

# The Public Trust Doctrine

Implications for Wildlife Management and  
Conservation in the United States and Canada

Technical Review 10-01  
September 2010

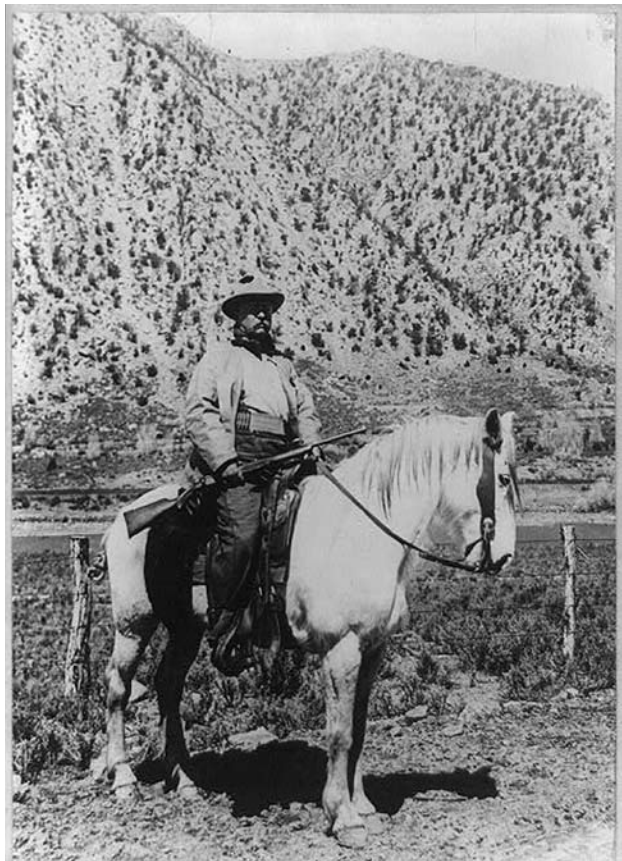
# The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada

Technical Review 10-01  
September 2010

“Defenders of the short-sighted men who in their greed and selfishness will, if permitted, rob our country of half its charm by their reckless extermination of all useful and beautiful wild things sometimes seek to champion them by saying that “the game belongs to the people.” So it does; and not merely to the people now alive, but to the unborn people. The “greatest good for the greatest number” applies to the number within the womb of time, compared to which those now alive form but an insignificant fraction. Our duty to the whole, including the unborn generations, bids us to restrain an unprincipled present-day minority from wasting the heritage of these unborn generations. The movement for the conservation of wildlife and the larger movement for the conservation of all our natural resources are essentially democratic in spirit, purpose, and method.”

Theodore Roosevelt (1916)

Armed for a hunt, Theodore Roosevelt makes ready to ride, circa 1900.



Credit: Underwood and Underwood/Library of Congress



# The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada

Technical Review 10-01  
September 2010

The Wildlife Society  
Association of Fish and Wildlife Agencies  
Western Association of Fish and Wildlife Agencies  
Wildlife Management Institute

## Technical Review Committee on the Public Trust Doctrine

### **Gordon R. Batcheller (Chair)**

New York State Division of Fish, Wildlife  
and Marine Resources  
625 Broadway  
Albany, NY 12233-4754

### **M. Carol Bamberg**

General Counsel  
Association of Fish and Wildlife Agencies  
444 North Capitol Street, N.W.  
Suite 725  
Washington, D.C. 20001

### **Laura Bies**

The Wildlife Society  
5410 Grosvenor Lane, Suite 200  
Bethesda, MD 20814

### **Thomas Decker**

Vermont Fish and Wildlife Department  
103 South Main Street  
Waterbury, VT 05671-0501

### **Steven Dyke**

North Dakota Game and Fish Department  
100 N. Bismarck Expressway  
Bismarck, ND 58501-5095

### **David Guynn**

Department of Forestry and Natural Resources  
260 Lehotsky Hall  
Clemson University  
Clemson, SC 29634-0317

### **Michael McEnroe**

North Dakota Chapter of The Wildlife Society  
7455 Brook Loop  
Bismarck, ND 58503

### **Michael O'Brien**

Nova Scotia Department of Natural Resources  
136 Exhibition Street  
Kentville, NS B4N 4E5

### **John F. Organ \***

U.S. Fish and Wildlife Service  
300 Westgate Center Drive  
Hadley, MA 01035-9589

### **Shawn J. Riley**

Department of Fisheries and Wildlife  
2D Natural Resources Building  
Michigan State University  
East Lansing, MI 48824

### **Gary Roehm**

18425 Lost Knife Circle #203  
Gaithersburg, MD 20886



The Wildlife Society  
5410 Grosvenor Lane, Suite 200  
Bethesda, MD 20814

\* The findings and conclusions in this article are those of the author and do not necessarily represent the views of the U.S. Fish and Wildlife Service.

This report is copyrighted by TWS, but individuals are granted permission to make single copies for noncommercial purposes. To view or download a PDF of this report, or to order hard copies, go to

<http://wildlife.org/TechnicalReview>

ISBN: 978-0-9830402-0-0

Front cover illustration: Bison roam the winter snows near Midway Geyser Basin in Yellowstone National Park

Cover photo courtesy of Stephen Hoerold/iStockphoto

Produced and distributed for The Wildlife Society by Worthy Shorts, Inc.

## Foreword

Presidents of The Wildlife Society (TWS) occasionally appoint *ad hoc* committees to study and report on selected conservation issues. The reports ordinarily appear as technical reviews or position statements. Technical reviews present technical information and the views of the appointed committee members, but not necessarily the views of their employers.

This technical review focuses on the legal underpinnings and application of the Public Trust Doctrine as it pertains to wildlife management in the United States and Canada. The review was a collaborative effort by TWS, the Association of Fish and Wildlife Agencies (AFWA), the Western Association of Fish and Wildlife Agencies (WAFWA), and the Wildlife Management Institute (WMI).

## Acknowledgments

In July 2006, the North Dakota Game and Fish Department hosted the annual meeting of the Western Association of Fish and Wildlife Agencies in Bismarck, North Dakota. The two-day plenary session, “Keeping the Public’s Wildlife Public,” focused on the Public Trust Doctrine and the implications for the North American Model of Wildlife Conservation. WAFWA subsequently adopted a resolution in 2006 agreeing to develop a strategic plan for strengthening the Public Trust Doctrine among member states and provinces, and to facilitate a comprehensive review of the status of the Doctrine in cooperation with AFWA, TWS, and WMI. In March 2007, a memorandum of understanding was signed by the cooperating entities to develop this technical review.

The Committee expresses its sincere appreciation and recognition to the North Dakota Game and Fish Department and WAFWA for serving as the catalyst to begin the work of evaluating the status of the Public Trust Doctrine in the U.S. and Canada. The Committee also expresses its gratitude to AFWA, TWS, and WMI for their support and encouragement. In particular, the Committee appreciates the legal resources provided by TWS and AFWA necessary to the completion of this technical review.

Meeting facilities and logistic support were kindly provided by Michigan State University, the U.S. Fish and Wildlife Service in Bismarck, and the North Dakota Game and Fish Department.

The Committee appreciates the support and constructive review by members of TWS Council, and particularly by members of the Technical Review subcommittee—John McDonald, Thomas Ryder, Bruce Thompson, and Don Yasuda—who provided oversight of the work of the Committee.



## **Table of Contents**

<b>Foreword</b>	<b>5</b>
<b>Acknowledgments</b>	<b>5</b>
<b>Synopsis</b>	<b>9</b>
<b>Introduction</b>	<b>9</b>
<b>An Overview of the Public Trust Doctrine</b>	<b>10</b>
<b>Threats to the Public Trust Doctrine</b>	<b>15</b>
<b>Current Status of the Public Trust Doctrine in the U.S. and Canada</b>	<b>20</b>
<b>The Benefits of Strengthening the Public Trust Doctrine</b>	<b>24</b>
<b>Recommendations</b>	<b>25</b>
<b>Conclusions</b>	<b>26</b>
<b>Literature Cited</b>	<b>27</b>





## SYNOPSIS

The Public Trust Doctrine (PTD), with its origin in Roman civil law, is an essential element of North American wildlife law. The Doctrine establishes a trustee relationship of government to hold and manage wildlife, fish, and waterways for the benefit of the resources and the public. Fundamental to the concept is the notion that natural resources are deemed universally important in the lives of people, and that the public should have an opportunity to access these resources for purposes that traditionally include fishing, hunting, trapping, and travel routes (e.g., the use of rivers for navigation and commerce).

The PTD is also recognized as an essential foundation of what has been termed the “North American Model of Wildlife Conservation” (the Model; Geist 1995). This model is viewed as an important construct of law, policy, program framework, and scientific investigation that has led to the protection, conservation, and restoration of wildlife populations in the U.S. and Canada (Geist *et al.* 2001). The underpinnings of the PTD and the future relevance and successful application of the Model may be at risk due to recent changes in society, government policies, and case law (Organ and Mahoney 2006).

