The Future of Public Trust

The legal status of the Public Trust Doctrine

By John Organ
and Shane Mahoney

Mankind has a deep-rooted reverence for wild animals. Throughout history, we have both feared and depended upon wildlife for our survival. Not surprisingly, wild animals are also a focus of our art and spirituality. Although humans value all kinds of animals, the range and depth of our emotions for wild animals are particularly pronounced, perhaps because of the innate mystery of our encounters with them, so often furtive and fleeting. In North America, the historic importance of wild animals has been sustained by laws rooted in the premise that wildlife cannot be owned by people but instead is held in trust by government for the benefit of all citizens. One reason the North American model of wildlife conservation has been hailed as the greatest model of effective conservation worldwide is that it rests on a bedrock philosophy: Wildlife is a public resource, one that is held in trust.

Today, however, what came to be known as the Public Trust Doctrine, and with it the North American model of wildlife conservation, are under siege. Increasing privatization of wildlife (where landowners restrict access to wildlife for personal profit), a boom in the establishment of game farms raising wildlife for sale, the animal rights movement, and other trends are continually eroding the underpinnings of the Public Trust Doctrine. These developments threaten the legal mechanisms that allow for the protection and conservation of wildlife as a public resource. To protect the Public Trust Doctrine, conservation practitioners must consciously revisit its foundations so they can better understand its benefits, as well as the risks that citizens face if wildlife is not robustly protected by public ownership and government trust.

Deep Roots of Public Trust

An 1842 U.S. Supreme Court case resulted in the Public Trust Doctrine. The ruling denied a landowner's claim to exclude all others from taking oysters from particular mudflats in New Jersey. Chief Justice Roger Taney, in determining that the lands under navigable waters were held as a public trust, based the decision on his interpretation of the Magna Carta (A.D. 1215). The Magna Carta, in turn, drew upon the Justinian Code—Roman law as old as western civilization itself:

> "By the law of nature these things are common to all mankind — the air, running water, the sea, and consequently the shore of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations."

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The roots of the Public Trust Doctrine in Roman law are, of course, more complex than this simple, eloquent statement. The Romans recognized an elaborate hierarchical system where property either belonged to the gods, to the state, or to individuals. Each type of property had a special status and had to be treated in a certain way. Romans also recognized common property (*res communis*) which could not be privately owned. This category included wildlife (*ferae naturae*) and, in fact, nature as a whole (*res nullius*). Under this system wild animals could only be owned when the animal was physically possessed, most typically when killed for food.

While the English incorporated the substance of Roman civil law in drafting the Magna Carta, they also provided their own cultural perspective. English common law disliked the notion of "things" without owners, so the king was given vested ownership of public resources. As a result, under the English legal code, wildlife and nature were legally owned by the king, although not for his private use. The king was a trustee of natural resources, a custodian with special responsibilities to hold properties in trust for the public.

The American colonies worked under English law until independence, a transition which voided the king's role as trustee of communal property. The colonies thus lacked a specified trustee for governing natural resources until an 1842 Supreme Court ruling (*Martin v. Waddell*) that gave individual states public trustee status. And though Canada modeled much of its legal system after Great Britain, Canada, too, opted for the same basic policies governing wildlife as did the United States.

The courts continued to refine the American idea of the Public Trust Doctrine in the decades following *Martin v. Waddell*. In 1896, the Supreme Court clearly articulated the theory of state ownership of wildlife (*Geer v. Connecticut*) and made the first explicit reference to wildlife as a public trust resource. Since the *Geer* decision, the courts have continued to rule on the extent of the Doctrine's applicability. At the same time, the idea of public ownership of wildlife began to be enshrined in state constitutions and in statute. Although many aspects of *Geer* have been subsequently overturned, the idea of wildlife as a public trust resource has been sustained and become crucial to the conservation of wildlife in North America.

Public Trust is ...

Although both are pillars of the wildlife conservation movement, neither the ancient concept of public trust nor the modern North American Public Trust Doctrine has been exclusive to wildlife. The issue of the Public Trust Doctrine re-emerged in 1970, with the writings of Joseph Sax, a Harvard-trained legal scholar. In his article *The Public Trust Doctrine in the Natural Resource Law: Effective Judicial Intervention*, Sax describes the four fundamental concepts that form the legal basis for public trust of natural resources. He declares that the Public Trust is:

Common law. At present, very few legal codes articulate the Public Trust Doctrine. Instead, issues related to public trust resources are ruled upon by judges, and are thus "judge-made law." These laws evolve as they are interpreted through court decisions.

State law. Laws concerning public trust resources differ from state to state: There is no single law that articulates the fundamental rights of all citizens to access and share public resources. (That being said, the trustee status of states in regard to wildlife is transferred to the U.S. federal government when wildlife falls within parameters of the United States Constitution in dealing with particular issues related to international treaty-making, commerce, and federal-owned property.)

Property law. State laws that assert property rights over public resources are invoking the rights embedded in the philosophy of the Public Trust Doctrine—that certain kinds of property, like wildlife, are public property.

A Public right. Trust property is owned by the public and held in trust for the benefit of the public. Anyone who is a member of the public can claim rights to such property.

What's at Stake

For millennia, human societies and cultures have almost universally held that wild animals should remain wild and be owned by no one. But in recent years there has been a steady increase in enterprises seeking to privatize or commercialize wildlife. These efforts by individuals or corporations create profound legal and philosophical

dilemmas. On one hand, every citizen, as a member of the public, has a right to access and use wildlife, as wild animals belong to the public as property in trust. On the other hand, landowners expect to be able to control access to the land they own, pay taxes on, or manage. The current status of the Public Trust Doctrine puts public rights, property law, and the very notion of "the commons" at loggerheads with private property rights and the quest for profit derived from wildlife, whether personal, corporate, or even communal.

