5. The Motel shall construct a boundary wall at a distance of not more than 4 meters from the cluster of rooms (main building of the Motel) towards the river basin. The boundary wall shall be on the area of the Motel which is covered by the lease dated September 29, 1981. The Motel shall not encroach/cover/utilise any part of the river basin. The boundary wall shall separate the Motel building from the river basin. The river bank and the river basin shall be left open for the public use.

- B 6. The Motel shall not discharge untreated effluent into the river. We direct the Himachal Pradesh Pollution Control Board to inspect the pollution control devices/treatment plants set up by the Motel. If the effluent/waste discharged by the Motel is not conforming to the prescribed standards, action in accordance with law be taken against the motel.

- C 7. The Himachal Pradesh Pollution Control Board shall not permit the discharge of untreated effluent into river Beas. The Board shall inspect all the hotels/institutions/factories in Kullu- Manali area and in case any of them are discharging untreated effluent/waste into the river, the Board shall take action in accordance with law.

- D 8. The Motel shall show cause on December 18, 1996 why Pollution-fine and damages be not imposed as directed by us. NEERI shall send its report by December 17, 1996. To be listed on December 18, 1996.

- E The writ petition is disposed of except for limited purpose indicated above.

V.S.S.

Petition disposed of.