Several significant threats have been identified that directly or indirectly erode or challenge the PTD in North America (e.g., Geist and Organ 2004). These threats undermine existing state, provincial, and federal laws, as well as governmental policies and programs. Moreover, they inhibit sound conservation practices for fish and wildlife resources. Approaches to wildlife conservation that for many decades have afforded protection and ensured the sustainability and conservation of wildlife populations are dependent on the legal underpinnings of the PTD. The degree and magnitude of the threats are not universal, though the following issues have been recognized as significant challenges: inappropriately claiming ownership of wildlife as private property; unregulated commercial sale of live wildlife; prohibitions on access to and use of wildlife; personal liability issues; and a value system oriented toward animal rights (Organ and

## THE NORTH AMERICAN MODEL OF WILDLIFE CONSERVATION

The North American Model of Wildlife Conservation has seven distinctive components (Geist *et al.*, 2001):

1. Wildlife as a public trust resource.
2. Elimination of markets for wildlife.
3. Allocation of wildlife by law.
4. Wildlife can only be killed for a legitimate purpose.
5. Wildlife is considered an international resource.
6. Science is the proper tool for discharge of wildlife policy.
7. Democracy of hunting.

Mahoney 2006, Organ and Batcheller 2009). These threats in various ways are potentially harmful to the long-standing tenet that wildlife is a public trust resource.

Concerns regarding these threats and their overall effects led to this technical review, which includes an assessment of the current status of state and provincial statutes and case law related to the PTD. This review examines the benefits of the PTD and also outlines the role of government agencies and their stakeholders in maintaining public trust resources and the rights, privileges, and benefits that the PTD bestows upon the public. Recommendations are set forth with the objective of enhancing the PTD. Securing the PTD is seen as a significant action relevant to the continued protection, conservation, and public use of wildlife resources in North America.

## INTRODUCTION

Wildlife professionals have used the Model to describe the system of conservation and natural resource management that has developed over the past two centuries in the U.S. and Canada

(Geist 1995). The PTD—as it relates to water resources, submerged lands, and by extension to fish, wildlife, and other natural resources—provides the cornerstone upon which the highly successful Model was built.

In support of the Model, the North Dakota Chapter of TWS requested that TWS adopt the seven principles of the Model as a basis for guiding and providing input on wildlife management policy, work to enshrine the Model into international treaty law between Canada and the U.S., develop education and information strategies in support of the Model, and seek the support of other conservation organizations to pursue similar actions.

Following the 2006 WAFWA annual conference in North Dakota, a resolution was adopted to encourage the development of a strategic plan to strengthen application of the PTD among member states and provinces and to facilitate a legal analysis, in cooperation with AFWA, WMI, and TWS, of the current status of the Doctrine in member states and provinces.

In March 2007, TWS approved a position statement on the Model, as well as a proposal to prepare a technical review of the PTD in collaboration with WAFWA, AFWA, and WMI. The purpose of this technical review was to: (1) synthesize and interpret existing materials on the PTD as it relates to wildlife management and conservation; (2) review the status and scope of state and provincial legislation as it relates to the PTD; and, (3) identify components that should be included in state or provincial statute, state or provincial wildlife agency charter, or other authorizations and executive proclamations to ensure a legally defensible PTD. Questions that guided the technical review committee focused on legal “ownership” of wildlife, origins of state or provincial laws addressing issues of wildlife management and conservation, clarity of agency authority to manage wildlife, legal tenets that provide evidence the PTD is in place, variability among laws or protection among jurisdictions or among various wildlife species, and competing agency authorities (i.e., among state wildlife and agriculture departments, or between state and federal agencies).

## AN OVERVIEW OF THE PUBLIC TRUST DOCTRINE

### The Trust Defined and Why it Matters

Simply defined, a trust is a collection of assets committed or entrusted to one to be managed or cared for in the interest of another. The party to whom the trust assets are committed is commonly referred to as the trustee, whereas the party for whom the assets are being managed is referred to as the beneficiary of the trust. Accordingly, the PTD holds that publicly owned wildlife resources are entrusted to the government (as trustee of these resources) to be managed on behalf of the public, the beneficiaries. Consequently, governmental institutions do not own trust resources; rather, they are owned by the public and are entrusted in the care of government to be safeguarded for the public’s long-term benefit.

The PTD has been described by some as the cornerstone of the Model (Geist *et al.* 2001, Geist and Organ 2004, and Prukop and Regan 2005). This viewpoint holds that the PTD establishes the core principles central to the Model—the notion that wildlife is a public resource, managed for the common good, and held in custodianship by a cadre of trained professionals who serve as trustees (Brulle 2000) and are held accountable by the beneficiaries, the public.

Alternative models have developed in other countries and are frequently based on privately owned fish, wildlife, and habitat managed for personal or corporate gain. In such cases, the general public may receive little or no apparent benefit from wildlife resources. A number of undesirable outcomes may result from a system of wildlife management not anchored on a PTD foundation including:

- (a) a diminished connection or indifference toward wildlife resources stemming from a disassociation with nature, which means wildlife may become irrelevant to the general public thereby reducing public support for conservation.
- (b) wildlife resources that are viewed as an artifact of the past, separated from modern life, to be seen and appreciated yet

## FISHERIES AND THE PUBLIC TRUST DOCTRINE

Navigation, access to public water, and indeed the privilege to fish (Martin v. Waddell, 1842) have all been a part of the Public Trust Doctrine. Fisheries conservation and wildlife conservation are intertwined institutionally throughout North America. The technical review committee chose to focus on wildlife conservation and exclude specific reference to fisheries for a number of reasons:

- Fisheries conservation and wildlife conservation arose from different origins.
- Historically, wildlife conservation is largely attuned to restoration, while fisheries conservation is primarily attuned to propagation.
- Commercial harvest is integral to fisheries conservation, while its elimination has been a cornerstone of wildlife conservation.
- Institutionally, federal (U.S.) fisheries oversight is split between the Interior and Commerce Departments, while federal trust authority for wildlife is primarily contained within the Department of Interior.

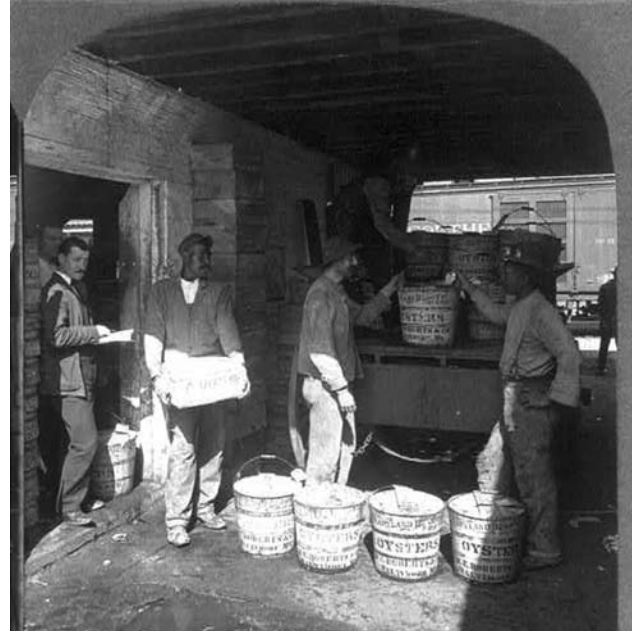
These and other factors cloud the linkage between wildlife and fisheries and the resultant ‘noise’ would hinder addressing public trust applications for both within the same document.

with a lack of understanding and acceptance of sustainable use, and

- (c) wildlife resources viewed as a liability or threat to be minimized to the extent possible rather than an asset to be conserved and managed for the benefit of current and future generations.

### History of the Public Trust Doctrine

The roots of the PTD can be traced to early Greek and Roman civil law. By the sixth century Roman civil law, The Justinian Institutes,



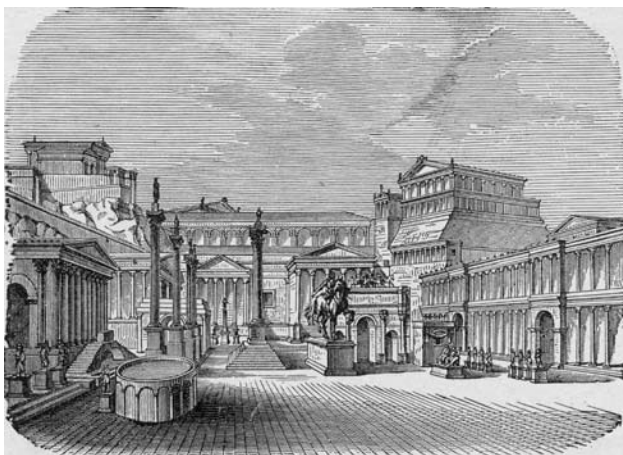
Credit: Library of Congress

Workers in Baltimore prepare oysters for shipping in 1905. Oyster harvest was at the center of the 1842 U.S. Supreme Court decision in *Martin v. Waddell*, which established a central tenet of the Public Trust Doctrine—public ownership of public resources.

the legal texts of the time, stated: “*By the law of nature these things are common to all mankind: the air, running water, the sea, and consequently the shores of the sea*” (Koehl 2006). Thus, common property could be owned by no one, affording all citizens access to it. Roman civil law was reaffirmed by the English Magna Carta in 1215 AD, and redefined by English common law in 1641. English disfavor for “ownerless property” caused them to express the Roman concept in a less assertive way by assigning ownership of common property to the king, not for his private use, but as a trustee of these properties for the benefit of the people (Horner 2000, Henquinet and Dobson 2006, Organ 2006). In earlier times this arrangement resulted in the dispersion of privileges taken or allowed by royalty (Blumm and Ritchie 2005). Regarding waters, this introduced the concept of common easements for public navigation and fishing with an understanding that the Crown owned submerged lands and shorelines in trust for the people (Henquinet and Dobson 2006).