Several core issues are riding on the direction the law takes in addressing these tensions. First, if stewardship of wildlife is taken out of the public domain and placed in private hands, the role of professional wildlife managers, particularly those employed by governments, will be weakened. If government employees charged with managing wildlife cannot put management practices into place and implement them across the landscape, their ability to actually manage wildlife populations will be cut off at the knees. A lack of authority to oversee wildlife populations has potentially devastating implications—from losing the capability to accurately monitor wildlife populations or track the spread of disease, to being unable to properly enforce protection of sensitive habitats and species.

Second, if the strength of the Public Trust Doctrine deteriorates, the public's acknowledged connection to wildlife could erode with it. In other words, a weakened Public Trust Doctrine, in law and practice, would result in a diminished ability of citizens to look at a scene of nature and know, unequivocally, that all the elements of the environment in their view are part of their citizen inheritance. Such a change in perception could impact the very core of how experiences in nature, such as fishing, hunting, hiking, birding, and more, are valued by the public at large.

Third, and immensely troubling, is the reality that if wildlife and its habitat are not protected under a strong and sound public trust system, the public will not have the ability to challenge, and therefore influence, management decisions. The Public Trust Doctrine, in its ideal form, provides the public with a legal right that can be enforced against the government. Challenges made by members of the public have been crucial in the development of management actions that sustain natural populations as well as human economies. Eroding the Public Trust Doctrine could lead to courts becoming more hesitant

Credit: iStockphoto.com/Degany

Tourists flock to observe majesty on public land—the regular eruptions of Yellowstone National Park's Beehive Geyser.

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to recognize the public's right to enforce the doctrine against the government.

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For the Public Trust Doctrine to be an effective wildlife conservation tool, the public must understand that wild animals, regardless of whose property they are on, belong to everyone. Furthermore, the government as trustee must be legally accountable for preventing the squandering of the trust resource. Finally, the Doctrine must be up to date, with provisions for modern resources and conservation practices—even those which may have not been considered by the original architects of the public trust. For example, Roman law established precedent for the modern view that wildlife is owned by no one, but they could not have conceived of modern concerns over species extinctions and needs for active management of wildlife.

Unfortunately, recent court proceedings portend a tempestuous future for the Public Trust Doctrine. In *Normal Parm, et al. v. Sheriff Mark Shumate* (2006), for instance, the United States District Court for the Western District of Louisiana declared it was criminal trespassing for the public to boat, fish, or hunt on the Mississippi River and other navigable waters of America. This ruling makes illegal all recreational boating, fishing, and waterfowl hunting on navigable waters, unless conducted in the main channel

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Credit: J. Schmidt/NPS

Bison were victims of the tragedy of the commons, shot in hoards as Americans moved west. A concerted conservation effort has returned them to places like Yellowstone National Park.

of the river or with the permission of all riparian landowners along the navigable river. Traditionally, the Public Trust Doctrine had been interpreted to allow public access to the entire river, from bank to bank.

In *Kramer v. Clark Wis.* (Ct.App., Dec. 21, 2006), the Wisconsin state court of appeals held that a nonprofit group seeking to preserve the wildlife and natural resources of Richland County did not have standing to challenge the county's practice of granting rezoning petitions. The court declared that the state Public Trust Doctrine does not confer the right to challenge "any government action that arguably impacts any natural resources in Wisconsin." In Wisconsin, the doctrine has never been applied beyond the context of direct infringement of the public's rights in navigable waters, and the court has directed that it cannot be applied to wildlife.

These decisions may reflect the courts' difficulty in distinguishing between government's general obligation to act for the public benefit and the additional, and perhaps greater, obligation it has as trustee of certain public resources. For example, in upholding its obligation to act for the public benefit, a court may consider the current situation of a case under review as relevant to a conservation or resource-use decision, but not factor in its trustee responsibility to perpetuate these resources for future generations. The question remains, 165 years after *Martin v. Waddell*: Does the Public Trust Doctrine have any judicially enforceable right beyond the laws that it has already inspired? And a further question must be asked: What needs to be done to ensure the Public Trust Doctrine survives the next 165 years and beyond?

A first step in solidifying the Doctrine may be to revisit the statutory charters of state and provincial fish and wildlife agencies. The codes that govern the disposition of fish and wildlife should be explicit, not only in defining these resources as property of the jurisdiction, but also in mandating the responsibility to maintain these resources for the benefit of present and future generations. Despite inevitable regional and cultural variability, the underlying tenets of the public trust should be consistent and easily interpreted. Where there is doubt, or room for dispute, agencies should immediately revise their charters to clarify and exercise the core principles of public trustee responsibilities in wildlife conservation. Codifying the Public Trust Doctrine in this way will be crucial to ensuring it remains a vital tool for the protection and management of wildlife in North America.

In future decades, will citizens continue to have free access to enjoy wildlife in traditional as well as emerging pursuits? Will governments preserve biodiversity for future generations? Will wildlife remain wild? The answers to these questions will depend significantly upon people's awareness of their innate share in the ownership of wildlife, and in their shared responsibility for it. Government trustees can help secure the Public Trust Doctrine by increasing public awareness and by increasing government responsiveness to the needs and desires of all citizens, democratically enshrined and democratically discharged. ■

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For a bibliography of additional readings on laws and policies relating to the Public Trust Doctrine and links to court cases, see this article online at *wildlifejournals.org*.