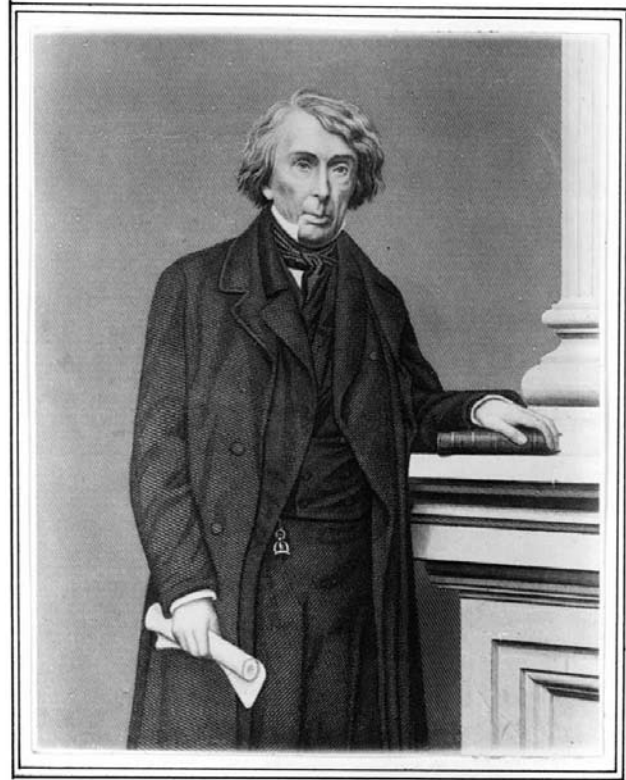
In the U.S., English common law was applied to the 13 colonies, and eventually redefined and assigned to the states by the courts following America's independence (Henquinet and Dobson 2006). In doing so the American courts abolished the English system of royal prerogatives and reestablished or restored and strengthened the full public trust concept (Blumm and Ritchie 2005). In 1821 the New Jersey Supreme Court, in deciding *Arnold v. Mundy*, corrected England's diversions from Roman civil law, which were only partially restored by the Magna Carta, by stating that the ownership of water and underlying lands transferred to New Jersey's citizens upon statehood, thus returning public trust law closer to the original Roman concept (Henquinet and Dobson 2006).

The first federal court decision affirming the PTD occurred in 1842 when the U.S. Supreme Court in *Martin v. Waddell* found that the public held a common right to fish in navigable and tidal waters of New Jersey because they and their underlying lands were owned by the state for the common use by the people. Subsequent court findings reaffirmed such public ownership including cases addressing the Equal Footings Doctrine (*Shively v. Bowlby* 1894), which described rights of states newly admitted into the Union (Henquinet and Dobson 2006).



Credit:Eon Images

The Roman Forum still stands as a symbol of the empire that established the broad principles of a "public trust" nearly two millennia ago, ensuring public access to common property.



Credit: Library of Congress

In 1842, U.S. Supreme Court Chief Justice Roger B. Taney cited the Magna Carta in *Martin v. Waddell*, the ruling that established the basis for the Public Trust Doctrine in the United States.

Traditional public interests protected by the PTD were navigation, commerce, and fishing. Subsequent court cases mainly addressed these three interests during the 20<sup>th</sup> Century. However, *Geer v. Connecticut* (1896) included "wild fowling" within a state's trustee responsibilities. Although partially reversed in *Hughes v. Oklahoma* (1979), state statutes and state courts continue to assert state trusteeship of wildlife. Recent case law has markedly expanded the application of the Doctrine. For example, the California Supreme Court in *Marks v. Whitney* (1971) opined that considering the changing needs of the public, a state is not bound to protect just the traditional interests addressed by early case law. Rather, that court found that ecological protection was a public interest afforded oversight by the Doctrine (Henquinet and Dobson 2006). Other recent case law has expanded the relevance of the Doctrine to

include such diverse topics as wildlife habitat; the open seas; environmental protection from development, pollution, and invasive species; recreational activities such as swimming, parks, and historic monuments; public health; bathing; flood prevention; aesthetic values such as open and scenic beauty; diversion of water for domestic, industrial, and agricultural purposes; religious and cultural interests; and even the electromagnetic spectrum (Cottriel 1996, Stenehjem 2005, Henquinet and Dobson 2006, Organ 2006, and Simmons 2007).

In Canada, as a part of the British Commonwealth of which the reigning British monarch is the symbolic head of state, common or public property is referred to as assets of the “Crown.” Most of the provincial statutes relating to public lands and wildlife describe ownership as “vested in His/Her Majesty in the right of the Province,” which in modern times implies held in trust for the benefit of the people. For example, the Nova Scotia Wildlife Act states the following in reference to ownership of wildlife: “. . . the property in all wildlife situate within the Province, while in a state of nature, is hereby declared to be vested in Her Majesty in right of the Province and no person shall acquire any right or property therein otherwise than in accordance with this Act and the regulations.”

In contrast, after review of the basis and application of the PTD in Canada, Henquinet and Dobson (2006) concluded that only a rudimentary PTD, related to the public’s right to navigate and fish in navigable waters, existed in Canada. Those authors indicated few instances of case law in Canada that dealt with public trust issues, and virtually no articulation of a PTD.

The Yukon and Northwest Territories have incorporated the concept of public trust into statutes related to natural resources. Section 6 of the Northwest Territories Environmental Rights Act (1990) states the need “to protect the integrity, biological diversity, and productivity of the ecosystems in the Northwest Territories” and the “right to protect the environment and the public trust.” The Environment Act of the Yukon, passed in 1991, recognizes that the government is a “trustee of the public trust to

protect the natural environment from actual or likely impairment.” At this time the concept of public trust established in these statutes has not been tested in court.

Although Canadian courts obviously are not bound by U.S. case law, it may be considered in their deliberations. Koehl (2006) summarized recent favorable comments in regard to the principle of the PTD in a judgment by the Supreme Court of Canada. The reference to the PTD was particularly interesting in that previous Canadian references were in cases dealing with water resources and the cited case dealt with forests (damage caused by a fire negligently started by a logging company). The author suggested that discussion of the PTD in the case allowed for optimism that Canada’s courts may expand application to other natural resources. Until there is a broader acceptance of a doctrinal concept in Canada similar to the PTD applied in the U.S., the actions of natural resource managers will be driven more by a desire to implement “wise policy” to protect the public interest than by a legal obligation imposed by a public trust.

Collectively, case law and history illustrate the flexibility of the PTD to meet the contemporary needs of the public. The PTD is neither inflexible nor static (Stenehjem 2005). Flexibility is considered one of the strengths of the Doctrine, and is a prerequisite of its continued effectiveness for future generations (Annear 2002, Stenehjem 2005, Henquinet and Dobson 2006). Sax (1970) described capability to respond to contemporary concerns as one of the three factors the PTD must achieve to remain effective. The other two factors he cited include the general public’s understanding that it describes a legal right, and that it be enforceable against the government. For a more complete discussion of the history of the PTD, refer to Sax (1970), Cottriel (1996), Horner (2000), Grant (2001), Blumm and Ritchie (2005), Henquinet and Dobson (2006), Organ (2006), and Simmons (2007).

### **Relationship to the North American Model**

Maintaining the elements of the PTD must be ensured to maintain the integrity of the Model



Credit: SUNY-ESF Archives/Franklin Moon Library

As governor of New York in 1928, Franklin Delano Roosevelt visits the New York College of Forestry, where a cadre of wildlife scientists gained training to protect forest resources for future generations.

(Geist and Organ 2004). Pioneer conservationists developed the model of conservation practiced on the North American continent during the 19<sup>th</sup> and early 20<sup>th</sup> centuries. This Model is globally and historically unique and thus far has demonstrated success in contributing to the conservation of wildlife in the U.S. and Canada. The Model evolved in response to the continental demise of once abundant wildlife resources due to unregulated economic markets that placed value only on harvested wildlife. It asserts that wildlife is a public resource, and therefore should be managed by governmental trustees as a public trust for the benefit of all people.

If the public's ownership of wildlife, or the value they place in it, is compromised, the Model could be jeopardized. Threats to the PTD (e.g., inappropriate or unsustainable commercialization and privatization of wildlife) exist and are increasing. If these threats prevail, the trust (wildlife populations or their habitats, water quantity and quality) could become mismanaged, or the public may lose access to these resources resulting in their value to the public becoming diminished. Lack of awareness and understanding of the benefits and responsibilities of the Doctrine leading to social and legal indifference by the trustee (government) or the

beneficiary (the public itself) could therefore create grave consequences for conservation.

Other threats (e.g., animal-rights values) claim a social or moral consciousness asserting that non-human animals are sentient (have the ability to suffer) and therefore, like humans, may not be owned. This concept is in direct conflict with the central premise of the PTD, which holds that wild animals are a publicly owned resource that can be renewably and sustainably managed.

### **The Role of the Trustee**

Within a trust relationship the trustee manages assets that belong to others. The trustee therefore must be accountable to the beneficiaries of the trust. The PTD requires accountability of government for its actions in managing publicly owned assets. The public, as beneficiary of the trust, has legal rights to enforce accountability upon its government, typically through litigation and less commonly via elections or ballot initiatives.

These critical elements of the Doctrine were made clear in 1892 by the landmark U.S. Supreme Court case *Illinois Central Railroad Co. v. Illinois*. The court supported the Illinois Legislature in rescinding a prior grant by the

## **THE ROLE OF FEDERAL AGENCIES IN THE PUBLIC TRUST DOCTRINE**

Federal natural resource agencies, including the U.S. Fish and Wildlife Service, National Park Service, U.S. Forest Service, Bureau of Land Management, Canadian Wildlife Service, Parks Canada, and others have public trust roles and responsibilities. The U.S. Constitution provides for the federal government to act as trustee when wildlife interests come under the purview of any of three clauses: the Property Clause, the Commerce Clause, or the Supremacy Clause (Bean and Rowland 1997). The Migratory Bird Treaty Act and Endangered Species Act are grounded in the Supremacy Clause (federal treaty-making power), and the Lacey Act is grounded in the Commerce Clause. However, the charge to this technical review committee was to assess the adequacy and variability of state- and provincial-based legal authorities and to develop recommendations for strengthening the PTD at this level. Therefore, we do not address federal implications in this paper.

state to the railroad of submerged land in Lake Michigan along virtually the entire shoreline of Chicago. The court, in acknowledging the public ownership of submerged lands in navigable waters and the state's role in holding these lands in trust for the public, found that the state was not empowered to relinquish the trust's assets. Such a grant would have substantially impaired the public's rights and exceeded the state's authority as trustee of the land (Sax 1970, Horner 2000, Henquinet and Dobson 2006, Simmons 2007).

This important case had several meaningful contributions to the development of the PTD. It expanded the application of the Doctrine to navigable waters not influenced by tides, and it clearly defined the role and responsibility of the governmental trustee. The court found the state could no more abdicate its trust over property than it could its police powers in the administration of government and the preservation of the peace (Sax 1970, Horner 2000, Stenehjem 2005).

## **The Role of the Beneficiaries**

The public is the beneficiary of the trust for whom assets are managed. Trustee accountability for those assets is necessary for the PTD to be effective, and will be best served with an informed and engaged public. Public input into decision-making processes will help assure trustee understanding of and responsiveness to contemporary needs, as well as public understanding of competing demands on trust resources. Courts in California, Connecticut, Indiana, and Minnesota have explicitly granted the public legal standing under the PTD, albeit without explicitly referencing wildlife resources. (Case law that addresses wildlife in the context of the PTD are summarized beginning on page 21.)

## **THREATS TO THE PUBLIC TRUST DOCTRINE**

### **Privatization and commercialization of wildlife**

There is widespread and frequent use of the terms "privatization" and "commercialization" when discussing fish and wildlife resources. They often mean distinctly different things to some people, whereas others have difficulty distinguishing the difference among the two. Therefore, it is helpful to offer an important distinction to help frame this discussion.

In some states and provinces it is lawful to own domesticated native or exotic animals whose ancestry is of a recent wild origin (e.g., game farms that propagate elk, white-tailed deer, upland game birds, falconry, alligator farms, and fur farms). Management practices that characterize these operations include genetic husbandry (e.g., raising game species with "trophy" antlers and the sale of genetic material to game farms), marketing meat and parts (e.g., antlers), and hunts within fenced enclosures. The legal status of captive animals held under these conditions varies among state and provincial agencies, including whether they remain "trust resources" or private property. This raises an important legal question: Is a wild animal enclosed within a large fenced area and ostensibly "free roaming" the property of the private landowner or part of the public trust? Is there a distinction between the status of a wild animal



that happens to be enclosed by a fence, and an animal deliberately placed within an enclosure? These are central legal issues associated with the PTD and wildlife conservation in North America, but they have not yet been conclusively addressed in case law.

Although the captive wildlife industry is regulated to varying degrees by state agricultural or wildlife agencies, there are several potential problems, including the transmission of diseases to free-ranging populations (Lanka *et al.* 1990; Demarais *et al.* 2002). Some states now require double-fencing or other assurances that captive animals may not escape to the wild, but a uniform approach has not been adopted. Captive operations can have problems with animals escaping into the wild, wild animals entering private enclosures, or both (Fischer and Davidson 2005). This lack of separation among captive and wild individuals has serious negative ramifications to the general health and well-being of wild populations, particularly with respect to maintaining genetic purity and spreading disease (Geist 1995; Demarais *et al.* 2002).

In those instances where wild animals are found and reported inside high fenced op-



Credit: North Dakota Game and Fish Department

A fenced enclosure on a game farm near Turtle Lake, North Dakota prevents white-tailed deer from leaving the owner's property. Keeping deer and other wildlife captive can lead to disease transmission and, on a broader scale, threatens a key tenet of the Public Trust Doctrine: that wildlife should not be privately owned and should be accessible to all.

erations, the animal is frequently euthanized as most regulatory entities will not allow its release to the wild because of disease concerns. In some instances the operator may release the animal back into the wild without reporting it to avoid attention by the regulating agency, or may simply illegally incorporate the animal into its business venture. In each of these instances, the wildlife ceases to belong to the public. With the confirmation of chronic wasting disease in 16 states and two provinces (Chronic Wasting Disease Alliance 2009), many wildlife jurisdictions require or advocate for the use of double perimeter fences to avoid nose to nose contact among wild ungulate populations on the outside and captive populations inside. Where states or provinces assign primary regulatory jurisdiction to their agricultural agencies, their respective wildlife agencies may not have sufficient authority to initiate safeguards and protective measures on the captive wildlife industry to protect free-ranging wildlife maintained in the public trust (Lien 2002).

Generally, commercialization places monetary value on wildlife and their parts, and as a result provides an incentive or reward for their use. Placing monetary value on dead or live wildlife has the potential to threaten the public ownership of wildlife resources by raising the incentive for privatization. This may apply to the illegal trafficking of live wildlife by collectors (e.g., the exotic pet trade), or the illegal sale of wildlife parts (e.g., migratory bird feathers, sturgeon roe). Illegal taking of wildlife is a theft from the public trust thus violating the PTD. The Lacey Act (1900) was adopted by the U.S. Congress in response to the threat to wildlife populations caused by commercial exploitation—primarily the millinery trade's unregulated and unsustainable demand for the feathers of herons, egrets, and other water birds.

It is widely recognized that the unregulated commercial use of wildlife is often unsustainable. However, in most jurisdictions some commercialization of wildlife is allowed under highly regulated legal regimes. In North America it is generally accepted that wildlife belongs to the public until it is lawfully taken, at which point it becomes the private property of the tak-



Credit: New York State Department of Environmental Conservation

Fur traders scout pelts at an auction in Herkimer County, New York—part of the legal market for wildlife products. Lawful trapping, guided by oversight from wildlife professionals, is consistent with the North American Model of Wildlife Conservation.

er. “Lawfully taken” is a critical distinction in the legal analysis, as are other regulations that may apply. Once deemed private property, the disposal of dead wildlife and its parts is subject to the regulation of the appropriate jurisdiction. For example, it is common for the non-edible parts of lawfully taken, non-migratory wildlife species to be legally sold, traded, or bartered. The sale of heads, hides, horns, or antlers of lawfully taken wildlife is legal in many states and provinces. Trapping is an important wildlife management tool in most of North America, and the pelts of furbearing animals lawfully taken during regulated trapping seasons are an important form of legal commerce. However, most jurisdictions do not allow the sale of legally taken live game species or edible portions of legally taken game. There is also growing recognition that some taxa, such as reptiles, are heavily exploited for commercial reasons and additional regulation of commercial activities is needed.

In some cases there may be little distinction between privatization of wildlife and its commercialization. Commerce in captive (privately owned) wildlife species may threaten the public trust in several ways. The markets created from this industry may provide incentive to some people to illegally exploit those markets with publicly owned wildlife or their parts. These

incentives can promote unethical practices or even illegal harvest of wildlife to supply the markets created by the commerce associated with privately-owned wildlife. Moreover, the commercialization and privatization of wildlife contradicts the very premise of a “public” resource and would render the PTD and the Model moot.

### Access to Wildlife

Although there are differences among states and provinces, the public is having an increasingly difficult time gaining entry to hunt or trap on private property or reach tracts of public land (Responsive Management/National Shooting Sports Foundation 2008). Recently the sporting press recognized the issue of private land access to public land, and in one article suggested purchasing “gateway properties” that border public land to gain nearly “exclusive access” (Howlett 2008). The amounts of fees being paid vary widely and depend on the type and duration of the hunt. This is particularly disconcerting because a large segment of the hunting public either cannot afford additional user fees or is philosophically opposed to paying a trespass or access fee to hunt (Duda *et al.* 1998). As a result, some members of the public unable or unwilling to pay access or trespass fees have become solely dependent on public lands. Others may stop hunting due to the frustration of not having a place to hunt or because of overcrowding on public land. If the hunting public becomes disenchanted with either the quality of the hunt or having to pay too high a price to hunt, they may quit hunting (Responsive Management/National Shooting Sports Foundation 2008), and consequently could also stop supporting wildlife conservation efforts. Over time, access for other uses of wildlife (e.g., observation) may also be compromised. Collectively and cumulatively, the loss of access to wildlife for a diversity of uses is likely to erode support for public custodianship of wildlife resources, a central premise of the PTD.

The relationship between public access and private property can extend to public lands where private ownership patterns may legally preclude

access to public lands. “Gateway properties” that occur at the boundaries of public lands can legally preclude access to public lands. In some cases these private properties may entirely surround public lands. Checkerboard land patterns of alternating sections (square miles) of public and private lands may legally limit access to very large expanses of public land. Public access agreements to these areas, negotiated between the private landowner and state or federal fish and wildlife agencies, are often the most effective means to provide public access to wildlife occurring on these lands. Concern by private landowners for mistreatment of their private lands by the public and the cost associated with acceptable access agreements may provide barriers to public access that are often unsolvable. Private ownership patterns that reduce or eliminate reasonable access to public lands may also render wildlife inaccessible to a majority of people.

In several states, guides and outfitters are increasingly using bait to lure big game animals from public land (e.g., national wildlife refuges, national grasslands, national parks, and state wildlife management areas) to private lands managed for fee hunting. This practice redistributes or stockpiles public wildlife to areas that are not open to public hunting or inaccessible to hunters not willing to pay to hunt on private land. In an impact similar to fencing, these actions jeopardize the democracy of hunting, a central tenet to the Model (for a review of these issues see Dunkley and Cattet 2003; Ermer et al. 2005).

### Public Indifference

The strength of the PTD is the value that the public assigns to the trust’s assets. If the public grows indifferent to wildlife, or worse, adopts a negative perspective, the Doctrine will have greatly diminished value. Historically, this has tended to occur in situations where wildlife resources were owned by an aristocracy and public access was prohibited (Manning 1993). In this context, where the general public had no ownership of wildlife or a right to make use of it, citizens were indifferent to its protection. In extreme cases they coveted wildlife as

just another possession of the privileged class, resulting in widespread poaching (Geist 1985). Changing perspectives may occur to some degree as the general public finds wildlife of little value to them if they are precluded from its use by high cost or lack of access. Should the management of the trust’s assets disenfranchise people, their interest in conserving these assets may wane. As they sense less personal ownership or value, less utility or inequitable access to their assets, their proprietorship may decrease.

Public antipathy towards wildlife may increase when people experience property damage (e.g., deer-vehicle collisions, crop depredation) or the competition it creates for their livelihood (e.g., wildlife depredations on crops or forage). Still others may fear wildlife as a danger to their personal safety (e.g., hazards from bears, wolves, cougars, or coyotes). Another component leading to negative opinions toward wildlife and trustees is opportunity for participation (or lack thereof) in wildlife management decisions. When those decisions are viewed as being made mostly by agencies in consultation with limited constituents (e.g., farmers and hunters), the remainder of the stakeholders (usually a majority) may feel disenfranchised. If the beneficiaries of the trust cease to value the trust assets, the trust becomes vulnerable to those who wish to take it from



Credit: Eric Nuse/Vermont Fish and Wildlife Department

For these hunters in Vermont, and for many outdoor enthusiasts, a successful hunt is one way to feel a sense of value about wildlife and other public trust resources.

them. Indifference by the public for their wildlife resources makes the trust's assets valueless, eliminating the need for trusteeship. Therefore, the trustee has an important role in ensuring that the beneficiaries' interest in the trust's assets is maintained.

### **Lack of Understanding of Natural Systems**

Dissociation of people from nature has been identified as a growing trend with potentially profound implications for how future generations of North Americans may value wildlife (Louv 2008; Shepard 1982). For example, the estimated number of "avid wildlife observers" declined 16 percent between 1991 and 2006 (11,927,000 vs. 9,970,000 avid participants, respectively) and they are growing older (USFWS 2009). Similarly, the number of "wildlife watchers" also declined over this same period, dropping from 76,111,000 in 1991 to 71,132,000 in 2006, a 7 percent decline.

The extent to which these trends may mitigate the growing dissociation from nature is unknown. We know little about the attitudes, values, and knowledge of wildlife-watchers (avid or casual), or to what extent they are aware of their rights under the public trust and whether trustee actions fulfill their interests. Of potential risk is a waning of interest in and awareness of local populations of wildlife to the point where advocacy for their conservation and protection of their habitats is minimal. Participation in consumptive activities may continue to decline, and opposition to those activities may increase, threatening the primary funding base for management of all trust wildlife, not just game species (Organ and Fritzell 2000). In addition to threats to funding, foundational elements of the public trust could be threatened with increasing social antipathy toward consumptive uses of wildlife. Sax (1970) stressed that a fundamental responsibility of trustees is to maintain trust resources for particular uses, including traditional uses and natural uses peculiar to a resource. Harvest (i.e., angling, hunting, trapping) has been suggested as an example of a traditional and natural use (Organ and Batcheller 2009).

### **Interagency Disputes over Jurisdiction**

Conflicting missions and values between different state agencies may complicate the conservation and management of wildlife, and consequently threaten the fulfillment of public trust obligations. Legislative mandates that transfer a portion of wildlife management responsibilities (e.g., predator and other wildlife conflict management, game and fur farming, wildlife disease management, and human health protection) from state/provincial wildlife agencies to the state/provincial/federal agricultural, health or other departments or municipal governments may threaten the PTD depending on how these agencies manage the public trust resources. For example, predators managed solely by a state agricultural agency to reduce damage to livestock may not have the necessary conservation protections afforded with management by a fish and wildlife agency charged with providing conservation benefits to a broad array of stakeholders.

In 1996, Colorado enacted a law defining "depredating animal" and giving the Colorado Department of Agriculture "exclusive jurisdiction over the control of depredating animals," including game species, for the express purpose of reducing economic losses to agriculture. However, under existing statutes, the Colorado Division continues to be liable for damage claims resulting from damage caused by wildlife. Moreover, an agricultural agency may not value scientifically-based management of these resources if the sole focus is on the protection of agricultural interests. In situations where certain wildlife management responsibilities have been fully or partially legislatively re-assigned, the resulting management may not be in the best interest of the beneficiaries, or may advantage a particular segment to the detriment of the greater public trust. In such situations, the Doctrine may be compromised.

### **Animal Rights**

Animal rights is a philosophical movement, with specific views on the relationship of humans to other forms of animal life. A basic tenet

of animal rights philosophy is that animals, including wildlife, are sentient and therefore should not be viewed as property. According to Gary L. Francione (Francione 1996), "...animal rights theory is not "utopian"; it contains a nascent blueprint for the incremental eradication of the property status of animals." Public trust law is based on the premise that certain things are public property (Sax 1970). If the animal rights philosophy was to become law (whether adopted by legislative bodies or by referenda), wildlife would no longer be property, and would therefore fall out of the public trust.

### **CURRENT STATUS OF THE PUBLIC TRUST DOCTRINE IN STATE AND PROVINCIAL LAW**

An analysis of each jurisdiction's statutory and constitutional law provides a measure of the strength of the PTD in the U.S. and Canada. The following parameters were evaluated to provide an assessment of the status of the PTD in North America:

- 1. Inclusive definition of fish and wildlife.** Does the jurisdiction have a clear and inclusive definition of fish and wildlife that provides for adequate identification and protection of the trust resources? Inclusiveness means that the definition should address the status of vertebrates and invertebrates living in a wild state and in captivity, and address all life stages of those species.
- 2. Clear statement of public ownership of wildlife.** Is it clear that fish and wildlife are owned by the public or by the people of the state or province, or in some cases by the state or province itself? This statement of ownership should include all fish and wildlife in the jurisdiction; resident or migratory, native or introduced. Ideally this statement will make clear that the governments manage fish and wildlife in trust for the people.
- 3. A clear delegation of management responsibility to the trustees for the beneficiaries.** Is the responsibility of the trustees to manage fish and wildlife for the

### **RULES AND REGULATIONS NOT ANALYZED**

Our review of the status of the Public Trust Doctrine in the United States relied on a review of state constitutions, statutory law, and case laws. Administrative rules and regulations were not included. Rules and regulations are promulgated by agencies, under statutory authority. While they have the force of law, rules and regulations are more likely to change frequently and thus are not an ideal vehicle for jurisdictions to use to codify the PTD. Because of this, and also due to the chance that any review of rules and regulations would be outdated before it could be published, our review of the current status of the PTD of the states and provinces did not include administrative rules and regulations.

- public clearly and completely delegated to one or more governmental agencies, or to an individual within an agency, with the legal authority to manage fish and wildlife in the jurisdiction for the benefit of the public?
- 4. A mission and purpose of the trustees that serves the interest of the beneficiaries.** The mission and purpose of the agency must serve the interests of all of the beneficiaries. The trustee cannot manage trust assets in an inequitable manner nor can it gift assets for private benefit. For example, if a public asset such as predators were assigned to a state or provincial agency as trustee, and the agency's role is described as managing predator populations in a self-sustaining manner for the benefit of future generations, the purpose of the PTD would be served. On the contrary, the purpose of the PTD would not be served if the purpose of the agency is described solely as preventing economic impact to agricultural producers.
- 5. Accountability for the trustees' actions, decisions, and policies.** There should be a clear mechanism to evaluate the performance of trustees, and for public beneficiaries to hold them accountable for their actions. The actions of the trustees are

Criteria	States					Provinces				
	Constitution		Statue		Not Found	Constitution		Statue		Not Found
	+	-	+	-		+	-	+	-	
Inclusive definition of wildlife	0	0	38	10	2	0	0	13	0	0
Clear statement of public ownership of wildlife	1	0	38	3	10	0	0	7	0	6
Clear delegation of management responsibility	2	0	48	0	0	0	0	13	0	0
Mission and purpose appropriate to PTD	2	0	44	4	0	0	0	7	0	6
Accountability of trustees	2	1	38	11	0	0	0	13	0	0

Table 1: Number of States or Provinces meeting Public Trust Doctrine criteria through constitutional or statutory language (entities where criteria are addressed in both documents are counted twice). Language is rated either satisfactory (+) or deficient (-).

transparent and clearly described, thereby facilitating evaluation and accounting. Examples of accountability mechanisms include requirements for public participation and the full disclosure of accomplishments and failures.

Each jurisdiction’s wildlife legislation and its constitutional provisions were examined with these five factors in mind to determine whether or not wildlife had been recognized as a public trust resource in the state or province. Each state and province’s legislative and constitutional provisions were evaluated using the five criteria (see Table 1).

Jurisdictional case laws and their inclusion of wildlife are another component of determining the strength of the PTD. In addition to the summary of case law that follows, a table was developed to better distill how wildlife, and the PTD in general, have been treated in each state (see Table 2).

In Canada the PTD has not taken root in statutory or case law on the same level as in the

U.S. Although each province has adopted an inclusive definition of wildlife, not every province has created a clear statement of public ownership of wildlife. Seven of the provinces do have language that vests some type of public ownership over wildlife. As described in the following summary of PTD case law, Canada has almost no case law dealing with the PTD, therefore the provinces were not included in the case law analysis.

### Findings: Public Trust Doctrine and Wildlife Legal Summary

In the U.S., the PTD in its traditional form is firmly rooted in statutory and case law. The PTD has traditionally been used to protect the public’s right to use navigable waterways and to protect each jurisdiction’s sovereign ownership of those waterways to hold in trust for the public’s use. In recent times, a movement has taken place in both statutory and case law to extend the PTD to other natural resources. Some of these resources include beaches, parks, and

Criteria	Yes	No	Not Treated
PTD Recognized as valid legal doctrine	41	1	8
PTD discussed in relation to wildlife	15	3	32
PTD extended to resources other than navigable waterways	21	6	23
Court grants standing under PTD	4	6	40

Table 2: Number of States addressing the Public Trust Doctrine in State case law.

wildlife habitat areas apart from wildlife itself. Case law has been slow to recognize extension of the Doctrine, whereas statutory law has quickly evolved to place more natural resources within the realm of PTD protection.

Few states have case law recognizing wildlife as a public trust resource. Many states and provinces have already adopted statutes that either explicitly or implicitly confer upon wildlife status as a public trust resource. Indeed, bringing wildlife into the PTD through statutory measures appears to be the best way to accomplish the goal of extending the Doctrine in this area.

### State Statutes

State statutory law is the main legal vehicle for giving public trust status to wildlife. In many states, the statutory provisions do this in an indirect manner through implicit trust language. For example, New Hampshire's statute states that: "It shall be the policy of the state to maintain and manage [wildlife] resources for future generations" (N.H. Rev. Stat. §212-B:2). While not a direct statement identifying wildlife as a trust resource, the language definitely has the aim of preserving wildlife for the public interest. Similarly, North Carolina's statute reads: "The enjoyment of the wildlife resources of the State belongs to all of the people of the state" (N.C. Gen. Stat. §113-133.1).

Georgia has strong statutory language, explicitly granting wildlife public trust resource status. The statute provides that: "Wildlife is held in trust by the state for the benefit of its citizens and shall not be reduced to private ownership except as specifically provided for in this title" (Ga. Code §27-1-3). Ohio and West Virginia have similar statutes, with Ohio holding title to all wild animals "in trust for the benefit of all the people" (Ohio Rev. Code §1531.02), and West Virginia holding title to all wild animals "as trustee for the people" (W. Va. Code §20-2-3). These three states provide clear statutory language that identifies wildlife as a public trust resource.

Kentucky has broad language, both in protection of wildlife and in furtherance of the public interest. The statute provides that state policy is "to protect and conserve the wildlife of the Commonwealth to insure a permanent and continued supply of the wildlife resources of this state for the purpose of furnishing sport and recreation for the present and future residents of this state" (Key. Rev. Stat. §150.015). This language serves the dual purpose of protecting wildlife while coincidentally insuring that the public will still enjoy the right to engage in activities such as hunting and fishing.

As of early 2010, 33 states have adopted the Wildlife Violator Compact, which includes in Sec. 11: "The participating states find that wildlife resources are managed in trust by the respective states for the benefit of all their residents and visitors." This language implies the existence of the PTD in those states, which is important because many states that did not previously have strong implicit or explicit trust language in their statutes have adopted the Compact. (Eight other states are currently considering adoption of the Compact.)

Clear "ownership" language pertaining to wildlife is important to firmly establish wildlife as a public trust resource. Forty-one states currently claim some type of ownership of their wildlife. The language varies between claiming ownership by the state and ownership by the people of the state. While the distinction may seem superfluous because of our states' republican form of government, a statute that places ownership in the "people" is a stronger indication that wildlife is a public trust resource. An example is North Carolina: "The marine and estuarine and wildlife resources of the State belong to the people of the State as a whole...The enjoyment of the wildlife resources of the State belongs to all of the people of the State" (N.C. Gen. Stat. §113-133.1). This type of language better imbues the purpose of confirming wildlife to be a public trust resource rather than language that merely states, for example, that: "All wildlife found in this state is the property of the state." Language clearly placing ownership of wildlife in the people residing in a state is important because of the

need to establish standing to enforce the PTD in individuals, rather than state governmental agencies.

### Case Law

Nearly every state recognizes some form of the PTD in its common (case) law, however few states specifically address wildlife in case law. Typically, it is in the traditional form of state sovereignty over the navigable waterways of the state. Any extension of the Doctrine appears to have encompassed a limited number of resources such as beach access and parkland. Most cases that discuss the PTD relate it to the right of commerce and fishing in the state's navigable waterways.

Few states have case law that explicitly discusses the PTD in relation to wildlife, and even fewer discuss it in terms that may extend the PTD to wildlife itself. In Alaska, the case of *Owsichek v. State of Alaska, Guide and Licensing Control Board* (1988) spelled out perhaps the clearest recognition of wildlife as a trust resource by relying on the state's Constitution. The court in *Owsichek* held that a common use clause in the Constitution of Alaska was intended to engraft certain trust principles, guaranteeing public access to the fish, wildlife, and water resources of the state.

In Illinois, *Wade v. Kramer* (1984) made it clear that it was "undoubtedly true that the State has a type of guardianship or trust over wildlife in the state." This ruling came well before Illinois had adopted the Wildlife Violator Compact. Because the ruling came before the Compact was adopted, it is clear that common law in Illinois fully recognizes wildlife as a trust resource.

A recent case from California involving the impacts of wind farms on bird mortality (*Center for Biological Diversity v. FPL Group, Inc.*) included an explanation of how wildlife falls under the umbrella of the Public Trust Doctrine by citing a California Supreme Court case stating that public trust duties for birds and wildlife are primarily derived from statute (*Environmental Protection and Information Center v. California Dept. of Forestry & Fire Protection*). Common law recognition of wildlife as a public

trust resource is important in states where it is not statutorily recognized, as was the case in Illinois before it adopted the Wildlife Violator Compact. When the PTD is codified through the state's statutes, however, common law recognition becomes less important. Once adopted by statute in a state, the only course for the state's courts to take would be to overturn the statute if found invalid or to modify its meaning through judicial interpretation.

### State Constitutions

Inclusion in a state's constitution provides a strong foundation for the PTD. However, few states have constitutional provisions clearly articulating the PTD.

Alaska's Constitution, Article 8, §3, states that: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." This was held to mean that the state "intended to engraft certain trust principles guaranteeing access to the fish, wildlife, and water resources of the state," according to the Alaska Supreme Court in *Owsichek v. State of Alaska, Guide and Licensing Control Board* (1988). Louisiana's Constitution sets out the requirement that the state is "to protect,



Credit: © 2005 David Monniaux/Wikimedia Commons

Policymakers at the California State Legislature and at other state legislatures around the nation can pass laws regulating sustainable use of natural resources and other key elements of the Public Trust Doctrine.



conserve, and replenish all natural resources, including the wildlife and fish of the state, for the benefit of its people.”

A constitutional provision is a legally robust means to establish wildlife as a public trust resource, though changing a state constitution is obviously a long and difficult process. Also, amending a state constitution is not ironclad as problems of enforceability and standing could arise if challenged in court.

## Canada

Just over half of the provinces and territories have incorporated language on the public ownership of wildlife in their statutes. Nonetheless, this is an indication of the intent to treat wildlife as a public trust resource. Case law is at this point non-existent as to any explicit mention of the “public trust.” The case of *Green v. Ontario* (1973) purports to apply a statutory form of the PTD, but it is nothing like the common law PTD that has developed in the U.S. Certainly there are no cases that compel provinces or territories to hold certain natural resources in “trust” for the people. The rights of the citizens in Canada that could be analogous to the rights enjoyed in the U.S. under the PTD are the right to navigate and fish. However, the Canadian Parliament retains the primary authority to modify these rights.

## Need for Stronger Statutes

The PTD is both a common law principle, primarily associated with waters and their resources (e.g., commercially valuable fish species), and one based on statutes defining public trust duties and responsibilities. In the United States, the PTD in its traditional form is firmly established in both state common law and statutory law. However, the extension of the PTD to specifically cover wildlife is not well-established. In Canada, the legal underpinnings of the PTD, especially as it applies to wildlife, are even weaker, resting mainly on provincial codifications of wildlife ownership. A model

broad-based statutory framework that could be put in place throughout the states and provinces would have to address some key issues.

First, three conditions must be met for the PTD to be an effective tool: (1) it must contain some concept of a legal right in the general public; (2) it must be enforceable against the trustee (government); and (3) it must be capable of interpretation consistent with contemporary concerns (Smith 1980).

Second, any model statutory language must be carefully drafted to avoid the PTD being used negatively to eliminate the traditional recreational/sporting benefit of wildlife. As noted earlier, traditional and natural uses peculiar to a resource must be provided for as part of the public trust (Sax 1970), and hunting has been identified as such a use (Organ and Batcheller 2009). Additionally, funding for management of wildlife as a trust resource comes primarily from consumptive user fees. Keeping these issues in mind while using language from existing statutes, a successful model statutory framework could be developed to extend the PTD to wildlife as a public trust resource in each state and province.

## THE BENEFITS OF STRENGTHENING THE PUBLIC TRUST DOCTRINE

The PTD is a long-time cornerstone of the most successful model of wildlife management and it has fostered the public’s interest in conserving wildlife resources in North America. With few exceptions, however, it rarely is supported by state or provincial constitutional law, and inconsistently by statute. This presents a degree of insecurity to its consistent application, now and in the future.

The PTD is largely supported in case law but with less clarity than statutory law. Case law often is less precise and subject to greater, often inconsistent, interpretation. Courts of equal authority, representing different jurisdictions, may arrive at opposite conclusions.

Statutory and constitutional law is made by elected representatives of the people (e.g.,

Congress, Parliament, and Legislatures) or by the direct will of the people (i.e., ballot initiative or referendum), but case law, by design, lacks a public participation component.

As case law regarding the PTD continues to evolve and its scope of application continues to expand, new interpretations will be created that may revise current understanding, making current “protections” afforded by the Doctrine potentially uncertain in the future. Managing diverse public assets may cause conflicts for the trustees and the beneficiaries. For example, property protection through flood control may cause conflict with environmental quality or the welfare of fish and wildlife. In such situations, trustees may have to assume the authority to decide preference of one over another. These decisions likely are to be challenged through litigation. Courts eventually may redefine the Doctrine by assigning priority of trust assets for use by competing interests. Current uses may be viewed by some as privileges rather than rights. In turn, privileges may be viewed as increasingly unacceptable uses of public trust assets as has emerged in the case of commercial fishing versus the survival of fish stocks (Henquinet and Dobson 2006).



Credit: New York State Archives

Surrounded by their harvest of rabbit and deer, two hunters pose for the New York State Conservation Commission, circa 1920. A strong Public Trust Doctrine can help ensure that public agencies remain the stewards of natural resources.

The benefits of strengthening the PTD for the benefit of wildlife resources are clear. Codifying the Doctrine in statute, or amending state constitutions to include it may secure its future, clarify its purpose, and ensure that its principles are more consistently applied and less subject to interpretation.

## RECOMMENDATIONS

The following recommendations are intended to help trustees of the public’s wildlife ensure that the PTD extends to wildlife and the public’s access to wildlife in their state or province and continues to do so in the future. They also serve to inform key stakeholders and other beneficiaries of key strategies for strengthening the PTD.

### Statutory Changes

State and provincial wildlife agencies should review their constitutional or statutory authorities that address the principles of the PTD, and where absent or inadequate, strengthen their authority with new legislation. Although amending the state or provincial constitution to include the Doctrine would provide the strongest legal protection, we recognized that changing a constitution is a long and difficult process. Therefore, we recommend that states and provinces enshrine the PTD as it applies to wildlife in state/provincial law. In particular, those states that have adopted the Wildlife Violator Compact, which implicitly recognizes the PTD, should move to formally codify the PTD in their states.

We offer language containing several key elements to provide guidance to states and provinces seeking to protect the PTD.

### Model Statutory language:

1. The state declares that wildlife is held in trust by the state for the benefit of its citizens:
  - a) to protect and conserve the wildlife of this state or province;

- b) to ensure the permanent and continued abundance of the wildlife resources of this state or province;
  - c) to provide for the sustainable use and enjoyment of wildlife for present and future residents of this state or province; and
  - d) to ensure that wildlife resources will not be reduced to private ownership except as specifically provided for in law.
2. Individuals have an equitable right of access to wildlife as a public trust resource:
- a) to ensure a permanent and continued abundance of wildlife resources of this state or province;
  - b) to provide for the sustainable use and enjoyment of wildlife for present and future residents of this state or province; and
  - c) to ensure that wildlife resources will not be reduced to private ownership, except as specifically provided in law.

This language makes it clear that wildlife is held in trust for the people of the state or province, will not be squandered or mismanaged by the state or province as trustee, and allows for balance between conservation and recreation. The language also prohibits government from transferring wildlife resources to private ownership, except as provided by law. The “except as specifically provided for in this title” language gives jurisdictions some leeway to provide for preserve and management areas.

#### **Administrative Law (Rules and Regulations)**

While administrative rules were not summarized and included in this review, these rules and regulations promulgated by agencies or regulatory boards have the force of law. These rules (along with administrative policy and standard operating procedures) are an important instrument to further codify and provide consistent and frequent reinforcement of public trust Doctrine tenets related to wildlife resources. These rules (and challenges to them) also represent a venue by which future case law will be established, potentially strengthening the Public Trust Doctrine.

#### **Outreach and Education**

Increased awareness of the PTD and its importance among the public, and wildlife professionals and wildlife students in particular, can be facilitated through fostering educational opportunities. The Western Association of Fish and Wildlife Agencies is developing an outreach plan to explain the PTD and the Model to a target audience including high school students (T. Gray, 2009, pers. comm., Arizona Game and Fish Department). When completed, piloted, and finalized, this curriculum will also be available for adoption by other state agencies. Additionally, the Conservation Leaders for Tomorrow program ([www.clft.org](http://www.clft.org)) features a lesson on the North American Model, including the PTD. The Wildlife Society and state agencies should further promote outreach efforts on the Model and the PTD.

#### **CONCLUSIONS**

The Public Trust Doctrine is a crucial element of the Model. Geist and Organ (2004) identified emerging threats that challenge the PTD in North America, thereby jeopardizing the legal underpinnings for wildlife conservation. In particular, a trend towards the commercialization and privatization of wildlife challenges the notion of trust species held in custodianship by competent authorities (both state, federal, and provincial agencies) for broad public benefits. A corollary to this threat is the loss of public access to wildlife via highly controlled land access systems managed by private individuals.

Central to protecting the PTD is assuring that legal institutions are in place within each competent authority to clearly establish the PTD’s applicability to wildlife. While a number of jurisdictions address the notion of public ownership of wildlife (and the associated trust responsibilities of those jurisdictions), the need for a broad-based statutory framework was confirmed as needed to unequivocally bring wildlife conservation programs within the PTD framework. To this end, model statutory authority is offered as a template to strengthen the PTD throughout North America.

## LITERATURE CITED

- Annear, T.C. 2002. Chapter 2, The Public Trust Doctrine, in *Instream Flows for Riverine Resource Stewardship*. Instream Flow Council, Wyoming, USA. 9 pages.
- Bean, M.J., and M.J. Rowland. 1997. *The Evolution of National Wildlife Law*, 3rd ed. Praeger, New York, New York. 544 pp.
- Blumm, M. C. and L. Ritchie. 2005. The pioneer spirit and the public trust: the American rule of capture and state ownership of wildlife. 35 *Envtl. L.* 48 pages.
- Brulle, R.J. 2000. Agency, democracy, and nature. The MIT Press, Cambridge, Massachusetts. 347 pp.
- Chronic Wasting Disease Alliance, 2009, website, [www.cwd-info.org](http://www.cwd-info.org).
- Cottriel, D.K. 1996. The right to hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition? 27 *Pac. L. J.* 1235. 54 pages.
- Demarais, S., R.W. DeYoung, L.J. Lyon, E.S. Williams, S.J. Williamson, and G.J. Wolfe. 2002. Biological and social issues related to confinement of wild ungulates. *The Wildlife Society Technical Review* 02-3, 29 pp.
- Duda, M., S. Bissell, and K. Young. 1998. Wildlife and the American mind: public opinion on and attitudes toward fish and wildlife management. Responsive Management National Office, Harrisburg, Virginia, USA. 804 pp.
- Dunkley, L. and M.R.L. Cattet. 2003. A comprehensive review of the ecological and human social effects of artificial feeding and baiting of wildlife. Canadian Cooperative Wildlife Health Center.
- Ermer, J., W. Jensen, M. Johnson, S. Dyke, D. Halstead and T. Phalen. 2005. A review of wildlife baiting and feeding practices pertaining to North Dakota with special emphasis on big game. North Dakota Game and Fish Department Report. Bismarck. 94 pages.
- Fischer, J. and W. Davidson. 2005. Reducing risk factors for disease problems involving wildlife. *Transactions of the North American Wildlife and Natural Resources Conference* 70:289-309.
- Francione, G.L. 1996. *Rain Without Thunder: The Ideology of the Animal Rights Movement*. Temple University Press.
- Geist, V. 1985. Game Ranching: Threat to wildlife conservation in North America. *Wildlife Society Bulletin* 13: 594-598.
- Geist, V. 1995. North American policies of wildlife conservation. Pages 75-129 in V. Geist and I. McTaggart-Cowan, eds., *Wildlife Conservation Policy*. Detselig Enterprises, Ltd., Calgary, Alberta, Canada. 308 pp.
- Geist, V., S.P. Mahoney, and J.F. Organ. 2001. Why hunting has defined the North American model of wildlife conservation. *Transactions of the North American Wildlife and Natural Resources Conference* 66: 175-185.
- Geist, V., and J. F. Organ. 2004. The public trust foundation of the North American model of wildlife conservation. *Northeast Wildlife* 58: 49-56.
- Grant, D.L. 2001. Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad. *Arizona State Law Journal*. 25 pages.
- Henquinet, J.W. and T. Dobson. 2006. The public trust doctrine and sustainable ecosystems: a Great Lakes fisheries case study. *NYU Environmental Law Journal*, Vol. 14. Pages 322-373.
- Horner, S.M. 2000. Embryo, not fossil: breathing life into the public trust in wildlife. 35 *Land and Water L. Rev.* 23. University of Wyoming. 41 pages.
- Howlett, D. This land is yours. *Outdoor Life*. June/July 2008. Vol.215 (6):26-28.
- Koehl, A. 2006. Question of trust: the public trust doctrine holds hope for protecting Canada's ecosystems. *Alternatives Journal* 32:4-5. Environmental Studies Association of Canada. Page 40.
- Lanka, B., R. Guenzel, G. Fralick., and D. Thiele. 1990. Analysis and recommendations on the application by Mr. John T. Dorrance III to import and possess native and exotic species. Wyoming Game and Fish Department, Cheyenne, Wyoming, USA. 139 pp.
- Lien, D. 2002. A Pioneer Press Investigation: an inevitable collision – imports, tax oversight put Minnesota and chronic wasting disease on the same track. 2002, October 6, Grand Forks Herald, Grand Forks, North Dakota, USA.
- Louv, R. 2008. *Last Child in the Woods: Saving Our Children from Nature-Deficit Disorder*. Algonquin Books, Chapel Hill, North Carolina.
- Manning, R.B. 1993. *Hunters and poachers: A social and cultural history of unlawful hunting in England, 1485-1630*. Clarendon Press, Oxford, U.K. 255 pp.
- Organ, J. 2006. The public trust foundation of wildlife conservation in North America. Presentation at the Western Association of Fish and Wildlife Agencies Plenary session, 2006, July 25, Bismarck, North Dakota
- Organ, J.F. and G.R. Batcheller. 2009. Reviving the public trust doctrine as a foundation for wildlife management in North America. In *Wildlife and Society-The Science of Human Dimensions*, M.J. Manfredo, ed., Island Press, Washington, D.C., 350pp.
- Organ, J. and E. Fritzell. 2000. Trends in consumptive recreation and the wildlife profession. *Wildlife Society Bulletin* 28(4): 780-787.
- Organ, J. and S. P. Mahoney. 2007. The Future of the Public Trust. *The Wildlife Professional* 1:18-22.
- Prukop, J. and R.J. Regan. 2005. The value of the North American model of wildlife conservation-an IAFWA position. *Wildlife Society Bulletin* 33:374-377.
- Responsive Management/National Shooting Sports Foundation. 2008. *The future of hunting and the shooting sports: Research-based recruitment and retention strategies*. Harrisonburg, Virginia.
- Roosevelt, T. 1916. *A Book Lover's Holidays in the Open*. Charles Scribner's and Sons. New York, New York.
- Sax, J.L. 1970. The public trust doctrine in natural resource law: effective judicial intervention. 68 *Mich. L. Rev.* (1969-1970). Pages 471-566.
- Shepard, P. 1982. *Nature and madness*. The University of Georgia Press, Athens and London.
- Simmons, R.T. 2007. Property and the public trust doctrine. PERC Policy series No. PS-39. 28 Pages.
- Smith, F.E. 1980. The public trust doctrine - Instream flows and resources. A discussion paper prepared by the California Water Policy Center. U.S. Fish and Wildlife Service, Sacramento, California
- Stenehjem, W. 2005. North Dakota Attorney General's Office Letter Opinion 2005-L-01. Letter to Ken Royse, Chairman, Burleigh County Water Resources District, dated January 3, 2005. 13 pages.

U.S. Fish and Wildlife Service. 2009. Wildlife watching trends: 1991-2006, a reference report, addendum to the 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation. U.S. Department of the Interior, Fish and Wildlife Service. Washington, D.C.

## LIST OF CASES

*Arnold v. Mundy*, 6 N.J.L. 1 (1821)

*Center for Biological Diversity v. FPL Group, Inc.*, 166 Cal. App. 4th 1349 (2008)

*Citizens for the Preservation of Buehler Park v. City of Rolla*, 230 S.W. 3d 635 (2007)

*Environmental Protection and Information Center v. California Dept. of Forestry & Fire Protection*, 44 Cal 4<sup>th</sup> 459 (2008)

*Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 1727 (1896)

*Green v. Ontario*, 2 O.R. 396 (H.C.J.) (1973)

*Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727 (1979)

*Illinois Central Railroad v. Illinois*, 146 U.S. 387, 36 L. Ed. 1018 (1892)

*Marks v. Whitney*, 6 Cal. 3d 251, 491 P. 2d 374 (1971)

*Martin v. Waddell*, 41 U.S. 367 (1842)

*Owsichek v. State of Alaska Guide Licensing and Control Bd.*, 763 P. 2d 488 (1988)

*Shively v. Bowlby*, 152 U.S. 1 (1894)

*Wade v. Kramer*, 121 Ill.App.3d 377, 459 N.E. 2d 1025 (1984)



**The Wildlife Society**

5410 Grosvenor Lane, Suite 200  
Bethesda, MD 20814-2144  
301-897-9770  
301-530-2471 Fax  
TWS@wildlife.org



**Association of Fish and Wildlife Agencies**

444 North Capitol Street, NW  
Suite 725  
Washington, DC 20001  
202-624-7890  
202-624-7891 Fax  
info@fishwildlife.org



**Western Association of Fish and Wildlife Agencies**

522 Notre Dame Court  
Cheyenne, WY 82009  
307-638-1470  
307-638-1470 Fax  
larry.kruckenberg@wgf.state.wy.us



**Wildlife Management Institute**

1440 Upper Bermudian Road  
Gardners, PA 17324  
717-677-4480  
swilliams@wildlifemgt.org

ISBN 978-7-7777-7777-9

